

IN THE SUPREME COURT OF OHIO

Environmental Law and Policy Center)	
<i>Appellant,</i>)	Case No. 2013-0513
)	
v.)	On Appeal from the Public Utilities
)	Commission of Ohio
The Public Utilities Commission of Ohio)	
<i>Appellees.</i>)	Case No. 12-1230-EL-SSO
)	

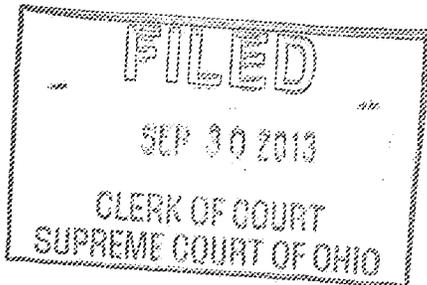
REPLY BRIEF OF APPELLANT
ENVIRONMENTAL LAW AND POLICY CENTER

Robert Kelter (admitted pro hac vice)
Counsel of Record
Justin Vickers (admitted pro hac vice)
Nicholas McDaniel (0089817)
Environmental Law and Policy Center
1207 Grandview Avenue, Suite 201
Columbus, Ohio 43212
P: 614-488-3301
F: 614-487-7510
rkelter@elpc.org
jvickers@elpc.org
nmcdaniel@elpc.org

**COUNSEL FOR APPELLANT,
ENVIRONMENTAL LAW AND POLICY
CENTER**

Richard Michael DeWine (0009181)
Attorney General of Ohio
William L. Wright (0018010)
Section Chief, Public Utilities Section
Thomas McNamee(0017352)
Counsel of Record
Ryan O'Rourke
Assistant Attorneys General
Public Utilities Commission of Ohio
180 East Broad Street - 6th Floor
Columbus, OH 43215
Telephone: (614) 466-4397
Facsimile: (614) 644-8764
william.wright@puc.state.oh.us
werner.margard@puc.state.oh.us
thomas.McNamee@puc.state.oh.us
ryan.o'rourke@puc.state.oh.us

**COUNSEL FOR APPELLEE, PUBLIC
UTILITIES COMMISSION OF OHIO**



Glenn S. Krassen (Reg. No. 0007610)
BRICKER & ECKLER LLP
1001 Lakeside Avenue, Suite 1350
Cleveland, OH 44114
Telephone: (216) 523-5405
Facsimile: (614) 227-.2390
gkrassen@bricker.com

Dane Stinson (Reg. No. 0019101)
Mathew W. Warnock (Reg. No. 0082368)
J. Thomas Siwo (Reg. No. 0088069)
BRICKER & ECKLER, LLP
100 South Third Street
Columbus, OH 43215-4291
Telephone: (614) 227-2300
Facsimile: (614) 227-2390
dstinson@bricker.com
mwarnock@bricker.com
tsiwo@bricker.com

**COUNSEL FOR APPELLANT,
NORTHEAST OHIO PUBLIC ENERGY
COUNCIL**

David A. Kutik (Reg. No. 0006418)
(Counsel of Record)
JONES DAY
901 Lakeside Avenue
Cleveland, OH 44114
Telephone: (216) 586-3939
Facsimile: (216) 579-0212
dakutik@jonesday.com

James W. Burk (Reg. No. 0043808)
Carrie M. Dunn (Reg. No. 0076952)
FIRSTENERGY SERVICE COMPANY
76 South Main Street
Akron, OH 44308
Telephone: (330) 384-5861
Facsimile: (330) 384-3875
burkj@firstenergycorp.com
cdunn@firstenergycorp.com

**COUNSEL FOR INTERVENING
APPELLEES OHIO EDISON COMPANY,
THE CLEVELAND ELETRIC
ILLUMINATING COMPANY, AND THE
TOLEDO EDISON COMPANY**

TABLE OF CONTENTS

TABLE OF CONTENTS i

I. INTRODUCTION.....1

II. ARGUMENT.....1

A. The Commission’s Order Harms ELPC and its Members1

B. The PUCO did not Exempt FirstEnergy from the Requirements of OAC 4901:1-35-03(C)(1)3

C. ELPC Does Not Dispute in This Appeal That the Commission Could Rely on Administratively Noticed Materials4

D. Reliance on Testimony From Prior Cases Alone Does Not Allow FirstEnergy to Comply With OAC 4901:1-35-03(C)(1)4

E. ELPC Has Not Argued that FirstEnergy Should Provide a “Mindless” Volume of Testimony and Exhibits5

III. CONCLUSION6

I. INTRODUCTION

The Environmental Law and Policy Center (“ELPC”) appeals a Public Utilities Commission of Ohio (“PUCO” or “Commission”) Order approving the Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company’s (collectively, “FirstEnergy” or “Companies” or “Intervening Appellees”) application (“Application”) to provide a standard service offer (“SSO”) through an electric security plan (“ESP”) pursuant to R.C. 4928.141 and R.C. 4928.143. Because FirstEnergy failed to meet its requirement under OAC 4901:1-35-03(C)(1) to file an application that includes a “complete description of the ESP and testimony explaining and supporting each aspect of the ESP,” the Commission erred in approving FirstEnergy’s Application.

The PUCO and Intervening Appellees attempt to mischaracterize ELPC’s position in this case and misinterpret ELPC’s interest. Contrary to assertions made by parties in their Merit Briefs, the Commission’s Order harms ELPC and its members, the PUCO has not exempted FirstEnergy from OAC 4901:1-35-03(C)(1), ELPC does not dispute the Commission’s right to rely on properly administratively noticed materials, reliance on irrelevant testimony from prior cases does not allow FirstEnergy to meet its obligation under OAC 4901:1-35-03(C)(1), and ELPC has not argued for a “mindless” volume of testimony and exhibits. As described in its Merit Brief as well as this Reply, the Court must reverse the PUCO’s Order because it does not comply with OAC 4901:1-35-03(C)(1).

II. ARGUMENT

A. The Commission’s Order Harms ELPC and its Members

The Commission incorrectly argues that “ELPC has not demonstrated harm and indeed it cannot.” Appellee Merit Brief at 9. ELPC has members in Ohio and has an office in Ohio that

focuses on Ohio energy and environmental issues, both subjects of FirstEnergy's ESP 3. ELPC has been a party to FirstEnergy's ESP applications since the ESP 2 case, 10-388-EL-SSO, in April 2010. FirstEnergy requested that all intervenors from ESP 2, including ELPC, be included in the ESP 3 case without submitting a new motion to intervene. FirstEnergy Application at 3.

Under Ohio law, ESPs include "provisions relating to the supply and pricing of electric generation service." R.C. 4928.143(B)(1). Because of the potential impacts on ELPC and its Ohio members, ELPC seeks to ensure that FirstEnergy's Application meets the applicable legal requirements in order to demonstrate that its proposed ESP is preferable to a market rate offer ("MRO"). This appeal will determine whether or not the Commission is able to approve ESP 3 before FirstEnergy has complied with OAC 4901:1-35-03(C)(1). The appeal goes to the heart of the ESP process in that it seeks to ensure that the Commission is in a position, per its own regulations, to properly evaluate FirstEnergy's proposed ESP 3. ELPC is harmed if the Commission refuses to enforce its own procedural requirements to only review a complete application that includes FirstEnergy's explanations of each aspect of ESP 3.

While this Court has stated that a party's interest "must be immediate and pecuniary," it is the matter of the injury's present and concrete nature that is the most determinative of a justiciable appeal. *Ohio Contract Carriers Ass'n v. Pub. Utils. Comm'n*, 140 Ohio St. 160, 161 (1942). The Commission's argument that ELPC cannot show an immediate pecuniary interest in the case because the very order contested by ELPC states that a violation of OAC 4901:1-35-03(C) has no pecuniary effect (Appellee Merit Brief at 9) is circular and without merit. ESP 3 has a direct impact on how FirstEnergy will procure electricity for its customers, including members of ELPC, and how it will continue to comply with Am. Sub. SB No. 221 (SB 221), the requirements for utilities to provide alternative and renewable energy to customers in Ohio,

including solar energy resources, reflected at R.C. 4928.64k. FirstEnergy's failure to file a complete application made it impossible for the Commission to make a reasonable determination of the merits of ESP 3 over a MRO. The Commission, therefore, is not in a position to determine whether or not ESP 3 will have adverse pecuniary effects on ELPC and its members.

If this Court upholds the Commission's Order, ELPC and its members will be harmed now and for years to come by FirstEnergy's failure to comply with the requirements of OAC 4901:1-35-03(C)(1).

B. The PUCO did not Exempt FirstEnergy from the Requirements of OAC 4901:1-35-03(C)(1)

The Commission argues that it effectively waived OAC 4901:1-35-03(C)(1) and its requirement that FirstEnergy explain and support "each aspect" of ESP 3, by exercising its power under OAC 4901:1-35-02(B) to "waive any requirement of [OAC 4901:1-35]." Appellee Merit Brief at 7-8. The Commission's interpretation ignores the fact that its power to waive requirements is limited to instances in which a party files "an application or a motion . . . to waive any requirement . . . for good cause shown." OAC 4901:1-35-02(B).

In this case, FirstEnergy requested waiver of OAC 4901:1-35-03(C)(2)-(10), but never moved to be waived from (C)(1). FirstEnergy Motion for Waiver of Rules at 2-4. The Commission granted, in part, and denied, in part, FirstEnergy's motion, but never exempted FirstEnergy from compliance with (C)(1). *See*, PUCO, 12-1230-EL-SSO, PUCO, Entry, pp. 5-7 (April 25, 2012). The Commission, therefore, did not waive FirstEnergy's obligation to comply with OAC 4901:1-35-03(C)(1).

C. ELPC Does Not Dispute in This Appeal That the Commission Could Rely on Administratively Noticed Materials

FirstEnergy's assertion that ELPC argues that "the Commission can't use administratively noticed materials" (Intervening Appellees Merit Brief at 44) is untrue. ELPC has not claimed in this appeal that the Commission cannot use properly administratively noticed materials. Rather, ELPC argues that reliance on the administratively noticed materials from the ESP 2 case does not allow FirstEnergy to meet its burden to file an application that includes, pursuant to OAC 4901:1-35-03(C)(1), "a complete description of the ESP and testimony explaining and supporting each aspect of the ESP" because those materials are out of date and cannot alone support the many aspects of ESP 3 not addressed in Witness Ridmann's testimony.

D. Reliance on Testimony From Prior Cases Alone Does Not Allow FirstEnergy to Comply With OAC 4901:1-35-03(C)(1)

Both the Commission and FirstEnergy point to the similarities between ESP 3 and ESP 2 to argue for the reasonableness of the Commission's determination that FirstEnergy filed a complete application. Appellee Merit Brief at 7; Intervening Appellees at 44. As ELPC has argued in the case below and in its Merit Brief, the drastic changes and uncertainties in the electricity market and the economy more broadly demand an examination of whether or not each aspect of ESP 3 makes sense today, not three and four years ago. For example, given the current state of the Ohio energy markets and economy, is it still preferable to include a flat rate structure for FirstEnergy's residential rates? Merely stating that – as the Commission and FirstEnergy have – because it and many other provisions were preferable under ESP 2 they are preferable under ESP 3, does not make it so.

As the Commission notes, it is required to approve or modify and approve a proposed ESP if it finds that the ESP is more favorable in the aggregate to a MRO. Appellee Merit Brief at

8. In this case, however, the Commission never received justification for ESP 3 in the context of today's markets and the markets that are likely over the life of the plan. Without this information, it is not possible for the Commission to effectively determine whether ESP 3 is preferable to a MRO. Merely asserting that because the Commission approved those provisions in ESP 2 does not mean that they warrant approval in ESP 3.

It is not ELPC's burden to prove that the testimony from 2009 and 2010 remains relevant today and will remain relevant going forward. Rather, it is FirstEnergy's obligation to explain and support "each aspect of the ESP." OAC 4901:1-35-03(C)(1). The logical extension of the Commission's and FirstEnergy's argument in favor of relying, without justification, on the testimony from prior cases leads to an absurd conclusion in violation of this Court's canons of statutory interpretation prohibiting such unreasonable readings. *See, State ex rel. Asti v. Ohio Dep't of Youth Servs.*, 107 Ohio St. 3d 262, 267 (Ohio 2005) ("We must construe the applicable statute and rule to avoid such unreasonable or absurd results."). Under the Commission's interpretation, so long as FirstEnergy keeps provisions the same from ESP to ESP, it need never provide justification for any ESP ever again. This is an unreasonable outcome that could not have been the intention of the legislature when it allowed utilities to file ESPs rather than MROs. If the Commission wanted to allow FirstEnergy to rely on prior testimony to complete its Application, then the Commission should have required FirstEnergy to explain why that testimony remains relevant today for each aspect of the ESP.

E. ELPC Has Not Argued that FirstEnergy Should Provide a "Mindless" Volume of Testimony and Exhibits

FirstEnergy mischaracterizes ELPC's position as reducing OAC 4901:1-35-03(C)(1) to "an exercise in page counting." Intervening Appellees Merit Brief at 46. ELPC has made no such argument. ELPC's commenting on the paucity of supporting testimony for ESP 3 was to

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing *Reply Brief of Appellant Environmental Law & Policy Center* was served by electronic mail to all parties to the proceedings, this 30th day of September, 2013.



Nicholas McDaniel
Environmental Law & Policy Center

Glenn S. Krassen (Reg. No. 0007610)
BRICKER & ECKLER LLP
1001 Lakeside Avenue, Suite 1350
Cleveland, OH 44114
Telephone: (216) 523-5405
Facsimile: (614) 227-2390
gkrassen@bricker.com

David A. Kutik (Reg. No. 0006418)
JONES DAY
901 Lakeside Avenue
Cleveland, OH 44114
Telephone: (216) 586-3939
Facsimile: (216) 579-0212
dakutik@jonesday.com

Dane Stinson (Reg. No. 0019101)
Mathew W. Warnock (Reg. No. 0082368)
J. Thomas Siwo (Reg. No. 0088069)
BRICKER & ECKLER LLP
100 South Third Street
Columbus, OH 43215-4291
Telephone: (614) 227-2300
Facsimile: (614) 227-2390
dstinson@bricker.com
mwarnock@bricker.com
tsiwo@bricker.com

James W. Burk (Reg. No. 0043808)
Carrie M. Dunn (Reg. No. 0076952)
FIRSTENERGY SERVICE COMPANY
76 South Main Street
Akron, OH 44308
Telephone: (330) 384-5861
Facsimile: (330) 384-3875
burkj@firstenergycorp.com
cdunn@firstenergycorp.com

Richard Michael DeWine (Reg. No. 0009181)
Attorney General of Ohio
William L. Wright (Reg. No. 0018010)
Section Chief, Public Utilities Section
Thomas McNamee (Reg. No. 0017352)
Ryan O'Rourke
Assistant Attorneys General
PUBLIC UTILITIES COMMISSION OF OHIO
180 East Broad Street, 6th Floor
Columbus, OH 43215
Telephone: (614) 466-4397
Facsimile: (614) 644-8764
william.wright@puc.state.oh.us
thomas.mcnamee@puc.state.oh.us
werner.margard@puc.state.oh.us
ryan.o'rourke@puc.state.oh.us

demonstrate not that FirstEnergy failed to meet some minimum page number, but to put into some context for the Court just how little support FirstEnergy actually provided outside of its reliance on testimony from years old cases relating to a prior ESP. The Court should ignore FirstEnergy's feigned outrage over ELPC's provision of what it hoped would be helpful context.

III. CONCLUSION

FirstEnergy failed to comply with OAC 4901:1-35-03(C)(1). Without testimony explaining and supporting each aspect of ESP 3, the Commission cannot approve FirstEnergy's Application. For the reasons set forth above, ELPC respectfully requests that this Court reverse the Commission's approval of ESP 3 and require the Commission to order FirstEnergy to submit a complete application in compliance with 4901:1-35-03(C)(1).

September 30, 2013

Respectfully submitted,



Robert Kelter
Justin Vickers
Nicholas McDaniel
Environmental Law & Policy Center
1207 Grandview Avenue, Suite 201
Columbus, OH 43212
P: 614-488-3301
F: 614-487-7510
RKelter@elpc.org
JVickers@elpc.org
NMcdaniel@elpc.org

Attorneys for the Environmental Law &
Policy Center.