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

REPLY TO FIRSTENERGY'S MEMORANDUM CONTRA MOTION TO COMPEL RESPONSES TO DISCOVERY BY THE OFFICE OF THE OHIO CONSUMERS' COUNSEL

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I. INTRODUCTION

On June 30, 2010, the Office of the Ohio Consumers' Counsel ("OCC") filed a Motion to Compel Responses to Discovery. On July 15, 2010, FirstEnergy[1] filed a Memorandum Contra OCC's Motion to Compel, seeking to preclude all discovery on matters of great concern to the residential customers of FirstEnergy—whether FirstEnergy engaged in improper marketing of all-electric rates. OCC, on behalf of approximately 1.9 million residential electric customers of FirstEnergy, replies to FirstEnergy's Memo Contra. This Reply is filed pursuant to Ohio Admin. Code 4901-1-12(B)(2) and 4901-1-07(C).[2]

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[1] "FirstEnergy" is defined as Ohio Edison, Toledo Edison, and Cleveland Electric Illuminating Company. OCC in this pleading may also refer to FirstEnergy as "Companies."

[2] FirstEnergy served OCC electronically and by regular mail. Because OCC did not consent to electronic service of the document, OCC is treating service as being accomplished by mail, which is consistent with the PUCO's rules. See Ohio Admin. Code 4901-1-05(C)(4) which states that service by electronic message may only be made if the person served has consented to receive service of the document by electronic message. Service by mail adds three days onto the prescribed response period of seven days. See Ohio Admin. Code 4901-1-07(B). Thus OCC's reply to FirstEnergy's Memo Contra is due on or before July 26, 2010.

For the reasons set forth in this Reply and in OCC's Motion to Compel, the PUCO should grant OCC's Motion to Compel and order FirstEnergy to respond to OCC Interrogatories 39, 40, and 42, and the related requests for production 18, 19, and 21.

II. ARGUMENT

A. OCC's Discovery Is Reasonably Calculated To Lead To The Discovery Of Admissible Evidence.

FirstEnergy argues that OCC's discovery requests seek information that is not relevant to this proceeding.[3] FirstEnergy's argument is twofold. First, it argues that the Commission has already determined that allegations on alleged marketing activities are not in issue in this case.[4] FirstEnergy relies upon the Commission's April 15, 2010 Entry, which denied OCC's request to expand the scope of the staff investigation to the alleged marketing practices. FirstEnergy asserts that until the Entry is modified, discovery *must* proceed according the Commission's April 15, 2010 Entry[5]--with no discovery of alleged marketing practices.

Second, FirstEnergy declares that OCC's "cost causation" arguments—that the PUCO may allocate to FirstEnergy the revenue shortfall from the all-electric rates—misconstrue cost causation analysis that generally is looked at[6] and occurs in the "traditional rate-setting analysis" as entailed in this proceeding.[7] FirstEnergy restricts its

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[3] FirstEnergy Memo Contra at 3-8. Relevance is only part of the standard to be applied to discovery in a Commission proceeding. The relevance standard is further defined by the PUCO's rules that establish that the information need only be "reasonably calculated to lead to the discovery of admissible evidence." See Ohio Admin. Code 4901-1-16(B).

[4] FirstEnergy Memo Contra at 3-6.

[5] Id.

[6] See FirstEnergy Memo Contra at 6-8.

[7] See FirstEnergy Memo Contra at 4.

definition of "cost causation" to costs caused by customers taking service from the utility.[8] It concludes a utility does not itself cause the cost of service.[9] Thus, it asserts that its culpability is irrelevant to cost causation.[10]

1. The Commission determined the scope of the Staff's investigation, not the scope of discovery for this proceeding.

The PUCO's directive to its Staff was to "investigate" and file a report regarding the appropriate long-term rates that should be provided to customers.[11] The report is to include a range of options regarding proposed rates and discounts to be provided to the all-electric customers. Additionally, the PUCO advised that the report should present a range of options for recovering the revenue shortfall as a result of the all-electric discount.[12]

Initially, the Commission required its Staff to file the report within 90 days, and indicated its intent to establish a period for the filing of comments by interested parties.[13] In a subsequent entry, the ninety day time frame was lifted, but nonetheless the Staff was ordered to continue its investigation and develop a process, which "ensures that

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[8] Id. at 7.

[9] Id. at 8.

[10] Id.

[11] *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 3-4 (Mar. 3, 2010).

[12] Id.

[13] Id.

interested parties and stakeholders have a meaningful opportunity to participate in the resolution of the issues raised in this proceeding."[14]

These directives envision meaningful participation by interested parties, including OCC, with the filing of comments upon the Staff investigation. The investigation ordered appears to be similar to the staff report of investigation generally conducted in a rate case. Just like the scope of the Staff Report in a rate case proceeding does not define discovery,[15] neither should the scope of the Staff investigation here define the scope of permissible discovery in this case.

Parties will only be placed in a position to file comments that the Commission has requested after they engage in ample discovery—the ample discovery that *shall* be granted to parties and intervenors under R.C. 4903.082. The discovery sought to be compelled here relates to pursuing options to recovering a revenue shortfall. One of those options is to have the Companies bear some of the burden of the revenue shortfall. If FirstEnergy engaged in unfair marketing of the electric rates, inconsistent with the terms of the tariff, they should bear some of the burden of the ongoing revenue shortfall. Moreover, the practices of the Companies may also bear on how long the discount should be permitted, and at what levels. Considering such mitigating factors in the design of rates is something the Commission has frequently done.[16]

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[14] *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, Fourth Entry on Rehearing at 2 (Apr. 15, 2010).

[15] It is the objections to the staff report that frame the issues to the proceeding. See Ohio Admin. Code 4901-1-28(C); R.C. 4909.19.

[16] See e.g. *Pike Natural Gas Company v. Pub. Util. Comm.* (1981), 68 Ohio St.2d 181, 185; *In the Matter of the Application of Eastern Natural Gas Company for Approval of an Alternative Rate Plan Proposing a Revenue Decoupling Mechanism*, Case No. 08-940-GA-ALT, Opinion and Order at 33 (June 16, 2010).

While the Commission in its April 15 Entry determined the Staff's investigation should not extend to alleged agreements, promises, or inducements made by the Companies, its ruling should not be used to circumscribe discovery in this proceeding. The scope of discovery should be broader to permit fully exploring remedies for recovering the revenue shortfall, including recovering the shortfall from the Companies. Such a scope of discovery would allow parties to respond to the Commission's request for comments on the Staff's report of investigation.

2. The Commission may suspend its order pending resolution of the applications for rehearing.

Both OCC and the Companies applied for rehearing on the Commission's ruling that the issues related to marketing practices are "best suited for a court of general jurisdiction rather than the Commission."[17] The Commission granted rehearing on these issues, finding that the applications for rehearing raised issues that merit further consideration.[18] The OCC agrees that these issues merit further consideration.

By narrowly defining its jurisdiction to exclude investigating marketing practices of FirstEnergy, the Commission has unnecessarily limited the gathering of information that may be useful in determining long-term solutions to the all-electric rate discount. As noted by the Companies, the Commission has exclusive jurisdiction over a wide array of utility-related matters that go beyond the express terms of a tariff, including rates and rate-related disputes and a utility's marketing and advertising activities.[19]

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[17] *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, Fourth Entry on Rehearing at 2 (Apr. 15, 2010).

[18] Id.

[19] See FirstEnergy's Application for Rehearing at 12-13 (May 14, 2010).

Moreover, as FirstEnergy aptly describes in its Application for Rehearing, the Commission's jurisdiction extends to a broad array of rate and service-related matters including jurisdiction to hear complaints relating to rates, services, and practices under R.C. 4905.26.[20] The disputes over marketing practices relate to the Companies' rates, the terms under which those rates are available, and the Companies' marketing practices related to those rates, all of which fall squarely within the Commission's jurisdiction.[21]

Where OCC and the Companies differ is that OCC believes the jurisdiction of the PUCO should be exercised in the present proceeding, and not in some other to-be-determined complaint filing or PUCO investigation. Indeed, it would be appropriate to consider the marketing practices of FirstEnergy here and the Commission has clear authority to do so in this case. Under R.C. 4909.153, the Commission may '[i]n fixing the just, reasonable, and compensatory rates, joint rates, tolls, classifications, charges, or rentals to be observed and charged for service by any public utility" hear "service complaints, if any, that may be presented by customers and the public during any proceeding."

The Commission should exercise its authority here and now and allow the service complaints related to unfair marketing to be heard.[22] Hearing such complaints within the

[20] Id at 14.

[21] Id.

[22] While the Companies assert that that this would "bog down this proceeding and undermine the effort to reach a long-term solution" its assertions are misplaced. FirstEnergy Memo Contra at 2. OCC believes this would enhance, rather than undermine, efforts to lead to a long-term solution.

context of the present proceeding will contribute to the just and reasonable resolution of the questions directly presented in this proceeding and will serve the interest of administrative convenience. Indeed the Commission has frequently permitted such complaints to be heard in the context of rate cases.[23]

On rehearing the Commission may determine that its conclusions narrowly limiting its jurisdiction are unjust or unwarranted. It may then proceed under R.C. 4903.10 to abrogate or modify its original order. Assuming arguendo that the PUCO order prescribes the scope of discovery, OCC requests that the Commission allow the April 15, 2010 order to be temporarily suspended until the Commission issues its Order on Rehearing resolving this matter. Doing so will allow OCC to conduct its discovery in the prompt and expeditious manner called for under Ohio Admin. Code 4901-1-16(A). It will further allow OCC to thoroughly and adequately participate in this proceeding. OCC will then be able to provide in its comments meaningful options for revenue shortfall recovery –which comments will be requested, under the Commission directives in this proceeding.

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[23] *In the Matter of the Application of the Dayton Power & Light Company for authority to modify and increase its rates for electric service to all jurisdictional customers*, Case No. 78-92-EL-AIR, Opinion and Order at 102 (Mar. 9, 1979)(permitting service complaint, filed by OCC, on behalf of a residential customer, regarding prompt payment discount, to be heard in rate case); *In the Matter of the Application of the Ohio Bell Telephone Company for Authority to Increase and Adjust its Rates and Charges and to Change Regulations and Practices Affecting the Same*, Case No. 79-1184-TP-AIR, Opinion and Order at 157-158 (Dec. 3, 1980)(allowing City of Columbus to raise service issues in rate case*); In the Matter of the Application of Ohio Edison Company to increase certain of its filed schedules fixing rates and charges for electric service*, Case No. 82-1025-EL-AIR, Opinion and Order at 5 (Sept. 14, 1983)(accepting Luntz Corporation service complaint in rate case); *In the Matter of the Application of Choctaw Utilities, Inc. for Authority to File and to Amend and Increase Certain of its Rates and Charges for Water Service in its Entire Area*, Case No. 82-933-WW-AIR, Opinion and Order at 3-4 (Oct. 12, 1983) (accepting Choctaw Lake Property Owners Association service complaint in rate case*); In the Matter of the Complaint of the Office of the Consumers' Counsel on behalf of Jim and Helen Heaton, et al. v. Columbus Southern Electric Company*, Case No. 83-1279-EL-CSS, Opinion and Order at 1 (Apr. 16, 1985)(accepting OCC's notice of service complaints in the context of the rate increase application of the utility in Case No. 83-314-EL-AIR).

Such a ruling is consistent with the PUCO's recent ruling in its significantly in excess earnings test ("SEET") investigation proceeding, Case No. 09-786-EL-UNC.[24] There, in response to a pleading filed by Duke[25], the PUCO suspended its earlier order requiring the SEET applications to be made on or before July 15, 2010. Duke had claimed that it was intending to file an application for rehearing and argued that the Commission could clarify or address issues on rehearing, thus making the filing deadline inconvenient. The PUCO extended the deadline in response to Duke's pleading until September 1, 2010.[26] The PUCO could accomplish the same result here by permitting discovery to go forward on the marketing practices, while waiting to resolve the applications on rehearing. It should do so.

3. OCC's discovery is reasonably calculated to discover and present a theory of cost recovery linked to the Companies' marketing practices.

While generally a utility does not cause the costs of service, there are exceptions. An exception to this principle can be found in prudence cases where the Commission determined that the utility's actions were imprudent, and the imprudence caused unreasonable costs to be incurred. When costs are found to be imprudent, the

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[24] *In the Matter of the Investigation into the Development of the Significantly Excessive Earnings Test Pursuant to Amended Substitute Senate Bill 221 for Electric Utilities*, Case No. 09-786-EL-UNC, Entry at 4 (July 14, 2010).

[25] *In the Matter of the Investigation into the Development of the Significantly Excessive Earnings Test Pursuant to Amended Substitute Senate Bill 221 for Electric Utilities*, Case No. 09-786-EL-UNC, Duke Motion for Extension of time (July 6, 2010).

[26] See also *In the Matter of the Commission-Ordered Investigation of Ameritech Ohio Relative to its Compliance with Certain Provisions of the Minimum Telephone Service Standards Set Forth in Chapter 4901:1-5, Ohio Administrative Code*, Case No. 99-938-TP-COI, Entry (Aug. 1, 2000). In that proceeding the PUCO by Opinion and Order found that Ameritech Ohio was providing inadequate service to its customers. Nonetheless, the PUCO permitted Ameritech to declare and distribute dividends, despite R.C. 4905.46(B). R.C. 4905.46(B) prohibits the declaration of dividends when a finding of inadequate service exists. The PUCO determined that it was anticipating receiving applications for rehearing and that it was appropriate to allow a reasonable period of time for Ameritech to improve its service. Thus, the PUCO essentially stayed its finding of "inadequate service" in its original Opinion and Order.

Commission has refused to allow utilities to collect such costs, although these costs were incurred in providing service to customers. FirstEnergy should be well aware of the Commission precedent in this respect after the Commission disallowed costs for Perry nuclear power plant, and Davis Besse, which were owned in part, or wholly, by the FirstEnergy operating companies, or their predecessors.[27]

Thus and contrary to FirstEnergy's assertion, culpability--whether it be as a result of imprudence or unlawful practices--is relevant to cost causation. Here OCC seeks to discover information related to the marketing activities of the utility to determine if it engaged in actions which were unlawful and unreasonable. If customers in turn relied upon the Companies' unlawful and unreasonable actions, the Companies' culpability should impact whether they can collect revenues from customers that flow from their unlawful actions. The revenue deficiencies flowing from inappropriate actions, like revenue deficiencies flowing from imprudently incurred costs, should not be borne by customers.

B. FirstEnergy's Allegations Of Undue Burden Are Insufficient To Warrant Precluding Discovery Of The Matters Requested.

FirstEnergy argues that certain of OCC's discovery (Interrogatories 39, 40, 42) require it to identify 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.[28] FirstEnergy further argues that the requests for production pertaining to advertising are

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[27] See for example *In the Matter of Investigation of Perry Nuclear Power Plant*, Case No. 85-521-EL-COI, Opinion and Order at 267 (January 12, 1988)(disallowing $627 million of costs related to imprudence); *In the Matter of the Regulation of the Electric Fuel Component Contained within the Rate Schedules of the Toledo Edison Company and Related Matters*, Case No. 86-05-EL-EFC, Supplemental Opinion and Order at 178-179 (July 16, 1987) (disallowing $60 million of replacement fuel and purchased power related to Davis Besse outage).

[28] FirstEnergy Memo Contra at 9.

not limited as to time, and this will require the Companies to search 30 years worth of files to locate documents. This is a "palpable hardship and undue burden" on the Companies, it argues.[29]

1. FirstEnergy mischaracterizes what is required of it under Interrogatories 39, 40, and 42

Interrogatories 39, 40, and 42 require identification of FirstEnergy employees responsible for the *development and approva*l of all-electric rates. This would not encompass, as alleged by FirstEnergy, every one of its "current or former FE employee who discussed all electric rates with any customer at any time." See Memo Contra at 9. To try to resolve this matter without the need for PUCO intervention[30], OCC even revised its request to limit the information sought to those employees *responsible for the development and approval of rates.* OCC's revision satisfied the Companies' objections in certain respects, as the Companies then withdrew their objection that the request was overly broad. See OCC Attachment 6, Motion to Compel. Now FirstEnergy seeks to rechallenge the broadness of the discovery requests, masking its challenge as an undue burden argument. The PUCO should not allow this. FirstEnergy withdrew its objection. Such an objection cannot now be sustained.

2. FirstEnergy's efforts to search document files do not present an undue burden and it should bear expenses incident to its litigation.

Although FirstEnergy claims that efforts to search its document files will present an undue burden, these allegations are mere assertions, unsubstantiated by evidence, as was

[29] Id.

[30] See Ohio Admin. Code 4901-1-23(C), requiring a party seeking discovery to exhaust all reasonable means of resolving differences before moving to compel. OCC's efforts complied with this rule.

pointed out in OCC's Motion to Compel.[31] Moreover, the courts have recognized that it is not a valid objection that compilation will necessitate large expenditures of time and money.[32] Additionally, FirstEnergy filed its application on February 12, 2010, to revise its current tariffs. As a party initiating this litigation, FirstEnergy must be expected to bear expenses incident to litigation.[33]

3. FirstEnergy has a duty to respond and acquire all information available to it. It should fulfill this duty.

FirstEnergy never disputes that the documents and other information being sought are not in existence or in its possession, custody, or control. FirstEnergy has a duty to respond and acquire all information available to it including information within the personal knowledge of former corporate employees.[34] FirstEnergy should fulfill this duty.

III. CONCLUSION

For the reasons set forth here and in OCC's motion to compel, OCC urges the Commission to grant its motion and order FirstEnergy to respond to OCC Interrogatories 39, 40, and 42, and the related requests for production, 18, 19, and 21. The information sought is reasonably calculated to lead to the discovery of admissible evidence. Producing it will not present an undue burden upon FirstEnergy. The time to produce the

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[31] See OCC Motion to Compel at 12, citing to federal case law holding that, when a party objects to an interrogatory based on oppressiveness or undue burden, that party must show specifically how, despite the broad and liberal construction afforded discovery rules, each interrogatory is overly broad, burdensome, or oppressive.

[32] *Adelman v. Nordberg Manufacturing Co.* (1947 DC Wis), 6 F.R.D. 383; *Burns v. Imagine Films Entertainment* (1996, WD NY), 164 F.R.D. 589.

[33] *Life Music, Inc. v. Broadcast Music, Inc.* (1996, SD NY), 41 F.R.D. 16.

[34] *General Dynamics Corp. v. Selb. Manufacturing Co.* (1973, CA8), 481 F.2d 1204, cert. den. (1974), 414 U.S. 1162.

information is now, in the context of this very docket. Customers should not be prevented from establishing the culpability of FirstEnergy regarding their current predicament. Customers should have this forum before the Public Utilities Commission of Ohio to pursue appropriate remedies on a going forward basis.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the Reply to Memo Contra by the Office of the Ohio Consumers' Counsel was provided to the persons listed below via electronic transmission and by first class mail, postage prepaid, this 26th day of July, 2010.

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Summary: Reply Reply to FirstEnergy's Memorandum Contra Motion to Compel Responses to Discovery by the Office of the Ohio Consumers' Counsel electronically filed by Ms. Deb J. Bingham on behalf of Grady, Maureen R. Ms.