

FILE

12
RECEIVED-DOCKETING DIV

2009 JAN 16 PM 4:02

BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

PUCO

In the Matter of the Commission's Review
of Chapters 4901:1-17 and 4901:1-18 and
Rules 4901:1-5-07, 4901:1-10-22, 4901:1-
13-11, 4901:1-15-17, 4901:1-21-14, and
4901:1-29-12 of the Ohio Administrative
Code.

Case No. 08-723-AU-ORD

**APPLICATION FOR REHEARING OF OHIO EDISON COMPANY,
THE CLEVELAND ELECTRIC ILLUMINATING COMPANY, AND
THE TOLEDO EDISON COMPANY**

Pursuant to R.C. § 4903.10 and Rule 4901-1-35, Ohio Administrative Code, Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company (collectively, the "Companies"), hereby file their Application for Rehearing of the Finding and Order entered in the journal on December 17, 2008 in the above-captioned case. As explained in more detail in the attached Memorandum in Support, the Commission's Finding and Order in this case is unlawful and unreasonable on the following grounds:

- A. The Commission is a creature of statute and has no power or authority except that conferred on it by the General Assembly. *Tongren v. Pub. Util. Comm.*, 85 Ohio St. 3d 87, 88 (1999); *Columbus Southern Power Co. v. Pub. Util. Comm.*, 67 Ohio St. 3d 535, 537 (1993). The finding and Order adopted certain rules that conflict with the language and intent of the Revised Code, rendering such rules improper and subject to invalidation.
- B. The Finding and Order adopted rules that will impose unjust and unreasonable burdens on the Companies.

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 DM Date Processed JAN 16 2009

For these grounds, as more fully set out in the accompanying Memorandum in Support filed herewith and hereby incorporated herein, the Companies respectfully request that the Commission grant their Application for Rehearing, and enter a new Finding and Order that is reasonable and lawful.

Respectfully submitted,

Ebony L. Miller /JTS
James W. Burk, Counsel of Record
Ebony L. Miller

ATTORNEYS FOR OHIO EDISON
COMPANY, THE CLEVELAND
ELECTRIC ILLUMINATING
COMPANY AND THE TOLEDO
EDISON COMPANY

76 South Main Street
Akron, OH 44308
Tel: (330) 384-5861
Fax: (330) 384-3875
burki@firstenergycorp.com
elmiller@firstenergycorp.com

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Commission's Review
of Chapters 4901:1-17 and 4901:1-18 and
Rules 4901:1-5-07, 4901:1-10-22, 4901:1-
13-11, 4901:1-15-17, 4901:1-21-14, and
4901:1-29-12 of the Ohio Administrative
Code.

Case No. 08-723-AU-ORD

**MEMORANDUM IN SUPPORT OF APPLICATION FOR REHEARING OF
OHIO EDISON COMPANY, THE CLEVELAND ELECTRIC ILLUMINATING
COMPANY, AND THE TOLEDO EDISON COMPANY**

I. INTRODUCTION

The Commission in its entry dated June 25, 2008 requested comments from interested parties to the rules in those chapters of the Ohio Administrative Code ("O.A.C.") captioned-above. Although Commission Staff initially proposed to apply O.A.C. Chapter 4901:1-17 ("Chapter 17") to electric utility companies and the Companies submitted initial and reply comments pertaining to Chapter 17, the Commission in its Finding and Order found that all references to electric utility companies as proposed by Staff shall be deleted from Chapter 17. Consequently, the Companies will not burden this Application for Rehearing with issues arising from Chapter 17.

The Companies appreciate the hard work and attention that went into this rulemaking, and recognize certain changes made that improve upon the existing rules. However, in a few important areas, the Commission either exceeds its administrative authority or adopts rules that will impose unjust and unreasonable burdens on the

Companies. These rules are improper and should not be adopted. The Commission's promulgation of rules that are in conflict with the language or intent of the statute or impose an unjust and unreasonable burden upon the Companies is unlawful and unreasonable. For this reason, and for the rationale set forth below, the Companies respectfully request the Commission to grant rehearing and modify the rules appropriately.

II. ARGUMENT

A. Rule 4901:1-18-02 General Provisions.

1. 4901:1-18-02(B)

The Commission has added additional language to this rule which would permit the Commission to forgo the requirements of Revised Code ("R.C.") 119.032, and the review and approval process by the Joint Committee on Agency Rule Review ("JCARR").¹ Such an action is unlawful and unreasonable. It is well established that the Commission is a creature of statute and has no power or authority except that conferred on it by the General Assembly. *Tongren v. Pub. Util. Comm.'n*, 85 Ohio St. 3d 87, 88 (1999); *Columbus Southern Power Co. v. Pub. Util. Comm'n.*, 67 Ohio St. 3d 535, 537 (1993). Any attempt to exercise powers beyond the scope of those granted by statute constitutes an impermissible usurpation of the state's legislative power. *Gardner v. Ewing*, 88 F. Supp. 315 (S.D. Ohio 1950), *aff'd*, 185 F.2d 781 (6th Cir. 1950), *reversed on other grounds*, 341 U.S. 321 (1951). Moreover, once the General Assembly establishes the specific statutory provisions pursuant to which the Commission must conduct a rule

¹ In particular, the Commission would bypass the requirement to review comments received concerning any proposed change to a rule. R.C. 119.032(D).

review, the Commission is obligated to adhere closely to the express criteria set out therein.

In its Finding and Order, the Commission justifies its unusual deviation from the law stating

in certain rare instances, [the Commission] has found through the complaint process, that compliance with the Commission's rules have an unintended consequence and, in those cases, has ordered that the involved utility company take certain action to avoid further inconvenience to the end user.

Finding and Order, p. 27.

The fact that certain rules may produce unintended consequences under unique situations is one of the precise purposes of the required rule review pursuant to R.C. 119.032 and the subsequent JCARR review. The Commission cannot be heard to short cut this process and unilaterally amend rules based on select testimony provided through a complaint case. Moreover, the Commission admits that the issue it is seeking to resolve is not common, referring to such situations as "rare instances". Accordingly, the language the Commission has added to 4901:1-18-02(B)(2) is unlawful and unreasonable and should be stricken.

B. Rule 4901:1-18-04 Extended payment plans and responsibilities. [Finding and Order refers to such section as Rule 4901:1-18-05]

As a preliminary matter "Rule 4901:1-18-04 Extended payment plans and responsibilities" has consistently been cited throughout initial comments, reply comments and now the Commission's Finding and Order as "Rule 4901:1-18-05 Extended payment plans and responsibilities". In an effort to avoid confusion, the Companies will hereinafter refer to Rule 4901:1-18-04 as the "Payment Plan Rule".

1. Payment Plan Rule –(B)

This rule requires compliance with a purported Ohio Administrative Code section that does not exist. Specifically, it requires

If a customer requests additional information about PIPP, the utility company shall inform the customer of the eligibility requirements as set forth in paragraph (C) of rule 4901:1-18-12 of the Administrative Code (gas PIPP) or to Chapter 122.5-3 of the Administrative Code (electric PIPP), and provide the customer with a copy of PIPP literature and direct the customer to the local community action agency.

The Companies support the ongoing efforts to revise the electric PIPP program. However, it is unlawful and unreasonable for the Commission to direct the Companies to comply with and inform customers of a proposed rule that is not yet, nor may ever be, in effect. Currently, 122.5-3 does not exist and thus the Companies were unable to review and provide meaningful comments pertaining to this rule. This rule as it pertains to electric utilities is premature and should be removed.

2. Payment Plan Rule-(B)(2)

The Commission's approval of Staff's proposed one-twelfth payment plan imposes an unjust and unreasonable burden on the Companies. The ultimate goal should be to encourage customers to pay their outstanding balance on time. If a customer falls one or two months behind in making timely payments it is reasonable for a utility to negotiate a payment plan over a short duration. However, the concept of a twelve month payment plan presupposes that the customer has accumulated a substantial outstanding balance. A balance (albeit declining) that the Companies would now be required to carry on their books for an entire year. Moreover, the Commission places no guidelines or parameters to distinguish customers that are in greater need for additional time from customers who would simply rather save the money than pay their utility bill. As the Companies stated

in their Reply Comments, if customers have the option of extending payment over 12 months versus 6 months it is likely they will do so. For the foregoing reasons it was unjust and unreasonable for the Commission to approve the addition of a one-twelfth plan with no additional qualifying criteria and no discretion on the part of the utility. The one-twelfth plan should be removed from the rule.

3. Payment Plan Rule (H)

The Commission's approval of the elimination of late payment fees to customers who are current on their extended payment plan is wholly unjust and unreasonable. As the Companies stated in their Initial Comments, the late payment fee is not a penalty to the customer, but rather serves as a carrying charge to help compensate the Companies for carrying the outstanding balance on their books. At a single customer level, the Companies can absorb and later pass through such costs in rates. However, the Companies estimate that customer arrears based on the current payment plan structure can exceed \$200,000,000 in one year. The Companies cannot absorb such costs (absent frequent rate cases) with no allowance of late payment fees, it is simply an unreasonable requirement. As the Companies stated in their Initial Comments, the mere fact that a customer is making a good faith attempt to pay down his/her outstanding balance does not mean that a portion of such balance, namely the late fees, should be written off. The elimination of charging late payment fees to customers who are current on their extended payment plan is unjust and unreasonable and should be deleted from the rule.

III. CONCLUSION

For the foregoing reasons, the Companies respectfully request the Commission grant rehearing and modify the rules accordingly.

Respectfully submitted

Ebony L. Miller / JTS

James W. Burk, Counsel of Record
Ebony L. Miller
FIRSTENERGY SERVICE COMPANY
76 South Main Street
Akron, OH 44308
Tel: (330) 384-5849
Fax: (330) 384-3875
burkj@firstenergycorp.com
elmiller@firstenergycorp.com

ATTORNEYS FOR OHIO EDISON
COMPANY, THE CLEVELAND
ELECTRIC ILLUMINATING COMPANY
AND THE TOLEDO EDISON COMPANY

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Application for Rehearing and Memorandum for Support of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company was served by first-class mail, postage prepaid, to the following parties of record this 16th day of January, 2009:

Ebony L. Miller/JTS
Ebony L. Miller

Elizabeth L. Anstaett
2250 Huntington Center
41 S. High Street
Columbus, OH 43215

Tom Brown
Ohio Gas Association, Inc.
200 Civic Center
P.O. Box 117
Columbus, OH 43216-0117

Daniel A. Creekmur
200 Civil Center Drive
P.O. Box 117
Columbus, OH 43216-0117

Harcatus Tri-County Community,
Action Organization
108 N. 2nd Street
Dennison, OH 44621

Paul Colbert
Attorney at Law
Cincinnati Gas & Electric Company
139 East Fourth Street
2500 Atrium II Bldg.
Cincinnati, OH 45201-0960

Lisa McAlister
McNees, Wallace & Nurik
21 East State Street, 17th Floor
Columbus, OH 43215-4228

David Bergmann
Attorney at Law
Office of Consumers Counsel
10 W. Broad Street, Suite 1800
Columbus, OH 43215

Richard Reese
Attorney at Law
Office of Consumers Counsel
10 W. Broad Street, Suite 1800
Columbus, OH 43215

Lorana Kelly
Community Action Partnership
719 South Main Street
Dayton, OH 45402

Duane W. Luckey, Chief
Public Utilities Commission of Ohio
Attorney General Station
180 East Broad Street, 9th Floor
Columbus, OH 43215-3793

Tim Walters
4115 Bridge Street
Cleveland, OH 44113

Noel Morgan
215 East Ninth Street, Suite 5200
Cincinnati, OH 45202

Mike Piepsny
3631 Perkins Avenue, Suite 3A-4
Cleveland, OH 44114

Jeffrey A. Diver
Executive Director
P.O. Box 1322
Hamilton, OH 45012

Mike Walters
Pro Seniors, Inc.
7162 Reading Road, Suite 1150
Cincinnati, OH 45237

Michael Smalz
Ohio State Legal Service Assoc.
555 Buttles Avenue
Columbus, OH 43215-1137

Ellis Jacobs
Legal Aid Society of Dayton
333 West First Street, Suite 500
Dayton, OH 45402

Michelle Lucas
108 N. 2nd Street
Dennison, OH 44621

Dale Arnold
Director, Energy Services
Ohio Farm Bureau Federation
P.O. Box 182383
Columbus, OH 43218

Tom Mendelsohn
3030 Euclid, Suite 100
Cleveland, OH 44115

Ronald Bridges
AARP Ohio
17 S. High Street, Suite 800
Columbus, OH 43215

Deb. J. Bingham
Office of the Ohio Consumers' Counsel
10 W. Broad Street, 18th Floor
Columbus, OH 43215

Patti Mallarnee
Office of the Ohio Consumers' Counsel
10 W. Broad Street, Suite 180
Columbus, OH 43215

Douglas E. Hart
Attorney at Law
441 Vine Street, Suite 4192
Cincinnati, OH 45202

Ebony L. Miller
FirstEnergy Service Company
76 South Main Street
Akron, OH 44308

Thomas E. Lodge
Thompson Hine LLP
10 West Broad Street
Columbus, OH 43215

Joseph M. Clark
Attorney at Law
McNees Wallace & Nurik LLC
21 East State Street, 17th Floor
Columbus, OH 43215-4228

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

Barth E. Royer
Bell & Royer Co LPA
33 South Grant Avenue
Columbus, OH 43215-3927

James W. Burk
FirstEnergy Service Company
76 South Main Street
Akron, OH 44308

Jon F. Kelly
AT&T Services, Inc.
150 E. Gay Street, Room 4-A
Columbus, OH 43215

Eric B. Gallon
Porter Wright Morris & Arthur LLP
41 South High Street, Suite 3000
Columbus, OH 43215

Anita M. Schafer
Duke Energy Ohio
139 E. Fourth Street
P.O. Box 960
Cincinnati, OH 45202

Checkfreepay Corporation
15 Sterling Drive
P.O. Box 5044
Wallingford, CT 06492-7544

D. Scott Ringo, Jr.
Cincinnati Bell Telephone Co LLC
221 E Fourth Street
Cincinnati, OH 45202

Douglas E. Lumpkin
Franklin County Department of Job and Family
Services
80 East Fulton Street
Columbus, OH 43215-5174

Donna Seger-Lawson
Dayton Power and Light
1065 Woodman Drive
Dayton, OH 45432

Judi L. Sobecki
Attorney at Law
1065 Woodman Drive
Dayton, OH 45432

Cleveland Housing Network
2999 Payne Avenue
Cleveland, OH 44114

Bill Faith
Coalition on Homelessness and Housing in Ohio
175 S Third Street
Columbus, OH 43215

Robert G. Kriner
Columbia Gas of Ohio, Inc.
200 Civic Center Drive
Columbus, OH 43215

Marvin Resnik
American Electric Power Serv. Corp.
1 Riverside Plaza, 29th Floor
Columbus, OH 43215

Page P. Blakemore
Constitution Gas Transport Co., Inc.
1005 E. 3900 South
Salt Lake City, UT 84124

Joseph Meissner
Consumer for Fair Utility Rates
1223 West 6th Street
Cleveland, OH 44113

Lee Fisher
Department of Development
77 South High Street
P.O. Box 1001
Columbus, OH 43216-1001

Gregory A. Sciullo
Dominion East Ohio
501 Martindale Street, Suite 500
Pittsburgh, PA 15212-5835

Paul G. Smith
Duke Energy Ohio
139 E. Fourth Street
Cincinnati, OH 45202

East Ohio Gas Company
DBA Dominion East Ohio
P.O. Box 165017
Columbus, OH 43216-5017

Dawn Seifried, Controller
Eastern Natural Gas Company
5 Radnor Corporate Center, Suite 400
Radnor, PA 19087

Andrew J. Campbell
Jones Day
325 John H. McConnell Blvd., Suite 600
Columbus, OH 43215-2673

Empowerment Center of Greater
3030 Euclid Avenue, Unit 100
Cleveland, OH 44115

Daniel G. Foraker, President
Foraker Gas Company, Inc.
420 S. State Street
New Lexington, OH 43764

Joseph Herz, President
KNG Energy, Inc.
1700 Westfield Drive
Findlay, OH 45840

Rev. Mike Frank, Co-Chair
Neighborhood Environmental Coalition
5920 Eagle Avenue
Cleveland, OH 44127

Phil Cole
Ohio Association of Community Action Agencies
50 W. Broad Street, Suite 1616
Columbus, OH 43215

Lisa Hamler-Fuggit
Ohio Association of Second Harvest Foodbanks
51 N. High Street, Suite 761
Columbus, OH 43215

Ohio Department of Development
77 South High Street
P.O. Box 1001
Columbus, OH 43216-1001

Roy Rushing, Executive Director
Ohio Gas Association
200 Civic Center Drive
Columbus, OH 43215

Gregory E. Hitzhusen, M.D.
Ohio Interfaith Power and Light
P.O. Box 26671
Columbus, OH 43226

Colleen L. Mooney
Ohio Partners for Affordable Energy
1431 Mulford Road
Columbus, OH 43212

Selwyn J. R. Dias
Ohio Power Company
88 E. Broad Street, Suite 800
Columbus, OH 43215-3550

Judith E. Matz
Ohio Telecom Association
17 S. High Street, Suite 600
Columbus, OH 43215

Brian Jonard, President
Pike Natural Gas Company
Southeastern Natural Gas Company
P.O. Box 377
Frazeyburg, OH 43822

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

Supports to Encourage Low Income Families
P.O. Box 1322
Hamilton, OH 45012

Dean Armstrong, VP
Swickard Gas Company
P.O. Box 387
Bettsville, OH 44815

Harvey L. Wagner
The Cleveland Electric Illuminating Company
Ohio Edison Company
The Toledo Edison Company
76 South Main Street
Akron, OH 44308

United Clevelanders Against Poverty
May Dugan Center
4115 Bridge Avenue
Cleveland, OH 44113

Ronald E. Christian
Vectren Energy Delivery of Ohio, Inc.
One Vectren Square
Evansville, IN 47708