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June 2, 2000

Docketing Division
PUCO
180 East Broad Street
Columbus, Ohio 43215

Re: Case Nos. 99-1212-El-ETP, 99-1213-EL-ATA, and 99-1214-EL-AAM

To Docketing:

Please accept the enclosed original and twenty-eight copies of the Initial Brief of Citizen Power and the Ohio Environmental Council in the above-named cases.

Please file the original and twenty-seven copies of the Brief in the above-named cases, and send a time-stamped copy to me in the enclosed self-addressed envelope.

Thank you for your assistance and cooperation.

Sincerely,

William M. Ondrey Gruber

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.)

Initial Brief of Citizen Power
and
the Ohio Environmental Council

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Initial Brief of Citizen Power
and
the Ohio Environmental Council

Citizen Power and the Ohio Environmental Council (“Council”), intervenors in the above-captioned cases (which interventions were granted in the Attorney Examiner’s Entry issued January 31, 2000 as to Citizen Power, and in the Entry issued April 28, 2000 as to Ohio Environmental Council), hereby respectfully present to the Public Utilities Commission of Ohio (“Commission”) their joint Initial Brief concerning FirstEnergy Corporation’s (“FirstEnergy” or “Company”) revised Application for Approval of its Transition Plans filed in these cases on December 22, 1999, and the Stipulation and Recommendation (“Stipulation”) filed on April 17, 2000.

Introduction

Citizen Power and the Council oppose the Stipulation as unlawful and anti-competitive. The Stipulation and the Company's Transition Plan violate Section 4928 Ohio Revised Code ("O.R.C.") and the rules promulgated by the Commission pursuant to that Section. The Stipulation leaves intact almost the entire Transition Plan proposed by FirstEnergy, with relatively little change. This leaves intact the Company's \$8.9 billion transition cost request and the excessive transition charges the Company proposes. It also means that approval of the Stipulation would mean approval of the Company's plan for an independent transmission entity and consumer education plan that are unreasonable and unlawful.

The retail electricity market is supposed to replace price regulation with vigorous competition that will both restrain prices and provide utilities with incentives to be efficient. FirstEnergy's proposed settlement, however, is designed to achieve the legislatively mandated 20% customer switching, while actually thwarting the development of lasting competition that could threaten the Company's market dominance.

The Stipulation, and the Company's Transition Plan violate Ohio law and the Commission's rules in several respects, including its plan for a transmission entity that is not operational and has not been approved by the FERC. Another violation is the Company's proposed Net Metering Tariff, which is unlike any other filed by utilities in Ohio, and would discriminate against Northeast Ohio consumers. Even worse, the Tariff will stymie the intent of the law and the employment of Net Metering, which is the obvious intent of the Company and the

inevitable result of the Commission's approval of the Stipulation as proposed. In addition, FirstEnergy's Consumer Education Plan is inadequate and incomplete.

Citizen Power and the Council support the positions, and incorporate the arguments on brief, of Ohio Citizen Action, the Safe Energy Communications Council-Ohio, and Ohio Public Interest Research Group, and will not repeat here many of their arguments set forth in their initial briefs.

Statement of the Case

FirstEnergy initiated three separate proceedings related to its Transition Plan, each one on behalf of all three of its operating utilities: Ohio Edison Company ("OE"), The Cleveland Electric Illuminating Company ("CEI"), and The Toledo Edison Company ("TE"). FirstEnergy filed its original Transition Plan on October 4, 1999, which was later rejected by this Commission. On November 30, 1999, the Commission issued rules regarding the structure and substance of electric utility transition plans. Then on December 22, 1999, FirstEnergy filed a revised Application for Approval of its Transition Plan.

Citizen Power filed preliminary objections to FirstEnergy's Plan on February 5, 2000, pursuant to the Commission's Transition Plan Rules, Section 4901:1-20-07 Ohio Administrative Code ("O.A.C."). In early April, FirstEnergy submitted a proposal for settlement at a meeting called for that purpose, to which all parties were invited. However, it became very clear, very quickly, that the Company had already been negotiating with certain parties, including the Ohio Consumers Counsel, and had already reached significant agreement with a

number of these parties, again including Consumers Counsel. There was amazingly little

discussion or give and take, except by those who had not already reached their agreements with the Company.

A Stipulation was quickly agreed upon by the select parties, and that set the stage, not only for this case, but for all transition cases in Ohio, among which this case was the lead. It became impossible for other parties, particularly those also representing residential consumers, to negotiate with the Company over the major issues in the case. What was left were those issues of concern to a large block of marketer interests, side issues -- the scraps -- and financial pay-offs to some of the parties. Citizen Power and the Council do not begrudge or object to those parties who negotiated and took what they believed to be in their own best interests from a settlement. Considering the meager Staff Report, the extreme pressure of time imposed by the law and the Commission, and the secret deals made by some of the most influential parties, there was hardly a full and fair opportunity for the remaining parties to negotiate a settlement.

Argument

A. The procedure followed by the Commission and the process leading to the Stipulation were unlawful and unreasonable.

Any settlement and resulting Stipulation must, by law, be reached and presented as part of a fair and open process. This did not occur in this case. As set forth above, the process leading to the Stipulation was secretive and exclusionary. When presented to the majority of the parties in the case, the Stipulation was a “done deal.” There was little room to negotiate. Citizen Power and OEC made proposals to the Company. Citizen Power’s oral proposal pertaining to

renewable power was met with an instantaneous answer that the Company was “not willing to discuss” the matter, while OEC has not heard back from the Company.

The true scope and nature of the deals made to reach the settlement may never be known, and will certainly not be part of the record in this proceeding because of action by the Examiner and inaction by the Commission. Parties not part of the original settlement agreement were denied their due process rights as the proceeding went forward. The multiple side agreements made to induce endorsement of the Stipulation, or “non-opposition” to it, have not been made public for the most part, and were not made a part of the record. The failure of the Commission to require that all such deals be filed publicly and made a part of the record has denied to those contesting the Stipulation the ability to inquire and fully evaluate and comment upon the process that led to the Stipulation. Moreover, it is impossible to fully understand or analyze the impact of the Stipulation and all the side agreements on the Company, on consumers, or on competition, because a major portion of the deals have been kept out of the record.

These secret deals certainly must have some impact, perhaps substantial, on the Stipulation itself, how successful it will be in causing competition to flourish, and how the Stipulation will be implemented. Parties such as Citizen Power and OEC were denied their due process rights when parties were not permitted to question witnesses on the side agreements and the process that led to the Stipulation.

In addition, the failure of the Commission to allow testimony or cross examination of witnesses on the issue of the Company’s consumer education plan has unreasonably limited consumer involvement and a critical review of the plan, and constitutes an abuse of discretion by

the Commission. On March 23, 2000, the Commission issued an Entry stating that “the Commission believes that the consumer education aspect of FirstEnergy’s plan may not require a hearing. Prior to determining whether this issue should be set for hearing, we will afford parties to these proceedings an opportunity to submit comments...” (Emphasis added.)

Citizen Power filed Comments arguing that a hearing was needed, and provided a summary of its arguments as to why the Company’s plan is inadequate. However, Citizen Power and other parties were denied the ability to put on witnesses on the issue, which would have assisted the Commission in deciding whether the Company’s plans are adequate. The Commission has yet to decide whether this issue should be part of the Transition Plan hearing for FirstEnergy, though obviously the hearing is over.

B. The Stipulation is anticompetitive, unreasonable and unlawful, and the Commission must reject it.

(1) Switching

A stipulation is given a substantial amount of deference by the Commission and the courts, but it cannot substitute for the requirements of law or common sense. The Stipulation here would do both. As shown below, the full effect of the Stipulation is to thwart the development of competition for FirstEnergy in local markets by other suppliers. FirstEnergy presents it to the Commission as if it were intended to have the opposite effect, that is, to spark competition through the provision of various incentives for customers to switch to other suppliers. However, by defining the role of “switching” in the Company’s favor, the Stipulation

violates the intent and clear language of the law. The Stipulation counts a switch from a FirstEnergy operating company to the FirstEnergy Services Company (“FES”) as a switch for

the purposes of the 20% switching standard. Section 4928.40 (A) and (B) (2) (a) O.R.C. and Stipulation at p. 9.

The law includes a “switching” standard of 20% by the end of the Market Development Period (“MDP”), with a preliminary evaluation in the middle of the MDP, to consider the progress being made. Section 4928.40 O.R.C. The goal of the law is to create a competitive market for electric power that will restrain prices once prices are fully deregulated at the end of the MDP. The law establishes 20% as a gauge of whether a particular utility’s transition is on the right track, and the mid-point date is a safety valve to allow time for corrective action to be taken.

Through the Stipulation, switches by customers of the Company’s operating companies to FirstEnergy's marketing affiliate are counted as switches for the purpose of meeting the 20% standard. But FirstEnergy’s marketing affiliate, FES, is a wholly owned subsidiary of FirstEnergy, just like the FirstEnergy operating companies from whom the customer would be switching. Because the same stockholders own both (stockholders own FirstEnergy and FirstEnergy owns FES), no switching will actually have occurred. Customers will still be served by an affiliate of FirstEnergy. Profits from sales, whether made by FES, CEI, OE, or TE, will all go to the same stockholders, those who own shares in FirstEnergy.

Simply put, this means that FES does not compete for retail sales with the

operating companies. A customer switching from OE to FES is no indication of any additional competition, any more than is switching from OE to CEI. Since that customer remains with

FirstEnergy, competition is not affected. Any market study of concentration would ignore such "switches". Only switches to genuinely arms-length companies must be counted.

The statute does not specify that switches to a company's affiliate should be counted for the purpose of measuring whether 20% of a company's load has switched to another supplier. Section 4928.40 (A) and (B) (2) O.R.C. Neither has the Commission established any rules that would require the nonsensical result of counting switches to FES.

The Legislature's purpose is clear, as is the policy incorporated into the law. The law requires that actions taken to implement its provisions must "ensure diversity of electricity supplies and suppliers..." Section 4928.02 (C) and (G) O.R.C. In determining whether there is effective competition, the Commission must consider the extent to which service is available from "alternative suppliers in the relevant market." Section 4928.06 (D) O.R.C. A switch to FES cannot be counted as a switch to an "alternative supplier," because it is not a switch from FirstEnergy. This provision of the Stipulation is unlawful and anticompetitive.

(2) Hold harmless clause.

The Stipulation allows FirstEnergy to add to its cost recovery any revenues lost due to customers switching to another supplier. Stipulation at p. 14, Section VIII.2. To the extent that FirstEnergy is held harmless in this way, one of the major effects of competition--penalizing losers--is thwarted. By rewarding winners and penalizing losers, competition serves to shift resources to more efficient suppliers and provides incentives for the losers to reduce their

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costs. All of this is lost when FirstEnergy is permitted to recover the revenue it loses through competition.

If more than 20% of a customer class for any of the three operating utilities

switches to another supplier, the Company is permitted to extend the Regulatory Transition Charge (“RTC”) recovery period. Stipulation at p. 16, Section IX. 3. This extension of the recovery period will increase its chances of being held harmless.

In addition, the hold harmless provision, combined with counting switches to FES, will result in some double collection of revenues by FirstEnergy. For all switches to FES, FirstEnergy will collect the revenue when a customer chooses FES and add the revenue "lost" by the switch to its RTC. Customers pay twice: to reimburse FirstEnergy’s operating companies on a deferred basis for the foregone revenue from a sale it "lost" (to FES), and for the cost of the power their customers are buying from FES. The Commission must not allow customers to be forced to pay twice for the same power.

(3) Power availability.

FirstEnergy offers through the Stipulation 1120 MW of capacity for other suppliers to sell at retail that would create a temporary market (through 2005) designed to encourage customers to shop. However, FirstEnergy's marketing affiliate, FES, is allowed access to most of the capacity it is offering, as if the Company’s affiliate were a separate company that will compete with FirstEnergy's operating utilities for sales. Stipulation at p. 6, Section V. 1. FirstEnergy's marketing affiliate would be allowed access to 100MW of capacity for residential sales and all 620MW being made available for the commercial and industrial market--the latter

being markets that are likely to see the most competition develop in the short run.

The Commission cannot allow FES access to the offered capacity. FirstEnergy is

offering capacity with one hand and taking more than half of it back with the other. If the 1120 MW is intended to foster competition with FirstEnergy, all of it must be offered to genuinely arms-length companies.

Under the Stipulation, FES has access to some of the offered capacity, while marketing affiliates of the other Ohio utilities are excluded from the offer unless: (a) they offer similar amounts of capacity in the same way on their system, or (b) they no have capacity close by to sell. Stipulation at p. 6, Section V. 1. This is a blatantly anticompetitive provision and the Commission cannot approve it. FirstEnergy must not be allowed to choose with whom it competes. The excluded utilities are some of the suppliers most able to compete over the long term with FirstEnergy by virtue of their resources and nearby location, which minimizes transmission access and pricing problems. Excluding them will greatly reduce the potential competition FirstEnergy must face, and will strengthen FirstEnergy's position as the dominant supplier.

In short, to allow for competition to develop in such a way as to threaten FirstEnergy's market dominance, all of the offered capacity should be made available to genuinely arms-length companies, including the marketing affiliates of other Ohio utilities. FirstEnergy's affiliates must be excluded.

Moreover, the effect of FirstEnergy's offer of capacity on the development of lasting competition in local markets is likely to be distinctly limited. The market created will be

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separate from the rest of the sales by virtue of the separate price and limit to the capacity being offered. The offer of capacity and the market created by it is temporary. FirstEnergy makes no commitment to offer capacity once the MDP ends and all restrictions on the price it can charge

are removed. Customers who buy from other suppliers using the capacity FirstEnergy offers will get savings for awhile, but no lasting competition will have been created that can restrain FirstEnergy's prices after the end of the MDP when FirstEnergy withdraws that capacity.

This problem will be exacerbated if FirstEnergy is allowed to count "switches" to FES to meet the 20% standard. If the Commission approves this Stipulation, at the end of the MDP the situation will be the following: the offered capacity will be withdrawn and most of the switching customers will still be buying from FirstEnergy. FirstEnergy will be in a dominant position. No competitive market will have been developed that could restrain its prices.

C. The Company has failed to meet its burden of proving that its Transition Plan meets the requirements of the law, and the Company's Plan is unreasonable and unlawful.

Despite the submission of a Stipulation, this Commission cannot approve the Company's Transition Plan to the extent that it violates the law. The settlement reached in this case may resolve all of the issues in the case in a satisfactory manner for a number of parties and the Company. This Commission may also find that, despite its numerous serious flaws, the Stipulation makes sense as a practical matter (a conclusion with which we would strongly disagree.) But those considerations do not establish an exception to Section 4928 of the Revised Code and the requirements for Transition Plans set forth in Ohio law. The Transmission Plan

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must stand on its own merits, despite the Stipulation which, while tacked on to it, changes very little in it.

(1) Independent Transmission Plan

Historically, control of market entry through the use of transmission has been a crucial element in limiting potential competition by alternative suppliers. It follows that removal

of that control, and putting it into the hands of an regional transmission organization (“RTO”), is likewise crucial to the development of the competition necessary to restrain prices once they are deregulated. At this time, however, there exists no workable plan for FirstEnergy’s participation in an RTO.

The Commission has the authority and the legal responsibility under Ohio law to “take such measures or impose such requirements on (FirstEnergy)... as the Commission determines necessary and proper to achieve independent, nondiscriminatory operation of, and separate ownership and control of...electric transmission facilities” if a qualifying transmission entity is not operational as contemplated under the law. Section 4928.12 O.R.C. Under these circumstances the Commission must exercise that authority.

FirstEnergy claims that it can meet the requirements of Ohio law through its participation in the Alliance RTO. This plan does not meet the requirements or intent of Ohio law or the Commission’s rules. SR at p. 43. Section 4928.12 O.R.C. The Alliance RTO in the Company’s plan is not operational. Moreover, the Staff noted that on December 20, 1999, the FERC found that the Company’s plan to join the Alliance RTO was deficient and could not be unconditionally approved. SR at p. 44. The Staff should know, since the Commission is a party

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to the FERC case. A few weeks ago, FERC found deficiencies in the Alliance proposal again. See Federal Energy Regulatory Commission (“FERC”) Case No. EC 99-80, Order of May 18, 2000.

The Staff stated in its Report that “(t)he Commission cannot approve FirstEnergy’s transition plan until the company complies with (Section 4928.12 O.R.C.) in a manner satisfactory to this Commission.” SR at p. 45. There is no mention in the Stipulation as

to how the Company has complied with the statute since the Staff Report. Since FirstEnergy is not a member of an operational and qualifying independent transmission entity (i.e. an RTO), the Commission cannot approve a Stipulation which would give Commission approval to the Company's transmission plan under Section 4928.12 O.R.C. See Staff Report of Exceptions and Recommendations ("SR"), at pgs. 43-44. In fact, the Stipulation's language might be interpreted by the Company to give approval to its membership in the Alliance RTO. See Stipulation, at p. 10. Certainly, the fact the Stipulation states that the Company's Transition Plan, including, presumably, the Company's Transmission Plan, is approved if the Stipulation is approved, means that the Commission would be approving the Company's Transmission Plan by approving the Stipulation. This would clearly violate the law.

Thus, the Commission cannot approve a Stipulation that includes approval of the Company's Transmission Plan. Alternatively, if the Commission is going to approve the Stipulation, it should do so contingent on the satisfactory resolution of the transmission issues at the FERC. At the least, the Commission must state clearly that it is not approving the Company's Transmission Plan. As the Staff said: "The PUCO should wait until the (FERC) proposed

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changes are made public, evaluate the changes for compliance with Ohio statutory requirements of Ohio, then make a final ruling on the Alliance RTO as a qualifying transmission entity." SR at p. 44.

(2) Consumer Education Plan

Pursuant to Section 4928.31 (A)(5) O.R.C., the Company's transition plan must include a consumer education plan, and it must be consistent with the Commission's rules. The

Commission may not approve the Company's Transition Plan without a consumer education plan. Section 4928.34 (A) (11) O.R.C. The Commission's Rules require the Company to provide a plan for the education of consumers within its each of its three territories (i.e. CEI, Ohio Edison and Toledo Edison). The Company has failed to provide such plans.

The Commission should reject FirstEnergy's Consumer Education Plan as inadequate and incomplete. The Company fails to set forth the details of a territory-specific plan, including a budget, major objectives, methods to be employed and other critical features that cannot be left up to the Company to address. The Company has failed to describe the process for the formation and workings of the Advisory Group required for the local territory-specific plan. This also cannot be left to the Company to determine and bring to the Commission after this proceeding is completed.

Unfortunately, FirstEnergy cannot be trusted to form a local advisory group that is in the best interests of consumers. It is likely the Company will exclude from such a panel those consumer representatives and organizations who have criticized the Company's Transition Plans or otherwise are not in favor with the Company. This is the same company, after all, that

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unlawfully and unilaterally dissolved the long-standing Consumer Advisory Panels of CEI that had been formed by Order of the Commission in settlement of a rate case.

The Commission must require a comprehensive plan for the establishment of such Advisory Group or Groups, and require the submission of bylaws for its operation and purpose. FirstEnergy's plans for a local advisory group is flawed, because there must be at least one group for each of the operating companies owned by FirstEnergy, that is, one each for CEI, Toledo

Edison and Ohio Edison. FirstEnergy's position that it intends to have just one such panel, but that the actual decision as to the number of groups will be made later, is unreasonable and violates the Commission's Rules (Attachment II, Finding and Order, Case No. 99-1141-EL-ORD, November 30, 1999).

FirstEnergy's "plans" for consumer education fail to provide for the allocation of funds and resources to local community based groups and other consumer organizations that are knowledgeable about utility matters and consumer needs, as well as those that have particular credibility in and access to segments of the consumer population, for the provision of at least a portion of FirstEnergy's consumer education. The Commission has stated that the plan it adopted

for consumer education specifically includes partnerships with community based organizations ("CBOs") as one of the tactics to be employed. The Commission also encouraged the utilities to work with CBOs and to provide CBOs with membership on the service territory-specific advisory groups. See Second Entry on Rehearing, Case No. 99-1141-El-ORD, January 27, 2000, at p. 3.

It is impossible for the Commission to decide that the Company's Transition Plan has met the consumer education criterion required in Ohio law based on the meager "plan"

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submitted by the Company in this case. The burden is on the Company to prove that its plan meets the law and the Commission's rules. As described here, the Company has not met that burden by a long shot, and has not met the Commission's requirements.

Since the Commission has not determined to allow this issue to be part of the hearing in this case, the Company's testimony on this issue cannot be considered part of the

record. Citizen Power notified the Examiner that it intended to cross examine the Company's witness on this issue, but the Company's witness was not put on the stand to offer his testimony for the record and he was not offered for cross examination. Thus, the Company's only "proof" of having met the Commission's rules and the law is its plan as filed, which is basically silent on the issue of the local territory specific plan for CEI, the local plan for Ohio Edison and the local plan for Toledo Edison. The Commission cannot therefore approve the Transition Plan of the Company because it is incomplete.

(3) Transition Charges

The Commission should disallow any costs included in transition charges related to the Davis Besse, Perry and Beaver Valley Nuclear Plants. Even if such costs have been determined to be prudent, such costs are not allowable under Section 4928.39 O.R.C. FirstEnergy has not met its burden of proving that such costs are "legitimate" or that the Company "would otherwise be entitled an opportunity to recover the costs."

Electric utilities are not guaranteed under Ohio law a return on their investments, nor even that they will recover the cost of any particular investment. They have no entitlement to recover their costs under prior law or the new deregulation statute. Moreover, as to the two

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nuclear power plants, Perry and Beaver Valley, there has never been a determination by this Commission that they are used and useful, since every rate case including the costs of these plants was settled with a stipulation. Thus, while for rate making purposes the plants may be lawfully included, that does not mean that they qualify for inclusion under the new law as transition costs.

Before the Commission may determine that such costs are allowable as transition costs, the Commission must require the Company to prove the used and usefulness of the Plants today and for the prior period over which time they accumulated the costs they are seeking to recover.

FirstEnergy has also exaggerated the amount of transition costs it claims it is entitled to recover. The fact that its transition charges are often greater than the generation component of its current rates is indicative of the exaggerated transition costs. The Company also exaggerates its transition costs by failing to prove that each and every one of the statutory requirements for such costs are met for each cost component.

(4) Net Metering Tariff

FirstEnergy's Net Metering Tariff violates Section 4928.67 O.R.C. and Section 4901:1-10-28 O.A.C., as well as the spirit and intent of the State's new restructuring law and rules. See FirstEnergy's Net Energy Metering Riders; e.g. Ohio Edison Company Original Sheet No. 94, Schedule UNB-1, pages 211-212. Based upon this issue alone, the Commission cannot approve the Stipulation as proposed. By its language, approval of the Stipulation would result in the approval by this Commission of the transition plans of the FirstEnergy companies, including the Net Metering Tariff. Stipulation at p. 11.

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First, the Company's proposed Tariff states that the Company will install the meter required if a customer-generator's meter is not capable of registering flow of electricity in two directions. Section 4928.67 (A) (2) O.R.C. states that the customer-generator, not the Company, "shall be responsible for all expenses involved in purchasing and installing a meter..." The

statute does not limit such purchase and installation to the electric service provider. The Commission established the same rule in Section 4901:1-10-28 (C) O.A.C. The Company's limitation is extra-statutory and should not be approved. It also limits competition and customer choice, such that it just does not make sense, and the Company has not met its burden to justify such a limitation in its filing.

Second, the Company proposes to charge customer-generators based on the "sum of the electricity provided by the Company and the electricity fed back to the Company from the customer-generator." Ohio law is clear that this proposed practice is unlawful. Section 4928.67 (B) O.R.C. The law requires that "the customer-generator shall be billed for the net electricity supplied by the electric service provider, in accordance with normal metering practices" or a credit must be given to the customer-generator if electricity is provided to the electric service provider. Section 4928.67 (B) O.R.C.

This Commission has concluded that this means that "customer-generators should not incur wire and transport fees for the energy they place onto the distribution system." Finding and Order, Case No. 99-1613-El-ORD, April 7, 2000, p. 19. Section 4901:1-10-28 (E) O.A.C. requires that the electric service provider "net" the energy used by the customer-generator, and explicitly states that "(i)n no event shall the electric distribution company impose on the customer-

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generator **any** charges that relate in any way to electricity the customer-generator feeds back into the system." (Emphasis added.) Thus, the Stipulation cannot be approved in its entirety without change, because that would result in approval of an unlawful Tariff proposed for each of the FirstEnergy companies.

Although the Company and others have sought rehearing of the Commission's rules, and the rules are not in this sense final, the Commission's rules after appeals are exhausted, and the Commission's decision in this case, may not violate the statute. As demonstrated above, the statute does not permit what the Company proposes. Moreover, the Stipulation and the Company's Transition Plan are not limited by whatever the Commission's rules ultimately require after appeals are completed. To the contrary, the Stipulation would exempt the Tariff from the rules and the law, a waiver not allowed or contemplated by the statute or the Commission's rules.

Thus, to the extent the Tariff violates the Commission's rules set forth in the O.A.C., the Tariff also violates state law. And to the extent the Tariff violates the rules and law, it cannot be permitted to stand---but approval of the Stipulation would allow such an outcome to occur. Furthermore, approval of the Tariff as proposed would result in discrimination against FirstEnergy's customer-generators vis-à-vis the customer-generators throughout most if not all of the rest of Ohio.

Conclusion

Wherefore, this Commission should not and cannot approve the proposed Stipulation. To the extent that approval of the Stipulation would result in approval of provisions and Tariffs that are unlawful, the Commission's approval of the Stipulation would be unlawful.

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To the extent that approval of the Stipulation would result in an unregulated monopoly and anti-competitive activity, it is unwise and violates the spirit and letter of the law. And to the extent that approval of the Stipulation would result in approval of the Company's recovery from

customers through transition charges of revenue that would not be recoverable even if the restructuring law had not been enacted, it is unlawful.

The Commission should reject the Stipulation and require the parties to return to the bargaining table, or to proceed to hearing so that this Commission can have all the evidence and information before it, to protect consumers and satisfy the requirements of the law.

Respectfully submitted,

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June 2, 2000

Attorney for Citizen Power and
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Certificate of Service

I certify that a copy of this Initial Brief has been sent to the Applicant and all Intervenors by E-mail this 2nd day of June, 2000.

William M. Ondrey Gruber