

6
FILE
RECEIVED-DOCKETING DIV
2006 JAN 18 AM 11:03
PUCO

Craig I. Smith
Attorney At Law
2824 Coventry Road
Cleveland, Ohio 44120
216-407-0890
WTPMLC@aol.com

Via Fax and Special Delivery

January 17, 2006

Public Utilities Commission of Ohio
Attention Docketing, Floor 13
180 East Broad Street
Columbus, Ohio 43215

Greetings:

On behalf of Elyria Foundry, I enclose for filing its Memorandum Contra to the Motion for Clarification in Case Nos. 05-704 EL-ATA, 05-1125-EL-ATA, 05-1126-EL-AAM, and 05-1127-EL-UNC, involving the FirstEnergy operating companies.

Regards



Craig I. Smith
Attorney For Elyria Foundry

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 78 Date Processed 1-18-06

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

**In the Matter of the Joint Application of Ohio
Edison Company, The Cleveland Electric
Illuminating Company and The Toledo Edison
Company of a Generation Charge Adjustment Rider.**

Case No. 05-704-EL-ATA

**In the Matter of the Application of Ohio Edison
Company, The Cleveland Electric Illuminating
Company and The Toledo Edison Company for
Authority to Modify Certain Accounting Practices
and for Tariff Approvals.**

Case No. 05-1125-EL-ATA

Case No. 05-1126-EL-AAM

Case No. 05-1127-EL-UNC

**MEMORANDUM CONTRA BY ELYRIA FOUNDRY
TO MOTION FOR CLARIFICATION DATED JANUARY 10, 2006
BY OHIO EDISON, THE CLEVELAND ELECTRIC ILLUMINATING
COMPANY, AND THE TOLEDO EDISON COMPANY**

The FirstEnergy companies move to clarify the Commission's Opinion and Order approving a Rate Certainty Plan embodied in the revised stipulation. *[See Motion For Clarification, dated January 10, 2006, and Request For Expedited Ruling, dated January 11, 2006]*

The motion requests the booking of monthly fuel and distribution deferrals prior to the Staff's annual review under the Opinion and Order. *[Motion For Clarification, at pg. 2- 3, Subpart A., and fn. 3]* It seeks assurances that the types of costs enumerated by "Attachment 2" meet the criteria for deferrals under the Opinion and Order. *[Motion For Clarification, at pg. 4, Subpart B.]* The motion seeks approval of a methodology to deduct from deferred costs those costs already being recovered in rates as required by the Opinion and Order. *[Motion For Clarification, at pg. 4-5, Subpart C.]* Finally, it seeks approval to defer costs for both accelerated and non-accelerated distribution projects under the Opinion and Order. *[Motion For Clarification, at pg. 6-7, Subpart D.]*

Common law provides the Commission with inherent authority to correct errors through orders *nunc pro tunc* to subsequently record actions previously taken “*** so that the record speaks the truth***.” *State ex rel. Fogle v. Steiner* (1995), 74 Ohio St. 3d. 158, 163-164, citing *In re. Estate of Cook* (1969), 19 Ohio St. 2d. 121, 127

The motion for clarification exceeds the Commission’s inherent authority to correct the record *nunc pro tunc* by seeking changes to the Opinion and Order based on the FirstEnergy companies belief as to what the Commission should have decided, or intended to decide, when rendering its decisions. See *State ex rel. Fogle v. Steiner, supra*, 164, citing *Webb v. W. Res. Bond & Shore Co.* (1926), 115 Ohio St. 247, 256

The motion exceeds the proper use of *nunc pro tunc* orders by asking the Commission to change its Opinion and Order to allow the booking of deferrals before annual reviews, provide assurances that certain costs meet the criteria for deferrals, approve a methodology to determine net deferred costs, and approve the deferral of costs for accelerated and non-accelerated projects.

Further, RC 4903.10 nullifies as a legal fiction the FirstEnergy companies moving for clarification as an interim step to substitute for, or avoid, rehearing as provided for by the Ohio statutory scheme.

Ohio law requires FirstEnergy companies to timely filing an application for rehearing specifically setting forth grounds for the unreasonableness and unlawfulness of

the Opinion and Order upon which to request reversal or modification by the Commission, subject to court review.

The matters raised by the motion for clarification are not properly before the Commission until the FirstEnergy companies file for rehearing under RC 4903.10.

In closing, the motion for clarification exceeds the Commission's inherent powers to correct the record *nunc pro tunc*, and becomes a nullity when used as an interim step to substitute for a rehearing application under RC 4903.10.

The motion for clarification requires denial by the Commission.

Respectfully submitted



Craig I. Smith (Ohio Reg. #0019207)
2824 Coventry Road
Cleveland, Ohio 44120
216-407-0890
WTPMLC@aol.com

Attorney for Elyria Foundry

Certificate of Service

I hereby certify that a true copy of the foregoing Memorandum Contra by Elyria Foundry was served on January 17, 2006 upon the persons listed below by first class mail, postage prepaid.



Craig I. Smith

James Burk
Stephen Feld
FirstEnergy Service Company
76 South Main Street
Akron, Ohio 44308

Glenn Krassen
Bricker & Eckler LLP
1375 East Ninth Street, Ste. 1500
Cleveland, Ohio 44114-1718

Samuel Randazzo
Daniel Neilsen
McNees, Wallace & Nurrick
Fifth Third Center, STE. 910
21 East State Street
Columbus, Ohio 43215

Joseph P. Meisser
Legal Aid Society of Cleveland
1223 West 6th Street
Cleveland, Ohio 44113

William Zigli
Chief Assistant Director of Law
City of Cleveland
601 Lakeside Avenue, Room 106
Cleveland, Ohio 44114-1077

Ann M. Hotz
Office of Consumer's Counsel
10 West Broad Street, Ste 1800
Columbus, Ohio 43215

William Wright
Thomas McNamee
Elizabeth Stevens
Assistant Attorney General
Public Utilities Commission of Ohio
180 East Broad Street
Columbus, Ohio 43215

Helen L. Liebman
JONES DAY
PO Box 165017
Columbus, Ohio 43216-5017

Judith B. Sanders
Bell, Royer @ Sanders Co., LPA
33 south grant Avenue
Columbus, Ohio 43215-3927

Michael L. Kurtz
Boehm, Kurtz & Lowry
36 East Seventh St.
Suite 1510
Cincinnati OH 45202-45

Phyllis Vento
Assistant Director of Law
City of Euclid
585 East 222nd Street
Euclid, Ohio 44123-2099

Joseph P. Haefner
Law Director-City of Stow
3760 Darrow Road
Stow, Ohio 44224

Robert W. Heydorn
Village of Silver Lake
527 Portage Trail
Cuyahoga Falls Ohio 44221

David Rinebolt
Ohio Partners for Affordable Energy
231 West Lima Street
PO Box 1793
Findlay, Ohio 45839-1793

Leslie Kovacik
City of Toledo Law Department
One Government Center, STE 2250
Toledo, Ohio 43604

M Howard Petricoff
Vorys, Sater, Seymour and Pease, LLP
52 East Gay Street
Columbus, Ohio 43216-1008

John Bentine
Bobby Singh
Chester, Wilcox & Saxbe, LLP
65 East State Street, Ste. 1000
Columbus, Ohio 43215