

FILE

**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.)

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**MEMORANDUM CONTRA
FIRSTENERGY'S APPLICATION FOR REHEARING
BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL**

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The Office of the Ohio Consumers' Counsel ("OCC"), under Ohio Adm. Code 4901-1-35(B), files this Memorandum Contra FirstEnergy's Application for Rehearing on the Second Entry on Rehearing ("Order") issued by the Public Utilities Commission of Ohio ("PUCO" or "Commission") on April 15, 2010. FirstEnergy ("Companies") requests carrying charges on deferrals (to enable future charges to customers) and supports the Commission's refusal to expand the scope of its Staff's investigation to the practices and inducements of FirstEnergy in marketing electricity to consumers. FirstEnergy's application should be denied in order to protect consumers from funding excessive rates, though carrying charges. Additionally, the application should be denied in order to allow consumers the opportunity to be heard, *in this case*, on the marketing practices of FirstEnergy on all-electric rates. Doing so will enable the PUCO to determine the culpability of FirstEnergy, and factor such culpability into its decision on how to allocate the cost of the all-electric discounts.

I. FIRSTENERGY'S APPLICATION FOR REHEARING IS NOT TIMELY BECAUSE MORE THAN 30 DAYS HAVE PASSED SINCE THE PUCO ORDER THAT DID NOT PROVIDE FOR CARRYING CHARGES ON DEFERRALS.

On March 3, 2010, the PUCO issued a Finding and Order in this proceeding that authorized FirstEnergy, under R.C. 4905.13, to modify its accounting procedures. Under its Finding and Order discounts for all-electric customers were reinstated, in most respects. The Commission allowed FirstEnergy to defer the difference in rates collected under its Finding and Order and the rates and charges that would otherwise apply to service provided to all-electric customers.¹ Conspicuously absent from the Commission's March 3, 2010 Finding and Order, however, was any authorization for FirstEnergy to accrue carrying charges on the deferrals.

On April 2, 2010, FirstEnergy filed an application for rehearing and sought rehearing or clarification on two issues; but not on the Commission's failure to allow carrying charges. The Companies' Application for Rehearing sought clarification and/or rehearing on the language used by the Commission in authorizing the deferrals and on the applicability of rate relief for winter billing periods only.² No party to the case opposed this application for rehearing, and the PUCO issued a Third Entry on Rehearing on April 28, 2010 granting the Companies' Application for Rehearing.³

In response to the Commission's Second Entry on Rehearing, issued April 15, 2010, FirstEnergy seeks rehearing on the absence of carrying charges on the costs related

¹ *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 an Existing Rider*, Case No. 10-176-EL-ATA, Second Entry on Rehearing (April 15, 2010); Third Entry on Rehearing (April 28, 2010).

² FirstEnergy's Application for Rehearing (April 2, 2010).

³ Third Entry on Rehearing (April 28, 2010).

to providing the discount that was authorized.⁴ It has done so under the guise of complaining about the Commission expanding the scope of the discount and extending the discount beyond the next winter heating season, even though the Companies claim they are not challenging these issues.⁵

FirstEnergy's efforts to cure its procedural error should be rejected because they failed to comply with the law governing rehearing of Commission decisions, R.C. 4903.10. Under R.C. 4903.10, an application for rehearing must be "filed within thirty days after the entry of the order" that is the subject of the pleading. This statute is mandatory and jurisdictional. The PUCO has no jurisdiction to entertain an application for rehearing filed out of time.⁶

The Companies' Application for Rehearing filed on May 14, 2010 -- which addresses the carrying charge issue -- is not timely. If the Companies were uncertain of the PUCO's intention in this regard, they had the opportunity to seek rehearing of the Commission's order. FirstEnergy raises the carrying charge issue seventy-two days after the Second Entry on Rehearing that authorized deferrals without carrying charges. The Commission has no jurisdiction to hear FirstEnergy's Application for Rehearing on the lack of carrying charges, and must reject FirstEnergy's argument.

⁴ FirstEnergy's Application for Rehearing, Memorandum in Support at 1 (May 14, 2010).

⁵ FirstEnergy Application for Rehearing at 7-13 (May 14, 2010). Despite claiming they are not challenging these issues, the Companies argue that the PUCO failed to explain the reason for doing so, and claim that the expansion is contrary to prior PUCO orders including the RCP Order, the Distribution Rate Case Order, and the ESP Order.

⁶ *City of Dover v. Pub. Util. Comm.* (1933), 126 Ohio St. 438, 185 N.E. 833; *Greer v. Pub. Util. Comm.* (1961), 172 Ohio St. 361, 16 O.O.2d 214, 176 N.E.2d 416; *Pollitz v. Pub. Util. Comm.* (1918), 98 Ohio St. 445, 16 OLR 10, 121 N.E. 902.

II. THE COMMISSION DID NOT DEPART FROM CONTROLLING PRECEDENT WHEN IT DID NOT PROVIDE FOR CARRYING CHARGES ON THE DEFERRALS CREATED IN THE PUCO'S MARCH 3, 2010 ORDER.

If the PUCO determines that it retains jurisdiction to hear FirstEnergy's application for rehearing on the carrying charges -- a decision that would be at odds with Ohio law -- it must consider the unique facts in this case to determine whether to allow FirstEnergy to book carrying charges. The PUCO's decision will be important because carrying charges are not merely about accounting, as FirstEnergy's arguments would suggest. Rather carrying charges will affect the ultimate rates that FirstEnergy can be expected to seek to collect from Ohio customers.

Because the decision to allow carrying charges is a case by case determination, there can be no controlling precedent that presumes one particular outcome, despite the string of citations cited by FirstEnergy. For instance, FirstEnergy argues that the Commission authorized carrying charges for distribution deferrals in its ESP case⁷ and thus, that should control the PUCO's decision here. There, however, the PUCO permitted carrying charges on certain deferrals --distribution, line extensions, and transition taxes -- that are not at issue here.⁸ The Commission reviewed the deferrals and carrying charges in the context of an overall ESP filing, guided in part⁹ by the standard

⁷ FirstEnergy Application for Rehearing at 11.

⁸ FirstEnergy Application for Rehearing at 11-12, arguing that they are entitled to carrying charges because they received recovery of such charges in their ESP proceeding.

⁹ The PUCO also determined that each portion of the ESP was to be reviewed on an individual basis to determine if the provision complied with the policy mandates of R.C. 4928.02. See *In the Matter of the Application of Ohio Edison Company, the Cleveland Electric Illuminating Company and the Toledo Edison Company for Authority to Establish a Standard Service offer Pursuant to R.C. 4928.143 in the Form of an Electric Security Plan*, Case No. 08-935-EL-SSO, Opinion and Order at 8, 12 (December 19, 2008).

set forth in R.C. 4928.143(C)(1) regarding ESP filings. The ESP standard is that the Commission shall approve (or modify and approve) an ESP filing if it finds that the plan is more favorable in the aggregate than a standard service offer price set through a market rate offer. That analysis is not applicable here.

FirstEnergy also cites to a number of PUCO cases where carrying charges were permitted on deferrals.¹⁰ FirstEnergy fails to explain, however, the rationale for allowing carrying charges in those cases, and does not explain how those cases are necessarily controlling on a factual or legal basis. It fails to show that the authority it cites is controlling and that the Commission's denial of carrying charges in this case would be unlawful and unreasonable. Moreover, there is precedent for not permitting carrying charges on deferrals. The Commission has declined to allow carrying charges on deferrals in a number of cases.¹¹

Instead of looking only at the number of cases where carrying charges have been granted or denied, it is useful to seek out the general principles the PUCO has espoused in reviewing requests for deferral accounting and carrying charges. Where the Commission has approved deferred accounting (and carrying charges) in the past, it has generally done so to avoid the possibility of *significant* financial harm to the

¹⁰ See FirstEnergy Application for Rehearing at 10-11 (May 14, 2010).

¹¹ See, e.g., *In re CG&E Request to Modify Accounting Procedures Related to the Disconnection Moratorium*, Case No. 01-3229-EL-AAM, Entry (July 8, 2003) (where the PUCO allowed no carrying charges on deferrals of incremental electric residential past due accounts); *In re Columbia Gas Request to Change Accounting Methods*, Case No. 09-371-GA-AAM, Entry (July 8, 2009) (where no carrying costs were permitted on deferrals of pension costs and post retirement benefits).

utility.¹² Similarly, the Commission has found that where deferrals are not necessary to maintain a utility's financial integrity, they should be denied.¹³ Recently, the Commission denied deferrals where the deferrals would cause the rates customers pay to substantially increase.¹⁴

In the instant case, FirstEnergy alleges merely that failure to authorize carrying charges will harm the Companies. The Companies do not claim that denial of carrying costs, which they fail to identify by rate, substance, or amount, will impose a significant financial burden upon them.¹⁵ Nor do they claim that the carrying charges are necessary to maintain their financial integrity. Instead, the Companies claim this is a "matter of fundamental fairness." But "fundamental fairness" in this case should mean denying the carrying charges that FirstEnergy can be expected to use to increase electricity rates for customers in the future.

¹² See, e.g., *In re Investigation into the Financial Impact of FASB Statement No. 106, "Employers Accounting for Postretirement Benefits Other Than Pensions,"* Case No. 92-1751-AU-COI, Finding and Order at 19 (February 25, 1993); *Cincinnati Gas & Electric Company*, Case No. 92-946-EL-AAM, Entry at 1-2 (October 1, 1992); *Ohio Edison Company*, Case No. 84-188-EL-AAM, Entry at 1-2 (February 2, 1988); *Cleveland Electric Illuminating Company*, Case No. 87-109-EL-AAM et al, Entry at 2 (February 2, 1988); *Ohio Edison Company*, Case No. 87-985-EL-AAM et al, Entry at 2 (October 20, 1987).

¹³ See *Cincinnati Gas & Electric Co.*, Case No. 90-2017-EL-AAM, Entry (March 14, 1991).

¹⁴ See, e.g., *In re FirstEnergy's Request for Authority to Modify Certain Accounting Practices and for Tariff Approvals*, Case No. 07-1003-EL-ATA, Finding and Order 7-8 (January 9, 2008).

¹⁵ If a carrying cost is permitted, in order to minimize the costs that will likely be sought to be recovered from customers, it should be comprised of the following: Debt only, with no cost of equity, and no compounding of the carrying charge rate, on a net of tax basis. See FASB (Financial Accounting Standard Board) 92, which prohibits capitalization of the return on equity other than during construction or as part of a qualified phase-in plan.

III. THE COMMISSION SHOULD EXERT JURISDICTION IN THIS PROCEEDING AND DIRECT ITS STAFF TO INVESTIGATE THE BUSINESS AND MARKETING PRACTICES OF FIRSTENERGY IN THIS CASE RATHER THAN IN A SEPARATE COMPLAINT CASE AS REQUESTED BY FIRSTENERGY.

FirstEnergy argues that the PUCO Entry misstates the scope of the PUCO's jurisdiction.¹⁶ It argues that the PUCO wrongly determined that complaints by all-electric customers would involve contract rights. FirstEnergy appears to be arguing that the Commission is the appropriate forum for looking at its marketing practices, present case excluded. This was the approach FirstEnergy took in filing its motion to dismiss the complaint filed by a number of customers in Geauga County Common Pleas Court.¹⁷ FirstEnergy asserts that the Commission was correct in denying OCC's request to expand the scope of the Staff's investigation to the marketing practices of FirstEnergy. It appears instead that FirstEnergy would have its marketing practices reviewed if, and only if, a separate complaint case is filed by a person, firm, or corporation or upon the initiative or complaint of the Public Utilities Commission, as permitted under R.C. 4905.26. FirstEnergy apparently believes that the result of such a complaint has no bearing upon the issues presently facing the Commission.

The Companies are wrong. A complaint/investigation into the culpability of FirstEnergy is an integral part of the proceeding before the Commission where the Commission must determine who should fund the all-electric rate discounts. OCC urges the Commission to direct its Staff to undertake the investigation as a part of the current

¹⁶ FirstEnergy Application for Rehearing at 12-21.

¹⁷ See *DiFranco v. FirstEnergy Corp. et al.*, Case No. 10M000164, Motion to Dismiss (March 18, 2010).

proceeding. This would allow the Commission in one case to resolve related and fundamental issues that must be addressed, including determining who should fund the discount. The culpability of the Companies must be determined as part of fashioning a solution to funding the discount. Under the Companies' approach in their Application for Rehearing, it would not be.

Moreover, the Companies' approach –deferring this issue until a complaint is filed—is strewn with roadblocks for consumers who want to be heard on these issues. Filing a complaint at the PUCO takes time and resources, and puts the onus on the party filing the complaint, without the assistance of a full-time Staff devoted to investigating these issues. Separate treatment of FirstEnergy's marketing practices in a complaint case does not assure the timely resolution to the long-term treatment of all-electric rates that is needed, as reflected in the earliest Entry issued by the Commission in this case.¹⁸

OCC urges the Commission to contemporaneously initiate its own investigation into FirstEnergy's marketing practices if the PUCO grants rehearing to FirstEnergy on this issue and determines that the investigation of the marketing practices of FirstEnergy should be considered by the PUCO elsewhere. The PUCO has the power to do so under R.C. 4905.26 and other statutes within the Revised Code, including R.C. 4909.154 regarding the consideration of management policies and practices in connection with setting rates. Such an investigation could be pursued utilizing the numerous and far-reaching powers of the PUCO, as contained in provisions of R.C. Title 49. Such powers

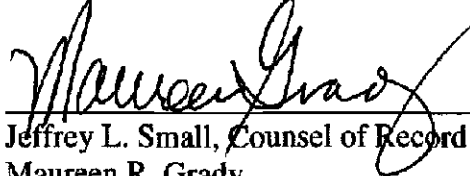
¹⁸ *In the Matter of the Application of Ohio Edison Company, the Cleveland Electric Illuminating Company, and the Toledo Edison Company for Approval of a New Rider and Revision of an Existing Rider*, Case No. 10-176-EL-ATA, Finding and Order at 4 (March 3, 2010), establishing a 90 day time frame for the Staff to complete its investigation and report the results.

are not necessarily powers held by other persons, firms, or corporations, and thus investigations by such parties can be more easily thwarted.

Wherefore, for the reasons espoused here, OCC urges the Commission to deny the Companies' application for rehearing, and instead alter its Order, consistent with the OCC's Application for Rehearing, filed on May 17, 2010.

Respectfully submitted,

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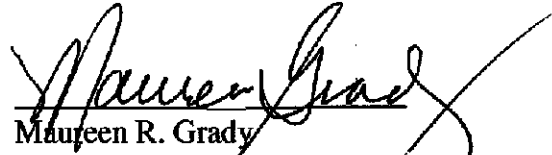


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CERTIFICATE OF SERVICE

I hereby certify that a copy of the Office of the Ohio Consumers' Counsel's Memorandum Contra FirstEnergy's Application for Rehearing was served upon the persons listed below via first class U.S. Mail, postage prepaid, this 24th day of May, 2010.


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