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**IN THE
SUPREME COURT OF OHIO**

Citizen Power, Inc., et al.	:	Case No. 01-1956
	:	
Appellants,	:	Appeal from the Public Utilities
	:	Commission of Ohio, <i>In the Matter of</i>
v.	:	<i>the Petition of Citizen Power, Inc., et al.</i>
	:	<i>Requesting the Commission Assert</i>
The Public Utilities	:	<i>Jurisdiction over the Proposed Merger of</i>
Commission of Ohio,	:	<i>FirstEnergy Corp. and GPU, Inc.,</i>
	:	Docket No. 00-2469-EL-UNC
Appellee.		

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In accordance with S. Ct. Prac. R. VI, Sec. 2, Appellants Citizen Power, Inc., David Hughes, Kelli O'Neill, Ron O'Connell and Marguerite Schossler (collectively "Citizen Power")¹ hereby submit their merit brief in the captioned proceeding.

STATEMENT OF THE FACTS

This case involves Citizen Power's appeal of a decision by Appellee Public Utilities Commission of Ohio ("PUCO" or "the Commission") declining to exercise its jurisdiction to review the proposed merger of FirstEnergy Corp. ("FirstEnergy") and GPU, Inc. ("GPU").

On or about August 8, 2000, FirstEnergy and GPU announced that FirstEnergy intended to acquire GPU. FirstEnergy is the parent holding company for, among other entities, three Ohio electric utilities: Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company. (Supp. 1-3). GPU is the parent holding company for, among other entities, Metropolitan Edison Company, Pennsylvania Electric Company (two Pennsylvania utilities) and Jersey Central Power & Light in New Jersey. (Supp. 1-3). Beginning in early November 2000, FirstEnergy and GPU filed applications for approval of the merger with the Federal Energy Regulatory Commission ("FERC"), the Securities and Exchange Commission, the Nuclear Regulatory Commission, the Department of Justice, the Federal Trade Commission, the Federal Communications Commission, and two of the three state utility commissions with jurisdiction over FirstEnergy or GPU, the Pennsylvania Public Utilities Commission and the

¹ Citizen Power is a not-for-profit research, education and advocacy organization that seeks to advance the interests of utility customers in Ohio and Western Pennsylvania. Mr. Hughes is the Executive Director of Citizen Power. The other individual appellants are Trustees of Citizen Power, Inc. All of the individual appellants have residences in FirstEnergy's Ohio service areas.

New Jersey Board of Public Utilities. (Supp. 4). FirstEnergy and GPU did not seek approval from PUCO, the other commission with jurisdiction over FirstEnergy. In its application to FERC, FirstEnergy stated that it “believes that the approval of the Merger by the PUCO is not required.” (Supp. 4).

On December 21, 2000, Citizen Power filed a complaint with the Commission against FirstEnergy (and its public utility operating companies) and GPU (and its public utility operating companies) contending that the merging companies had improperly failed to file for PUCO authorization. (Supp. 1). Citizen Power argued, *inter alia*, that the Commission had jurisdiction over the merger pursuant to its general supervisory powers under Ohio Rev. Code Ann. §§ 4905.05 and 4905.06, citing several cases, including one, *McCaw Cellular Communications, Inc.*, No. 93-1446-TP-UNC, 1993 WL 501442 (Ohio PUC September 16, 1993), in which the Commission had exercised jurisdiction over the merger of utility holding companies. (Supp. 7-8). Citizen Power also noted that the stock issuance necessary to consummate the merger required the prior approval of the Commission pursuant to Ohio Rev. Code Ann. §§ 4905.40 and 4905.42. (Supp. 8-10, 29-31). Citizen Power explained that the merger raised concerns about, *inter alia*, the impact on utility competition in Ohio markets, the cost of the merger to Ohio customers, potential adverse environmental effects, concerns about an excessive debt burden on FirstEnergy, and other risks that could impact Ohio customers and the state of Ohio. (Supp. 5-6, 22-25).

On August 6, 2001, Citizen Power filed a motion to expedite Commission action on its complaint.² Citizen Power noted that, in the approximately seven months that had passed, the

² After Citizen Power’s complaint had been pending for several months, State Senator Robert F. Hagan wrote to PUCO in April, and again in May, 2001, urging it to act on Citizen Power’s filing. Citizen Power included the letter as an attachment to its August 6, 2001 Motion.

proceedings to obtain the other approvals required for the FirstEnergy/GPU merger had gone forward. Citizen Power requested PUCO to act on its complaint as expeditiously as possible in order to allow adequate time to fully evaluate whether the proposed merger of FirstEnergy and GPU was in the best interest of Ohio citizens.

PUCO denied Citizen Power's complaint by an order issued September 5, 2001.³ (Appx. 9). PUCO did not dispute that it had jurisdiction to review the merger, but concluded (1) that passage of Amended Substitute Senate Bill No. 3 ("SB 3") had "made it clear" that now the Commission "need not assert" its jurisdiction and (2) that it would not assert jurisdiction because its "activities" in the FERC proceeding reviewing the merger made its own review unnecessary:

Inasmuch as the Commission believes that our activities in the above-cited FERC proceeding are adequate to protect the interests of the customers of FE's Ohio operating utilities and the interest of Ohio, the Commission does not believe it is necessary to initiate its own review of the merger at this time.

(Appx. 10).

On September 25, 2001, Citizen Power filed an application for rehearing of the Commission's September 5 Order, arguing that, contrary to PUCO's explanation, the public record of the FERC proceeding showed that PUCO had engaged in no activities in that proceeding that could have protected Ohio interests. (Appx. 28). Citizen Power cited FERC's finding that "*the Ohio Commission did not raise concerns with this merger; rather, it merely filed an intervention. It did not file a protest, comments or seek any relief in this proceeding.*" (Appx. 37, quoting *Ohio Edison Co., et al.*, 95 FERC (CCH) ¶ 61,178 at p. 61,585 (2001))

³ As a procedural matter, the Commission indicated that Citizen Power's complaint "is more properly considered as a petition inasmuch as it is requesting the Commission assert jurisdiction over the proposed merger." (Appx. 9).

(emphasis added)).⁴ Citizen Power pointed out that it also intervened in the same proceeding at FERC and that it had unsuccessfully asked FERC to consider the effects of the proposed merger on Ohio retail markets. (Appx. 37). Citizen Power noted that FERC’s reason for declining to do so was its policy that it would review retail merger effects “only if a state commission that lacks jurisdiction over the merger raises concerns,” and its observation that “even if the Ohio Commission does not have regulatory authority over the merger, *it raised no regulatory concerns in its intervention.*” (Appx. 37, quoting *Ohio Edison Co., et al.*, 94 FERC (CCH) ¶ 61,291 at p. 62,047 (2001) (emphasis added)). Since PUCO neither told FERC that it lacked jurisdiction to do its own review, nor asked FERC to conduct such a review, the effects of the merger on Ohio were never considered at FERC. (Appx. 37-38).

PUCO first stated that its “activities” before FERC made a review of the merger unnecessary in its September 5 Order denying Citizen Power’s petition for rehearing. (Appx. 10). Citizen Power, therefore, could not have discussed PUCO’s explanation for declining to review the merger in its initial petition. On October 24, 2001, however, PUCO denied Citizen Power’s Rehearing Application, asserting only that “Citizen Power has not raised any issues on rehearing that were not raised in its initial petition.” (Appx. 12).

Citizen Power filed its Notice of Appeal on November 2, 2001. (Appx. 1). An Amended Notice of Appeal was filed on November 5, 2001. (Appx. 5). Citizen Power also filed a motion seeking expedited consideration of this appeal, which the Court denied. On November 7, 2001,

⁴ The FERC issued two substantive orders in connection with the merger. The first, “Order Authorizing Merger,” was issued on March 15, 2001. *See Ohio Edison Co., et al.*, 94 FERC (CCH) ¶ 61,291 (2001). A copy of this order is included in the Appendix, beginning on page 13. The second order was issued on May 7, 2001 and denied requests for rehearing of the March 15, 2001 order. *See 95 FERC (CCH) ¶ 61,178 (2001)*. A copy of the FERC order denying rehearing is included in the Appendix, beginning on page 20.

FirstEnergy consummated its merger with GPU, and, on November 30, 2001, filed a motion to dismiss on alleged mootness grounds. Citizen Power filed memoranda in opposition to FirstEnergy's motion, and to a nearly identical December 20, 2001 motion by PUCO, on December 10, 2001 and December 31, 2001, respectively. Those motions remain pending as of the date of this brief.

ARGUMENT

Proposition Of Law No. I: To Be Sustained As Reasonable, PUCO's Decisions Must Follow Logically from the Relevant Facts.

Pursuant to Ohio Rev. Code Ann. § 4903.13, the Court must reverse PUCO's orders in this proceeding to the extent they are found to be unlawful or unreasonable. (Appx. 23-24). In applying the "unlawful or unreasonable" standard of Section 4903.13, the Court generally will not substitute its judgment for that of the Commission on factual questions. *See, e.g., Cleveland Elec. Illuminating Co. v. Public Util. Comm'n*, 76 Ohio St. 3d 163, 165, 666 N.E.2d 1372, 1374 (1996). The Court, however, possesses "complete and independent power of review as to all questions of law." *Id.*

The Court has made clear that a PUCO order will be reversed as unlawful and unreasonable where the Commission's actions amount to an abuse of discretion. *See, e.g., Office of Consumers' Counsel v. Public Util. Comm'n*, 10 Ohio St. 3d 49, 461 N.E.2d 303 (1984) (PUCO abused its discretion to establish appropriate cost phase-in percentage when it selected a figure that differed from its previously-established percentage without providing justification); *Office of Consumers' Counsel v. Public Util. Comm'n*, 67 Ohio St. 2d 372, 424 N.E.2d 300 (1981) (PUCO abused its discretion to make post-test year cost-of-service adjustments where the applicant utility was aware of the post-test year costs and could have filed at a time when costs would have been in the test year). An abuse of discretion, in turn, occurs when the agency acts

arbitrarily. See *Office of Consumers' Counsel v. Public Util. Comm'n*, 10 Ohio St. 3d at 51, 461 N.E.2d at 305 (1984).

Here, there is no quarrel regarding the relevant facts. PUCO intervened, but did nothing else, in the merger proceedings before FERC. Nor is the question of the PUCO's jurisdiction over the merger before the Court, having been conceded by PUCO. The relevant inquiry in this appeal is whether PUCO's conclusion that it had no need to review the FirstEnergy/GPU merger because of its participation in the FERC proceedings can be, as a matter of law, supported by the facts and the reasoning cited by the Commission.

This Court has recognized that a proper function of judicial review of PUCO orders is to “determine whether the facts found by the commission lawfully and reasonably justified the conclusions reached by the commission in its order” See *Tongren v. Public Util. Comm'n*, 85 Ohio St. 3d 87, 89, 706 N.E.2d 1255, 1256-67 (1999) (quoting *Commercial Motor Freight, Inc. v. Public Util. Comm'n*, 156 Ohio St. 360, 363-64, 102 N.E.2d 842, 844-45 (1951) explaining the need for a complete record as required by Ohio Rev. Code Ann. § 4903.09). In an oft-cited opinion, the United States Supreme Court has made the same point: to be found reasonable and non-arbitrary, an administrative order “must offer a rational connection between the facts found and the choice made.” *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Ins. Co.*, 463 U.S. 29, 43 (1983). Other states are in accord. See *In the Matter of the Excess Surplus Status Of Blue Cross And Blue Shield Of Minnesota*, 624 N.W.2d 264, 277 (Minn. 2001); *Atlixco Coalition v. Maggiore*, 965 P.2d 370 (N.M. App. 1998); *Barela v. Beye*, 916 P.2d 668, 677 (Colo. Ct. App. 1996). As set forth in Proposition of Law No. III below, there is no logical connection between PUCO's stated explanation for declining to review the merger and the

undisputed facts. Accordingly, PUCO's refusal to review the merger was arbitrary, an abuse of discretion, and was therefore unlawful and unreasonable.

Proposition Of Law No. II: The Passage Of SB 3 Does Not Provide A Basis For PUCO To Decline To Exercise The Jurisdiction It Concedes It Possesses.

It bears emphasis that there is no dispute between Citizen Power and PUCO regarding PUCO's jurisdiction to review the FirstEnergy/GPU merger. Rather, the dispute turns on whether PUCO had the discretion to decline to exercise that jurisdiction, and, if so, whether it exercised that discretion unreasonably. Thus, despite Intervening-Appellee FirstEnergy's response to Citizen Power's petition urging PUCO to find it lacked jurisdiction, (Supp. 12), PUCO's September 5 Order instead concluded that it had jurisdiction, but had discretion whether and when to assert it:

[W]ith the passage of SB3, the legislature has made it clear that the Commission need not assert jurisdiction and review and approve mergers of electric utilities where the acquisition of control of domestic utilities or of a holding company controlling a domestic utility is not involved.

(Appx. 10). The Commission concluded, however, that it need not exercise its jurisdiction in this case:

Inasmuch as the Commission believes that our activities in the above-cited FERC proceeding are adequate to protect the interests of the customers of FE's Ohio operating utilities and the interest of Ohio, the Commission does not believe it is necessary to initiate its own review of the merger *at this time*.

(Appx. 10) (emphasis added).

In responding to Citizen Power's rehearing application, FirstEnergy once again urged PUCO to find it lacked jurisdiction, this time more bluntly:

While we understand the Commission's reluctance to admit it does not have jurisdiction, the law is clear – the Commission does *not* have jurisdiction over the FirstEnergy/GPU merger. The answer to Citizen Power's Petition is not that the

Commission *need* not assert jurisdiction over the merger. Rather, it is that the Commission *cannot* assert jurisdiction over the merger, because it doesn't have such jurisdiction.

(Supp. 34) (emphasis in original).

PUCO declined to respond to FirstEnergy's assertion. It simply denied Citizen Power's rehearing request without elaboration, (Appx. 12), leaving in place its original determination that it had jurisdiction to review the merger, but chose not to assert it.

As noted above, PUCO stated that passage of SB 3 somehow "made clear" that it now had the discretion whether (and when) to exercise its conceded jurisdiction. *Id.* SB 3 amended Ohio Rev. Code Ann. § 4905.40.2 to provide the Commission with specific additional authorization to review mergers in which Ohio utilities or utility holding companies that own them are acquired by out-of-state utilities or holding companies. (Appx. 26). From this predicate, PUCO reasons that "the legislature has made it clear that the Commission need not assert jurisdiction and review and approve mergers of electric utilities where the acquisition of control of a domestic electric utility or of a holding company controlling a domestic electric utility is not involved." (Appx. 10).

The Commission's conclusion that *SB 3* gave it the discretion to decline to exercise jurisdiction in this case makes no sense. *SB 3 expanded* PUCO's jurisdiction, extending it to acquisition of Ohio utilities by out-of-state holding companies. Obviously, *SB 3* does not apply to the facts of the FirstEnergy/GPU merger, in which the holding company of Ohio utilities is acquiring the holding company of out-of-state utilities. The Commission does not explain, however, how a statute that expands its jurisdiction to cover a different situation somehow gives it discretion to decline to review a transaction it otherwise does not dispute it has the power to review. In any event, as discussed below, even if *SB 3* gave PUCO the discretion to choose

when it would exercise jurisdiction over mergers of utility holding companies, its stated rationale for exercising that discretion is implausible and unreasonable.

Proposition Of Law No. III: PUCO’s Conclusion That Its “Activities” In The FERC Proceeding Were Adequate To Protect Ohio Interests Is Contrary To Undisputed Facts And Constitutes An Abuse Of Discretion.

Assuming, *arguendo*, that SB 3 gave PUCO the discretion to decline to exercise its jurisdiction over the FirstEnergy/GPU merger, its rationale for doing so is wholly contrary to the facts. The sole reason offered by PUCO for declining to assert its jurisdiction and review the FirstEnergy/GPU merger “at this time” is that its “activities” at FERC were “adequate to protect the interests of the customers of [FirstEnergy’s] Ohio operating utilities and the interest of Ohio.” (Appx. 10). As discussed below, however, PUCO engaged in no “activities” before FERC, much less activities “adequate to protect the interests of the customers of [FirstEnergy’s] Ohio operating utilities and the interest of Ohio.” A review of the public record of the FERC proceeding, in fact, shows that PUCO’s claim is patently unreasonable and that its orders constitute an abuse of discretion.

Under Section 203(a) of the Federal Power Act (“FPA”), 16 U.S.C. § 824b(a), FERC has authority to review mergers of utility companies under its jurisdiction. (Appx. 27). In interpreting and implementing this authority, FERC generally limits its review of competitive issues to a merger’s impact on wholesale competition. *See generally, Ohio Edison Co.*, 94 FERC at p. 62,044, (Appx. 16). As a matter of general policy, FERC does not review the effects of a merger on retail markets unless the relevant state commission: (1) lacks jurisdiction to conduct its own review; and (2) asks FERC to do a review in its stead. *See id.* (Appx. 16).

Both Citizen Power and PUCO intervened in the FirstEnergy/GPU merger proceeding at FERC. Realizing that PUCO had not yet asserted its jurisdiction, Citizen Power asked FERC to

review the effects of the merger on Ohio. *See id.* at pp. 62,043-44 (describing Citizen Power argument), (Appx. 15-16). FERC refused, citing the above-referenced policy: “we will examine the effects of a proposed merger on retail competition in cases where the affected state commissions lack jurisdiction and request the Commission to do so. None have asked us to do so in this case.” *Id.* at p. 62,044 (Appx. 16).

Citizen Power asked for rehearing of FERC’s refusal. PUCO did not. In its rehearing request, Citizen Power argued that PUCO’s assertion in its motion to intervene that the merger “may substantially influence the ability of the Public Utilities Commission of Ohio to carry out its statutory obligations, particularly with regard to the restructuring of the electric utility industry in the State of Ohio,” should be accepted by FERC as a sufficient basis for FERC to review the merger’s effect on Ohio. *See Ohio Edison Co.*, 95 FERC (CCH) at p. 61,585 (reciting Citizen Power’s argument) (Appx. 22); (*see also* Appx. 36). FERC denied Citizen Power’s rehearing, and this time more pointedly characterized PUCO’s “activities” in front of it. Not only had PUCO not requested FERC to review the merger’s effect on Ohio, “*the Ohio Commission did not raise concerns with this merger; rather, it merely filed an intervention. It did not file a protest, comments or seek any relief in this proceeding.*” *Ohio Edison Co.*, 95 FERC (CCH) at p. 61,585 (emphasis added), (Appx. 22).

In sum, it was Citizen Power, not PUCO, that asked FERC to review the merger’s effects in Ohio. PUCO neither told FERC whether it had jurisdiction to do its own review nor asked FERC to do a review in its stead. FERC conducted no review of the effects of the merger on Ohio.

Against this background, it is astonishing that PUCO would issue an order claiming it need not review the merger’s effects in Ohio because Ohio residents were adequately protected

by its nonexistent “activities in the above-cited FERC proceeding.” (Appx. 10). Compounding the arbitrary nature of its decisions, PUCO ignored the undisputed public facts of its negligible involvement before FERC – facts about which it necessarily had full knowledge – even after being reminded of them in Citizen Power’s rehearing application. PUCO did nothing at FERC that could colorably be said to be protective of Ohio interests. It did nothing that could substitute for its own review of Ohio effects, including the impact of the merger on competition in the State’s recently deregulated retail electric markets. *The effects of the FirstEnergy/GPU merger in Ohio remain unexamined.*

The Commission is left without a reasoned basis for declining to assert jurisdiction to evaluate the effects in Ohio of FirstEnergy’s acquisition of GPU, and the Court must reverse.

CONCLUSION

The question of PUCO’s jurisdiction over the merger is not before the Court, having been conceded by the Commission. The relevant inquiry in this appeal is whether, as a matter of law, PUCO’s conclusion that it need not review the FirstEnergy/GPU merger can be supported by the facts and the reasoning cited by the Commission. It cannot. The Commission’s purported rationale for declining to review the FirstEnergy/GPU merger, that: (i) the passage of SB 3 gives it discretion whether to assert its jurisdiction and review the merger in this case, and (ii) its actions at FERC made a review of Ohio effects unnecessary, provides no reasonable basis for the Commission’s conclusion.

The Commission's orders are unlawful and unreasonable. Accordingly, the Court should reverse PUCO's orders and remand the case with instructions that PUCO must assert its jurisdiction and review the FirstEnergy/GPU merger to ensure it is consistent with the public interest in Ohio.

Respectfully submitted,

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