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 BRIEF
BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL

JANINE L. MIGDEN-OSTRANDER
CONSUMERS' COUNSEL

Jeffrey L. Small, Counsel of Record
Maureen M. Grady
Christopher J. Allwein
Assistant Consumers' Counsel

Office of the Ohio Consumers' Counsel
10 West Broad Street, Suite 1800
Columbus, Ohio 43215-3485
614-466-8574 (Telephone)
614-466-9475 (Facsimile)
small@occ.state.oh.us
grady@occ.state.oh.us
allwein@occ.state.oh.us

April 12, 2011

TABLE OF CONTENTS

Page

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 BRIEF
BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL

I. SUPPLEMENTAL STATEMENT OF THE FACTS

The history of the case, beginning with the Application filed by the Ohio Edison Company ("OE"), the Cleveland Electric Illuminating Company ("CEI"), and the Toledo Edison Company ("TE", collectively with OE and CEI, "FirstEnergy" or the "Companies") on February 12, 2010, is recounted in the Initial Brief filed by the Office of the Ohio Consumers' Counsel ("OCC"). On March 28, 2011, initial briefs were filed by the OCC, the CKAP Parties,[1] and the Ohio Partners for Affordable Energy ("OPAE"). These parties argued in their initial briefs in favor of continued recognition by the Public Utilities Commission of Ohio ("PUCO" or "Commission") of special rates for residential customers who heat their homes with electricity.

Other parties that filed initial briefs on March 28, 2011 were FirstEnergy, Industrial Energy Users – Ohio ("IEU"), the Ohio Manufacturing Association jointly with the Ohio Hospital Association ("OMA/OHA"), and the PUCO Staff. The four initial

[1] Sue Steigerwald, Citizens for Keeping the All-Electric Promise ("CKAP"), Joan Heginbotham, and Bob Schmitt Homes, Inc.

briefs by these parties share the position that the Commission's initiative to create RGC credits should be entirely phased out, regardless of circumstances. However, these parties took varying positions regarding other matters in this case. FirstEnergy and the PUCO Staff favored the rate proposals stated in their sponsored testimony. FirstEnergy states that its rate proposal achieves the Companies' goals "at a lower cost" than the rate proposal discussed in Staff Witness Fortney's testimony.[2]

II. PRELIMINARY LEGAL ARGUMENTS

A. The Testimony of OCC Witness Yankel Was Properly Admitted.

The Commission should uphold the Attorney Examiner's ruling that admitted the testimony of OCC Witness Yankel over the objection of IEU.[3] The objection at the hearing that the OCC's violated a settlement agreement -- IEU was one party, and it also devotes a substantial portion of its brief to this topic[4] -- was poorly articulated and supported at hearing. IEU's initial brief relies upon the oral argument at the hearing, and does not further explain or support its objection to the admission of Mr. Yankel's testimony.

The stipulation that is the subject of IEU's objection settled the electric security plan ("ESP") case during 2009, Case No. 08-935-EL-SSO (the "*FirstEnergy ESP I Proceeding*").[5] The Attorney Examiner's ruling that permitted Mr. Yankel to testify was correct, on the outset, because the stipulation in the *FirstEnergy ESP I Proceeding* does

[2] FirstEnergy Brief at 66.

[3] IEU Brief at 11.

[4] Id. at 11-17.

[5] Id. at 13.

not appear anywhere in the record of the instant proceeding.[6] If such a record had been established and considered at hearing, that record would have revealed that the *FirstEnergy ESP I Proceeding* determined standard service offer ("SSO") rates for the period ending May 31, 2011. Mr. Yankel's testimony did not address rates on or before that date, but addressed his proposal for going forward rates while recognizing that the PUCO had already made its determinations regarding RGC levels through the end of May 2011.[7]

IEU's argument misses the mark regarding the nature and history of this case and the OCC's role in that history. On February 12, 2010, the Companies filed the original Application to reduce rates for certain residential customers. On March 3, 2010, the Commission recognized "substantial public concern . . . regarding certain all-electric residential customers' bills" and approved immediate relief: "bill impacts commensurate with FirstEnergy's December 31, 2008, charges."[8] The Commission also recognized that its immediate rate relief efforts were "not a long-term solution," and stated that it would take "comments by interested persons" after the report by the PUCO Staff was issued.[9] The Commission's rate relief was established, "at a minimum . . . through the next winter

[6] This fact can be confirmed by examining the portion of the transcript cited by IEU. IEU Brief at 11, citing Tr. Vol. I at 203, 207, and 208 (February 16, 2011). The pages cited by IEU do not mention the *FirstEnergy ESP I Proceeding*.

The argument by parties opposing the admission of portions of Mr. Yankel's testimony mention "ETP," "RCP," and "ESP" cases, without making a record of any of the stipulations referred to in the oral arguments. Tr. Vol. I at 198-210. The only case relevant to rates during the period discussed in Mr. Yankel's testimony is that covered by the second ESP case, Case Nos. 10-388-EL-SSO, et al. The OCC is not a party to the stipulation in that case.

[7] See, e.g., OCC Ex. 1 at 3 (Yankel) (recognizing that the PUCO had already acted on rates through May 31, 2011).

[8] Finding and Order at 3 (March 3, 2010).

[9] Id. at 3-4.

heating season [i.e. 2010/11]."[10] The Commission's interest in "comments" (i.e. in its Entry dated March 3, 2010) later developed into interest in testimony, and Mr. Yankel's testimony regarding rates after May 31, 2011 was properly submitted by the OCC and entered into the record at the hearing.

B. The Commission May Adjust Residential Rates Based Upon the Record that Demonstrates the Need for Such Adjustments.

IEU's argument against the admissibility of Mr. Yankel's testimony appears more directed at opposition to changes to the results of the as yet operational rate plan, a position echoed by OMA/OHA in its initial brief.[11] The Commission's final determinations will have an impact on rates that were previously the subject of FirstEnergy's second ESP case (i.e. the "*FirstEnergy ESP II Proceeding*," Case Nos. 10-388-EL-SSO, et al.).[12] The Commission should respect its previous decisions, and not authorize changes in rates that conflict with an earlier result without the need for such a departure.[13] In March 2010, however, the Commission recognized that such a need existed and acted to provide short-term rate relief to certain residential customers.

Although rate proposals and the commentary offered in the initial briefs vary by party, testimony in this case reveals the consistent theme that customers that use electricity as the primary source of fuel to heat their homes should receive rate relief that continues beyond the Commission's short-term rate treatment for these customers.

---

[10] Second Entry on Rehearing at 2 (April 15, 2010).

[11] OMA/OHA Brief at 8 (referring to Case No. 10-388-EL-SSO).

[12] The OCC is not a signatory to any stipulation submitted to the Commission or approved by the Commission in the *FirstEnergy ESP II Proceeding*.

[13] *Ohio Consumers' Counsel v. Public Util. Comm*. (2006), 110 Ohio St.3d 394, 399; 853 N.E.2d 1153; 2006-Ohio-4706; *Cleveland Elec. Illum. Co. v. Public Util. Comm.* (1975), 42 Ohio St.2d 403, 431; 330 N.E.2d 1.

FirstEnergy Witness Ridmann's testimony and FirstEnergy's initial brief propose an RGC adjustment to rates that Mr. Ridmann expected would continue through the winter of 2013/14.[14] PUCO Staff Witness Fortney's testimony and the PUCO Staff's initial brief propose that such adjustments should continue for through winter 2014/15[15] -- i.e. beyond winter 2013/14 when the rate plan approved in the FirstEnergy ESP II Proceeding ends. OCC Witness Yankel's testimony and the OCC's Initial Post-Hearing Brief propose a longer-term reappraisal of the relationship between rates paid by customers who use electric heat and other customers.[16]

The testimony of the public in this case, supplemented by the expert testimony on the subject of rate adjustments, supports a Commission determination that rates paid by customers who heat with electricity should be re-evaluated. The outcome of the FirstEnergy ESP II Proceeding should be modified.

III. ARGUMENT REGARDING THE LONG-TERM SOLUTION

A. Electric Heating Rates Should Apply to New Owners Based Upon Two Regulatory Principles.

Cost of service and rate gradualism regulatory principles should be applied to determine rates, and the cost of service principle supports the existence of a discount for customers who use electricity as their primary source energy source for heating irrespective of when the customer established an account with FirstEnergy.[17] FirstEnergy and the PUCO Staff base their proposals on the rate gradualism regulatory

[14] OCC Ex. 5 (Ridmann Workpaper 6) (also attached to the OCC's Initial Post-Hearing Brief, showing projected RGC credits for three utilities extending to "Winter 2013/14") and FirstEnergy Brief at 35-36.

[15] Staff Ex. 1 at 3 (Fortney) and Staff Brief at 11-12.

[16] OCC Ex. 1 at 34-35 (Yankel) and OCC's Initial Post-Hearing Brief at 18-19.

[17] See OCC Initial Post-Hearing Brief at 14-19.

principle alone.[18] Rate gradualism, however, also supports the continuing existence of a discount for existing electric heat customers and persons who purchase residences from these customers since property values are affected from a sudden removal of separate electric heating rates.

Both FirstEnergy and the PUCO Staff take a narrow view of the evidence to arrive at their conclusions that home values are unaffected by the removal of separate rates for customers who heat with electricity. FirstEnergy argues that "[t]here is no evidence that electric-heated homes will suffer loss in value absent special rates."[19] The PUCO Staff devotes a section of its initial brief to denying the existence of "[c]redible [e]vidence [s]upporting [d]ecline in [p]roperty [v]alues."[20] FirstEnergy Witness Ritley, responding to CKAP Parties Witness Frawley's testimony[21] regarding decreased property values for homes heated with electricity, testified that "[l]ong lasting stigmas result from conditions that are unchanging or relatively permanent and that affect the value of the home."[22] The Commission invited the public to "share information with the Commission regarding any aspect of potential future all-electric rates."[23] FirstEnergy and the PUCO Staff ignore important evidence submitted by the public in response to the Commission's request for additional information.[24]

---

[18] FirstEnergy Brief at 36-37; PUCO Staff Brief at 11.

[19] FirstEnergy Brief at 69.

[20] Staff Brief at 32.

[21] CKAP Parties Ex. 1.

[22] FirstEnergy Ex. 64 at 25 (Ritley).

[23] Entry at 3, ¶(7) (October 14, 2010).

[24] The initial brief submitted by the PUCO Staff does not make a single reference, nor include a single citation, to the testimony submitted at the local public hearings.

The evidence was extensive from the public on the topic of decreases in the value of homes in connection with loss of separate electric heating rates. As an example, Ms. Carol Nussle testified in Strongsville as follows:

> I'm now a senior citizen on Social Security. I cannot afford to stay in my home. My house went up for sale in April of this year [2010] at a fair market price. At every showing of my home, the feedback was that my home was lovely, immaculate and well kept, but buyers were afraid of an all-electric home. They did not know what it would cost to heat the house. No one was willing to purchase my house when they could not know what it would cost to heat it. Most were aware of the current issue with the rates and failed promises of the electric company, and they were afraid.[25]

The testimony presents a direct experience regarding the effect that electric heating rates have on residential property values. This anxiety regarding property values is a recurring theme in the testimony presented at the local public hearings.[26]

CKAP Parties Witness Frawley is a real estate agent whose base of operations is Strongsville which has a "large concentration of all-electric homes."[27] He testified that "[i]n [his] experience, the reports of large increases in utility bills have created a stigma for all-electric homes."[28] This is the testimony that drew the response from FirstEnergy Witness Ritley that an effect would be felt from "conditions that are unchanging or relatively permanent"[29] -- the matter at issue where the Commission sought comment

[25] Tr. Strongsville at 40-41 (Nussel) (October 25, 2010).

[26] See, e.g., Tr. Sandusky at 18 (Kinney) and at 22 (Kempton) (October 25, 2010); Tr. Strongsville at 27 (Landers) and at 45 (Ansari) and at 54 (LaSalvia) and at 86 (Damert) and at 102 (Patten) and at 112-114 (Sass) and at 116-118 (Sull) and at 121 (Blankenship) and at 142-143 (Finley) and at 174 (Dragics) (October 27, 2010); Tr. N. Ridgeville at 20 (Kos) and at 34 (Lockhart) and at 62-63 (Ferry) and at 73-74 (Franz) and at 142 (Silski) (November 22, 2010); Tr. Kirtland at 35 (Kossick) and at 129 (Walermire) and at 133 (Gift) and at 147 (Kurz) and at 171 (Rickettson) (November 23, 2010).

[27] CKAP Parties Ex. 1 at 2 (Frawley).

[28] Id. at 2-3.

[29] FirstEnergy Ex. 64 at 25 (Ritley).

from the public to determine the "long term solution."[30] Another Strongsville realtor, Ms. Diana Sull, testified about her inability to sell homes having electric heat under the present state of uncertainty regarding electric rates.[31] According to Ms. Sull, "[w]e need you to get it resolved, and we need you desperately to find in favor of an all-electric discount which has been around for the last 30 years."[32]

The Companies rely upon an uninformative presentation by FirstEnergy Witness Ritley in an effort to distract from the testimony of realtors and others on the subject of the impact of electric rates on property values.[33] Mr. Ritley tightly selected observations on the value of sales for residential properties in subdivisions developed between 1965 and 1985 -- subdivisions having both homes heated by electric and non-electric furnaces -- and compared their sales prices for various period of time.[34] Within the areas selected, Mr. Ritley eliminated some of the data.[35] The periods selected for comparisons were 2003-2010, 2007-2010, and the year 2010.[36] Observations outside 2010 were selectively used in the third comparison,[37] but Mr. Ritley did not draw any ultimate conclusions from his comparison of sales data for 2010.[38]

Mr. Ritley's selection of time periods was not well chosen to determine the effect of electric rate changes on home sales prices. Rates for electrically heating homes moved

[30] Finding and Order at 3-4 (March 3, 2010).

[31] Tr. Strongsville at 115-118 (Sull).

[32] Id. at 118.

[33] FirstEnergy Brief at 69 (citing FirstEnergy Ex. 64).

[34] FirstEnergy Ex. 64 at 4-6 (Ritley). The sales that were compared were from residences in the same subdivision. Tr. Vol. IV at 761 and 764 (Ritley) (February 23, 2011).

[35] FirstEnergy Ex. 64 at 7 (Ritley) ("eliminated outliers").

[36] Id. at 3.

[37] Id. at 6 ("exception . . . in the Avon Lake submarket").

[38] FirstEnergy Ex. 64 at 3 (Ritley) ("not sufficient to draw any meaningful conclusions").

upwards for purchasers of such homes after the grandfathering of rates occurred for winter 2006/2007.[39] Therefore, comparisons for the 2003-2010 period include many years when the electric discount was stable and the price of alternative heating fuels varied at levels that were not analyzed by Mr. Ritley.[40]

Mr. Ritley picked the 2007-2010 period, a period when he claimed "buyers were or *should have been aware* that they would no longer be eligible to received discounted rates for electric heating. . . ."[41] Again, comparative energy prices were not considered, and the quote from Mr. Ritley admits the probability that some homes were purchased during and after 2007 without *actual* knowledge on the part of home buyers of the change in electric rates.[42] The gradual dissemination of information to potential homebuyers regarding changes in electric rates -- which is displayed in the public testimony as homebuyers described their efforts to investigate electric rates[43] -- means that Mr. Ritley's testimony regarding the 2007-2010 data (which is based upon a sharp dividing line for information on electric rates) is uninformative.

Mr. Ritley's crafting of the sales information for his testimony also undermined his ultimate results concerning the effect of electric rate changes on home sales prices. As reflected by the public testimony, strong effects on home prices have resulted under

---

[39] FirstEnergy Brief at 9.

[40] Mr. Ritley was not even aware of the course of electric rates for customers served by the Companies. Tr. Vol. IV at 748-749 and 750 (Ritley) (February 23, 2011). Other infirmities in the 2003-2010 comparison exists, such as Mr. Ritley's failure to adjust for inflation during an eight-year period. Id. at 753.

[41] FirstEnergy Ex. 64 at 3 (Ritley).

[42] No study was conducted regarding how customers of electric service form their expectations concerning future electric rates. Tr. Vol. IV at 774-775 (Ritley) (February 23, 2011).

[43] Public testimony is revealing regarding the manner in which energy information is disseminated. For example, Mr. LaSalvia testified that "utility costs were a serious concern" during his home purchase decision and that he was provided bill information by the homeowner for a one-year period. Tr. Stongsville at 53 (LaSalvia) (October 27, 2010). Similar testimony was given in North Ridgeville. Tr. N. Ridgeville at 29 (Lockhart) (November 22, 2010).

circumstances where the owner of an electrically heated home is extremely limited in the ability to adjust to changing rate conditions.[44] Owners of homes in subdivisions that do not have access to natural gas and that are heated without the ductwork that would make conversion to an alternative fuel possible (if it could be made available) are the most economically vulnerable to changes in electricity rates. Yet these customers were purposefully excluded from Mr. Ritley's review.[45]

Mr. Ritley admitted, on cross-examination, that his work did not pick up differences in the value of residences between his selected subdivisions, where alternatives existed, and different locations where natural gas lines are unavailable.[46] His statistical results, even if conducted in a scientifically acceptable manner,[47] were unlikely to discern much effect in the 2010 data from the spike in winter rates because the sales data did not include the transactions likely to be most affected by a sudden change in electric rates.

The OCC's Initial Post-Hearing Brief supported the application of the cost of service regulatory principle, which would result in the PUCO providing a discount for

---

[44] See, e.g., Tr. Strongsville at 25 (Landers) ("no alternatives when it comes to using other sources of energy") (October 27, 2010); Tr. N. Ridgeville at 30-31 (Lockhart) and at 75 (Jager) ("no natural gas feeder lines") (November 22, 2010); Tr. Kirtland at 35 ("limited due to our type of heating, electric baseboard heat") (Kossick) and at 126 (Waltermire) ("road did not . . . have natural gas available") (November 23, 2011).

[45] Tr. Vol. IV at 764 (Ritley) (February 23, 2011) ("looking at the same subdivision for electrically-heated residences and gas-heated residences; is that correct? Yes.").

[46] Tr. Vol. IV at 762 (February 23, 2011).

[47] Mr. Ritley's knowledge of statistics is very limited, attributable to a single course in general business statistics. Tr. Vol. IV at 735 (February 23, 2011). The OCC's motions to strike the Mr. Ritley's statements of a statistical nature should have been granted. Id. at 739-746. Mr. Ritley initially (before motions to strike were tendered) stated that he does not hold himself as an expert in statistical analysis. Id. at 736. Mr. Ritley seemed aware that his statistical tests assumed that a random sample of sales had been selected. Id. at 778. But he described his sample selection in decidedly non-random terms: "It was not a -- the selection if you were to say random covering an entire community you lost the basis of comparison. Our random selection eliminated certain homes that we regarded as outliers." Id. at 779.

electric heat customers irrespective of when the customer established an account with FirstEnergy.[48] If, in the alternative, the PUCO does not decide that electric heat customers in new dwellings should receive a separate discounted rate, the PUCO should still require FirstEnergy to continue discounted electric rates for customers who purchase existing residences that are electrically heated in order to guard against devastating declines in property values. This provision for protecting customers was supported by the PUCO Staff in its initial brief, and should be adopted.[49]

B. The Economic and Operational Rationales for Providing Separate Electric Heat Rates Have Not Changed.

FirstEnergy's initial brief predictably argues that enactment of S.B. 3, the spin off of the Companies' generating assets to an affiliate, and enactment of S.B. 221 changed cost principles that apply to retail rate-setting under Ohio law.[50] FirstEnergy cites the testimony of FirstEnergy Witness Ridmann that emphasizes the absence of "fixed generation costs" related to the Companies' procurement of generation service in an auction process, but the Companies fail to recognize important cost differences between customers having different demand profiles.[51]

The Commission recently distinguished between the contractual cost of acquiring wholesale generation supply as the result of an auction for the supply of generation services and the development of appropriate retail pricing for customers. In Case No. 10-2586-EL-SSO that involved a proposal by Duke Energy Ohio for an auction process similar to that conducted by FirstEnergy, the Commission recently stated:

---

[48] OCC Initial Post-Hearing Brief at 15.

[49] PUCO Brief at 12 ("stay with the property").

[50] FirstEnergy Brief at 37.

[51] Id., citing FirstEnergy Ex. 1 at 11 ("no longer have fixed generation costs").

> Duke asserts that it has justified its proposal to remove demand charges from the market-based portion of its SSO price, as Duke is moving to full market pricing . . . .
>
> * * *
>
> The Commission directs Duke to consider, in any subsequent application filed by Duke, either for an ESP or an MRO, its rate design with respect to its demand classes and address whether Duke's proposed rate design send appropriate price signals.[52]

The Commission recognizes the distinction between generation service acquisition costs and the proper manner in which to set rates for retail generation service. Retail rate-setting in the post-S.B. 221 environment (including those set where auctions set overall generation rates) remains focused on the development of retail rates that "send appropriate price signals."

Enactment of S.B. 221 did not change cost principles that apply to retail rate-setting under Ohio law. The Commission's order should reflect the Companies' failure to recognize important cost differences between customers having different demand profiles that support separate electric heat charges. Such cost differences support a separate electric rate for customers who heat with electricity.[53]

C. FirstEnergy Engaged in Unfair and Deceptive Marketing Practices.

The PUCO Staff states a narrow view of this proceeding when it argues that "OCC and CKAP failed to produce any credible evidence to show that FirstEnergy promised a discounted rate to all-electric customers for eternity," and that documents entered into evidence were "in conflict with the Companies' standard rules and

[52] *In re Duke's MRO Application*, Case No. No. 10-2586-EL-SSO, Opinion and Order at 55-56 (February 23, 2011).

[53] See OCC Initial Post-Hearing Brief at 14-19.

regulations."[54] Substantial, credible evidence was presented during this proceeding -- including evidence provided at local public hearings that the PUCO Staff completely ignores -- regarding FirstEnergy's promises, much of it demonstrating that FirstEnergy's personnel carried out the Companies' marketing and sales practices in conflict with Commission approved rules and regulation. Evidence of such conflicts is not exculpatory to the Companies, but part of the basis upon which the Commission should find that violations of the PUCO's rules took place.

The evidence presented regarding the FirstEnergy's unfair and deceptive marketing practices did not take the form of a single document obtained from the Companies' standards -- such standards are the subject of approval in filings before the Commission. Instead, the record contains a myriad of communications that demonstrate a pattern of false communications to customers regarding electric rates that were inconsistent with the approved rules and regulations for the Companies.[55] The initial brief submitted by the PUCO Staff does not make a single reference, or include a single citation (on any subject), to the testimony submitted at the local public hearings. That testimony, which included the testimony of several former FirstEnergy employees, is both plentiful and credible.[56]

The PUCO Staff's treatment of the testimony of Mr. Elio Andreatta is incorrect and demonstrates a misperception of the problems caused by the Companies' marketing practices. The Staff Brief states that "the letter [from OE employee Andreatta to customer Thomas Logan] is contrary to the applicable tariff in effect at the time and the

[54] Staff Brief at 23.

[55] OCC Initial Post-Hearing Brief at 23-33.

[56] Id.

Companies' standard rules and regulations."[57] The PUCO Staff argues that the conflict shows that, if Mr. Andreatta authored the letter,[58] he "was not authorized to make such representations."[59] This assertion, unsupported by any citation to the record, is incorrect. Mr. Andreatta *testified* that his letters were reviewed by a residential supervisor at Ohio Edison before being transmitted, and that he was asked through his supervisor to represent that electric heating tariffs could be used by a customer (but not new customers) after it was withdrawn.[60] The communication to Mr. Logan that conflicted with the standard rules and regulations that were approved by the Commission is an *example of an unfair and deceptive marketing practice* by Ohio Edison. Mr. Andreatta was not a rogue employee: he carried out his instructions as an Ohio Edison employee, and the Ohio Edison's marketing practices that he carried out were unfair and deceptive.

The record contains credible evidence regarding unfair and deceptive sales and marketing by FirstEnergy.[61] The consequences of that conduct should be the denial of FirstEnergy's request to recover deferrals associated with discounts that were provided to electric heat customers though the heating season of 2010/11.

---

[57] Staff Brief at 27.

[58] The PUCO Staff apparently takes seriously the accusation by FirstEnergy (FirstEnergy Brief at 30-32) that Strongsville Ex. 2 (the "Logan Letter") is an elaborate forgery. Staff Brief at 27 ("Whether Mr. Andreatta authored Strongsville Exhibit 2 is questionable"). The essential contents of the Logan Letter were verified by both its recipient (Logan) in testimony at the Strongsville local public hearing (Tr. Strongsville at 124-126, referencing Strongsville Ex. 2) and its author (Andreatta) in testimony in Columbus. Tr. Vol. I at 109-119 (February 16, 2011). No evidence suggests that Mr. Logan and Mr. Andreatta have been in contact with one another since the period during which the letter was written (the late 1980s), yet their testimonies confirm one another.

[59] Staff Brief at 27.

[60] Tr. Vol. I at 114-118 (February 16, 2011).

[61] Id.

D. Carrying Charges Should Not be Approved.

1. The Commission did not authorize the Companies to collect carrying charges from customers for the deferred costs of Rider RGC.

The PUCO did not permit the Companies to accrue carrying charges in this proceeding. In its March 3, 2010 Finding and Order, the PUCO authorized FirstEnergy to modify its accounting procedures under R.C. 4905.13. Conspicuously absent from the Commission's order, however, was any authorization for FirstEnergy to accrue carrying charges on the deferrals. The Companies failed to timely apply for rehearing of the PUCO's Entry.[62] Commission cases that have awarded carrying costs on deferrals are based upon two factors: timely application for such treatment and PUCO approval of such treatment. Here, neither factor is present.

2. Constitutional issues are not within the jurisdiction of the Commission.

FirstEnergy argues in its initial brief that the Commission should award carrying charges on the basis of arguments regarding the U.S. Constitution.[63] The Ohio Supreme Court has confined the scope of the Commission's jurisdiction to utility-related matters.[64] R.C. Title 49 defines the entire scope of the PUCO's jurisdiction. Under R.C. Title 49, the PUCO has exclusive jurisdiction over various matters involving public utilities, such as rates and charges, classifications, and service, effectively denying jurisdiction to all courts except the Supreme Court. But because the Commission is ultimately a creature of

[62] See OCC Initial Post-Hearing Brief at 33.

[63] FirstEnergy Brief at 42-44.

[64] *Allstate Ins. Co. v. Cleveland Elec. Illuminating Co.* (2008) 119 Ohio St.3d 301, 302, 893 N.E.2d 824.

statute,[65] it has only those powers conferred to it by statute. Thus, the Commission does not have the jurisdiction to decide constitutional challenges.

The Ohio Supreme Court has explicitly provided that decisions regarding the constitutionality of the Commission's actions under the PUCO's guiding statutes are decisions for the courts, and not for the PUCO or for an advisory board. To this end, the Supreme Court has emphasized: "[the] PUCO *is not a court* and has no power to judicially ascertain and determine legal rights and liabilities.'"[66] Constitutional rights fall within the "legal rights and liabilities" that courts have the power to determine.[67] FirstEnergy's constitutional arguments are misplaced in this regulatory setting, and should not be heard by the Commission.

3. Even if FirstEnergy's constitutional argument is considered, the absence of carrying charges does not involve an unconstitutional taking of property.

a. The Companies' arguments lack merit even if they are considered.

Although the Commission cannot rule on issues of constitutionality, FirstEnergy makes arguments over which the Commission might have concerns regarding whether the Supreme Court of Ohio would find merit in these arguments. In this light only, while maintaining the legal position that the Commission should not consider FirstEnergy's

[65] See, e.g., *Columbus S. Power Co. v. Public Util. Comm*. (1993), 67 Ohio St. 3d 535, 620 N.E.2d 835; *Pike Natural Gas Co. v. Public Util. Comm.* (1981), 68 Ohio St. 2d 181, 22 Ohio Op. 3d 410, 429 N.E.2d 444; *Consumers' Counsel v. Public Util. Comm.* (1981), 67 Ohio St. 2d 153, 21 Ohio Op. 3d 96, 423 N.E.2d 820; and *Dayton Communications Corp. v. Public Util. Comm*. (1980), 64 Ohio St. 2d 302, 18 Ohio Op. 3d 478, 414 N.E.2d 1051.

[66] *Allstate Ins. Co. v. Cleveland Elec. Illuminating Co.* (2008) 119 Ohio St.3d 301, 302, 893 N.E.2d 824 (citation omitted) (emphasis added).

[67] *Herrick v. Kosydar* (1975), 44 Ohio St. 2d 128.

constitutional arguments, this Reply Brief responds to FirstEnergy's arguments. The Companies' arguments lack merit.

b. No *per se* "takings" rule applies for Fifth Amendment purposes related to the absence of carrying charges.

The Companies arguments should be rejected regarding the absence of carrying charges in connection with narrow categories of potential regulatory "takings" that are considered "*per se*" for Fifth Amendment purposes. The Company characterizes these as "categorical" and "non-categorical" takings,[68] but neither applies to the circumstances in this case.

Categorical takings that violate the Fifth Amendment occur when the government regulation *completely* deprives an owner of "all economically beneficial use" of property.[69] The absence of carrying charges in this case does not deprive the utility of "all economically beneficial use" of property.[70] Carrying charges, which are not a cost of generation, were specifically not awarded in the Finding and Order issued on March 3, 2010. The absence of carrying charges is not the equivalent of complete deprivation of all economically beneficial uses of FirstEnergy's property.

With no complete deprivation, only a partial deprivation -- i.e. a "non-categorical taking" -- could be considered. A non-categorical taking occurs when the regulation causes an owner to suffer a permanent physical invasion of property, however minor.[71]

[68] FirstEnergy Brief at 42.

[69] *Lingle v. Chevron U.S.A. Inc*. 544 U.S. 528, 538.

[70] Id.

[71] Id. at 538.

By not awarding carrying charges, the Commission has not ventured into the area of a non-categorical taking because no permanent, physical invasion of property has occurred.

c. *Penn Central Transp. Co. v. New York City* -- whose standards are not met here -- governs "takings" arguments outside those considered *per se*.

Outside of the two relatively narrow categories discussed above, regulatory takings are not governed by a discrete formula but by the factors set forth in *Penn Central Transp. Co. v. New York City*.[72] Primary among the factors in *Penn Central* are "the economic impact of the regulation;" (2) the extent to which regulation interferes with the owners' distinct investment backed expectations; and (3) the character of the government action-whether it amounts to physical invasion or instead merely affects property interests through "some public program adjusting the benefits and burdens of economic life to promote the common good."[73] The U.S. Supreme Court opined that these three factors establish a "touchstone" focusing on the severity of the burden that government imposes on private property rights.[74] The *Penn Central* inquiry, the Court has noted, "turns in large part on the magnitude of the regulations economic impact and the degree to which it interferes with legitimate property interests**.**"[75]

Here the magnitude of the regulation, in terms of economic impact, is small in comparison to the total generation purchased power costs. Moreover, there has been no physical invasion of property here, but merely a regulation that affects property interests through a public program that adjusts the benefits and burdens to promote the public

[72] *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978).

[73] *Lingle* at 539.

[74] Id. at 540.

[75] Id.

good. The PUCO placed a balance or limit on regulatory liability associated with the RGC in order to curb the costs that would eventually be charged to customers.

A PUCO decision that does not award carrying charges on the deferrals does not interfere with legitimate property interests because there was no legitimate property interest created under the law nor under the PUCO rulings in this case. FirstEnergy could not have a reasonable expectation that it is entitled to carrying charges after the Companies failed to request such carrying charges, and the PUCO thereafter ruled that carrying charges had not been awarded.[76]

Case law merely provides utilities with the opportunity to seek carrying charges, not a guarantee. The Commission has allowed carrying charges in the past in order to avoid the possibility of *significant* financial harm to the utility.[77] FirstEnergy's claim that recovery of carrying charges is necessary to "make the Companies whole"[78] falls short of the Commission's standard.[79]

---

[76] No statutory authority exists that mandates the imposition of carrying charges by the PUCO. Statutes under the Revised Code do not reflect a necessary connection between deferrals and carrying charges: e.g. R.C. 4928.143(B)(2)(a) defines purchase power costs as "including the costs of energy and capacity" only, with no mention of carrying costs.

[77] See, e.g., *In re Investigation into the Financial Impact of FASB Statement No. 106, "Employers Accounting for Postretirement Benefits Other Than Pensions,"* Case No. 92-1751-AU-COI, Finding and Order at 19 (February 25, 1993); *Cincinnati Gas & Electric Company*, Case No. 92-946-EL-AAM, Entry at 1-2 (October 1, 1992); *Ohio Edison Company*, Case No. 84-188-EL-AAM, Entry at 1-2 (February 2, 1988); *Cleveland Electric Illuminating Company*, Case No. 87-109-EL-AAM et al., Entry at 2 (February 2, 1988); *Ohio Edison Company*, Case No. 87-985-EL-AAM et al, Entry at 2 (October 20, 1987).

[78] FirstEnergy Ex. 1 at 44.

[79] In the alternative (i.e. if carrying charges are permitted), carrying charges should be comprised of the following: Debt only, with no cost of equity and no compounding of the carrying charge rate, on a net of tax basis. See FASB (Financial Accounting Standard Board) 92, which prohibits capitalization of the return on equity other than during construction or as part of a qualified phase-in plan. See also OCC Initial Post-Hearing Brief at 38 (the "net of taxes" argument, including the authority cited).

d. The absence of carrying charges is reasonable and not confiscatory.

In earlier holdings by the U.S. Supreme Court, which have not been overruled by *Lingle*, the Court framed the "taking clause" in the context of public utilities as an issue of reasonableness, not an issue of confiscation.[80] The Court has held that when legislation prescribing rate-setting affects the use of a utility's property, compensation should provide a reasonable rate of return upon the value of that property.[81] According to the Court, the guiding principle in utility rate regulation is the protection of the utility against rates that produce financial results that are so unjust as to be confiscatory.[82]

The absence of carrying charges on any deferrals in this case does not rise to the level of being so unjust as to be confiscatory. There has been no PUCO order whose total effect is unreasonable. The denial of carrying charges is only a portion of a larger order (as yet unissued) from which to judge the total financial effect on the Companies. FirstEnergy's claims are insufficient and premature, and must fail under standards by which claimed "takings" are judged.

E. All Customer Classes Should Contribute to Support the New Rates for Electrically Heated Residences, Consistent with the PUCO's Rule Regarding Reasonable Arrangements.

The PUCO Staff's initial brief argues for the allocation of ongoing revenue shortfalls associated with electric heating rates to other residential customers because

[80] *Duquesne Light Co. v. Barasch* (1989), 488 U.S. 299, 308.

[81] *West v. Chesapeake & Potomac Telephone Co.* (1935), 295 U.S. 662, 671 (holding that a state law prescribing reduced telephone rates was a taking because the rate was unreasonably calculated); *Duquesne Light Co. v. Barasch* (1989), 488 U.S. 299 (holding that if the total effect of the rate order is not unreasonable, judicial inquiry ends and the fact that the method employed to reach that result may contain infirmities is not then important).

[82] *Duquesne* at 307.

"ongoing discounts are a revenue shortfall among the residential class."[83] The PUCO Staff does not support its proposal with any citation to legal authority or to practice before the Commission.

R.C 4905.31 provides that "Chapters . . . 4909 [distribution rates] [and] 4928 [standard service offers] . . . do not prohibit a public utility from filing a schedule . . . providing for . . . [a] classification of service based upon the quantity used, the time when used, the purpose for which used, the duration of use, and any other reasonable consideration. . . . ."[84] FirstEnergy has proposed such a schedule. By Commission rule, recovery for the reduced revenue resulting from reasonable arrangements is "spread to all customers in proportion to the current revenue distribution between and among classes . . . ."[85] The Commission should modify the schedule finally proposed by FirstEnergy, and spread the cost of the revenue shortfall associated with the RGC credits across all customers according to the "current revenue distribution."

IV. CONCLUSION

Discounts for residential customers who heat with electricity should continue, consistent with the requirements stated in the OCC's Initial Post-Hearing Brief and this Reply Brief. The Commission should continue the efforts that it began in March 2010 to provide reasonable rates for these customers who where subject to marketing misrepresentations by FirstEnergy.

[83] Staff Brief at 21.

[84] R.C. 4905.31(D).

[85] Ohio Adm. Code 4901:1-38-08(A)(4).

Respectfully submitted,

JANINE L. MIGDEN-OSTRANDER
CONSUMERS' COUNSEL

/s/ Jeffrey L. Small

Jeffrey L. Small, Counsel of Record
Maureen M. Grady
Christopher J. Allwein
Assistant Consumers' Counsel

Office of the Ohio Consumers' Counsel
10 West Broad Street, Suite 1800
Columbus, Ohio 43215-3485
614-466-8574 (Telephone)
614-466-9475 (Facsimile)
small@occ.state.oh.us
grady@occ.state.oh.us
allwein@occ.state.oh.us

CERTIFICATE OF SERVICE

I hereby certify that a copy of the Office of the Ohio Consumers' Counsel's Reply Brief was served electronically upon the persons listed below this 12th day of April 2011.

/s/ Jeffrey L. Small
Jeffrey L. Small
Assistant Consumers' Counsel

PERSONS SERVED

John Jones
Attorney General's Office
Public Utilities Section
180 East Broad Street, 6th Floor
Columbus, OH 43215

James W. Burk
FirstEnergy Service Company
76 South Main Street
Akron, OH 44308

Samuel C. Randazzo
McNees Wallace & Nurick LLC
21 E. State St., 17th Fl
Columbus, OH 43215

Attorneys for Industrial Energy Users-Ohio

Thomas J. O'Brien
Bricker & Eckler LLP
100 S. Third St
Columbus, OH 43215

Attorney for Ohio Hospital Association and Ohio Manufacturers' Association

Richard L. Sites
Ohio Hospital Association
155 East Broad Street, 15th Floor
Columbus, OH 43215-3620

Attorney for Ohio Hospital Association

Kevin Corcoran
Corcoran & Associates Co., LPA
8501 Woodbridge Court
North Ridgeville, OH 44039

Attorney for Sue Steigerwald; Citizens For Keeping The All-Electric Promise (CKAP); Joan Heginbotham and Bob Schmitt Homes, Inc.

David C. Rinebolt
Colleen L. Mooney
231 West Lima Street
Findlay, OH 45839-1793

Attorneys for Ohio Partners for Affordable Energy

David A. Kutik
Jones Day
North Point, 901 Lakeside Ave.
Cleveland, OH 44114-1190

Attorney for Ohio Edison Company, Cleveland Electric Illuminating Company and the Toledo Edison Company

Cynthia Fonner Brady
Senior Counsel
Constellation Energy Resources, LLC
550 West Washington Blvd Suite 300
Chicago, IL 60661

Attorney for Constellation New Energy, Inc.

M. Howard Petricoff
Stephen M. Howard
Vorys, Sater, Seymour & Pease
52 East Gay St., PO Box 1008
Columbus, OH 43216-1008

Attorneys for Constellation New Energy, Inc.

Grant W. Garber
Jones Day
P.O. Box 165017
Columbus, OH 43216-5017

Attorney for Ohio Edison Company, Cleveland Electric Illuminating Company and the Toledo Edison Company

John.jones@puc.state.oh.us
cynthia.a.fonner@constellation.com
smhoward@vorys.com
cmooney2@columbus.rr.com
tobrien@bricker.com
mhpetricoff@vssp.com
drinebolt@aol.com
sam@mwncmh.com
ricks@ohanet.org
kevinocorcoran@yahoo.com
burkj@firstenergycorp.com
dakutik@jonesday.com
gwgarber@jonesday.com

greg.price@puc.state.oh.us
mandy.willey@puc.state.oh.us

Summary: Brief Reply Brief by the Office of the Ohio Consumers' Counsel electronically filed by Ms. Deb J. Bingham on behalf of Small, Jeffrey L. Mr.