

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of)
Ohio Edison Company, The)
Cleveland Electric Illuminating) Case No. 04-1931-EL-AAM
Company, and The Toledo Edison)
Company for Authority to Modify)
Their Accounting Procedures.)

ENTRY ON REHEARING

The Commission finds:

- (1) On December 30, 2004, Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company (FirstEnergy) filed an application to modify its accounting procedures and to defer the incremental transmission- and ancillary service-related charges incurred under the Midwest Independent Transmission System Operator, Inc. (MISO) Open Access Transmission Tariff and Transmission Energy Markets Tariff until FirstEnergy begins to recover those costs in rates. FirstEnergy joined MISO, a regional transmission operator, on October 1, 2003, pursuant to Section 4928.12, Revised Code. On March 17, 2005, FirstEnergy filed a supplemental application to request that it be permitted to defer incremental loss charges in addition to all other transmission- and ancillary service-related charges incurred under the MISO tariff.
- (2) On May 18, 2005, the Commission issued its Finding and Order in this case. In the Finding and Order, the Commission granted FirstEnergy's application to modify its accounting procedures and to defer the incremental transmission- and ancillary service-related charges, including incremental loss charges, incurred under the MISO tariff after December 30, 2004. In addition, the Commission denied motions to intervene filed by the Ohio Consumers' Counsel (OCC), the Ohio Partners for Affordable Energy (OPAE) and the Industrial Energy Users-Ohio (IEU-Ohio).
- (3) 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.

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- (4) On June 16, OCC filed an application for rehearing alleging that the Finding and Order in this case was unreasonable and unlawful on the following grounds:
 - (a) The Commission violated Section 4928.34(A)(6), Revised Code, and Commission precedent in allowing deferrals of costs incurred during the market development period (MDP) for recovery after the MDP.
 - (b) The Commission violated the Commission's Opinion and Order approving FirstEnergy's Electric Transition Plan, Case No. 99-1212-EL-ETP, and the stipulation and recommendation in that case.
 - (c) The Commission acted unlawfully in failing to grant OCC's motion to dismiss the application on the grounds that the application violated Ohio law and Commission precedent.
 - (d) The Commission acted unlawfully in failing to grant OCC's motion to intervene because OCC met the criteria set forth in Section 4903.221, Revised Code and Rules 4901-1-11(A)(2) and 4901-1-11(B) for intervention in this matter.
- (5) On June 16, 2005, OPAE docketed, by facsimile transmission, an application for rehearing. On June 20, 2005, OPAE filed its application for rehearing, alleging that the Commission's Finding and Order was unreasonable and unlawful because the Finding and Order permits FirstEnergy through the mechanism of a deferral to violate the rate cap provisions of Section 4928.34(A)(6), Revised Code.
- (6) On June 17, 2005, FirstEnergy filed an application for rehearing alleging that the Commission's rationale for disallowing the costs incurred from October 1, 2003 through December 30, 2004 was insufficient and that the Finding and Order was arbitrary, unreasonable and unlawful.
- (7) On June 25, 2005, FirstEnergy filed a motion to strike OPAE's application for rehearing, arguing that the application was not timely filed since it was filed by facsimile on June 16, 2005 and

an original was not filed until June 20, 2005, after the statutory deadline for the filing of applications for rehearing.

FirstEnergy's motion to strike OPAE's application for rehearing should be granted. Section 4903.10, Revised Code, requires that an application for rehearing must be filed within 30 days after the issuance of the Commission's decision. However, applications for rehearing, unlike other pleadings or documents, may not be filed by facsimile transmission. Rule 4901-1-02(B)(1), O.A.C. *See also*, Rule 4901-1-35, O.A.C. Therefore, the application for rehearing filed by OPAE was not timely filed; and no effective filing was made within 30-day period prescribed by Section 4903.10, Revised Code. *See, In the Matter of the Application of FirstEnergy Corp. On behalf of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Approval of Their Transition Plans and for Authorization to Collect Transition Revenues*, Case No. 99-1212-EL-ETP et al., Entry on Rehearing dated September 13, 2000 at 2). Although the Commission will grant FirstEnergy's motion to strike OPAE's application for rehearing, we note that OCC included, in its application for rehearing, an assignment of error similar to the assignment of error raised by OPAE. The Commission will address the merits of OCC's assignment of error below.

- (8) On June 27, 2005, OCC filed a memorandum contra FirstEnergy's application for rehearing, and FirstEnergy filed a memorandum contra OCC's application for rehearing.
- (9) In its first assignment of error, OCC argues that the Commission violated Section 4928.34(A)(6) and Commission precedent in allowing deferrals of costs incurred during MDP for recovery after the MDP.

OCC argues that the Commission acted unlawfully when it granted deferrals of transmission costs based upon Section 4928.35(A), Revised Code, which authorizes the Commission to approve adjustments to rate schedules during the MDP as "authorized by federal law." However, OCC does not dispute that the incremental transmission- and ancillary service-related charges incurred by FirstEnergy under the MISO tariff are "authorized by federal law." Rather, OCC argues that FirstEnergy should increase its transmission rates to recover the MISO charges incurred during the MDP and, correspondingly,

reduce its distribution rates by the same amount. However, it is not necessary for the Commission to rule on this argument advanced by the OCC. FirstEnergy's distribution rates are not before the Commission in this proceeding. Section 4928.35(A), Revised Code, does authorize adjustments to the rate schedules as "authorized by federal law," and, pursuant to this authority, the Commission has authorized FirstEnergy to defer the incremental transmission- and ancillary service-related charges incurred under the MISO tariff.

OCC argues that the Commission has previously found, as a matter of law, that deferrals of expenses incurred during the MDP violate Section 4928.34(A)(6), Revised Code. *See, In the Matter of the Application of the Cincinnati Gas & Electric Company to Modify its Nonresidential Generation Rates to Provide for Market-Based Standard Service Offer Pricing and to Establish an Alternative Competitive-Bid Service Option Subsequent to the Market Development Period*, Case Nos. 03-93-EL-ATA et al., (Opinion and Order dated September 29, 2004). *See also, In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Approval of a Post-Market Development Rate Stabilization Plan*, Case No. 04-169-EL-UNC (Opinion and Order dated January 26, 2005).

The Commission believes that the OCC has misconstrued the Commission's holdings in these cases. Although the Commission did decline to authorize deferrals in both cases, the Commission did so based upon the facts specific to each case rather than as a matter of law. In fact, in the AEP case, the Commission specifically addressed this point. After denying AEP the authority to defer transmission-related charges incurred during the MDP, the Commission stated that "[w]e reach this conclusion based upon the specific circumstances before us in this proceeding. Nothing in this decision is intended to be precedent-setting or to be construed as ruling upon the other RTO charge-related deferral requests that we have recently received from other [electric distribution utilities]." Case No. 04-169-EL-UNC (Opinion and Order dated January 26, 2005 at 27).

Rehearing on this assignment of error should be denied.

- (10) In its second assignment of error, the OCC argues that the Commission violated its Opinion and Order approving the stipulation in the FirstEnergy electric transition plan proceeding, *In the Matter of the Application of FirstEnergy Corp.*, Case No. 99-1212-EL-ETP et al., Opinion and Order dated July 19, 2000).

OCC does not cite to any specific provisions of the electric transition plan stipulation allegedly violated by approval of the creation of the deferrals; instead, OCC argues that neither the stipulation nor the Commission's Opinion and Order approving the stipulation provided for the deferral, during the MDP, of any incremental costs associated with FirstEnergy's participation in MISO. However, the Commission finds that the electric transition plan stipulation neither authorized nor prohibited the deferral of transmission- and ancillary service-related charges incurred during the MDP.

In the absence of a specific provision in the stipulation addressing the issue, the Commission should determine whether the deferrals are otherwise permitted under Ohio law. The Commission determined in the Finding and Order in this proceeding that Section 4905.13, Revised Code, authorized the Commission to modify the Uniform System of Accounts prescribed by the Federal Energy Regulatory Commission as it applies to utilities operating within this state. The Commission approved the application filed by FirstEnergy based upon this statutory authority. Rehearing on this assignment of error should be denied.

- (11) In its third assignment of error, the OCC argues that the Commission erred in failing to grant OCC's motion to dismiss the application on the grounds that the application violates Ohio law. OCC argues that the application was unlawful because it violates the provisions of Section 4928.34(A)(6), Revised Code; therefore, OCC argues, the Commission should have granted its motion to dismiss the application.

The Commission fully considered this issue in the Finding and Order. The OCC has raised no new arguments in its application. Further, the Commission addressed in Finding (9) the applicability of Section 4928.34(A)(6), Revised Code, to the application filed by FirstEnergy. Rehearing on this assignment of error should be denied.

- (12) In its fourth assignment of error, the OCC argues that the Commission erred in failing to grant OCC's motion to intervene because the OCC met the criteria for intervention set forth at Section 4903.221, Revised Code, and Rules 4901-1-11(A)(2) and 4901-11(B), O.A.C.

The Commission fully considered this issue in the Finding and Order. The OCC has raised no new arguments in their application. Rehearing on this assignment of error should be denied.

- (13) In its sole assignment of error, FirstEnergy argues that the Commission basis for disallowing the costs incurred from October 1, 2003, through December 30, 2004 is insufficient and that the Commission's decision is arbitrary, unreasonable and unlawful. FirstEnergy argues that the Commission's decision is not logical nor is it based on statute.

FirstEnergy is mistaken in its argument that the Commission's decision is not based upon statute. Section 4905.13, Revised Code, states, in relevant part, "[The Commission] may . . . prescribe by order the accounts in which particular outlays and receipts shall be entered, charged or credited." This provision vests considerable discretion with the Commission to determine whether to grant or to reject, in whole or in part, applications to modify accounting procedures and to authorize the creation of deferrals. In this case, the Commission determined that there had been a period of undue delay between the time FirstEnergy began incurring the costs, October 1, 2003, and FirstEnergy's filing of the application to modify its accounting authority, December 30, 2004. Therefore, because of this undue delay, the Commission limited, in part, its approval of the application to only those costs incurred after the date of the filing of the application.

FirstEnergy further argues that whether these costs were incurred six months before the issuance of the Commission order or twenty-one months before the date of the order is irrelevant to the merits of the request to defer costs. FirstEnergy is mistaken, again. The timeliness of any application submitted to this Commission for its approval is certainly relevant to the Commission's consideration of the application. Rehearing on this assignment of error should be denied.

It is, therefore,

ORDERED, The FirstEnergy's motion to strike OP&E's application for rehearing is granted. It is, further,

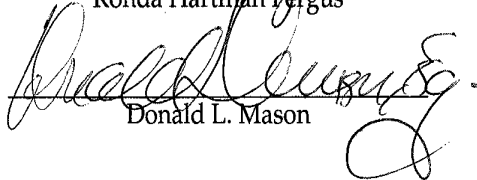
ORDERED, That the applications for rehearing filed by the Ohio Consumers' Counsel and FirstEnergy are denied. It is, further,

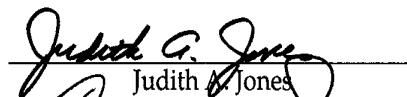
ORDERED, That a copy of this Entry on Rehearing be served upon all parties of record.

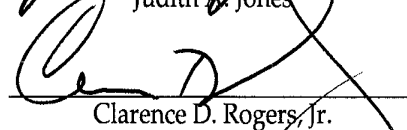
THE PUBLIC UTILITIES COMMISSION OF OHIO


Alan R. Schriber, Chairman


Ronda Hartman Fergus


Donald L. Mason

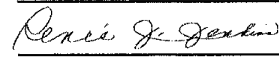

Judith A. Jones


Clarence D. Rogers, Jr.

GAP:ct

Entered in the Journal

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Renee J. Jenkins
Secretary