

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of First-)	
Energy Corp. on Behalf of Ohio Edison)	
Company, The Cleveland Electric Illumi-	)	Case No. 99-1212-EL-ETP
nating Company, and The Toledo Edi-	)	Case No. 99-1213-EL-ATA
son Company for Approval of Their	)	Case No. 99-1214-EL-AAM
Transition Plans and for Authorization)	
to Collect Transition Revenues.)	

In the Matter of the Application of The)	
Cincinnati Gas & Electric Company for	)	Case No. 99-1658-EL-ETP
Approval of its Electric Transition Plan,	)	Case No. 99-1659-EL-ATA
Approval of Tariff Changes and New	)	Case No. 99-1660-EL-ATA
Tariffs, Authority to Modify Current	)	Case No. 99-1661-EL-AAM
Accounting Procedures, and Approval	)	Case No. 99-1662-EL-AAM
to Transfer its Generating Assets to an	)	Case No. 99-1663-EL-UNC
Exempt Wholesale Generator.)	

In the Matter of the Application of the)	
Dayton Power and Light Company for)	
Approval of its Transition Plan, for	)	Case No. 99-1687-EL-ETP
the Opportunity to Receive Transition	)	Case No. 99-1688-EL-AAM
Revenues, for Approval to Change	)	Case No. 99-1689-EL-ATA
Accounting Methods, and Approval to)	
Amend its Tariff.)	

In the Matter of the Applications of)	
Columbus Southern Power Company	)	Case No. 99-1729-EL-ETP
and Ohio Power Company for Approval	)	Case No. 99-1730-EL-ETP
of Their Electric Transition Plans and)	
for Receipt of Transition Revenues.)	

In the Matter of the Application of)	
Monongahela Power Company dba	)	Case No. 00-02-EL-ETP
Allegheny Power for Approval of an)	
Electric Transition Plan.)	

ENTRY

The Commission finds:

- (1) Prior to the start of electric competition pursuant to Amended Substitute Senate Bill 3 of the 123rd General Assembly (SB3), the Commission issued entries in each of the above transition cases approving tariffs to implement electric restructuring. In those entries, the Commission adopted, on an interim basis, the staff's recommendation that the electric utilities' Use of Service or Resale and Redistribution provisions in the standard rules

and regulations be made in accordance with the Commission's decision in *Brooks et al. v. Toledo Edison Co.*, Case No. 94-1987-EL-ATA (May 8, 1996). The *Brooks* decision held that The Toledo Edison Company could not restrict the resale or redistribution of electric service by a landlord to a tenant if the resale or redistribution takes place only upon property owned by the landlord, and if the landlord was not operating as a public utility. For those utilities whose tariffs to not comport with staff's recommendation, the Commission directed those utilities to modify their tariffs. However, the Commission also stated that it intended to review this issue further. Therefore, it provided all interested parties the opportunity to submit comments regarding the issue of sales for resale and the findings of the *Brooks* order in light of SB3 and electric restructuring within 15 days of the approval of those entries. Interested parties were given seven days after that date to file reply comments.

- (2) Comments were received by Industrial Energy Users-Ohio, Ohio Builders Owners and Managers Association; Enron Energy Services, Inc; Columbus Southern Power and Ohio Power Company; General Growth Properties, Inc; The Cincinnati Gas and Electric Company; and Simon Real Property Group, L.P. in support of maintaining the Commission's current policy on the resale or redistribution of electricity set forth in the *Brooks* decision. The Ohio Council of Retail Merchants, FirstEnergy Corp., and The Appalachian People's Action Coalition filed comments recommending the Commission change its current policy set forth in *Brooks*. Those in favor of the current policy argued that the passage of SB3 has no effect on the Commission's policy on the resale or redistribution of electricity by landlords. They argue that the landlord remains the customer of the electric utility and that the landlord is not an electric light company under Section 4905.03, Revised Code, nor an electric service company under Section 4928.01, Revised Code. Those commenters opposed to the *Brooks* decision argue that the Commission should promote customer choice and that tenants should have the opportunity to choose their own electric supplier. The Appalachian People's Action Coalition argues that permitting electric utilities to restrict sales for resale is a way of protecting tenants from abuse of landlords, and that, if landlords are permitted to resale or redistribute electric to their tenants, they should be subject to the Commission's jurisdiction as an aggregator.
- (3) After reviewing the comments, the Commission believes that our *Brooks* decision should be affirmed. The legislature's passage of SB3 does not change the underlying rationale for our decision in *Brooks*. We still believe that the redistribution

or resale of electricity by a landlord to its tenants as part of a lease arrangement under the conditions established in *Inscho, et al. V. Shroyer's Mobile Homes*, Case No. 90-182-WS-CSS, et al. (February 27, 1992) and *Brooks* is a matter of landlord-tenant relations and should not fall under the Commission's jurisdiction. SB3 does not change the Commission's conclusion that, in these circumstances, the landlord is the customer of the electric utility and any electric service company providing generation service. There is nothing in SB3 that requires or warrants the Commission to change its position that such landlords are not electric light companies.

- (4) Further, the Commission cannot agree with the argument that shopping center landlords are aggregators under SB3 when they resale or redistribute electricity as part of lease arrangements. Pursuant to Section 4928.01(A)(9), Revised Code, these landlords do not fall within the definition of an electric service company, or aggregator, because they have already been determined not to be electric light companies. Additionally, the landlord is not combining any other utility customer loads to be considered an aggregator. To accept FirstEnergy's arguments that the ultimate consumer or tenant should be entitled to choose their electric suppliers would lead to the undesirable result that any landlord that rents out rooms would need to be regulated by the Commission as a public utility or an aggregator if the landlord receives some sort of reimbursement of electric service costs from the tenant. We further note that many shopping malls fall within the *Brooks* situation and that to consider them as aggregators is not only inconsistent with our established holdings but would lead to unnecessary regulation and possibly costly reconfiguration of electric facilities to separately meter each tenant's leased space. Lastly, certain of the arguments raised by the few commenters who requested we overturn our *Brooks* decision are the same arguments that were initially made when we set forth our position in *Inscho*, followed in *Toledo Premium Yogurt, Inc., dba Freshens Yogurt, Inc.*, Case No. 91-1528-EL-CSS (Entry dated September 17, 1992) and in *Brooks*. We still believe our reasoning in those cases holds true. Our position is also supported by the Ohio Supreme Court in *Jonas v. The Sweetland Co.*, 119 Ohio St. 12 (1928), wherein the court found that the resale of electricity by a landlord to a tenant as part of the terms of a lease did not make the landlord a public utility. Further, in *Shopping Centers Ass'n v. Pub. Util. Comm.*, 3 Ohio St. 2d 1 (1965), the court found that, although a shopping center resold electricity to its tenants, it did not effect the shopping center's status as a customer of the electric utility.

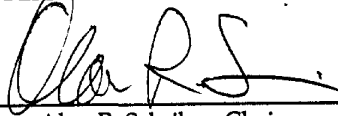
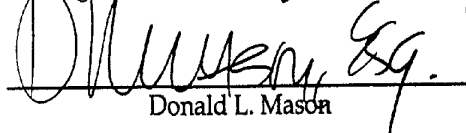
- (5) FirstEnergy has also raised the issue that the tariffs included as part of its stipulated settlement in its electric transition case included a restriction on the resale/redistribution of electricity and, therefore, the Commission should abide by the stipulation. The Commission does not find this argument persuasive inasmuch as the Commission apprised the parties to FirstEnergy's electric transition plan case in the September 13, 2000 entry on rehearing that the Commission would consider the resale/redistribution issue in the context of FirstEnergy's compliance tariff application.
- (6) In light of the findings above, the Commission concludes that the provisions in the electric utilities' tariffs regarding resale and redistribution of electric service as previously established by the Commission should remain in effect. We would note, however, that nothing contained in SB 3 or decided by this entry affects the rights of any party to enforce the terms of an existing landlord/tenant contract.

It is, therefore,

ORDERED, That the provisions in the electric utilities' tariffs regarding resale and redistribution of electric service as previously established by the Commission shall remain in effect. It is, further,

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

THE PUBLIC UTILITIES COMMISSION OF OHIO

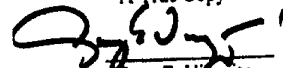

Alan R. Schriber, Chairman
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RRG;geb

Entered in the Journal

JAN 18 2001

A True Copy


Gary E. Vigorito
Secretary

CASE NUMBER: 00-0002-EL-ETP
CASE DESCRIPTION: MONONGAHELA POWER COMPANY
DOCUMENT SIGNED ON: 1/18/2001
DATE OF SERVICE: 1.22.01

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