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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 MOTION TO COMPEL RESPONSES TO DISCOVERY BY THE OFFICE OF THE OHIO CONSUMERS' COUNSEL

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I. INTRODUCTION

On February 12, 2010, Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company (collectively "Companies") initiated this case by filing an Application for approval of a new bill credit for all-electric customers. On March 3, 2010, the Commission authorized the Companies to implement a new credit rider reducing bills for certain all-electric customers and ordered Staff to examine "long-term" options for all-electric rates. *See* Mar. 3, 2010 Finding and Order ("March 3 Order"), ¶ 10. The Companies filed new all-electric tariffs on March 17, 2010, consistent with the March 3 Order. Since that time, Staff and the parties have focused on the forward-looking "long-term" issues raised by the Commission.

Throughout this case, however, the Office of Consumers' Counsel ("OCC") has fixated on a wholly unrelated matter. Specifically, OCC has attempted repeatedly and improperly to inject into this proceeding allegations regarding the Companies' past marketing of all-electric homes. (*See* Request for Clarification and, in the Alternative, App. for Reh'g dated Mar. 8, 2010, pp. 6-8; Mot. for Declaration of an Emergency, *et al.*, dated Feb. 25, 2010, pp. 12-13.) Those allegations, some of which relate to rates that have been in place for 30 years, have nothing to do with the instant rate-setting proceeding. (*See* pp. 3-8, *infra.*) Accordingly, the Commission has flatly held that such allegations are not properly heard in this matter. *See* Apr. 15, 2010 Entry ("Apr. 15 Entry"), ¶ 9.

Undeterred (and in plain defiance of the April 15 Entry), OCC continues to press these irrelevant allegations. On June 1, 2010, OCC propounded revised discovery requests that relate solely to the Companies' alleged past marketing of all-electric rates. (*See* Mot., Attachments 9-12; *see* pp. 2-3, *infra.*) In those requests, OCC seeks identification of Company employees responsible for communicating with customers regarding all-electric rates, as well as all related

marketing documents generated throughout the 30-year history of those rates. (*See id.*) After the Companies objected to those requests, OCC filed this Motion to Compel. (*See* Mot., pp. 6-7.)

The Commission should reject OCC's attempted end-around the April 15 Entry; the Commission should deny OCC's Motion. As demonstrated below, the purpose of this case is to address all-electric discounts going forward, not to investigate allegations of past conduct. Although the Commission has jurisdiction over complaints that have been (or may be) raised separately by all-electric customers, it should not deal with allegations contained in those complaints (or allow discovery regarding those complaints) in this proceeding, as doing so would only serve to bog down this proceeding and undermine the effort to reach a long-term solution. Moreover, OCC's argument regarding the relevance of its requests fundamentally misconstrues the purpose of the rate-setting principles at issue here. Because OCC's discovery requests are irrelevant and unduly burdensome, the Commission should find that the Companies need not respond to them, and that such issues remain beyond the scope of this proceeding.

II. ARGUMENT

All of the discovery requests at issue pertain to OCC's allegations regarding the Companies' past marketing of all-electric rates:

- Interrogatory 39 seeks identification of Company employees "responsible for the development and/or approval of the advertisements or other documents that promoted all electric rates;
- Request for Production 21 seeks "copies of all advertising" used to promote all electric rates;
- Interrogatory 40 seeks identification of Company employees "responsible for the development and/or approval of agreements, promises, warranties, covenants, representations or inducements made to your customers to incent them to purchase all electric homes or install electric water heaters, or participate in load management activities";
- Request for Production 18 seeks copies of "advertisements, agreements, promises, covenants, representations, or inducements related to incent customers to

purchase all electric rate homes, install load management devices, or install electric water heaters";

- Interrogatory 42 seeks identification of Company employees "responsible for the development and/or approval of agreements, promises, warranties, covenants, representations or inducements made to builders to incent them to build all electric homes"; and

- Request for Production 19 seeks copies of "advertisements, agreements, promises, covenants, representations, or inducements related to incent builders to build all electric rate homes."

According to OCC, this information is relevant here because the Companies' "culpability" (whatever that means) in marketing all-electric rates should be considered in allocating the burden of the revenue deficiency resulting from the newly established all-electric rates. (Mot., pp. 12-14.) But past marketing practices from years ago do not constitute a basis to force the Companies to currently absorb all or part of a credit provided to all-electric customers as ordered by the Commission, thereby denying the Companies the opportunity to recover prudently incurred purchased power costs arising from a Commission-approved competitive bidding process.

As set forth below, this argument fails, and OCC's Motion to Compel should be denied.

A. OCC's Discovery Requests Seek Information And Documents That Are Irrelevant In This Proceeding.

1. The Commission already has decided that allegations regarding alleged marketing activities are not at issue in this case.

The purpose of this case is threefold: (i) to address the effects of changes to the Companies' former all-electric rates (accomplished through the use of short-term discounts or residential generation credits); (ii) to address the amount, scope and duration of all-electric discounts or credits going forward.; and (iii) to implement recovery from customers of the Commission-authorized deferral amounts arising from the institution of the credits, as ordered by the Commission. *See* Mar. 3 Order, ¶ 12 (ordering Staff to file a report regarding "long-term

rates" in this case). This proceeding thus entails a traditional rate-setting analysis, including an examination of bill impacts at various ranges of consumption and the allocation of the Companies' all-electric rate revenue requirement among customer classes and rate schedules. *See id.*

OCC's discovery requests have nothing to do with all-electric discounts going forward or a rate-setting analysis. Rather, as described above, those requests seek information or documents relating to the Companies' alleged past marketing activities from long ago. (*See* pp. 2-3, *supra.*) But the Companies' alleged ***past*** conduct is not at issue here. This case addresses and seeks a long-term solution for ***future*** all-electric (and other) discounts or credits. Indeed, this is not OCC's first attempt to shoehorn these allegations into this case. In February 2010, OCC first requested that the Commission investigate the Companies' marketing activities regarding all-electric rates. (*See* Mot. for Declaration of an Emergency, *et al.*, dated Feb. 25, 2010, pp. 12-13.) In March 2010, it repeated that request. (*See* OCC Request for Clarification and, In the Alternative, App. for Reh'g dated Mar. 8, 2010, pp. 6-8.) In its April 15 Entry, the Commission flatly rejected OCC's proposed investigation. *See* Apr. 15 Entry, ¶ 9. Given that conclusion, OCC's allegations involving the Companies' past marketing practices simply are not before the Commission, and OCC's discovery requests are not relevant to any issue in this proceeding. *See In re App. of Buckeye Wind LLC for a Certificate to Construct Wind-powered Elec. Generation Facilities in Champaign Cty., Ohio*, No. 08-666-EL-BGN, Entry dated Oct. 30, 2009, ¶ 11 (denying motion to compel discovery regarding wind turbines not at issue in proceeding); *In re App. of Middletown Coke Co. for a Certificate of Environmental Compatibility and Public Need to Build a Cogeneration Facility*, No. 08-281-EL-BGN, Entry dated Nov. 4, 2008, ¶ 6 (denying motion to compel discovery regarding a particular facility, where Commission lacked

jurisdiction and issues relating to facility thus were beyond scope of the proceeding); *Metricom, Inc. v. Ohio Edison Co.*, No. 01-431-EL-CSS, Entry dated May 30, 2001, ¶¶ 4-5 (denying motion to compel discovery of pricing information deemed "not relevant" to case); *In re App. of Cincinnati Bell Tele. Co. for Approval of an Alternative Form of Regulation and for a Threshold Increase in Rates*, No. 96-899-TP-ALT, Entry dated Dec. 5, 1997, ¶¶ 2-4 (denying motion to compel cost studies that would not "provide a basis for developing relevant evidence in [the] proceeding").

Notwithstanding the Commission's April 15 Entry, OCC contends that the Companies should be forced to answer its discovery requests because the "Commission's resolution of this issue is not complete." (Mot., p. 11.) OCC correctly observes that both it and the Companies have sought rehearing of the April 15 Entry, and that the Commission is continuing to consider the parties' rehearing arguments. *See* Fourth Entry on Reh'g dated June 9, 2010, ¶ 9 (finding sufficient reason for "further consideration" of parties' applications for rehearing). However, the Commission has not indicated how (if at all) it will modify its April 15 Entry or its decision regarding the investigation requested by OCC. *See id.* Unless it does, discovery in this case must proceed according to the Commission's April 15 Entry, which established that allegations regarding past marketing activities are beyond the scope of this proceeding. Given this, it is reasonable for the Companies to await further guidance from the Commission before responding to OCC's requests (which as described below require examination of Company records dating back to the 1970s). (*See* pp. 8-9, *infra.*)

On rehearing, there is good reason for the Commission to reaffirm that OCC's allegations are irrelevant and beyond the scope of this proceeding. As described above, the purpose of this case is to address future all-electric discounts or credits and to determine how the recovery of the

deferrals arising from the cost of such discounts or credits should be allocated across customer classes. (*See* pp. 3-4, *supra.*) As such, the Commission (and the parties) should focus on identifying the best long-term solution for all stakeholders, not on litigating the existence of alleged marketing activities dating back over 30 years.

As set forth in the Companies' Application for Rehearing, the Commission's jurisdiction extends to a broad array of rate-related matters and utilities' marketing and advertising activities. *See State ex rel. Cleveland Elec. Illuminating Co. v. Cuyahoga Cty. Court of Common Pleas* (2000), 88 Ohio St. 3d 447, 450 ("There is perhaps no field of business subject to greater scrutiny and government control than that of the public utility. This is particularly true of the rates of a public utility.") (citations omitted); Rule 4901:1-10-24(D), Ohio Administrative Code (prohibiting deceptive practices "in connection with the promotion . . . of service"); *see also* App. for Reh'g of Ohio Edison Co., *et al.*, dated May 14, 2010, pp. 13-15. Allegations regarding the Companies' past marketing of all-electric rates fall squarely within this jurisdiction, and the Commission is empowered to investigate those allegations, either upon complaint of individual customers or others, and to order appropriate remedies based on its findings. *See* App. for Reh'g of Ohio Edison Co., *et al.*, dated May 14, 2010, pp. 15-21. The Commission thus should grant rehearing of its April 15 Entry to conclude that it has jurisdiction regarding all-electric matters. *See id.* But because the Commission has correctly decided not to take evidence regarding those allegations in the instant proceeding, OCC's discovery requests are beyond the scope of this case and are irrelevant.

2. The principle of cost causation has nothing to do with the Companies' marketing practices.

In an attempt to overcome the clear effect of the Commission's April 15 Entry, OCC argues that, according to "cost causation principles," the Commission may allocate to the

Companies the revenue shortfall arising from the new all-electric rates, and that its allegations of past conduct thus are relevant here. (Mot., pp. 13-14.) Because this argument fundamentally misconstrues the cost causation analysis, the Commission should reject it.

According to the principle of cost causation, a utility's rates for a particular class of customers should reflect the cost of serving those customers. Thus, costs are attributed to the customers who "cause" them by taking service from the utility. *See* R.C. 4909.151 (authorizing Commission to "consider the costs attributable to . . . service" in the rate-making process); *In re App. of The East Ohio Gas Co. for Authority to Increase Rates for its Gas Distribution Serv.*, Nos. 07-829-GA-AIR, *et al.*, Op. and Order dated Oct. 15, 2008, p. 25 ("The foundation of rate design is that each customer bears his or her proportionate share of the costs for providing the utility services."); *In re App. of Ohio Edison Co., et al., for Authority to Increase Rates for Distribution Serv.*, Nos. 07-551-EL-AIR, *et al.*, Op. and Order dated Jan. 21, 2009, pp. 24-25 (approving cost-of-service study that reasonably allocated distribution-related costs and corresponding revenue responsibility to various customer classes); *see also Myers v. Pub. Util. Comm.* (1992), 64 Ohio St. 3d 299, 302 (approving of rate differential between two types of customers, where costs to serve customers was different, and where rates properly reflected "cost-causation considerations"); *Townships of Mahoning Cty. v. Pub. Util. Comm.* (1979), 58 Ohio St. 2d 40, 49 (remanding rate proceeding for additional consideration of "reasonable costs of serving comparable [geographic] areas").

Notably, where a certain class of customers receives discounts or credits, such reduced rates typically do not reflect cost of service to those customers. That is the case here. Indeed, the whole purpose of this proceeding was to deal with the impact of moving towards rates that more accurately reflected the cost of service to these customers. To be sure, mitigating rate

increases is a legitimate and well-recognized rate-setting policy. But this case, has little, if anything, to do with cost causation. For OCC to contend otherwise flies in the face of reality.

Further, OCC suggests that the costs associated with all-electric rates can be attributed to the Companies. But that argument turns "cost causation" on its head. The purpose of cost causation is to allow a utility to recover the cost of providing service from the entities that receive the service: ***the utility's customers***. Contrary to OCC's suggestion, cost causation has nothing to do with attributing costs ***to the utility***. A utility does not itself "cause" the costs of service. Rather, a utility incurs costs by serving customers, and under cost causation, customers are responsible for paying those costs. Thus, the Companies' alleged "culpability" is irrelevant to cost causation—the Companies do not "cause" costs to be incurred, and therefore under that principle they cannot be responsible for costs-of-service associated with all-electric discounts or credits. OCC's cost-causation argument provides no basis for the relevance of its discovery requests.[1]

B. OCC's Requests Are Unduly Burdensome.

The Commission also should sustain the Companies' objection that OCC's discovery requests are unduly burdensome. (*See* Mot., Attachments 9-12.) The Companies' all-electric

[1] Nor are OCC's discovery requests relevant according to the other rate design principles it cites. (*See* Mot., p. 13 n.37.) Gradualism (and the related concern with rate shock) requires the Commission to consider possible bill impacts in weighing proposed allocations of costs among customers—it does not, however, mean that utilities themselves must "make up the difference" if bills are too high. *See In re App. of The East Ohio Gas Co. for Authority to Increase Rates for its Gas Distribution Serv.*, Nos. 07-829-GA-AIR, *et al.*, Op. and Order dated Oct. 15, 2008, p. 25 (holding that before applying "strict cost causation," Commission should consider whether proposed rate design can be "implemented without rate shock"). Similarly, the Commission applies "equitable principles of cost allocation" only to allocate costs ***among customers***. *See In re App. of Eastern Natural Gas Co. for Approval of an Alternative Rate Plan Proposing a Revenue Decoupling Mechanism*, Nos. 08-940-GA-ALT, *et al.*, Op. and Order dated June 16, 2010, p. 15 (approving rate design that provided "more equitable cost allocations ***among customers***") (emphasis added); *In re App. of Vectren Energy Delivery of Ohio, Inc. for Authority to Amend its Filed Tariffs to Increase the Rates and Charges for Gas Services and Related Matters*, Nos. 07-1080-GA-AIR, *et al.*, Op. and Order dated Jan. 7, 2009, p. 13 ("We also find that the levelized rate design promotes the regulatory principle of providing a more equitable cost allocation ***among customers***, regardless of usage.") (emphasis added); *In re App. of Columbia Gas of Ohio, Inc. for Authority to Amend Filed Tariffs to Increase the Rates and Charges for Gas Distribution Service*, Nos. 08-72-GA-AIR, *et al.*, Op. and Order dated Dec. 3, 2008, p. 16 (finding that rate design "provides a more equitable cost allocation ***among customers*** regardless of usage") (emphasis added).

rates have a long history before the Commission, which first approved an all-electric rate tariff for The Cleveland Electric Illuminating Company in November 1973 and approved additional such tariffs for the Companies throughout the 1970s, 1980s and 1990s. (*See* Companies' App. for Reh'g dated May 14, 2010, pp. 2-3.) All told, the Companies offered all-electric rates for over 30 years, and during that time, perhaps dozens of the Companies' current and former employees have been involved in administering and marketing them.

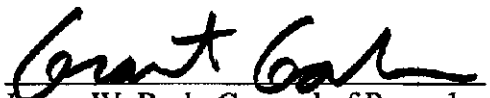
OCC's discovery requests impose an undue burden on the Companies. For example, OCC seeks identification of any Company employee "responsible for" any "promise" or "representation" regarding all-electric rates to any customer or all-electric home builder over the past 30 years. (*See* Interrog. 39, 40, 42.) This request encompasses virtually any current or former FirstEnergy employee who discussed all-electric rates with any customer at any time during the 30-year history of those rates. Moreover, OCC requests copies of all "advertising," "promises" and "representations" regarding all-electric rates, without limitation as to time. OCC thus purports to require the Companies to search 30 years' worth of files to locate documents related to those rates. These requests impose a palpable hardship and undue burden on the Companies, and given the Commission's April 15 Entry, that burden is unnecessary. The Commission should deny OCC's Motion for this additional reason.

III. CONCLUSION

For the above reasons, the Companies respectfully request that the Commission deny OCC's Motion to Compel.

DATED: July 15, 2010

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Memorandum of the Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company Contra the Motion to Compel Responses to Discovery by the Office of the Ohio Consumers' Counsel was delivered to the following persons by first class mail, postage prepaid, and e-mail this 15th day of July, 2010:

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