

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. 10-388-EL-SSO
Edison Company for Authority to Establish)
a Standard Service Offer Pursuant to)
Section 4928.143, Revised Code, in the)
Form of an Electric Security Plan.)

THIRD 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 October 20, 2009, FirstEnergy filed an application, in Case No. 09-906-EL-SSO (hereinafter, *MRO Case*), for its standard service offer (SSO) commencing June 1, 2011, pursuant to Section 4928.141, Revised Code. This application was for a market rate offer (MRO) in accordance with Section 4928.142, Revised Code.
- (3) Subsequently, on March 23, 2010, FirstEnergy filed an application in Case No. 10-388-EL-SSO, pursuant to Section 4928.141, Revised Code, for a SSO for the period between June 1, 2011, and May 31, 2014. This application is for an electric security plan (ESP), in accordance with Section 4928.143, Revised Code.
- (4) On August 25, 2010, the Commission issued its Opinion and Order in this proceeding, adopting three stipulation filed by various parties (the Combined Stipulation), as modified by the Commission, and approving the proposed ESP.
- (5) 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.

- (6) On September 24, 2010, Citizen Power, Ohio Consumers' Counsel, and the Natural Resources Defense Council (Ohio Consumer and Environmental Advocates or OCEA) filed an application for rehearing, alleging that the Opinion and Order was unreasonable and unlawful on twelve separate grounds.¹
- (7) On October 4, 2010, Industrial Energy Users-Ohio, (IEU-Ohio), FirstEnergy, and Nucor Steel Marion, Inc., (Nucor) each filed memoranda contra the application for rehearing.

In its memorandum contra, IEU-Ohio claims that the Commission should deny the application for rehearing in its entirety inasmuch as the application for rehearing raises no new issues for the Commission's consideration.

- (8) On October 22, 2010, the Commission granted rehearing to further consider the matters specified in the application for rehearing.
- (9) In its first assignment of error, OCEA claims that the Commission erred to the extent that the Commission altered the pleadings and the record in the case, as provided in the Combined Stipulation, to exclude the full participation of non-signatory parties in the proceeding. OCEA argues that the Commission may not exclude consideration of briefs simply to support its order and that the Commission may not modify the record based upon the agreement of stipulating parties whose sole aim is to support their position.

In its memorandum contra, Nucor notes that, in approving the provision withdrawing testimony filed in response to the Combined Stipulation, the Commission did not withdraw testimony in the *MRO Case* that was incorporated into the record of this proceeding. Thus, Nucor argues that the withdrawal of testimony was much more limited than OCEA claims.

¹ OCEA included the case caption of the *MRO Case* in its application for rehearing and filed the application in the *MRO Case*. Since the *MRO Case* has not been consolidated with the instant proceeding, both including the *MRO Case* caption in the application for rehearing and the filing of the application for rehearing in the *MRO Case* were improper and will be disregarded by the Commission.

The Companies contend in its memorandum contra that the Commission properly permitted parties to the Combined Stipulation to withdraw their briefs and testimony, claiming that this is common practice before the Commission. *See WPS Energy Services, Inc. v. FirstEnergy Corp.*, Case No. 02-1944-EL-CSS, Opinion and Order (August 6, 2003) at 5.

The Commission notes that OCEA did not object at hearing to the withdrawal of briefs or testimony. By failing to object at hearing, OCEA failed to obtain clarification regarding the scope of the withdrawal of briefs and testimony, proffer the disputed evidence, or seek a resolution of this issue with the signatory parties or the attorney examiner. As Nucor points out, the testimony cited by OCEA in its application for rehearing was not withdrawn, and OCEA does not identify any other evidence in the record which it would have relied upon but for the withdrawal of the testimony. Thus, the Commission finds that OCEA's arguments regarding the testimony are moot. With respect to the withdrawal of briefs, as OCEA acknowledges, the Commission fully considered the briefs filed by OCEA in this proceeding; the Commission simply inferred that several parties which had originally been a part of OCEA had withdrawn their support of OCEA's briefs. Accordingly, the Commission finds that OCEA was not prejudiced by the withdrawal of the briefs filed in this proceeding and that rehearing on this assignment of error should be denied.

- (10) In its second assignment of error, OCEA contends that the Commission erred when it failed to address the manner in which notice was provided to the public and the manner in which public hearings were conducted in this proceeding.

FirstEnergy responds that the Commission properly conducted public hearings on the Companies' application. FirstEnergy claims that, by setting the time for hearing, sending written notice of the hearing to the Companies, and directing the Companies to publish the notice of the hearing, the Commission adhered at all of the statutory procedures required by Section 4928.141(B), Revised Code.

The Commission notes that OCEA has provided no statutory basis or prior Commission precedent for its claims that the

public notice in this proceeding was inadequate or in any manner contrary to law. Further, the Commission finds that OCEA's claimed errors, which occurred during an informal presentation before one of eight public hearings, did not in any manner prejudice OCEA or preclude the presentation of testimony by the public during the public hearing. Therefore, the Commission finds that rehearing on this assignment of error should be denied.

- (11) In its third assignment of error, OCEA contends that the Commission erred by approving a market rate offer containing impermissible rate elements. OCC argues that Section 4928.142, Revised Code, controls this proceeding, rather than Section 4928.143, Revised Code, and that certain elements of the SSO adopted by the Commission are not authorized by Section 4928.142.

The Companies contend in its memorandum contra that the Commission did not adopt an MRO which includes impermissible rate plan elements. FirstEnergy claims that it filed an application for approval of an ESP under Section 4928.143 and that the use of a competitive bidding process (CBP) to determine retail generation rates does not convert an ESP to an MRO or make the provision of Section 4928.142, Revised Code, applicable to an ESP.

The Commission notes that FirstEnergy expressly characterized its application in this proceeding as an ESP filed under Section 4928.143, Revised Code. OCC's own witness consistently described the proposed SSO as an ESP during the hearing (OCC Ex. 2 at 4, 11, 23, 26, 28, 34, 41, 42, 43, 45, 46, 47, 54, and 55). The Commission considered the application under the provisions of Section 4928.143, Revised Code, and applied the statutory test for approval of an ESP contained in Section 4928.143(C)(1), Revised Code. Opinion and Order at 42-45. Although the ESP does provide that generation rates will be determined by a CBP, OCC has cited to no authority that an ESP cannot contain provisions for a CBP to determine generation pricing. In fact, the Commission has approved an ESP in which generation pricing was based upon a CBP. *In re FirstEnergy*, Case No. 08-935-EL-SSO, Second Opinion and Order (March 25, 2009) at 8. Rehearing on this assignment of error should be denied.

- (12) In its fourth assignment of error, OCEA alleges that the Commission's Opinion and Order is unreasonable and unlawful because the Commission is not permitted to take administrative notice of the record in the pending *MRO Case* in order to eliminate a portion of FirstEnergy's burden of proof. OCEA claims that the Commission took administrative notice of the record in the *MRO Case* without any basis in law and unlawfully eliminated a portion of the Companies' burden of proof.

FirstEnergy replies that the Commission properly permitted all parties to reference testimony and exhibits admitted into evidence in the record of the *MRO Case*. Further, the Companies contend that the Commission fully addressed and rejected OCC's arguments in detail in its Entry on Rehearing issued on May 13, 2010.

In its memorandum contra, Nucor notes that the Commission has already denied rehearing of the decision to incorporate the record from the *MRO Case* into the record of this proceeding. Further, Nucor states that motive ascribed to the Commission by OCEA in the application for rehearing is unsubstantiated and belied by the actual conduct of the proceeding.

The Commission thoroughly addressed OCEA's arguments in support of this assignment of error in our Entry on Rehearing dated May 13, 2010. Entry on Rehearing (May 13, 2010) at 6-8. OCEA has raised no new arguments or issues. Accordingly, rehearing on this assignment of error should be denied.

- (13) In its fifth assignment of error, OCEA argues that the Commission erred when it disregarded statutory requirements regarding distribution ratemaking and reliability. OCEA contends that adjustments to Rider DCR must be considered to be applications for an increase in rates pursuant to Section 4909.18, Revised Code, and that the Commission failed to address distribution reliability as required by law.

All of the arguments raised by OCEA in the support of this assignment of error were previously addressed by the

Commission in the Opinion and Order, where the Commission held that:

[The] provision of the Combined Stipulation which clarifies that the quarterly updates to Rider DCR are not "applications for an increase in rates" subject to the requirements of Section 4909.18, Revised Code, was filed as part of an application submitted pursuant to Section 4928.143, Revised Code. The statutory authority to file an application under Section 4928.143, Revised Code, is separate and independent from the statutory provisions of Section 4909.18, Revised Code.

Opinion and Order at 40. With respect to distribution reliability, the Commission determined in the Opinion and Order that "the provisions of the Combined Stipulation related to Rider DCR were not filed under Section 4928.143(B)(2)(h), Revised Code; therefore, there is no requirement to conduct an examination of the reliability of FirstEnergy's distribution system." Opinion and Order at 41. OCEA has raised no new arguments in support of this assignment of error. Therefore, rehearing should be denied.

- (14) In addition, OCEA claims in its sixth assignment of error that the Commission erred in approving the provision of the Combined Stipulation which provides for participation in audits of Rider DCR by Staff and other signatory parties to the Combined Stipulation. Similarly, in its seventh assignment of error, OCEA argues that the Commission erred in approving the provision of the Combined Stipulation which provides for participation in the development of the request for proposal for the renewable energy credit procurement process by Staff and other signatory parties to the Combined Stipulation.

FirstEnergy contends that the Commission properly approved the Rider DCR audit process, noting that there is no legal requirement that any parties be involved in the independent audit and that OCEA will have all statutory rights available to it in any Commission proceeding which includes a review of the audit results. Likewise, FirstEnergy contends that the Combined Stipulation does not preclude OCEA from

intervening in any Commission proceeding in which the Companies seek approval of its request for proposal (RFP) for renewable energy credits.

In the Opinion and Order, the Commission fully addressed all arguments raised by OCEA in support of these assignments of error. Opinion and Order at 40. OCEA has raised no new arguments in its application for rehearing. Thus, the Commission finds that rehearing on both of these assignments of error should be denied.

- (15) In its eighth assignment of error, OCEA alleges that the Commission erred in its determination of interruptible rates because the Opinion and Order conflicts with a previous Commission determination, is not supported by findings of fact and violates Section 4903.09, Revised Code.

The Companies respond that the Commission properly approved the interruptible service offerings included in the ESP; the Companies argue that OCEA has not shown that continuing the interruptible service offerings is unreasonable or unlawful in the context of the Combined Stipulation. Further, the Companies claim that OCC's witness agreed during the hearing that the interruptible service offerings are demand reduction programs initiated by the Companies effective June 1, 2009, in furtherance of the requirements of Am. Sub. Senate Bill 221 (Tr. III at 783-784).

Nucor argues in its memorandum contra that the Opinion and Order in no way conflicts with previous Commission decisions on cost recovery for interruptible rates and that the interruptible riders may properly be considered to be incremental for purposes of meeting FirstEnergy's peak demand reduction benchmark.

In the Opinion and Order, the Commission thoroughly considered, and rejected, OCEA's argument that the Combined Stipulation conflicts with the Commission's decision in *In re FirstEnergy*, Case Nos. 09-535-EL-EEC, et al., Opinion and Order (March 10, 2010). In the Opinion and Order, the Commission noted that "we did not determine that interruptible capabilities after 2008 were not incremental; we concluded that there was *insufficient information* in the record

of that proceeding to make that determination." Opinion and Order at 40. The Commission finds that OCEA has raised no new arguments on rehearing and that rehearing on this assignment of error should be denied.

- (16) OCEA claims in its ninth assignment of error that the Commission erred in its treatment of lost distribution revenues because the Opinion and Order conflicts with a previous Commission determination, is not supported by findings of fact and violates Section 4903.09, Revised Code.

FirstEnergy argues that the Commission properly approved the Companies' recovery of lost distribution revenue. The Companies contend that OCEA cannot argue that the recovery of lost distribution revenue is unlawful; instead, OCEA's arguments represent little more than a preference for use of an alternative mechanism in the future.

The Commission notes that the recovery of lost distribution revenue was an express provision the Combined Stipulation (Joint Ex. 1 at 24). In evaluating the Combined Stipulation, the Commission considered the arguments raised by OCEA and determined that the evidence in the record demonstrated that "as a package, the Combined Stipulation advances the public interest by resolving all the issues raised in these matters without resulting in extensive litigation and by providing for stable and predictable rates . . . for customers during the ESP period." Opinion and Order at 29, 36. Nonetheless, in its assignment of error, OCEA seeks to replace the lost distribution revenue recovery mechanism with a decoupling rider, which is OCEA's preferred alternative recovery mechanism. However, in our evaluation of the Combined Stipulation, the Commission considered, and rejected, OCEA's alternative recovery mechanism. The Commission also notes that we recently opened a proceeding to comprehensively review our policies regarding rate design to better align utility performance with Ohio public policy. In *the Matter of Aligning Electric Distribution Utility Rate Structure with Ohio's Public Policies to Promote Competition, Energy Efficiency, and Distributed Generation*, Case No. 10-3126-EL-UNC, Entry (December 29, 2010). Accordingly, rehearing on this assignment of error should be denied.

- (17) In its tenth assignment of error, OCEA claims that the Commission unlawfully delegated its responsibilities regarding the continuation of storm damage deferrals. Further, OCEA cites to the testimony of its witness Gonzalez who claimed that the treatment of storm damage deferrals under the Combined Stipulations was vague (OCC Ex. 2 at 20).

The Commission finds that the provision regarding storm damage deferrals is not vague; the provision extends the accounting authority for storm damage deferrals from December 31, 2011 to May 31, 2014, consistent with the base rate distribution freeze contained in the Combined Stipulations. Opinion and Order at 40-41. OCC does not identify any evidence in the record which supports its contention that this provision represents an unlawful delegation of the Commission's responsibilities. Therefore, rehearing on this assignment of error should be denied.

- (18) Moreover, in its eleventh assignment of error, OCEA claims that the Commission erred because the proposed ESP is not more favorable in the aggregate as compared to the expected results that would otherwise apply under Section 4928.142, Revised Code.

FirstEnergy claims that the testimony by OCC's witness on this issue lacked any probative value and that the Commission did not err in disregarding the testimony.

The Commission thoroughly addressed this issue in the Opinion and Order. Opinion and Order at 42-45. OCEA raised no new arguments in its application for rehearing. Accordingly, rehearing on this assignment of error should be denied.

- (19) OCEA argues in its twelfth assignment of error that the Commission erred because the Opinion and Order is based upon criteria for the evaluation of stipulation that is outdated and should be revised in light of the enactment of Am. Sub. Senate Bill 221.

The Commission considered and rejected the arguments made by OCEA that the criteria for the evaluation of

stipulations should be revised in light of the enactment of Am. Sub. Senate Bill 221. Opinion and Order at 20-21. OCEA has raised no new arguments in its application for rehearing; therefore, rehearing on this assignment of error should be denied.

It is, therefore,

ORDERED, That the application for rehearing filed by OCEA be denied. It is, further,

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

THE PUBLIC UTILITIES COMMISSION OF OHIO

Steven D. Lesser, Chairman

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Reneé J. Jenkins
Secretary