

FILE

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

8
RECEIVED-BOOKETING DIV
2011 APR 12 PM 5:21
PUCO

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
OF
INDUSTRIAL ENERGY USERS-OHIO**

Samuel C. Randazzo (Counsel of Record)
Scott Elisar
McNEES WALLACE & NURICK LLC
21 East State Street, 17TH Floor
Columbus, OH 43215
Telephone: (614) 469-8000
Telecopier: (614) 469-4653
sam@mwncmh.com
selisar@mwncmh.com

April 12, 2011

Attorneys for Industrial Energy Users-Ohio

This is to certify that the images appearing are an
accurate and complete reproduction of a case file
document delivered in the regular course of business.

{C33821:5 }

Technician Sam Date Processed APR 13 2011

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of Ohio)	
Edison Company, The Cleveland Electric)	Case No. 10-176-EL-ATA
Illuminating Company, and The Toledo)	
Edison Company for Approval of a)	
New Rider and Revision of an Existing)	
Rider.)	

**REPLY BRIEF
OF
INDUSTRIAL ENERGY USERS-OHIO**

I. INTRODUCTION

In its Initial Brief, the Industrial Energy Users-Ohio ("IEU-Ohio") addressed many of the core positions of the parties, such as the Office of the Ohio Consumers' Counsel ("OCC"), that have asked the Public Utilities Commission of Ohio ("Commission") to undo results that they previously asked the Commission to authorize, grant relief favoring some residential customers and, in doing so, increase the rates and charges of non-residential customers. In its Initial Brief, IEU-Ohio explained why the results sought by parties like OCC are unreasonable and unlawful.

In contrast, the Initial Post-Hearing Brief of OCC restated positions previously taken by OCC even though these positions lack the legal and factual support that must be established to succeed on their merit. OCC's Initial Post-Hearing Brief did not address the legal and factual defects that compel the Commission to reject the relief

requested by OCC. In its Initial Brief, IEU-Ohio explained why the results sought by parties like OCC are unreasonable and unlawful.

In this relatively short Reply Brief, IEU-Ohio fortifies its protest of the Commission allowing OCC to breach OCC's settlement-related duties and the meritless positions which the Commission has allowed OCC to advance in this proceeding.

A. Mr. Yankel's Testimony Should Have Been Stricken

IEU-Ohio again asserts that Anthony Yankel's testimony should have been stricken since the sponsor of the testimony, OCC, agreed to support settlements that produced the results opposed by Mr. Yankel.¹ OCC signed and agreed to the terms of the settlements. The provisions of the settlements include recommendations on revenue distribution and rate designs for residential and non-residential customers. The Commission adopted the settlements and, in doing so, enabled agreements in which, "The Signatory Parties agree that signing this Supplemental Stipulation binds them to the stipulation,"² and "The Signatory Parties agree not to oppose the Stipulated ESP as modified by this Supplemental Stipulation in any forum."³

The record evidence shows that OCC previously signed and supported settlements that produced the very rate design and revenue distribution that OCC is seeking to undo in this proceeding. OCC's Initial Post-Hearing Brief did not contest this

¹ *In the Matter of the Application of the Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo 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*, PUCO Case Nos. 08-935-EL-SSO, et al., Application (July 31, 2008) (hereinafter "*FE ESP Proceeding*").

² *FE ESP Proceeding*, Supplemental Stipulation at 10 (February 26, 2009); *FE ESP Proceeding*, Second Opinion and Order at (March 25, 2009).

³ *Id.*

reality. Instead, OCC has behaved as though this history never happened. OCC has a duty to honor the settlements which it negotiated, signed and joined in recommending to the Commission once the settlements are adopted by the Commission. The Commission has a duty to prevent OCC from violating OCC's settlement obligations, as OCC has done here.

Therefore, IEU-Ohio again urges the Commission to find that IEU-Ohio's Motion to Strike⁴ was proper and that the Motion must be sustained.

II. OCC'S RECOMMENDATIONS ARE WITHOUT MERIT

Even if the Commission does not sustain IEU-Ohio's Motion to Strike Mr. Yankel's testimony, the revenue distribution recommendations of OCC (that affect the rates and charges of non-residential customers) are without merit.

The Commission's Staff ("Staff") and the Ohio Edison Company ("OE"), The Cleveland Electric Illuminating Company ("CEI"), and The Toledo Edison Company ("TE") (collectively "FE") aptly explain in their Post-Hearing Briefs why the responsibility for any incremental revenue shortfall should reside with residential customers, as any share of such responsibility for non-residential customers has already been determined in accordance with the settlements and decisions in the FE electric security plan ("ESP") proceeding.⁵ Staff correctly concludes that there is no rationale for having non-residential customers pay for the revenue shortfalls created by members of the residential class.⁶ FE's Post-Hearing Brief explains why residential customers should

⁴ Tr. Vol. I at 203, 207, 208.

⁵ Staff Ex. 1 at 4; Staff Post-Hearing Brief at 20.

⁶ Staff Post-Hearing Brief at 20.

be responsible for the deferred costs and carrying charges associated with the discount imposed by the Commission on an interim basis.⁷ FE's Post-Hearing Brief concludes that residential customers should pick up the tab because "residential customers historically have received the benefits."⁸ FE's Post-Hearing Brief also explains that non-residential customers are already picking up a significant portion of the cost of the benefit that is available to the residential customers that are benefited by the all-electric discounts.⁹

In its Post-Hearing Brief, which spans some fifty (50) pages, OCC simply restates their misconnected observations and unfounded pronouncements, but it offers no hint of how the Commission might lawfully and reasonably connect Mr. Yankel's casual observations about rates approved by the Commission prior to Ohio's electric restructuring legislation to his current day recommendations for altering the default generation supply prices that are set and approved by the Commission based on a competitive bidding process (not cost of service principles). Further, the OCC's Post-Hearing Brief does not attempt to rebut the evidence that shows that Mr. Yankel's testimony is neither relevant nor reliable.¹⁰ Nor does the OCC show that Mr. Yankel's testimony is based on any reliable facts that were properly applied to this case.¹¹

At page 41 of its Post-Hearing Brief, the OCC highjacks the Commission's rules regarding reasonable arrangements and attempts to divert the rules to support OCC's

⁷ FE Post-Hearing Brief at 45, citing Company Ex. 1 at 43-44.

⁸ *Id.* at 45-46, citing Tr. Vol. I at 184-185.

⁹ *Id.*

¹⁰ Fed. R. Evid. 702; *Kumho Tire v. Carmichael*, 119 S. Ct. 1167 (1999).

¹¹ *Id.*

position on how the cost of its self-destructing recommendations should be distributed. OCC's Post-Hearing Brief ignores the uncontested fact that non-residential customers are already picking up a significant portion of the cost of the benefit provided to some residential customers pursuant to settlements approved by the Commission. OCC's Post-Hearing Brief also ignores the conflict between Mr. Yankel's kWh-based allocation of this cost with the proportion-of-current-revenue-distribution allocation method referenced in the Commission's rule (cited at page 41 of OCC's Post-Hearing Brief).¹²

III. CONCLUSION

For the reasons explained above, IEU-Ohio urges the Commission to preclude OCC from violating OCC's obligations under binding settlement agreements. IEU-Ohio also urges the Commission to reject proposals that would require non-residential customers to pick up responsibility for whatever incremental revenue shortfall has been or will be created by the Commission's determinations in this proceeding.

Respectfully Submitted,



Samuel C. Randazzo (Counsel of Record)

Scott Elisar

McNees Wallace & Nurick LLC
21 East State Street, 17th Floor
Columbus, OH 43215

Telephone: (614) 469-8000

Telecopier: (614) 469-4653

sam@mwncmh.com


selisar@mwncmh.com

Attorneys for Industrial Energy Users-Ohio

¹² OCC Post-Hearing Brief at 41.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *Reply Brief of Industrial Energy Users-Ohio* was served upon the following parties of record this 12th day of April 2011, via electronic transmission, hand-delivery or first class mail, postage prepaid.



Scott Elisar

James W. Burk (Counsel of Record)
Senior Attorney
FirstEnergy Service Company
76 South Main Street
Akron, OH 44308

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

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

ON BEHALF OF FIRSTENERGY CORP.

Jeffrey L. Small
Maureen Grady
Christopher Allwein
Assistant Consumer's Counsel
Office of the Ohio Consumers' Counsel
10 W. Broad Street, Suite 1800
Columbus, OH 43215-3485

**ON BEHALF OF THE OFFICE OF THE OHIO
CONSUMERS' COUNSEL**

Thomas J. O'Brien
Bricker & Eckler LLP
100 South Third Street
Columbus, OH 43215-4291

**ON BEHALF OF THE OHIO MANUFACTURERS'
ASSOCIATION**

Richard L. Sites
General Counsel & Senior Director of Health
Policy
Ohio Hospital Association
155 East Broad Street, 15th Floor
Columbus, OH 43215-3620

Thomas J. O'Brien
Bricker & Eckler LLP
100 South Third Street
Columbus, OH 43215-4291

ON BEHALF OF OHIO HOSPITAL ASSOCIATION

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

**ON BEHALF OF SUE STEIGERWALD, CITIZENS FOR
KEEPING THE ALL-ELECTRIC PROMISE ("CKAP");
JOAN HEGINBOTHAM; AND BOB SCHMITT HOMES,
INC.**

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

David I. Fein
VP, Energy Policy-Midwest
Constellation Energy Group, Inc.
550 W. Washington Street, Suite 300
Chicago, IL 60661

Cynthia Fonner Brady
Senior Counsel
Constellation Energy Resources, LLC
550 W. Washington St., Suite 300
Chicago, IL 60661

**ON BEHALF OF CONSTELLATION NEWENERGY, INC.
("CONSTELLATION" OR "CNE")**

David C. Rinebolt
Colleen L. Mooney
Ohio Partners for Affordable Energy
231 West Lima Street
Findlay, OH 45839-1793

**ON BEHALF OF OHIO PARTNERS FOR AFFORDABLE
ENERGY**

John Jones
Thomas Lindgren
Assistant Attorneys General
Public Utilities Section
180 East Broad Street
Columbus, OH 43215

**ON BEHALF OF THE STAFF OF THE PUBLIC
UTILITIES COMMISSION OF OHIO**

Henry H. Phillips-Gary
Gregory Price
Mandy Willey
Attorney Examiners
Public Utilities Commission of Ohio
180 East Broad Street
Columbus OH 43215

ATTORNEY EXAMINERS