

THE PUBLIC UTILITIES COMMISSION OF OHIO

13
RECEIVED-DOCKETING DIV
2008 JAN 10 PM 3:32
PUCO

In the Matter of the Application of Ohio)	
Edison Company, The Cleveland Electric)	Case No. 07-551-EL-AIR
Illuminating Company, and The Toledo Edison)	Case No. 07-552-EL-ATA
Company for Authority to Increase Rates)	Case No. 07-553-EL-AAM
For Distribution Service, Modify Certain)	Case No. 07-554-EL-UNC
Accounting Practices and for Tariff Approval)	

**APPLICANTS' MOTION TO STRIKE OBJECTIONS
AND MEMORANDUM IN SUPPORT THEREOF**

Pursuant to Rule 4901-1-28, Ohio Administrative Code ("O.A.C.") and the Attorney Examiner's Entry of December 21, 2007, Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company ("Applicants" or "Companies") move to strike certain objections to the Staff Reports of Investigation filed on behalf of several parties upon grounds as follows.

I. Specificity

*Objections: IEU-Ohio Objections 1, 12, 13, 16, 25, 26, 29, 40 and 41
OCC Objection II.A (first paragraph)*

Rule 4901-1-28(B), Ohio Administrative Code, requires that objections made to a report of investigation filed with the Commission must be specific. Under the December 21 Attorney Examiner's Entry, "Any objection that is not specific enough to convey what is actually being placed at issue may be struck" pursuant to that rule.¹

¹ Prior Attorney Examiner Entries in other cases have provided some guidance to the degree of specificity required. See, e.g., *In re Consumers Ohio Water Company*, Case No. 95-1076-WW-AIR, Entry, July 2, 1996 (1996 Ohio PUC LEXIS 371).

Several² IEU-Ohio Objections fail to satisfy the required criteria. Objections 1, 12 and 13 provide as follows:

1. IEU-Ohio objects to Staff's recommended revenue increase range of \$56,939,104 to \$65,623,537. Staff Report at 91 (Schedule A-1, line 11). The revenue increase proposed by Staff significantly overstates the magnitude of the increase to which OE is entitled and has supported. As more specifically described in the Objections to follow, Staff's recommended increase is the product of certain unreasonable, unlawful, and erroneous determinations and will result in rates that are unreasonable and proved OE excessive compensation and return for the services it provide.

12. IEU-Ohio objects to Staff's recommended distribution of tariff-related increases. Staff Report at 30.

13. IEU-Ohio objects to Staff's recommended capacity charges for the General Service-Secondary (GS), General Service-Primary (GP), General Service-Subtransmission (GSU), and General Service-Transmission (GT) rate schedules. Staff Report at 33.

On their face, none of these objections articulate what it is that IEU-Ohio is putting at issue. Objection 1 simply declares that Staff's recommended revenue increase is "unreasonable, unlawful and erroneous," but without any further explanation. Objections 12 and 13 are even more vague, with IEU-Ohio merely stating that it "objects" to Staff's recommendations. While one might discern that IEU-Ohio disagrees generally with the recommendations made in the Staff Report in the areas of revenue requirement, revenue distribution and level of capacity charges, left unsaid is specifically what issues IEU-Ohio intends to raise in these areas – if in fact they intend to raise any. Indeed, the language of Objection 1 implicitly acknowledges its own shortcomings in stating that the required "specificity" will be supplied "in the Objections that follow".

² IEU Objections 1, 12 and 13 pertain to the Ohio Edison Staff Report. The substantive text of those three objections appears identically as IEU Objections 16, 25, and 26 for the CEI Staff Report and as IEU Objections 29, 40 and 41 for the TE Staff Report. We will not burden this Motion with repetition of the language. The argument made here applies to these other objections equally.

OCC Objection II.A. is similarly defective. Its brief objection here to the Staff recommended revenue increases is:

“because they are excessive due to the use of inappropriate and incorrect rate bases, operating expenses, and rates of return, as detailed below in the OCC’s objections to Staff’s determination regarding these matters.”

None of this group of IEU-Ohio and OCC Objections satisfies the requisite specificity requirement. They should be stricken.

II. Matters which are beyond the scope of these proceedings

OCC Objections II.E.2 (“Tariffs” -- related to Net Metering and Interconnection Tariffs, page 15, last paragraph, through page 16, second paragraph)

It is unnecessary to burden these proceedings with matters which are being properly resolved elsewhere. Moreover, an Objection which attempts to use a rate case for one company to force a policy decision affecting all utilities, thereby depriving others of the opportunity to be heard, should likewise not be tolerated. That is what generic Commission proceedings are for. All parties interested in an appropriate outcome of those other issues are, presumably, participating in those cases – they are not, nor should they necessarily be a part of this case. Those issues will be resolved in the other proceedings and, presumably, the Companies here will be subject to whatever results emerge.

OCC, in these objections, seeks to raise issues relating to the Staff’s “failure to recommend” certain positions with respect to existing interconnection tariffs and net metering provisions. The objections state:

The OCC objects to the Staff Reports’ failure to recommend adjustments to FirstEnergy’s current interconnection tariffs, including a reduction in the excessive fees being charged by FirstEnergy.

The OCC objects to the Staff Reports’ failure to recommend that the technical requirements for interconnection and parallel operation of

facilities in FirstEnergy's interconnection tariffs specifically reference IEEE standard 1547.

The OCC objects to the Staff Reports' failure to recommend adjustments to FirstEnergy's net energy metering riders so that a customer-generator is credited with the whole generation rate when the customer-generator feed more kilowatt-hours of electricity back to the system than the Company supplies to the customer-generator facility during the billing period.

These issues are presently the subject of several consolidated Commission dockets. *In the Matter of the Commission's Response to Provisions of the Federal Energy Policy Act of 2005 Regarding Net Metering, Smart Metering and Demand Response, Cogeneration and Power Production Purchase and Sale requirements, and Interconnection*, Case Nos. 05-1500-EL-COI, *et al.* They need not and should not be considered here. The underlying Objections should be stricken.

III. Objections directed to the Staff's failure to make recommendations which are impossible to effect or are contrary to law.

*Objections: IEU Objections 14, 27, and 42
Nucor Objection 1
Constellation New Energy Objections 1 and 2*

A. IEU Objections 14, 27, and 42

IEU Objection No. 14³ states:

"IEU-Ohio objects to Staff's recommendation that OE provide a typical bill comparison in conjunction with final compliance tariffs filed in response to the order in this proceeding. Staff Report at 36. A typical bill comparison reflecting the Commission's determination of an appropriate revenue requirement, rate design and schedules approved in this proceeding should be submitted before a final Commission order is issued in order to help ensure the results of this proceeding do not produce anomalous results for individual customers."

³ As with the "Specificity" objections discussed above, the IEU objection addressed here is directed to the OE Staff Report. Objections 27 and 42 raise the identical point with respect to CEI and TE, respectively. The argument made here applies equally to those Objections.

The issue here is a classic “chicken and the egg” problem. IEU wants a “typical bill comparison” before there is a “final Commission order”. The problem is that the compliance tariffs and schedules from which a typical bill comparison is made can only be completed following the determination of the revenue requirements and rate design – matters which are determined in that final Commission order. The point of IEU’s objection simply cannot be accommodated under the Commission’s practice and there is no basis for the objection to stand.

B. Nucor Objection 1

Nucor’s Objection No. 1 states:

“FirstEnergy’s Bundled Rates Should Not Be Eliminated Before Comparable Utility-Provided Rates Are In Place.”

In summary fashion, Nucor objects to the Staff Reports’ failing to recommend that the Companies offer retail electric service under bundled retail rate schedules.

In 1999, the Ohio Legislature passed S.B. 3 that unbundled retail electric rates in Ohio. As part of that unbundling process, electric distribution utilities were required to create a separate unbundled component for distribution service. R.C. 4928.34(A)(2). In accordance with the statute, the Companies have maintained a separate distribution component in retail rates since 2001. The Commission cannot lawfully order the Companies to rebundle their rates in a manner contrary to statute. Further, the Supreme Court of Ohio has recognized that retail rates must be unbundled and priced separately. *Ohio Consumers’ Counsel v. Pub. Util. Comm.*, 114 Ohio St.3d 340, 872 N.E.2d 269, 2007-Ohio-4276. As Nucor acknowledges, the Companies have a separate proceeding pending before the Commission to establish retail generation rates that was filed in July 2007, just one month after the filing of this proceeding. Any uncertainty that Nucor may

be experiencing with regard to generation rates is because the generation procurement and pricing has not yet been resolved in the generation case. There is no basis to hash out issues pertaining to generation rates in this distribution rate case.

C. Constellation New Energy, Inc. ("Constellation") Objections 1 & 3

Constellation Objection No. 1 states:

1. As part of the Rate Certainty Program, Ohio Edison, Cleveland Electric Illuminating, and Toledo Edison deferred fuel costs for subsequent collection as distribution charges. While these deferral were authorized by the Commission in Case No. 05-704-EL-ATA and 05-1125-EL-ATA, the Ohio Supreme Court in *Elyria Foundry v. Public Utilities Commission* 114 Ohio Street. 3d 305 (2007), 2007 – Ohio 4164 found the practice of collecting fuel expenses in distribution charges to be a violation of Revised Code Section 4928.02(G). In light of the above referenced Supreme Court decision, no fuel deferral may be included either as a component of Rate Base or as a separate collection rider. The Staff Report appropriately applies this decision. See the "Other Rate Base Items" section at Staff Report (for all three operating companies), p. 8. The Staff Report however should have clarified that, consistent with the *Elyria* decision, no fuel or purchased power costs may be included in or as a rate component of any of the distribution rates.

Constellation Objection No. 3 states:

3. Customers who are put on a disadvantageous distribution tariff rate schedule on the advice of FirstEnergy should receive the full difference between the rates they paid and the rates they should have paid if the correct rate was selected in accordance with the Commission's decision in *White Plastics v. Columbus Southern*, Case No. 85-0650, Opinion and Order, June 18, 1985. CNE supports the position taken by the Staff Report on this issue. See Staff Report (for all three operating companies), p. 20.

Both of these "objections" are long on support for positions taken in the Staff Reports but short on raising any issues taken in response to them. With respect to Objection No. 1, Constellation acknowledges that the Staff Report removed the fuel deferrals from the case but complains, essentially, that the Staff should have further "clarified" its implementation of the Ohio Supreme Court's decision in *Elyria Foundry*.

But the Staff Reports cannot be any clearer – Staff recommended removal of the fuel deferrals. Objection No. 3 is not an objection at all; it is an outright endorsement of a Staff position. Constellation is free to endorse Staff positions in its post-hearing briefs. Its endorsement here is improper and unnecessary.

These objections should be stricken.

IV. Objections which attempt to raise issues a party is estopped from pursuing should be stricken

OCC Objections II.B.3, II.C.1, and II.E.2 (first paragraph)

The Commission should apply the doctrine of estoppel to prevent parties in these proceeding from attacking prior Commission decisions or from asserting Objections which are contrary to positions taken in prior Stipulations signed by the objecting parties. See R.C. 4903.082 (endorsing the Commission’s application of the Ohio Rules of Civil Procedure); Ohio Civil Rule 8 (providing for the defense of estoppel).

With respect to Objections II.B.3 (“Balance of ‘RCP – Distribution O&M Deferral’ in Rate Bases”) and II.C.1 (“Amortization of RCP – Distribution O&M Deferrals”), OCC is estopped from objecting to these components of the Staff Report because such objections are inconsistent with the Stipulation and Supplemental Stipulation signed by OCC in the Rate Certainty Plan proceeding, Case No. 05-1125-EL-ATA et seq. In that proceeding, OCC signed the supplemental stipulation filed with the Commission on November 4, 2005. All signatory parties, including OCC, agreed to be bound by the terms and conditions of the Stipulation and Recommendation filed with the Commission on September 9, 2005. One of those terms and conditions, specifically regarding the Distribution Deferrals, was that:

“The Signatory Parties agree that in the next or subsequent distribution cases they will not challenge the reasonableness or legality of the deferral process or the types of expenditures deferred. This Stipulation does not preclude the Signatory Parties from challenging the reasonableness of the level of a particular type of expenditure included in the deferrals.”

RCP Stipulation and Recommendation, Case No. 05-1125-EL-ATA et seq., p. 11. With regard to OCC Objections II.B.3 and II.C, the OCC is objecting to the reasonableness of the deferral process, which it agreed not to do in the RCP case. OCC does not restrict its objection to “the reasonableness of the level of a particular type of expenditure included in the deferrals” as it agreed it would under the RCP Stipulation and Recommendation. If Commission stipulations are to have any meaningful effect, the Commission must hold parties to the stipulations they sign. OCC’s objections should be stricken.

With respect to II.E.2 (“Tariffs” – first paragraph), OCC objects to the Staff Report because the Staff fails to recommend additional forms of mitigation for new customers that would have otherwise been able to take service under the discounted rates listed by OCC on page 14-15 of its objections. Here, too, OCC should be estopped from making this argument because it signed the Supplemental Stipulation in the RCP case, and therefore is bound to the terms and conditions of the Stipulation and Recommendation in that proceeding, as described above.

In the Stipulation and Recommendation, the parties agreed that the rates listed by OCC on page 14-15 would be grandfathered as of April 1, 2006 (which was subsequently extended to January 1, 2007 by the Commission), meaning that they were no longer available to new customers. See RCP Stipulation and Recommendation, Case No. 05-1125-EL-ATA et seq., p. 12 and Attachment 3. OCC is now estopped from objecting to

the Staff Report on the basis that these rates must be made available to new customers, as such position is inconsistent with its agreement under the RCP Stipulation and Recommendation.

For the foregoing reasons, Applicants' Motion that the above listed Objections to the Staff Reports be stricken should be granted.

Respectfully submitted,

Stephen L. Feld / *JS*

Stephen L. Feld, Counsel of Record
Kathy J. Kolich
Arthur E. Korkosz
James W. Burk
Mark A. Hayden
Ebony L. Miller
76 South Main Street
Akron, Ohio 44308
330-384-4573 - Telephone
330-384-3875 - Fax
Felds@firstenergycorp.com

Mark A. Whitt
Jones Day
325 John H. McConnell Blvd,
Suite 600
P.O. Box 165017
Columbus, OH 43216-5017
(T) 614-281-3830
(F) 614-461-4198

Attorneys for Applicants, Ohio Edison
Company, The Cleveland Electric
Illuminating Company and The Toledo
Edison Company

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing Applicants' Motion to Strike Objections and Memorandum in Support Thereof was this 10th day of January, 2008 served by regular U.S. Mail on the parties of record reflected on the attached service list.


Stephen L. Feld
Attorney for Applicants

**Case No. 07-551-EL-AIR, et al.
Service List**

Public Utilities Commission of Ohio

Delia Jackson-Black
180 East Broad St.
Columbus, OH 43215
Phone: 614.466.5455
Fax: 614.752.8352
E-mail:
delia.jackson-black@puc.state.oh.us

Jim Gould
180 East Broad St
Columbus, OH 43215
Phone: 614.466.8238
E-mail: james.gould@puc.state.oh.us

Industrial Energy Users (IEU)

Samuel C. Randazzo
Lisa G. McAlister
Daniel J. Neilsen
Joseph M. Clark
McNees, Wallace & Nurick LLC
21 East State St., 17th Floor
Columbus, OH 43215
Phone: 614.469.8000
Fax: 614.469.4653
E-mail: sam@mwncmh.com;
lmcalister@mwncmh.com;
dneilsen@mwncmh.com;

Kroger Co & Ohio Energy Group (OEG)

David F. Boehm
Michael L. Kurtz
Boehm, Kurtz & Lowry
36 East Seventh St., Suite 1510
Cincinnati, OH 45202-4454
Phone: 513.421.2255
Fax: 513.421.2764
E-mail: dboehm@BKLawfirm.com;
mikurtz@BKLawfirm.com

Ohio Consumers' Counsel (OCC)

Jeffrey L. Small
Richard C. Reese
Ohio Consumers' Counsel
10 West Broad St., Suite 1800
Columbus, OH 43215
Phone: 614.466.8574
E-mail: small@occ.state.oh.us;
reese@occ.state.oh.us

Ohio Home Builders Association (OHBA)

Thomas L. Froehle
Lisa G. McAlister
McNees, Wallace & Nurick LLC
21 East State St., 17th Floor
Columbus, OH 43215
Phone: 614.469.8000
Fax: 614.469.4653
E-mail: lmcalister@mwncmh.com;
tfroehle@mwncmh.com

Ohio Partners for Affordable Energy (OPEA)

David C. Rinebolt
Colleen L. Mooney
231 West Lima Street
P.O. Box 1793
Findlay, OH 45839-1793
Phone: 419.425.8860
Fax: 419.425.8862
E-mail: drinebolt@aol.com;
cmooney2@columbus.rr.com

**Northwest Ohio Aggregation Coalition
(NOAC)**

Toledo

Leslie A. Kovacik
Kerry Bruce
420 Madison Ave., Suite 100
Toledo, OH 43604-1219
Phone: 419.245.1893
Fax: 419.245.1853
E-mail: leslie.kovacik@toledo.oh.gov

Holland

Paul Skaff
Leatherman Witzler Dombey & Hart
353 Elm St.
Perrysburg, OH 43551
Phone: 419.874.3536
Fax: 419.874.3899
E-mail: paulskaff@justice.com

Lake

Thomas R. Hays
Lake Township – Solicitor
3315 Centennial Road, Suite A-2
Sylvania, OH 43560
Phone: 419.843.5355
Fax: 419.843.5350
E-mail: hayslaw@buckeye-express.com

Lucas

Lance M. Keiffer
Lucas County Assist Prosecuting Atty
711 Adams St., 2nd Floor
Toledo, OH 43624-1680
Phone: 419.213.2001
Fax: 419.213.2011
E-mail: lkeiffer@co.lucas.oh.us

Maumee

Sheilah H. McAdams
Marsh & McAdams – Law Director
204 West Wayne Street
Maumee, OH 43547
Phone: 419.893.4880
Fax: 419.893.5891
E-mail: sheilamca@aol.com

Northwood

Brian J. Ballenger
Ballenger & Moore – Law Director
3401 Woodville Rd., Suite C
Toledo, OH 43619
Phone: 419.698.1040
Fax: 419.698.5493
E-mail: ballengerlawbib@sbcglobal.net

Oregon

Paul S. Goldberg
Oregon – Law Director
6800 W. Central Ave.
Toledo, OH 43617-1135
Phone: 419.843.5355
E-mail: pgoldberg@ce.oregon.oh.us

Perrysburg

Peter D. Gwyn
Perrysburg – Law Director
110 West Second St.
Perrysburg, Oh 43551
Phone: 419.874.3569
Fax: 419.874.8547
E-mail: pgwyn@toledolink.com

Sylvania

James E. Moan
Sylvania – Law Director
4930 Holland-Sylvania Rd
Sylvania, OH 43560
Phone: 419.882.7100
Fax: 419.882.7201
E-mail: jimmoan@hotmail.com

Jones Day

Mark A. Whitt
P.O. Box 165017
325 John H. McConnell Blvd. Suite 600
Columbus, OH 43216-5017
Phone: 614-281-3880
Fax: 614-461-4198
E-mail: mawhitt@jones.day.com

City of Cleveland

Robert J. Triozzi (0016532)
Director of Law
Direct Dial: (216) 664-2800
Harold A. Madorsky (0004686)
Assistant Director of Law
Direct Dial: (216) 664-2819
City of Cleveland
Cleveland City Hall
601 Lakeside Avenue, Room 106
Cleveland, Ohio 44114-1077
E-mail: RTriozzi@city.cleveland.oh.us
HMadorsky@city.cleveland.oh.us

John W. Bentine, Esq. (0016388)
Trial Counsel
Direct Dial: (614) 334-6121
Mark S. Yurick, Esq. (0039176)
Direct Dial: (614) 334-7197
Chester, Willcox & Saxbe LLP
65 East State Street, Suite 1000
Columbus, Ohio 43215-4213
(614) 221-4000 (Main Number)
E-mail: jbentine@cwslaw.com
myurick@cwslaw.com

Nucor Steel Marion, Inc's

Garret A. Stone
Counsel of Record
Michael K. Lavanga
Brickfield, Burchette, Ritts & Stone, P.C.
1025 Thomas Jefferson St, NW
8th Floor, West Tower
Washington, D.C. 20007
Phone: 202.342.0800
Fax: 202.342.0800
E-mail: gas@bbrslaw.com
mkl@bbrslaw.com

Constellation Energy Group

Howard Petricoff
Stephen M. Howard
Vorys, Sater, Seymour & Pease, LLP
52 East Gay Street
PO Box 1008
Columbus, OH 43216-1008
Phone: 614.464.5414
Fax: 614.464.6350
E-mail: mhpetricoff@vorys.com
smhoward@vorys.com

Cynthia A. Fonner
Senior Counsel
Constellation Energy Group, Inc.
550 W. Washington St., Suite 300
Chicago, IL 60661
Phone: 312.704.8518
Cell: 312.502.6151
Fax: 312.795.9286
E-mail: Cynthia.A.Fonner@constellation.com

David I. Fein
VP, Energy Policy – Midwest/MISO
Constellation Energy Group, Inc.
550 West Washington Blvd., Suite 300
Chicago, IL 60661
Phone: 312.704.8499
E-mail: david.fein@constellation.com

Terry S. Harvill
VP & Director, Retail Energy Policy
Constellation Energy Resources
111 Market Place
Baltimore, Maryland 21202
Phone: 248.936.9004
Cell: 312.415.6948
E-mail: terry.harvill@constellation.com

Ohio Manufacturers' Association (OMA)

Sally W. Bloomfield
Thomas J. O'Brien
Bricker & Eckler LLP
100 South Third Street
Columbus, OH 43215-4291
Phone: 614.227.2368; 227.2335
Fax: 614.227.2390
E-mail: sbloomfield@bricker.com
tobrien@bricker.com

Ohio Schools Council

Glen S. Krassen
Bricker & Eckler LLP
1375 East Ninth Street, Suite 1500
Cleveland, Ohio 44114
Phone: 216.523.5469
Fax: 216.523.7071
E-mail: gkrassen@bricker.com

The Citizens Coalition

Joseph P. Meissner
The Legal Aid Society of Cleveland
1223 West 6th Street
Cleveland, OH 44113
Phone: 216.687.1900
E-mail: jpmeissn@lasclev.org

Integrus Energy Services, Inc.

Bobby Singh
Senior Attorney
Integrus Energy Services, Inc.
300 West Wilson Bridge Rd., St. 350
Worthington, OH 43085
Phone: 614.844.4340
Fax: 614.844.8305
Email: bsingh@integrusenergy.com