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Via Federal Express

February 23, 2007

Ms. Renee J. Jenkins
Director, Administration Department
Secretary to the Commission
Docketing Division
The Public Utilities Commission of Ohio
180 East Broad Street
Columbus, OH 43215-3793

Dear Ms. Jenkins

Re: ***Memorandum Contra***
Elyria Foundry Application for Rehearing
Elyria Foundry v. Ohio Edison Company
Case No. 05-796-EL-CSS

Enclosed for filing, please find the original and twelve (12) copies of the *Memorandum Contra of Ohio Edison Company* regarding the above-referenced case. Please file the enclosed *Memorandum Contra of Ohio Edison Company*, time-stamping the two extras and returning them to the undersigned in the enclosed envelope.

Thank you for your assistance in this matter. Please contact me if you have any questions concerning this matter.

Very truly yours,

Kathy J. Kolich

kag
Enclosures

cc: Parties of Record

BEFORE THE
PUBLIC UTILITIES COMMISSION OF OHIO

Elyria Foundry,	)	
	)	
Complainant,	)	
	)	
vs.	)	CASE NO. 05-796-EL-CSS
	)	
Ohio Edison Company	)	
	)	
Respondent.	)	

MEMORANDUM CONTRA
ELYRIA FOUNDRY APPLICATION FOR REHEARING

INTRODUCTION

On January 17, 2007, the Commission issued its Opinion and Order in this proceeding in which it concluded that Ohio Edison's Rider 75 did not violate any applicable statute, regulation or guideline. (Order, p. 11.) On February 16, 2007, Complainant, Elyria Foundry Company, filed an Application for Rehearing ("AFR") in which it claims 22 errors in the Commission's 12-page Order. As a preliminary matter, Complainant raises no facts, issues or arguments that have not already been raised by Complainant in its briefs and considered and rejected by the Commission. The fact that the Commission disagrees with Complainant does not justify a rehearing of the same issues and arguments and, accordingly, Complainant's Application for Rehearing should be summarily rejected. However, if the Commission chooses to address any of the 22 assignments of error, the Order requires no modifications because, as explained below, Complainant's arguments are without merit.

ARGUMENT

Although Complainant raises 22 assignments of error in its Application for Rehearing, these alleged errors can all be placed into one of three categories: (1) Statutory filing requirements (Elyria Foundry's Assignments of Error Nos. 1-2); (2) Alleged discriminatory treatment (Elyria Foundry Assignments of Error Nos. 3-6); and (3) Interpretation and implementation of the Power Supply Agreement ("PSA") (Elyria Foundry Assignments of Error Nos. 7-22). For the reasons set forth below (and more fully addressed in Ohio Edison's briefs) each of Complainant's 22 assignments of error should be rejected.

A. Neither R.C. 4909.18 nor R.C. 4905.30 Require the 2001 Policy to be Filed with the Commission.

On January 24, 2001, FirstEnergy's Ohio Operating Companies -- Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company (collectively "Ohio Companies") -- documented the criteria ("2001 Policy") that FirstEnergy Solutions Corp. ("FES") should follow when calling for an economic buy through ("EBT") event on behalf of the Ohio Companies. Complainant argues that the Commission erred when it found that it was not necessary for the 2001 Policy to be filed under either R.C. 4909.18 or R.C. 4905.30. (EF AFR, pp. 5-8.)[1] As the Commission correctly concluded, the 2001 Policy is "merely a documentation of the company's internal operational standards" and, therefore, neither a tariff amendment application under R.C. 4909.18 nor the filing of a new tariff under R.C. 4905.30 was necessary. (Order, pp. 5-6.) The Commission is correct. The same criteria set forth in

[1] Complainant filed both an application for rehearing and a memorandum in support. The page references to "AFR" included in this Memorandum Contra refer to the corresponding page in Complainant's Memorandum in Support.

the 2001 Policy were utilized by the vice president of utility operations prior to the creation of the 2001 Policy. (Tr. I, p. 176; OE Exh. 2, p. 4.). In order to expedite the process and minimize the communication between FirstEnergy's regulated and unregulated affiliates, these criteria were memorialized in the 2001 Policy. (Tr. I, p. 176.) Clearly if the Ohio Companies were never required by law, rule or regulation to document these criteria in the first place, they certainly would not be required to file the document upon its creation, especially when the document is consistent with the terms and conditions of the Rider to which it applies, and this Rider has been approved by the Commission.

Complainant claims that "[t]he 2001 Policy established the rules, regulation and practices affecting when the published rates of Rider 75 no longer applied." (Id.) Clearly, Complainant is confused. All rates charged by Ohio Edison are governed by its Commission approved tariff, P.U.C.O. No. 11. Rider 75, which was approved by the Commission, sets forth the rates to be charged *at all times*, even during an EBT event.[2] Therefore, the 2001 Policy *never* can render any part of Rider 75 inapplicable.

Complainant also argues that R.C. 4909.18 required that the 2001 Policy be filed with the Commission because "[t]he legal standard for filing and Commission approval is whether the regulation, rule or practice affected the rate." (EF AFR, p. 6.) As discussed below, using Complainant's own standard, R.C. 4909.18 does not require the Company to file the 2001 Policy for the simple reason that the 2001 Policy did not "affect the rate."

[2] According to Rider 75, customers such as Elyria Foundry that elect to buy through and take service from Ohio Edison are required to "pay the cost of energy obtained or generated by the Company on a best efforts basis at the lowest cost after all other prior obligations are met. (OE Exh. 1, SEO-3, p. 7.)

Rider 75 determines when an EBT event can be called, providing in pertinent part:

> The Company reserves the right to interrupt service to customer's interruptible load whenever the incremental revenue to be received from the customer is less than the anticipated incremental expense to supply the interruptible energy for the particular hour(s) of the interruption request. [OE Exh. 1, SEO-3, p. 6.]

Thus, according to Rider 75, FES cannot call an EBT event on behalf of Ohio Edison unless (i) the incremental cost to supply the interruptible load is greater than the expected incremental revenues to be received for supplying such load; and (ii) the interruption lasts for at least one hour.

As Complainant correctly summarized:

> The 2001 Policy calls for economic interruptions whenever FES' incremental, out-of-pocket, costs to supply exceed $65/MWh, and current or expected load obligations exceed available planned resources. Under the policy interruptions are called at the same time, for the same duration, at the same replacement power costs, for all economically interruptible customers served under contract or tariff of [the Ohio Companies]. FES must anticipate high prices for at least three hours before interrupting, and follow all contract and tariff restrictions. [EF AFR p. 4.][3]

Complainant argues that the 2001 Policy somehow modifies Rider 75. Complainant is wrong. The 2001 Policy does not change Rider 75; it mirrors the prerequisites for calling an EBT event set forth in Rider 75. First, it is uncontroverted that the $65 strike price included in the 2001 Policy represents the highest approximate incremental revenue to be received from any of the Ohio Companies' EBT Program participants (OE Exh. 1, p. 7), thus meeting the prerequisite that no EBT event be called unless the cost to supply the incremental load is greater than the revenues to be received

[3] The 2001 Policy also requires that FES be short at least 300 MWs during a consecutive 3 hour period. (OE Exh. 1, p. 6.) This criterion actually makes the 2001 Policy more stringent than the prerequisites set forth in Rider 75, which has no similar requirement.

for supplying such load.[4] Second, the Policy requires that the duration of an EBT event be at least three consecutive hours, a requirement that is consistent with the 1 hour minimum duration of an EBT event set forth in Rider 75. Finally, Complainant attempts to make a big deal out of the fact that the 2001 Policy only permits an EBT event to be called for either all or none of the EBT Program participants, arguing that "Rider 75 only addresses the relationship between the rates (revenues) of individual customers and the incremental expense of supply...." Complainant, however, ignores past practice and misreads Rider 75. Prior to filing Rider 75, the protocol at Ohio Edison was to always call interruptions for *all* interruptible customers at the same time. (OE Exh. 1, p. 4.) There was no intent to change this practice under Rider 75. (Id.) Moreover, nothing in Rider 75 can be interpreted as changing this protocol. Rider 75 provides in pertinent part that "[t]he Company *reserves the right* to interrupt service to the customer's interruptible load whenever the incremental revenue to be received from the customer is less than the anticipated incremental expense to supply the interruptible energy for the particular hour(s) of the interruption request." (OE Exh 1, SEO-3, p. 6)(Italics added.) Nowhere in Rider 75 does it say that Ohio Edison must call an EBT event each time the costs to serve an individual customer exceed the revenues received from that customer. Nor does it say that the strike price at which an EBT event will be called will be the cross over point at which such a situation occurs. All that Rider 75 requires is that the incremental expense

[4] Complainant claims that the fact that the strike price was changed from $85/MWh to $65/MWH "impacted when and how often economic interruptions were called, and the rates paid by Elyria Foundry during those economic interruptions." (EF AFR, p. 7.) Complainant again ignores the fact that Rider 75 establishes the criteria under which an EBT event can be called. The fact that the strike price was changed from $85 to $65/MWH did not change the Rider approved by the Commission because Rider 75 always allowed the Ohio Operating Companies to use a $65 strike price. Neither Ohio Edison Company nor the other Ohio Companies should be criticized for calling *less* EBT events in the past than they were otherwise legally entitled to call.

to serve a customer be greater than the revenues received from that customer. Inasmuch as the strike price used in the 2001 Policy is at a level slightly above the highest approximate revenue to be received from all EBT Program participants, the prerequisite set forth in Rider 75 is always met when EBT events are called. While Rider 75 gave Ohio Edison the *option* to call individual EBT events based on individual customer revenues and costs, it does not *mandate* that this approach be used.

Complainant also argues that "[t]he 2001 Policy remained hidden ... from Elyria Foundry because it was never filed for public inspection...." (EF AFR, p. 8.) Even if the 2001 Policy should have been filed in 2001 (which, based on the above, it clearly did not have to be), Complainant cannot show harm. As Complainant's Executive Vice President and General Counsel, Samuel R. Knezevic, admitted, he had no real complaint about the operation or administration of the EBT Program during the period 1997 through 2004. (Tr. I, pp. 19-20.)

In sum, the criteria set forth in the 2001 Policy were used prior to 2001 without having been documented. Given that there was no original legal requirement to document these criteria, there can be no legal requirement that the 2001 Policy be filed simply because the criteria were in fact documented. The Commission was correct in finding that the 2001 Policy is simply an internal operating document that is not required to be filed under R.C. 4909.18 or R.C. 4905.30. Moreover, Rider 75 was approved by the Commission, thus complying with all statutory requirements, and the 2001 Policy is consistent with the terms and conditions set forth in Rider 75. The 2001 Policy did not modify, amend, change or otherwise affect Rider 75 and, therefore, using Complainant's

own standard, R.C. 4909.18 does not require the 2001 Policy to be filed with the Commission. Complainant's first two assignments of error should be rejected.

B. The EBT Program is Not Discriminatory.

Complainant limited its claims of discrimination during the hearing and briefing process to only discrimination among customers being served by different Ohio Companies. (Tr. I, p. 54; EF Brief, p. 28.) It is unclear, based on Complainant's arguments set forth in its memorandum in support of its Application for Rehearing, whether Complainant is now attempting to expand the discrimination claim to also include treatment among customers taking service under a specific rider (EF AFR, p. 10) and the treatment of customers taking service under Ohio Edison's Rider 73, 74 and 75. (EF AFR, pp. 10-11). Given the lack of clarity surrounding Complainant's argument, in an abundance of caution Ohio Edison will address all three scenarios -- treatment among the Ohio Companies, treatment among customers on a single rider, and treatment among customers taking service under either Rider 73, 74 or 75 -- explaining why, regardless of the scope of Complainant's claim, the EBT Program is not discriminatory.

As more fully discussed in Ohio Edison's initial and reply briefs, R.C. 4905.35 does not apply to service being offered by *different* utilities. R.C. 4905.35 provides: "No public utility shall make or give any undue or unreasonable preference or advantage to any person, firm, corporation or locality or subject any person, firm corporation or locality to any undue or unreasonable prejudice or disadvantage. Inasmuch as this statute addressed public utilities in the singular, the statute should not be interpreted as combining practices of different utilities when determining discriminatory treatment. Therefore, the fact that EBT Program customers taking service from the Cleveland

Electric Illuminating Company and the Toledo Edison Company pay a different price than those taking a similar service from Ohio Edison Company is not a violation of R.C. 4905.35.

Similarly, as Complainant already acknowledges, "[f]or all customers on Rider 75, taking service at 23 and 34.5 kV, the incremental on-peak revenues are equal at 5.135 cents per kWh." (EF AFR, p. 10.) Or, in other words, all similarly situated customers are paying the same price under Rider 75. In light of this observation by Complainant, there is clearly no discriminatory treatment among customers taking service under the same Rider.[5] Complainant, at least during hearings, agreed. (Tr. I, p. 54.)

And finally, there is no discrimination among customers taking service under Riders 73, 74 and 75. Complainant argues that "[i]ncremental revenues from Ohio Edison interruptible customers vary from somewhere in the 3-cent range up to 6.5 cents per kWh" (EF AFR, p. 11), complaining that "[t]he strike price causes Ohio Edison to provide economically interruptible power under substantially the same circumstances and conditions, but at different prices for assuming the same interruptible risks." (Id. at 12.) Complainant's argument misses the point. Ohio Edison did not design the rates included in each of its three interruptible riders based on the level of interruptible risk assumed by each customer. This is obvious given Ohio Edison's past practice of interrupting all interruptible customers at the same time, as well as the fact that Rider 75 does not require that an EBT event be called based on an individual customer basis. Rather, the prices charged these customers are based on factors such as billing determinants, rate structures and rate schedule eligibility included in Ohio Edison's interruptible Riders 73, 74 and 75.

Obviously, if all interruptible customers were similarly situated, there would be no need for three different interruptible riders. But all of Ohio Edison's EBT Program participants are not similarly situated, and, therefore, Ohio Edison's three interruptible riders apply under different circumstances. Each of the three rates is unique in their applicability to customers. For example, Rider 75 is only available to customers who are expanding, thus serving as an economic development tool. (OE Exh. 1, SEO-3, p. 1.) Rider 74 is available only to metal melting customers, while Rider 73 is generally reserved for high load factor customers. (*See generally* Ohio Edison P.U.C.O. No. 11, Riders 73, 74.) The Commission approved the rates to be charged under each of these tariffs based upon these distinctions. Clearly if Complainant consumed electricity in a fashion identical to a customer paying a lower incremental price and otherwise qualified for the rider under which that other customer takes service, Complainant would pay an identical price. But Complainant has not demonstrated that it is identical to those customers that pay a lesser incremental price, and therefore, Complainant cannot demonstrate a discriminatory practice.

The Commission properly concluded that "in light of the wide variety of billing determinants and circumstances of individual customers, a reasonable choice in this particular circumstance is to apply a single strike price." (Order, p. 7.) Complainant attempts to find error in this statement, arguing that "all Rider 74 customers get the same rate, no matter the variation in billing determinants or circumstances." (EFAFR, p. 10.) This statement is simply wrong. The price charged Rider 74 customers takes into

[5] Complainant also acknowledges that customers taking service at *different* voltages pay a *different* price. (EF AFR, p. 10.) Clearly these customers are not similarly situated to those taking service under the voltages discussed above and a different price is warranted.

account voltage level and includes different rates for on and off peak consumption. (*See generally* Ohio Edison Tariff, P.U.C.O. No. '11, Rider 74.) Therefore, based on these billing determinants, customers taking service under Rider 74 could, indeed, pay different prices.

In sum, violations of R.C. 4905.35 are limited to *undue* discrimination or, 'in other words, when similarly situated customers are treated differently or differently situated customers are treated the same. Neither is the case here. The price paid by each of Ohio Edison's EBT Program participants is a function of the consumption pattern and their eligibility for each of Ohio Edison's interruptible riders. These factors sufficiently distinguish the customers taking service under each of these riders, thus justifying the difference in the prices paid by these customers. The Commission was correct in finding that Ohio Edison's EBT Program is not discriminatory. Accordingly, Complainant's Assignments of Error Nos. 3 - 6 should be rejected.

C. The Commission Interpreted the PSA Correctly.

All of Complainant's remaining assignments of error (Nos. 7 through 22) are related to the assignment of the costs of power purchased by FES on behalf of Ohio Edison during an EBT event. Complainant raises nothing not already argued in its briefs and rejected by this Commission. Ohio Edison addressed each of these arguments in detail in its brief and reply brief. Therefore, rather than reiterating its responses to each of Complainant's 16 remaining assignments of error set forth in its Application for Rehearing, Ohio Edison incorporates by reference its responses set forth in its briefs, and, instead, focuses herein on several of Complainant's more blatant misstatements.

Complainant argues that "[i]t is unlawful and unreasonable to define the term "incremental expenses" for Rider 75 based upon parameters and documents that were developed five years after the rider went into effect." (EF AFR, p. 17.) Complainant is either confused or trying to confuse this Commission. The concept of "incremental expense" is an economic concept and its definition does not change no matter what the time frame. Moreover, while the parties' respective expert witnesses used different words, their definition of incremental expense meant the same thing. Mr. Idle defined "incremental expense" as "the last group of costs associated with the last purchase of energy used to meet the last block of demand" (OE Exh. 5, p. 6), while Mr. Yankel defined the term as "the actual expense to serve the next increment of load." (Tr. I, p. 50.)[6] Indeed, as Complainant acknowledged in its initial brief at page 12, while Rider 75 does not define the term "incremental expense", it is "well understood in [the] context of utility ratemaking." And, although the PSA does not define the term "incremental expense" per se, it is used to *calculate* the incremental expense for each of the Ohio Companies based on the well understood meaning of the term as used in the context of utility ratemaking. In sum:

- Ohio Edison offers the EBT Program through Rider 75. (OE Exh. 1, SEO-3.)
- Rider 75 authorizes Ohio Edison to call an EBT event "whenever the incremental revenue to be received from [a Program participant] is less than the anticipated incremental expense to supply the interruptible energy for the particular hour(s) of the interruption request." (*Id.* at 6.)
- In 2005 Ohio Edison, as well as the other Ohio Companies, purchased *all* of their power needs from FES through the PSA. (OE Exh. 2, CJI-1). (OE Exh. 2, p. 6.)

[6] Mr. Yankel's definition of "incremental expense" seemed to evolve with Complainant's many theories of the case. The definition quoted above, was the first definition of the term provided by Mr. Yankel, which was provided prior to him hearing Ohio Edison's defense to Complainant's claims.

- Exhibit A of the PSA indicates the prices to be charged to the Operating Companies for the power purchased through the PSA.

- Because the Operating Companies purchase all of their power needs from FES, the PSA must set the incremental expense of power provided to Ohio Edison under any power supply scenario.

As explained by Mr. Idle:

> For purposes of defining incremental cost during an economic buy through event, the price of power being purchased to serve that portion of customer's interruptible load that it chooses not to curtail is the incremental expense to the Operating Companies. This is because the Operating Companies incur the purchased power cost only if their interruptible customers elect to buy through. Stating this another way, if the interruptible customers curtail, FES does not have to purchase the incremental power at all. Paragraph 3 of Exhibit A of the PSA sets forth the mathematical formula to be used to determine the purchased power costs to be billed to Ohio Edison for power supplied to its customers. [OE Exh. 5, pp. 6-7.]

Clearly based on the foregoing, the incremental expense incurred by Ohio Edison for *any* power purchased on its behalf by FES is established through the PSA.

Complainant also argues that "[t]he 2001 Policy voided the protections of the noticing provision of Rider 75 at pg. 6 where incremental cost for regulated interruptible load was priced right after regulated firm load from 1996 (when Rider 75 was first implemented) until five years later (when the 2001 Policy was written.) In the 1996-2001 timeframe the regulated firm load had consisted of both Ohio Edison's retail load as well as its FERC wholesale load -- it did not include competitive market sales." (EF AFR, pp. 16-17.) As a preliminary matter, Complainant acknowledges that Ohio Edison was required to meet its firm *wholesale* commitment to Potomac Electric Power Company. This commitment was for a sale of 450 MWs each hour of each month through 2005. (OE Exh. 2, p.4.) Therefore, based on Complainant's own observations, there is no precedent that would support Complainant's claim that EBT Program participants should

be prioritized immediately after firm retail customers. (EF AFR, p. 17.) Further, what Complainant fails to acknowledge in its observation is that FES could not make competitive retail sales until the industry was restructured through Am. Sub. S.B. No. 3 (commonly referred to as "Senate Bill 3".) Therefore, while its observation could perhaps be considered by some to be interesting, it certainly proves nothing. Moreover, as the Commission noted, "it is important to remember that [interruptible] customers receive substantial discounts for accepting risk of service interruption." (Order, p. 9.) If interruptible customers were placed ahead of firm customers, it would negate the need for such a discount.

Complainant also attempts to convince this Commission that the costs allocated through the PSA were incorrect because the total cost per MWh was not prorated based on the percentage of total purchased power consumed by Ohio Edison customers. (EF AFR, pp. 25-28.) As a preliminary matter, Ohio Edison, as it is required by law to do, allocated the costs of purchased power consistent with the PSA formula. Even Mr. Yankel acknowledged this fact. (Tr. III, p. 25.). Moreover, Complainant's example is contrary to basic mathematics. Clearly if the total cost is to be allocated based on the percentage of consumption to get the unit cost, so too must the volume. Complainant's example fails to acknowledge this simple mathematical concept and instead focuses solely on cost.

Using Complainant's example on page 27 of its Application for Rehearing, Ohio Edison's allocation factor is 46.11%. Based on this observation, Complainant unbelievably argues that the strike price should be $141. (EF AFR, p. 27.) What Complainant fails to recognize, however, is that the number of MWs purchased would

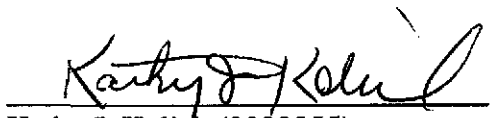
also have to be prorated at the same 46.11%. When volume is taken into account, the strike price remains $65. To demonstrate, assume that FES purchased 100 MWs at a cost of $6500 (resulting in a unit cost of $65/MW), and Ohio Edison customers consumed 46.11% of these megawatts. The cost of the 46.11 MWs of power consumed by Ohio Edison customers would be $2997 [$6500 x 0.4611]. Taking into account a pro rata allocation of the volume, the unit cost of the power consumed by Ohio Edison remains $65 [$2997 / 46.11MWs.] Complainant's argument is ridiculous as evidenced by the fact that under Complainant's theory, there would have been "zero interruptions during 2005" (EF AFR, p. 27) -- a year in which Ohio experienced the hottest June and the fifth hottest July in the past 30 years, the coldest ever recorded first 21 days of December, and significant increases in wholesale power market prices caused by extreme regional coal shortages and hurricane driven spikes in natural gas costs. (OE Exh. 2, pp. 10-11.) If the 22 assignments of error raised in Complainant's Application for Rehearing did not eliminate what credibility surrounding Complainant's case that may still remain, such an outrageous claim that Complainant should not have been interrupted during the extreme conditions experienced in 2005 after having received almost a half million dollars in net savings certainly should.

CONCLUSION

In sum, as evidenced above, Complainant is grasping at straws, making arguments that have already been made and rejected by this Commission and are either misleading at best or just flat out wrong. Complainant agreed to take service under Rider 75, which allows Ohio Edison to call for an EBT event any time the costs to supply EBT Program participants exceeds the revenues received from these same customers. Complainant had

no complaints as to how the EBT Program was administered during the period 1997 through 2004. It was only when extreme conditions occurred in 2005 that caused the calling of more EBT events than Complainant was used to did Complainant suddenly find all sorts of violations related to the EBT Program offered by Ohio Edison -- a program that has not changed at least since 2001. Complainant's 22 assignments of error raise nothing new and nothing that can justify a change in the Commission's findings. Accordingly, for the reasons set forth above and in Ohio Edison's briefs, Ohio Edison respectfully asks that the Commission deny Complainant's Application for Rehearing.

Respectfully submitted,



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Oh behalf of Ohio Edison Company

CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that a copy of the foregoing Memorandum contra of Ohio Edison Company was served upon Craig I. Smith, Attorney at Law, 2824 Coventry Road, Cleveland, Ohio 44120 by regular U.S. Mail, postage prepaid this 23rd day of February, 2007.

Kathy J. Kolich, Esquire