

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. )

FIFTH ENTRY ON REHEARING

The Commission 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. On March 8, 2010, 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 our Second Entry on Rehearing (April 15 Entry) in this proceeding.

Further, on April 2, 2010, FirstEnergy 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 (April 28 Entry) in this proceeding.

- (4) Section 4903.10, Revised Code, states that any party to a Commission proceeding may apply for rehearing with respect to any matters determined by the Commission within 30 days of the entry of the order upon the Commission's journal.

- (5) On May 14, 2010, FirstEnergy filed an application for rehearing. In its application for rehearing, FirstEnergy alleges that the April 15 Entry is unreasonable and unlawful on two separate grounds.
- (6) Further, on May 17, 2010, Industrial Energy Energy Users-Ohio (IEU-Ohio) filed an application for rehearing alleging that the April 15 Entry is unreasonable and unlawful on two separate grounds.
- (7) OCC also filed an application for rehearing on May 17, 2010. In its application for rehearing, OCC alleges that the April 15 Entry is unjust and unreasonable on three separate grounds.
- (8) On May 24, 2010, OCC filed a memorandum contra FirstEnergy's application for rehearing. Further, on May 27, 2010, IEU-Ohio filed a memorandum contra OCC's application for rehearing, and FirstEnergy filed a memorandum contra the applications for rehearing filed by OCC and IEU-Ohio.
- (9) In our Fourth Entry on Rehearing, issued on June 9, 2010, the Commission, after finding that further consideration of the matters specified in the applications for rehearing filed by FirstEnergy, IEU-Ohio, and OCC was warranted, granted rehearing on all three applications for rehearing.
- (10) In its first assignment of error, FirstEnergy claims that the April 15 Entry is unreasonable and unlawful because it fails to provide the Companies with authorization to accrue carrying charges on deferred costs of the rate relief. FirstEnergy argues that the April 15 Entry requires the Companies, without adequate explanation, to extend all-electric credits to tens of thousands of new customers who would not have qualified for the credit under the stipulations adopted in prior cases, and to extend these credits to both new and existing customers indefinitely. According to the Companies, this results in approximately \$80 million in discounts to all-electric customers every year that the Companies are not collecting. Although the April 15 Entry authorized the Companies to defer incurred costs equivalent in amount to these discounts, it imposes substantial harm on the Companies by denying

them carrying charges on those deferred amounts. FirstEnergy contends that the failure to authorize carrying charges changes the recovery contemplated by the stipulations approved by the Commission on Case No. 05-1125-EL-ATA, Case No. 07-551-EL-ATA, and Case No. 08-935-EL-SSO.

OCC initially responds by arguing that FirstEnergy failed to timely file for rehearing on the issue of carrying charges on the deferred costs of the rate relief, since FirstEnergy's application for rehearing was filed more than 30 days after the Commission made its original ruling on this issue. If the Commission determines that it retains jurisdiction to hear FirstEnergy's application for rehearing on the carrying charges, OCC argues that, contrary to FirstEnergy's contentions, there can be no controlling precedent that presumes one particular outcome, because the decision to allow carrying charges requires a case-by-case determination. OCC argues that, in general, the Commission has previously approved deferred accounting and carrying charges only when a utility faces the possibility of significant financial harm, and has denied deferrals when not necessary for maintenance of a utility's financial integrity. OCC contends that the Companies have not claimed that denial of the carrying charges will impose a significant financial burden nor that the carrying charges are necessary to maintain their financial integrity.

- (11) The Commission finds that rehearing on this assignment of error should be denied. The Commission will address the question of carrying charges when it addresses the recovery of any deferrals authorized in this proceeding.
- (12) In its second assignment of error, FirstEnergy alleges that the April 15 Entry is unreasonable and unlawful because it defines the scope of the Commission's jurisdiction in a way that is inconsistent with its exclusive jurisdiction over matters pertaining to rates and marketing practices. FirstEnergy notes that the April 15 Entry held that the Commission lacked jurisdiction to review allegations by OCC that the Companies made false promises and inducements to customers regarding the duration of the all-electric discounts. FirstEnergy claims

that, because the alleged promises and inducements relate directly and unequivocally to the rates that the Companies charge, OCC's allegations fall within the Commission's exclusive jurisdiction over rates. Moreover, the Companies argue that the Commission has express statutory and administrative authority to investigate alleged deceptive trade practices.

In its first assignment of error, OCC claims that the April 15 Entry is unreasonable and unlawful because of its determination that the adjudication of any alleged agreements, promises and inducement is outside of the Commission's jurisdiction. OCC contends that this determination precludes Staff from inquiring into these issues for relevant purposes such as assessing the culpability of the Companies in evaluating the options for recovery of the costs of the rate relief provided to all-electric customers. Moreover, in its second assignment of error, OCC claims that, in the April 15 Entry, the Commission unreasonably and unlawfully failed to fulfill its responsibility under Sections 4905.22, 4905.37, 4928.02(I), and 4928.10, Revised Code, and Rule 4901:1-10-24, Ohio Administrative Code.

In its memorandum contra OCC's application for rehearing, FirstEnergy argues that, 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 this proceeding is not the appropriate forum to investigate OCC's allegations. FirstEnergy agrees with OCC that Section 4928.02(I), Revised Code, and Rule 4901:1-10-24(D), O.A.C., place the responsibility for protecting consumers against a public utility's unfair marketing practices on the Commission. However, FirstEnergy disputes OCC's conclusion that 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 claims in court. FirstEnergy argues that the Commission's authority over utility regulation is exclusive except for "pure contract" or "pure tort" actions. According to the Companies, OCC essentially admits that its allegations are not "pure contract" or "pure tort" claims

because, if that were true, the Commission would not have jurisdiction to consider the claims at all.

FirstEnergy also disputes OCC's claim that the allegations, even if proven, would provide a basis for setting future rates. FirstEnergy notes that OCC has not cited a single statute, Commission decision or court case suggesting that the Commission may rely upon evidence relating to unjust marketing practices as a basis to disallow the recovery of costs in setting rates.

- (13) In the April 15 Entry, the Commission determined that the scope of the Staff's investigation should not be expanded, as requested by OCC, because we believed that the adjudication of any alleged agreements, promises, or inducements made by the Companies outside of the express terms of its tariffs, as alleged by OCC, is best suited for a court of general jurisdiction rather than the Commission.

However, in the interim, the Geauga County Court of Common Pleas has issued a decision holding that it lacks jurisdiction over allegations pertaining to the Companies' rates and marketing practices. The Commission agrees with the Court that claims that customers were to receive rates that are in violation of Commission-approved tariffs or which were not authorized by the Commission are issues that the Commission is empowered to decide. Therefore, the Commission finds it necessary to grant rehearing to clarify the scope of our decision in the April 15 Entry. The Commission will exercise our jurisdiction over FirstEnergy's rates and marketing practices, pursuant to Section 4928.02(I), Revised Code, and Rule 4901:1-10-24(D), O.A.C., and the parties are not precluded from conducting discovery regarding these issues nor from presenting evidence during the hearing provided that such evidence is otherwise properly admissible in Commission proceedings. However, the Commission will reiterate that we lack jurisdiction to hear "pure contract" claims, including claims based on reliance or promissory estoppel or claims seeking equitable remedies.

- (14) OCC's third assignment of error contends that the Commission unreasonably and unlawfully permitted

discriminatory rates, in violation of Sections 4905.22, 4905.33, and 4905.35, Revised Code, by limiting rate relief to those customers specified in FirstEnergy's application, thereby excluding electric water heating customers.

FirstEnergy responds that limiting rate relief to all-electric customers is not inappropriate or illegal, as different rate treatments for different rate classifications are proper when there are "real differences" with a "reasonable basis" between two groups of customers. FirstEnergy contends that, because all-electric customers use electricity to heat their homes, significant differences exist between these two groups of customers, rendering the differential rate treatment appropriate. IEU-Ohio concurs, arguing that it is inappropriate to expand rate relief to electric water heating customers, since OCC has not shown that these customers experience the same hardships as space heating customers during the winter period. Both FirstEnergy and IEU-Ohio caution that expansion of the customer group receiving rate relief increases the potential financial impact for the Companies' other customers when the Companies seek recovery of the deferred revenue shortfall.

- (15) The Commission finds that OCC's third assignment of error lacks merit and, accordingly, rehearing on this basis should be denied. As both FirstEnergy and IEU-Ohio point out, rate relief was provided to all-electric customers because all-electric customers rely upon electricity for winter heating. Electric water heating customers, on the other hand, do not rely upon electricity for winter heating. Therefore, the Commission finds that the rates are not discriminatory and do not violate Sections 4905.22, 4905.33, and 4905.35, Revised Code.
- (16) In its first assignment of error, IEU-Ohio asserts that the Commission exceeded its authority in the April 15 Entry by unilaterally modifying the rates and charges established by prior final Commission orders. IEU-Ohio claims that the rate relief authorized by the Commission in this proceeding is not the product of any authority that has been delegated to the Commission by the General Assembly and that the rate relief is not the product of any process that has been established by

the General Assembly as a predicate for the Commission's exercise of its delegated authority.

- (17) The Commission finds that rehearing on this assignment of error should be denied. FirstEnergy's application was filed pursuant to Section 4909.18, Revised Code, and the application was expressly identified as an application not for an increase in rates. In our Finding and Order dated March 3, 2010, the Commission approved FirstEnergy's application, as modified by the Commission, on that basis. IEU-Ohio did not seek rehearing of our March 3, 2010 Finding and Order within 30 days of the entry of the Finding and Order upon the Commission's journal, and the Commission finds that rehearing should be denied on that basis. Nonetheless, the Commission also notes that IEU-Ohio has not demonstrated that the Commission's determination that the application constituted an application not for an increase rates was erroneous, and rehearing would be denied on that basis, even if IEU-Ohio's application for rehearing had been filed within 30 days of the entry of the Finding and Order upon the Commission's journal.
- (18) In its second assignment of error, IEU-Ohio claims that the Commission's grant of authority to defer the revenue shortfall created by the rate relief is unreasonable and unlawful.
- (19) The Commission finds that rehearing on this assignment of error should be denied. In our March 3, 2010, Finding and Order, the Commission authorized FirstEnergy to modify its accounting procedures pursuant to the statutory authority granted to the Commission by Section 4905.13, Revised Code. IEU-Ohio did not seek rehearing of our March 3, 2010 Finding and Order within 30 days of the entry of the Finding and Order upon the Commission's journal, and the Commission finds that rehearing should be denied on that basis. Nonetheless, the Commission also notes that IEU-Ohio has not demonstrated that the Commission's exercise of our authority under Section 4905.13, Revised Code, was unlawful, even if IEU-Ohio's application for rehearing had been filed within 30 days of the entry of the Finding and Order upon the Commission's journal.

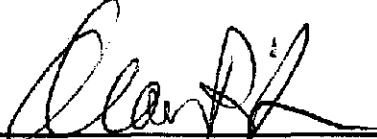
It is, therefore,

ORDERED, That the applications for rehearing filed by OCC and FirstEnergy be granted, in part, and denied, in part. It is, further,

ORDERED, That the application for rehearing filed by IEU-Ohio be denied. It is, further,

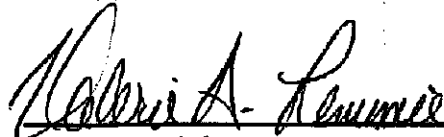
ORDERED, That a copy of this Fifth Entry on Rehearing be served upon all parties of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO



Alan R. Schriber, Chairman

Paul A. Centolella



Valerie A. Lemmie

Steven D. Lesser



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Renee J. Jenkins  
Secretary