IN THE SUPREME COURT OF OHIO

THE CLEVELAND ELECTRIC ILLUMINATING COMPANY

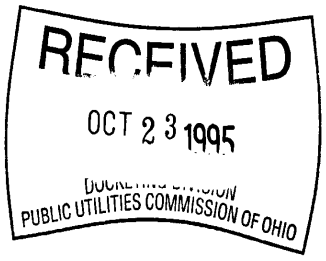
Appellant,

v.

THE PUBLIC UTILITIES COMMISSION OF OHIO,

Appellee

Case No. 95-2157



Appeal from the Public Utilities Commission of Ohio
Case No. 94-578-EL-CMR
Case No. 94-1176-EL-CMR
Case No. 94-1177-EL-CMR

NOTICE OF APPEAL OF THE CLEVELAND ELECTRIC ILLUMINATING CO.

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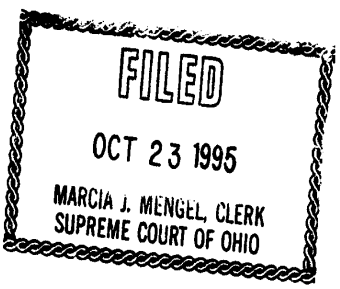

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NOTICE OF APPEAL OF THE CLEVELAND ELECTRIC ILLUMINATING CO.

The Cleveland Electric Illuminating Company ("CEI"), the Appellant herein, hereby gives notice of its Appeal, pursuant to Ohio Revised Code 4903.11 and 4903.13, to the Supreme Court of Ohio from an Opinion and Order of the Public Utilities Commission of Ohio ("Commission") entered upon the journal of the Commission on June 29, 1995, in Case Numbers 94-578-EL-CMR, 94-1176-EL-CMR, and 94-1177-EL-CMR ("the Complaint Cases"), and from the Commission's August 24, 1995 Entry on Rehearing in these Complaint Cases. Copies of the Opinion and Order

and the Entry on Rehearing are attached to this Notice of Appeal as Attachments A and B, respectively.

Appellant was and is a party of record in the aforesaid Complaint Cases, and timely filed its Application for Rehearing of the appellee's June 29, 1995 Opinion and Order in accordance with R.C. 4903.10. Appellant's Application for Rehearing was denied, with respect to the issues on appeal herein, by Entry entered on August 24, 1995.

The Appellant complains and alleges that Appellee's June 29, 1995 Opinion and Order, and Appellee's August 24, 1995 Entry on Rehearing in the aforesaid Commission Complaint Cases are unlawful, unjust and unreasonable in the following respects, as set forth in Appellants Application for Rehearing:

1. The Commission unreasonably or unlawfully found and determined in Footnote 1 that it did not concede jurisdiction over the issue of CEI's franchise rights in Garfield Heights but then expressed no opinion concerning the validity or enforceability of Sections 3 (last sentence only), 5, 6, 7, 8, and 9 of Ordinance Nos. 21-1994 and 32-1994, or Sections 1 and 2 of Ordinance No. 35-1994.

2. The Commission unreasonably and unlawfully found and determined in Footnote 1 that CEI had presented no evidence to support its arguments that the "nonrate" ordinance provisions appealed by CEI place unreasonable burdens on the company while simultaneously finding and determining at page 10 that the company's continuing property records are not kept by municipality and at page 11 that the cost to serve particular customers, or geographical locations, cannot be identified by the

location of specific utility plant in service.

3. The Commission unreasonably and unlawfully failed to hold that the preexisting nonrate provisions, conditions, form, and structure prescribed by the Commission for electric utilities generally and for CEI in particular are prima facie reasonable as a matter of law with regard to CEI's service to and in Garfield Heights and therefore unreasonably and unlawfully imposed on CEI a burden of proof to present evidence with respect to the reasonableness of the preexisting nonrate provisions, conditions, form, and structure and the unreasonableness of the nonrate provisions of the Ordinances.

4. The Commission unreasonably and unlawfully failed to hold that the preexisting nonrate provisions, conditions, form, and structure prescribed by the Commission for electric utilities generally and for CEI in particular are prima facie reasonable as a matter of law with regard to CEI's service to and in Garfield Heights and therefore unreasonably and unlawfully failed to impose the burden of proof on Garfield Heights to present evidence to overcome the prima facie reasonableness of the preexisting regulations and practices and to support the reasonableness of the nonrate provisions of the Ordinances.

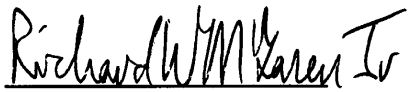
5. The Commission unreasonably and unlawfully failed to determine that the nonrate provisions of the Ordinances appealed from are or will be unjust or unreasonable or that the form and structure of the rate, price, charge, toll, or rental fixed by such nonrate provisions of such Ordinances may be unfair or unreasonable, or may have the effect of causing any rate, price, charge, toll, or rental to be fixed by the

Commission to become unfair or unreasonable, and unreasonably and unlawfully failed in its order to strike out such unjust or unreasonable nonrate provisions, conditions, form, and structure of said ordinances and substitute for them the preexisting provisions, conditions, regulations and practices it has previously found and determined to be fair and reasonable pursuant to the factors stated in section 4909.15 of the Revised Code.

6. The Commission unreasonably and unlawfully failed to assess its costs and the Company's rate case expense against the City of Garfield Heights.

WHEREFORE, Appellant will contend in the Supreme Court of Ohio that the Opinion and Order and Entry on Rehearing of the Public Utilities Commission of Ohio from which this appeal is taken should be reversed, vacated, and set aside and remanded to the appellee with instructions to correct the errors complained of herein.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served by hand delivery or by first class main this 23 day of October, 1995, upon the following parties:

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BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Complaint and Appeal of The Cleveland Electric Illuminating Company from Ordinance 21-1994 of the Council of the City of Garfield Heights, Ohio, Passed March 10, 1994, Entitled "An Emergency Ordinance to Establish and Fix a Schedule of Rates, Terms and Conditions for Electric Service Being Provided by The Cleveland Electric Illuminating Company to its Electric Customers in the City of Garfield Heights, Ohio".	Case No. 94-578-EL-CMR
In the Matter of the Complaint and Appeal of The Cleveland Electric Illuminating Company from Ordinance No. 32-1994 of the Council of the City of Garfield Heights, Ohio, Passed May 9, 1994.	Case No. 94-1176-EL-CMR
In the Matter of the Complaint and Appeal of The Cleveland Electric Illuminating Company from Ordinance No. 35-1994 of the Council of the City of Garfield Heights, Ohio, Passed May 9, 1994.	Case No. 94-1177-EL-CMR

OPINION AND ORDER

The Commission, coming now to consider the complaints and appeals filed by The Cleveland Electric Illuminating Company, the staff's report of investigation, and the exhibits and testimony introduced into evidence, and being otherwise fully advised of the facts and issues in this proceeding, hereby issues its opinion and order.

APPEARANCES:

Richard W. McLaren, Jr., Michael C. Regulinski, and Mark R. Kempic, Centerior Energy Corporation, 6200 Oak Tree Boulevard, Independence, Ohio 44131, on behalf of The Cleveland Electric Illuminating Company.

Henry W. Eckhart, 50 West Broad Street, Columbus, Ohio 43215, and David E. Mack, City Law Director, 5407 Turney Road, Garfield Heights, Ohio 44125, on behalf of the City of Garfield Heights.

(A)

Betty D. Montgomery, Attorney General of Ohio, Duane W. Luckey, Acting Section Chief, by Paul W. Colbert and Anne L. Hammerstein, Assistant Attorneys General, Public Utilities Section, 180 East Broad Street, Columbus, Ohio 43215-3793, on behalf of the staff of the Public Utilities Commission of Ohio.

HISTORY OF THE PROCEEDINGS:

On March 10, 1994, the City of Garfield Heights (City) enacted municipal ordinance No. 21-1994 which ordinance provided for a 30 percent reduction in the current tariff rates for all customers of The Cleveland Electric Illuminating Company (CEI or company) located within the City. Pursuant to Section 4909.38, Revised Code, CEI filed a complaint and appeal on April 8, 1994 objecting to the City's municipal rate ordinance. This initial complaint and appeal was designated as Case No. 94-578-EL-CMR.

On June 8, 1994, the City enacted two additional ordinances, Nos. 32-1994 and 35-1994, the first which reduced rates by thirty percent with some minor adjustments from the initial ordinance and the second which revoked CEI's franchise agreement to provide electric service in Garfield Heights. Two additional complaints and appeals were filed by CEI on July 8, 1994 and were designated as Case Nos. 94-1176-EL-CMR and 94-1177-EL-CMR, respectively.[1]

CEI requested a test period beginning January 1, 1993 and ending December 31, 1993 with a date certain of March 31, 1994. The Commission approved the date certain and test period requested by CEI by entry issued June 30, 1994. If the City's 30 percent reduction were implemented, CEI's base rate revenue for the Garfield Heights jurisdictional area would be reduced by approximately $4,589,798.

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1. The City argues that only the issues raised by Case No. 94-1176-EL-CMR need be decided in this proceeding because the initial ordinance (21-1994) was rendered moot by enactment of the subsequent ordinance (32-1994) and the final ordinance (35-1994) raises a purely legal issue, regarding revocation of CEI's franchise rights in Garfield Heights, which is beyond the scope of the Commission's jurisdiction. CEI argued on brief that the nonrate ordinance provisions should also be rejected by the Commission because they place unreasonable burdens on the company. Although we do not concede jurisdiction over the issue of CEI's franchise rights in Garfield Heights, or elsewhere, the company presented no evidence to support its arguments on this issue. Therefore, we will address in this order only the ordinance provisions that affect the rates charged by CEI in Garfield Heights. Specifically, we express no opinion concerning the validity or enforceability of Sections 3 (last sentence only), 5, 6, 7, 8, and 9 of Ordinance Nos. 21-1994 and 32-1994, or regarding Sections 1 and 2 of Ordinance No. 35-1994.

CEI is a wholly-owned subsidiary of Centerior Energy Corporation (Centerior) which was formed in 1985 as the holding company for CEI and The Toledo Edison Company (Toledo Edison).[2] CEI is an Ohio corporation engaged in the generation, transmission, distribution, and sale of electric energy. CEI provides service to approximately 747,820 customers in northeastern Ohio in a service area which covers approximately 1,700 square miles. CEI is a public utility and electric light company, as defined by Sections 4905.02 and 4905.03, Revised Code. The company is subject to the jurisdiction of this Commission pursuant to Sections 4905.04, 4905.05, and 4905.06, Revised Code. CEI's current rates for electric service were established by the Commission in Cleveland Electric Illuminating Co., Case No. 89-848-EL-COI, et al. (January 24, 1991).

The Staff Report of Investigation (Staff Ex. 1) was filed on January 23, 1995. Objections to the Staff Report were filed by the City and CEI on February 22, 1995. Motions to strike various objections were filed on March 1, 1995 by the City and CEI.

The evidentiary hearing commenced on March 20, 1995 and continued through March 29, 1995. Two local public hearings were conducted on April 18, 1995 in Garfield Heights. Briefs and reply briefs were filed on May 5 and May 17, 1995, respectively.

COMMISSION REVIEW AND DISCUSSION:

These cases come before the Commission pursuant to Section 4909.34, Revised Code, which permits public utilities to file a complaint and appeal with the Commission from a municipal ordinance fixing rates and charges for utility service. In this proceeding, the City of Garfield Heights enacted a rate ordinance which reduced CEI's rates to customers located in the City by 30 percent across-the-board.

Section 4909.34, Revised Code, provides that a utility may file a complaint and appeal with this Commission for relief from a municipal rate ordinance. Pursuant to Section 4909.34, Revised Code, the Commission must then determine whether the rates imposed by the municipality are just, reasonable, and sufficient. According to Sections 4909.38 and 4909.39, Revised Code, the complaint and appeal shall be governed by the rate application guidelines set forth in Sections 4909.17, 4909.18, and 4909.19,

2. A merger between CEI and Toledo Edison was approved by the Commission on December 1, 1994 in order to afford the operating companies the opportunity to make needed management and administrative changes and to achieve some additional cost savings not attainable as a result of the Centerior affiliation. Cleveland Electric Illuminating Co. and Toledo Edison Co., Case No. 94-1150-EL-UNC (December 1, 1994).

Revised Code, and the ratemaking formula contained in Section 4909.15, Revised Code.

On January 23, 1995, the staff filed its Staff Report of Investigation (Staff Report) which concluded that the rates enacted under the City's ordinance were insufficient to allow CEI to earn a fair and reasonable rate of return under Ohio's statutory ratemaking formula. The staff indicated that the rates currently in effect are reasonable and that it does not recommend current rates be reduced to reflect the ordinance rates passed by Garfield Heights (Staff Ex. 1, at 4).

Based on the statutory ratemaking guidelines, the staff determined CEI's rate base for the Garfield Heights jurisdictional area to be $47,832,677 and calculated the company's adjusted operating income to be $3,931,383 (Id., Sched. A-1). Using a discounted cash flow method, the staff recommended a rate of return range of 9.90 percent to 10.16 percent (Id. at 92). The staff then determined CEI's required operating income range as $4,735,435 to $4,859,800 which, when netted against test year operating income, produces an income deficiency of $804,052 to $928,417. Applying the gross revenue conversion factor results in a required revenue increase of $1,315,676 to $1,519,175 under the Staff Report recommendation (Id.).

CEI argues that the Commission must decide three issues in this case. First, the company claims that the Commission must resolve the legal issue of whether the City is bound by the stipulations signed by the Ohio Office of Consumers' Counsel (OCC) in Cleveland Electric Illuminating Co., Case No. 88-170-EL-AIR (1989) and in the so-called CRG Agreement cases, Cleveland Electric Illuminating Co. and Toledo Edison Co., Case No. 89-498-EL-COI et al. (January 24, 1991; December 19, 1991; and October 22, 1992). In those cases, OCC entered into agreements on behalf of the residential ratepayers of CEI and Toledo Edison which, upon adoption of the agreements by the Commission, established the rates currently in effect in CEI's service territory. CEI claims that the City is bound by OCC's representation in those cases and may not, therefore, unilaterally reduce rates through municipal ordinance without the consent of the other signatory parties in those proceedings.

CEI also raises the issue of whether, if the Commission decides rates should be changed in this case, rates must be increased for Garfield Heights based on cost-of-service allocations. The company claims that the issue is whether the Ohio Supreme Court's decision in Columbus v. Pub. Util. Comm., (1992) 62 Ohio St. 3d 430, requires the Commission to fix higher rates for Garfield Heights based on the cost of serving the City,

despite CEI's position of keeping rates at current levels until the company's pending rate case (Case No. 95-300-EL-AIR) is decided.

The company further claims that, if the Commission decides the prior rate agreements are not binding for purposes of this case, the issue of proper allocation methodology must be addressed. According to CEI, the use of the staff's recommended 12-month coincident peak (12 CP) would have far-reaching implications because the remainder of CEI's retail customers would still pay rates based on the 4 CP methodology. CEI states that, if 12 CP is adopted for Garfield Heights in this case, other municipalities with few industrial customers would surely pass ordinances to take advantage of the 12 CP allocation in order to benefit residential ratepayers in their communities. Such a situation, argues CEI, would pit municipalities with a small number of industrial customers against those with a larger base of such customers.

For the reasons set forth below, we do not believe that the scope of our analysis is as restricted as that suggested by CEI. We need not reach the issue of whether OCC's stipulation of prior rate cases is binding on the residential customers of Garfield Heights such as to prohibit the City from enacting a municipal rate ordinance. We will address below the holding in the Columbus case cited by the company, as well as the issue of the proper allocation methodology to be employed in this case.

Standard of Review

We are faced in this case with deciding whether the 30 percent rate reduction enacted by the city of Garfield Heights is reasonable. In making this assessment, we are required by Section 4909.39, Revised Code, to apply the ratemaking formula set forth in Section 4909.15, Revised Code. This section, among other things, requires the Commission to determine a valuation of property used and useful in rendering utility service, a fair and reasonable rate of return on that valuation, and the costs to the utility of rendering utility service during the test year.

In a complaint and appeal case, as in a rate case, the Staff Report and objections filed to the Staff Report frame the issues for consideration by the Commission. Section 4909.19, Revised Code; Rule 4901-1-28(C), Ohio Administrative Code. Thus, for purposes of reviewing the reasonableness of the rate ordinances enacted by Garfield Heights, we must measure the City's objections, and the evidence presented in support of those objections, against the Staff Report and the testimony and exhibits presented at the hearing. CEI, as the complainant in

this proceeding, maintains the burden of proof. However, given that CEI is not requesting that rates be increased in this case, we need only adjust the current rates in the event a rate decrease is found to be justified.

The Staff's Recommendation

The staff's investigation involved interviews with company personnel and examination of internal documents and published financial reports about the company. The staff evaluated test year operating income and date certain rate base valuation through review of operating revenues and continuing property records. The staff also analyzed CEI's proposed adjustments to operating income and rate base and accepted some of the company's changes while making adjustments on others (Staff Ex. 1, at 3).

The following table compares the original company (Co. Ex. 1, Sched. B-1) and revised staff recommendations for CEI's property used and useful in rendering electric service to jurisdictional customers as of the date certain March 31, 1994, based on modifications to the Staff Report contained in staff testimony. The staff also made several minor adjustments to its operating income recommendation following issuance of the Staff Report. The revised staff recommendation for the company's adjusted operating income for the 12 months ending December 31, 1993, the test period in this proceeding, is set forth below.[3]

3. The revisions to the staff's rate base and operating income recommendations pertain to the following items: updated plant in service to include general ledger reconciliation adjustments (Co. Ex. 3A, at 3); updated depreciation reserve to include general ledger reconciliation adjustments (Co. Ex. 3A, at 3); updated nuclear decommissioning reserve adjustment for Acct. 324, Accessory, Electric Equipment, to reflect 3/31/94 date certain balance (Staff Ex. 3, at 3); updated other rate base items to include first mortgage bonds blended rate deferral with the associated deferred taxes (Staff Ex. 11, at 5); updated DSM expense adjustment to exclude test year current level costs and updated the amortization of DSM deferred costs to reflect 3/31/94 date certain balance (Staff Ex. 2, at 6); updated financial services expense adjustment to exclude three quarters of remarketing fees (Staff Ex. 11, at 8); updated the advertising expense adjustment to exclude only the equivalent salary of a full-time employee (Staff Ex. 11, at 13); updated and corrected the property taxes calculation to include Acct. 311.03 in the calculation of the real property tax (Staff Ex. 11, at 14); and updated PIPP uncollectibles allowance to include a thirteen months average of PIPP excess charge-offs (Staff Ex. 11, at 5).

Jurisdictional Rate Base

	CEI	Revised Staff
Plant in Service	$83,833,318	$77,693,436
Less: Depreciation Reserve	(23,065,647)	(21,471,242)
Net Plant in Service	$60,767,671	$56,222,194
Plus: CWIP	0	0
Working Capital	1,445,806	496,437
Less: Other Items	(3,473,800)	(8,865,741)
Jurisdictional Rate Base	$58,739,677	$47,852,890

Adjusted Operating Income

	CEI	Revised Staff
Operating Revenues	$19,354,865	$19,544,740
Operating Expenses		
Operation and Maint.	7,970,649	7,094,451
Depreciation	2,568,899	2,326,971
Taxes Other Than Inc.	2,739,381	2,538,512
Income Taxes	131,838	893,903
Fuel and Purchased Power	3,957,103	3,927,657
Other Amortization	(866,179)	(1,181,199)
Total Operating Expenses	$16,501,691	$15,600,295
Net Operating Income	$2,853,174	$3,944,445

The staff concluded that CEI's current rates generate a rate of return for the Garfield Heights jurisdictional area of 8.24 percent. The staff determined that a fair and reasonable rate of return is in the range of 9.90 and 10.16 percent, using the traditional Discounted Cash Flow method of calculating the company's cost of common equity. The staff's recommended baseline cost of common equity for Centerior is in the range of 12.33 to 13.26 percent, including a 3.5 percent issuance cost adjustment (Staff Ex. 1, at 19-23). Accordingly, the staff found that the ordinance rates passed by Garfield Heights would result in a rate of return even lower than the current rate of return. The staff recommended, therefore, that current rates not be reduced to reflect the ordinance enacted by the City of Garfield Heights (Id. at 4).

Garfield Heights Proposal in Support of Ordinance Rates

The City filed 93 objections to the Staff Report, of which 22 were stricken by the attorney examiner on the first day of hearing. Through Mr. Yankel's testimony, the City raises a number of issues. Primarily, the City contends that CEI's rates should be lowered because they are unreasonably high.

For purposes of determining whether the 30 percent ordinance rate reduction is reasonable, Mr. Yankel claims that the City's rates must be set based on the cost of serving Garfield Heights as a separate jurisdiction, and not as part of the overall CEI system average. In order to accomplish this allocation of costs to Garfield Heights on a stand-alone basis, Mr. Yankel makes several recommendations. He suggests that the City's lower than system average usage levels must be reflected, that Garfield Heights specific billing determinants be reflected, and that costs and revenues associated with interruptible load be reconciled. In addition to his allocation issue, Mr. Yankel makes the following recommendations: 1) certain deferral costs should not be charged to Garfield Heights ratepayers that are not assessed to other customers; 2) 550 MW of "mothballed" capacity should be included in CEI's reserve margin calculation; 3) $100 million per year of purchased power associated with Toledo Edison's 150 MW share of Beaver Valley 2 capacity should be disallowed from rates; and 4) CEI's proposed rate case expense not be imposed upon Garfield Heights ratepayers (City Ex. 1, at 3-5).

Based on his proposed stand-alone allocation adjustments, Mr. Yankel calculated that a 9 percent reduction is justified for Garfield Heights. When combined with his adjustments for excess capacity, Mr. Yankel finds that a minimum across-the-board rate reduction of 23.65 percent is appropriate for Garfield Heights. Mr. Yankel concludes, therefore, that the 30 percent rate reduction passed by the City is fair, just, and reasonable (Id. at 6).

The City did not dispute many of the staff's rate base and operating income determinations. Nor did the City contest the staff's rate of return calculations or tariff issues. We will address in this order only those issues pursued by the City at hearing and addressed on brief.

Allocations

The most broadly contested issues in this case involve the determination of the appropriate jurisdictional allocation methodology and the ability to determine proper allocations for Garfield Heights on a stand-alone basis. We need not decide whether the 12 CP or 4 CP methodology is appropriate in this case because, even applying the method most favorable to the City (12 CP), the outcome of our decision would not change.

Use of Specific Garfield Heights Data for Allocations

In Columbus, supra, the Ohio Supreme Court addressed an appeal from a Commission decision involving a complaint and appeal by Columbia Gas of Ohio (Columbia) from a municipal rate ordinance enacted by the City of Columbus. In the case before the Commission, Columbus had passed an ordinance rate just prior to Columbia's filing of rate increase applications for its five regions, including the region encompassing the city of Columbus. The Commission compared the rate of return to Columbia on the city's rate base and found such return to be inadequate compared to the overall system rate of return established by the Commission. The Commission concluded, therefore, that Columbus' ordinance rate was inadequate and substituted the uniform rate fixed in the consolidated rate cases. On appeal, the Ohio Supreme Court held that, because Columbia had sought relief from the Columbus ordinance rate, the Commission "must allocate valuation and cost factors on the basis of rendering service to the municipality." Columbus, supra, at 439. The court's opinion that the municipal rate could not be rolled into the general areawide rate structure was based on Section 4909.34(A), Revised Code, which preserves the "preeminence of the municipal ordinance passed when no general rate application is pending and of the separate procedure for a complaint and appeal in response to the ordinance". Id.

In this proceeding, Garfield Heights argues that Columbus requires the Commission to affirm the City's ordinance rates because CEI has failed to identify Garfield Heights specific data and has, instead, relied upon system average costs for purposes of performing allocations. City witness Yankel contends that the company and the staff have failed to take into account the lower cost of serving customers in Garfield Heights relative to overall cost of service on the CEI system. For example, Mr. Yankel argues that it is inappropriate to allocate costs to Garfield Heights on a system average basis because: 1) the housing stock in Garfield Heights is older and tends to have less electric space heating and air conditioning and 2) the population in Garfield Heights is older and less affluent and is, therefore, more cost conscious concerning electricity usage (City Ex. 1, at 39-46). According to Mr. Yankel, actual usage data supports his contention of lower usage by Garfield Heights residents (Id. at 47-49). Mr. Yankel asserts that distribution plant is generally allocated to the jurisdiction in which it is located and, because distribution facilities in an older area such as Garfield Heights would tend to be more fully depreciated, the use of system average allocations is inappropriate (Id. at 53-54).

Although staff witness Tucker concedes that the use of Garfield Heights specific data would be preferable, he claims that no practical method exists for tracking the actual information

needed to make allocations on a municipality basis (Staff Ex. 9, at 8). The staff asserts that its methodology does consider Garfield Heights specific valuations and cost factors, to the extent possible, and is, therefore, in compliance with the holding in Columbus.

CEI contends that its cost allocations were city-specific because they used actual Garfield Heights billing data to extrapolate load research data for similar-sized customers and because the company took actual load meter data from demand meters on the largest customers in the city to determine actual contribution to system peak. CEI disputes the City's arguments on several bases. CEI claims that, absent the availability of hour-by-hour load demand information from a large sample of customers (which the company suggests would be extremely costly), it is necessary to allocate the majority of the company's costs (primarily the cost of production plant) based on the total demand a customer class puts on the plant during the one hour per month that is the system's peak demand (See, Co. Ex. 1, Sched. B-7). CEI also argues that Mr. Yankel's primary usage adjustment came from employing an improper double-count of the usage data, as pointed out by company witness Seboldt (Tr. III, 147-148).

Central to the issue of allocation of costs to individual municipalities, such as Garfield Heights, is the availability of cost data specific to a particular city. On cross-examination, Mr. Yankel suggested that costs associated with distribution and transmission plant located within the City's boundaries could be identified using tax records and the company's continuing property records (Tr. V, 27-43). Mr. Yankel's position is that allocating costs based on the location of plant within the City's boundaries more accurately reflects the costs associated with serving the municipality. Both the staff and the company oppose such an allocation process because of the lack of data available to perform city-by-city calculations. Company witness Cantwell testified that the company's continuing property records are not kept by municipality, although Ms. Seboldt indicated that some records were kept from which the number of poles within the City could be identified (Tr. II, 65; Tr. III, 121).

Although Mr. Yankel's proposal of using tax and company records for allocation purposes is an interesting one, we are not persuaded that it is possible to identify such costs based on the record which exists in this case. We also recognize that the largest portion of the cost of providing service is related to generation facilities, none of which are located within the city of Garfield Heights. Further, little transmission plant is located within the City and, thus, a proportionate share of the

costs associated with transmission would also have to be allocated to Garfield Heights to reflect the cost of providing service there. Even some distribution plant which is not physically located within the City may be used to provide service to Garfield Heights to the extent that the distribution system is integrated for maximum system efficiency. While distribution circuits are generally operated radially, they are typically designed as integrated networks in order to provide reliable and continuous service when equipment is taken out of service for maintenance. As such, even if tax records could be used to identify the location of generation, transmission, and distribution facilities, we are not persuaded that, for allocation purposes, the cost to serve particular customers, or geographical locations, can be identified by the location of specific plant. Despite these problems, we believe that greater efforts should be made by CEI, and other electric utilities in this state, to identify costs associated with serving different customer subsets. Such data will become crucial as competition in the electric industry becomes more prevalent.[4]

Comparative Rates

The City alleges that CEI's rates are excessive and unreasonable by virtue of comparison with the rates of other electric utilities in Ohio and surrounding states. According to City witness Yankel, CEI's rates have increased by 236 percent from 1976 to 1993, compared to an average increase of 148 percent for the five other nonaffiliated investor-owned electric utilities in Ohio over that same period (City Ex. 1, at AJY-1). The City attributes this differential to CEI's investment in nuclear capacity and points out that Cleveland Public Power's rates are approximately 30 percent less than CEI.

Although we are concerned with the level of CEI's rates, particularly as the electric industry begins to face increasing competitive pressures, we do not believe that the statutory ratemaking formula in effect in Ohio permits rates to be set based solely on comparisons with other utilities. Section 4909.15, Revised Code. We are, however, extremely concerned regarding the competitive position in which CEI finds itself relative to companies in adjacent and neighboring areas. We are also interested and concerned with CEI's ability to continue to provide quality service at reasonable rates to its retail jurisdictional

4. Although we find that there is sufficient data to make the allocation at issue in this case, we feel that, in the future, the staff should undertake a more thorough up-front investigation of this issue (See, City Reply Brief, at 8-9). Nevertheless, the issue was fully explored at the hearing, leaving the Commission with a complete record to make a decision in this case.

customers. We will continue to review CEI's rates in order to assess its ability to compete and we expect the company to continue to pursue every possible means of placing itself in a more competitive position, while providing quality service at reasonable and nondiscriminatory rates to retail customers.

Deferrals

The City raised an objection to the staff's inclusion of expenses related to deferrals for FAS (Financial Accounting Standard) 112, Demand-Side Management, CRG Deferral Amortization, VTP Expense Adjustment, and FAS 106 Expense (City Ex. 1, at 70). Mr. Yankel contends that, because this case will be concluded before the company's general rate case, the customers of Garfield Heights would be paying for these deferral expense items well before other customers on the CEI system. Mr. Yankel claims that inclusion of these deferral expenses is discriminatory (Id.).

To test the current rates of the company, the staff applied normal ratemaking procedures as though the current rates were going to be changed. The nonphase-in deferrals were included in the revenue requirement calculation as a part of the normal ratemaking process (Staff Ex. 11, at 16). The staff did not, however, recommend a change in the current rates and the company is not recovering these costs in the current rates. The City is simply incorrect in its assertion that the residents of Garfield Heights will be paying for these deferrals before the company's other customers, because the rates have not been changed to include the deferrals. Therefore, the recovery of these deferrals has no rate impact in this case.

FAS 71

Financial Accounting Standard (FAS) 71 states, in part, that, before a regulated utility can book deferrals as regulatory assets, it must be "probable that future revenue in an amount at least equal to the capitalized cost will result from inclusion of that cost in allowable costs for ratemaking purposes (Tr. VIII, 64-65). The City argues that there has been no assurance from the Commission that CEI will ever be allowed to recover the $2.19 billion in rate stabilization deferrals on the company's balance sheet as of the end of 1994 (City Ex. 17, at 26). The City contends that additional write-offs are likely by Centerior and Garfield Heights customers should not be charged rates that reflect deferrals that may never be charged to other customers.

As with the nonphase-in deferrals, no recovery is being sought from Garfield Heights customers for these costs since current rates would not be changed. We note that, for the phase-in deferrals, all parties, including counsel for the City

agreed that the phase-in deferral issue would not be litigated in this proceeding but would be addressed in the company's pending rate case (Tr. VIII, 38).

Nuclear Plant Decommissioning Costs

The City filed objections alleging that the staff had failed to investigate and determine if, and how, current site-specific estimated nuclear plant decommissioning costs are included in CEI's current rates. Staff witness Kotting testified that the determination sought by the City was not necessary in this case because, for purposes of deciding whether the Garfield Heights ordinance rates are reasonable, the staff based its decommissioning cost estimates on those used to set rates in the company's last rate case (88-170-EL-AIR). Mr. Kotting added that an updated decommissioning cost estimate is part of an ongoing staff investigation in Case No. 94-2026-EL-AAM, which investigation is not yet complete.

For the reasons stated by staff witness Kotting, we believe that the City has not been prejudiced by the staff's treatment of nuclear decommissioning costs in this case. The staff's use of existing expense levels insures that the City is not subjected to higher expense levels than those currently in place. Once the staff's investigation of these expenses is completed, the Commission will be able to make an updated assessment of the appropriate level of decommissioning expense.

Interruptible Credits

City witness Yankel further claims that the company excluded interruptible and curtailable loads from its calculation of total system peak loads. Mr. Yankel that, by removing these loads from the peak load calculation, the effect is to raise the peak contribution for Garfield Heights, thus making the City responsible for a portion of the generation plant used to supply interruptible and curtailable loads (City Ex. 1, at 65-66). Mr. Yankel contends that the peak load calculation must either remove the generation serving interruptible customers or credit the revenues associated with these customers (Tr. V, 60-62).

We agree with Mr. Yankel on this point and, because no interruptible revenue figure was available in the record, we directed the company, the City, and the staff (at the June 21, 1995 Commission meeting) to determine the appropriate amount of

revenue for this item.[5] Because the inclusion of interruptible revenues in the peak load calculation only minimally affects the overall revenue requirement for the Garfield Heights jurisdiction, sustaining the City's objection on this issue does not alter the ultimate conclusion reached in this case.

Delta Revenues

The City also raised objections regarding the staff's treatment of delta revenues (the difference between revenues which would have been received at full tariff rates and revenues received as a result of the special contracts between CEI and some customers). The City argues that special contracts are available only to large industrial or commercial customers and, therefore, discriminate against areas such as Garfield Heights which has few large customers. The City offered no evidence to support its claim other than presenting two exhibits showing the amount of delta revenues associated with individual special contract customers between 1986 and 1993 and for 1994 (City Exs. 7 and 9)[6].

As pointed out by staff witness Howard, the staff historically has recommended approval of economic development contracts and competitive response contracts in order to aid in the development within a utility's service territory and to prevent customers, and their associated load, from leaving the system (Staff Ex. 6, at 2-3). Mr. Howard also indicated that the staff treated delta revenues in this case in a manner consistent with prior staff and Commission precedent - namely, half of economic development delta revenues are included in rates and no delta revenues associated with competitive response contracts are

5. By letter filed June 26, 1995, the company and the City agreed that the revenues associated with interruptible load for the test period were $29,901,974. The parties also stated that the Commission had a variety of options available to it for purposes of allocating such revenues to Garfield Heights. The parties did not, however, recommend a particular allocation factor be used. For purposes of determining the revenue requirement associated with this issue, the staff applied the $29,901,974 to the D-10 (Demand) allocation factor (1.03543), the E-10 (Energy) allocation factor (0.92024), and the Sale for Resale allocation factor (0.92888). This calculation shows that applying the E-10 and the Sale for Resale allocation factors results rate of returns of 8.59 and 8.60 percent, respectively. Even under the D-10 allocation factor, which is most favorable to the City, the rate of return earned by CEI from the Garfield Heights jurisdiction was only 8.64 percent.

6. These exhibits were admitted under seal because of their identification of specific customers' delta revenues.

included (Id. at 7). There was no evidence presented in this case which persuades us that the staff's treatment of the delta revenues was inappropriate. Accordingly, the City's objections on this issue will be denied.

Management Practices

A number of the objections filed by the City suggest that CEI's rates should be reduced due to poor management decisions, the company's financial condition, and other operating inefficiencies.

For example, the City argues that CEI's financial position has significantly deteriorated over the past 20 years, as evidenced by its just-above investment grade bond ratings, its retained earnings position, and its dividend cut from $1.60 to $.80 per share (City Br. at 34). The City goes on to question why Centerior has maintained any dividend when it had negative cash earnings in several recent years, including 1993 when significant write-downs occurred (Staff Ex. 1, at 25) due to cancellation of Perry 2. The City also points out that Centerior's financial performance (as measured by ratios of operating revenues compared to net plant value, total assets, and fixed assets) has been "decidedly lower than industry averages" (Staff Ex. 1, at 27), despite some recent improvements, and that several productivity factors indicate poor generation plant performance when compared to other utilities in the country (Id. at 32-33). Given all of these factors, the City argues that the staff has failed to consider the company's precarious financial position and management problems in reaching the conclusion that current rates are reasonable and should not be reduced.

Although we recognize the company's difficult financial position, we do not necessarily agree with the City's proposed remedy. Based on the facts of this case, the 8.64 percent rate of return determined by the staff (including the interruptible revenue adjustment) is lower than any range awarded by the Commission. The record does not, therefore, support a finding that rates should be lowered at this time for Garfield Heights customers. Accordingly, we need not adopt a particular rate of return for CEI in this case.

Moreover, in order to consider Centerior's strategic planning process, for purposes of addressing the company's financial and competitive position, the staff has proposed to retain an independent consultant in the pending rate cases for the Centerior operating companies. An entry was recently issued in those cases seeking responses to a Request for Proposal which was distributed concurrently with the entry. See, Toledo Edison Co. and Cleveland Electric Illuminating Co., Case No. 95-299-EL-AIR, et al. (May 26,

1995, as modified on May 30, 1995). Accordingly, we believe that the issues raised by the City can more properly be considered in the rate case, where the staff, assisted by an independent consultant, as well as other intervening parties, may fully investigate Centerior's financial position and offer recommendations for future strategic planning by the company. Intervenors in the case will also have the opportunity to raise objections in response to the staff's recommendations on this issue.

Perry Performance

The City is also critical of the staff's investigation regarding the Perry plant's performance during the test year. The City argues that Perry's 39 percent equivalent availability during the test year is indicative of problems at the plant which should have been addressed in CEI's Perry Course of Action Plan (PCA) and reviewed by the staff. The Perry PCA was submitted by Centerior to the Nuclear Regulatory Commission in 1993 and is comprised of a series of strategies designed to return Perry to industry average performance by the end of the plant's fifth refueling outage (Staff Ex. 4, at 2). Staff witness Adkins explained that the results of the strategies initiated in 1993 will not be realized and measurable until 1994-1996 and beyond, which is outside the test year in this case (Id. at 3). Accordingly, the staff did not investigate the "results" of the Perry PCA.

Although we agree partially with the staff that the final results of the Perry PCA may not yet be fully measurable, the staff should be continually monitoring the operational efficiency of Perry to ensure that all appropriate steps are being pursued. To that end, we direct the staff to report in CEI's rate case the latest known results of the Perry PCA, whether or not such results are final or strictly within the test year.

Excess Capacity

The City asserts that CEI has a great deal of excess capacity, which is the primary basis for the company's economic problems. The City claims, for example, that CEI's purchase of Toledo Edison's 150 MW share of Beaver Valley 2 capacity is inappropriate because of the high cost of that capacity relative to other available less expensive capacity. Mr. Yankel also states that the removal of 550 MW other lower cost capacity into "mothballed" status is simply a "shell game" intended to mask Centerior's excess capacity situation for regulatory purposes (City Ex. 1, at 72-73).

As pointed out by staff witness Tucker, only Lakeshore Unit 18 (with 243 MW of capacity) was "mothballed" at the end of the test year and that capacity was included by the staff in its

calculation of CEI's net generating capability (Staff Ex. 1, Sched. B-8; Staff Ex. 9, at 3). Mr. Tucker also stated that, because CEI's purchase of Toledo Edison's share of Beaver Valley 2 was approved in the company's last rate case (88-170-EL-AIR), and in subsequent long-term forecast report cases, the staff saw no need to investigate this issue further or consider recommending a disallowance of that transaction in this case (Staff Ex. 9, at 3). The staff calculated CEI's reserve margin to be 10.8 percent in 1993, 14.4 in 1994, 13.2 in 1995, 11.7 in 1996, 10.5 in 1997, and 9.7 in 1998 (Staff Ex. 1, Sched. B-8.1).

None of these margins approaches the Commission's 20 percent presumptive standard for excess capacity. We will, however, be willing to consider any credible evidence presented in the company's rate case concerning CEI's treatment of mothballed plants and the effect on reserve margins.

General Electric Lawsuit

Another issue raised by the City relates to the company's treatment of money received from settlement of a lawsuit against General Electric. The City argues that the money received from the settlement, the amount of which is under seal and has not been disclosed by CEI, should be used as a reduction to rate base for the Perry plant.

The City offered no evidence in support of its allegations on this issue. There is no evidence in the record to indicate the amount CEI received in this settlement within the test year established in this case. Due to the incomplete record on this issue, no appropriate treatment of the settlement proceeds is possible in this case.

Rate Case Expense

The City contends that it should not be charged for rate case expense incurred by CEI because Garfield Heights has a constitutional and statutory right to enact rate ordinances and it is CEI that caused rate case expenses to be incurred by filing a complaint and appeal in this case. Early in the process of this case, we issued an entry (April 7, 1994) which, among other things, pointed out that the Commission is authorized to impose costs of any hearing or investigation on any party in the case. Section 4903.24, Revised Code. We indicated that, to the extent we concluded that the issues raised in the case were insignificant, without merit, or did not justify the expense of the Commission's resources, we reserved the right to assess costs to one or more parties to the case.

Our primary concern when we issued the April 7, 1994 entry in this case was that municipalities would pass such ordinances and then not bother to defend them before the Commission. A complaint and appeal case takes a great deal of Commission and staff resources, and we were concerned that this work would be undertaken by the staff with no case being put on by the municipality. This did not occur in this case as the City presented a witness who presented substantial defenses for the ordinances in good faith, and after undertaking discovery from the company in order to make an informed presentation. We find, therefore, that our initial reasons for raising the possibility of assessment of costs has not been triggered in this case.

The City also argues that, to the extent any rate case expense is passed through to ratepayers, it should be amortized over more than the one-year period set forth in the Staff Report to reflect the fact that CEI has not had a rate case application before the Commission for six years. In a late-filed exhibit submitted April 10, 1995, CEI adjusted its projected $120,000 rate case expense downward to $33,871. In a cover letter, counsel for CEI claims that this reduction is due primarily to reliance on in-house counsel and in-house rate of return studies. We believe that, under the circumstances of this case, CEI's claimed expense for this case is reasonable. However, even if rate case expenses were totally disallowed, it would not affect the outcome of this case. We expect the company to continue to control the amount of rate case expense incurred in pursuing its pending rate increase application.

Public Hearing Testimony

At the two local public hearings held in Garfield Heights on April 18, 1995, 22 witnesses testified. Twelve of the public witnesses offered sworn testimony while 10 others gave unsworn statements. Of those giving sworn testimony, 8 supported the City's municipal ordinance rate reductions and 4 opposed the City's ordinance efforts. Those persons opposing the rate ordinance reductions indicated generally that CEI had provided reliable service over the years and the City's actions were politically motivated (See Local Tr. I, 72-77, 86-93; Local Tr. II, 42-45, 53-60).

The witnesses testifying in support of the ordinance rate reductions included the mayor of Garfield Heights, several members of City Council, members of Ohio Citizen Action, a business owner, representatives of the local Chamber of Commerce, and residential consumers. These witnesses supported the City's efforts to reduce CEI's rates, stating that they believed the rates were too high and that the high rates had been caused by CEI's mismanagement over the past 10 to 20 years. Several witnesses specifically

mentioned opposition to the cost of the company's nuclear generating capacity and others cited the need for lower rates in order to attract businesses to the area (Local Tr. I, 44-51, 51-58, 64-70; Local Tr. II, 11-32, 37-42, 45-52, 68-77). In addition, the mayor read from a statement which outlined the issues raised by the City in the evidentiary hearing (Local Tr. I, 11-32).

One member of city council stated that a certain area of the city had experienced "brownouts" the past summer (Local Tr. II, 23-24). CEI was directed to investigate this service complaint and report back on its findings (Id., 29-30). On June 5, 1995, CEI filed a letter indicating that the area referred to at the hearing had experienced no more than normal summer outages between July and September 1994, two-thirds of which were attributed to customer equipment or to a loose connection at the house cap, where wind and trees can interfere with wires.

In its assessment of CEI's reliability of service, the staff found that the distribution feeders serving Garfield Heights were of better than average reliability, compared to the entire CEI distribution system (Staff Ex. 1, at 91; Staff Ex. 3, at 4). Staff witness Maxwell testified that 3 of the 19 distribution feeders serving Garfield Heights performed in the bottom 50 percent of the company's distribution system. Mr. Maxwell attributed the outages on these feeders to a variety of causes including, most frequently, lightning (Staff Ex. 3, at 4). We do not find that there is significant record support for finding that an excessive number of outages occurred in Garfield Heights. The staff should, however, continue to monitor the outage situation in Garfield Heights, and the CEI system in general, and report in the company's base rate case regarding the overall quality of service provided by CEI to its customers.

CONCLUSION:

The City claims that CEI has failed to meet its burden of proof that the ordinance rates set by Garfield Heights were not fair, just, and reasonable. The City cites Mr. Yankel's conclusion that CEI's rates for Garfield Heights should be reduced by at least 23.65 percent (City Ex. 1, at 75-76) not including consideration of the impact of the General Electric lawsuit settlement, poor plant performance (including Perry), poor company management decisions, and CEI's high rates.

For the reasons set forth above, we disagree with the City's recommendations and find that the staff's conclusion, that no rate decrease is justified, is amply supported by the record evidence presented in this case and is consistent with the relevant statutory ratemaking guidelines. As indicated above, an 8.64

percent rate of return, which represents inclusion of the D-10 allocation factor for the interruptible revenues, does not support the reduction set forth in the Garfield Heights ordinance. We need not, therefore, reach any conclusion in this case regarding an appropriate rate of return for CEI.

Having determined that no rate decrease is warranted based on the facts of this case, we need not address the objections to the Staff Report raised by CEI[7]. Indeed, to the extent we would have agreed with any of CEI's objections raised in this case, it would only serve to bolster the conclusion that no rate decrease is warranted in this case. The issues raised by the company are likely to be relitigated in CEI's pending rate case and, by not addressing those issues in this order, we will avoid setting precedent on matters that are better considered within the context of a full rate proceeding where all interested parties will be able to provide input into the process.

FINDINGS OF FACT:

1) The City of Garfield Heights enacted three separate municipal rate ordinances, 21-1994 (March 10, 1994), and 32-1994 and 35-1994 (June 8, 1994), which provided for a 30 percent reduction in the current tariff rates for all customers of CEI located within Garfield Heights.

2) CEI filed complaints and appeals from the three ordinances, designated as Case Nos. 94-578-EL-CMR (April 8, 1994) and 94-1176-EL-CMR and 94-1177-EL-CMR (July 8, 1994).

3) A test period of calendar year 1993, with a date certain of March 31, 1994, was established by entry issued June 30, 1994.

4) CEI is a public utility and electric light company, as defined by Sections 4905.02 and 4905.03, Revised Code, and is subject to the jurisdiction of this Commission pursuant to Sections 4905.04, 4905.05, and 4905.06, Revised Code.

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7. CEI filed objections regarding the staff's treatment of depreciation reserve, working capital, amortization expense for phase-in deferred costs (this issue was specifically deferred to the rate case by agreement of the parties), deferred taxes resulting from alternative minimum tax, depreciation expense, transmission related revenues, delta revenues, DSM expense, labor expense, advertising expense, employee picnic expense, 12 CP allocation methodology, and rate of return.

5) The Staff Report of Investigation was filed on January 23, 1995. The Staff Report, subject to several minor subsequent adjustments, concluded that CEI was earning rate of return of only 8.24 percent, which is below the 9.90 percent to 10.16 percent rate of return the staff found to be fair, just, reasonable for the company. When applied to the rate base determined by the staff, and considering other operating income adjustments, the staff concluded that CEI could justify a rate increase for its Garfield Heights jurisdictional customers of between $1,297,577 and $1,501,163. Because CEI was not seeking to increase rates through this case, however, the staff recommended that current tariff rates be retained.

6) Evidentiary hearings were held between March 20 and March 29, 1995 and local public hearings were conducted in Garfield Heights on April 18, 1995. Post hearing briefs and reply briefs were filed on May 5 and May 17, 1995, respectively.

7) The value of the company's property used and useful for the rendition of electric service to its Garfield Heights jurisdictional customers, determined in accordance with Sections 4909.05 and 4909.15, Revised Code, as of the date certain of March 31, 1994, is not less than $56,222,194.

8) For the 12-month period ending December 31, 1993, the test period in this proceeding, the Garfield Heights jurisdictional revenues, expenses, and net operating income realized by CEI under its present rate schedules were not less than $19,854,354, $15,720,444, and $4,133,910 respectively.

9) The net annual compensation of $4,133,910 represents a jurisdictional rate of return of 8.64 percent on the jurisdictional rate base of $47,865,946.

10) A rate of return of 8.64 percent is insufficient to provide the company reasonable compensation for the service rendered to customers in the jurisdictional area which is the subject of this complaint and appeal.

11) Given CEI's position of not seeking an increase in rates in this case, the company's present tariffs should be maintained.

CONCLUSIONS OF LAW:

1) The complaints and appeals were filed by CEI pursuant to, and this Commission has jurisdiction thereof, under the provisions of Sections 4909.34, 4909.38, 4909.39, 4909.17, 4909.18, and 4909.19, Revised Code.

2) A staff investigation was conducted and a report duly filed, and public hearings have been held, the written notice of which had complied with the requirements of Sections 4909.19 and 4903.083, Revised Code.

3) The 30 percent rate reduction enacted through the Garfield Heights rate ordinances does not result in a rate of return that is fair, just, and reasonable for CEI under the facts presented in this case.

4) The municipal rate ordinances enacted by the City of Garfield Heights would result in unjust and unreasonable rates under the facts presented in this case and, pursuant to Section 4909.39, Revised Code, the tariff rates currently in effect for CEI shall remain in effect for Garfield Heights as identified above in footnote 1.

ORDER:

It is, therefore,

ORDERED, That CEI's complaints and appeals from the ordinance rates enacted by the City of Garfield Heights are granted, to the extent, and for the reasons set forth in this opinion and order. It is, further,

ORDERED, That, to the extent set forth above in footnote 1, CEI's current tariff rates shall remain in effect for Garfield Heights, pending the outcome of CEI's rate case. It is, further,

ORDERED, That a copy of this opinion and order be served upon all parties of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO

Craig A. Glazer, Chairman

JoLynn Barry Butler

Richard M. Fanelly *

Ronda Hartman Fergus

David W. Johnson

DDN/gm

* See Separate Concurring Opinion

Entered in the Journal
JUN 29 1995

A True Copy

Gary E. Vigorito
Secretary

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Complaint and Appeal of The Cleveland Electric Illuminating Company from Ordinance No. 21-1994 of the Council of the City of Garfield Heights, Ohio, Passed March 10, 1994, Entitled "An Emergency Ordinance to Establish and Fix a Schedule of Rates, Terms and Conditions for Electric Service Being Provided by The Cleveland Electric Illuminating Company to its Electric Customers in the City of Garfield Heights, Ohio".	Case No. 94-578-EL-CMR
In the Matter of the Complaint and Appeal of The Cleveland Electric Illuminating Company from Ordinance No. 32-1994 of the Council of the City of Garfield Heights, Ohio, Passed May 9, 1994.	Case No. 94-1176-EL-CMR
In the Matter of the Complaint and Appeal of The Cleveland Electric Illuminating Company from Ordinance No. 35-1994 of the Council of the City of Garfield Heights, Ohio, Passed May 9, 1994.	Case No. 94-1177-EL-CMR

CONCURRING OPINION

The ordinance provisions listed on page 2, footnote 1, of the Opinion and Order are not integral to the rate provisions of the ordinances, in my opinion. The non-rate provisions represent a putative exercise of either the general police powers or the utility franchise/contract powers of the municipality. The proper forum for their review is a court of general jurisdiction, not this administrative agency. The rate provisions of the ordinances, those not listed on page 2, footnote 1, of the Opinion and Order, must be in conformance with the tariffs of the Company and applicable rules and standards imposed by the Commission. To the extent they are not, they must fail.

In my opinion, costs of both the complainant and the Commission should be assessed against a municipality that causes a rate ordinance appeal if the ordinance is subsequently ruled invalid. The rate ordinance appeal before this agency should not be delayed pending judicial resolution.

Entered in the Journal
JUN 29 1995

A True Copy

Gary E. Vigorito
Secretary

Richard M. Fanelly

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Complaint and Appeal of The Cleveland Electric Illuminating Company from Ordinance 21-1994 of the Council of the City of Garfield Heights, Ohio, Passed March 10, 1994.	Case No. 94-578-EL-CMR
In the Matter of the Complaint and Appeal of The Cleveland Electric Illuminating Company from Ordinance 32-1994 of the Council of the City of Garfield Heights, Ohio, Passed May 9, 1994.	Case No. 94-1176-EL-CMR
In the Matter of the Complaint and Appeal of The Cleveland Electric Illuminating Company from Ordinance 35-1994 of the Council of the City of Garfield Heights, Ohio, Passed May 9, 1994.	Case No. 94-1177-EL-CMR

ENTRY ON REHEARING

The Commission finds:

1) On June 29, 1995, the Commission issued its opinion and order in this case granting, to the extent set forth therein, the complaints and appeals filed by The Cleveland Electric Illuminating Company (CEI or company) from three separate municipal ordinances passed by the City of Garfield Heights (City). As set forth in Footnote 1 of the order, our decision was limited to finding that the 30 percent across-the-board rate reductions passed by the City were not justified based on the record developed in this proceeding. We expressed no opinion, however, regarding the nonrate provisions of the ordinances (specifically, Sections 3 [last sentence only], 5, 6, 7, 8, and 9 of Ordinance Nos. 21-1994 and 32-1994 and Sections 1 and 2 of Ordinance No. 35-1994). Applications for rehearing were filed by CEI on July 28, 1995 and by the City on July 31, 1995. CEI filed a memorandum contra the City's application on August 10, 1995.

2) CEI's rehearing application sets forth six assignments of error. The company argues that the Commission unreasonably failed to rule on the validity of the nonrate provisions in the ordinances; that the Commission unreasonably found that CEI had failed to present evidence regarding the nonrate provisions; that the Commission unreasonably failed to hold that the existing nonrate tariff provisions in effect for CEI were prima facie reasonable as a matter of law; that the Commission unlawfully failed to impose the burden of proof on the City to overcome the prima facie reasonableness of CEI's existing nonrate tariff provisions; that the Commission unreasonably failed to strike down the nonrate ordinance provisions and substitute the existing nonrate tariff provisions; and that the Commission unreasonably failed to assess its costs and the company's rate case expense against the City.

3) CEI's first five assignments of error jointly suggest that the Commission should have invalidated the nonrate ordinance provisions in addition to the provisions that were rate-related. As indicated in the opinion and order (in Footnote 1), CEI failed to present any evidence that would allow the Commission to make a determination regarding the ordinance provisions not related to the rates charged by CEI to customers within the City of Garfield Heights. We do not believe that the burden of proof was unfairly shifted to the company by requiring that some evidence be presented to support its claims. Having failed to do so, it would not be appropriate, at this time, to address the nonrate ordinance provisions. Regarding the assessment of costs to the City, we fully explained in the order that our initial concern, that the City would fail to defend its ordinance rates, did not occur inasmuch as the City pursued its case with a witness who presented a good faith defense of the ordinances. Given that fact, we do not believe it is necessary to assess the Commission's costs for this case to the City. For these reasons, CEI's request for rehearing is denied.

4) The City cites two "fundamental" errors in the Commission's order. First, the City claims that the Commission failed to find that CEI did not sustain its burden of proof regarding the reasonableness of current rates. Second, the City argues that the Commission unlawfully failed to apply the ratemaking formula set forth in Section 4909.15, Revised Code. In addition to these two alleged fundamental errors, the City raises most of the same allegations and arguments contained in its posthearing briefs regarding specific rate case issues. For example, the City argues that the Commission misconstrued or improperly decided issues concerning: the inclusion of deferrals in rates; the use of customer count data; setting a specific rate of return; setting rates based on comparative utility information; consideration of the City's FAS 71 arguments; treatment of Delta revenues; consideration of Perry plant performance; excess capacity; allocations based on Garfield Heights specific data (based on company property records); application of proceeds from the General Electric lawsuit settlement to reduce Perry's rate base; treatment of decommissioning costs; and an alleged subsidy by CEI to Toledo Edison for Beaver Valley capacity.

5) We are not persuaded by the City's arguments regarding the two alleged "fundamental" errors (that the Commission improperly shifted the burden of proof and misapplied the statutory ratemaking formula). As we noted in the opinion and order (at pages 5-6), CEI bears the burden of proof in this case. However, as pointed out by CEI, the issues in a rate case (or in a complaint and appeal case) are framed by the objections to the Staff Report. See, Section 4909.19, Revised Code; Section 4901-1-28, Ohio Administrative Code; See also, Consumers' Counsel v. Pub. Util Comm., (1978) 56 Ohio St.2d 220. As such, the burden shifts to the proponent of such objections for purposes of presenting some evidence in support of its allegations of error in the Staff Report. East Ohio Gas Co., Case No. 82-901-GA-AIR (August 19, 1983), at 81. Thus,

as indicated in the opinion and order in this case, we properly measured "the City's objections, and the evidence presented in support of those objections, against the Staff Report and the testimony and exhibits presented at the hearing." Opinion and Order at 5. Since no improper shifting of the burden of proof occurred, the City's first allegation of error is without merit.[1]

6) Nor are we persuaded by the City's arguments concerning application of the statutory ratemaking formula. As indicated in the opinion and order, the 8.64 percent rate of return calculated by the staff, including certain specified adjustments (see Footnote 5), was determined to be "lower than any range awarded by the Commission" and, therefore, the record did not support a reduction in rates as advocated by the City. Opinion and Order at 15, 19-20. Given that CEI was not seeking a rate increase in this case, however, it was not necessary to adopt a specific system rate of return for CEI in this case. Our findings in this case are entirely consistent with the statutory ratemaking formula set forth in Section 4909.15, Revised Code. Accordingly, we reject the City's second primary ground for rehearing.

7) With regard to the other items contained in the City's application (see Finding 4 above), we find no basis for departing from the conclusions reached in the opinion and order. Each of these issues was fully discussed in the opinion and order (at pages 8-18) and the City has raised no new arguments not previously considered by the Commission.

8) Having thoroughly reviewed the applications for rehearing filed in this case, we find that neither CEI nor the City has raised any facts, issues or arguments which warrant rehearing and, since all matters raised have been given proper and adequate consideration

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1. Our placement of the burden of proof on CEI is demonstrated by our support for the City's proposed interruptible credit adjustment advanced by City witness Yankel, as well as by our observation that CEI presented no evidence in support of its appeal of the nonrate provisions of the ordinance.

in the opinion and order, as well as in this entry on rehearing, both applications for rehearing are denied.

It is, therefore,

ORDERED, That the applications for rehearing filed by CEI and the City of Garfield Heights are denied. It is, further,

ORDERED, That a copy of this entry on rehearing be served upon all parties of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO

Craig A. Glazer, Chairman

Jolynn Barry Butler

Richard M. Fanelly *

Ronda Hartman Fergus

David W. Johnson

DDN/gm

* See separate opinion

Entered in the Journal
AUG 2 4 1995

A True Copy

Gary E. Vigorito
Secretary

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Complaint and Appeal of The Cleveland Electric Illuminating Company from Ordinance 21-1994 of the Council of the City of Garfield Heights, Ohio, Passed March 10, 1994.	)	Case No. 94-578-EL-CMR
In the Matter of the Complaint and Appeal of The Cleveland Electric Illuminating Company from Ordinance 32-1994 of the Council of the City of Garfield Heights, Ohio, Passed May 9, 1994.	)	Case No. 94-1176-EL-CMR
In the Matter of the Complaint and Appeal of The Cleveland Electric Illuminating Company from Ordinance 35-1994 of the Council of the City of Garfield Heights, Ohio, Passed May 9, 1994.	)	Case No. 94-1177-EL-CMR

CONCURRING OPINION OF COMMISSIONER RICHARD M. FANELLY

I concur with the majority opinion that the Commission should not conclude the cited non-rate provisions to be void and thus unenforceable. However, I disagree with the majority concerning the reason for such legal conclusion.

In my view, the non-rate provisions of the ordinances are a putative exercise of the constitutional, statutory or police powers of a municipality; and as such must be tested for validity and enforceability, through an appropriate proceeding in a court of competent jurisdiction. The non-rate provisions of the ordinances are not within the purview of the subject matters delegated to this administrative agency in Title 49 of the Ohio Revised Code.

The Commission should dismiss CEI's appeal of the non-rate provisions on jurisdictional grounds, thereby permitting CEI to pursue a remedy in Common Pleas Court.

Entered in the Journal
AUG 2 4 1995
A True Copy
Gary E. Agorito
Secretary

Richard M. Fanelly