

FILE

**FirstEnergy**

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April 19, 2005

VIA OVERNIGHT MAIL

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 43266-5073

PUCO

2005 APR 20 AM 11:38

RECEIVED-DOCKETING DIV

Re: *In the Matter of Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company Request for Approval or Waiver of Authority to Review Contracts Between Affiliates and an Affiliated Exempt Telecommunications Company*  
Ohio Edison Company, The Cleveland Electric Illuminating Company, and  
The Toledo Edison Company Memo Contra Office of Consumers' Counsel  
Motion to Intervene  
Case No. 05-201-EL-UNC

Dear Ms. Jenkins:

Enclosed for filing, please find the original and 17 copies of *Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company Memo Contra Office of Consumers' Counsel Motion to Intervene* in the above-referenced case which was fax-filed on April 19, 2005. Please file-stamp the two extra copies and return them to the undersigned in the enclosed pre-paid envelope.

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

Very truly yours,

*James W. Burk*

JWB:ge  
Enclosures

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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 *[Signature]* Date Processed *4-20-05*

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

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In the Matter of Ohio Edison Company, The	:	Case No. 05- 201 -EL-UNC
Cleveland Electric Illuminating Company, and	:	
The Toledo Edison Company Request For	:	
Approval or Waiver of Authority to Review	:	
Contracts Between Affiliates and an Affiliated	:	
Exempt Telecommunications Company	:	

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**OHIO EDISON COMPANY, THE CLEVELAND ELECTRIC ILLUMINATING  
COMPANY, AND THE TOLEDO EDISON COMPANY MEMO CONTRA  
OFFICE OF CONSUMERS' COUNSEL MOTION TO INTERVENE**

Come now the Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company ("Companies"), by counsel, and submit their Memo Contra OCC's Motion to Intervene filed on April 4, 2005 in this proceeding.

**I. Introduction**

The OCC raises a number of issues in its Motion to Intervene, most of which are beyond the scope of such a Motion and this Application. Primarily, the OCC is concerned that the contracts that are the subject of this Application may ultimately harm residential ratepayers, presumably through the inclusion in rates of unreasonable costs. The Companies, however, are not seeking rate recovery of any costs associated with such contracts in this Application, therefore that concern is premature and intervention unnecessary at this juncture. The OCC also urges the Commission not to waive jurisdiction, citing past Commission cases dealing with

contracts between public utilities and exempt telecommunications companies. But this case does not deal with contracts where a public utility is a party and therefore does not constitute binding precedent. Finally, the OCC requests that the Commission make certain findings and direct the Companies to make future filings. As is discussed below, this filing was made in effort to comply with the Public Utility Holding Company Act, therefore future filings in accord with the PUHCA are already required and will be made, just as this filing was made; no further action from the Commission is necessary. In any event, OCC intervention is not necessary to ensure that the Commission has the ability to review future filings of this nature.

## **II. Nature of Application**

Filed as a precaution, the genesis of this Application is a provision of the Public Utility Holding Company Act ("PUHCA"), specifically 15 USCS Section 79z-5c(i), that states in pertinent part that a State commission with jurisdiction over the retail rates of a public utility must either approve or waive jurisdiction over contracts between such public utility and an exempt telecommunications company ("ETC"), as that term is defined in the PUHCA. The precautionary nature of the Application is that the contracts at issue are not between a public utility and an ETC, therefore Section 79z-5c(i) would not appear to apply. The contracts were entered into between FirstEnergy Service Company and First Communications, L.L.C., neither a public utility subject to the jurisdiction of the Commission. Out of an abundance of caution, the contracts were filed pursuant to Section 79z-5c to avoid any appearance of non-compliance with the PUHCA. Therefore, contrary to OCC's suggestion, the Commission is not bound by the cases cited by OCC. In any event, even if the Commission were to exert jurisdiction over the contracts, the Companies are not seeking ratemaking treatment in this Application and the

Commission retains jurisdiction to determine whether the costs associated with the contracts should be included in rates.

### **III. The Companies Are Not Seeking Ratemaking Treatment With This Application.**

OCC's primary concern appears to be that the contracts could ultimately harm residential ratepayers. Motion to Intervene at 2. The basis of this concern is apparently that rates for residential customers will be unreasonably increased, or unreasonable costs will otherwise be included in rates to be paid by residential customers, and OCC must intervene in this proceeding to argue against that happening.

The Companies, however, are not seeking ratemaking treatment for the costs associated with the contracts as a part of this Application. As stated in the Application: "nothing in PUHCA shall preclude a state regulatory commission, such as the Commission, from exercising its jurisdiction under applicable law to determine whether a public utility company may recover in rates the costs of products or services that were either directly or indirectly purchased from an affiliated exempt telecommunications company." Application at 4. As was determined by the Pennsylvania Public Utility Commission in its recent Final Opinion and Order approving the same contracts: "The Commission's retained authority governing review, cost disapproval or auditing effectively address any later claims that these contracts and transactions are not in the public interest." Pennsylvania Public Utility Commission, Docket No. P-00052145, April 7, 2005, pp. 3-4 (Copy attached.). Therefore, OCC's concern about a potential rate impact is premature, and does not provide a basis for its intervention in this proceeding.

#### **IV. OCC Suggestions To Aid Future Commission Review**

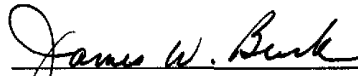
OCC suggests that the Commission “require FE to docket all such affiliate contracts in order to provide the Commission an opportunity to review and monitor the relationship between the Joint Applicants and their unregulated affiliate.” Motion to Intervene at 3-4. The PUHCA already requires affiliate contracts between a public utility and an affiliated ETC to be submitted for approval or waiver of jurisdiction to the Commission. No further directive or order from the Commission is required, as evidenced by this filing, to compel the Companies to make such filings. In any event, OCC’s for the Commission’s ability to review future filings of this nature does not support its Motion to Intervene in this proceeding.

OCC also suggests that certain criteria must be met before the Commission may approve the contracts. Motion to Intervene at 4. While the Commission may consider the factors it deems relevant in approving the contracts or waiving jurisdiction related thereto, the PUHCA sets forth no such specific standard by which the contracts subject to this Application must be judged or approved, and the Commission should not allow itself to be tied down to such criteria. As was determined by the Pennsylvania Public Utilities Commission approving the same contracts: “The costs and cost allocations appear to be just and reasonable.” Pennsylvania Public Utility Commission, Docket No. P-00052145, April 7, 2005, p. 3 (Copy attached.). With the Pennsylvania Public Utilities Commission ultimately determining: “There is no reason to deny approval of these contracts and transactions; Therefore, It Is Ordered: 1. That the contracts and transaction submitted by the Petitioners in this docket be, and hereby are, approved.” *Id.* at 4. The Companies request similar approval, or waiver, from the Commission.

**V. Conclusion**

In conclusion, the Companies request that the Commission either waive jurisdiction over or approve the contracts attached to the Application, and deny the intervention of the OCC for the foregoing reasons.

Respectfully submitted,

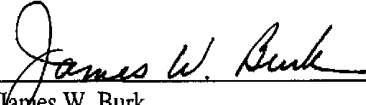
A handwritten signature in cursive script, reading "James W. Burk", is positioned above a horizontal line.

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Counsel for Ohio Edison Company  
The Cleveland Electric Illuminating Company  
The Toledo Edison Company

**CERTIFICATE OF SERVICE**

I hereby certify that the foregoing Memo Contra OCC Motion To Intervene was served by United States first class mail, postage prepaid, this 19<sup>th</sup> day of April 2005 upon the parties set forth below.

  
James W. Burk  
Senior Attorney

Larry S. Sauer, Esq.  
Assistant Consumers' Counsel  
Office of the Ohio Consumers' Counsel  
10 West Broad Street, Suite 1800  
Columbus, Ohio 43215-3485

Duane Luckey, Esq.  
Senior Deputy Attorney General  
Public Utilities Section  
180 East Broad Street  
Columbus, Ohio 43215-3793

**PENNSYLVANIA  
PUBLIC UTILITY COMMISSION  
Harrisburg PA 17105-3265**

Public Meeting held April 7, 2005

**Commissioners Present:**

Wendell F. Holland, Chairman  
Robert K. Bloom, Vice Chairman  
Kim Pizzigrilli

In Re: Pennsylvania Electric Company,  
Metropolitan Edison Company, and  
Pennsylvania Power Company Request For  
Approval or Waiver of Authority to Review  
Contracts Between Affiliates and an Affiliated  
Exempt Telecommunications Company

Docket No. P-00052145

**FINAL OPINION AND ORDER**

**BY THE COMMISSION:**

Before the Commission for disposition is the Petition ("Petition") of Pennsylvania Electric Company ("Penelec"), Metropolitan Edison Company ("Met-Ed") and Pennsylvania Power Company ("PennPower") (collectively, the "Petitioners") for Commission approval or waiver regarding a series of transactions between the Petitioners, as Pennsylvania public utilities, and affiliated or associated FirstEnergy companies providing telecommunications and other services to the Petitioners.

**HISTORY OF THE PROCEEDING**

On January 21, 2005, the Petitioners submitted the pending Petition requesting the Commission to either take and approve or to disclaim jurisdiction over certain transactions pursuant to Section 34(i) of the Public Utility Holding Company Act of



1935, as amended, at 5 USC §79z-5c (“PUHCA”). FirstEnergy Corporation (“FirstEnergy”), a registered public utility holding company under PUHCA, wholly owns the Petitioners. Other FirstEnergy affiliates or associates are FirstEnergy Service Company (“FES”), a company providing centralized administrative and other corporate services to the Petitioners, and First Communications, L.L.C. (“First Comm”), an “exempt telecommunications company” as defined in Section 34(i)(1) of PUCHA.

There are no formal protests or challenges contesting the Petitioners’ Petition.

## DISCUSSION

The Petitioners ask the Commission to either approve the submitted contracts or waive jurisdiction over the same arrangement between FES and First Comm. The transactions provide supporting services for Pennsylvania operations. The approval or waiver is sought under the Public Utility Holding Company Act (PUHCA) of 1934, 5 USC §79z-z6, particularly 5 USC §79z-5c(i).

Section 79z-5c(a) defines exempt telecommunications companies (PUCHA ETCs). Section 79z-5c(b) requires state consent for the sale of existing rate-based facilities to an ETC. Sections 79z-5c(c) and (d) authorize ETC investments by exempt and registered holding companies. Federal authority over financing and other relationships between an ETC and a registered is retained under Section 79z-5c(e). Sections 79z-5c(f) through 79z-5c(g) governs reporting, assumption of liabilities, and pledging of assets by a public utility on behalf of an ETC. Section 79z-5c(i) prohibits abusive affiliate transactions by providing state commissions with regulatory authority to approve affiliate ETC transactions if the state has retail rate regulation over the public utility or, in cases where there is no retail rate regulation, authority to ensure that there is no resale to an affiliate or associate company.<sup>1</sup> State commissions can allow or disallow cost recovery under Section 79z-5c(j). Section 79z-5c(k) prohibits reciprocal arrangements. Section 79z-5c(l) empowers a state commission to examine the books and

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<sup>1</sup>Section 79z-5c(i) also allows a state commission to waive jurisdiction.

records for ETC services if needed to discharge state regulatory responsibilities.

Section 79z-5c(m) allows a state commission to order an independent audit, on no less than an annual basis, that are reasonably related to retail rates.

State commissions take different approaches to Section 79z-5c(i) petitions.

Delaware and Michigan did not exercise jurisdiction under Section 79z-5c(i) although the state commission retained cost recovery, record examination, and auditing authority under Sections 79z-5c(j), (l) and (m). *In the Matter of the Joint Application for Approval of Certain Transactions between Indianan Michigan Power Company and AEP Communications, LLP*, Case No. U-11615, Michigan Public Service Commission, 1998 Mich. PSC Lexis 222 (1998); *In the Matter of the Application of Delmarva Power & Light Company For Approval of a Service Agreement with Conectiv Communications, Inc.*, PSC Docket No. 00-358, Delaware Public Service Commission, 48 Delaware Government Register 33, (1999). Alabama approved the contracts pursuant to Section 79z-5c(i), concomitant with a fully distributed cost requirement, while retaining cost recovery, record examination, and auditing authority under Section 79z-5c. *Petition of Alabama Power Company for Approval of Inter-Affiliate Agreement Between Alabama Power Company and Southern Telecom, Inc.*, Informal Docket No. U-4057, Alabama Public Service Commission, 1999 Ala. PUC Lexis 556 (1999); *Petition of Alabama Power Company for Approval of Inter-Affiliate Agreement Between Alabama Power Company and PowerCall, Inc.* Informal Docket No. U-4056, Alabama Public Service Commission, 1999 Ala. PUC Lexis 565 (1999).

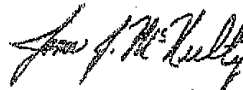
Upon consideration of the merits and examination of the contracts and transactions, we approve the Petitioners' contracts and transactions consistent with our Public Utility Code and Section 79z-5c(i). We grant this Petition for several reasons.

The contracts and transactions do not violate the prohibition against reciprocal agreements under Section 79z-5c(k). The costs and cost allocations appear to be just and reasonable. The Commission's retained authority governing review, cost disapproval or

auditing effectively address any later claims that these contracts and transactions are not in the public interest. Also, approval is warranted under Section 79z-5c(i) given Pennsylvania's regulation of FirstEnergy's transmission and distribution rates as well as FirstEnergy's ongoing transition to competitive energy supplies under Chapter 28. Finally, the Public Utility Code and PUCHA encourage filings such as these in order to promote review, compliance, and transparency. There is no reason to deny approval of these contracts and transactions; **THEREFORE, IT IS ORDERED:**

1. That the contracts and transactions submitted by the Petitioners in this docket be, and hereby are, approved.
2. That this approval shall be effective as of the date of entry of this Opinion and Order.

**BY THE COMMISSION,**



James J. McNulty  
Secretary

(SEAL)

ORDER ADOPTED: April 7, 2005  
ORDER ENTERED: APR 08 2005