

12

RECEIVED-DOCKETING DIV
2007 NOV 26 PM 5:03
PUCO

**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)	Case No. 07-1003-EL-ATA
Edison company for Authority to Modify)	Case No. 07-1004-EL-AAM
Certain Accounting Practices and for)	
Tariff Approvals.)	

**REPLY TO OHIO EDISON COMPANY, THE CLEVELAND ELECTRIC
ILLUMINATING COMPANY, AND THE TOLEDO EDISON COMPANY
MEMORANDUM CONTRA TO THE OHIO CONSUMERS' COUNSEL'S
MOTION FOR A STAFF INVESTIGATION AND HEARING
BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL**

I. INTRODUCTION

The Office of the Ohio Consumers' Counsel ("OCC") files this Reply Memorandum to the Memorandum Contra filed on November 14, 2007 by the Ohio Edison Company, the Cleveland Electric Illuminating Company and the Toledo Edison Company (collectively "FirstEnergy" or "the Companies"). FirstEnergy opposed the Motion For A Staff Investigation and Hearing filed by OCC on October 30, 2007. OCC is the representative of FirstEnergy's residential customers and is advocating in this case that the Public Utilities Commission of Ohio ("Commission" or "PUCO") must ensure, among other things, that the electric costs charged to customers are no higher than what FirstEnergy can prove to be reasonable under law.

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 JM Date Processed 11/26/07

II. LEGAL STANDARDS

A. **FirstEnergy's Fuel Costs Must Be Evaluated Through a Hearing to Determine If The Costs Are Nondiscriminatory and Reasonable Under R.C. 4928.14(A).**

FirstEnergy's fuel cost recovery mechanism was approved by the Commission as part of its rate stabilization plan ("RSP") or as part of the market-based standard service offer FirstEnergy is required to provide under R.C. 4928.14(A).¹ R.C. 4928.14(A) states:

After its market development period, an electric distribution utility in this state shall provide consumers, on a comparable and nondiscriminatory basis within its certified territory, a market-based standard service offer of all competitive retail electric services necessary to maintain essential electric service to consumers, including a firm supply of electric generation service. Such offer shall be filed with the public utilities commission under section 4909.18 of the Revised Code.

R.C. 4928.02(A) emphasizes that the market based standard service offer and all other generation offers authorized under Chapter 4928 should:

Ensure the availability to consumers of adequate, reliable, safe, efficient, nondiscriminatory, and reasonably priced retail electric service.

Moreover, FirstEnergy is required under R.C. 4933.83(B) to "furnish adequate facilities to meet the reasonable needs of the consumers and inhabitants in the certified territories that they are authorized and required to serve pursuant to sections 4933.81 to 4933.90."

B. **FirstEnergy's Fuel Costs Must Be Evaluated Through A Hearing To Determine if the Costs Are Just and Reasonable Under R.C. 4909.18.**

Under the procedural requirements of 4909.18:

¹ In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company for Authority to Continue and Modify Certain Regulatory Accounting Practices and Procedures, for Tariff Approvals and to Establish Rates and Other Charges Including Regulatory Transition Charges Following the market Development Period, Case No. 03-2144-EL-ATA, Entry on Rehearing (August 4, 2004) at 3.

If it appears to the commission that the proposals in the application may be unjust or unreasonable, the commission shall set the matter for hearing and shall give notice of such hearing by sending written notice of the date set for the hearing * * * at such hearing, the burden of proof to show that the proposal in the application are just and reasonable shall be upon the public utility.

Accordingly, the Commission should set a matter for hearing if the utility has not demonstrated that the application is just and reasonable.

C. FirstEnergy's Fuel Costs Must Be Found to Be Justified Through a Hearing Process Under FirstEnergy's RSP Before The Costs Can Be Approved By the Commission.

The Commission first directed FirstEnergy to file an RSP in Case No 03-1461-EL-UNC that would balance the three objectives: rate certainty, financial stability for the electric distribution utilities ("EDUs) and further competitive market development.² In FirstEnergy's proposal FirstEnergy suggested that generation charges could increase under the following condition:

Before the Company may implement any increase in the tariffed generation charge, such Company shall apply to the Commission, justify and receive approval from the Commission. **After a hearing and upon sufficient justification**, the Commission shall approve the increase.³

As part of the RSP, the Commission approved the fuel cost recovery mechanism in its Entry on Rehearing on August 4, 2004.

Accordingly, the approval of any generation charge increase accepted by the Commission as part of the RSP was necessarily subject to a hearing and sufficient justification.

² *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 Tariff Adjustment.*, Case No. 03-1461-EL-UNC, Entry (September 23, 2003) at 4-5.

³ *Id.*, FirstEnergy Application (October 21, 2003) at Section I, Paragraph 5(a) (emphasis added).

D. FirstEnergy Had To Justify Its Fuel Costs In A Distribution Rate Case Before FirstEnergy Could Collect Any of Those Costs Under The RCP Provision.

The rate certainty plan (“RCP”) submitted by FirstEnergy as a stipulated program provided that FirstEnergy would defer rather than collect some of the generation increases.⁴ Under the RCP, the prudence and justification for the fuel recovery would be reviewed through a hearing before the deferrals would be collected in the next FirstEnergy distribution rate case.⁵ The Commission approved that plan.⁶ But that plan was appealed to the Ohio Supreme Court and rejected by the Ohio Supreme Court and remanded to the Commission.⁷

E. Elyria Foundry Rejected the Recovery of Generation Rates Through a Distribution Rate Case But Did Not Relieve The Commission From Holding A Hearing to Require FirstEnergy to Justify the Level of Its Generation Increases.

The Ohio Supreme Court rejected the fuel cost recovery mechanism incorporated in the RCP.⁸ The Ohio Supreme Court stated that the recovery of generation-related fuel costs through distribution rates as contemplated under the RCP is contrary to R.C. 4928.02(G). Rather the Court insisted that the PUCO revise the plan so that the fuel costs would be recovered only through generation customers:

Accordingly, we hold that the commission violated R.C. 4928.02(G) when it gave FirstEnergy authority to collect deferred increased fuel costs through future distribution rate cases, or to alternatively use excess fuel-cost recovery to reduce deferred distribution-related expenses. Therefore, we reverse the

⁴ *In the Matter of the Joint Application of Ohio Edison Company, The Cleveland Electric Illuminating Company and the Toledo Edison Company for Approval of a Generation Charge Adjustment Rider*, Case No. 05-1125-EL-ATA, et seq., (RCP Case), Stipulation and Recommendation (September 9, 2005).

⁵ *Id.* at 11.

⁶ RCP Case, Opinion and Order (January 4, 2006).

⁷ *Elyria Foundry Co. v. Pub. Util. Comm.*, 114 Ohio St.3d. 305 (August 29, 2007) (“*Elyria Foundry*”).

⁸ *Id.* at 14-18.

commission's order on this issue and remand to the commission to modify the rate-certainty plan to remedy the statutory violation.⁹

Accordingly, FirstEnergy cannot rely upon a distribution rate case to justify its increased fuel costs and therefore must do so at an alternative hearing as FirstEnergy originally proposed in its RSP.

III. ARGUMENT

A. A Hearing Is Required Before the Companies May Increase the Tariffed Generation Charge or Deferred Generation Costs.

FirstEnergy states in its memorandum contra that the Commission held hearings before approving both the RSP and the RCP as if to imply that FirstEnergy justified all future generation costs in those hearings.¹⁰ But those hearings were not held for that purpose. Those hearings were held to determine the appropriateness of the Stipulations. FirstEnergy could not have justified future generation costs in those hearings because FirstEnergy could not have known what those costs were to be during those hearings.

The Commission has consistently required all the electric distribution utilities ("EDUs") to justify generation rate increases through a hearing when the generation rate increases are provided for under the RSP cases.¹¹ As mentioned above, the Commission must require such hearings to ensure that the market based standard service offer is "efficient, nondiscriminatory, and reasonably priced" as required under R.C. 4928.02(A).

⁹ Id. at 18.

¹⁰ FirstEnergy Memo Contra at 2.

¹¹ See, Case Nos. Duke Energy Company 05-724, 05-725 and 07-63.

Moreover, because market-based standard service offers are provided for under R.C. 4928.14(A) the Commission must insist that such offers be “filed with the public utilities commission under section 4909.18.” Under R.C. 4909.18:

If it appears to the commission that the proposals in the application may be unjust or unreasonable the commission **shall** set the matter for hearing* * *At such a hearing the burden of proof to show that the proposals in the application are just and reasonable, shall be on the public utility. (emphasis added).

Therefore, under R.C. 4909.18, if the Commission is not sure that an application is just and reasonable, the Commission must set the matter for hearing. Because of the requirements under R.C. 4909.18, the Commission has always set generation rate increases under R.C. 4928.14(A) for a hearing. In addition, the Commission adopted FirstEnergy’s RSP generation proposal without removing the hearing request.

FirstEnergy speciously argues that it no longer has to justify the level of its fuel costs through a hearing. FirstEnergy states that the hearing is not needed because the Commission did not state in its Entry on Rehearing that adopted the increases in generation costs that a hearing was required.¹² But in that Entry on Rehearing when the Commission approved the provision for increasing generation costs, the PUCO stated:

To provide equity to the adjustment process, the Commission also finds that any increases approved as a result of filing an application would be subject to adjustments downward if in subsequent years during the RSP period fuel costs should decrease.¹³

The Commission could not possibly determine whether in subsequent years during the RSP period fuel costs decreased or the degree to which they decreased unless it held a hearing on the matter.

¹² FirstEnergy Memo Contra at 2.

¹³ RSP Case, Entry on Rehearing at 3.

And as FirstEnergy admits, “in the plan itself, however, there was a provision that contemplated the filing of a new application and a hearing before the Companies could increase the tariffed generation charge or defer generation costs.”¹⁴ In adopting FirstEnergy’s plan, the Commission did not delete the hearing requirement.

B. The Evaluation of FirstEnergy’s Fuel Costs Through Intervenor Discovery and Hearing Preparation Regarding Fuel Costs Was Not Completed Before It Was Interrupted In the Distribution Rate Case Due to the Ohio Supreme Court Decision And Must Be Continued In This Case.

FirstEnergy complained that OCC suggested that the Companies have provided no information related to the fuel costs that have been deferred.¹⁵ FirstEnergy points out that it has responded to discovery requests by the Staff and OCC in the distribution rate case, 07-551-EL-AIR. In fact, the fuel costs have not been an issue in the distribution case since August 29, 2007 when *Elyria Foundry* was decided and almost three months of discovery time has been lost since then. In addition, as FirstEnergy points out, the fuel costs are no longer a part of that case and are no longer subject to discovery in that case and so they should be subject to continuing discovery in this case. Also, if intervenors wish to present testimony on the fuel costs in this case, they should be provided that opportunity because they are no longer able to do so in the distribution case.

Moreover, under R.C. 4903.082:

All parties and intervenors shall be granted ample rights of discovery.

And under Ohio Adm. Code 4901-1-16(A):

The purpose of rules 4901-1-16 to 4901-1-24 of the Administrative Code is to encourage the prompt and expeditious use of prehearing

¹⁴ FirstEnergy Memo Contra at 2.

¹⁵ Id at 3.

discovery in order to facilitate thorough and adequate preparation for participation in commission proceedings.

Accordingly, the Commission should open a hearing in this case and provide for continuing discovery on the fuel costs in this case.

C. The Information FirstEnergy Provided to the PUCO Staff Based Upon RCP Requirements Is Not Sufficient To Ensure That FirstEnergy Is Providing the Standard Service Offer At Just and Reasonable Rates and Accordingly the Staff Should Investigate FirstEnergy's Fuel Procurement Processes To Ensure That The Fuel Costs FirstEnergy Has Deferred and Will Recover Through Customers Are Just And Reasonable.

FirstEnergy inaccurately implies that the information FirstEnergy provided Staff based upon RCP requirements was sufficient to meet discovery requirements and to justify recovery of the dollar amount of increased fuel costs it requests.¹⁶ Under the RCP, FirstEnergy was only required to:

On or before March 1 of 2007, 2008 and 2009, * * * submit to the Commission a statement showing the amounts booked as Distribution Deferrals and Fuel Deferrals under the Plan for the previous year with supporting accounting information.¹⁷

The information provided to the Staff under the RCP pertained only to amounts of fuel deferrals and not to the prudence of FirstEnergy's fuel procurement practices for the standard service offer customers. Without procurement information, it is not possible for the Staff to determine whether the fuel increases are justified or not under R.C. 4909.18.

Under Ohio Adm. Code 4901-1-28(E) the Commission has the authority to order a Staff Report of Investigation under cases other than rate cases and has so on many

¹⁶ Memo Contra at 3.

¹⁷ RCP Stipulation at 11.

occasions.¹⁸ This case provides a perfect opportunity for a Staff Report of Investigation because as FirstEnergy states:

The fuel deferrals has been subject to significant discovery from the Staff * * *in the distribution case.¹⁹

Rather than the Staff wasting the prehearing preparation that it has already begun, the Staff should continue its investigation into the fuel deferrals in this docket and should issue a Staff Report as provided for under Ohio Adm. Code 4901-1-28(E). Continuing the investigation already begun in the distribution rate case would not be a great burden to either the Staff or the Companies, and will contribute toward a process where all parties would have an opportunity to present information to the Commission about whether FirstEnergy has justified increasing its rates to consumers.

IV. CONCLUSION

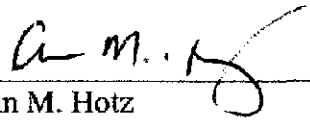
The Commission should order a Staff Investigation and hearing in this case under R.C. 4928.14(A), R.C. 4928.02(A), R.C. 4909.18, R.C. and under Ohio Adm. Code 4901-1-28(E). The Commission has always required a hearing under additional generation rate increases provided for under RSP cases. And the Commission has no reason to not require a hearing in this case pursuant to FirstEnergy's RSP that provides for a hearing in which FirstEnergy will justify further generation rate increases. The discovery that was started and discontinued in FirstEnergy's distribution rate case 07-551-EL-AIR is not sufficient to replace discovery needed in this case because it was discontinued almost three months ago upon the issuance of *Elyria Foundry*.

¹⁸ See Staff Report in Case No. 05-1500 and Gas Riser Case.

¹⁹ Memo Contra at 3.

Respectfully submitted,

JANINE MIGDEN-OSTRANDER
CONSUMERS' COUNSEL

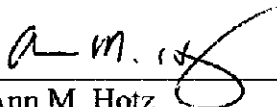


Ann M. Hotz
Counsel of Record
Jacqueline Lake Roberts
Gregory J. Poulos
Assistant Consumers' Counsel

Office of the Ohio Consumers' Counsel
10 West Broad Street, 18th Floor
Columbus, Ohio 43215
(614) 466-8574 – Phone
(614) 466-9475 – Facsimile
hotz@occ.state.oh.us
roberts@occ.state.oh.us
poulos@occ.state.oh.us

CERTIFICATE OF SERVICE

I hereby certify that a true copy of this Reply was served by First Class Mail, postage prepaid, to the parties of record identified below, on this 26th day of November, 2007.



Ann M. Hotz
Assistant Consumers' Counsel

Duane Luckey
Attorney General's Office
Public Utilities Section
180 East Broad Street, 9th Floor
Columbus, OH 43215

David Boehm
Boehm, Kurtz & Lowry
36 East Seventh St., Ste. 1510
Cincinnati, OH 45202

Attorneys for Ohio Energy Group

Michael Kurtz
Boehm, Kurtz & Lowry
36 East Seventh St., Ste. 1510
Cincinnati, OH 45202

Attorneys for The Kroger Co.

Leslie A. Kovacik
Kerry Bruce
420 Madison Ave., Ste. 100
Toledo, OH 43604-1219

Attorneys for the City of Toledo

James Burk
Mark Hayden
FirstEnergy Service Company
76 South Main Street
Akron, OH 44308

David Rinebolt
Colleen Mooney
231 West Lima Street
P.O. Box 1793
Findlay, OH 45839-1793

**Attorneys for Ohio Partners for
Affordable Energy**

Samuel Randazzo
Lisa McAlister
Daniel Neilsen
Joseph Clark
McNees Wallace & Nurick LLC
21 East State St., 17th Fl.
Columbus, OH 43215

**Attorneys for Industrial Energy Users-
Ohio**

Lance M. Keiffer
Assistant Prosecuting Attorney
711 Adams St., 2nd Fl.
Toledo, OH 43624-1680

Attorney for Lucas County

M. Howard Petricoff
Stephen M. Howard
Vorys Sater Seymour and Pease
52 E. Gay St.
P.O. Box 1008
Columbus, OH 43216-1008

John W. Bentine
Chester, Willcox & Saxbe
65 E. State St., Ste 1000
Columbus, OH 43215-4213

Attorney for Nucor Steel Marion, Inc.

**Attorneys for Integrys Energy Services,
Inc.**