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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 Edison Company for Approval of a New Rider and Revision of an Existing Rider.	)))))))	Case No. 10-176-EL-ATA

MEMORANDUM OF OHIO EDISON COMPANY, THE CLEVELAND ELECTRIC ILLUMINATING COMPANY AND THE TOLEDO EDISON COMPANY CONTRA APPLICATIONS FOR REHEARING BY THE OFFICE OF THE OHIO CONSUMERS' COUNSEL AND INDUSTRIAL ENERGY USERS-OHIO

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I. INTRODUCTION

The Application for Rehearing previously filed by Ohio Edison, The Cleveland Electric Illuminating Company and The Toledo Edison Company (the "Companies") raised two issues: (1) the scope of the Commission's jurisdiction; and (2) the proper way to handle the issues raised by the Commission's expansion of the group that will receive all-electric discounts. OCC's Application for Rehearing asks the Commission to revisit essentially the same two issues, but as to each, OCC seeks to take an already untenable situation and make it worse.

As to the first, the Companies demonstrated in their Application for Rehearing that the Commission's Second Entry on Rehearing dated April 15 (the "April 15 Entry") improperly narrows the Commission's jurisdiction, an error that will cause ongoing confusion in Ohio's courts and before the Commission. OCC agrees that the Commission's jurisdiction covers allegations regarding the Companies' marketing practices, thereby confirming the need for Commission clarification on this jurisdictional issue.

Having identified the same jurisdictional problem in the April 15 Entry, though, OCC proposes a "solution" that only exacerbates the confusion that the entry creates. According to OCC, the Commission's exercise of jurisdiction "should not preclude parties from pursuing other avenues of inquiry into the Companies' marketing practices, including ... pursuing issues in court." OCC App. for Rehearing at 9.

OCC is wrong. The Commission, and ***only*** the Commission, has jurisdiction over the allegations here. As OCC admits, both statutes and administrative rules expressly provide the Commission with the authority to regulate utility marketing practices. That role, having been assigned by the General Assembly to the Commission, is not the province of the courts of common pleas.

OCC is likewise wrong to suggest that the Commission should take OCC's allegations into account in determining the Companies' recovery on the deferral amounts created in this case. OCC App. for Rehearing at 6-7. If there were anything to OCC's allegations as to the Companies' marketing practices (and there is not), the appropriate procedure for fashioning a remedy would be for a customer to file a complaint case before the Commission. Tinkering with rates in this case is not a permissible substitute. Indeed, what OCC suggests is to set rates going forward based on alleged past wrongs. To state this argument demonstrates its weakness.

Because this case is not the place to entertain allegations about improper marketing practices (and, in any event, those allegations are wrong on the merits), the Commission was correct to find that an investigation was not warranted. Moreover, as the allegations are not relevant to any issue here, the discovery that OCC suggests should be permitted into those allegations is neither warranted nor appropriate in this proceeding. But, it is vital that the Commission make clear that the appropriate forum to pursue such allegations is in a complaint case before the Commission, not in a court of common pleas.

OCC's proposed treatment of the second issue similarly is wrong. The Commission's April 15 Entry expanded the group of customers who will receive the all-electric credit under Rider RGC to include customers who had never received "all-electric" rates in the first place.[1]

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[1] For purpose of this Memorandum, "all-electric customers" refers to customers who took service under the "all-electric" rate schedules specified in FirstEnergy's application in this proceeding including: (1) Ohio Edison customers who took service as of January 22, 2009 under any of the following rates—Residential Space Heating Rate (Original Sheet 11), Residential Optional Time-of-Day (Original Sheet 12), Residential Optional Controled Service Rider (Original Sheet 14), Residential Load Management Rate (Original Sheet 17), and Residential Optional Electrically Heated Apartment Rate (Original Sheet 19), and (2) Cleveland Electric Illuminating Company customers taking service as of April 30, 2009 under any of the following rates—Optional Load Management Rate (Original Sheet 10); Residential Add-On Heat Pump (Original Sheet 11); Residential Space Heating (Original Sheet 13); Residential Water Heating and Space Heating (Original Sheet 14) and Optional Electrically Heated Residential Apartment Schedule (Original Sheet 15). "All-electric customers" also refers to those additional customers who the Commission determined could be eligible to receive discounts under Rider RGC in the Commission's April 15, 2010 Entry including: (1) any subsequent customer at the same service address as any Ohio Edison or Cleveland Electric Illuminating Company customer who fell into one of the rate categories listed above; or (2) Toledo Edison customers who took service as of January 1, 2007, or any subsequent customer at the same address, under any of the

OCC now demands that the Commission expand the group yet further to include "Residential Water Heating Customers."[2] OCC App. for Rehearing at 10. According to OCC, failing to provide this group with the same credits as all-electric customers results in unlawful "discriminatory rates." *Id.*

OCC's argument makes no sense. Residential water heating customers have long had different rates from all-electric customers. Moreover, the reason for Rider RGC rate relief in the first place was to address the large bill impacts felt by all-electric customers. Residential water heater customers use far less electricity than all-electric customers (who heat their entire homes with electricity). Thus, those customers saw little if any increase in their bills during the winter of 2010 compared to December 2008, and therefore the same basis for rate relief simply does not exist.

There is no reason to further extend additional rate credits to water heating customers in this case. If the Commission elects to do so, though, at the very least the Companies urge the Commission to authorize deferral of incurred costs equivalent to the amount of the credits and to grant carrying charges on such deferred amount.[3] For the same reasons that the Companies

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following rates—Residential Rate "R-02" (Original Sheet 11), Residential Rate "R-06" (Original Sheet 13), Residential Rate "R-06a" (Original Sheet 14), Residential Rate "R-07" (Original Sheet 17), Residential Rate "R-07a" (Original Sheet 18, Residential Rate "R-09" (Original Sheet 19), and Residential Rate "R-09a" (Original Sheet 20).

[2] More specifically, OCC's Application for Rehearing seeks to expand the group receiving the credit under Rider RGC to include: "CEI's Residential Water Heating Customers (Original Sheet 12); TE's Residential Rate R-04 Water Hearing 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)." OCC App. for Rehearing at 10.

[3] IEU's Application for Rehearing correctly notes that the Commission's April 15 Entry unilaterally expanded the rate relief under Rider RGC to an entire new class of customers (the "successor customers"), and that the Commission offered no reasons for undertaking this unilateral expansion. While the Companies did not specifically challenge the Commission's expansion of the group receiving rate relief through the April 15 Order, IEU is correct that expanding the pool of customers who receive this rate relief creates larger deferrals (and carrying charges), which in turn raise questions about who will ultimately bear responsibility for payment of these deferred

stated in their Application for Rehearing, only through a deferral and carrying charges do the Companies receive appropriate cost recovery of these deferred amounts.

II. ARGUMENT

A. Although OCC Is Correct That The Commission Has Jurisdiction Over Allegations Regarding Improper Marketing Practices, OCC Is Wrong In Failing To Recognize That The Commission's Jurisdiction Is Exclusive, And That The Appropriate Vehicle To Address Such Claims Is Not This Proceeding.

1. Ohio Law Provides The Commission With Jurisdiction Over Allegations Regarding The Companies' Marketing Practices.

The Companies and OCC agree that the Commission erred in its description of the Commission's jurisdiction in the April 15 Entry. That Entry asserted that "adjudication of any alleged agreements, promises or inducements made by Companies outside the express terms of the tariffs, as alleged by OCC, is best suited for a court of general jurisdiction rather than the Commission." Second Entry on Rehearing dated April 15, 2010 at 3. As OCC's Application for Rehearing notes, however, the Ohio Revised Code and the Ohio Administrative Code (the same statutes and rules that the Companies cited in their application for rehearing) place responsibility for adjudicating allegations such as those OCC made here squarely with the Commission.

As demonstrated by the Companies' Application for Rehearing, the Commission's jurisdiction is not limited to "the express terms of the tariffs." Companies' App. for Rehearing at 13. Rather, the Commission "has exclusive jurisdiction over ***various matters*** involving public utilities." *Id.* citing *State ex rel. Cleveland Elec. Illuminating Co. v. Cuyahoga Cty. Court of Common Pleas* (2002), 97 Ohio St. 3d 69, 72. This includes, as OCC's application notes, jurisdiction over a utility's marketing activities. In that regard, OCC is correct that R.C.

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costs. The concerns that IEU raises are legitimate, and they provide yet additional reasons to decline the additional expansion of rate relief that OCC proposes in its Application for Rehearing.

4928.02(I) and Ohio Admin. Code 4901:1-10-24(D) "place the responsibility for protecting consumers against a public utility's unfair marketing practices with the PUCO." OCC App. for Rehearing at 9. *See also*, OAC 4901:1-10-24(D) ("No electric utility shall commit an unfair or deceptive act or practice in connection with the promotion or provision of service, including an omission of material information."). The Commission's description of its jurisdiction in the April 15 Entry is erroneously narrow, and OCC is right that the Commission should correct that error.

2. OCC Is Wrong To Suggest That The Commission's Jurisdiction Is Not Exclusive And That The Commission Can Take Allegedly Improper Marketing Practice Claims Into Account In Setting Rates In This Proceeding.

The OCC is wrong to suggest that: (1) the Commission's jurisdiction over such allegations "should not preclude other parties from pursuing other avenues of inquiry into the Companies' marketing practices, including ... pursuing the issues in court," OCC App. for Rehearing at 9; and (2) the Commission can somehow rely on allegations that a utility has engaged in improper marketing practices as a basis for reducing the utility's rates, *id.* at 6-7.

As the Ohio Supreme Court has noted, the General Assembly has charged the PUCO with "regulat[ing] the business activities of public utilities." *Corrigan v. Illuminating Co.* (2009), 122 Ohio St.3d 265, 266. To that end, "the PUCO shall hear complaints filed against public utilities alleging that 'any rate, fare, charge, toll, rental, schedule, classification or service rendered, ... or that any regulation, measurement, ***or practice affecting or relating to any service furnished by the public utility, or in connection with such service,*** is, or will be, in any respect unreasonable, unjust, insufficient, unjustly discriminatory or unjustly preferential." *Id.* at 267 (quoting R.C. 4905.26) (emphasis added). Importantly, the Court has also explained that this jurisdiction "'is so complete, comprehensive and adequate as to warrant the conclusion that it is

likewise ***exclusive.***'" *Id.* (quoting *State ex rel. N. Ohio Tel. Co. v. Winter* (1970), 23 Ohio St. 2d 6, 9, in turn quoting *State ex rel. Ohio Bell Tel. Co. v. Cuyahoga Cty. Court of Common Pleas* (1934), 128 Ohio St. 553, 557) (emphasis added).

The only exceptions to the Commission's exclusive authority over utility regulation are so-called "pure contract" or "pure tort" actions. Such actions are those where the contract or tort that is claimed is "one having nothing to do with the utility's service or rates ...," *Hull v. Columbia Gas of Ohio* (2004), 110 Ohio St. 3d 96, 102, or otherwise "do[es] not require a consideration of the statutes and regulations administered and enforced by the commission," *State ex rel. The Illuminating Co. v. Cuyahoga Cty. Court of Common Pleas* (2002), 97 Ohio St. 3d 69, 74. Here, the allegations are that the Companies misled customers into taking service by promising a certain rate. Such allegations can hardly be characterized as "having nothing to do with the utility's service or rates." And, as noted above, the "statutes and regulations administered and enforced by the commission" expressly cover a utility's marketing practices.

In fact, OCC essentially admits that its allegations do not involve "pure contract" or "pure tort" claims. If the claims were "pure contract" or "pure tort" claims, the Commission would not have jurisdiction to consider them ***at all.*** *See, e.g., Kazmaier Supermarket, Inc. v. Toledo Edison Co.* (1991), 61 Ohio St. 3d 147, 154 ("The commission itself has recognized limitations upon its jurisdiction to consider and determine pure contract claims not involving tariffs."). If the Commission has jurisdiction here, as OCC correctly argues that it does, that jurisdiction is necessarily "'so complete, comprehensive and adequate as to warrant the conclusion that it is likewise exclusive.'" *Corrigan*, 122 Ohio St.3d at 267. Thus, OCC's admission that the Commission has jurisdiction over the allegations here precludes it from

arguing that plaintiffs should be free simultaneously to "pursu[e] the issues in court." OCC App. for Rehearing at 9.

Nor is OCC correct to claim that the Commission can consider these allegations in the context of setting the Companies' rates, including in this proceeding. According to OCC, "[i]f the investigation turns up evidence that the Companies did make agreements, promises, or inducements ...," that information should be taken into account "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." OCC App. for Rehearing at 7. That view represents a fundamental misunderstanding of ratemaking. Nowhere do the Ohio statutes provide that evidence relating to claims of unjust marketing practices may be used as a basis to disallow recovery of costs in setting rates. Thus, not surprisingly, neither in OCC's application for rehearing, nor in its memorandum contra to the Companies' application for rehearing, does OCC cite to a single statute, Commission decision or court case even suggesting that the Commission can do so.

What's more, failing to provide a ratemaking remedy in this proceeding for alleged breached promises does not mean, as OCC claims, that "customers will be deprived of any forum to be heard on these issues." OCC App. for Rehearing at 7, n. 14. Rather, the correct proceeding to hear and resolve such allegations is a complaint proceeding before the Commission under R.C. 4905.26. That statute provides the Commission authority over any claim that a utility has acted unjustly or unreasonably "in connection with" its services. The allegations here fall within that definition. If the Commission finds that the Companies have violated their obligations with regard to marketing practices (which the Companies did not), the Commission would then have full remedial authority, including the power to "order rescission of

a contract, or restitution to customers." R.C. 4928.16. But nowhere in the Revised Code is there any suggestion that such a finding would be an appropriate consideration in determining the Companies' rates on a going-forward basis.

Notwithstanding OCC's protests to the contrary, its proposed investigation and remedy are a non sequitur. OCC seeks to revise rates going forward based on alleged conduct that supposedly took place as long as thirty years ago or more. OCC does not dispute that: (1) at all times, the Companies charged only those rates authorized by the Commission; and (2) the discounts authorized by the Commission in this proceeding will cause the Companies to receive less than their authorized revenues. Consequently, there is little doubt, based on Commission precedent, that the Companies should be authorized: (1) to establish now and going forward deferrals of costs in an amount equivalent to the amount of the credits, including carrying charges thereon; and (2) to recover at some point those deferrals and accrued carrying charges.

If certain customers believe that they had an agreement for a particular rate and that the Companies inappropriately charged a different rate, then those claims should be resolved by the Commission in a complaint proceeding brought by those customers. The proceedings here, however, do not provide an appropriate forum for further consideration of such claims.

B. The Commission Should Not Further Expand The Rate Relief To Include Residential Water Heating Customers.

1. It Is Not Unlawfully Discriminatory To Treat Different Groups of Customers Differently, And Residential Water Heating Customers Appropriately Have Long Been Treated Differently.

OCC also seeks to expand the availability of the rate relief contemplated in the Commission's Orders in this case. In particular, OCC now claims that residential water heating customers should be eligible to receive credits under Rider RGC. OCC further claims that the failure to extend such rate relief to this group is unlawfully discriminatory. Contrary to OCC's

claims, it is perfectly lawful to limit the ordered rate relief to all-electric customers; extending it to residential water heating customers would be inappropriate.

The statutes that OCC cites in support of its discrimination claim—R.C. 4905.22, 4905.33 and 4905.35—do not require absolute uniformity of rates among customers in different rate classifications. As the Ohio Supreme Court explained in recently rejecting an OCC claim of unlawfully discriminatory rates: "R.C. 4905.33 does not prohibit rate discrimination *per se*; rather it prohibits charging different rates when the utility is performing ... a like and contemporaneous service under substantially the same circumstances and conditions." *Ohio Consumers Counsel v. Public Utilities Commission of Ohio* (2006), 109 Ohio St.3d 328, 336. Similarly, R.C. 4905.35 prohibits only "***unreasonable*** prejudice or disadvantage." *Id.* (emphasis added). In short, "[t]he statutes do not require uniformity in utility prices and rates." *Id.* Revised Code section 4905.22, meanwhile, merely requires charges to be "just" and "reasonable" and does not in any way expand the non-discrimination requirements in R.C. 4905.33 and .35.

Different rate treatments for different rate classifications are proper when there is a "real difference" with a "reasonable basis" between two groups of customers. *See Weiss v. Public Utilities Commission of Ohio* (2000), 90 Ohio St. 3d 15, 18. And, in deciding whether such differences exist, "[d]ue deference should be given to statutory interpretations by an agency that has accumulated substantial expertise and to which the General Assembly has delegated enforcement authority." *Id.* at 17.

Here, the Commission has long recognized that there are substantial differences between residential water heating customers and all-electric customers. The Commission has authorized separate rates for residential water heating customers for Ohio Edison Company for at least

several decades. During that time, the Commission has never suggested that the discounts reflected in these different tariffs must be equal.

Nor would there have been any reason to do so. There are "real differences" with a "reasonable basis" between residential water heating customers and all-electric customers, particularly with regard to the rate relief at issue here. Residential water heating customers use electricity to heat their water, ***not*** to heat their homes. All-electric customers, by contrast, use electricity to heat their homes. As a result, all-electric customers typically use substantially more electricity at different times using different equipment than the residential water heating customers do. Accordingly, all-electric usage patterns are different and the magnitude of the bill increases that some all-electric customers faced was correspondingly significantly greater than the magnitude of the bill increases that the residential water heating customers typically experienced.

The rate relief that the Commission ordered through Rider RGC was premised on the magnitude of the bill increases that the all-electric customers had experienced. As a result, the difference in usage (and thus bill impacts), as well as the differences in equipment involved (electric water heating vs. electric space heating) and usage patterns, are perfectly reasonable bases for distinguishing between the all-electric customers and the residential water heating customers.

As Industrial Energy Users-Ohio notes in its application for rehearing, any expansion of the customer group receiving rate relief increases the "potential consequences for FirstEnergy's other customers," who will bear the burden of providing recovery for the deferred amounts. *See* IEU App. for Rehearing at 7. There is no reason to exacerbate that problem by expanding rate

relief to yet another group, a group that, as noted above, has been treated differently under Commission precedent for decades.

2. At The Very Least, If The Commission Further Extends The Rate Relief Under The April 15 Entry To Include Residential Water Heating Customers, The Commission Should Allow The Companies Carrying Charges On The Resulting Deferrals.

If the Commission determines that it will keep in place the expansion of rate relief from the April 15 Entry, or even expand that relief still further to include yet another new class of customers as OCC now requests, the Commission should allow the Companies carrying charges on the resulting deferrals. Under the April 15 Entry, the Commission dramatically expanded the rate relief in this proceeding in two regards. First, that Entry extended the credits to "successor customers" (i.e., customers who are a successor account to a customer who previously qualified for all-electric rates) and second, it increased indefinitely, both as to the successor customers and as to customers who had received rate relief under the March 3rd Finding and Order, the period of time during which the credits will be in place. The Commission failed in the April 15 Entry, however, to authorize carrying charges for the greatly-increased deferrals that will result from both of those expansions. The Companies are challenging that omission in their Application for Rehearing. If the Commission now accedes to OCC's request to extend the rate relief to yet an ***additional*** class of customers, that will increase still further the size of the deferrals. As the Companies explained in their Application for Rehearing, however, a deferral, without carrying charges, does not offer the Companies appropriate recovery of the deferred amount.

Carrying charges represent the cost imposed on a utility by the delay between when costs are incurred and when those costs are recovered. Given that the Commission has now determined that the interim rate relief will be of much longer duration than originally contemplated in the March 3rd Finding and Order, as well as the fact that further expansion of the

groups receiving rate relief means that the deferrals themselves accrue at a much greater rate than originally contemplated, the harm imposed on the Companies by a lack of carrying charges will be substantial, and such harm arises directly from the April 15th Second Entry on Rehearing. That harm would only increase if the Commission were to grant OCC's request to add yet more customers, without also providing carrying charges

The Commission routinely authorizes carrying charges for deferred amounts. *See* Companies' App. for Rehearing at 10-11 (citing cases). Moreover, the Commission consistently has approved carrying charges on deferred costs in all of the Companies' recent cases including, e.g., Case Nos. 08-935-EL-SSO, 09-641-EL-ATA, and 09-642-EL-ATA. While, for the reasons discussed above, the better approach would be to deny expansion of rate relief to the residential water heating customers at all, at the very least, if the Commission grants the additional expansion, it should provide authorization for carrying charges to accompany the deferrals that will arise.

III. CONCLUSION

For the foregoing reasons, the Commission should deny OCC's Application for Rehearing. Although the Commission should clarify that it has jurisdiction over OCC's allegations, the Commission should determine that such allegations should not be heard in this case. The Commission should reject OCC's attempt to expand Rider RGC to residential water heating customers.

May 27, 2010

Respectfully submitted,

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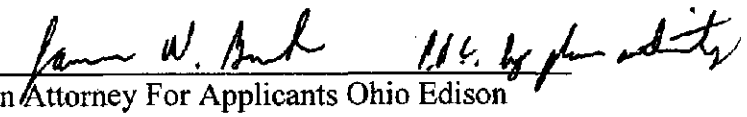
CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Memoranda Contra Applications for Rehearing was delivered to the following persons by first class mail, postage prepaid, and e-mail this 27th day of May, 2010:



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