

**IN THE
SUPREME COURT OF OHIO**

Citizen Power, Inc., et al. : **Case No. 02-400**

Appellants, : Appeal from the Public Utilities
Commission of Ohio, *In the Matter of the*
v. : *Application of FirstEnergy Corp. on*
: *Behalf of Ohio Edison Company, The*
The Public Utilities Commission of Ohio, : *Cleveland Electric Illuminating Company,*
: *and the Toledo Edison Company for*
Appellee. : *Approval of Tariff Adjustments,* PUCO
Case No. 01-2736-EL-UNC

**BRIEF ON THE MERITS OF
APPELLANTS CITIZEN POWER, INC., ET AL.**

William M. Ondrey Gruber
(Registration No.0005950)
(Counsel of Record)
Attorney-at-Law
2714 Leighton Road
Shaker Heights, OH 44120
(216) 371-3570
Fax: (801) 697-4625
E-Mail: GruberWL@aol.com

**Attorney for Appellants
Citizen Power, Inc., et al**

Betty D. Montgomery
(Registration No. 0007102)
Attorney General
Duane W. Luckey
(Registration No. 0023557)
(Counsel of Record)
Thomas G. Lindgren
(Registration No. 0039210)
Assistant Attorneys General
180 East Broad Street—7th Floor
Columbus, OH 43215-3793
(614) 466-4395
Fax: (614) 644-8764

**Attorneys for Appellee, The
Public Utilities Commission of
Ohio**

Paul T. Ruxin
(Registration No. 0000044)
(Counsel of Record)
Jones, Day, Reavis & Pogue
901 Lakeside Avenue
Cleveland, Ohio 44114
(216) 586-3939
Fax: (216) 579-0212

Helen L. Liebman
(Registration No. 0014566)
Jones, Day, Reavis & Pogue
1900 Huntington Center
Columbus, Ohio 43215
(614) 469-3944
Fax: (614) 461-4198

Arthur E. Korkosz
(Registration No. 0010587)
FirstEnergy Corp.
76 South Main Street
Akron, Ohio 44308
(330) 384-5861
Fax: (330) 384-3875

**Counsel for Intervening Appellee,
FirstEnergy Corp.**

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STATEMENT OF FACTS

Appellants Citizen Power, Inc., David Hughes, Kelli O’Neill, Ron O’Connell and Marguerite Schossler (collectively “Citizen Power”), filed this appeal from the Opinion and Order issued December 13, 2001, by the Public Utilities Commission of Ohio (“PUCO”) in PUCO Case No. 01-2736-EL-UNC (“Compliance Filing Case”). (Record of Proceedings, ICN 16; Appendix at p. 1.)¹ Appellant Citizen Power, Inc. is a not-for-profit research, education and advocacy organization that seeks to advance the interests of utility customers in Ohio and Western Pennsylvania. Appellant David Hughes is Executive Director of Citizen Power. Appellants Kelli O’Neill, Ron O’Connell and Marguerite Schossler are trustees of Citizen Power. All of the individual Appellants are customers of the Cleveland Electric Illuminating Company, an Ohio operating subsidiary of FirstEnergy Corp. (“FirstEnergy” or “Company”). (Motion to Intervene and Memorandum in Support, ICN 6, at Memorandum pp. 1-2)

This matter arose when the Applicant, and Intervening Appellee, FirstEnergy made a compliance filing on October 24, 2001, which was required by the PUCO’s Order in FirstEnergy’s Transition Plan Case (Case No. 99-1212-EL-ETP, et al.).² FirstEnergy’s Transition Plan Case was initiated by the Company’s application to the PUCO for approval of its “plan for the utility’s provision of retail electric service...during the market development period” established by the electric restructuring legislation,

¹ References to the Record of the Proceeding filed by the PUCO on April 10, 2002 in this case, which is entitled the “Index Docket and Entries,” shall be designated as “ICN” followed by the document number 1-16, and then the page number, as the situation requires. Appendix citations refer to the documents attached to this Brief, and the page within the Appendix, as applicable.

² *In the Matter of the Application of FirstEnergy 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 Nos. 99-1212-EL-ETP, 99-1213-EL-ATA, and 99-1214-EL-AAM (“*Transition Plan Case*”).

Substitute Senate Bill 3.³ That application by FirstEnergy was required by Ohio Revised Code Ann. (“O.R.C.”) Section 4928.31. Appellant Citizen Power, Inc. was a party to the Transition Plan Case. (ICN 6, Memorandum at p. 2; see also Opinion and Order, *Transition Plan Case*, PUCO Case No. 99-1212-EL-ETP, et al., July 19, 2000, at p. 5, Appendix at p. 23.) That case was resolved by a Stipulation, which was approved by the PUCO on July 19, 2000.⁴ *Id.*; and see Stipulation and Supplemental Stipulation, Appendix at pp. 91 and 125, respectively.

The Stipulation in the Transition Plan Case “provides for shopping incentives” for retail electric consumers, so that each of FirstEnergy’s operating companies can “achieve a 20 percent switching rate (of customers) by midway through the market development period, as dictated by Section 4928.40 Revised Code.” *Transition Plan Case*, supra, at p. 16, Appendix at p. 34. The PUCO’s Order in the Transition Plan Case describes the shopping incentives:

The shopping incentive has two components. The first component is based on the market-based shopping credit proposed in the company’s transition plan. The second component is an incentive to induce customer switching and develop a competitive market. The incentive component is initially set at 45 percent, 30 percent, and 15 percent of the unconstrained shopping credit for the residential, commercial, and industrial classes, respectively...Graduated incentives are provide for in the settlement to achieve the targeted 20 percent switching goal for each class and, if the 20 percent level has not been attained by any class by January 1, 2003, the Commission may increase the incentive in order to reach the goal on a class by class basis...

Id. The Stipulation further provides that “(s)uch shopping incentives for the commercial and industrial classes determined on a Company by Company basis will be increased

³ The Market Development Period is defined in O.R.C. Sections 4928.01 (A) (17) and 4928.40.

⁴ Appellant Citizen Power, Inc. was not a signatory to the Stipulation and opposed its approval before the PUCO.

annually by 5%, effective January 1 of each year, if such class of customers has not attained a 20% shopping level.” Stipulation and Recommendation, *Transition Plan Case*, supra, filed April 17, 2000, at p. 7, Appendix at p. 98. FirstEnergy was required by the Stipulation, and hence by the PUCO’s Opinion and Order in the Transition Case, to make an annual compliance filing in which it was to “set forth the shopping credit and incentives by rate schedule” prior to November 1 of each year to reflect the incentive to be effective on the next January 1. Stipulation and Recommendation, supra, at p. 8, Appendix at p. 99.

FirstEnergy made its compliance filing, as required, in its Application for Approval of Tariff Adjustments, which it filed on October 24, 2001. (ICN 1; see also Supplement to the Briefs (“Supplement”).⁵) The PUCO assigned the Application, referred to herein as the Company’s “Compliance Filing Case,” with the docket number 01-2736-EL-UNC.⁶ In the Compliance Filing Case, FirstEnergy asked for the PUCO’s approval to modify the incentive portion of the shopping credits for commercial and industrial customers that were contained in Attachment 3 of the Transition Plan Case Stipulation because it claimed it had met the 20% switching target for each relevant customer group. (ICN 1, and Supplement, at p. 2.)

On November 14, 2001, Enron filed a motion to intervene, raised several concerns with FirstEnergy’s claims, and submitted data requests for more information. (ICN 2 and 3) On December 4, 2001, Citizen Power filed a Motion to Intervene and a Memorandum Contra to the Application of FirstEnergy, raising additional concerns.

⁵ The Supplement to the Briefs, filed at the same time as this Brief, contains the Application of FirstEnergy.

⁶ The PUCO denominated the Compliance Filing Case as a “UNC” case, meaning “unclassified.”

(ICN 5, 6, and 7) Citizen Power also submitted data requests to FirstEnergy at that time, although the Company has not responded to the requests. On December 7, 2001, Citizen Power filed a Supplemental Memorandum containing additional information for the PUCO to consider. (ICN 8 and 9)

On December 13, 2001 the PUCO issued its Entry denying the interventions of Enron and Citizen Power and approving FirstEnergy's proposed tariff changes as filed. Entry, *Compliance Filing Case*, PUCO Case No. 01-2736-EL-UNC, December 13, 2001; Appendix at p. 7. Citizen Power filed an Application for Rehearing on December 31, 2001. (ICN 13; Appendix at p. 139.) Citizen Power's Application for Rehearing was denied, with respect to the issues on appeal herein, by the Commission's Entry on Rehearing issued January 24, 2002. (ICN 15; Appendix at p. 11.)⁷

ARGUMENT

A. Proposition of Law No. 1

FirstEnergy's Application is a compliance filing necessary to implement the Stipulation approved by the PUCO in the Transition Plan Case, to which Citizen Power was a party, and therefore the PUCO's denial of Citizen Power's intervention was unjust, unreasonable, and contrary to law.

FirstEnergy's Application is the first of several annual compliance filings required to implement the Stipulation approved by the PUCO in the Transition Plan Case (99-1212-EL-ETP, et al.). Opinion and Order, *Transition Plan Case*, July 19, 2000, at p. 71, Appendix at p. 89, approving the Stipulation and Recommendation, filed April 17, 2000, Section V. 2., at p. 7-8, Appendix at p. 99-100. As the PUCO acknowledged in

⁷ Appellants Citizen Power filed a Stipulated Extension of Time to File the Brief on the Merits by facsimile on May 16, 2002, extending the Brief's due date until May 30, 2002.

describing FirstEnergy's Application, "[u]nder that Stipulation, FirstEnergy was obligated to submit a compliance filing prior to November 1, 2001." Entry, *Compliance Filing Case*, December 13, 2001, at p. 1, Appendix at p. 7.

The Stipulation established annual shopping incentive credits for customers, but required FirstEnergy to file data on customer switching with the PUCO each year to determine if the credits should be adjusted. The credits set out in the Stipulation are thus provisional, to be finalized each year only upon a compliance filing by FirstEnergy.

The PUCO does not dispute that Citizen Power is a party to the Transition Plan Case, in which the PUCO approved and incorporated the Stipulation. See Opinion and Order, *Transition Plan Case*, July 19, 2000, at pp. 5 and 15. As such, Citizen Power has a clear interest in the determination of the shopping credits. Citizen Power has a right to raise concerns as to whether FirstEnergy's filing accurately reflects the Stipulation or contains errors that must be corrected before the Stipulation can be properly implemented. Citizen Power intervened in FirstEnergy's compliance filing to raise such concerns. The PUCO may not deny that intervention.

On rehearing, the PUCO claimed that Citizen Power's standing in the Transition Plan Case did *not* make it a party to FirstEnergy's compliance filing because "[w]e have not consolidated the two dockets nor incorporated the record from that case into this docket." Entry on Rehearing, ICN 15, at p.3, Appendix at p. 13. The PUCO's argument is irrelevant. The fact that the PUCO assigned a separate docket number to the compliance filing and its claim that it did not consolidate the two proceedings are meaningless gestures that cannot obscure the simple fact that this is a compliance filing required by the Stipulation. To approve FirstEnergy's proposed credits, the PUCO had to

first find that they properly implemented the Stipulation: "the computation of shopping levels as reported in this application are consistent with the Stipulation." [sic] Entry, *Compliance Filing Case*, December 13, 2001, at p. 2, Appendix at p. 8. The PUCO obviously referenced the Transition Plan Case Stipulation, as it must, to address Citizen Power's objections.

It does not matter whether or not the PUCO has formally consolidated FirstEnergy's compliance filing with the Transition Plan Case. No such consolidation is necessary. Since FirstEnergy's filing implements the Stipulation to which Citizen Power is a party, Citizen Power is entitled to be heard on it.

Even if this were not a compliance filing, however, the PUCO overstates the importance of its failure or refusal to consolidate the dockets. In *Ohio Domestic Violence Network v. Pub. Util. Comm.*, (1994) 70 Ohio St. 3rd 311, 638 N.E. 2nd 1012 ("*ODVN*"), this Court found that when the record from one case is used as a basis for the decision in another case, the cases are "effectively consolidated," whether or not the PUCO has actually consolidated the two dockets. *ODVN*, at p. 316. A party's standing in the first case carries over to the second, and therefore, such a party is deemed to have already been effectively granted intervention. *ODVN*, at p. 316.

In *ODVN*, the Court considered claims of intervention by *ODVN* and the Ohio Consumers' Counsel ("*OCC*") in three tariff applications by Ohio Bell Telephone Co. The PUCO denied both parties intervention in all three proceedings. This Court upheld the Commission's denial of intervention by *OCC* in one case and dismissed *OCC*'s appeal, but allowed the appeals of both parties in the other two cases, because the PUCO had adopted the record from an earlier proceeding in which appellants had intervened. The

PUCO had used that record "as the basis to address appellant's objections in the instant case and ultimately, to approve the services." *ODVN*, at p. 316. Further, the Court concluded, "that by its actions, the commission effectively consolidated the two proceedings, (so) that appellants should be deemed parties." *ODVN*, at p. 316. The Court found that the appellants' right to intervene carried over from the previous case, and they were effectively deemed to be parties in the case before the PUCO. The appellants were thus deemed to already have been granted intervention by the PUCO from the earlier proceeding.

Citizen Power's right to be considered an intervener is even clearer in this case, where the record from the Transition Plan Case was used by the PUCO as the basis for its decision *because*, in deciding a compliance filing from that case, it was required to do so.

In its initial order, the PUCO also claimed that because it chose not to hold a hearing on FirstEnergy's compliance filing it could deny Citizen Power's intervention in the case. Entry, at p. 3, Appendix at p. 9. On rehearing, the PUCO claimed its denial "is supported by the Ohio Supreme Court in *Ohio Domestic Violence Network v. Pub. Util. Comm.*, 70 Ohio St. 3d 311 (1994)." Entry on Rehearing, at p. 3, Appendix at p. 13. The PUCO misuses the Court's findings in that case.

Citizen Power notes that this is the same case it cited above for the proposition that when two cases are effectively consolidated, a party is deemed to have standing in both cases. The PUCO, however, ignores that finding. Instead it cites to the other part of *ODVN*, mentioned above, where intervention was denied.

But that denial was based on narrow grounds, wholly inapplicable here. This Court dismissed the appeal of OCC in one of the *ODVN* cases because it said that since

"the commission did not exercise its discretion to hold a hearing on applications for new services under O.R.C. 4909.18, there is no right to intervene." *ODVN*, at p. 315. The fact that new services were involved was the key to the Court's findings, and distinguishes it from this case. The Court concluded that when new services are offered that appear to be just and reasonable, the General Assembly intended them to be offered without the delay inherent in a hearing. The Court also found that aggrieved parties as to new services have recourse through the complaint procedure under O.R.C. 4905.26. *ODVN*, at p. 315.

The Court's holding and its reasoning do not apply here. FirstEnergy made a compliance filing to the Transition Plan Case, not an application under O.R.C. 4909.18. No new services are at issue whose offer would be delayed unduly by a hearing. Because this is one of a series of annual compliance filings, there is no certain recourse other than intervention here to assert Citizen Power's interests. It is doubtful that grounds exist for a complaint under O.R.C. 4905.26, and there is little doubt that the PUCO would argue that a complaint on these issues is an untimely request for reconsideration, since it has made a final decision on FirstEnergy's Application. See *Allnet Communications v. Pub. Util. Comm.*, (1987) 32 Ohio St. 3rd 115, 117 (the Court found grounds for a complaint under O.R.C. 4905.26, because the PUCO would review in the future the reasonableness of changes it was approving in that case; here the PUCO is finalizing credits provisionally set out in a prior case, as it was required to do by the order in that case.)

The part of *ODVN* cited by the PUCO offers no support for its claim that it may deny Citizen Power's intervention because it chose not to hold a hearing on FirstEnergy's compliance filing. Whether or not the PUCO held a hearing has no bearing on Citizen Power's right to be heard on FirstEnergy's filing, and the decision to not hold a hearing is

not grounds for denying a party's intervention. The PUCO conducts proceedings on a regular basis in which, although no hearing is held, extensive comments are filed and briefs submitted, sometimes over a period of many months or even years.⁸

Likewise, in the Compliance Filing Case Citizen Power and Enron submitted arguments against the Company's Application. Thus, the issues were joined in the proceeding, and the intervention of Citizen Power below was not made "moot" by the PUCO's decision not to hold a hearing.

This Court should reverse the PUCO's denial of Appellants' intervention.

B. Proposition of Law No. 2

The PUCO's failure to require FirstEnergy to comply with the Stipulation approved by the PUCO in the Transition Plan Case (99-1212-EL-ETP, et al), which requires inclusion of contract customer data in the calculation of the percentage of customers who have switched electric suppliers, was unlawful, unjust and unreasonable.

In its initial order, the PUCO asserted that "the computation of shopping levels as reported in this application are consistent with the Stipulation" [sic]. Entry, at p.2, Appendix at p. 8. The PUCO is mistaken. The Stipulation required contract customers of FirstEnergy's operating utilities to be included in the calculation of switching percentages. See Stipulation V. 2. at p. 8, Appendix at p. 99. Yet FirstEnergy did not include them, greatly distorting the results, and allowing it to claim to have met the 20% switching standard, when it actually has not done so. Stipulation, Attachment 4, p. 4, Appendix at p. 120; see also Application, Supplement to the Briefs, Exhibit B at p. 19.

⁸ An example is the consolidated proceeding *In the Matter of the Commission Ordered Investigation of an Elective Alternative Regulatory Framework for Incumbent Local Exchange Companies*, Case No. 00-1532-TP-COI, *In the Matter of the Commission Ordered Investigation of the Existing Local Exchange Competition Guidelines*, Case No. 99-998-TP-COI and *In the Matter of the Commission Review of the Regulatory Framework for Competitive Telecommunications Services Under Chapter 4927, Revised Code*, Case No. 99-563-TP-COI, in which the PUCO took extensive series of comments and briefs, without any hearing whatsoever. This matter is now on rehearing before the PUCO.

Paragraph IV. 3. of the Stipulation provides that each customer under contract to one of FirstEnergy's operating utilities has the right to cancel its contract without penalty through December 31, 2001, so that it may shop for alternative suppliers. Stipulation IV. 3., at p. 5, Appendix at p. 96. Thus, all contract customers had the right to shop for alternative suppliers during the relevant time period (before September 30, 2001, the end of the period for which FirstEnergy calculated switch percentages). The Stipulation leaves no doubt that these customers are to be counted: "(f)or purposes of determining whether 20% of customers have shopped, only those customers who switch after January 1, 2001, including contract customers whose contracts have either terminated or been cancelled provided that such contract customer selects a supplier other than the applicable Company, will be counted." Stipulation V. 2., at p. 8, Appendix, at p. 99.

Yet FirstEnergy excludes contract customers from its data, including only its rate schedule customers. Stipulation, Attachment 4, p. 4, Appendix at p. 120. In doing so, FirstEnergy contradicts the explicit terms of the Stipulation.

Deleting contract customers improperly raises switch percentages, in some cases enormously so. The most egregious example is FirstEnergy's claim that 38.13% of Toledo Edison's (TE's) industrial load switched suppliers. Application, Supplement to the Briefs, Exhibit B. at p. 19. To get that number, FirstEnergy first deleted more than 90% of TE's load from its calculations.

The PUCO's Division of Market Monitoring and Assessment calculates its own switching percentages by company and customer class, and the PUCO publishes them on its website. (See Appendix at p. 160; and PUCO website at www.puco.ohio.gov/ohioutil/marketmonitoring/ECC_Switch_Rates_Summary/ecc_switch_rates_

summary.html)⁹ The PUCO's numbers include all customers, including those under contracts. *Id.* As of September 30, 2001, the same end-date used by FirstEnergy in its Application, the PUCO's own data showed that only 2.27%, not 38.13%, of TE's industrial customers had switched suppliers. *Id.* The extent of the FirstEnergy's distortion of the data is indicated by the fact that, in its filing, FirstEnergy shows TE's industrial load *for the whole year* to be only 376,079 MWh. Stipulation, Attachment 4, p.4, Appendix at p. 120. The PUCO's numbers say that TE's industrial load *for the month ending September 30, 2001 alone* was 471,224 MWh. Appendix at p. 160.

Correcting this one error by restoring contract customers to customer switching calculations shows that FirstEnergy actually failed to meet the 20% target for each customer class, except Ohio Edison's (OE's) industrial customers, even when inappropriate switches among its affiliates, discussed below, are counted. Below are the PUCO's numbers compared to what FirstEnergy filed:¹⁰

⁹ The PUCO data and its source are referenced in Citizen Power's Application for Rehearing, at p. 14, Appendix at p. 153.

¹⁰ The Commission's data differs from the numbers FirstEnergy filed in one respect that is unlikely to have much effect. The Commission measures switch percentages based on monthly customer load (in this case September), and FirstEnergy uses annual data as its basis. That will not matter unless September is an extremely unrepresentative month for the year. This is unlikely. PUCO's monthly number of TE's industrial customers that switched suppliers, when simply multiplied by twelve, is roughly comparable to the annual data FirstEnergy used. This is true of all other customer classes as well. The difference in the percentages between Commission and FirstEnergy data is almost entirely due to FirstEnergy's inappropriate deletion of contract customers from its base.

Table 1: Comparison of Data on Customers Switching From FirstEnergy

Company & Load	FE As Filed %	Commission %
CEI Commercial Load	23.14 %	18.01 %
CEI Industrial Load	38.19 %	14.24 %
OE Commercial Load	23.51 %	18.85%
OE Industrial Load	40.87 %	21.35 %
TE Commercial Load	21.02%	19.35 %
TE Industrial Load	38.13 %	02.27 %

Application, Supplement to the Briefs, Exhibit B at p. 19; and Appendix at pp. 159-160.

Despite having its own data about switch percentages that conforms with Stipulation terms, the PUCO approved FirstEnergy's incorrect numbers that violate the Stipulation. The Court should reverse the PUCO and order that the correct data including contract customers be used in determining whether FirstEnergy has met the 20% switch standard and is thus entitled to use the lower shopping incentive credit.

C. Proposition of Law No. 3

The PUCO's approval of FirstEnergy's inclusion of customer switches between its wholly owned affiliates violates the intent of O.R.C. Chapter 4928, which requires that, to be counted, switches must be the result of competition between the incumbent supplier and new suppliers, because affiliates of the same holding company cannot and do not compete.

It is a widely known as a matter of fact and law, that affiliates owned by the same holding company do not compete with each other, but instead comprise one economic unit that competes with others outside the corporation. FirstEnergy is aware of this. It knows its affiliates do not compete with each other.

After claiming throughout the Transition Plan Case that its retail marketing affiliate, now called FirstEnergy Solutions ("FES"), competed with its other affiliates, CEI, OE, and TE for customers, FirstEnergy acknowledged the falseness of its claim in a filing at the Federal Energy Regulatory Commission ("FERC") after the Commission's restructuring order was issued. In that filing, which involved a merger of its marketing affiliates, FirstEnergy asked FERC to forego its usual analysis of effects on competition. The merger, FirstEnergy said, "will have no effect on competition in any relevant market" because "affiliated utilities do not and are not expected to compete with each other in an economic sense." *Application of FirstEnergy Trading Services, Inc. for Authority to Merger into FirstEnergy Services, Inc. and Related Transactions*, Federal Energy Regulatory Commission (FERC) Docket No. EC 01-3 (filed October 11, 2000) at p. 9, Appendix at p. 162.

Lest anyone think FirstEnergy's admission somehow applies to only some affiliates or is out of context to this case because it was made during a merger

proceeding, FirstEnergy also cited in its Application in that case, a FERC precedent for the general proposition that affiliates do not compete with each other for customers. See *Illinois Power Company*, 67 FERC ¶61,136 at 61,353-354 (1994), cited at Appendix p. 162; see also the opinion attached at Appendix p. 163.

Moreover, the U.S. Supreme Court has found that: “the ultimate interests of the subsidiary and parent are identical, so the parent and the subsidiary must be viewed as a ‘single’ economic unit.” *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984).

The issue is clear: who competes with FirstEnergy’s incumbent utilities, such as CEI, from which customers may switch? If a customer switch from CEI to another supplier is to be counted as a “competitive switch,” it must have resulted from competition between CEI and that supplier. Any switch of customers between affiliates FES and CEI is a cooperative arrangement between FES and CEI for use of the same generating capacity to the ultimate benefit of FirstEnergy shareholders that own both companies. It is not the result of market competition between FES and CEI, as FirstEnergy acknowledges in its FERC filing. *Application of FirstEnergy Trading Services, Inc. for Authority to Merger into FirstEnergy Services, Inc. and Related Transactions, Id.* at p. 9.

Along with its Memorandum Contra, Citizen Power served data requests on FirstEnergy, including a request that FirstEnergy provide data on the extent to which the customer switches it claims involve merely the intra-corporate transfer of sales from one of the FirstEnergy operating companies to its affiliate FES. FirstEnergy did not respond to Citizen Power’s data requests, and thereafter the PUCO approved its Application.

From all indications, however, a significant portion of the claimed switches involved FES. If these switches were deleted, it is very likely that none of the FirstEnergy companies would have reached the 20% switching standard, based on that change alone.

Citizen Power cannot state the principle that affiliates do not compete any clearer than FirstEnergy did in front of FERC. This Court should require that all switches of customers from FirstEnergy operating companies to FES be deleted from FirstEnergy's calculations of switching percentages in order to make such calculations just and reasonable, and lawfully demonstrative of competitive switches.

D. Proposition of Law No. 4

The PUCO's approval of FirstEnergy's customer switch percentages in which the numerator and denominator of the fraction cover different time periods, contrary to the data standards the PUCO set out in its own restructuring order that all data must be "based on reasonable assumptions," "accurate," and "employ an adequate methodology," is unjust and unreasonable. Opinion and Order, *Electric Transition Plan Rules Case*, PUCO No. 99-1141-EI-COI, November 30, 1999.¹¹

The object of FirstEnergy's Application below is the determination of how many of its customers switched suppliers. That requires, at a minimum, data measuring all those who switched compared to those who could have switched at that time (in this case as of September 30, 2001). FirstEnergy does not provide this information. Instead, FirstEnergy compares switches as of September 30 to the load of 2-3 years before that. Stipulation, Attachment 4, Appendix at pp. 116-119.

¹¹ *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, (Electric Transition Plan Rules Case)* Opinion and Order, PUCO No. 99-1141-EI-COI, November 30, 1999.

Accurate data on the extent of competition is crucial for the evaluation of efforts to instill competition. Yet by comparing load switched as of September 30 to load of 2-3 years before that, FirstEnergy's data is meaningless. For a fraction to have any meaning the numerator and denominator must measure the same thing—in this case they must include data as of the same time period. With load growth, using old load data as the base on which switch percentages are calculated will inflate those percentages.

The PUCO's own data published on its website employs no such nonsensical methods as it accepted from FirstEnergy.¹² It compares the load that has switched to the load that could have switched *during the same time period*. It must enforce the same requirement on FirstEnergy that it imposes on itself: a requirement that the data at least make sense.

In its initial order on the shopping incentive rules, the Commission found that “the proposed shopping incentive must be supported by a report that: (1) is based on reasonable assumptions, (2) is based upon accurate data, and (3) fully describes and employs an adequate methodology.” Opinion and Order, *Electric Transition Plan Rules Case*, PUCO No. 99-1141-EI-COI, November 30, 1999, at p. 42. First Energy's calculations fail this standard.

¹² The issue of the contradiction between the PUCO's own numbers and those submitted by FirstEnergy in its Application, as demonstrated on the PUCO's own website, was brought to the attention of the PUCO by Citizen Power below. Since then the PUCO has made its statutorily required Report on the status of the transition toward competition in Ohio to the Ohio General Assembly. That Report, which presumably contains the “official” data, confirms the figures that were already published on the PUCO website referenced to the PUCO by Citizen Power, and that so clearly contradicts the numbers the PUCO has accepted from FirstEnergy. Electric Market Report to the General Assembly, April 2, 2002 (www.puco.ohio.gov/ohioutil/electric_report.pdf)

The Court should order the PUCO to instruct FirstEnergy to correct its data, and in all future filings to compare switches and total load for the same time period.

E. Proposition of Law No. 5

The PUCO has both the authority and the responsibility to correct errors, particularly when the restructuring statute requires the PUCO to actively monitor its implementation to ensure statutory intent is being met. O.R.C. Sections 4928.02 and 4928.37 (A) (1) (b).

In its Memorandum Contra and Supplemental Memorandum Contra, and again in its Application for Rehearing, Citizen Power indicated that FirstEnergy's filing contains specific errors, including a violation of explicit terms of the Stipulation. (ICN 5 and 7; 8 and 9; and 13, Appendix at p. 139.) In its initial order, the PUCO did not address these errors. Instead it merely asserted that "[t]he Commission finds that the computation of shopping levels as reported in this application are consistent with the Stipulation." [sic] Appendix at p. 8. On rehearing the PUCO elaborated:

In reviewing FirstEnergy's application, we found that FirstEnergy had followed the provisions of the Stipulation concerning how future adjustments would be made to the shopping credits. The methodology for determining whether 20 percent switching level has been met was one of many issues upon which parties to the Stipulation agreed as part of the total agreement. The Commission will not now change the terms of the Stipulation by ordering a different methodology be used.

(ICN 15; Appendix at p. 12.)

The PUCO's response fails for two reasons. As Citizen Power has shown above, the PUCO's claim of consistency with the Stipulation is not true. FirstEnergy's calculations do *not* follow the provisions of the Stipulation; they violate the provision which requires contract customers to be counted.

Second, even if the PUCO's claims were true, its response is insufficient. Counting switches among affiliates as competitive switches, and constructing a fraction where the numerator and denominator measure different time periods, are errors that must be corrected to provide an accurate picture of the marketplace on which to base a properly considered decision about the credits. The PUCO has the authority to correct these errors. It also has the responsibility. Like any quasi-judicial body, the PUCO has the responsibility to correct any substantive mistakes that become known to it, including errors due to acts, omissions, ignorance, or surprise.

The restructuring statute requires the PUCO to actively monitor the implementation of company transition plans, and, by implication, correct errors it finds that would hinder the proper functioning of the plans in the public interest. The PUCO has jurisdiction to determine whether a utility has failed to implement its transition plan in accordance with State policy, and the Commission *may modify any transition order as appropriate*. See, e.g., O. R.C. Sections 4928.18 and 4928.36. This gives PUCO the authority to review and correct the implementation of plans under Section 4905.26 R.C. Under that Section, the PUCO may determine whether any regulation or "measurement or practice" affecting or related to any service is unreasonable, unjust, or preferential.

The general policy on restructuring is set forth in O.R.C. Section 4928.02, including the obligation for the PUCO to "ensure the diversity of electricity supplies and suppliers..." (Subsection (C).) Also, the PUCO must "ensure effective competition in the provision of retail electric service..." (Subsection (G).) More specifically, the PUCO is required to ensure that shopping incentives "encourage the development of effective competition." O.R.C. Section 4928.37 (A)(1)(b).

Periodically the PUCO must submit reports to the Ohio Legislature on its implementation of the restructuring statute and the state of competition in Ohio electricity markets. In its recent Report to the Legislature, the PUCO spared no rhetoric to assure the Legislature of its continued vigilance in carrying out its monitoring responsibilities. The PUCO has long recognized its responsibility. In its initial order on shopping credit rules, PUCO emphasized the importance of continuing reviews:

Section 4928.40(B)(1), Revised Code, state that the Commission “may conduct a periodic review no more often than annually and, as it deems necessary, adjust the transition charges of the electric utility as initially established....An interim review of the effectiveness of the shopping credit is in the public interest and in the best interest of attaining the intent of the legislation.

Opinion and Order, *Electric Transition Plan Rules Case*, PUCO No. 99-1141-EI-COI, November 30, 1999, at p. 44.

The purpose of FirstEnergy’s compliance filing is to provide exactly the kind of periodic review envisioned by the statute, and established by the Stipulation. The “intent of the legislation” in this case is that the PUCO determine, as best it can, whether the FirstEnergy companies have reached the 20% switching standard, so that a well-considered decision about the shopping incentive credits can be made. The PUCO cannot do so, however, unless it first corrects the errors in FirstEnergy’s filing identified by Citizen Power.

CONCLUSION

Appellants Citizen Power, respectfully request that this Court reverse the decision of the PUCO denying the intervention of Citizen Power in the case below, reverse the PUCO’s approval of the Application of FirstEnergy, and order the PUCO to do the following with regards to FirstEnergy’s data in its Application below:

1. Require FirstEnergy to include contract customer data in the calculation of the percentage of customers who have switched electric suppliers;
2. Require FirstEnergy to exclude customer switches between its wholly owned affiliates in its calculation of whether it has met the 20% competition standard; and
3. Require FirstEnergy to correct the mistake in its calculation of customer switch percentages, by using a numerator and denominator that cover the same time periods.

Citizen Power also requests that this Court require the PUCO to direct FirstEnergy to reflect these changes in its next compliance filing due before November 1, 2002. Also, the PUCO should direct FirstEnergy to reflect the higher incentive credits in the rates of customers who changed suppliers beginning January 1, 2002.

Respectfully submitted,

William M. Ondrey Gruber
(Registration No. 0005950)
Attorney-at-Law
2714 Leighton Road
Shaker Heights, OH 44120
(216) 371-3570
Fax: (801) 697-4625
E-Mail: GruberWL@aol.com

**Attorney for Appellants
Citizen Power, Inc., et al**

Certificate of Service

I certify that a copy of this Brief on the Merits was served by regular U.S. Mail on the ____ day of May 2002.

William M. Ondrey Gruber
Attorney for Appellants
Citizen Power, Inc., et al

Parties of Record:

Duane W. Luckey
Thomas G Lindgren
Assistant Attorneys General
180 East Broad Street—7th Floor
Columbus, OH 43215-3793

Paul T. Ruxin
Jones, Day, Reavis & Pogue
901 Lakeside Avenue
Cleveland, Ohio 44114

Helen L. Liebman
Jones, Day, Reavis & Pogue
1900 Huntington Center
Columbus, Ohio 43215

Arthur E. Korkosz
FirstEnergy Corp.
76 South Main Street
Akron, Ohio 44308

APPENDIX

NOTICE OF APPEAL (ICN 16)

ENTRY, PUCO CASE NO. 01-2736-EL-UNC, DECEMBER 13, 2001

ENTRY ON REHEARING, PUCO CASE NO. 01-2736-EL-UNC,
JANUARY 24, 2002

OPINION AND ORDER, *IN THE MATTER OF THE APPLICATION OF FIRSTENERGY 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 NOS. 99-1212-EL-ETP, 99-1213-EL-ATA, AND 99-1214-EL-AAM (“*TRANSITION PLAN CASE*”), JULY 19, 2000

STIPULATION AND RECOMMENDATION, *IN THE MATTER OF THE APPLICATION OF FIRSTENERGY 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 NOS. 99-1212-EL-ETP, 99-1213-EL-ATA, AND 99-1214-EL-AAM (“*TRANSITION PLAN CASE*”), APRIL 17, 2000

SUPPLEMENTAL SETTLEMENT MATERIALS (“*SUPPLEMENTAL STIPULATION*”), *IN THE MATTER OF THE APPLICATION OF FIRSTENERGY 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 NOS. 99-1212-EL-ETP, 99-1213-EL-ATA, AND 99-1214-EL-AAM (“*TRANSITION PLAN CASE*”), MAY 9, 2000

APPLICATION FOR REHEARING, DECEMBER 31, 2001.

SUMMARY OF SWITCH RATES FROM EDUS TO CRES PROVIDERS
IN TERMS OF SALES FOR THE MONTH ENDING SEPTEMBER 30,
2001

*APPLICATION OF FIRSTENERGY TRADING SERVICES, INC. FOR
AUTHORITY TO MERGER INTO FIRSTENERGY SERVICES, INC. AND
RELATED TRANSACTIONS*, FEDERAL ENERGY REGULATORY
COMMISSION (FERC) DOCKET NO. EC 01-3 (FILED OCTOBER 11,
2000), TITLE PAGE AND PAGE 9.

OPINION AND ORDER, *ILLINOIS POWER COMPANY*, 67 FERC ¶61,136
AT 61,353-354 (1994).

STATUTORY PROVISIONS.