

FILE

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of the Ohio)
Edison Company, The Cleveland Electric)
Illuminating Company, and the Toledo)
Edison Company for Authority to Establish)
a Standard Service Offer Pursuant to R.C.)
§ 4928.143 in the Form of an Electric)
Security Plan)

Case No. 10-388-EL-SSO

PUCO

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**POST-HEARING BRIEF
OF THE
ASSOCIATION OF INDEPENDENT COLLEGES AND UNIVERSITIES OF OHIO**

I) INTRODUCTION

Section (E)(5) of the Stipulation and Recommendation ("Stipulation") should be adopted. The Stipulation was filed at the Public Utilities Commission of Ohio ("PUCO") and is between Ohio Edison, Toledo Edison, and Cleveland Electric Illuminating Company ("First Energy"), PUCO staff, the Association of Independent Colleges and Universities of Ohio ("AICUO") and several other interested parties. Section (E)(5) establishes that the combined electrical load on a particular AICUO member campus will be considered when determining whether such member colleges and universities qualify as mercantile customers.¹ Ohio Consumers' Counsel ("OCC") witness Wilson Gonzalez ("Gonzalez") asserts in written pre-filed testimony that section (E)(5) violates "an important regulatory principle or practice" and would result in the application of the Statute in an "unprincipled manner."² However, on cross-examination, Gonzalez contradicted his written pre-filed testimony by agreeing that that the combined electrical load of all facilities on a particular college or university could be considered in determining whether a customer

¹ Stipulation and Recommendation, pg. 25, (E)(5).

² Gonzalez testimony, PUCO Case No. 10-388-EL-SSO, pgs. 15-16.

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qualifies to be treated as a mercantile customer.³ Notwithstanding, the definition of mercantile customer is clearly stated under Ohio law and it is not prohibitive of section (E)(5).⁴

Qualifying as a mercantile customer is important because it affords AICUO colleges and universities additional opportunities to implement energy efficiency and demand response programs.

OCC is not a party to the Stipulation and, based upon multiple assertions made by Gonzalez in written pre-filed testimony, OCC opposes its adoption.⁵ This post-hearing brief is limited to addressing OCC's opposition to adoption of section (E)(5) of the Stipulation. Curiously, the opposition now being asserted by OCC in the current proceeding is being made after OCC failed to raise its concerns with such treatment of AICUO colleges and universities in prior proceedings, including the most recent market rate offer ("MRO") initiated by First Energy.⁶

II) STATEMENT OF FACTS

A standard service offer ("SSO") is an electric distribution utility's offer of all "competitive retail electric services necessary to maintain essential electric service to consumers" within a certified territory. A SSO establishes the rates, terms, and conditions for electric service. Ohio law requires that a SSO be made via a MRO or an electric security plan ("ESP").⁷ First Energy is currently operating under an ESP which expires on May 31, 2011.⁸

On October 20, 2009, First Energy filed an application with PUCO for approval of a MRO to satisfy SSO requirements beginning June 1, 2011.⁹ AICUO intervened in that

³ Transcript, Volume IV, PUCO Case No. 10-388-EL-SSO, pg. 898.

⁴ R.C. §4928.01(A)(19).

⁵ Gonzalez testimony, PUCO Case No. 10-388-EL-SSO, pgs. 15-16.

⁶ PUCO Case No. 09-906-EL-SSO.

⁷ R.C. §4928.143.

⁸ PUCO Case No. 08-935-EL-SSO.

⁹ PUCO Case. No. 09-906-EL-SSO.

proceeding to ensure that the interests of its members were adequately represented. On October 29, 2009, First Energy held a technical conference on the MRO application. On December 1, 2009, a pre-hearing conference was held. On December 15, 2009, the evidentiary hearing in the MRO proceeding commenced.

As part of the MRO proceeding, AICUO filed the written expert witness testimony of Mr. Thomas V. Chema. In his pre-filed written testimony, Mr. Chema stated that "the Commission and First Energy should ensure that the statutory definition of "mercantile customer . . . is not applied in a manner so as to eliminate colleges and universities from being eligible for energy efficiency and other programs."¹⁰ All parties to the MRO proceeding, including OCC, elected not to cross-examine Mr. Chema, and his testimony, including his assertions regarding the classification of colleges and universities, was submitted into the MRO record without objection.¹¹

On February 23, 2010, prior to a PUCO decision on the MRO application, First Energy filed the Stipulation initiating the current proceeding. The Stipulation requests the adoption of an ESP and resolves several other concerns of PUCO staff, AIUCO, and other parties. The Stipulation: (1) is the result of serious bargaining among capable and knowledgeable parties; (2) does not violate any important regulatory principles or practices; and (3) as a package, benefits ratepayers and the public interest.

An evidentiary hearing on the Stipulation commenced on April 20, 2010, and concluded on April 23, 2010.

III) LAW AND ARGUMENT

- a. Adopting Stipulation Language Providing for the Treatment of AICUO Colleges and Universities as Mercantile Customers is Consistent with Ohio Law.

¹⁰ Thomas V. Chema testimony, PUCO Case No. 09-906-EL-SSO, pg. 6.

¹¹ Transcript, Volume V, PUCO Case No. 09-906-EL-SSO, pg. 657.

According to the Ohio Revised Code, “mercantile customer means a commercial or industrial customer if the electricity consumed is for nonresidential use and the customer consumes more than seven hundred thousand kilowatt hours per year or is part of a national account involving multiple facilities in one or more states.”¹² Accordingly, any customer who, (1) uses electricity as a commercial or industrial customer and not for residential use, and (2) consumes more than 700,000 kWh of electricity per year, would be eligible to qualify as a mercantile customer.

In its testimony, OCC does not contest that AICUO colleges and universities are commercial customers. In fact, under the current tariff structure, AICUO members are billed predominantly under commercial tariff scheduled codes and rates. Rather, on behalf of OCC, Gonzalez makes several assertions that misconstrue the Statute. First, Gonzalez asserts that “an important regulatory principle or practice” would be violated if section (E)(5) of the Stipulation is adopted. Second, Gonzalez asserts that “multiple loads may be aggregated to [meet the 700,000 kWh threshold and] constitute a mercantile customer only under situations where those accounts are part of a national account.” These assertions are separately addressed below.

b. There is no Regulatory “Principle” or “Practice” that Prevails Over the Ohio Revised Code’s Definition of Mercantile Customer.

Gonzalez asserts that “an important regulatory principle or practice” would be violated if section (E)(5) of the Stipulation is adopted, but fails to cite any specific regulatory principle or practice that is to be applied in addition to the stated statutory framework.¹³ Regardless of name, there is but one controlling law, Statute, rule, principle, or practice that establishes who qualifies for treatment as a mercantile customer. The Ohio Revised Code controls. On cross-examination, Gonzalez agreed that the Ohio Revised Code controls:

¹² R.C. §4928.01(A)(19).

¹³ Gonzalez testimony, PUCO Case No. 10-388-EL-SSO, pg. 16.

Q. Mr. Gonzalez, do you agree that the Commission must apply the statutory definition that you just read when determining what customers qualify as mercantile customers for the purposes of Chapter 4928 of the Revised Code?

A. Yes.

Q. Is there any additional principle or practice that must be applied?

A. No. I don't believe so.¹⁴

R.C. 4928.01 provides that commercial customers must do two things to achieve mercantile customer status. The commercial customer must use energy that it consumes for a non-residential purpose and use more than 700,000 kWh per year.¹⁵ The Statute requires nothing more and nothing less.

Because Gonzales did not, and cannot, cite to any regulatory principle or practice to be applied in addition to the statutory framework, PUCO is bound by the requirements of the Statute in determining whether to adopt section (E)(5) of the Stipulation.

c. Ohio Law Does Not Prohibit the Aggregation of the Electric Load of Facilities on a Particular AICUO College or University Campus in order to Meet the Statutory Demand Threshold.

Gonzalez's contention that "multiple loads may be aggregated to constitute a mercantile customer only under situations where those accounts are part of a national account"¹⁶ misinterprets the Revised Code and misapplies the Stipulation. A commercial "customer" qualifies for treatment as a mercantile customer upon consuming "more than seven hundred thousand kilowatt hours per year or [as a result of being] part of a national account involving multiple facilities in one or more states."¹⁷ The Stipulation provides that First Energy "will treat [an AICUO college or university] as a mercantile customer . . . so long as the aggregate load of

¹⁴ Transcript, Volume IV, PUCO Case No. 10-388-EL-SSO, pgs. 887-888.

¹⁵ R.C. §4928.01(A)(19).

¹⁶ Gonzalez testimony, PUCO Case No. 10-388-EL-SSO, pg. 16.

¹⁷ R.C. §4928.01(A)(19).

facilities situated on a campus and owned or operated by the respective college or university qualifies such an entity as a mercantile customer.”¹⁸

First, it is important to note that the Statute does not define the term “customer.” Accordingly, the term “customer” must be “read in context and construed according to the rules of grammar and common usage.”¹⁹ The term “customer” commonly means “one that purchases a commodity or service.”²⁰ In general, AICUO colleges and universities, on their own behalf, and for their particular campuses purchase electricity for their use. Obviously, each particular college or university purchases electricity for recreation facilities, classroom facilities, office facilities and other uses necessary for its operations. The only electric utility customer is the college or university. Accordingly, a college or university would be considered a “customer” for the purposes of the mercantile customer Statute.

The Gonzalez testimony misinterprets the Statute because the “national account” language contained within the Statute is inapplicable to AICUO colleges and universities. The only requirements for a commercial customer to qualify for treatment as a mercantile customer are, (1) that the customer use the electricity for nonresidential purposes and, (2) consume more than 700,000 kWh annually or be “part of a national account involving multiple facilities in one or more states.”²¹ A college or university using its electricity for nonresidential purposes and consuming more than 700,000 kWh has done everything required to be considered a mercantile customer. While the consideration of whether a college or university is part of a national account may be a consideration under the Statute, since a customer can meet the threshold

¹⁸ Stipulation and Recommendation, pg. 25, section (E)(5).

¹⁹ R.C. §1.42.

²⁰ Merriam-Webster, online edition.

²¹ R.C. §4928.01(A)(19).

requirement by consuming more than 700,000 annual kWh or by being part of a national account, it is not the only consideration nor is it the primary consideration.

Gonzalez misapplies the Stipulation based upon his contention that "multiple loads" would be combined under the Stipulation. The aggregation of loads, under the Stipulation, is a very limited concept. Aggregating multiple loads of varying customers at varying geographic locations is not what is envisioned or stated in the Stipulation. Aggregation would be limited to "facilities situated on a campus and owned or operated by the respective college or university."²² Thus, customer loads would not be aggregated with the loads of other customers and loads on particular campuses would not be aggregated with loads on other campuses. Only the electric consumption for a particular customer (a college or university) at a particular geographically defined and confined location (a college or university campus) would be eligible for aggregation. The Statute does not prohibit the aggregation of multiple customer owned or operated facilities located on a single college or university campus to meet the 700,000 kWh annual consumption threshold.²³

On cross-examination, OCC witness Gonzalez agreed that the consideration of the combined electrical load on a college or university campus should be considered when determining whether to treat a college or university as a mercantile customer.

The following exchange took place on cross-examination:

Q. Okay. So treating a college or a university with its buildings and parking lots and facilities and gymnasiums and libraries on one campus at one location would be applying the Statute in an "unprincipled manner"?

A. Not if they use 750,000 or more kilowatt-hours a year.²⁴

²² Stipulation and Recommendation, pg. 25, (E)(5).

²³ R.C. §4928.01(A)(19).

²⁴ Transcript, Volume IV, PUCO Case No. 10-388-EL-SSO, pg. 898.

IV) CONCLUSION

Section (E)(5) of the Stipulation should be adopted. This provision would allow for the consideration of the combined electrical load from facilities on a particular AICUO college or university campus in determining whether the institution qualifies to be treated as a mercantile customer. Such treatment provides opportunities for AICUO members to participate in energy efficiency and demand response programs. Arguments against such treatment made by Gonzalez, in his written testimony, are not based upon fact or law and were directly contradicted by Gonzalez on cross-examination. Accordingly, such contentions should be disregarded.

Respectfully Submitted,



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