

FILE

BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

9
RECEIVED-DOCKETING DIV
2007 MAY -4 PM 2:25
PUCO

Buckeye Energy Brokers, Inc.,

Complainant,

v.

Ohio Edison Company, The
Cleveland Electric Illuminating Company
and FirstEnergy Corp.,

Respondents.

Case No. 06-835-EL-CSS

RESPONDENTS' APPLICATION FOR REHEARING

Pursuant to R.C. § 4903.10 and Rule 4901-1-35(A) of the Ohio Administrative Code, The Ohio Edison Company, The Cleveland Electric Illuminating Company, and FirstEnergy Corp. (collectively, "Respondents") file this application for rehearing of the Commission's April 4, 2007 Entry on Rehearing.

I. INTRODUCTION

Eight months ago, Respondents filed a Motion to Dismiss advancing four independent grounds for dismissing the Complaint of Buckeye Energy Brokers, Inc. ("Buckeye"). The Commission granted that Motion to Dismiss on February 7, 2007. On April 4, 2007, the Commission reversed itself and granted rehearing. The Commission's Entry on Rehearing sheds no light on the basis of the Commission's reversal or the basis upon which this litigation is proceeding, if it is proceeding.

The Commission's Entry on Rehearing of April 4, 2007, was unlawful and unreasonable for three reasons. First, the Commission did not set forth the reasons prompting its decision to

This is to certify that the images appearing are an accurate and complete reproduction of a case file document delivered in the regular course of business.
Technician 78 Date Processed 5-4-07

grant rehearing, in violation of R.C. § 4903.09. Second, the Commission did not specify the purpose for which rehearing was granted, in violation of R.C. § 4903.10. Both failures to communicate make it impossible for Respondents to understand, much less respond to, the Commission's substantive legal decision, if indeed one has been made. Lastly, even if the Commission had adequately explained its decision (and assuming that decision was correct, which cannot currently be verified), at no point did the Commission respond to all of the arguments set forth in the Respondent's Motion to Dismiss of August 24, 2006. Because any of those arguments provides grounds for disposing of this Complaint, the Commission should reaffirm its dismissal of this proceeding.

II. ARGUMENT

A. By failing to set forth the reasons prompting its decision, the Entry on Rehearing violates R.C. § 4903.09.

R.C. § 4903.09 provides:

In all contested cases 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.

This case—in the process of being “heard” by the Commission and “contested” by Respondents and Buckeye—triggers the Commission's duty to keep a record and to explain “the decisions” it has “arrived at.”

This duty to explain applies in the context of a motion to dismiss. In *Allen v. Public Utility Commission* (1988), 40 Ohio St.3d 184, 187, the Ohio Supreme Court applied R.C. § 4903.09 to what it called “a procedural entry,” referring to the Commission's ruling on a motion to dismiss. It held that “[t]he procedural entry herein and the *Continental* order meet [R.C. § 4903.09's] test. They show, in detail, the facts in the record and the reasoning followed.”

Id. The Commission has also applied R.C. § 4903.09 to an entry resolving a prehearing motion. *In re Cincinnati Gas & Elec. Co.*, No. 00-681, Entry of July 28, 2004, ¶ 8 (applying R.C. § 4903.09 to entry granting motion to intervene and determining that the statute was satisfied).

The Commission's decision in this case does not satisfy the R.C. § 4903.09 standard. The Supreme Court recently noted that "PUCO orders which merely ma[k]e summary rulings and conclusions without developing the supporting rationale or record have been reversed and remanded." *Ohio Consumers' Counsel v. Pub. Util. Comm.* (2006), 111 Ohio St. 3d 300, 309 (reversing the Commission for failing to comply with R.C. § 4903.09 and remanding with orders to "thoroughly explain its conclusion that the modifications on rehearing are reasonable"). As the Court has explained, "It is essential to the integrity of the administrative process, to judicial review of administrative action, and to the assurance of comprehension of agency orders by the parties and the public, that the reasons prompting such orders be explicitly stated." *East Ohio Gas Co. v. Pub. Util. Comm.* (1976), 45 Ohio St. 2d 86, 91.

The two-page entry in this case recounts the alternative arguments for rehearing set forth by Buckeye, describes the counterarguments made by Respondents, and then states:

The Commission grants Buckeye's application for rehearing. We believe sufficient reason has been set forth by Buckeye to warrant further reconsideration of the matters specified in the application for rehearing.

(Entry on Reh'g, ¶ 5.) A mere eight words comprise the Commission's reasoning. By stating that "sufficient reason has been set forth by Buckeye," the Commission, at once, deprives Respondents of the ability to make a substantive response and the Supreme Court of Ohio of the ability to review the substantive merits.

If Buckeye had advanced only one argument in support of rehearing, the parties might infer which position the Commission was adopting. (Even then, it would remain questionable

whether such a scant opinion would satisfy the Commission's duty to explain itself, particularly in the presence of plausible counterarguments supported by authority.) But here, Buckeye raised two distinct assignments of error: one based on what items may permissibly be considered on a motion to dismiss; the other based on the requirement of "substantial justice" in Rule 8 of the Ohio Rules of Civil Procedure. One can only guess which reason was deemed sufficient and on what basis the Commission rejected Respondents' counterarguments.

By failing to explain its decision, the Commission's Entry on Rehearing is unlawful and unreasonable. If nothing else, the Commission should explain the reasoning behind its decision to grant rehearing.

B. The Commission's Entry also fails to "specify" the purpose for which rehearing is granted, thus violating R.C. § 4903.10.

R.C. § 4903.10 provides, in part, "If the commission grants such rehearing, it shall specify in the notice of such granting the purpose for which it is granted." "Specify" means to "tell or state precisely or in detail." *Webster's Third Int'l Dictionary* 2187 (2002).

The Commission ordered in the April 4 Entry that "rehearing is granted for further consideration of the matters specified in the application for rehearing." (Entry on Reh'g, ¶ 5.) This language gives little hint concerning where the Commission means to go from here. The Commission will "further consider" the rehearing application, apparently meaning Buckeye's arguments. But it is unclear what "further consideration" means. This could indicate that the arguments have not yet been accepted and that the Commission will rule on these arguments in the future. Or perhaps it means that the arguments have been accepted and that the Complaint has been reinstated. The statute requires a detailed and explicit statement explaining why rehearing has been granted, but the language in the entry not only lacks detail, but leaves one wondering what exactly the Commission has even done or intends to do.

If nothing else, to enable the parties to proceed, the Commission should state explicitly and in detail why it has granted rehearing and on what issues. As written, the order violates R.C. § 4903.10 and leaves the parties in limbo.

C. The Commission has not yet taken up other grounds put forth in Respondents' motion to dismiss, any one of which would dispose of this Complaint.

Even if the Commission had been persuaded by Buckeye's arguments and adequately explained its decision, the grounds asserted for rehearing do not provide a basis for the Complaint to proceed. In their August 24, 2006 Motion to Dismiss, Respondents presented the following four independent grounds justifying dismissal of Buckeye's Complaint.

First, Respondents pointed out that the Complaint improperly named FirstEnergy Corp. as a respondent. The Complaint did not allege that FirstEnergy Corp. provided any discount or did anything that would give rise to reasonable grounds for a complaint. Further, holding companies such as FirstEnergy Corp. are not proper respondents in cases arising from service complaints because holding companies do not provide service. *See Allianz Global Risks US Ins. Co. v. FirstEnergy Corp., et al.*, Entry of March 7, 2006, Case No. 05-1011-EL-CSS (consolidated). Because holding companies do not provide service, they also do not charge rates. Thus, this case arises from allegedly discriminatory rates that FirstEnergy Corp. could not have charged. FirstEnergy Corp. should be dismissed as a Respondent in this case.

Second, Buckeye lacks standing to bring service- or rate-related claims on behalf of the communities listed in the Complaint and individual customers in those communities. Just as a municipality has no standing to represent its constituent citizens, *see City of Solon v. Cleveland Elec. Illum. Co.*, Entry of Dec. 17, 2003, Case No. 03-1407-EL-CSS, a power broker lacks standing to represent its customers, potential or current. The Complaint should therefore be dismissed based on Buckeye's lack of standing.

Third, Respondents showed that according to the NOPEC agreement that gave rise to Buckeye's Complaint that CEI and Ohio Edison are not providing discounted rates. That agreement showed that the discount was provided by FirstEnergy Solutions Corp. ("FES"), a competitive retail electric service ("CRES") provider that is not subject to Ohio Revised Code Sections 4905.33 or 4905.35. Because the Commission has no obligation to accept sham allegations as fact, Buckeye failed to state a claim.

Fourth, even if the Commission rejected all the foregoing arguments, the Complaint still does not state a claim. If it were proven at hearing that CEI and Ohio Edison are improperly discounting tariffed standard offer generation service, the proper remedy would be an order directing the appropriate Respondents to discontinue the improper discount. Buckeye, however, wanted the same "illegal," below-tariff rates that NOPEC customers receive. Buckeye has no legal right to receive illegal rates, and therefore failed to state a claim.

In the Commission's February 7, 2007 Entry, the Commission recognized that Respondents "present four arguments in support of their motion to dismiss." (¶ 4.) In dismissing the Complaint, the Commission explained, "CEI and OE do not provide discounted rates Rather, we find that the NOPEC discount is provided by . . . a CRES provider." (*Id.* ¶ 10.) This language clearly reveals that the Commission was relying on Respondents' third argument. The Commission also noted that "if an electric distribution company (EDU) were to provide below-tariff rates in violation of Ohio law, we would order that EDU to discontinue that practice." (*Id.*) It is less clear, but this language seems to allude to Respondents' fourth argument. At least one, perhaps two, of Respondents' arguments were taken into account.

Buckeye challenged the dismissal on both grounds. As discussed above, it is unclear whether the Commission has agreed with Buckeye arguments, but for purposes of the present

discussion only, Respondents assume the worst—that the Commission has reversed itself and is rejecting Respondents’ third and fourth arguments. Even if that were the case, the Commission still has not ruled on the first or second arguments. And Buckeye’s arguments on rehearing have no relevance to either. It would be unreasonable for this litigation to proceed before the Commission rules in some way on the remaining arguments raised in Respondents’ Motion to Dismiss. And as shown in that Motion, reaffirming dismissal of this proceeding is the only appropriate course.

If in fact the Commission has reversed course from its dismissal entry, Respondents respectfully request the Commission to reconsider such reversal and to consider the first and second arguments advanced in its Motion to Dismiss and dismiss the Complaint. If the Commission has not reversed course, Respondents respectfully request the Commission to dismiss this Complaint for all of the reasons explained in the Motion to Dismiss.

III. CONCLUSION

For the reasons discussed above, Respondents respectfully request that the Commission grant rehearing of its April 4, 2007 Entry on Rehearing and dismiss the Complaint.

Dated: May 4, 2007

Respectfully submitted,



David A. Kutik
Meggan A. Rawlin
JONES DAY
North Point
901 Lakeside Avenue
Cleveland, Ohio 44114
Telephone: 216-586-3939
Facsimile: 216-579-0212
E-mail: dakutik@jonesday.com
mrawlin@jonesday.com

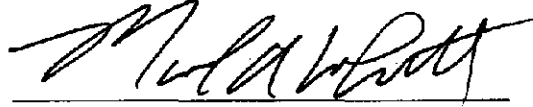
Mark A. Whitt (Trial Counsel)
JONES DAY
Mailing Address:
P.O. Box 165017
Columbus, Ohio 43216-5017
Street Address:
325 John H. McConnell Blvd., Suite 600
Columbus, Ohio 43215-2673
Telephone: 614-469-3939
Facsimile: 614-461-4198
E-mail: mawhitt@jonesday.com

James W. Burk
Senior Attorney
FirstEnergy Service Company
76 South Main Street
Akron, Ohio 44308
Telephone: 330-384-5861
Fax: 330-384-3875
E-mail: burkj@firstenergycorp.com

Attorneys for Respondents

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Application for Rehearing was mailed by ordinary U.S. mail to Carol L. Gasper, Attorney at Law, LLC, 10 W. Streetsboro, Suite 301, Hudson, Ohio 44236, this 4th day of May, 2007.

A handwritten signature in black ink, appearing to read 'Mark A. Whitt', written over a horizontal line.

Mark A. Whitt
An Attorney for Respondents