

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 Existing Rider. )

ENTRY

The attorney examiner finds:

- (1) Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company (FirstEnergy or the Companies) are public utilities as defined in Section 4905.02, Revised Code, and, as such, are subject to the jurisdiction of this Commission.
- (2) On February 12, 2010, FirstEnergy filed an application in this proceeding to revise its current tariffs in order to provide rate relief to certain all-electric customers.
- (3) On March 3, 2010, the Commission issued its Finding and Order in this proceeding, approving FirstEnergy's application as modified by the Commission and providing interim rate relief for all-electric residential customers. On March 8, 2010, the office of the Ohio Consumers' Counsel (OCC) filed an application for rehearing. On April 6, 2010, the Commission granted rehearing for the purpose of further consideration of the matters specified in the application for rehearing. Subsequently, on April 15, 2010, the Commission denied rehearing in the Second Entry on Rehearing (April 15 Entry) in this proceeding. On April 2, 2010, FirstEnergy also filed an application for rehearing regarding the Commission's March 3, 2010, Finding and Order. The Commission granted rehearing on April 28, 2010, in the Third Entry on Rehearing in this proceeding.

On May 14, 2010, FirstEnergy filed an application for rehearing regarding the April 15 Entry. Further, on May 17, 2010, Industrial Energy Energy Users-Ohio (IEU-Ohio) and OCC each filed applications for rehearing regarding the April 15 Entry. On June 9, 2010, the Commission granted

rehearing for the purpose of further consideration of the matters specified in these applications for rehearing.

- (4) Further, on June 30, 2010, OCC filed a motion to compel discovery, requesting that the Commission order FirstEnergy to respond to OCC Revised Interrogatories 39, 40, and 42, and the corresponding requests for production of documents, RPD 18, 19, and 21. On July 15, 2010, the Companies filed a memorandum contra the motion to compel. OCC filed a reply to the memorandum contra on July 26, 2010.
- (5) In its motion to compel, OCC argues that the Companies have failed to establish that the requested information would not reasonably lead to the discovery of admissible evidence. OCC contends that, under Section 4903.082, Revised Code, parties to Commission proceedings are to be granted ample rights of discovery and that, under Rule 4901-1-16, Ohio Administrative Code (O.A.C.), a party may obtain discovery of any matter, not privileged, which is relevant to the subject matter of the proceeding. OCC alleges that the information sought through discovery is relevant to the question of whether FirstEnergy will be allowed to recover any revenue shortfall from Ohio customers; OCC contends that, under cost causation principles, the Commission should assess whether the cause of any revenue deficiency is attributable to the business practices and marketing activities of FirstEnergy.

OCC also claims that the Companies have failed to provide specific arguments as to how answering the discovery requests would be unduly burdensome. OCC argues that the burden is on the party opposing discovery to explain and support its objections and that, because the Companies have failed to do so, its objection should be overruled.

- (6) In its memorandum contra the motion to compel, FirstEnergy argues that OCC's discovery request seeks information and documents that are irrelevant to this proceeding. The Companies claim that the Commission already has decided that allegations regarding alleged marketing activities are not at issue in this case. According to FirstEnergy, the purpose of this proceeding is solely to

reach a long-term resolution regarding future discounts or credits to be provided to all-electric customers.

FirstEnergy also rejects OCC's claim regarding cost causation, arguing that the principle of cost causation has nothing to do with the Companies' marketing practices. FirstEnergy claims that the purpose of cost causation is to allow a utility to recover the cost of providing service from the utility's customers and that cost causation has nothing to do with attributing costs to the utility.

Finally, FirstEnergy contends that the discovery requests are unduly burdensome. The Companies note that all-electric rates were offered for 30 years, and, during that time, dozens of employees may have been involved in administering and marketing those rates. Further, the Companies claim that the discovery requests would require the Companies to search 30 years' worth of files to locate advertising and other documents related to the all-electric rates.

- (7) In its reply to FirstEnergy's memorandum contra, OCC argues that the discovery request is reasonably calculated to lead to the discovery of admissible evidence. OCC contends that, in the Second Entry on Rehearing in this proceeding, the Commission determined only the scope of the Staff's investigation, not the scope of discovery, in this proceeding. Further, OCC claims that the discovery requests are related to a theory of cost recovery linked to the Companies marketing practices. OCC contends that, if customers relied upon marketing practices which were unlawful and unreasonable, these unlawful and unreasonable practices should impact FirstEnergy's ability to recover any revenue shortfall from customers.

OCC also claims that FirstEnergy's allegations of undue burden are insufficient to warrant precluding discovery. OCC states that it is not a valid objection to a discovery request that the compilation of the information requested will necessitate large expenditures of time and money. OCC argues that, as the party who initiated this proceeding through the filing of its application to revise its tariffs, FirstEnergy must be expected to bear expenses incident to litigation. Finally, OCC notes that FirstEnergy has never

claimed that documents and other information requested are not in existence or not in its possession, custody, or control. Thus, according to OCC, FirstEnergy should fulfill its duty to respond and acquire all information available to the Companies.

- (8) The attorney examiner finds that the motion to compel should be granted. FirstEnergy notes in its memorandum contra that the Commission's jurisdiction extends to a broad array of rate-related matters and to utilities' marketing and advertising activities. Further, the Companies acknowledge that allegations regarding the Companies' past marketing of all-electric rates fall squarely within the Commission's jurisdiction and that the Commission is empowered to investigate those allegations and to order appropriate remedies based upon its findings. However, FirstEnergy claims that the Commission has decided not to admit evidence related to such allegations in this proceeding. The attorney examiner finds that FirstEnergy's claim is not proper grounds for objecting to the discovery request. The only decision that the Commission has made regarding FirstEnergy's alleged marketing activities was to deny OCC's request that the Staff be ordered to investigate such activities. The information sought through the discovery request is plainly related to the subject matter of this proceeding and appears to be reasonably calculated to lead to the discovery of admissible evidence. Rule 4901-1-16(B), Ohio Administrative Code.

Further, FirstEnergy has not demonstrated that the discovery requests, as revised by OCC, are unduly burdensome. OCC has limited discovery to identification of FirstEnergy employees responsible for the development and approval of all-electric rates, rather than any employee who may have been involved in administering and marketing those rates.

Accordingly, the attorney examiner finds that the motion to compel should be granted; further, FirstEnergy is directed to serve responses to the discovery requests upon OCC within seven days.

- (9) The attorney examiner notes that, although the motion to compel discovery will be granted, the admissibility of any information obtained through discovery will be determined at the hearing in this proceeding.

It is, therefore,

ORDERED, That OCC's motion to compel discovery be granted. It is, further,

ORDERED, That a copy of this Entry be served upon all parties of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO



By: Gregory A. Price  
Attorney Examiner

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Entered in the Journal

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Renee J. Jenkins  
Secretary