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**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of Ohio)	
Edison Company, The Cleveland Electric)	
Illuminating Company and The Toledo)	Case No. 10-176-EL-ATA
Edison Company for Approval of a New)	
Rider and Revision of an Existing Rider.)	

**APPLICATION FOR REHEARING
BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL**

The Office of the Ohio Consumers' Counsel ("OCC"), pursuant to R.C. 4903.10 and Ohio Adm. Code 4901-1-35(A), seeks rehearing on the Second Entry on Rehearing ("Order") issued by the Public Utilities Commission of Ohio ("PUCO" or "Commission") on April 15, 2010. This Commission's findings are unjust and unreasonable in the following respects:

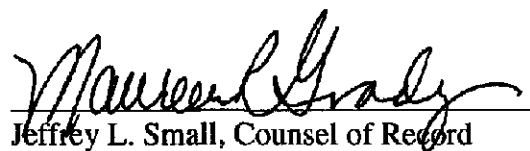
- A) In determining that the adjudication of any alleged agreements, promises or inducements by the Companies is outside the Commission's jurisdiction, the Order is unreasonable and unlawful and prohibits the PUCO Staff from inquiring into these issues for relevant purposes. Those purposes include assessing the culpability of the Companies for purposes of considering options for recovering the costs of the "revenue shortfall" from the rate relief permitted in this proceeding as a result of the Commission's March 3, 2010 Finding and Order.

- B) In determining that the adjudication of any alleged agreements, promises or inducements by the Companies is outside the Commission's jurisdiction, the Commission unreasonably and unlawfully fails to fulfill its responsibility under R.C. 4905.22, 4905.37, 4928.02(I), 4928.10 and Ohio Admin. Code 4901:1-10-24.
- C) In limiting the rate relief to those customers specified in FirstEnergy's application, the Commission excluded residential electric water heating customers, which amounts to approving unreasonable and unlawful discriminatory rates, in violation of R.C. 4905.22, 4905.33 and 4905.35.

The reasons for granting this Application for Rehearing are set forth more fully in the attached Memorandum in Support.

Respectfully submitted,

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MEMORANDUM IN SUPPORT

I. INTRODUCTION

FirstEnergy filed its Application on February 12, 2010. The Application proposed to adjust certain residential electric rates, which are applicable to some of the Companies' approximately 1.9 million residential customers who had been served under certain non-standard rates. Under the Application, among other matters, FirstEnergy proposed to phase out, over eight years, a generation credit to certain non-standard residential customers, generally referred to as "all-electric customers." The OCC, the state agency that represents Ohio's residential utility consumers, moved to intervene in this case on February 23, 2010.¹

The Commission issued an Order on March 3, 2010. The March 3, 2010 Order concluded that until the Commission determines the best long-term solution, it would permit "rate relief" to "all-electric residential customers."² That rate relief encompassed a

¹ OCC also filed a number of various motions and requests in this proceeding, including a motion for declaration of an emergency and a motion for an order to direct FirstEnergy to file replacement tariffs.

² *In the Matter of the Application of Ohio Edison Company, the Cleveland Electric Illuminating Company, and the Toledo Edison Company for Approval of a New Rider and Revision of Existing Rider*, PUCO Case No. 10-176-EL-ATA, Finding and Order at 3 (March 3, 2010).

general concept that customers' bill impacts should be commensurate with FirstEnergy's December 31, 2008 charges. The Commission recognized that further proceedings regarding the recovery of the "revenue shortfall" associated with the rate relief are necessary. In the meantime it permitted FirstEnergy to modify its accounting procedures to defer the difference between the rates to be charged all-electric customers under the rate relief ordered and the rates and charges that would otherwise be charged. The PUCO also ordered FirstEnergy to file tariffs reflecting the rate relief for the "all-electric residential subscribers." It directed its Staff "to investigate and file a report in this proceeding regarding the appropriate long-term rates"³ subject to "comments by interested persons" at a later date. The Commission also determined that the report "should include a range of options for the Commission regarding the recovery of the revenue shortfall as a result of the discounts provided to all-electric residential customers."

The OCC sought clarification, or in the alternative rehearing, on several issues. Two of these issues are germane to this Application for Rehearing.⁴ OCC sought rehearing on that part of the Commission Order framing the boundaries for the PUCO Staff investigation. OCC argued that the PUCO should direct its Staff to investigate any FirstEnergy promises and inducements that caused (directly or indirectly) customers to commit to purchasing and installing major electricity-consuming equipment (such as for space and water heating). OCC Application for Rehearing at 6-7. OCC claimed that such

³ Id.

⁴ *In the Matter of the Application of Ohio Edison Company, the Cleveland Electric Illuminating Company, and the Toledo Edison company for Approval of a New Rider and Revision of Existing Rider*, PUCO Case No. 10-176-EL-ATA, Application for Rehearing (March 8, 2010).

an investigation is necessary to consider the option of assigning some financial responsibility to FirstEnergy for the rate relief costs permitted to be deferred in this proceeding.

OCC also sought to clarify exactly which customers the Commission was referring to by using the term “all-electric residential customers.” OCC further pursued this same issue in its March 31, 2010 motion which objected to the Companies’ tariffs that were filed to comply with the PUCO’s March 3, 2010 Order.⁵ There, OCC highlighted the fact that FirstEnergy had filed tariffs which excluded the rate relief (in the form of generation credits) to certain of its non-standard residential customers. Specifically OCC identified these customers as CEI’s Residential Water Heating Customers (Original Sheet 12); TE’s Residential Rate R-04 Water Heating Customers (Original Sheet 16); OE’s Residential Water Heating Customers (Original Sheet 18); and OE’s Standard Rate Special Provision Section Customers who have installed 80 gallon plus water heaters with peak load control devices (Original Sheet 10).

On April 15, 2010, the PUCO issued a Second Entry on Rehearing. In its Order, the PUCO denied OCC rehearing on the assignment of error related to its decision to limit the PUCO Staff investigation.⁶ The PUCO characterized OCC’s claims as being “made under laws governing contracts and equitable remedies.”⁷ Relying upon *Marketing*

⁵ *In the Matter of the Application of Ohio Edison Company, the Cleveland Electric Illuminating Company, and the Toledo Edison company for Approval of a New Rider and Revision of Existing Rider*, PUCO Case No. 10-176-EL-ATA, Motion For Order Directing FirstEnergy to File Replacement Tariffs That Comply with the Commission’s Order (March 31, 2010).

⁶ *In the Matter of the Application of Ohio Edison Company, the Cleveland Electric Illuminating Company, and the Toledo Edison company for Approval of a New Rider and Revision of Existing Rider*, PUCO Case No. 10-176-EL-ATA, Second Entry on Rehearing at 3 (April 15, 2010).

⁷ *Id.*

*Research Service Inc. v. Pub. Util. Comm.*⁸ the PUCO concluded that it has no power to determine legal rights and liabilities in cases solely involving contract rights even though a public utility is involved. Consequently, it ruled that the “adjudication of any alleged agreements, promises, or inducements made by Companies outside the express terms of its tariffs, as alleged by OCC, is best suited for a court of general jurisdiction rather than the Commission.”⁹ In responding to OCC’s request to clarify the meaning of “all-electric rates,” the Commission determined that the rate relief “applies to all residential customers who had previously been billed under the ‘all electric’ rate schedules specified in FirstEnergy’s application in this proceeding...”

It is these two findings that are the subject of this application for rehearing. For the reasons detailed below, OCC seeks to reverse these aspects of the PUCO’s Order.

II. ARGUMENT

- A. In determining that the Commission has no jurisdiction over the alleged agreements, promises, or inducements made by FirstEnergy related to the marketing of all-electric rates, the Commission unreasonably and unlawfully prohibited the PUCO Staff from investigating the marketing practices of the Companies for purposes of determining how the revenue shortfall from the all-electric discount will be funded.**

Broad discovery and thorough investigation are necessities in this proceeding. Boundaries imposed by the PUCO may inhibit the process that must be employed to forge an adequate, just, and reasonable resolution of this case.

⁸ *Marketing Research Service Inc. v. Pub. Util. Comm* (1987), 34 Ohio St. 3d 52, 56.

⁹ *Id.*

The case before the Commission involves many facets. The Commission is seeking a long-term solution to the all-electric rates paid by a number of the Companies' residential customers. In establishing reasonable long-term electric rates for the Companies' residential customers, the Commission will have to determine many underlying issues. The Commission must ferret out the true cost of the interim discounts or rate relief (referred to as the "revenue shortfall") extended to the Companies' all-electric residential customers as a result of its March 3, 2010 Finding and Order. Additionally, the Commission will have to determine how the revenue shortfall, as a result of the discounts, will be funded. The PUCO will also have to address whether and how long the discounts should continue for the all-electric customers.

In adjudicating these various issues the Commission should have before it all relevant information. Relevant information is expected to be gathered in the course of this proceeding through discovery by interested parties, as well as through the Staff investigation. Both the discovery permitted and the Staff investigation must be broad in scope in order to accomplish a just and reasonable resolution of the issues presented.

And yet the PUCO's ruling that the Staff investigation should not encompass the investigation of any alleged agreements, promises, or inducements made by the Companies, threatens to unnecessarily and unreasonably narrow the scope of the Staff's inquiry. Moreover it could be used by FirstEnergy to potentially limit the scope of discovery, conflicting with the statutory mandate that parties be granted ample rights of

discovery in all proceedings before the PUCO.¹⁰ These ample rights of discovery should necessarily include investigating the culpability of FirstEnergy.

The culpability of FirstEnergy is relevant to evaluating the range of options for recovering the revenue shortfall, including amounts being deferred in this case for discounts provided to all-electric residential customers.¹¹ Under cost causation principles that underlie the design of rates,¹² the Commission should assess whether the cause of the revenue deficiency is attributable, in part, or whole, to improper business practices and/or marketing efforts of the Companies. Then the Commission can examine options that would include assigning responsibility for some portion (if not all) of the revenue shortfall to FirstEnergy.

An investigation into the promises made by the Companies outside the terms of the tariff, e.g., that the all-electric discounts would be permanent, bears upon the solution that should be adopted, on a going forward basis, for resolving the all-electric rate issues, including whether the discounts should continue and for what period of time. If the investigation turns up evidence that the Companies did make agreements, promises, or

¹⁰ See Ohio Rev. Code 4903.082. The scope of discovery is specifically prescribed by Ohio Admin. Code 4901:1-16(B) as related to any matter "relevant" to the proceeding. The scope of discovery by parties need not necessarily be prescribed by the scope of the PUCO Staff Investigation. However, from the responses received to OCC's Second Set of Discovery, it is clear that FirstEnergy believes the Commission ruling on the scope of the Staff investigation should preclude OCC from inquiring into the marketing efforts of FirstEnergy related to all-electric rates. Even if the PUCO does not reverse its Second Entry on Rehearing as requested here, the PUCO should clarify that its ruling should not be interpreted as precluding discovery on these issues.

¹¹ In its Third Entry on Rehearing, dated April 28, 2010, the PUCO clarified that FirstEnergy is authorized to modify its accounting procedures to defer incurred purchased power costs equal to the difference between the rates and charges to the all electric residential customers as the result of the rate relief ordered by the Commission and the rates and charges that would be otherwise charged. The accounting deferrals purport to represent the revenue shortfall that the Commission must allocate between customers and the utility.

¹² As the Commission is well aware, other principles underlie rate design as well, including gradualism, rate shock, and equitable principles of cost allocation.

inducements to customers that are outside the terms of the tariff, then it should conclude that the Companies engaged in unfair and deceptive practices related to providing all-electric service, in violation of numerous provisions of the Revised Code and Ohio Admin. Code 4901:1-10-24(D). Such a finding would bear upon the cause of the revenue shortfall and the options regarding the recovery of the revenue shortfall, lending support to a theory that the Companies should shoulder cost responsibility (in whole or in part) for the revenue shortfall. Moreover, once the representations and inducements are known, it may have an impact upon the length of time the discounts should continue.

While the Companies' have characterized OCC's approach as a backward looking effort,¹³ it is not. OCC is not seeking a dollar for dollar remedy for past unlawful behavior by the Companies—rather such a remedy is already being sought in the Geauga County class action suit.¹⁴ OCC is requesting that the PUCO Staff investigate the past behavior of the Companies in promoting the all-electric rates and allow discovery to proceed into these issues. This is a necessary step in establishing future all-electric rates and determining the responsibility for revenue deficiencies that will be created in this case by the rate relief granted. It should not be assumed that other residential customers

¹³ See Memorandum Contra OCC Application for Rehearing at 3-4 (March 18, 2010).

¹⁴ On February 16, 2010, a complaint was filed as *Difranco v. FirstEnergy*, Case No. 10M000164. That complaint seeks, in Counts 2 and 3, judgment in favor the plaintiffs for \$50 million on the basis of breach of contract claims, fraudulent inducement, and justifiable reliance. These are akin to the matters the Commission refers to as "claims made under laws governing contracts and equitable remedies." Interestingly, FirstEnergy has filed a motion to dismiss for lack of jurisdiction, claiming the matters fall exclusively with the Commission's jurisdiction. If the Court dismisses the complaint on the basis of the Companies' motion, and the Commission upholds its Second Entry on Rehearing, customers may be deprived of any forum to be heard on these issues. This is not a reasonable or just result, nor is it a result that is contemplated by the provisions of the Revised Code which prohibit utilities from engaging in deceptive sales practices.

should subsidize in whole FirstEnergy's business decision to offer inducements to customers in order to expand its sales.

- B. In determining that the Commission has no jurisdiction over the alleged agreements, promises or inducements made by FirstEnergy related to the marketing of all-electric rates the Commission unreasonably and unlawfully failed to fulfill its responsibilities under R.C. 4905.22, 4905.37, 4928.02(I), 4928.10 and Ohio Admin. Code 4901:1-10-24 to ensure that consumers are protected against unreasonable sales practices of an electric distribution utility.**

There are numerous provisions within the Ohio Revised Code that are intended to protect consumers against the unreasonable sales practices of an electric distribution utility. Under R.C. 4905.37, the Commission is vested with the authority to ensure that the "practices" of a public utility with respect to its public service are just and reasonable. If they are not, the commission shall fix and prescribe the practices. R.C. 4928.02(I) sets forth as one of the policies of the state associated with the competitive offering of retail electric service, ensuring consumers protection against unreasonable sales practices. Additionally, consistent with R.C. 4928.02(I), R.C. 4928.10 requires the Commission to adopt rules to protect consumers that include a prohibition against unfair, deceptive, and unconscionable acts in the marketing, solicitation, and sale of competitive electric retail service. Ohio Admin. Code 4901:1-10-24 (D) was promulgated as a result of these provisions of the Ohio Revised Code, and specifically prohibits an electric utility from committing an unfair or deceptive act or practice in connection with promoting or providing service. Generally, R.C. 4905.22 may be applicable as well as it requires utilities to furnish services and facilities as are "adequate and in all respects just and reasonable."

Together these provisions of the Revised Code and the Administrative Code place the responsibility for protecting consumers against a public utility's unfair marketing tactics with the PUCO. And yet despite such numerous and pervasive statutory provisions and rules, the Commission seeks to walk away from investigating the behavior of the Companies by limiting the Staff investigation, and ruling that the remedies for such behavior are best suited for the courts. While arguments may be made that *remedies* related to such behavior are the province of the Court, it can also be argued that the PUCO has sufficient jurisdiction to investigate the underlying behavior of the Companies, which is separate and apart from pursuing remedies due to statutory violations. In other words, the courts will address remedies for customers who can demonstrate that they have been harmed as a result of unfair or deceptive sales practices, but the Commission has the obligation to consider the practices of the company when it comes to setting rates and determining responsibility for costs incurred as a result of those practices.

OCC urges the Commission to reverse its Order and include a directive for its Staff to investigate the marketing tactics used by the Companies in promoting the all-electric rates. The purpose of conducting such an investigation in this case should be to assess the culpability of the utilities to determine whether the all-electric discount revenue deficiency created by the March 3, 2010 Order should be shouldered in whole or in part by the utilities. Such an investigation should not preclude parties from pursuing other avenues of inquiry into the Companies' marketing practices, including pursuing a complaint case against the utilities, requesting a commission-ordered investigation, or pursuing the issues in court. Additionally, the Commission should clarify that, even if it does not alter the scope of the Staff investigation, its ruling should not preclude parties

from conducting discovery into these issues and exercising their rights under Ohio Rev. Code 4903.082.

- C. In limiting the rate relief to those customers specified in FirstEnergy's application, thereby excluding electric water heating customers, the Commission unreasonably and unlawfully permits discriminatory rates, in violation of R.C. 4905.22, 4905.33 and 4905.35.**

OCC applies for rehearing of the Commission's Order which clarified that the rate relief "applies to all residential customers who had previously been billed under the 'all electric' rate schedules specified in FirstEnergy's application in this proceeding..."¹⁵ Defining "all-electric" customers as those specified under FirstEnergy's application will cause a number of non-standard electric customers to be deprived of the rate relief ordered. Specifically non-standard residential customers who will be deprived of the rate relief ordered are the following customers: CEI's Residential Water Heating Customers (Original Sheet 12); TE's Residential Rate R-04 Water Heating Customers (Original Sheet 16); OE's Residential Water Heating Customers (Original Sheet 18); and residential customers who have installed 80 gallon plus water heaters with peak load control devices (Original Sheet 10, solely under Special Provision section).

To exclude these customers from the rate relief ordered discriminates against them when they are receiving service under the same or similar circumstances as the other "all-electric" customers receiving the rate relief. Discriminatory rates are neither just nor reasonable and violate R.C. 4905.22. That provision of the Code requires utilities to furnish service and facilities that are adequate and in all respects just and reasonable.

¹⁵ *In the Matter of the Application of Ohio Edison Company, the Cleveland Electric Illuminating Company, and the Toledo Edison company for Approval of a New Rider and Revision of Existing Rider*, PUCO Case No. 10-176-EL-ATA, Second Entry on Rehearing at 3 (April 15, 2010).

There are other provisions of the Code that are being violated as well. Under the selected rate relief provided, an undue or unreasonable preference or advantage is being given to a portion of the “all-electric” customers. This is discriminatory and violates R.C. 4905.35. R.C. 4905.35 prohibits a utility from giving undue or unreasonable preference or advantage to any person. Moreover, it is also unlawful under R.C. 4905.33. R.C. 4905.33 precludes a utility from collecting from any customer greater or lesser compensation for services than it collects from other customers for doing “like and contemporaneous service under substantially the same or similar circumstances.”

The customers excluded from the rate relief are receiving service under the same or similar circumstances as the other “all-electric” customers receiving the rate relief. The service provided is a like and contemporaneous service. FirstEnergy has failed to prove otherwise. Nor has the Commission provided justification for including rate relief for some of the residential non-standard customers and not others. And yet the PUCO has ordered rate relief, through a residential generation credit, to be given to one set of non-standard residential customers and not other non-standard residential customers.

Indeed the electric water heating customers have many commonalities with the customers being provided rate relief under the PUCO’s March 3, 2010 order. They too installed electric equipment (water heaters) in response to marketing and promotional efforts by FirstEnergy. Their rates, like the other non-standard residential electric rates, were designed by FirstEnergy to encourage electric usage. These customers’ rates provide discounts for higher usage blocks of electricity.

There has been no justification presented by either FirstEnergy or the PUCO that would distinguish these customers from the other “all-electric” customers who have been

provided rate relief. They too are suffering under the rates imposed by FirstEnergy, and are as deserving of the rate relief ordered as the other residential non-standard electric customers. The PUCO should extend the rate relief ordered to these customers as well. Otherwise the PUCO and FirstEnergy are violating R.C. 4905.22, 4905.33, and 4905.35.

III. CONCLUSION

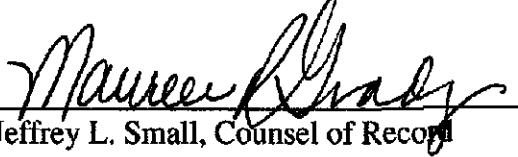
For the reasons set forth, OCC requests that the Commission reconsider its Order and instead determine to assert jurisdiction in this proceeding by directing its Staff to investigate the marketing of the all-electric rates by the Companies. Such an investigation should focus on determining the culpability of the Companies as it relates to resolving who should fund, on a going forward basis, the revenue deficiency created by the rate relief granted in the Commission's March 3, 2010 Order. This includes the amounts that are currently being deferred. In the event that the Commission determines to uphold its Order despite OCC's arguments, OCC urges the PUCO to clarify that its ruling does not preclude parties from conducting discovery into the marketing practices of FirstEnergy related to promoting the all-electric rates to its customers.

Additionally, in order to bring the PUCO's Order in compliance with the provisions of Title 49 of the Revised Code, the Commission should extend the rate relief ordered in its March 3, 2010 Order to the non-standard residential customers that include FirstEnergy's residential water heating customers¹⁶ and Ohio Edison's residential customers who have installed 80 gallon plus water heaters with peak load control devices (Original Sheet 10, solely under Special Provision section).

¹⁶ CEI's Residential Water Heating Customers (Original Sheet 12); TE's Residential Rate R-04 Water Heating Customers (Original Sheet 16); OE's Residential Water Heating Customers (Original Sheet 18).

Respectfully submitted,

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A handwritten signature in black ink, appearing to read "Maureen R. Grady", is written over a horizontal line.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the Office of the Ohio Consumers' Counsel's
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