

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of Ohio )  
Edison Company, The Cleveland Electric ) Case No. 07-1003-EL-ATA  
Illuminating Company, and The Toledo )  
Edison Company for Authority to Modify ) Case No. 07-1004-EL-AAM  
Certain Accounting Practices and for Tariff )  
Approvals. )

OPINION AND ORDER

The Public Utilities Commission of Ohio, having considered the evidence and the stipulation and recommendation presented by the parties, and being otherwise fully advised, hereby issues its opinion and order.

APPEARANCES:

Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company, by Mr. James W. Burk, 76 South Main Street, Akron, Ohio 44308.

Richard Cordray, Ohio Attorney General, by Duane W. Luckey, Section Chief, and William L. Wright and John Jones, Assistant Attorneys General, 180 East Broad Street, Columbus, Ohio 43215-3793, on behalf of Staff of the Commission.

Janine L. Migden-Ostrander, Ohio Consumers' Counsel, by Gregory J. Poulos, and Ann M. Hotz, Assistant Consumers' Counsel, 10 West Broad Street, Columbus, Ohio 43215.

Ohio Partners for Affordable Energy, by David C. Rinebolt and Colleen Mooney, 231 West Lima Street, Findlay, Ohio 45840.

Boehm, Kurtz & Lowry, by Kurt Boehm, 36 East Seventh Street, Suite 1510, Cincinnati, Ohio 45202, on behalf of Ohio Energy Group and the Kroger Company.

McNees, Wallace & Nurick, by Lisa McAlister, 21 East State Street, Columbus, Ohio 43215, on behalf of Industrial Energy Users-Ohio.

Northwest Ohio Aggregation Coalition, by Lance Keiffer, 711 Adams Street, 2<sup>nd</sup> Floor, Toledo, Ohio 43604.

Chester, Willcox & Saxbe LLP, by John W. Bentine, 65 East State Street, Suite 1000, Columbus, Ohio 43215, on behalf of Nucor Steel Marion, Inc.

Vorys, Sater, Seymour & Pease LLP, by M. Howard Petricoff and Stephen M. Howard, 52 East Gay Street, Columbus, Ohio 43216, on behalf of Integrys Energy Services, Inc.

OPINION:

I. History of the Proceedings

On October 21, 2003, Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company (collectively, FirstEnergy or the Companies) filed an application in Case No. 03-2144-EL-ATA (03-2144) for authority to continue and modify certain regulatory accounting practices and procedures, for tariff approvals, and to establish regulatory transition charges following the market development period (MDP). FirstEnergy also requested to establish rates for generation service under Chapter 4928, Revised Code, to be effective January 1, 2006. A partial Stipulation and Recommendation was filed on February 11, 2004, resolving some issues for certain signatory parties, and a revised rate stabilization plan (RSP) was filed on February 24, 2004. On June 9, 2004, the Commission issued an Opinion and Order in 03-2144, and subsequently issued an Entry on Rehearing (August 2, 2004), a Second Entry on Rehearing (September 29, 2004), and a Third Entry on Rehearing (November 23, 2004). Among other things, the Commission approved a modified RSP in these proceedings for the period of January 1, 2006, through December 31, 2008, including a provision that allowed FirstEnergy to seek an adjustment to its generation charge for increases in the cost of fuel.

On May 27, 2005, in accordance with the RSP, FirstEnergy requested the implementation of a rider to recover its increased fuel costs for 2006 through 2008, subject to reconciliation, in Case No. 05-704-EL-ATA (05-704). However, FirstEnergy subsequently filed under new cases, Case Nos. 05-1125-EL-ATA, et al. (05-1125), two settlements entered into by FirstEnergy and various other parties that established a rate certainty plan (RCP) as an alternative to the generation charge adjustment rider requested in 05-704. On January 4, 2006, the Commission issued an Opinion and Order in 05-704 and 05-1125 approving the RCP, with modifications. The Commission further modified the RCP through its January 25 and March 1, 2006 Entries on Rehearing.

On May 3, 2006, the Supreme Court of Ohio issued an opinion in *Ohio Consumers' Counsel v. Public Util. Comm.* (2006), 109 Ohio St.3d 328, an appeal as of right from 03-2144. The Court affirmed, in pertinent part, the Commission's decision regarding its approval of a modified RSP, including its approval of the provision that authorized FirstEnergy to request an adjustment to its generation charge during 2006 through 2008 to recover increases in the cost of fuel above its 2002 fuel cost baseline.

On August 29, 2007, the Court also issued an opinion in *Elyria Foundry Co. v. Public Util. Comm.* (2007), 114 Ohio St.3d 305, an appeal as of right from 05-704 and 05-1125, affirming the Commission's approval of the RCP, except with regard to the collection of deferred fuel costs through distribution base rates in future distribution rate cases. On this sole issue, the Court remanded the case to the Commission to modify the RCP accordingly.

In response to the Court's ruling, on September 10, 2007, the Companies filed an application on remand in Case No. 07-1003-EL-ATA, proposing to establish two generation-related fuel cost recovery riders to collect the actual fuel costs incurred in 2006 through 2008 that are above the 2002 fuel cost baseline and that are in excess of the fuel costs that have already been collected from customers via the fuel recovery mechanism.

On January 9, 2008, the Commission approved FirstEnergy's Fuel Cost Recovery Rider that would recover ongoing fuel costs incurred from January 1, 2008 through December 31, 2008. However, the Commission denied FirstEnergy's request to implement the Deferred Fuel Cost Recovery Rider that would recover fuel costs deferred from the inception of the fuel deferral under the RCP through December 31, 2007, plus carrying costs on the unrecovered deferred cost balance. Instead, the Commission ordered FirstEnergy to file an application to establish an alternative recovery mechanism to collect the 2006-2007 deferred fuel costs and associated carrying costs. The January 9, 2008, entry also granted motions to intervene filed by the Industrial Energy Users-Ohio (IEU-Ohio), Ohio Energy Group (OEG), Kroger, Ohio Partners for Affordable Energy (OPAЕ), the Office of the Ohio Consumers' Counsel (OCC), Northwest Ohio Aggregation Coalition (NOAC), Nucor Steel Marion, Inc. (Nucor), and Integrys Energy Services, Inc. (Integrys), as well as a motion to permit David C. Rinebolt to appear before the Commission pro hac vice on behalf of OPAЕ.

On February 8, 2008, FirstEnergy filed an application on remand in Case No. 08-124-EL-ATA (08-124) and Case No. 08-125-EL-AAM (08-125) to establish a recovery mechanism for fuel costs deferred during 2006-2007. FirstEnergy's application was filed pursuant to a Commission order issued in Case No. 07-1003-EL-ATA (07-1003) on January 9, 2008, which directed FirstEnergy to apply for an alternative recovery mechanism to collect the 2006-2007 deferred fuel costs and associated carrying costs previously established in 03-2144, the RSP proceeding, and 05-1125, the RCP proceeding.

On August 25, 2008, in recognition of Staff's, FirstEnergy's, and other intervenors' resources that were needed to address FirstEnergy's SSO filings within the timeframe indicated by Section 4928.141, Revised Code, the evidentiary hearing in 08-124 was continued until further notice. Subsequently, as part of the stipulation approved by the Commission in Case No. 08-935-EL-SSO, all of the issues related to the 2006-2007 deferred fuel costs were resolved, negating the need for an evidentiary hearing in 08-124.

On June 3, 2009, the attorney examiner issued an entry setting a procedural schedule for 07-1003, including a hearing date. In accordance with this procedural schedule, a Staff Report was filed on August 14, 2009.

On September 23, 2009, a Stipulation and Recommendation (Jt. Ex. 1 or Stipulation) signed by FirstEnergy, OCC, OP&E, and Staff was filed. IEU-Ohio, OEG, Kroger, NOAC, Nucor, and Integrys also signed the Stipulation as non-opposing parties.

## II. Evidentiary Hearing

A hearing on the matter took place on September 29, 2009. At the hearing, counsel for FirstEnergy represented that the parties had reached a Stipulation, which had been filed on September 23, 2009. FirstEnergy introduced and the attorney examiners admitted into the record the testimony of three FirstEnergy employees, Kevin Warvell (Company Ex. 1), Mark Fraley (Company Ex. 2), and Robert Borland (Company Ex. 3). The attorney examiners also granted FirstEnergy leave to file its application as a late-filed exhibit (Company Ex. 4). Further, Staff introduced and the attorney examiners admitted into the record the August 14, 2009, Staff Report (Staff Ex. 1).

## III. Stipulation and Recommendation

As stated previously, a Stipulation, signed by FirstEnergy, OCC, OP&E, and Staff, and unopposed by IEU-Ohio, OEG, Kroger, NOAC, Nucor, and Integrys was filed in the record on September 23, 2009. The Stipulation was intended by the signatory parties to resolve all outstanding issues in this proceeding. The stipulation included, *inter alia*, the following provisions:

- (1) By February 2010, the Companies will submit to Staff its 2009 physical inventory results and recommended adjustments in order to determine an appropriate allocation of the 2009 physical inventory adjustment between 2008 and 2009.
- (2) The adjustment arising from the 2008 SO<sub>2</sub> auction proceeds, approximately \$1.7 million, should be netted against auction proceeds experienced at the time the 2002 baseline was established. The 2002 auction proceeds of \$810,153 shall be reflected in the 2002 baseline, thereby decreasing the 2002 fuel baseline to \$779,842,847.
- (3) The revenue of \$184,910,498 the Companies collected through the 2008 Fuel Cost Recovery Rider exceeded the \$163,537,756 in expenses actually incurred by \$21,372,742. Therefore, an over-

recovery of fuel costs during the 2008 audit period occurred. The carrying charges due to customers as a result of this over-recovery amount to \$320,268; as such, the amount that should be returned to customers is \$21,693,010, which will accrue carrying charges at the embedded cost of long-term debt until applied to reduce the deferred fuel balance approved for recovery in Case No. 08-935-EL-SSO.

- (4) The amount of \$21,693,010 plus carrying charges, as set forth in (3) above, should be refunded to customers. The refund will be effected by applying the refund balance to reduce the deferred fuel balance approved for recovery in Case No. 08-935-EL-SSO, which will save customers approximately \$26,000,000 in carrying charges that would otherwise have been accrued and paid by customers as approved in Case No. 08-935-EL-SSO.

(Jt. Ex. 1 at 4-6.)

#### CONCLUSION:

Rule 4901-1-30, O.A.C., authorizes parties to Commission proceedings to enter into a stipulation. Although not binding on the Commission, the terms of such an agreement are afforded substantial weight. *Consumers' Counsel v. Pub. Util. Comm.* (1992), 64 Ohio St.3d 123, 125, citing *Akron v. Pub. Util. Comm.* (1978), 55 Ohio St.2d 155. This concept is particularly valid where the stipulation is unopposed by any party and resolves all issues presented in the proceeding in which it is offered.

The standard of review for considering the reasonableness of a stipulation has been discussed in a number of prior Commission proceedings. *Cincinnati Gas & Electric Co.*, Case No. 91-410-EL-AIR (April 14, 1994); *Western Reserve Telephone Co.*, Case No. 93-230-TP-ALT (March 30, 1994); *Ohio Edison Co.*, Case No. 91-698-EL-FOR, et al. (December 30, 1993); *Cleveland Electric Illum. Co.*, Case No. 88-170-EL-AIR (January 30, 1989); *Restatement of Accounts and Records (Zimmer Plant)*, Case No. 84-1187-EL-UNC (November 26, 1985). The ultimate issue for our consideration is whether the agreement, which embodies considerable time and effort by the signatory parties, is reasonable and should be adopted. In considering the reasonableness of a stipulation, the Commission has used the following criteria:

- (a) Is the settlement a product of serious bargaining among capable, knowledgeable parties?
- (b) Does the settlement, as a package, benefit ratepayers and the public interest?

- (c) Does the settlement package violate any important regulatory principle or practice?

The Ohio Supreme Court has endorsed the Commission's analysis using these criteria to resolve issues in a manner economical to ratepayers and public utilities. *Indus. Energy Consumers of Ohio Power Co. v. Pub. Util. Comm.* (1994), 68 Ohio St.3d 559, citing *Consumers' Counsel*, supra, at 126. The court stated in that case that the Commission may place substantial weight on the terms of a stipulation, even though the stipulation does not bind the Commission.(Id.)

Based on our review of the three-prong test, the Commission finds the first criterion, that the process involved serious bargaining by knowledgeable, capable parties, is clearly met. The Commission finds that the Stipulation filed in this case appears to be the product of serious bargaining among capable, knowledgeable parties. FirstEnergy, OCC, OPAE, IEU-Ohio, OEG, Kroger, NOAC, Nucor, Integrys, and Staff have been involved in numerous cases before the Commission and have consistently provided extensive and helpful information to the Commission. In addition, the stipulation also meets the second criterion. As a package, the Stipulation advances the public interest by resolving all the issues raised in this matter without resulting in extensive litigation. Finally, the Stipulation meets the third criterion because it does not violate any important regulatory principle or practice. *Consumers' Counsel v. Pub. Util. Comm.* (1992), 64 Ohio St.3d 123. Accordingly, we find that the stipulation is reasonable and should be adopted.

#### FINDINGS OF FACT AND CONCLUSIONS OF LAW:

- (1) On September 10, 2007, FirstEnergy filed an Application on remand in Case Nos. 07-1003-EL-ATA, et al., which proposed to establish two generation-related fuel cost recovery riders to collect actual fuel costs incurred in 2006 through 2008 that were above the 2002 fuel cost baseline and were in excess of the fuel costs that were previously collected from customers via the fuel recovery mechanism.
- (2) On January 9, 2008, the Commission approved FirstEnergy's Fuel Cost Recovery Rider to recover fuel costs incurred from January 1, 2008 through December 31, 2008, and denied FirstEnergy's request to implement the Deferred Fuel Cost Recovery Rider that would recover fuel costs deferred from the inception of the fuel deferral under the RCP through December 31, 2007, plus carrying costs on the unrecovered deferred cost balance.

- (3) On January 9, 2008, the Commission also ordered FirstEnergy to file an application to establish an alternative recovery mechanism to collect the 2006-2007 deferred fuel costs and associated carrying costs.
- (4) Additionally, on January 9, 2008, the Commission granted motions to intervene filed by IEU-Ohio, OEG, Kroger, OP&E, OCC, NOAC, Nucor, and Integrys, as well as a motion to permit David C. Rinebolt to appear before the Commission pro hac vice on behalf of OP&E.
- (5) On June 3, 2009, a procedural entry setting a hearing date of September 29, 2009, was issued.
- (6) On September 23, 2009, a Stipulation resolving all issues in the case signed by FirstEnergy, OCC, OP&E, and Staff was filed. IEU-Ohio, OEG, Kroger, NOAC, Nucor, and Integrys also signed the Stipulation as non-opposing parties.
- (7) An evidentiary hearing was held on September 29, 2009, at the offices of the Commission in Columbus, Ohio.
- (8) At the hearing, Staff introduced, and the attorney examiners admitted, the Staff Report, as well as the Stipulation into the record.
- (9) Also at the hearing, FirstEnergy introduced and the attorney examiners admitted into the record the testimony of three FirstEnergy employees, Kevin Warvell, Mark Fraley, and Robert Borland. The attorney examiners also granted FirstEnergy leave to file its application as a late-filed exhibit.
- (10) The Commission finds that the negotiation process leading to the Stipulation involved serious bargaining by knowledgeable, capable parties.
- (11) The Commission finds that the Stipulation advances the public interest by resolving all the issues raised in this matter without resulting in extensive litigation.
- (12) The Commission finds that the Stipulation does not violate any important regulatory principle or practice.

ORDER:

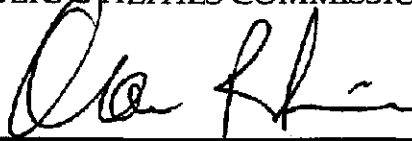
It is, therefore,

ORDERED, That the Stipulation of the parties be approved and adopted. It is, further,

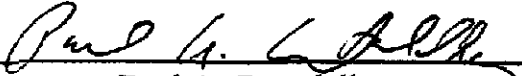
ORDERED, That FirstEnergy take all necessary steps to carry out the terms of the Stipulation and this order. It is, further,

ORDERED, That a copy of this opinion and order be served upon each party of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO



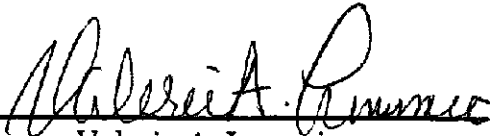
Alan R. Schriber, Chairman



Paul A. Centolella



Ronda Hartman Fergus




Valerie A. Lemmie

Cheryl L. Roberto

RLH/KWB/sc

Entered in the Journal

**MAR 24 2010**



Renee J. Jenkins  
Secretary