

THE PUBLIC UTILITIES COMMISSION OF OHIO

Respondent.

Case No. 05-796-EL-CSS

The Commission finds:

- (1) On June 20, 2005, Elyria Foundry Company (Elyria Foundry) filed a complaint against Ohio Edison Company (Ohio Edison), alleging, *inter alia*, that Ohio Edison, through interruptible service under its Rider 75 (Rider 75), has failed to provide clear means by which it determines whether Elyria Foundry should be economically interrupted. Elyria Foundry claims that the number of interruption events is unreasonable and is increasing in frequency. As a result, Elyria Foundry states that it incurs additional electric costs for replacement power purchased from Ohio Edison.
- (2) On January 17, 2007, following a hearing and the submission of briefs, the Commission issued its opinion and order in this proceeding. In the opinion and order, the Commission found that Elyria Foundry had not provided sufficient evidence either that Ohio Edison's charges, under Rider 75, had violated any applicable statute, regulation, or guideline or that Ohio Edison had failed to comply with any filing or notice requirement concerning its implementation of Rider 75.
- (3) Section 4903.10, Revised Code, states that any party to a Commission proceeding may apply for rehearing with respect to any matters determined by the Commission, within 30 days of the entry of the order upon the Commission's journal.

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- (4) On February 16, 2007, Elyria Foundry filed an application for rehearing and a memorandum in support of that application, setting forth 22 assignments of error. On February 26, 2007, Ohio Edison filed a memorandum contra Elyria Foundry's February application for rehearing. On March 14, 2007, the Commission issued an entry on rehearing, denying all 22 grounds for rehearing.
- (5) On April 4, 2007, Elyria Foundry filed a second application for rehearing (second application). In that pleading, Elyria Foundry suggests that there are five grounds for finding that the Commission's entry on rehearing was unlawful or unreasonable. Specifically, Elyria Foundry argues in favor of the following grounds:
 - (a) The Commission erred by denying rehearing without complying with R.C. 4903.09 to provide *[sic]* the factual basis and reasoning used for agreeing with the Ohio Edison position.
 - (b) The Commission erred in denying rehearing by agreeing with the unreasonable position of Ohio Edison to allocate volume by MWH.
 - (c) The Commission erred in denying rehearing by allowing, contrary to its findings, Ohio Edison to call for economic interruptions without determining its incremental costs under the PSA formula of Exhibit A.
 - (d) The Commission erred in denying rehearing by agreeing with the unreasonable position of Ohio Edison to notice economic interruptions based on the total cost of purchase power provided by FirstEnergy Solutions.
 - (e) The Commission erred by agreeing with the unreasonable position of Ohio Edison to notice economic interruptions based on total purchased power costs, even though almost 20% of those total costs were absorbed by FES and not charged under the PSA formula.

(Second App. for Reh. at 1-2.)

- (6) Ohio Edison did not file a memorandum contra the second application. However, it did file, on April 10, 2007, a motion to strike Elyria Foundry's second application. In that motion, Ohio Edison argues that the second application is improper because "it raises nothing not already argued" by Elyria Foundry. On this point, Ohio Edison explains that the statutory procedures for the review of Commission orders "do not include a second application for rehearing simply because the Commission disagrees with the arguments set forth by a party in its initial application for rehearing." (Mem. in Support at 2.) Ohio Edison contends, in the memorandum in support of its motion to strike, that Elyria Foundry's argument relating to Section 4903.09, Revised Code, is improper and should also be stricken.
- (7) On April 17, 2007, Elyria Foundry filed a memorandum contra the motion to strike.
- (8) In analyzing the pleadings currently before us, the first issue is whether or not the second application for rehearing was appropriately filed. Elyria Foundry, citing precedent to support its position, contends that multiple rehearing applications are not only allowed under Section 4903.10, Revised Code, but are necessary to preserve issues for appeal. Ohio Edison submits that Elyria Foundry has raised no issue that was not previously addressed by the Commission and, therefore, that Elyria Foundry had no right or need to file a second application for rehearing.
- (9) Elyria Foundry's first citation to apparent precedent is misplaced. Elyria Foundry notes that the Commission considered multiple applications for rehearing in *In the Matter of the Application of The Cincinnati Gas & Electric Company to Modify its Non-Residential Generation Rates to Provide for Market-Based Standard Service Offer Pricing and to Establish an Alternative Competitively Bid Service Rate Option Subsequent to Market Development Period*, Case No. 03-93-EL-ATA *et al.* Although Elyria Foundry is correct that the Commission considered multiple applications for rehearing in that proceeding, the situation is not analogous to the present one. In the cited case, the Commission had made substantial changes to its order as a result of the first application on rehearing, giving rise to the possibility for a second such application. In the present case, the

Commission's response to the first application for rehearing was a total denial. No changes were made. Thus, this precedent does not support Elyria Foundry's position.

- (10) Elyria Foundry's second citation to precedent is more relevant. The Supreme Court of Ohio considered the need to file multiple applications for rehearing in *Discount Cellular, Inc. v. Pub. Util. Comm.*, 112 Ohio St. 3d 360, 375-6 (2007). The court, in that case, stated that the Commission had substantively erred in its entry on rehearing when it cited, for the first time in its rehearing order, an additional reason for dismissing the complaint. The court, however, found that the appellant failed to preserve that issue for appeal because it did not file a second application for rehearing, challenging the substantive error. Thus, the court's holding clarifies that an allegation that a new error was made in an entry on rehearing, where that allegation could not have been made previously, can be the subject of a subsequent application for rehearing, even when the entry on rehearing denied rehearing on all grounds.
- (11) Finally, Elyria Foundry quotes, at some length, the court's language from a 1988 opinion considering the appeal of a Commission order. In *Senior Citizens Coalition v. Pub. Util. Comm.*, 40 Ohio St.3d 329 (1988), the court explained that the rehearing process is an integrated whole and that the window, during which appeals may be filed with the court, commences only after a rehearing where no subsequent rehearing application is filed. Elyria Foundry appears to cite this case as proof of its right to file this particular second application. However, the case does not address the propriety of claims made in sequential applications for rehearing, only showing that, in some circumstances, multiple applications for rehearing may be permissible. Thus, it is not helpful in our analysis of the situation.
- (12) We find that the *Discount Cellular* opinion is instructive in this situation. That opinion shows that an error that arose in an entry on rehearing can give rise to a subsequent application for rehearing. However, it is clear that the case does not say that the Commission's mere disagreement with a party's position is such an error. A party's claim that an error has been made on a substantive issue, with which the Commission disagreed, was

preserved for appeal to the court by the filing of the previous application for rehearing, making the new filing superfluous. Thus, only if a claimed error arose for the first time in the entry on rehearing, whether by the granting of rehearing and resultant modification of the underlying order or by the Commission erring in some new manner in the entry, is that claim an appropriate ground for a second application for rehearing.

- (13) With an understanding of the applicable law, we can now consider Ohio Edison's motion to dismiss the second application. We will consider each ground for rehearing set forth in the second application and review it in light of the standard just discussed.
- (14) Elyria Foundry's first ground for rehearing claims that the content of the entry on rehearing was statutorily deficient. That is an argument that could not have arisen previously. Therefore, Elyria Foundry can only preserve this issue for appeal by filing an application for rehearing. This ground for rehearing, therefore, should not be stricken.
- (15) Elyria Foundry's second, third, fourth, and fifth grounds for rehearing in the second application are restatements of the fifth group of grounds in the first application for rehearing (grounds then numbered 16 through 20). They are specifically based on the Commission's agreement, in the entry on rehearing, with the position taken by Ohio Edison in its memorandum contra the first rehearing application. In the last ground, Elyria Foundry even makes specific reference to grounds 16 through 20 in the first application. These are not new issues. By raising them again, Elyria Foundry is merely attempting to reargue issues about which the Commission has already denied rehearing. Therefore, these grounds for rehearing should be stricken.
- (16) We will now consider the substance of the one proper ground for rehearing. As noted above, Elyria Foundry contends that the Commission's entry on rehearing was deficient. Section 4903.09, Revised Code, the basis for Elyria Foundry's contention, provides that "[i]n all contested case heard by the public utilities commission, a complete record of all of the proceedings shall be made, including a transcript of all testimony and of all exhibits, and the commission shall file, with the records of such cases,

findings of fact and written opinions setting forth the reasons prompting the decisions arrived at, based upon said findings of fact." Elyria Foundry contends that the Commission, in the entry on rehearing, "failed to set forth some factual basis and the reasoning used in reaching its conclusion to deny rehearing Grounds 16-20 as required by R.C. 4903.09."

- (17) Elyria Foundry is incorrect in its reading of Section 4903.09, Revised Code. This statute requires the Commission, in all contested cases, to create a complete record of the basis for its opinion. Such a record must include testimony, exhibits, findings of fact and a written opinion setting forth the rationale for the decisions, which rationale is to be based on the findings of fact. This was done, in this proceeding, in the opinion and order. The statute does not require the Commission to restate its decision or to include any particular level of detail in an entry on rehearing. In fact, Section 4903.10, Revised Code, specifically provides for the possibility that the Commission might not issue any entry at all, pursuant to an application for rehearing, as such applications may be denied by operation of law. Thus, it cannot be an error for an entry denying rehearing not to include "some factual basis and the reasoning used . . .," as suggested by Elyria Foundry. The case cited by Elyria Foundry to support its reading is also helpful in understanding the meaning of Section 4903.09, Revised Code. In that opinion, the Supreme Court of Ohio, citing prior decisions, noted that the purpose of this section is to ensure that it will be able to determine whether the facts found by the Commission lawfully and reasonably justify the conclusions reached. *Tongren v. Pub. Util. Comm.*, 85 Ohio St.3d 87 (1999). In the present proceeding, the Commission's findings of fact and legal rationales are duly set forth in the opinion and order. No further compliance with Section 4903.09, Revised Code, is required. Therefore, rehearing will be denied.

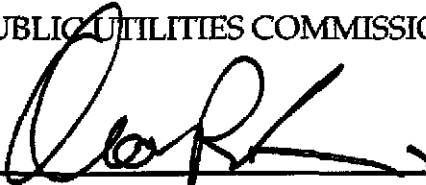
It is, therefore,

ORDERED, That rehearing on Elyria Foundry's first claimed ground be denied. It is, further,


ORDERED, That Elyria Foundry's second, third, fourth, and fifth grounds for rehearing be stricken. It is, further,

ORDERED, That a copy of this second entry on rehearing be served upon all parties of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO


Alan R. Schriber, Chairman


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Secretary