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August 18, 2000

Docketing Division
PUCO
180 East Broad Street
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Re: Case Nos. 99-1212-EL-ETP, 99-1213-EL-ATA, and 99-1214-EL-AAM
VIA FAX

To Docketing:

Please accept the enclosed facsimile of the Application for Rehearing of Citizen Power in the above-named cases. An original and twenty-eight copies are being sent via Federal Express for delivery on August 21, 2000.

Please file this facsimile, together with the original and twenty-seven copies of the Application in the above-named cases, and send a time-stamped copy to me in the self-addressed envelope that will be enclosed with the Federal Express package.

Thank you for your assistance and cooperation.

Sincerely,

Harvey L. Reiter
William M. Ondrey Gruber - Trial Attorney

BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of FirstEnergy)
Corp. on Behalf of Ohio Edison Company, The)
Cleveland Electric Illuminating Company and The) Case No. 99-1212-EL-ETP
Toledo Edison Company for Approval for Their)
Transition Plans and for Authorization To Collect)
Transition Revenues.)

In the Matter of the Application of FirstEnergy)
Corp. on Behalf of Ohio Edison Company, The)
Cleveland Electric Illuminating Company and The) Case No. 99-1213-EL-ATA
Toledo Edison Company for Tariff Approval.)

In the Matter of the Application of FirstEnergy)
Corp. on Behalf of Ohio Edison Company, The)
Cleveland Electric Illuminating Company and The) Case No. 99-1214-EL-AAM
Toledo Edison Company for Certain Accounting)
Authority.)

Citizen Power, an intervenor in the above-captioned cases, hereby respectfully applies to the Public Utilities Commission of Ohio (“Commission”) for rehearing of the Commission’s Opinion and Order issued July 19, 2000 in the above-captioned cases (“Opinion and Order”).

Introduction

The Commission’s Opinion and Order of July 19, 2000 (July 19 Order) sweeps aside the opposition of Citizen Power to the Stipulation and the Transition Plan of FirstEnergy (hereinafter FirstEnergy, FE or the Company) with hardly any comment, saying we presented no witness and were left with little record evidence to support our arguments. There is no legal requirement, however, that any intervenor present its own evidence in order to prevail on an issue. The Commissioner however, is obligated to follow S.B.3 and to respond to the arguments raised with a reasoned explanation for the

decision. *Motor Vehicle Mfrs. Assoc. v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29 (1983); *Kent v. Central Bens. Mut. Ins. Co.*, 61 Ohio App. 3rd 482, 485 (1989). The Commissioner’s order falls short on both courts.

On each issue for which we seek rehearing, we accept the record as is for the purposes of this Application. We cite that record and provide arguments that FirstEnergy has failed to meet the statutory requirements, that its plan will thwart rather than help the development of effective competition, and that the Commission failed to engage in reasoned decision making in accepting its Transition Plan.

I. ALLOWING TRANSFER OF CUSTOMER ACCOUNTS BETWEEN FIRSTENERGY AFFILIATES TO COUNT TOWARD SATISFYING THE “LOAD SWITCHING” REQUIREMENT OF SECTION 4928.40 VIOLATES THE PLAIN MEANING AND PURPOSE OF THE STATUTE

Section 4928.40 Revised Code provides in relevant part:

(A)...Factors the Commission shall consider in prescribing the expiration date of the utility's market development period and the transition charge for each customer class and rate schedule of the utility include, but are not limited to ... such shopping incentives by customer class as are necessary to induce, at a minimum, a twenty per cent *load switching* rate by customer class halfway through the utility's market development period but not later than December 31, 2003.

(emphasis added)

There is no dispute as to what the statute meant by the reference to twenty percent “load switching.” This commonsense understanding of the statute is reflected as well in the Commission’s implementing regulations. Those regulations provide, in relevant part, as follows:

Shopping Incentive

(A) Each electric utility shall propose as a part of its transition plan a customer shopping incentive that is specific to each of its

tariffs or rate schedules proposed to be in effect during the market development period. The proposed shopping incentive must be sufficient to cause customers representing at least twenty percent of the load in each customer class to switch generation suppliers to *someone other than the incumbent utility* by the midpoint of the utility's market development period but not later than December 31, 2003.

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 (Nov. 30, 1999) Attachment 1, Appendix E (Emphasis added)(hereinafter Electric Transition Rule).

In our Initial and Reply Briefs, we argued that a switch from one of FirstEnergy's operating utilities to FES, its marketing affiliate, must not count toward meeting the twenty percent switching threshold because FE affiliates do not compete with each other and hence do not reflect "load switching" within the meaning of S.B.3. A FirstEnergy affiliate is not "*someone other than the incumbent utility*" within the meaning of the Commission's own implementing regulations.

The Commission's order, however, dismisses these concerns in three terse sentences:

Regarding the arguments raised by Citizen Power, we note that S.B.3 does not prohibit switches to a company's affiliate from being counted for the purpose of measuring load switching. In fact, we rejected this same argument in the generic rules proceeding. We note that the Commission is charged with analyzing the efficacy of the market as it progresses over time, and any evidence of abuse of market power will be a signal for a change in the process.

Order at 17. None of the reasons advanced by the Commission, however, is sustainable.

As a threshold matter, it bears emphasis that, irrespective of its policy preferences, the Commission's authority to approve the settlement is limited by its statutory authority. The Commission's assertion "that S.B.3 does not prohibit switches to

a company's affiliate from being counted for the purpose of measuring load switching" ignores the plain meaning of the statute. "Load switching" can only mean that load has gone from one supplier to another. As noted above, the Commission's own regulations applying the statute reach the same conclusion. They require that a restructuring utility propose a shopping incentive "sufficient to cause customers representing at least twenty percent of the load in each customer class to switch generation suppliers to *someone other than the incumbent utility* by the midpoint of the utility's market development period but not later than December 31, 2003. Electric Transition Rule, Attachment 1, Appendix E (emphasis added). FirstEnergy's marketing affiliates are not someone "other than the incumbent utility." By definition, a parent company and each and every one of its wholly-owned subsidiaries effectively comprise a single economic entity.

The Supreme Court addressed this basic question in *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984). There, the argument was made that a company could conspire with its wholly-owned subsidiary to restrain competition under Section 1 of the Sherman Act. The Court rejected this notion, concluding that affiliates and subsidiaries cannot compete with one another because they are not separate economic entities. "[T]he ultimate interests of the subsidiary and the parent," it held, "are identical, so the parent and the subsidiary must be viewed as a single economic unit." *Id.* at n. 32.

The Court's rationale is instructive:

A parent and its wholly owned subsidiary have a complete unity of interest. Their objectives are common, not disparate; their general corporate actions are guided or determined not by two separate corporate consciousnesses, but one. They are not unlike a multiple team of horses drawing a vehicle under the control of a single driver. With or without a formal "agreement," the subsidiary acts for the benefit of the parent, its sole shareholder. If a parent and a wholly owned subsidiary do

"agree" to a course of action, there is no sudden joining of economic resources that had previously served different interests, and there is no justification for § 1 scrutiny.

Indeed, the very notion of an "agreement" in Sherman Act terms between a parent and a wholly owned subsidiary lacks meaning. A § 1 agreement may be found when "the conspirators had a unity of purpose or a common design and understanding, or a meeting of minds in an unlawful arrangement." *American Tobacco Co. v. United States*, 328 U.S. 781, 810 (1946). But in reality a parent and a wholly owned subsidiary *always* have a "unity of purpose or a common design." They share a common purpose whether or not the parent keeps a tight rein over the subsidiary; the parent may assert full control at any moment if the subsidiary fails.

Id. at 772. (emphasis in original).

The Supreme Court's reasoning is reflected in the regulatory sphere as well. In fact, the courts have often recognized that, even in situations of less than full ownership, effective control of one corporation by another eliminates the possibility of real competitive interaction. *See, e.g., Midwest Gas Users Association v. FERC*, 833 F.2d 341, 351-54 (D.C. Cir. 1987). In short, the common sense meaning of "load switching" means just what the Commission's own regulations state: "someone other than the incumbent utility." That someone, of course, cannot logically include the utility's affiliate.

No study of market concentration, and hence the level of competition, would even consider counting FES and each of the operating utilities also owned by FirstEnergy as separate competitors. For example, when FirstEnergy was created as a holding company to own the four operating utilities it acquired, those companies continued to exist as separate corporations, but the Commission and FERC quite properly evaluated market studies to assess the impact on competition of the reduction in the number of sellers. Applying the Commission's

reasoning in this case to that merger would have led to the absurd conclusion that FirstEnergy's acquisition of previously independent companies resulted in no diminution in competition because there was no change in the number of operating companies. Of course, the opposite is true. And it is also true that just as the existing operating companies are treated as one economic entity rather than independent competitors, adding another wholly owned subsidiary will not create new competition either.

Even if it were reasonable to conclude that S.B.3's requirement for "load switching" and the Commission's implementing requirement "to switch generation suppliers to *someone other than the incumbent utility*" did not *literally* exclude FirstEnergy's marketing affiliates such an interpretation is nonetheless implausible. The only "rationale" the Commission provides for such an interpretation is its observation that it "is charged with analyzing the efficacy of the market as it progresses over time, and any evidence of abuse of market power will be a signal for a change in the process." Order at 17. That observation, however, has nothing to do with the statutory command.

While administrative agencies are generally given deference in their interpretations of ambiguous statutory language they have been given responsibility to administer, their interpretations must nonetheless be reasonable ones.¹ Here, the statute commands twenty percent "load switching," That figure is nondiscretionary. The twenty percent load switching, as FirstEnergy witness Anthony Alexander testified, is "what the Gen. Assembly has targeted as an effective level of competition." Direct Testimony of Anthony Alexander, p.3. Thus, both FirstEnergy and the Commission agree that statute's "incentives are a means of pushing customers from the utility to a competitive supplier."

Order at 36. The Commission simply offers no explanation how a switch of customers from FirstEnergy to its affiliates constitutes a switch to a “competitive supplier”.² On the contrary, since under the restructuring requirements FirstEnergy’s customers would be served (directly or indirectly³) by its marketing affiliates even if no other competitors existed, the Commission’s interpretation would lead to the absurd conclusion that there could be a *100 percent* switchover “from the utility to a competitive supplier” (Id. at 36) even if *none* of FirstEnergy’s customers chose to switch to an unaffiliated supplier.⁴

Finally, the Commission’s reference to its prior ruling in Case No. 99-1141-EL-ORD cannot relieve it of the obligation to comply with S.B. 3’s statutory commands. In its generic order holding that switches between affiliates should count as competitive

¹ Chevron USA, Inc. v. Natural Resources Defense Counsel, Inc., 467 U.S. 837 (1984); State Energy Relations Board v. Miami Union., 643 N.E.2d 1113 (Ohio 1994).

² In its generic order holding that switches between affiliates should count as competitive switches, the Commission offers one additional argument, that it is "taking significant actions to separate the unregulated businesses of incumbent electric utilities from the incumbent electric utilities' operations." *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 (Nov. 30, 1999) at 44. Assuming the Commission has adopted that rationale here, it too, offers no logical support for the Commission’s order.

The critical defect in this rationale is that it confuses the purpose of functional separation -- to ensure equal treatment between a utility and its competitors -- and the purpose of the switching requirement -- “pushing customers from the utility to a competitive supplier.” July 19 Order at 36. Functional separation does not create new entry. Separating FES from the operating utilities to prevent cross-subsidization and undue preference plainly does not create separate companies who will compete with one another for customers. On the contrary, its purpose is to make transactions more transparent so that it will be more difficult for the utility to favor *itself* in the terms and conditions under which it provides access to its network. Indeed, the analogous unbundling requirements of Order No. 888 were premised on the fact that the utility’s transmission and distribution operations would favor its own generation -- whether sold through an affiliate or the vertically integrated utility itself. In short, the functional unbundling requirement serves a critical, but an entirely separate purpose from the switching provisions. If monitoring functional separation were sufficient to satisfy the statute’s purposes, there would have been no need for a switching requirement to judge the effectiveness of competition.

³ If FE customers do not make an election, they will continue to be billed by FE, but for power FE will buy from its marketing affiliate. If the customers choose, they can be billed directly by the affiliate for the same supply and this, under the Commission’s holding, would be counted as a load switch.

⁴ The Commission’s assurance that it will monitor the efficacy of the market is a particularly empty promise with regard to switching. FirstEnergy needs only carry out the Order, count the switches to meet the standard for effective competition when in fact no such competitive enhancement will have occurred, and there will be nothing for the Commission to monitor.

switches, the Commission offers one additional argument, that it is "taking significant actions to separate the unregulated businesses of incumbent electric utilities from the incumbent electric utilities' operations." *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 (Nov. 30, 1999) at 44. Assuming the Commission has adopted that rationale here, it too, offers no logical support for the Commission's order.

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If the Commission's reference to its November 30, 1999 order were intended to suggest that the load switching issue is already decided and that Citizen's objections are therefore untimely, this argument, too must fail. While contentions that a regulation adopted in another proceeding "suffers from some procedural infirmity" might in some circumstances be foreclosed as untimely, NLRB Union v. FLRA, 834 F. 2d 191, 195 (D.C. Cir. 1987), there is no bar to consideration of a challenge, as in this case, "that the issuing agency acted in excess of its statutory authority in promulgating [the regulation]", NLRB Union, 834 F. 2d at 195. On the contrary, "limiting the right of review of the underlying rule would effectively deny many parties ultimately affected by a rule an opportunity to question its validity." Functional Music, Inc. v. FCC, 274 F. 2d 543, 546 (D.C. Cir. 1958), cert. denied, 361 U.S. 813 (1959).

In any event, even if Citizen Power's challenge were considered procedural in nature, which it is not, the Commission has considered our argument and therefore "opened the issue up anew;" consequently "its renewed adherence is substantively reviewable." Assoc. of American Railroads v. ICC, 846 F. 2d 1327 (D. C. Cir 1988). See also, State of Ohio v. EPA, 838 F. 2d 1327, 1328-9 (D.C. Cir 1988); City of Pittsburgh v. FPC, 237 F. 2d 741, 749 (D.C. Cir 1956); Telanserphone, Inc. v. FCC, 231 F. 2d 732, 735 (D.C. Cir. 1965).

II.
**THE COMMISSION ARBITRARILY FAILED TO CONSIDER CITIZEN
POWER'S ARGUMENT THAT THE EXCLUSION OF THE AFFILIATES OF
OTHER OHIO UTILITIES FROM FIRSTENERGY'S CAPACITY OFFER,
WHILE FIRSTENERGY'S MARKETING AFFILIATE IS INCLUDED, IS
UNDULY DISCRIMINATORY AND ANTICOMPETITIVE**

FirstEnergy has offered 1120 MWs of its generating capacity to marketers and

brokers for sales to retail customers during the market development period. The Stipulation of April 17, 2000 at p.6, Section V.1., approved by the Commission as part of FirstEnergy's transition plan, however, makes this capacity available only to certain suppliers. It excludes the marketing affiliates of other Ohio utilities unless (a) they offer similar amounts of capacity in the same way on their system, or (b) they have no capacity close by to sell.

In its summary of both the Stipulation and the Supplemental Settlement docketed on May 9, 2000, (Order at pp. 6-14) the Commission never mentions this exclusion. The Order says instead that "FirstEnergy will make available 1120 megawatts (MW) of system level generation capacity to nonaffiliated marketers, brokers and aggregators for sales to retail customers of each such company during the market development period." (At p. 7) The stipulation actually reads "to non-affiliated marketers and brokers (non-affiliated with any Ohio investor-owned utility)" By deleting this explanation of the term nonaffiliated, the Commission has changed the meaning of the offer. The Order language indicates erroneously that all arms-length suppliers will have access to the capacity. The Order therefore never acknowledges that some suppliers will be excluded from the capacity offer.

In our Initial Brief, we called attention to the exclusion and argued that it was blatantly anticompetitive. The Order never mentions the issue or our arguments. The Commissioner's silence in this point, in the face of an issue squarely raised, is arbitrary. *See Greater Boston Television Corp. v. FCC*, 444 F2d 841 (D.C. Cir . 1970), *cert. den.*, 403 U.S. 923 (1971) (agency's order "crossed the line from the tolerably terse to the intolerably mute.") Accordingly, on rehearing, Citizen Power urges the Commission to

reconsider its ruling and declare the exclusion unreasonable. There is as discussed below, ample reason to do so.

FirstEnergy's exclusion of the affiliates of other Ohio utilities is as Citizen Power has previously asserted, unduly discriminatory and anticompetitive. Had the settlement barred First Energy or its affiliates from selling power at the start, this might have been a different case. Under such circumstances the Commissioner might have reasoned that selling First Energy's capacity only to non- Ohio utilities would be as important as a means to protect against market concentration, particularly if there were a proven, vigorous group of non utility suppliers waiting in the wings to enter. Where, as here, however, the incumbent -- through its affiliates -- will continue to hold the lion's share of capacity in the market, excluding First Energy's in-state utility competition is just a way to cut off the entities most likely to compete vigorously. In any event, there is no sound reason for excluding Ohio utilities or their affiliates. These utilities do not own the First Energy distribution network- the asset most likely to give utilities a leg up on the competition.

No utility must be allowed to choose with whom it will compete. If they are allowed such license, they will always discriminate against those most able to effectively compete with them, as FirstEnergy has done in this case. It is the very utilities that FirstEnergy seeks to exclude that are likely to be most able to compete with it by virtue of their nearby location, which minimizes transmission cost and, perhaps, access problems, and existing generation resources. Excluding them will greatly reduce the potential competition FirstEnergy must face, and it will strengthen FirstEnergy's position as the dominant supplier.

Moreover, to exclude potential competitors, FirstEnergy must show good cause. It must show how the public interest is served by its exclusion. FirstEnergy offered no reasons on the record. It merely made the limitation a part of the settlement, which must be accepted in all of its parts. But the Commission may not accept such obvious discrimination and its anticompetitive effects that will do great damage to the public interest simply because it is part of a settlement among some of the parties to the case.

The effect of allowing FES access to some of the capacity, moreover, simply exacerbates the problem and highlights the arbitrary nature of the exclusion. The effect of allowing FES to participate is to reduce the amount of the offer, which already constitutes less than 9% of FirstEnergy's capacity. Moreover, as we have discussed, on January 1, 2000, all FirstEnergy generating capacity will be transferred from the operating utilities to the operational control of FES. This means that suppliers seeking the offered capacity to compete for sales must secure it from the FirstEnergy affiliate with whom they compete. FES has a clear conflict of interest when it comes to allowing others to use its capacity, and can be expected to limit that use wherever practicable.

The Supplemental Settlement does modify FES's access by requiring FES to release some of its share of the capacity to a third-party marketer/broker "that wishes to serve a retail customer", when capacity would otherwise be fully taken. But this requirement is vague. How does a third party wish become a requirement for FES to relinquish capacity? The bottom line is that FES must be able to use some of the offered capacity only if no one else wants it, and the Commission must take action to ensure such a result.

In order for competition to develop from the capacity offer, temporary as it will be since the offer will be withdrawn at the end of the market development period, all of the capacity being made available must be offered to arms-length companies. FES must be excluded from the offer. FirstEnergy must include the affiliates of other Ohio utilities in the offer. The plan as approved by the Commission is discriminatory and anticompetitive.

III.
**THE CAPACITY OFFER WILL NOT CREATE EFFECTIVE AND LASTING
COMPETITION**

Citizen Power welcomes FirstEnergy's agreement to offer of capacity, but finds fault with the scope and nature of that undertaking. The Commission erred in failing to give reasoned considerations to the shortcomings in FirstEnergy's proposal outlined by Citizen Power in its earlier briefs.

As presently constituted, the settlement plan will not be effective in creating lasting competition. The offer is for a limited amount of capacity— less than 9% of FirstEnergy's system generation—for a limited time period—approximately five years. But the capacity being used to serve them will revert to FirstEnergy at the end of the period. Some temporary savings will have been created, but no basis for lasting competition that can restrain prices once the capacity reverts to FirstEnergy will result from the offer. The main, if not only, effect of the offer will be to help achieve the 20% switching standard mandated by S. B. 3. Surely the law does not contemplate such a cut-off of generation alternative suppliers the day after the market development period ends. Given the shortage of supply in the region temporary offers of capacity can do little or nothing to help the development of effective and lasting competition.

This illusion of competition is exacerbated if FirstEnergy is allowed to count switches to FES as signifying enhancement of competition. At the end of the market development period, when the offered capacity has reverted to FirstEnergy, there are likely to be three main kinds of customers: (1) those that have remained with the FirstEnergy operating utilities, (2) those that switched to FES, and (3) those supplied by third party companies, using capacity from their own sources, who have successfully traversed the many impediments to entering local markets. The first two groups are likely to be quite large, and the last very small. There will likely be very little competition to restrain FirstEnergy's prices at that point, regardless of whether the 20% switching standard is met by the artificial means concocted by FirstEnergy and accepted by the Commission.

The Commission's order gives these concerns no weight, relying instead, almost entirely on the breadth of agreement between the parties as sufficient rationale for the settlement's approval. Reasoned consideration of an agency's duty to the public interest, however, requires it to engage in more than a rubberstamping of a broadly-supported settlement. *See, e.g., Tejas Power Corp. v. FERC*, 908 F. 2d 998, (D.C. Cir. 1990). "In other words, that the proposal is a settlement does not 'establish without more the justness and reasonableness of its terms.'" *Mobile Oil Corp. v. FPC*, 417 U.S. 283 at 312-13 (1974); *ANR Pipeline Co. v. FERC*, 771 F.2d 507, 519 (D.C. Cir. 1985).

IV.

FIRSTENERGY FAILED TO MEET THE CLEAR INTENT OF S.B.3 FOR INDEPENDENT CONTROL OF TRANSMISSION, IT DID NOT ASK FOR A DEFERRAL OF THE STATUTORY REQUIREMENTS, AND NEITHER IT NOR THE COMMISSION HAS SHOWN GOOD CAUSE WHY IT SHOULD GET ONE

Effective and lasting competition will not develop unless market entry is provided for by a regional, independent transmission entity that both controls and operates regional transmission and plans for capacity sufficient for access to markets by many suppliers. Open market entry provided for by a well functioning, independent RTO is a crucial *prerequisite* to the development of such competition. Open entry is particularly important at the beginning of the competitive process when customers first get to shop for alternatives so that no utility, particularly an incumbent utility like FE, can easily establish market dominance early on.

S.B. 3 reflects the legislature's understanding of the crucial role of open market entry plays in the development of effective and lasting competition. Section 4928.03 requires, in relevant part, that:

Beginning on the starting date of competitive retail electric service and notwithstanding any other provision of law, each consumer in this state and the suppliers to a consumer shall have comparable and nondiscriminatory access to noncompetitive retail electric services of an electric utility in this state within its certified territory for the purpose of satisfying the consumer's electricity requirements in keeping with the policy specified in section [4928.02](#) of the Revised Code.

The need for open access is the basis for the requirement that each Ohio utility to transfer ownership and control of its transmission to "one or more qualifying transmission entities." (Section 4928.12 (A)). A qualifying transmission entity, in turn, is defined to exist only where "[t]he transmission entity achieves the objectives of an open and competitive electric generation marketplace, elimination of barriers to market entry, and preclusion of control of bottleneck electric transmission facilities in the provision of retail electric service." (Section 4928.12 (B) (5))

S.B. 3 requires each utility to be a member of, and transfer control of its transmission to, a qualified RTO on or after December 31, 2003. (Section 4928.35(G)). "The Commission's Order may specify an earlier date on which the transmission entity or entities are planned to be operational if the Commission considers it necessary to carry out the policy specified in Section 4928.02 of the Revised Code or to encourage effective competition in retail electric service in this state" (Id.) Clearly common sense and the experience in other states that have deregulated tells us that incumbent utilities like FE cannot be allowed several years at the beginning of retail deregulation to solidify their dominance before open market entry is realized.

If anything, having open market entry provisions in place before deregulation begins is even more important in this case, given the other problems of FE's transition plan we have outlined: (1) the inducements for customers to switch to FES, thus thwarting the development of competition with other suppliers, and (2) the exclusion of other Ohio utilities from the capacity offer. Yet the Order, after a brief page and a half discussion that mainly regurgitates FE's often erroneous characterizations of the situation and statutory requirements it must meet (while ignoring Citizen Power's rejoinders in our Reply Brief), simply grants FE a compliance deferral of unspecified duration, without good cause being shown for such a grant.

FirstEnergy asked the Commission to approve its transmission plan, "subject to final approval of the Alliance RTO, consistent with the Commission's authority under R.C. 4928.12" (FE Initial Brief at p.98), "including the transfer of ownership and control of its transmission facilities to the Alliance RTO" (FE Initial Brief at p.107). FE, however, did not request deferral of the consideration of its plan under 4928.34, 35 nor,

as a consequence, did it even attempt to show good cause why it should be given a deferral.

FE's plan fails to meet the statutory requirements of Section 4928.12. That section, moreover, does not provide for the conditional approval for which FE asks. Nor is there any provision in the statute giving the Commission's authority to grant approval of the transfer of facilities to the Alliance RTO as FE requests.

To be sure, Section 4928.34 (A) (13) does contain a limited provision allowing the Commission to grant deferral of a utility's transmission plan. "[F]or good cause shown," the Commission may "authorize[] the utility to defer compliance until an order is issued under division (G) of Section 4928.35 of the Revised Code". In its Briefs, however, FirstEnergy did not ask for a deferral under Section 4928.34 . But the Commission granted one anyway, and an open ended deferral at that, without a showing of good cause, either by FE or the Commission.

The Order offers only this explanation for why the Commission granted the deferral: "Because 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." (Order at p. 60).

The Commission is mistaken. It *can* determine that the Alliance is not *now* in compliance because FE's plan obviously fails to meet statutory requirements. The question, then, is whether there is good cause to (1) expect the Alliance RTO, based on what we now know about it, to be in compliance with statutory requirements in a

reasonable enough time consonant with the start of deregulation on January 1, 2000 to facilitate the competition contemplated in S.B. 3, and (2) allow deregulation to begin at that time without either a functioning RTO in place or the reasonable expectation of one soon.

Neither question can reasonably be answered in the affirmative. FirstEnergy says it will satisfy the requirements of Section 4928.12 at some unspecified date in the future by transferring its transmission to the Alliance RTO. But the company has had three bites of the apple at FERC over a period of nearly two years to file an RTO proposal that would satisfy FERC requirements and meet S.B. 3 mandates as well: its initial filing, its request for rehearing of FERC's order detailing deficiencies, and in its compliance filing to that initial order. Yet major deficiencies remain, many of the still unaddressed by FE in a substantive way.

FERC has detailed some of the major deficiencies, acknowledged by both FE and Commission staff (FE Initial Brief at p. 96 and Staff Report at p. 44), which include: (1) the lack of independence in RTO governance, (2) the failure to eliminate pancaked rates (among other rate problems FERC addresses), (3) the lack of sufficient scope of configuration so that the Alliance can provide for competition on a regional market basis, and (4) the lack of coordination with other utilities and RTOs, to, for example, deal with "seam" problems. While it has had every opportunity to do so, both at FERC, and in front of the Commission, at this writing FE still offers no specifics whatsoever as to either how it will correct these deficiencies (even if we assume that the other Alliance members will agree with FE) or whether the Alliance will ever be able to meet FERC or Ohio statute requirements.

FE says that with "additional guidance by FERC" it, along with the other Alliance members, "believes" it can change the governing structure of the Alliance to satisfy both FERC and the Commission. (FE Initial Brief at p. 96) The Order repeats this statement as if it were a substantive commitment. (Order at p. 54) Yet nowhere does FE offer any specifics as to what the Alliance members will do to meet FERC independence standards. This reticence is particularly troubling given FE's determination to retain an ownership in the for-profit RTO that is likely to work at cross purposes with the concept of transmission control by an entity which is completely independent of FE.

As to pancaked rates and the lack of sufficient scope, FE avers that, while it did not address them before, despite FERC's detailing of them, it plans to do so sometime this summer. It filed a letter at FERC on June 13, 2000 telling that commission the same thing. The Order reports FE's promises as if they were a substantive development. But nowhere in the record of this case or at FERC has FE offered any specifics as to how it and the other Alliance members will correct these deficiencies in the Alliance. The letter to FERC, which also contained no specifics, was a transparent ploy designed to show the Commission the appearance of change without FE actually doing anything.

Indeed, given the record so far we are entitled to argue that the lack of sufficient scope and the pancaked rates were specifically designed by Alliance members in attempt to retain as much transmission market power as they thought they could get away with, in order to limit entry by other suppliers into their markets. Moreover, these positions are ones that Alliance members will not easily change, as evidenced by their failure to do so, despite several opportunities over many months.

The fourth deficiency identified by FERC—the lack of coordination with other utilities and RTOs—is the only one FE addressed in its settlement with some of the parties in this case. But again, all it offers are promises. FE will work with others to resolve the problems and it will unilaterally file if the Alliance itself cannot come up with one. It is unclear what such a unilateral filing would accomplish if, in fact, other Alliance members are unwilling to be parties to it.

There is therefore no basis demonstrated, let alone a showing of good cause, why the Commission should conclude that either FE and the other Alliance members will ever correct the deficiencies in a satisfactory way, or that they will do so in sufficient time to allow for the development of competition in the nascent markets scheduled to start on January 1.

One thing is clear. There will be no independent transmission RTO in place to operate FE's transmission and provide open market access on January 1, 2000, when retail deregulation begins. Moreover, as of now there is no reason to believe such an entity will be in place in any reasonable time. The statute provides for a delay in the starting date in such a case: "Prior to January 1, 2000, and after application by an electric utility, notice, and an opportunity to be heard, the Public Utilities Commission may issue an order delaying the January 1, 2000 starting date of competitive retail electric service for the electric utility for a specific number of days not to exceed six months, but only for extreme technical conditions precluding the start of competitive retail electric service on January 1, 2000" (Section 4928.01 (C)).

FE has not asked for a delay and we don't expect it to do so. But the Commission must reject FE's transmission plan and the other features on which we seek rehearing.

The burden will then be on FE to satisfy the requirements of S.B. 3 or seek a delay until it can.

CONCLUSION

For the reasons stated above, Citizen Power respectfully requests that the Commission grant rehearing of its July 19 Order and reverse its approval of the FirstEnergy settlement.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon each person designated on the official service list compiled by the Commission in this proceeding.

Dated at Washington, D.C., this 18th day of August, 2000.

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