

ORIGINAL

9

Before
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of)
Cincinnati Gas & Electric Company for) Case No. 99-1658-EL-ETP
Approval of its Transition Plan and for)
Authorization to Collect Transition Revenues)

In the Matter of the Application of)
FirstEnergy Corp. on Behalf of)
Ohio Edison Company, The)
Cleveland Electric Illuminating)
Company and The Toledo Edison) Case No. 99-1212-EL-ETP
Company for Approval for Their)
Transition Plans and for Authorization)
To Collect Transition Revenues)

In the Matter of the Application of)
Columbus Southern Power Company for) Case No. 99-1729-EL-ETP
Approval of Electric Transition Plan and)
Application for Receipt of Transition Revenues)

In the Matter of the Application of)
Ohio Power Company for) Case No. 99-1730-EL-ETP
Approval of Electric Transition Plan and)
Application for Receipt of Transition Revenues)

In the Matter of the Application of)
The Dayton Power & Light Company)
for Approval of Transition Plan Pursuant) Case No. 99-1687-EL-ETP
to 4928.31, Revised Code and for the Opportunity)
to Receive Transition Revenues as Authorized)
Under 4928.31 to 4928.40, Revised Code)

In the Matter of the Application of)
Monogahela Power Company dba) Case No. 00-02-EL-ETP
Allegheny Power for Approval of an Electric)
Transition Plan.)

Reply Of The Ohio Council Of Retail Merchants
To Comments Concerning Sales For Resale
In The Context Of Electric Restructuring

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
Technician B. McCauley Date Processed 12/13/00

**Reply Of The Ohio Council Of Retail Merchants
To Comments Concerning Sales For Resale
In The Context Of Electric Restructuring**

I. Procedural History

On November 21, 2000, the Commission issued entries in the CG&E and FirstEnergy transition plan cases that ordered modifications to the tariffs that were proposed by the utilities in those cases, and otherwise approved tariffs that will be effective January 1, 2000. Both Commission entries made additional modifications to the approval of the stipulations that were entered into between the parties in the CG&E and FirstEnergy transition plan cases. The November 21, 2000 entries provided interested parties an opportunity to comment upon the issue of sales for resale in the context of electric restructuring in the State of Ohio. See In re Transition Plan of CG&E (November 21, 2000 Entry), PUCO Case No. 99-1658-EL-ETP at ¶9; In re Transition Plan of FirstEnergy Companies (November 21, 2000 Entry), PUCO Case No. 99-1212-EL-ETP at ¶9 (hereinafter, "CG&E Entry" and "FirstEnergy Entry," respectively).

Various parties filed comments on December 6, 2000. These comments were filed in various dockets that deal with the transition plans of investor-owned electric utilities. As a matter of caution, the Ohio Council of Retail Merchants (hereinafter, "OCRM") filed its comments in all the electric transition plan cases that are before the PUCO and also files this Reply in all of these dockets.

II. Reply Arguments

1. Ohio Policy Supports The Availability Of Consumer Choice To All Ultimate Customers

The entries in the CG&E and FirstEnergy transition plan cases invite comment “regarding the issue of sale for resale and the findings of the *Brooks* [v. *Toledo Edison Company* (May 8, 1996 Order), PUCO Case No. 94-1987-EL-CSS] order in light of Senate Bill 3 and electric restructuring.” See CG&E Entry at ¶9; FirstEnergy Entry at ¶9. Some parties commented that they do not see the connection between the decision in *Brooks* and the provisions contained in Senate Bill 3. See Simon Property Comments at 4 (“confusion”); General Growth Properties Comments at 2 (“nothing in ... Chapter 4928”); Ohio Building Owners Comments at 1 (“have not changed ... Supreme Court decisions”). Enron takes the argument further, stating that there is nothing in Ohio’s policy that guides the Commission’s actions on the present subject matter. See Enron Comments at 4 (“nothing in the state’s policy”). To the contrary, as pointed out by the OCRM’s initial comments on this issue, Ohio’s restructuring legislation provides:

It is the policy of this state to do the following throughout this state... :

(A) Ensure the availability to consumers of adequate, reliable, safe, efficient, nondiscriminatory, and reasonably priced retail electric service;

(B) Ensure the availability of unbundled and comparable retail electric service that provides consumers with the supplier, price, terms, conditions, and quality options they elect to meet their respective needs;

(C) Ensure diversity of electricity supplies and suppliers, by giving consumers effective choices over the selection of those supplies and suppliers....

* * *

(H) Ensure retail electric service consumers protection against unreasonable sales practices, market deficiencies, and market power....

R.C. 4928.02.

Ohio's policy is implemented by means of the restructuring in the provision of "retail electric service," defined as "service involved in supplying or arranging for the supply of electricity to ultimate consumers in this state." R.C. 4928.01(A)((27) (emphasis supplied). Ultimate consumers, including commercial establishments that consume electricity in multiple tenant situations, must be provided access to competitive supplies of electricity in order to fulfill the promises of Ohio's restructuring legislation.

Of the comments opposed to the OCRM's position, only the Ohio Building Owners appear to mention the role that ultimate consumers play in the State's policy and electric restructuring. The Ohio Building Owners cite Revised Code Section 4928.01(A)(27) (*see* Ohio Building Owners Comments at 5) -- cited above and containing the reference to "ultimate customers" -- but then simply state that the "Supreme Court of Ohio has held that office buildings, apartment houses and shopping centers are 'consumers' under R.C. 4905.03(A)(4)." *Id.* (emphasis supplied). The missing reference to "ultimate" consumers in the argument is apparently only provided in the preliminary remarks submitted by the Ohio Building Owners. Those comments declare, without any legal or logical support, that "the landlord is the ultimate consumer of the public utility's sale of utility service."¹ *Id.* at 1.

¹ The implication is that a commercial establishment that has lighting, space conditioning, and other needs that require the use of electricity and that pays for such electrical needs is not an ultimate consumer of electricity simply because payments are made to a landlord. The Ohio Building Owners would even extend

Commentators opposed to the OCRM's position on the issue at hand dismiss the State's policy because it does not, in itself, provide substantive provisions for the implementation of electric restructuring. The Commission is charged with broad responsibilities under Senate Bill 3 to implement consumer choice for electric suppliers. Concerning the issue at hand, commentators have presented various competing definitions or competing interpretations of definitions that are contained in the Revised Code or the Ohio Administrative Code. The Commission is faced with the task of weighing competing arguments under circumstances where recent legislation renders reliance upon case law problematic. Under these circumstances, the Commission must be guided by the State's statutorily expressed policy. If not used in such a manner, the General Assembly's drafting and debate over policy provisions were acts of futility. Ohio's policy that supports choice of suppliers by ultimate consumers of electricity must not be misplaced or lightly dismissed² by definitional slight of hand.

2. All Providers of Competitive Retail Electric Service Must Be Certified

Various parties have directed the Commission's attention to definitions in the Ohio Revised Code and the Ohio Administrative Code. Important among these are the Commission's definition of the term "aggregator" and the following statutory provisions:

No electric utility, electric services company, electric cooperative, or governmental aggregator shall provide a competitive retail electric service to a consumer in this state ... without first being certified by the public

this illogical construction to the case where the "utility service ... is submetered to the tenants." See Ohio Building Owners Comments at 1.

² One commentator argues that Commission action that deals with retailers would "detract from the important obligations of the Commission to effectuate the stated policies embodied in Am. Sub. S. B. 3." See Industrial Energy Users – Ohio Comments at 4. Those stated policies apply to all ultimate consumers of electricity.

utilities commission regarding its managerial, technical, and financial capability to provide that service. R.C. 4928.08(B) (emphasis supplied).

“Electric services company” means an electric light company that is engaged ... in the business of supplying or arranging for the supply of only a competitive retail electric service in this state. “Electric services company” includes a power marketer, power broker, aggregator, or independent power producer.” R.C. 4928.01(A)(9) (emphasis supplied).

An “electric light company,” for purposes of Revised Code Chapter 4928, is “engaged in the business of supplying electricity ... to consumers within this state.” R.C. 4905.03, *referenced in* R.C. 4929.01(A)(7) (definition of “electric light company”).

The Ohio Building Owners focus on the definition of “electric light company,” stating that the definition has not been changed since “the Ohio Supreme Court [in *Shopping Centers*] refused to apply [it] to a submetering landlord.” *See* Ohio Building Owners Comments at 5.³ Many changes have been necessitated by electric restructuring in Ohio, including a change in the definition of the term “electric services company” as noted above. Power marketers, power brokers, aggregators, and independent power producers -- mentioned in the definition of “electric services company” -- are part of the supply environment to consumers within Ohio under electric restructuring. While the definition of “electric light company” has not changed under S.B. 3, the cast of possible

³ General Growth Properties also states that a landlord cannot be considered an “electric services company,” but does not explain why a “mall owner-landlord ... [is not an] aggregator.” *See* General Growth Properties Comments at 4.

players that fall under the definition has definitely changed and rendered reliance on former Ohio Supreme Court decisions unreliable.

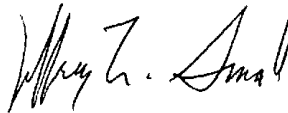
Simon Property is apparently not disturbed, from a definitional standpoint, by the application of the term “electric light company” to landlords. Instead, Simon Properties focuses on the application of the term “aggregator” to landlords. *See* Simon Property Comments at 15.⁴ Simon Property argues that “while there may be a rental agreement which controls how the tenant will be charged for the electric service provided, there is no contract with tenants to combine their loads.” *Id.* at 16. By this reasoning, an aggregator is transformed into an entity that is not obligated to comply with certification and other requirements under electric restructuring by merely combining an electric supply contract with its rental agreement. Guided by State’s statutorily expressed policy, the Commission must conclude that the General Assembly did not intend such subversion of electric restructuring requirements. Commercial establishments that consume electricity in multiple tenant situations must be provided access to competitive supplies of electricity in light of Ohio’s restructuring legislation.

⁴ The Industrial Energy Users – Ohio appear to believe that the Commission’s definition of “aggregation” and “aggregator” apply to the landlord situation, but dismiss the Commission’s earlier promulgation of rules as “overly-broad.” *See* Industrial Energy Users – Ohio Comments at 5-6.

III. Conclusion

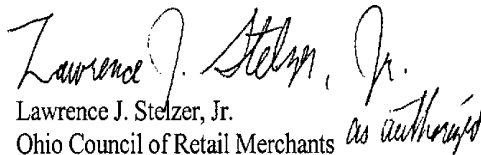
As previously stated by the OCRM, the Commission should order the investor-owned utilities in Ohio to retain the resale restrictions that exist in their tariffs or order that a standardized resale provision be adopted by each electric distribution company in conformity with the above comments and those contained in the OCRM's initial comments.

Respectfully submitted,



John W. Bentine
Jeffrey L. Small
CHESTER, WILLCOX & SAXBE LLP
17 South High Street, Suite 900
Columbus, Ohio 43215
(614) 221-4000
FAX 221-4012
email: jsmall@cwslaw.com

Attorneys for the Ohio Council
of Retail Merchants (all but 99-1212)

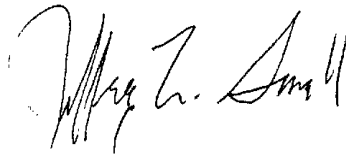


Lawrence J. Stelzer, Jr.
Ohio Council of Retail Merchants
50 West Broad Street, Suite 2020
Columbus, Ohio 43215
(614) 221-7833

Attorney for the Ohio Council
of Retail Merchants (Case 99-1212)

Certificate of Service

The below signifies that the above *Comments Concerning Sales for Resale* have been transmitted, via e-mail, to parties listed on the official e-mail service lists for each of the electric transition plan cases, this 13th day of December, 2000.

A handwritten signature in cursive script, appearing to read "Mary L. Small".