

IN THE SUPREME COURT OF OHIO

On Appeal From the Public Utilities Commission of Ohio

Elyria Foundry Company,
Appellant,

v.

The Public Utilities Commission of Ohio,
Appellee.

Case No. 07-0860

On Appeal from The Public
Utilities Commission of Ohio,
Case Nos. 05-796-EL-CSS

MERIT BRIEF OF APPELLANT ELYRIA FOUNDRY COMPANY

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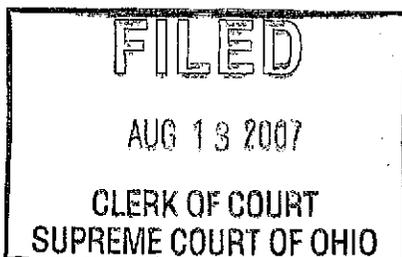
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I. INTRODUCTION

Elyria Foundry is solely a retail customer of Ohio Edison, and not of any other FirstEnergy affiliate. Ohio Edison provides Elyria Foundry with both Firm and Interruptible service. This Appeal is limited to Ohio Edison requested economic interruptions during 2005 under Rider 75. It does not involve emergency interruptions allowed under Rider 75, or firm service from Ohio Edison.

Under Rider 75, Ohio Edison may request an economic interruption:

“*** whenever the incremental revenue to be received from the customer is less than the anticipated incremental expense to supply the interruptible energy for the particular hour(s) of interruption request.” (Emphasis Added) (Supp. 8)

Elyria Foundry filed its complaint with the Commission because inappropriately requested economic interruptions under Rider 75 by Ohio Edison resulted in higher electric costs during 2005. The Commission held for Ohio Edison, and dismissed the complaint. This appeal raises errors that the Commission acted unlawfully by:

- Determining that Ohio Edison’s incremental costs for requesting economic interruptions should be based on the highest system costs of its affiliate FirstEnergy Solutions (FES), including FES’ cost of serving competitive market obligations.
- Not requiring the approval and publication of a 2001 Policy used by FES to initiate economic interruptions on behalf of Ohio Edison as specified in R.C. 4909.18 and R.C. 4905.30.
- Not finding that a single strike price used to interrupt all customers, at the same time, for the same duration, and offering the same replacement/buy-through price, did not unduly or unreasonably disadvantage Elyria Foundry under R.C. 4905.35.
- Not stating the basis and record support, as required by R.C. 4903.09, for finding in its Entry on Rehearing that Ohio FES’ “incremental expenses to supply” were allocated under the PSA formula before determining Ohio Edison’s pro rata share.

During 2005, FirstEnergy Solutions (FES), an unregulated affiliated power marketer,

provided competitive power to Ohio Edison and other (CEI, Toledo Edison, and Penn Power) affiliated regulated electric distribution companies under a FERC approved Revised Power Supply Agreement (PSA). The PSA purchasers are at times referred to as the "Operating Companies." FES also supplied non-PSA competitive market energy to unaffiliated customers located within and outside Ohio. Ohio Edison provided Elyria Foundry with firm service under Rate 23, and interruptible service under Rider 75. FES and the Operating Companies are affiliates of FirstEnergy Corporation.

II. STATEMENT OF FACTS

A. Ohio Edison service to Elyria Foundry

Elyria Foundry competes in the global market by receiving a portion of its electricity from Ohio Edison as interruptible service under Rider 75 to lower its production costs. (Supp. 74, 75) Elyria Foundry employs over 400 professional and plant workers as one of Lorain County's largest employers. (Supp. 74, 75)

Under Rider 75, Ohio Edison reserved the right to request an economic interruption of specific customers, such as Elyria Foundry, whenever Ohio Edison's incremental expense for supplying that interruptible energy exceeded the incremental revenue received from the customer. (Supp. 8) Customers avoided interruptions by electing to buy replacement/buy-through electricity either from Ohio Edison, or a third party supplier. (Supp. 8-9) Elyria Foundry continued its melting and manufacturing operations by buying-through each of the requested economic interruptions during 2005 with higher priced replacement electricity from Ohio Edison. (Supp. 77-78)

Ohio Edison's Riders 73, 74, and 75 were approved in 1996 under the Commission

Interruptible Service Guidelines¹, which were designed to make large manufacturers more competitive by receiving lower priced economic interruptible power with buy-through options, without undue harm to utility shareowners or ratepayers. (Supp. 30, 64, 74-75, 95, 370) All three Riders used the same language for requesting economic interruptions. (Supp. 64)

Rider 75 has virtually remained unchanged, other than rate unbundling, since its approval. (Supp. 84) Between 1997 and 2004, Ohio Edison noticed economic interruptions, on average, four days per year. (Supp. 76) In 2005, requested economic interruptions jumped ten times the annual average to 44 days, covering 642 total hours. (Supp. 76, 98, 119)

B. Energy Portfolio Planning

Ohio Edison included the interruptible loads as both an obligation and supply side resource for energy portfolio planning purposes in 1997. (Supp. 30) After Ohio Edison merged with Centerior Energy (CEI and Toledo Edison) in 1997, the three Ohio regulated utilities, as affiliates of FirstEnergy, operated a single dispatched operation with all resources and obligations of those utilities part of a single energy portfolio, and the interruptible buy-through programs were combined as one. (Supp. 32-33, 370-373)

In 2001, the Ohio Restructuring Act (Am. Sub. S. B. No. 3) caused Ohio Edison, CEI, and Toledo Edison to transfer their generation functions to the unregulated affiliate,

¹ The Commission adopted interruptible service guidelines in 1996, which underwent Phase II review in 1998. See *In the Matter Of Interruptible Electric Service Guidelines, Pursuant to the Agreement by Participants in the Commission Roundtable on Competition in the Electric Industry, Case No. 95-866-EL-UNC, Entry on Rehearing, dated April 11, 1996, and Finding and Order, Phase II, dated December 22, 1998.* (Supp. 603-617; 621-632) The Commission approved Riders 73, 74 and 75 on October 17, 1996. (Supp. 618-620)

FirstEnergy Solutions (FES). (Supp. 32-33, 372-373, 381-382) Ohio Edison, CEI and Toledo Edison each became regulated distribution companies. (Supp. 84, 168, 373) FES began selling competitive power in an unregulated environment to Ohio Edison and the other regulated Operating Companies from their previously owned and/or controlled plants, or from purchases of power from non-affiliated suppliers. (Supp. 16-18, 32-33, 168)

After restructuring, FES kept its generation and purchased power resources in balance with forecasted total monthly peak hour obligations of the combined affiliated Operating Companies and its own competitive market loads. (Supp. 31-33, 379-382, 400-401) The FES energy portfolio included retail interruptible loads such as Elyria Foundry as obligations as well as resources for meeting both its competitive market load and the load of the Operating Companies. (Supp. 31-32, 375-377, 380, 400-401)

C. FirstEnergy Solutions Competitive Market Sales

Under the PSA, FES supplied the full power requirements of Ohio Edison, CEI, and Toledo Edison to meet their firm and interruptible service obligations to retail tariff customers during 2005. (Supp. 16-18,) The entire PSA load was supplied on a firm basis. (Supp. 16-18)

FES also sold competitive market energy (at its own risk and for its own profit) to non-affiliated third parties. (Supp. 18, 400-403) Most of the non-PSA competitive market sales by FES were under direct contracts to customers in the service territories of FirstEnergy, Cinergy, and Detroit Edison. (Supp. 386-388)

FES sold capacity and energy to Ohio Edison and the other Operating Companies at fixed generation rates as set by Exhibit A of the PSA. (Supp. 25) Additionally, FES

recovered from Ohio Edison and the other Operating Companies a pro rata share of the costs of power purchased to meet FES' total obligations. (Supp. 19, 25) FES charged Ohio Edison and the other PSA buyers:

“*** a monthly charge equal to its pro rata share of the total cost of purchased Power (“Purchased Power”) incurred by Seller [FES] for delivery to the FirstEnergy Control Area the previous calendar month.”
(Supp. 19)

The pro rata share of FES' total purchase power costs payable by Ohio Edison and the other Operating Companies under the PSA is calculated by the formula under paragraph 3 of Exhibit A of the PSA as:

$$\frac{\text{Buyer's Power Supply Requirements (MWH)}}{\text{Seller's Total Supply Delivered to Control Area (MWH)}} \times \frac{\text{Sum of Purchased Power in dollars Delivered to the Control Area}}{\text{Sum of Purchased Power in dollars Delivered to the Control Area}}$$

(Supp. 25, 33)

In July 2005, the PSA formula resulted in an 80% allocation (rounded) of total FES purchased power to Ohio Edison and the other Operating Companies, with the remaining 20% of the costs absorbed by FES for its non-PSA competitive market sales. (Supp. 158-161) The percentage of monthly purchase power costs that was allocated to the Operating Companies varied from 80.41% in July up to 85.51% in December. Ohio Edison's pro rata share of that allocation varied from 44.08% in December, up to 46.11% in April. (Supp. 162)

FES' total competitive market requirements were 12,500 MW during the 2005 summer monthly peak. (Supp. 384-389) Of this 12,500 MW, FES calculated that 9,500 MW was associated with the PSA load, and an additional 3,000 MW was non-PSA competitive market load. (Supp. 384-389) Generation resources of FES during the 2005

summer monthly peak were 11,500 MW. (Supp. 383) FES forecasted a need to purchase a minimum of 1,000 MW during the 2005 summer peak. (Supp. 384-389)

D. 2001 Policy used to request economic interruptions

FES requested simultaneous economic interruptions on behalf of Ohio Edison, CEI, and Toledo Edison under a 2001 Policy that provided:

1. "Invoke an economic interruption whenever incremental out-of-pocket costs to supply exceeds \$[65]/MWH² and the current/expected load obligation will exceed available planned resources.
2. Interrupt all economic interruption customers whenever we call for an economic interruption.
3. Only interrupt when high prices are anticipated for at least 3 consecutive hours.
4. All contract and tariff restrictions should be followed.
5. Once an economic interruption has been invoked, to the extent 'surplus power' is available on an hourly basis, it should be sold into the wholesale power market."

(Supp. 15, 88-89)

For administrative reasons, FES used a single strike price to interrupt at the same time, for the same duration, and at the same strike price all 67 interruptible customers of Ohio Edison, CEI, and Toledo Edison. (Supp. 15, 331-332) Ohio Edison served 48 of those interruptible customers and approximately 33% of the interruptible load. (Supp. 318-319) The 2001 Policy used a single strike price of \$65/MWh as the cost point at or above which to economically interrupt all 67 interruptible customers. (Supp. 68, 327) This strike price approximated the highest incremental revenue "received from any interruptible customer in Ohio," which happened to be an Ohio Edison customer. (Supp. 67, 330) During economic interruptions, the composite group of interruptible customers

² Note that the price was changed in 2003 from \$85 to \$65/MWH, which was approved by Earl T. Carey, Vice President (retired). Charles E. Jones, Jr., Senior Vice President, Energy Delivery & Customer Service has replaced Mr. Carey and to date, he has not changed this strike price.

across Ohio Edison and the other Operating Companies were expected to purchase 300 MW of replacement electricity during economic interruptions. (Supp. 325, 345)

FES followed the 2001 Policy whenever it requested, on behalf of Ohio Edison, CEI, and Toledo Edison, economic interruptions during 2005. (Supp. 428) There is no other documentation for the Policy. (Supp. 330) According to Ohio Edison, the 2001 Policy was drafted by FirstEnergy's corporate risk management with language compatible with FES right to pass on costs to the Operating Companies through the PSA. (Supp. 597-601)

FES used the most expensive block of purchased power to determine its incremental costs upon which to request simultaneous economic interruptions of all similarly situated customers of Ohio Edison, CEI, and Toledo Edison. (Supp. 474-476) The same incremental costs were used as the "best efforts" price for Ohio Edison, CEI, and Toledo Edison to supply replacement/buy-through electricity. (Supp. 34-35, 478-479)

FES continuously monitored the next day and in-day energy markets upon which to request interruptions whenever: 1) FES' resources were "short" by at least 300 MW for at least three consecutive hours; and 2) FES' incremental costs equaled or exceeded \$65/MWH to purchase or produce that amount of energy. (Supp. 34-35, 66) FES economically interrupted, and then bought replacement energy at this higher incremental price for customers expected to buy-through. (Supp. 34-35, 478-479)

The interruptible buy-through program was a cost recovery mechanism. (Supp. 41, 343) FES' total purchased power costs for the last 300 MW block of energy were directly recovered from (streamed to) interruptible customers as Ohio Edison replacement power billings. Economic interruptions were requested (and replacement energy priced)

based on FES' unallocated highest system cost. (Supp. 474-480) Total incremental costs of FES were not those of Ohio Edison. FES' total incremental costs during times of economic interruptions were never allocated 80:20 as required under the formula. (Supp. 33-34, 41, 162, 474-480, 579) Specifically recorded buy-through customers of Ohio Edison were directly charged for replacement energy at the best efforts prices (i.e. the highest, unallocated, purchased power costs) plus adders. (Supp. 54)

II. ARGUMENT

Proposition of Law No. 1:

Ohio Edison's incremental costs for requesting economic interruptions were unlawfully determined based on the highest system costs of its affiliate FirstEnergy Solutions (FES), including FES' cost of serving competitive market obligations. Additionally, FES never allocated approximately 80% of those incremental costs to the Operating Companies before determining Ohio Edison's pro rata share.

A. Standard of review

This Court exercises complete and independent review of Commission decisions as to questions of law. *FirstEnergy Corp. v. Pub. Util. Comm.*, 95 Ohio St. 3d 401, 404-405, 202-Ohio-2430, 768 N.E. 2d 648, 652-653

The Court relies on the Commission's expertise in interpreting the law involving "highly specialized issues" and where that expertise would assist "in discerning the presumed intent of our General Assembly." *Consumers' Counsel v. Pub. Util. Comm.* (1979), 58 Ohio St. 2d 108, 110, 12 O.O. 3d 115, 388 N.E. 2d 1370

As to factual matters, the Court will reverse, vacate, or modify a decision of the Commission under R.C. 4903.13 "**** when, upon consideration of the record, the Court finds the order to be unlawful or unreasonable." *Constellation New Energy, Inc.*

v. Pub. Util. Comm., 104 Ohio St. 3d 530,540, 2004-Ohio-6767, 820 N.E. 2d 885, at par.

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The Court, under R.C. 4903.13 will not reverse or modify a decision of the Commission where sufficient probative evidence is shown in the record that the “*** determination is not manifestly against the weight of the evidence and is not so clearly unsupported by the record as to show misapprehension, mistake or willful disregard of duty ***”. *Monongahela Power Co. v. Pub. Util. Comm., 104 Ohio St. 3d 571, 578, 200-Ohio-6896, 820 N.E. 921, 927, citing to AT&T Communications of Ohio, Inc. v. Pub. Util. Comm. (2000), 88 Ohio St. 3d 549,5 55, 728 N.E. 2d 371,376*

The Court consistently refuses to substitute its judgment for that of the Commission on evidentiary matters. *AK Steel Corp. v. Pub. Util. Comm., 95 Ohio St. 3d 81, 84, 2002 Ohio 1735, 765 N.E. 2d 862, 866.* The Appellant must demonstrate the decision “is against the manifest weight of the evidence or is clearly unsupported by the record.” *Monongahela Power Co., supra, 104 Ohio St. 3d 578, 200-Ohio-6896, 820 N.E. 927*

B. The Commission’s determination of incremental expenses

Rider 75 reserved to Ohio Edison the right to interrupt:

“*** the customer’s interruptible load whenever the incremental revenue to be received from the customer is less than the anticipated incremental expense to supply the interruptible energy for the particular hour(s) of the interruption request.” (Supp. 8)

As with statutes, the “meaning and effect of such provisions are *** ascertained from the language employed, the connection in which used, and the evident purpose of such provisions” *Saalfeld Publishing Co. v. Pub. Util. Comm. (1948), 149 Ohio St. 113, 36 O.O. 468, 77 N.E. 2d 914, syllabus 1*

Unambiguous language is applied consistent with clearly expressed intent of the tariff. Significance and effect is accorded to every word, phrase, sentence and part of the tariff. Words or terms not defined by the tariff with a technical or particular meaning are construed accordingly. *See Wachendorf v. Shaver (1948) 149 Ohio St. 231,232, 36 O.O. 554, 78 N.E. 2d 370, syllabus 5; cited in Sarmiento v. Grange Mut. Cas. Co., 106 Ohio St. 3d 403,408, 2005-Ohio 5410*

The Commission found that the PSA purchase power adjustment formula would determine the incremental expenses of Ohio Edison to supply interruptible energy during the interrupted hours under Rider 75. The Commission reasoned that:

“*** Although the PSA only requires the calculation of charges on a monthly basis, that PSA formula is an actual determination of costs to Ohio Edison. If an interruptible customer chooses to curtail its usage or purchase its power requirements from another supplier during an interruption, the amount of power purchased under the PSA will be reduced by that amount. On the other hand, if an interruptible customer, such as Elyria Foundry, chooses to buy through the interruption, Ohio Edison’s costs under the PSA will increase by the amount of the buy-through. Thus, the pricing formula in the PSA is a true measure of incremental expenses.” (Appx. 17)

The Commission further found that incremental costs of Ohio Edison would be FES’ highest system costs for the last block of energy to serve the last block of load determined, after FES supplied its PSA and non-PSA competitive market obligations because:

“*** interruptible service should not be prioritized, from an economic point of view, ahead of any firm service. *** [I]t is not unreasonable to consider all of the obligations of FES, including sales that are made by FES outside of the PSA, in the determination of the incremental cost to Ohio Edison of serving interruptible customers.” (Appx. 17-18)

C. FES’ highest system costs were used to determine Ohio Edison’s incremental expenses.

FES’ combined firm service obligations of the PSA and non-PSA competitive market

customers were used by the Commission to determine the anticipated incremental expense of Ohio Edison to supply interruptible energy. Although only regulating Ohio Edison, and not FES, the Commission gave FES' firm electric service customers higher priority of service than the interruptible service customers of Ohio Edison, CEI, and Toledo Edison. Ohio Edison's interruptible customers received discounted rates for accepting the risk of service interruptions. (Appx. 17-18) Those discounts, however, came from Ohio Edison, not FES.

The Commission approved, as Ohio Edison's incremental expense, the last and highest group of costs incurred by FES as the expenses to serve Ohio Edison's retail interruptible load. (Supp. 188) The Interruptible Service Guidelines of the Commission in Case No. 95-866-EL-UNC mandated that every electric utility under Commission jurisdiction should offer just and reasonable interruptible service with the option to purchase replacement electricity. (Supp. 604) The Guidelines were developed so that utilities could provide "their largest customers with the kind of quality service they expect and need *** as part of customer retention efforts in increasingly more competitive times." (Supp. 605)

In this proceeding, the Commission characterized the interruptible Guidelines as recognition of the distinction between firm and interruptible service. (Appx. 17-18) The Commission found that any firm service (Ohio Edison's or FES') should have higher priority than the economically interruptible service offered by Ohio Edison. (Appx. 17-18) The Commission stated that all of FES costs incurred in providing service to its PSA and non-PSA competitive market customers may be included in determining the incremental costs of Ohio Edison to serve interruptible customers. (Appx. 17-18) The

Commission further believed the Ohio restructuring had no effect on the Commission's distinction of firm and interruptible service. (Appx. 26)

The Commission had no legal or factual basis to similarly treat Ohio Edison and FES customers. FES' competitive market obligations were not regulated by the Commission, and, for all practical purpose, were the same as any other power marketer, such as Detroit Edison.

The Guidelines distinguished between "firm electric service customers" and interruptible customers of Ohio Edison as the utility providing the services. (Supp. 613) The Commission in the Phase II proceedings³ limited the term "utility" to the regulated Operating Company (Ohio Edison). (Supp. 631-632)

Likewise, Ohio Restructuring under S.B. No. 3 defined the terms firm and non-firm service; and through the market development period specifically provided for non-firm service. (See R.C. 4928.01 (A) (12), (22), and R.C. 4928.44)

In this proceeding, the Commission not only distinguished between the two services, but gave the same service priority to firm customers served by Ohio Edison and the customers of its power marketing affiliate, FES.

Further, Ohio Edison and FES were involved in separate transactions. (Supp. 48) Ohio Edison provided service as a regulated electric distribution company at rates approved by the Commission. (Supp 63) FES provided firm service under the PSA at FERC approved rates. (Supp. 33) Non-PSA competitive market rates were not set by Ohio Edison, but by direct contract between FES and the customer. (Supp. 386-388) The Commission did not approve the rates under the PSA, nor the non-PSA service

³ Commission Case No. 95-866-EL-UNC

provided by FES. Likewise, Ohio Edison's firm and interruptible customers were not served by FES. (Supp. 48)

Ohio Edison purchased its full power requirements for both firm and interruptible obligations to retail customers from FES under the PSA. (Supp. 16-18, 370-377) FES used its generation resources and non-affiliated power purchases to also meet its non-PSA competitive market obligations. (Supp. 18, 400-403) Rider 75 permitted economic interruptions whenever the incremental costs to serve Ohio Edison's interruptible load were greater than the incremental revenues received by Ohio Edison during the interrupted hours. (Supp. 8)

The Commission, by finding it appropriate (Appx. 17-18) to include FES' incremental expenses to serve its competitive market obligations allowed Ohio Edison to overstate its incremental costs incurred to supply its retail interruptible load during economic interruptions.

D. FES' total system costs were used instead of Ohio Edison's pro rata share of 80% of FES' incremental costs as allocated under the PSA formula.

The Commission found that "**** the pricing formula in the PSA is a true measure of incremental expenses." (Appx. 17-18) The Commission used the PSA formula to determine Ohio Edison's incremental expense upon which to notice economic interruptions under Rider 75. (Appx. 17-18) The Commission reasoned the pricing formula actually measured incremental expenses because Ohio Edison's costs increased or decreased depending on whether customers bought through the event. (Appx. 17)

However, Ohio Edison determined its incremental expense (without using the PSA formula to allocate costs) as the highest system costs of FirstEnergy Solutions to meet its

combined PSA and non-PSA competitive market obligations when calling for an economic interruption under Rider 75.

FES used the following procedure with no consideration of the allocation of purchase power costs under the PSA formula when requesting economic interruptions or buy-through events, as described by the Ohio Edison witness:

“In the day ahead evaluation, FES reviews its energy portfolio position for the next day to determine if FES will be short 300 MW or more anytime in the next day. If they are, then FES looks to see how many hours during the next day they will be short. If it is estimated that FES will be short for 16 hours or more, then FES will purchase firm next day blocks of energy on a bilateral basis, if they are available in the market place. If the price of these blocks is \$65/MWh or more, then a next day economic buy through event is called.” (Emphasis added) (Supp. 34)

The procedure used for Ohio Edison to recover (directly assign as oppose to allocate) purchased power costs from its interruptible customers was inconsistent with and unsupported by the PSA and its formula, as the Ohio Edison witness described:

“*** the IBT [Interruptible Buy-Through] Program simply allows FirstEnergy to pass on actual costs of purchased power to the IBT customers in exchange for a price discount off of tariffed rates during all other hours of the year when no buy through events are called. Thus, the IBT Program is not intended to be a profit making transaction, but rather a cost recovery transaction. (Emphasis added) (Supp. 41)

Ohio Edison never used the PSA formula as intended and relied upon by the Commission in concluding the formula actually determined incremental costs.

The PSA formula should have billed only 80% of the total (including highest) system costs of FES to Ohio Edison and the other PSA purchasers. The remaining 20% stayed with FES for its non-PSA competitive market obligations—including 20% of its highest system costs. (Supp. 162)

This 80% allocation of costs to the retail interruptible customers never occurred based on Ohio Edison testimony that:

In fact, as evidenced in Exhibit CJI-4, during 2005, Ohio Edison received from IBT customers incremental revenues based on a weighted average of 9.2 [cents] per kWh, while the weighted average to supply this same load, based on actual purchases, cost FES 9.4 [cents] per kWh. (Supp. 41)

The PSA and PSA formula were ignored when using FES' highest system costs to request an economic interruption event, as verified by the Ohio Edison witness during cross-examination:

Q. What I'm asking is, in determining the incremental costs are you not making that determination having – based on FirstEnergy Solutions' total cost of providing power both under the PSA and to its competitive retail customers?

A. Well, if I understand your question correctly, total costs aren't part of the equation; it's 300 megawatts of purchases made during a time when an economic interruption event has been called for by Ohio Edison. If the customers all chose to interrupt during that event, those purchases would not be made and that's why they are incremental.

It's the customer's option, and if they choose to not buy through during the event, then the purchases do not need to be made. If they choose to buy through, then the purchases are made; that's why they are incremental. (Supp. 580-581)

The record shows that while all purchased power costs flow through the PSA formula, and the PSA was the only means to bill Ohio Edison, Ohio Edison used FES' highest system costs (without allocation) as the basis for determining its incremental costs to request an economic interruption. (Supp. 33-34)

Further, there is no record support for the Commission finding that the PSA formula was in fact used to truly measure the incremental costs of Ohio Edison. The formula was never even used to allocate only 80% of FES' total purchased power to the Operating Companies, while 20% was retained by FES. Instead, Ohio Edison and other Operating

Companies determined the incremental cost of their interruptible customers based on FES' full costs. The PSA formula was not, in fact, the basis used by FES and Ohio Edison for determining incremental expenses upon which to request economic interruptions.

The PSA formula did not separate out or measure Ohio Edison's incremental costs of purchase power differently than any other cost. Ohio Edison, according to its witness, did not determine its incremental expenses for its interruptible customers under the PSA formula because:

“All costs to Ohio Edison for energy purchased from FES come through the PSA billing. Every hourly purchase is summed up and included in the purchased power number that is allocated to all the operating companies.”
(Emphasis added) (Supp. 579)

FES billed Ohio Edison for its pro rata share of all of its purchase costs, including the highest priced block of energy upon which economic interruptions were requested. Contrary to the Commission's determination, the formula was not used as a basis for determining incremental cost upon which to request economic interruptions or set buy-through prices. (Supp. 474-480)

In reaching its decision, the Commission failed to recognize the difference between the treatment of “[e]very hourly purchase *** that is allocated to all the operating companies” under the PSA, and the costs charged to Elyria Foundry and the other interruptible customers that were simply considered incremental by FES to its entire load.
(Supp. 579)

The Commission unlawfully expanded the definition of “firm” customer to not only include those under its jurisdiction, but those of a marketing affiliate over which it has no jurisdiction. Consequently, Elyria Foundry and the other regulated interruptible

customers were used more as a resource for the firm customers of FES than of Ohio Edison. Further, the PSA formula properly used would have allocated 80% of those purchased power costs to the Operating Companies before Ohio Edison determined its pro rata share as its incremental cost. This was not done.

The Commission unlawfully and unreasonably determined Ohio Edison's incremental expenses for requesting economic interruptions based on the highest system costs of its affiliate FirstEnergy Solutions (FES), including FES' cost of serving competitive market obligations, and without allocating only 80% of those incremental costs to the Operating Companies before determining Ohio Edison's pro rata share.

Rider 75 economic interruptions should not have been based on the incremental costs of nearly 3,000 MW of competitive non-PSA market sales by FES. The term "firm electric service customers" as used under the Guidelines should not include those customers of FES. The PSA formula was not the true measure of Ohio Edison's incremental expenses under Rider 75. Ohio Edison never allocated its costs of purchased power before determining its pro-rata share of those costs upon which to notice economic interruptions. Consequently, the Commission allowed Ohio Edison to request an excessive number of economic interruptions during 2005 than appropriate under Rider 75, that resulted in higher priced buy-through electricity than appropriate.

The Commission's decision is as a matter of law unlawful, and against the manifest weight of the evidence and unsupported by the record.

Proposition of Law No. 2:

The 2001 Policy used to request economic interruptions affected rates paid by Rider 75 customers without Commission approval under R.C. 4909.18, and publication under R.C. 4905.30.

Under the 2001 Policy, FES requested (on behalf of Ohio Edison) economic interruptions whenever FES' incremental expenses exceeded \$65/MWh, and its current or expected load obligations exceeded available planned resources. For all economically interruptible customers served under contract or tariff by Ohio Edison, CEI, and Toledo Edison, economic interruptions were called at the same time, for the same duration, at the same strike price and all customers were offered the same replacement/buy-through power prices. (Supp. 15, 478-479)

The Commission never approved the 2001 Policy. (Supp. 334-335) The 2001 Policy was never published, and first came to light during this case. (Supp. 77, 336-339)

In reaching its decision, the Commission initially described the Policy as merely documenting internal operational standards. (Appx. 13-14) On rehearing, the Commission found the 2001 Policy did not affect rates:

“*** [a]s the 2001 policy did not negate any of the requirements in rider 75 and, additionally, specifically allowed for interruption as soon as triggered under the rider***.” (Appx. 24)

Practices and rules affecting rates need Commission approval. RC 4909.18 requires a written application to establish “any rate *** or to modify *** any existing rate *** or regulation or practice affecting the same ***.” Similarly, RC 4905.30 required Ohio Edison to file printed schedules with the Commission “*** showing all rates *** for service of every kind furnished by it, and all rules and regulations affecting them ***.”

The “meaning and effect of such provisions are to be ascertained from the language employed, the connection in which used, and the evident purpose of such provisions”

Saalfeld Publishing Co., supra, 149 Ohio St. 113, 36 O.O. 468, 77 N.E. 2d 914, syllabus 1

“Practice” as used in RC 4909.18 is a usual or customary action or performance. *Oxford English Dictionary, Vol., XII., Second Edition, (1989, Revised 1991).* A “rule”, as used in RC 4905.30 is a principle regulating a practice. *supra, Vol. XIV* “Affecting” as used in both statutes is to act upon, or to leave an effect upon. *supra, Vol. I* “Negate”, not used in the statutes, is to nullify or render ineffective. *supra, Vol. X .*

The Commission interpreted rather than applied the language of RC 4909.18 and RC 4905.30. The meaning of an unambiguous and definite statute “ ‘must be applied as written and no further interpretation is appropriate.’ ” *State ex. Rel. Purdy v. Clermont Cty. Bd. Of Elections (1997), 77 Ohio St. 3d 338, 673 N.E. 2d 1351, cited in Weiss v. Pub. Util. Comm. (2000), 90 Ohio St. 3d 15, 17, 734 N.E. 2d 775* “ ‘Words in a statute must be accorded their usual, normal or customary meaning.’ ” *Herman v. Klopffleisch (1995), 72 Ohio St. 3d. 581, 584, 651 N.E. 2d 995, 997, cited in Weiss, supra.*

Reliance on the Commission’s expertise is not necessary to interpret the words “practice”, “rule”, and “affect.” This is not statutory interpretation of “highly specialized issues” or where the Commission’s “expertise would *** assist in discerning the presumed intent of our General Assembly.” *Consumers’ Counsel v. Pub. Util. Comm. (1979), 58 Ohio St. 2d 108, 110, 12 O.O. 3d 115, 388 N.E. 2d 1370*

The 2001 Policy, regardless of its intended purpose, set forth practices and rules that affected Rider 75 rates (the amount of money paid by customers) by being used to request economic interruptions. Requested economic interruptions resulted in Elyria Foundry’s incremental interruptible rate increasing from \$51.35/MWH to the range of

\$65—\$125 per MWH during the interrupted hours. (Supp. 114)

The 2001 Policy added practices and rules for economic interruptions never approved under R.C. 4909.18, or published under R.C. 4905.30. Rider 75 allowed for economic interruptions “*** whenever the incremental revenues to be received from the customer ***”. (Supp. 8) Rider 75 addressed single customers. Conversely, the 2001 Policy addressed a group or block of customers to be interrupted at the same time, using the same strike price and buy-through prices. (Supp. 15) All or nothing interruptions violated the intent of the Guidelines to base priority of service upon rates paid—not based on a utility’s costs or other considerations. (Supp. 616-617) Rider 75 was publicly available. The 2001 Policy was not available to the public.

The Commission unlawfully applied R.C. 4909.18 and R.C. 4905.30 by interpreting rather than applying their clear and unambiguous meaning. “Practices” and “rules” are clearly defined and applied terms. “Affect” has a broader meaning than “negate”. “Practices” and “rules” that “affect” rates clearly includes the 2001 Policy that: 1) imposed a single strike price on all customers to form a 300 MW block of purchased power; 2) ignored priority of service considerations; and 3) charged all customers the same replacement/buy-through price for energy, regardless of the level of rates being paid.

Proposition of Law No. 3

A single strike price unduly disadvantaged Elyria Foundry by interrupting all customers at the same time, for the same duration because, under Rider 75, those customers paying higher incremental rates were to receive a higher service priority and less risks of interruptions than Ohio Edison customers paying lower incremental revenues.

Under the 2001 Policy, the \$65/MWH strike price became the “grouped” cross over point at which the highest incremental revenues paid by any interruptible customer of Ohio Edison, CEI, and Toledo Edison were considered less than FES’ incremental costs to supply 300 MW of interruptible energy. (Supp. 66-67)

The \$65/MWH strike price represented the highest incremental rates paid by any interruptible customer of the three companies and specifically an Ohio Edison customer. (Supp. 327) The lowest incremental revenue received by Ohio Edison was in the higher \$30/MWH (3 cents per kWh) range. (Supp 322, 324, 330)

Rider 75 compared customer specific revenue paid to Ohio Edison with the anticipated incremental expense paid by Ohio Edison to supply that interruptible energy during the interrupted hours. Incremental revenues were easily determined. Elyria Foundry paid \$51.35/MWH as a 69 kV customer. (Supp. 86)

Those customers paying in the \$30/MWH range gained an advantage by nearly a factor of two with the same interruptible risks as Elyria Foundry. Customers paying those revenues to Ohio Edison would not be interrupted until their incremental expense was 100% more than paid. (Supp. 146-148) Elyria Foundry’s incremental revenue was only 25% greater than the strike price.

The single strike price unduly (or unreasonably) disadvantaged Elyria Foundry under ORC 4905.35. Use of a single strike price resulted in Elyria Foundry paying much

higher incremental revenues/rates to Ohio Edison for a like and contemporaneous service that was interrupted under the same circumstances and conditions as those customers paying much lower revenues/rates. (Supp. 146-148)

RC 4905.35 prohibits utilities from charging different rates for performing “*** a like and contemporaneous service under substantially the same circumstances and conditions ***.” *Ohio Consumers’ Counsel v. Pub. Util. Comm.*, 109 Ohio St. 3d 328, 336, 2006-Ohio-2010; citing to *AK Steel Corp. v. Pub. Util. Comm.* (2002), 95 Ohio St. 3d 81, 86-87, citing to *Mahoning Cty. Twps. v. Pub. Util. Comm.* (1979), 58 Ohio St. 2d 40, 43-44.

A prohibition against different rates does not require “*** [a]bsolute uniformity *** [a] reasonable differential or inequality of rates may occur where such differential is based upon some actual and measurable differences in the furnishing of services to the consumer***.” *Mahoning Cty. Twps.*, *supra*, 58 Ohio St. 2d at 43-44, 12 O.O. 3d 45, 388 N.E. 2d 739

All interruptible customers received a like and contemporaneous service by FES’ use of the same strike price to economically interrupt at the same time, for the same duration, and the same higher replacement electric costs.

The Commission believed a single strike price was reasonable because Ohio Edison’s incremental revenues were based on widely varied billing determinants and circumstances. (Appx. 15, 25) However, Rider 75, as approved under the Guidelines, used “incremental revenue” as the criteria for requested economic interruptions instead of cost of service or billing determinants.

The Commission also believed that Elyria Foundry was not unduly (or unreasonably) disadvantaged. Different revenues/rates paid to Ohio Edison under interruptible Riders

73, 74, and 75 were based on actual and measurable differences in providing the service as approved by the Guidelines. (Appx. 25) However, different revenues/rates received by Ohio Edison from Riders 73, 74, and 75 were approved under Commission Guidelines setting forth such pricing factors as (i) avoided costs, (ii) priority of service, (iii) past number and duration of interruptions, (iv) the customer's operating characteristics (iv) and degree of risks of being interrupted. (Supp. 616-617)

Under Riders 73, 74, and 75, the incremental revenues paid to Ohio Edison are the actual measurable differences between customers when calling an interruption. Riders 73, 74, and 75 created a priority of service based on incremental revenues received by each customer. Customers with lower incremental revenues would be interrupted at lower incremental expenses before those paying higher incremental revenues.

The 2001 Policy eliminated service priorities based on revenues received as provided by Rider 75 under the Guidelines. The Policy simultaneously interrupted all customers at the same time, for the same duration, and charged the same replacement/buy-through rates. The Policy may have achieved other corporate objectives of Ohio Edison and its regulated affiliates. (Supp. 331-332) However, Elyria Foundry was unduly (or unreasonably) disadvantaged under R.C. 4905.35 in Ohio Edison accomplishing those goals.

A single strike price provided Elyria Foundry with the same interruptible service as all other customers, but at vastly higher rates than charged like customers for like service. Elyria Foundry, and all similarly situated/grouped customers, should pay Ohio Edison the same lower revenues paid by other customers for assuming the same interruptible risks. Use of a single strike price entitled Rider 75 customers to pay the same incremental

revenues/rates as all customers for assuming the same priority, risk and duration of economic interruptions. (Supp. 95-97, 117)

Otherwise, Elyria Foundry and other Rider 75 customers paying Ohio Edison higher incremental revenues, in the lower \$50/MWH range, were entitled to the “paid for” higher service priority, with less economic interruptions, and lower replacement electricity buy-through costs, than customers paying Ohio Edison much lower incremental revenues in the high \$30/MWH range. (Supp. 117)

Proposition of Law No. 4:

The Commission violated R.C. 4903.09 by not setting forth the factual basis and reasoning for its decision, when denying rehearing, on whether FES/Ohio Edison noticed economic interruptions without allocating its incremental costs as required under the PSA formula.

Elyria Foundry filed a second rehearing application from denial of rehearing by the Commission for Ground 16-20. The Commission failed to provide the factual basis and reasoning used for agreeing with the Ohio Edison position as stated in its memorandum contra argument that:

“In the fifth group of grounds of rehearing, Elyria Foundry attempts to show that Ohio Edison’s calculations of incremental costs were incorrect in they failed to allocate the cost per MWH based on the percentage of total purchased power consumed by Ohio Edison’s customers. Ohio Edison responds that Elyria Foundry’s mathematical argument is in error.”

“The Commission agrees with Ohio Edison on this issue. As stated by Ohio Edison in its memorandum contra, ‘if the total cost is be allocated based on the percentage of consumption to get the unit cost, so too must the volume.’ Ground for rehearing 16-20 will be denied.” (Appx. 27)

In its Second Entry on Rehearing, the Commission concluded that R.C. 4903.09 applied to its Opinion and Order, and that denial of rehearing under R.C. 4903.10 required no restatements or level of details. Rehearing may be denied by operation of

law. (Appx. 34) Therefore, “it cannot be an error for an entry denying rehearing not to include ‘some factual basis and the reasoning used...,’ ” as Elyria Foundry suggested. (Appx. 34)

While the Commission relies on its Opinion and Order, a reading of it does not provide the factual basis and reasons for denying rehearing of Grounds 16-20. After all, the Commission relied on arguments Ohio Edison presented in its memorandum contra without record. (Appx. 34)

The Commission abused its discretion by adopting the Ohio Edison memorandum contra argument because its Opinion and Order failed to provide without “ *** sufficient detail, the facts in the record upon which the order is based, and the reasoning followed *** in reaching its conclusion***.” *MCI Telecommunications Corp. v. Pub. Util. Comm.* (1987) 32 Ohio St. 3d 306, 312, 513 N.E. 2d 337,344

Further, the Commission abused its discretion by denying rehearing without record support solely on the basis of Ohio Edison’s memorandum contra arguments made after the Opinion and Order. A “ ‘ legion of cases establishes that the commission abuses its discretion if it renders an opinion on an issue without record support.’ ” *Tongren v. Pub. Util. Comm.* (1999), 85 Ohio St. 3d 87, 90, 706 N.E. 2d 1255, quoting *Cleveland Elec. Illum. Co. v. Pub. Util. Comm.* (1996), 76 Ohio St. 3d 163, 166, 666 N.E. 2d 1372, citing *Ohio Consumers’ Counsel v. Pub. Util. Comm.* 111 Ohio St. 3d 300 213, 220, 2006-Ohio-5789.

Finally, the Commission abused its discretion by not setting forth “some factual basis and reasoning thereon in reaching its conclusion ***” in its Opinion and Order on accepting the memorandum contra arguments. *Tongren, supra*, 85 Ohio St. 3d 89, 706

N.E. 2d 1257 Allnet Communication Serv. Inc. v. Pub. Util. Comm. (1994), 70 Ohio St. 3d 202, 209, 638 N.E. 2d 516, 521; Migden-Ostrander v. Pub. Util. Comm. 102 Ohio St. 3d 451, 455, 2004-Ohio-3924, 812 N.E. 2d 955, 959.

The Commission denied rehearing by agreeing with the memorandum contra arguments made, without record support, and after the rendering of the Opinion and Order. The record, and the Opinion and Order, do not support that decision.

III. CONCLUSION

In summation, the Commission acted unlawfully and unreasonably in its determination of Ohio Edison's incremental costs used to increase Elyria Foundry electric costs by requesting economic interruptions. The Commission should not determine those incremental costs based on the highest system costs of its affiliate FirstEnergy Solutions (FES), including FES' cost of serving competitive market obligations. The Commission should not have allowed Ohio Edison recovery before allocating approximately 80% of those incremental costs to the Operating Companies (and 20% to FES) before determining Ohio Edison's pro rata share.

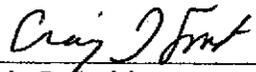
The Commission unlawfully applied R.C. 4909.18 by not requiring Ohio Edison to receive approval of practices affecting Rider 75 rates under its 2001 Policy. The policy affected Rider 75 rates by becoming the basis for requesting economic interruptions during which the approved incremental rates were replaced by higher priced replacement electricity. Further, the Commission unlawfully interpreted R.C. 4905.30 by not requiring publication of the 2001 Policy as part of Rider 75 service.

The Commission unlawfully interpreted R.C. 4905.35 by not finding undue or unreasonable disadvantage from Ohio Edison's use of a single strike price to interrupt all customers, at the same time, for the same duration, and offering the same replacement/buy-through price. Elyria Foundry had paid for a higher service priority through the incremental rates of Rider 75 approved under the Guidelines by the Commission. The Commission erred by applying cost of service or billing determinants to those rates, when "incremental revenue" is the only standard offered under Rider 75. Elyria Foundry, under Rider 75, should have had a higher service priority by being interrupted less often than those customers paying considerably less for interruptible service. Conversely, if all customers were to be interrupted at the same time, for the same duration, and pay the same replacement/buy-through price, then they all should have been given the same incremental revenue/rate.

Finally, the Commission erred when denying rehearing based on arguments raised in the memorandum contra of Ohio Edison. Commission reliance on its Opinion and Order failed to meet the standards of R.C. 4903.09.

These unlawful and unreasonable actions require reversal and remand.

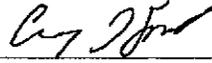
Respectfully submitted



Craig I. Smith
Counsel for Appellant,
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CERTIFICATE OF SERVICE

I hereby certify a copy of the Merit Brief of Appellant, Elyria Foundry Company was sent by ordinary mail, postage prepaid, to counsel of record at the addresses shown below this 13th day of August, 2007.



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IN THE SUPREME COURT OF OHIO

On Appeal From the Public Utilities Commission of Ohio

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Elyria Foundry Company,)
Appellant,)
v.)
The Public Utilities Commission of Ohio,)
Appellee.)

Case No. **07-0860**
Appeal from the Public
Utilities Commission of Ohio
Public Utilities Commission of
Ohio: Case No 05-796-EL-CSS

**NOTICE OF APPEAL
OF APPELLANT,
ELYRIA FOUNDRY COMPANY**

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FILED
MAY 10 2007
MARCIA J. MENGEL, CLERK
SUPREME COURT OF OHIO

NOTICE OF THE APPEAL OF APPELLANT, ELYRIA FOUNDRY COMPANY

Appellant, Elyria Foundry Company, pursuant to R.C. 4903.11, R.C. 4903.13, and S. Ct. Prac. R. II (3)(B) hereby gives notices to the Supreme Court of Ohio and to the Public Utilities Commission of Ohio (“Appellee” or “Commission”) of this appeal to the Supreme Court of Ohio. The appeal is from Appellee’s Opinion and Order entered into its Journal on January 17, 2007, the Entry on Rehearing entered in its Journal on March 14, 2007, and its Second Entry on Rehearing entered into its Journal on May 2, 2007 in the above captioned case 05-796-EL-CSS before the Commission. The Case is entitled *In the Matter of the Complaint of Elyria Foundry Company v. Ohio Edison Company*.

Appellant, Elyria Foundry Company, was the complainant in this proceeding. On February 16, 2007, Appellant timely filed, pursuant to R.C. 4903.10, an Application for Rehearing from the Opinion and Order, dated January 17, 2007. The Appellant’s Application for Rehearing was denied with respect to the issues being raised in this appeal by an Entry on Rehearing entered in Appellee’s Journal on March 14, 2007. Appellant, on April 4, 2007, filed, pursuant to R.C. 4903.10, a Second Application for Rehearing from the Entry on Rehearing, dated March 14, 2007. The Appellant’s Second Application for Rehearing was denied with respect to the issue being raised in this appeal by the Second Entry on Rehearing entered in Appellee’s Journal on May 2, 2007.

Appellant files this Notice of Appeal, complaining and alleging that Appellee’s January 17, 2007 Opinion and Order, the March 14, 2007 Entry on Rehearing, and the May 2, 2007 Second Entry on Rehearing, result in a final order that is unlawful and unreasonable, and the Appellee erred as a matter of law, in the following respects as

raised by the Application for Rehearing and the Second Application for Rehearing:

1. The Commission erred by not finding that ORC Sec. 4909.18 required Ohio Edison to apply for and receive approval of its "2001 Policy" used to establish or modify a regulation or practice affecting Rider 75 rates. [O&O at 5] [EF App. Reh. No. 1]
2. The Commission erred by not finding that ORC Sec. 4905.30 required Ohio Edison to file as a schedule its "2001 Policy" as it contains the rules and regulations affecting Rider 75 rates. [O&O at 6] [EF App. Reh. No. 2]
3. The Commission erred by not finding that Ohio Edison's use of a single strike price resulted in undue or unreasonable prejudice or disadvantage under ORC Sec. 4905.35 because Elyria Foundry received the same service priority at higher rates for the same risks of interruptions as paid for by lower priced interruptible customers. [O&O at 7] [EF App. Reh. No. 3]
4. The Commission erred by finding that different strike prices applied to customers with different rate structures could be viewed as prejudicial. [O&O at 7] [EF App. Reh. No. 4]
5. The Commission erred by finding that a single strike price, based on Ohio Edison's incremental costs and resources, is reasonable in light of the wide variety of billing determinants and circumstances. [O&O at 7] [EF App. Reh. No. 5]
6. The Commission erred by finding that insufficient evidence was presented to convince it that Ohio Edison's approach in this circumstance is unlawful or discriminatory. [O&O at 7] [EF App. Reh. No. 6]
7. The Commission erred by rejecting Elyria Foundry's definition of incremental expenses upon which to notice economic interruptions under Rider 75 at page 6. [O&O at 8-10] [EF App. Reh. No. 7]
8. The Commission erred by rejecting Elyria Foundry's analysis to establish that Ohio Edison unreasonably and unlawfully noticed interruptions for a minimum of 623 hours during 2005, and caused a minimum of an additional \$94,555 in replacement power costs. [O&O at 8-10] [EF App. Reh. No. 8]
9. The Commission erred by not finding that Ohio Edison's incremental expense used as a basis for calling economic interruptions under Rider 75 at page 6 should have been determined before FES made competitive market sales. [O&O at 9-10] [EF App. Reh. No. 9]
10. The Commission erred by rejecting Elyria Foundry's assignment of incremental costs based upon FES' competitive market load being incremental to [coming after] Ohio Edison's retail interruptible load. [O&O at 9-10] [EF App. Reh. No. 10]

11. The Commission erred by finding the purchase power adjustment formula at Exhibit A of the PSA were the true measure of Ohio Edison's incremental costs. [O&O at 9-10] [EF App. Reh. No. 11]
12. The Commission erred when finding under its Interruptible Guidelines that Ohio Edison may include all of the obligations of FES, including nearly 3,000 MW of competitive retail sales within MISO, when determining its incremental cost of serving interruptible retail customers, because the Guidelines intended to provide low costs energy options to help large consumers compete in the global market. [O&O at 9-10] [EF App. Reh. No. 12]
13. The Commission erred in relying on its Interruptible Guidelines (used to approve Rider 75) for the conclusion that the anticipated incremental expense of Ohio Edison to supply incremental service should include competitive market loads [non-PSA] expenses of FES. [O&O at 9-10] [EF App. Reh. No. 14]
14. The Commission erred by not finding that FES' incremental costs for competitive services were streamed through to retail interruptible customers because Ohio Edison failed to allocate expenses [costs] of purchased power as required by the PSA adjustment formula of Exhibit A before it determined whether those costs (after being allocated to Ohio Edison) exceeded the incremental revenues of Elyria Foundry upon which to notice economic interruptions under Rider 75 at page 6. [O&O at 8-10] [EF App. Reh. No. 16]
15. The Commission erred by not finding that FES' incremental costs for competitive services were streamed through to retail interruptible customers, because the full cost of energy purchased by FES was used as the proxy for anticipated incremental expenses, without Ohio Edison using the allocation procedure under the purchase power adjustment formula of Exhibit A of the PSA, before determining whether those costs exceeded the incremental revenues of Elyria Foundry prior to noticing economic interruptions under Rider 75 at page 6. [O&O at 8-10] [EF App. Reh. No. 17]
16. The Commission erred in finding that Ohio Edison noticed economic interruptions after allocating its incremental costs during 2005 under the purchase power adjustment formula of Exhibit A of the PSA. [O&O at 9-10] [EF App. Reh. No. 18]
17. The Commission erred in its Opinion and Order by failing to make the required allocation of those costs before finding that Ohio Edison reasonably and lawfully noticed economic interruptions of Elyria Foundry during 2005. [O&O at 8-10] [EF App. Reh. No. 19]
18. The Commission erred by approving Ohio Edison's definition of the term "anticipated incremental expense" by using as its proxy the unallocated "cost of energy obtained or generated by the Company on a best efforts basis at the lowest cost after all other prior obligations are met" under Rider 75 at page 7. [O&O at 9] [EF App. For Reh. 20]

19. The Commission erred in finding that Elyria Foundry had not provided sufficient evidence that Ohio Edison's charges, under its Rider 75, violated any applicable statute, regulation, or guideline, or that Ohio Edison failed to comply with any filing or notice requirement concerning its implementation of Rider 75. [O&O at 11] [EF App. Reh. No. 22]

20. The Commission erred by denying rehearing without complying with R.C. 4903.09 to provide the factual basis and reasoning used for agreeing with the Ohio Edison position. [Entry on Reh, par. 22 at pg. 7] [EF Second App. Reh. No. 1]

Wherefore, Appellant respectfully submits that Appellee's January 17, 2007 Opinion and Order, the March 14, 2007 Entry on Rehearing, and the May 2, 2007 Second Entry on Rehearing are unreasonable or unlawful and should be reversed. This case should be remanded to Appellee with instructions to correct the errors complained of herein.

Respectfully submitted



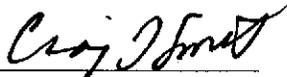
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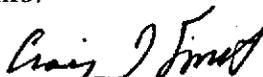
Certificate of Filing

I certify that a Notice of Appeal has been filed with the docketing division of the Public Utilities Commission in accordance with sections 4901-1-02(A) and 4901-1-36 of the Ohio Administrative Code.


Craig I. Smith
Counsel for Appellant,
Elyria Foundry Company

Certificate of Service

I hereby certify that on the 16th day of May 2007 a copy of the foregoing Notice of Appeal of Elyria Foundry was served upon the Appellee, the Public Utilities Commission of Ohio, and Ohio Edison Company, by ordinary U.S. Mail, postage pre-paid, to the mailing addresses shown, and, as required by section 4903.13, Ohio Revised Code, was served upon the Chairman of the Public Utilities Commission of Ohio by leaving a copy at the office of the Chairman in Columbus, Ohio.


Craig I. Smith
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Elyria Foundry Company

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The Ohio Edison Company

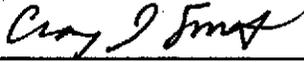
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The Public Utilities Commission of Ohio

**IN THE SUPREME COURT OF OHIO
CASE INFORMATION STATEMENT**

Case Name:	Case No. :						
Elyria Foundry Company v. Pub. Util. Comm.	PUCO Case No. 05-796-EL-CSS						
I. Has this case previously been decided or remanded by this Court? Yes [] No [X] If so, please provide the Case Name: _____ Case No.: _____ Any Citation: _____							
II. Will the determination of this case involve the interpretation or application of any particular case decided by the Supreme Court of Ohio or the Supreme Court of the United States? Yes [X] No [] If so, please provide the Case Name and Citation: SEE ATTACHED Will the determination of this case involve the interpretation or application of any particular Constitutional provision, statute, or rule of court? Yes [X] No [] If so, please provide the appropriate citation to the constitutional provision, statute, or court rule, as follows: <table style="width:100%;"> <tr> <td>U.S. Constitution: Article ____, Section ____</td> <td>Ohio Revised Code: R.C. SEE ATTACHED</td> </tr> <tr> <td>Ohio Constitution: Article ____, Section ____</td> <td>Court Rule: _____</td> </tr> <tr> <td>United States Code: Title ____, Section ____</td> <td>Ohio Adm. Code: O.A.C. ____-____-____</td> </tr> </table>		U.S. Constitution: Article ____, Section ____	Ohio Revised Code: R.C. SEE ATTACHED	Ohio Constitution: Article ____, Section ____	Court Rule: _____	United States Code: Title ____, Section ____	Ohio Adm. Code: O.A.C. ____-____-____
U.S. Constitution: Article ____, Section ____	Ohio Revised Code: R.C. SEE ATTACHED						
Ohio Constitution: Article ____, Section ____	Court Rule: _____						
United States Code: Title ____, Section ____	Ohio Adm. Code: O.A.C. ____-____-____						
III. Indicate up to three primary areas or topics of law involved in this proceeding (e.g. jury instructions, UM/UIM, search and seizure, etc.): 1) Use of a policy affecting rates that was not approved as required by R.C. 4909.18, and not publicly filed as required by R.C. 4905.30. 2) Use of a policy that violated R.C. 4905.35 by resulting in undue or unreasonable prejudice or disadvantage to Elyria Foundry Company. 3) Interpretation and application of an interruptible rate schedule used for rendering service.							
IV. Are you aware of any case now pending or about to be brought before this Court that involves an issue substantially the same as, similar to, or related to an issue in this case? Yes [] No [X] If so, please identify the Case Name: Case No.: Court where Currently Pending: Issue:							

Contact information for appellant or counsel:

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Address		Signature of appellant or counsel	
Cleveland	Ohio	44120	Counsel for: Elyria Foundry Company
City	State	Zip Code	

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Attachment to Case Information Statement for Elyria Foundry Company

Cases:

Tongren v. Pub. Util. Comm. (1999), 85 Ohio St. 3d 87, 706 N.E. 2d 1255

Ohio Consumers' Counsel v. Pub. Util. Comm., 109 Ohio St. 3d 328, 2006-Ohio-2010

Statutes:

R.C. 4903.09

R.C. 4905.26

R.C. 4905.30

R.C. 4905.35

R.C. 4909.18

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Complaint of Elyria Foundry Company,)	
)	
Complainant,)	
)	
v.)	Case No. 05-796-EL-CSS
)	
Ohio Edison Company,)	
)	
Respondent.)	

OPINION AND ORDER

The Commission, considering the complaint, the evidence of record, the arguments of the parties, and the applicable law, and being otherwise fully advised, hereby issues its opinion and order.

APPEARANCES:

Craig I. Smith, 2824 Coventry Road, Cleveland, Ohio, 44120, on behalf of Elyria Foundry Company.

Kathy J. Kolich, FirstEnergy Service Company, 76 South Main Street, Akron, Ohio 44308, and Jones Day, by Helen L. Liebman, 325 John H. McConnell Boulevard, Suite 600, Columbus, Ohio 43216, on behalf of Ohio Edison Company.

OPINION:

I. BACKGROUND AND HISTORY OF THE PROCEEDINGS

Elyria Foundry Company (Elyria Foundry) is an Ohio corporation that is a customer of Ohio Edison Company (Ohio Edison), using electricity to operate melt furnaces and to perform casting operations. Elyria Foundry is served under a contract with Ohio Edison, receiving both firm electric service under Ohio Edison's rate 23 and interruptible service under Rider 75 of Ohio Edison's tariff (Rider 75). (Elyria Foundry Ex. 1, at 2.)

Ohio Edison is an electric light company, as defined in Section 4905.03(A)(4), Revised Code, and is a public utility as defined by Section 4905.02, Revised Code.

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On June 20, 2005, Elyria Foundry filed a complaint against Ohio Edison, alleging, *inter alia*, that the number of economic interruptions of its service under rider 75, and the cost of those interruptions to Elyria Foundry, rose dramatically during 2005, as compared with prior years. Elyria Foundry urges the Commission to find that Ohio Edison's basis for determining when to call economic interruptions is unlawful, unjust, and/or unreasonable; that Ohio Edison's rider 75 unlawfully, unjustly, and/or unreasonably fails to provide for clear and transparent publicly available information for Elyria Foundry to verify replacement power costs; and that Ohio Edison's rider 75 unlawfully, unjustly, and/or unreasonably required a three-year cancellation notice for interruptible service. Elyria Foundry requests that the Commission order Ohio Edison to make a number of changes to rider 75 and to refund to Elyria Foundry the amounts that Elyria Foundry believes were overcharged during 2005, plus interest. On July 15, 2005, Ohio Edison filed an answer to the complaint, denying many of the allegations by Elyria Foundry and raising affirmative defenses.

On February 17, 2006, Elyria Foundry supplemented its complaint to allege, additionally, that Ohio Edison used its interruptible rider policy to exercise unjust, unreasonable, and unlawful discretion in calling economic interruptions; that Ohio Edison violated applicable statutory provisions by assigning lowest costs resources to retail firm and wholesale load obligations; and that Ohio Edison violated applicable statutory provisions by interrupting all interruptible customers at the same times and for the same hours regardless of their differing rate structures, thus charging Elyria Foundry unjust, unreasonable, and unlawful charges. On July 15, 2006, Ohio Edison filed its answer to the supplemental complaint.

Following unsuccessful efforts to settle the dispute, the case proceeded to hearing on June 28 and 29, 2006, with rebuttal testimony presented on August 16, 2006. Elyria Foundry presented the testimony of Samuel R. Knezevic and Anthony J. Yankel. Ohio Edison's witnesses were Steven E. Ouellette and Charles J. Idle. Briefs and reply briefs were filed by both parties on September 13 and September 26, 2006, respectively.

II. APPLICABLE LAW

The complaint in this proceeding was filed pursuant to Section 4905.26, Revised Code, which provides, in relevant part, that the Commission will hear a case

[u]pon complaint in writing against any public utility . . . that any rate . . . charged . . . is in any respect unjust, unreasonable unjustly discriminatory, unjustly preferential, or in violation of law . . . or that any . . . practice . . . relating to any service furnished by the public utility . . . is . . . in any respect unreasonable, unjust, . . . unjustly discriminatory, or unjustly preferential.

Ohio Edison's tariff for electric service, PUCO No. 11, includes Rider 75 for incremental interruptible service. According to the language of Rider 75, interruptible service is available to certain large, full service customers, where the customer can demonstrate that it has an interruptible load of at least 1,000 kilowatts and that its load can be interrupted within 10 minutes of notice (PUCO No. 11, Sheet No. 75, Page 1 of 12). Once a customer is served under Rider 75, Ohio Edison has the right to interrupt service to that customer under two circumstances. First, it can interrupt service in an emergency, when it "determines that the operation of its system requires curtailment of a customer's interruptible service . . ." (PUCO No. 11, Sheet No. 75, Page 8 of 12). In that event, the customer has no choice but to curtail its usage. Second, Ohio Edison may interrupt for economic purposes. It is this type of interruption that gives rise to the complaint in this proceeding.

The Company reserves the right to interrupt service to the customer's interruptible load whenever the incremental revenue to be received from the customer is less than the anticipated incremental expense to supply the interruptible energy for the particular hour(s) of the interruption request.

(PUCO No. 11, Sheet No. 75, Page 6 of 12.) Once Ohio Edison has called an economic interruption, the customer may choose to curtail its usage or to forego the interruption, with replacement power coming from Ohio Edison or from a third-party supplier. With regard to the pricing of replacement power that may be supplied by Ohio Edison, when the customer notifies Ohio Edison, within 30 minutes, that it will purchase replacement power from Ohio Edison, the customer must pay the cost of energy obtained or generated by the Ohio Edison on a best efforts basis at the lowest cost after all other prior obligations are met. If, on the other hand, the customer does not specify a replacement source for buy-through power within 30 minutes, Ohio Edison will endeavor to obtain or generate power for that customer and the customer must pay the cost of the most expensive power used during the period of the interruption. (PUCO No. 11, Sheet No. 75, Pages 6-8 of 12.)

It should, finally, be noted that in complaint cases before the Commission, the complainant has the burden of proving its case. *Grossman v. Public Utilities Commission*, 5 Ohio St.2d 189, 190, 214 N.E.2d 666, 667 (1966). Thus, in order to prevail, Elyria Foundry must prove the allegations in its complaint, by a preponderance of the evidence.

III. DISCUSSION AND CONCLUSIONS

A. Factual Background

The factual background of this proceeding is not disputed by the parties. Elyria Foundry's executive vice president, Samuel R. Knezevic, testified that, in addition to its firm service, Elyria Foundry began receiving interruptible power in 1995, through a contract with Ohio Edison that limited the number and duration of interruptions. He explained that

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this contract was replaced by Rider 75 and that Elyria Foundry continued with the interruptible service program in order to compete successfully in the marketplace. (Elyria Foundry Ex. 1, at 3.)

As noted above, Ohio Edison has the right, under Rider 75, to call economic interruptions of Elyria Foundry's service when the incremental revenue to be received from Elyria Foundry is less than the anticipated incremental expense to supply Elyria Foundry for a particular time period (Elyria Foundry Ex. 2, at 5). During interruptions, Elyria Foundry has several options. It can arrange for service from another supplier, purchase replacement power from Ohio Edison at a specified price, ignore the notice of interruption and pay for replacement power from Ohio Edison, or curtail its operations (Ohio Edison Ex. 1, at 4). Elyria Foundry always chooses to purchase replacement power from Ohio Edison (Elyria Foundry Ex. 1, at 5-6; Ohio Edison Ex. 1, at 4).

Ohio Edison's interruptible service is administered by FirstEnergy Solutions Corp. (FES), a wholly-owned subsidiary of FirstEnergy Corp. (FE) (Ohio Edison Ex. 1, at 5). Ohio Edison is also a wholly owned subsidiary of FE and is, therefore, a sister company of FES. FES is the owner of virtually all of the generation assets formerly owned by Ohio Edison and its sister operating companies and provides all electricity needed by the FE operating companies under a power supply agreement (PSA) approved by the Federal Energy Regulatory Commission (FERC) (Ohio Edison Ex. 2, at 6; Tr. II at 18). The cost of power under the PSA is based on fixed prices for power from the generating units owned or operated by FES plus a portion of the cost of purchased power. The purchased power costs are allocated among the FE operating companies based on a formula that determines each operating company's proportion of all electricity used in FE's entire service territory. (Ohio Edison Ex. 1, at 5; Ohio Edison Ex. 2, at 5-7).

FES administers the interruptible service program pursuant to internal guidelines that were documented in 2001 (2001 policy). The 2001 policy states that FES is to invoke an economic interruption when, for at least three consecutive hours, incremental out-of-pocket costs to supply power exceed a designated strike price and the current or expected load obligation will exceed available planned resources. The 2001 policy also instructs FES to interrupt all interruptible customers whenever an economic interruption is called. The strike price was originally set at \$85.00 per megawatt hour (mWh) but was decreased to \$65.00 per mWh in 2003. That strike price represents approximately the highest incremental revenue received from any interruptible customer in Ohio, according to Ohio Edison. (Ohio Edison Ex. 1, at 6-7 and at Ex. SEO-4.)

The number of economic interruptions experienced by Elyria Foundry each year from 1995 through 2004 varied, but was never more than 11. Mr. Knezevic indicated that, in early 2005, Elyria Foundry received a communication from Ohio Edison, warning that the number of interruptions under rider 75 might increase. In its letter, Ohio Edison explained that the frequency of interruptions is impacted by several factors. It specifically noted mild

weather conditions experienced in recent years, recent changes in the wholesale markets, the entry of Ohio Edison's parent company into Midwest Independent Transmission System Operator (MISO), growing uncertainty of prices in various markets, and growth in use of electricity. (Elyria Foundry Ex. 1, at 4, and at SK Ex. 1.) During 2005, Elyria Foundry experienced 44 economic interruptions, or four times the prior annual maximum (Tr. I at 13).

B. Assertions by Elyria Foundry

Elyria Foundry makes a variety of related allegations as to why the Commission should find in its favor. Elyria Foundry points out that Rider 75 does not include a definition of either incremental revenues or incremental expenses. It complains that, instead of a definition in the rider itself, Ohio Edison adopted its 2001 policy, which was never filed with or approved by the Commission and which, by its effect, determined the definitions of those terms. Elyria Foundry alleges that Rider 75, as effectuated by the 2001 policy, is unreasonably prejudicial in its treatment of interruptible customers, unreasonably results in sales of excess energy during interruptions, and causes an unreasonable number and length of interruptions due to the aggregation of all customers, and the assignment of low cost resources to customers of its unregulated affiliate, thereby forcing the interruptible Ohio Edison customers to subsidize the customers of FES.

1. Need for Commission Approval of 2001 Policy

Elyria Foundry, initially, complains that the 2001 policy was not filed with the Commission, approved by the Commission, or publicly noticed (Elyria Foundry Ex. 2, at 6; Tr. I at 182; Elyria Foundry Initial Brief at 19-20). Elyria Foundry argues that the 2001 policy should have been approved under either Section 4909.18 or Section 4905.31, Revised Code, and that it should have been publicly noticed under Section 4905.30, Revised Code. The Commission disagrees.

Section 4909.18, Revised Code, addresses the filing of applications for Commission approval of the establishment or modification of rates and services. The evidence in this proceeding clearly shows that the interruptible program was approved by the Commission, as set forth in Ohio Edison's tariffs. The 2001 policy was merely a documentation of the company's internal operational standards. Therefore, a tariff amendment application under Section 4909.18, Revised Code, was unnecessary.

Section 4905.31, Revised Code, relates to certain "arrangements" among public utilities or between a public utility and its customers, consumers, or employees providing for, among other things, stipulated variations in costs. Once again, this is inapplicable to the present situation.

Section 4905.30, Revised Code, requiring the filing of all rates and charges, and rules and regulations affecting them, is also inapplicable. The Commission finds that the matters covered by the 2001 policy were not "rules and regulations" affecting rates. The 2001 policy merely documented Ohio Edison's internal means of implementing its approved tariffs.

2. Unreasonable Prejudice Caused by 2001 Policy

The 2001 policy provides that an interruption will be called, basically, when incremental out-of-pocket costs to supply power exceed a given strike price. That strike price was, during the time period covered by Elyria Foundry's complaint, \$65.00 per mWh (or \$0.065 per kWh). Under that policy, whenever an economic interruption is to be called, all interruptible customers will be interrupted, regardless of the rate the individual customer is paying. According to the testimony of Mr. Oulette, a witness on behalf of Ohio Edison, the lowest price paid by an Ohio Edison customer under Ohio Edison's interruptible tariffs is in the range of three or four cents per kWh. (Ohio Edison Ex. 1 at Ex. SEO-4; Tr:I at 168-172.)

Elyria Foundry submits that, by interrupting all interruptible customers at the same time, Ohio Edison is in violation of Section 4905.35, Revised Code (Elyria Foundry Initial Brief at 29). That section provides that no public utility may give any undue or unreasonable preference or advantage to any person, or subject any person to any undue or unreasonable prejudice or disadvantage. Elyria Foundry's contention is that, when customers are paying different rates and are being interrupted at the same strike price, those customers receive different advantages. That is, a customer paying 3.25 cents per kWh and being interrupted at 6.5 cents per kWh receives a 100% (3.25 cents per kWh) advantage (as compared with the minimum point at which the tariff language would allow interruption), while a customer paying 5.135 cents per kWh would only be able to have its revenues exceeded by 25% before it is interrupted. (Elyria Foundry Ex. 2, at 35-36.)

Ohio Edison disputes Elyria Foundry's approach. Ohio Edison argues that discrimination is unlawful under Section 4905.35, Revised Code, only where similarly situated customers of a utility are treated differently or where dissimilarly situated customers or a utility are treated the same. It points out that dissimilar treatment of customers of different utilities is not covered by the statute. It also argues that Ohio Edison's pricing under its interruptible tariff is based on "billing determinants such as hours use, power factor, voltage, size of measured demand, on-and off-peak splits of energy consumption, and the portion of the customer's total load that can be interrupted." (Ohio Edison Ex. 2, at 18.) Therefore, Ohio Edison contends, the Commission should not look for discrimination by comparing the rates of differently situated customers.

The Commission does not find any evidence of prejudicial treatment in violation of Section 4905.35, Revised Code. Ohio Edison, by applying the same strike price to all interruptible customers, is interrupting those customers at the same times and for the same

duration. To apply different strike prices to customers with different rate structures could also be viewed, by some, as prejudicial. We feel that, in light of the wide variety of billing determinants and circumstances of individual customers, a reasonable choice in this particular circumstance is to apply a single strike price, based on Ohio Edison's incremental costs and resources. Elyria Foundry has not presented sufficient evidence to convince us that Ohio Edison's approach in this circumstance is unlawfully prejudicial or discriminatory.

3. Unreasonable Charges Under 2001 Policy for Periods During Which Ohio Edison was Making Hourly Wholesale Sales

Elyria Foundry also contends that, in violation of Section 4905.22, Revised Code, prohibiting unreasonable charges, Ohio Edison's 2001 policy results in Ohio Edison having extra power available for wholesale sales, during times when economic interruptions have been called. According to Elyria Foundry, customers may be interrupted "while there is extra energy available on the system" or extra energy may become available "because of the interruption itself" and Ohio Edison may sell this extra energy at wholesale. Elyria Foundry asserts that, because Ohio Edison "should not profit by requiring more economic interruptions than needed[,] . . . the revenue collected should go to the [interruptible] customers as an offset to the economic interruption that was called." (Elyria Foundry Ex. 2 at 20-23.)

Ohio Edison disputes Elyria Foundry's opinion on this topic. Citing the testimony of Mr. Idle on its behalf, Ohio Edison explains that, during an economic interruption, Ohio Edison may sell hourly energy into the market for one of several reasons, including planning for the next day's resources through purchases of 16-hour blocks, unanticipated changes in load for reasons such as weather or curtailments, or reliability dispatches by MISO. Mr. Idle summarized the situation, stating that "energy portfolio management is not an exact science. The goal is to match as closely as possible the resources with the obligations. Obviously there will be times when circumstances prevent a perfect match and FES may have to sell back into the market for short periods of time during an economic buy through event." (Ohio Edison Ex. 2, at 15-16; Ohio Edison Initial Brief at 14-15.)

Ohio Edison's tariff provides that it may call an economic interruption in the event that incremental revenues to be received from the interruptible customer are less than the anticipated incremental expense to supply the power for that period. If an interruption is called, there is nothing in the tariff to prevent Ohio Edison from making business decisions to sell power, as in the circumstances noted by Mr. Idle. The company may find itself in the position of having surplus power for an unanticipated reason or, for various operational reasons, may need to enter into a sale transaction. This is neither unreasonable nor a violation of law, regulation, tariff, or guideline.

4. Unreasonable Interruptions Result from Ohio Edison's Prioritization of Service

Elyria Foundry advances the proposition that Ohio Edison improperly defines its incremental costs to supply Elyria Foundry and, therefore, unreasonably and incorrectly prioritizes service to its various customers.

As pointed out by Elyria Foundry, Rider 75 does not specifically define the term "incremental expense to supply" (Elyria Foundry Ex. 2, at 5). Ohio Edison discussed the manner in which it determines the "incremental expense to supply" Elyria Foundry. It explained that it purchases all of its power requirements through a purchase sales agreement (PSA) approved by FERC. According to Ohio Edison, the PSA provides that FES will supply all of Ohio Edison's requirements at a price calculated under a defined formula that, basically, allocates the cost of purchased power "based on the percentage of all purchased power by FES that was used to serve all Ohio Edison obligations." (Ohio Edison Ex. 2, at 6-7.) The formula in the PSA, specifically, charges Ohio Edison a set price per kilowatt for capacity, plus a set price per mWh for energy, plus applicable taxes, plus an adjustment for purchased power. That purchased power adjustment is the part of the charge that is relevant in this proceeding. To determine the adjustment for purchased power, FES calculates Ohio Edison's power supply requirements for a given month and divides that amount by FES's total power supply delivered during that month to the entire control area covered by all FE operating companies. This fraction is then multiplied by the dollar value of all purchased power delivered within the FE control area during that month. Ohio Edison is thereby charged for its proportionate amount of all purchased power delivered by FES. (Ohio Edison Ex. 2 at CJI-1 page 10; Tr. I at 72.) Thus, and critically for this case, the "obligations" that are considered, in determining whether to call an economic interruption, include all power deliveries by FES into the FE control area, whether sold under the PSA or otherwise. (See, also, Tr. II at 27, 53)

According to Elyria Foundry, the term "incremental expense to supply" should mean "the lowest additional cost to be incurred to supply interruptible customers - after the lowest possible costs have been assigned to firm Retail customers." (Elyria Foundry Ex. 2, at 6 [emphasis omitted].) Elyria Foundry complains that, under the 2001 policy, Ohio Edison determines the level of the incremental expense to serve Elyria Foundry only after FES has satisfied its entire wholesale and competitive load. Elyria Foundry believes that this is an incorrect prioritization of service. Elyria Foundry contends that this prioritization results in the "streaming" of FES's costs to interruptible customers. (Elyria Foundry Ex. 2, at 7; Elyria Foundry Ex. 5, at 2; Elyria Foundry Initial Brief at 22, 25.)

Ohio Edison's view is that the PSA is the proper place to find Ohio Edison's incremental expense. Specifically, Ohio Edison's witness Idle stated that "incremental expense is the last group of costs associated with the last purchase of energy used to meet the last block of demand. For purposes of defining incremental cost during an economic

buy through event, the price of power being purchased to serve that portion of a customer's interruptible load that it chooses not to curtail is the incremental expense to [Ohio Edison]." (Ohio Edison Ex. 5, at 6.) Responding to Elyria Foundry's contention that, from a prioritization standpoint, interruptible customers should not be interrupted when lower cost resources are supplying FES's wholesale or competitive load, Ohio Edison's witness maintained that "interruptible load is, by definition, non-firm load. . . . The bottom line is that you cannot treat a non-firm load such as interruptible load as if it were firm load. To do so would defeat the purpose of having interruptible load." (Ohio Edison Ex. 2, at 17-18.)

As noted, the provisions of Rider 75 do not specifically address a definition for "incremental expense to supply." At page 6 of 12 of that rider, Ohio Edison "reserves the right to interrupt service to the customer's interruptible load whenever the incremental revenue to be received from the customer is less than the anticipated incremental expense to supply the interruptible energy for the particular hour(s) of the interruption request." The Commission finds that it is appropriate for Ohio Edison to determine its incremental expense to serve its interruptible customers on the basis of the pricing formula in the PSA. Although the PSA only requires the calculation of charges on a monthly basis, that PSA formula is an actual determination of costs to Ohio Edison. If an interruptible customer chooses to curtail its usage or purchase its power requirements from another supplier during an interruption, the amount of power purchased under the PSA will be reduced by that amount. On the other hand, if an interruptible customer, such as Elyria Foundry, chooses to buy through the interruption, Ohio Edison's costs under the PSA will increase by the amount of the buy-through. Thus, the pricing formula in the PSA is a true measure of incremental expenses.

The tariff provision must also be read in the context of the Commission's general consideration of interruptible service provision and the guidelines that resulted from that consideration. *In the Matter of Interruptible Electric Service Guidelines, Pursuant to the Agreement by Participants in the Commission Roundtable on Competition in the Electric Industry*, Case No. 95-866-EL-UNC. While those guidelines do not specifically address the precise question at issue in this case, they do reflect the Commission's recognition that the key to interruptible programs is the distinction between firm and interruptible service. For example, guideline 5(a) provides that, in seeking to obtain replacement energy during an interruption, the provider "shall use its best efforts to obtain and deliver the lowest cost replacement electricity, excluding that obtained for firm electric service customers, for each interruptible electric service class." Similarly, in its finding and order in phase two of its consideration of the guidelines, the Commission noted that "[e]ach utility has an obligation to maintain system integrity and service to firm . . . customers, and it is important to remember that [interruptible] customers receive substantial discounts for accepting risk of service interruption." Finding and Order (December 22, 1998), 8-9. The Commission believes now, as it did then, that interruptible service should not be prioritized, from an economic point of view, ahead of any firm service. Thus, the Commission also finds that it is not unreasonable to consider all of the obligations of FES, including sales that are made

by FES outside of the PSA, in the determination of the incremental cost to Ohio Edison of serving interruptible customers.

Finally, the Commission would note that, according to the testimony in this proceeding, Elyria Foundry saved approximately \$450,000 in 2005, as a result of participating in the interruptible program (Ohio Edison Ex. 1, at 5; Tr. I at 203). The Commission finds it difficult to imagine how unreasonable the implementation of the program can be, when the customer, having hedged its bets through its participation in the interruptible program, has ended up with a substantial economic advantage.

C. Conclusion

The Commission finds that Ohio Edison's interruptible program, as set forth in its tariffs and as implemented by Ohio Edison, is not unreasonable or prejudicial. The Commission further finds that Ohio Edison did not violate any applicable statutes or regulations in its implementation of Rider 75.

The Commission also notes, however, that Rider 75 requires, by its terms, three years' prior written notice if a covered customer wishes to return to firm service, "consistent with system planning criteria." This notice requirement parallels the Commission's guidelines. Rider 75 further provides that, upon mutual agreement, customers may return to firm service with less than three years' notice, provided that the customer will be billed for applicable firm service plus any reasonable additional costs incurred in providing such service, until the three-year notice period is fulfilled. The Commission finds that, since we initially discussed the notice period in our adoption of the guidelines in 1996, the electric industry has undergone substantial changes, with electric restructuring and the advent of regional transmission organizations such as MISO, causing utilities to invoke economic interruptions more often than had then been contemplated. Therefore, the Commission finds that Ohio Edison should provide all of its interruptible customers a one-time, 90-day opportunity to return to firm pricing and that, for this one-time opportunity, the "reasonable additional costs" of such service, as provided for in the tariff, should be deemed to be zero. In order to accomplish this, within 90 days from the date of this opinion and order Ohio Edison shall send a notice to all of its interruptible customers, informing them that, for a period of 90 days from the date of the notice, Ohio Edison will agree to allow a return to firm electric service without the three-year notice set forth in Tariff 75, at the applicable firm electric service rate. Based on the facts of this case, it appears that the same interruptions were called in all three FE operating companies in Ohio. Therefore, this same requirement shall apply to each of the other FE operating companies in Ohio.

Any arguments made by parties and not addressed in this opinion and order are denied.

FINDINGS OF FACT AND CONCLUSIONS OF LAW:

- (1) Ohio Edison is an electric light company, as defined in Section 4905.03(A)(4), Revised Code, and is a public utility as defined by Section 4905.02, Revised Code.
- (2) Elyria Foundry was an industrial customer of Ohio Edison, purchasing firm power and interruptible power during the period from January 1, 2005, through December 31, 2005.
- (3) Ohio Edison is required by Section 4905.22, Revised Code, to furnish necessary adequate service and facilities, and to furnish and provide such instrumentalities and facilities as are adequate and in all respects just and reasonable.
- (4) Elyria Foundry filed a complaint against Ohio Edison on June 20, 2005. A public hearing was held on June 28, June 29, and August 16, 2006.
- (5) The burden of proof in a complaint proceeding is on the complainant. *Grossman v. Public Utilities Commission*, 5 Ohio St.2d 189, 214 N.E.2d 666 (1966).
- (6) Elyria Foundry has not provided sufficient evidence that Ohio Edison's charges, under its Rider 75, violated any applicable statute, regulation, or guideline, or that Ohio Edison failed to comply with any filing or notice requirement concerning its implementation of Rider 75.
- (7) Ohio Edison should be required to allow its interruptible customers a 90-day opportunity to return to firm service without the required three-year notice.

ORDER:

It is, therefore,

ORDERED, That the complaint of Elyria Foundry be dismissed. It is, further,

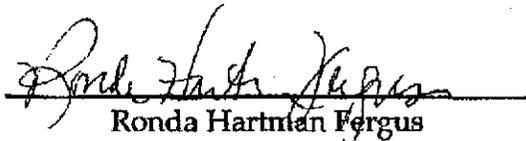
ORDERED, That Ohio Edison shall notify its interruptible customers of their 90-day opportunity to return to firm service, as discussed in this opinion and order. It is, further,

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

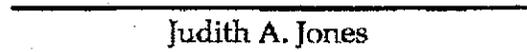
THE PUBLIC UTILITIES COMMISSION OF OHIO



Alan R. Schriber, Chairman



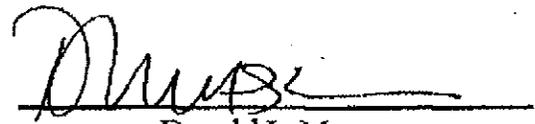
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Judith A. Jones



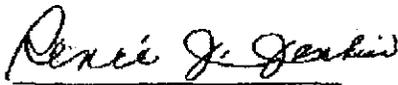
Valerie A. Lemmie



Donald L. Mason

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Entered in the Journal
JAN 17 2007



Renee J. Jenkins
Secretary

- (4) On February 16, 2007, Elyria Foundry filed an application for rehearing and a memorandum in support of that application, setting forth 22 assignments of error. These assignments of error were discussed by Elyria Foundry in seven general areas of concern:
- (a) Two grounds for rehearing relate to the necessity for Commission approval of the 2001 policy (2001 policy) setting forth Ohio Edison's internal guidelines for the calling of economic interruptions under rider 75.
 - (b) Four grounds for rehearing relate to Ohio Edison's use of a single strike price for all interruptible customers.
 - (c) Five grounds for rehearing relate to the definition and measurement of incremental expense and the resultant prioritization of customers.
 - (d) Four grounds for rehearing relate to the inclusion of all obligations of First Energy Services, Inc. (FES), in the determination of incremental expense.
 - (e) Five grounds for rehearing relate to Ohio Edison's failure to allocate expenses.
 - (f) One ground for rehearing relates to the Commission's consideration of savings by Elyria Foundry.
 - (g) One ground for rehearing relates to the Commission's conclusion.
- (5) On February 26, 2007, Ohio Edison filed a memorandum contra Elyria Foundry's application for rehearing. In that document, Ohio Edison points out that Elyria Foundry, in its application for rehearing, "raises no facts, issues or arguments that have not already been raised by Complainant in its briefs and considered and rejected by the Commission." Ohio Edison categorizes the 22 assignments of error into three categories: statutory filing requirements, alleged discriminatory treatment of Elyria Foundry, and interpretation and implementation of the Power Supply Agreement (PSA). Ohio Edison argues that each of the assignments of error should be rejected.

- (6) The Commission will consider the grounds for rehearing in the seven general groups in which they were discussed by Elyria Foundry.
- (7) The first general group, as noted above, relates to Elyria Foundry's argument that the Commission should have required that the 2001 policy be filed with and approved by the Commission pursuant to Sections 4909.18 and 4905.30, Revised Code. Having pointed out that Section 4909.18, Revised Code requires approval of practices that "affect rates," Elyria Foundry submits that the 2001 policy "affected Elyria Foundry's rates by setting forth the prerequisites and practices for noticing economic interruptions during which higher priced replacement power costs . . . was [sic] the result." (App. Reh. at 6.) Elyria Foundry continues with the assertion that the 2001 policy "substantively supplanted" the terms of rider 75 "by setting incremental revenues at \$65/MWh for all interruptible program participants of [Ohio Edison, CEI, and Toledo Edison]." (App. Reh. at 7.) Elyria Foundry also suggests that the 2001 policy required Commission approval because it applied to customers of more than just Ohio Edison, in contrast to the terms of Ohio Edison's rider 75.
- (8) Ohio Edison, in its memorandum contra, asserts that the 2001 policy did not render any part of rider 75 inapplicable and, thus, does not "affect the rate." It stresses that the 2001 policy does not change the rider but, rather, "mirrors" it, pointing out three areas of consistency: the strike price, the duration of the event giving rise to an interruption, and the application of the interruption to all customers at the same time. In addition, Ohio Edison points out that rider 75 is permissive, not mandatory.
- (9) Section 4909.18, Revised Code, requires Commission approval of modifications of practices "affecting" rates. Section 4905.30, Revised Code, similarly requires the filing of all rules and regulations "affecting" rates. Thus, to determine whether or not a document must be filed and approved, we must evaluate whether it "affects" rates.
- (10) Under Rider 75, Ohio Edison "reserves the right to interrupt service to the customer's interruptible load" when, for at least one hour, the cost to supply the incremental load is greater than

the revenues to be received for supplying such load. It is critical to understand that rider 75 is not mandatory. Ohio Edison could, under the rider's terms, decide not to interrupt an interruptible customer and, even during a period when an interruption was permissible, still be in compliance with its own tariffs. The 2001 policy was a documentation of internal operating procedures regarding when the decision to interrupt might be made. It is true that the policy was designed to trigger interruptions only when the economic situation was such that all interruptible customers would be interrupted. However, no interruptible customer was being interrupted when the rider applicable to it would not allow for interruption. (Of course, this statement assumes that Ohio Edison correctly applied rider 75, but that is the subject of separate grounds for rehearing.) As the 2001 policy did not negate any of the requirements in rider 75 and, additionally, specifically allowed for interruption as soon as triggered under the rider, we find the 2001 policy did not affect rates. Therefore, the filing and approval requirements of Section 4909.18 and 4905.30, Revised Code, were inapplicable. The first and second grounds for rehearing should be denied.

- (11) The second group of grounds for rehearing relates to the alleged prejudicial impact of the use of a single strike price. Elyria Foundry cites Section 4905.35, Revised Code, for the proposition that Ohio Edison's use of one strike price under the 2001 policy resulted in undue or unreasonable prejudice or disadvantage that was contrary to law. To support its assertion, Elyria Foundry points to the different impact the 2001 policy has on customers taking service under Ohio Edison's three interruptible service riders. Its argument revolves around the fact that the 2001 policy results in an interruption not being called at the lowest strike price possible for individual customers. The impact of this policy is that customers paying different rates experience different benefits from the single strike price. Elyria Foundry argues that this difference is prohibited by Ohio law.
- (12) Ohio Edison disagrees. It notes, initially, that Elyria Foundry's discrimination argument has varied over time. Therefore, it addresses all scenarios that have been argued by Elyria Foundry. Ohio Edison first submits that any possible discrimination among customers served by different, but affiliated, operating companies, as argued by Elyria Foundry during the hearing and

briefing stages, would not be covered by Section 4905.35, Revised Code, as the statute refers to actions of a single utility. With regard to discrimination among customers under various riders offered by Ohio Edison, Ohio Edison argues that those customers are not similarly situated, as "the prices charged these customers are based on factors such as billing determinants, rate structure and rate schedule eligibility . . ." (Mem. Con. At 8-9.) Finally, regarding discrimination among customers taking service under rider 75, Ohio Edison points out that all customers pay the same rate unless they take service at a different voltage. Hence, it argues, all similarly situated customers are treated the same.

- (13) We find no error with regard to this group of grounds for rehearing. The argument in the application for rehearing focuses on the different rates paid by customers taking interruptible service under riders 73, 74, and 75. Those riders were developed to serve customers in various circumstances, as described by Elyria Foundry itself. In this situation, the Commission finds that the different results caused by the 2001 policy were not undue or unreasonable. Similarly, any variation in rates charges under rider 75 itself were, as noted by Elyria Foundry, based on the voltage level of the service received. Hence, customers experiencing different impacts from the 2001 policy were, by definition, differently situated. Finally, we agree with Ohio Edison that customers of different operating companies should not be compared for purposes of Section 4905.35, Revised Code. Grounds three, four, five, and six should be denied.
- (14) The third group of grounds for rehearing relates to Elyria Foundry's concern regarding the definition and measurement of incremental expense and the resultant prioritization of customers. Disagreeing with the Commission's use of exhibit A to the power supply agreement (PSA) to determine incremental expenses, Elyria Foundry argues that incremental expenses of Ohio Edison must be measured prior to the competitive market load of FES. Elyria Foundry points out that rider 75 states that the incremental cost for regulated interruptible load is priced right after regulated firm load. It asks that "incremental expense to supply" be defined as "the lowest additional cost incurred to supply retail interruptible customers after the lowest possible costs were assigned to firm retail customers." (App. Reh. at 17.)

- (15) Ohio Edison responds, explaining that exhibit A to the PSA governs the incremental expense incurred by Ohio Edison for any power purchased on its behalf by FES. Further, it addresses the argument relating to the pricing priority under rider 75's terms, noting that rider 75 was implemented prior to the restructuring of the electric industry and, thus, prior to the time when FES could make competitive retail sales. It also points out that even Elyria Foundry agrees that Ohio Edison was required to meet a particular firm wholesale commitment, contrary to Elyria Foundry's statement that interruptible customers should be prioritized immediately after firm retail customers.
- (16) We find no error on this issue. As we stated in our opinion and order in this proceeding, interruptible service should not be prioritized ahead of any firm service. Although the electric industry has been restructured since the implementation of rider 75, we do not believe that restructuring changed the intent that the incremental cost to serve interruptible customers would be calculated on the basis of numbers that include the cost of all firm electric service. Thus, we find that the measurement of incremental cost by reference to charges for purchased power under exhibit A of the PSA results in a reasonable outcome. Grounds seven, eight, nine, ten, and eleven will be denied.
- (17) The fourth group of grounds for rehearing relates to the inclusion of all obligations of FES, in the determination of incremental expense. Elyria Foundry suggests that the Commission incorrectly ordered that the measurement of incremental expenses shall consider all obligations of FES and relied on an inapplicable portion of the interruptible service guidelines to support its decision. It also submits that the Commission's interpretation conflicts with its prior interpretation, set forth in the approval of other utilities' interruptible riders.
- (18) We first emphasize that Elyria Foundry misstated the Commission's finding in the opinion and order. We did not order that the incremental expense "shall" consider all obligations of FES. Rather, we stated that "it is not unreasonable to consider all of the obligations of FES . . ." Opinion and Order at 9. In addition, our reference to guideline 5(a) was specifically identified in the opinion and order as merely an example of the

distinction between firm and interruptible service. Opinion and Order at 9. Nowhere did we state that the referenced guideline referred to the "determination of anticipated incremental expenses for noticing economic interruptions."

- (19) As we noted in the opinion and order, the PSA controls the actual incremental costs experienced by Ohio Edison. Nothing in rider 75 regulates how Ohio Edison is to obtain the power upon which incremental costs are determined. Ohio Edison's decision to enter into the PSA with FES is not at issue. Under that PSA, the incremental cost of purchased power can be calculated by reference to exhibit A of the PSA.
- (20) We would also note that the thirteenth ground for rehearing suggests that Elyria Foundry "never assumed the risks of service interruptions to enable FES to sell approximately 3,000 MW of competitive generation when its costs exceeded forecasted prices, or resulted in less planned for resources than actual loads. [sic]" In agreeing to interruptible service, Elyria Foundry "assumed the risk" that Ohio Edison's costs might sometimes exceed the rates that Elyria Foundry was paying. However, Ohio Edison made no promises to Elyria Foundry regarding the source of its power. Assignments of error 12 through 15 should be denied.
- (21) In the fifth group of grounds of rehearing, Elyria Foundry attempts to show that Ohio Edison's calculations of incremental costs were incorrect in that they failed to allocate the cost per MWh based on the percentage of total purchased power consumed by Ohio Edison's customers. Ohio Edison responds that Elyria Foundry's mathematical argument is in error.
- (22) The Commission agrees with Ohio Edison on this issue. As stated by Ohio Edison in its memorandum contra, "if the total cost is to be allocated based on the percentage of consumption to get the unit cost, so too must the volume." Ground for rehearing 16 through 20 will be denied.
- (23) Elyria Foundry's ground for rehearing number 21 asserts that the Commission should not have found that \$450,000 in savings "established compliance with and reasonable administration of Rider 75 . . ." The Commission only noted the savings that were experienced by Elyria Foundry. It did not rely on those savings

to establish compliance. This ground for rehearing will be denied.

- (24) Elyria Foundry's final ground for rehearing is merely a summary, stating its belief that it presented evidence sufficient to meet its burden of proof in this proceeding. This ground for rehearing will be denied for all the reasons set forth previously in this entry on rehearing.

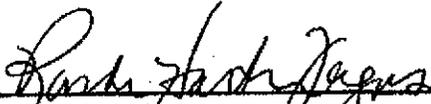
It is, therefore,

ORDERED, That Elyria Foundry's application for rehearing be denied. It is, further,

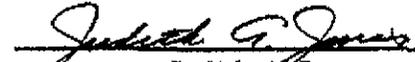
ORDERED, That a copy of this opinion and order be served upon all parties of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO

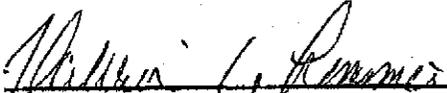
Alan R. Schriber, Chairman



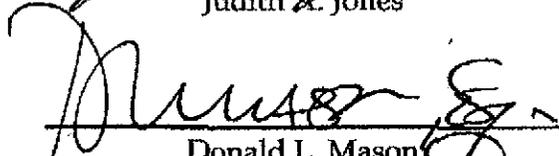
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- (4) On February 16, 2007, Elyria Foundry filed an application for rehearing and a memorandum in support of that application, setting forth 22 assignments of error. On February 26, 2007, Ohio Edison filed a memorandum contra Elyria Foundry's February application for rehearing. On March 14, 2007, the Commission issued an entry on rehearing, denying all 22 grounds for rehearing.
- (5) On April 4, 2007, Elyria Foundry filed a second application for rehearing (second application). In that pleading, Elyria Foundry suggests that there are five grounds for finding that the Commission's entry on rehearing was unlawful or unreasonable. Specifically, Elyria Foundry argues in favor of the following grounds:
- (a) The Commission erred by denying rehearing without complying with R.C. 4903.09 to provide *[sic]* the factual basis and reasoning used for agreeing with the Ohio Edison position.
 - (b) The Commission erred in denying rehearing by agreeing with the unreasonable position of Ohio Edison to allocate volume by MWH.
 - (c) The Commission erred in denying rehearing by allowing, contrary to its findings, Ohio Edison to call for economic interruptions without determining its incremental costs under the PSA formula of Exhibit A.
 - (d) The Commission erred in denying rehearing by agreeing with the unreasonable position of Ohio Edison to notice economic interruptions based on the total cost of purchase power provided by FirstEnergy Solutions.
 - (e) The Commission erred by agreeing with the unreasonable position of Ohio Edison to notice economic interruptions based on total purchased power costs, even though almost 20% of those total costs were absorbed by FES and not charged under the PSA formula.

(Second App. for Reh. at 1-2.)

- (6) Ohio Edison did not file a memorandum contra the second application. However, it did file, on April 10, 2007, a motion to strike Elyria Foundry's second application. In that motion, Ohio Edison argues that the second application is improper because "it raises nothing not already argued" by Elyria Foundry. On this point, Ohio Edison explains that the statutory procedures for the review of Commission orders "do not include a second application for rehearing simply because the Commission disagrees with the arguments set forth by a party in its initial application for rehearing." (Mem. in Support at 2.) Ohio Edison contends, in the memorandum in support of its motion to strike, that Elyria Foundry's argument relating to Section 4903.09, Revised Code, is improper and should also be stricken.
- (7) On April 17, 2007, Elyria Foundry filed a memorandum contra the motion to strike.
- (8) In analyzing the pleadings currently before us, the first issue is whether or not the second application for rehearing was appropriately filed. Elyria Foundry, citing precedent to support its position, contends that multiple rehearing applications are not only allowed under Section 4903.10, Revised Code, but are necessary to preserve issues for appeal. Ohio Edison submits that Elyria Foundry has raised no issue that was not previously addressed by the Commission and, therefore, that Elyria Foundry had no right or need to file a second application for rehearing.
- (9) Elyria Foundry's first citation to apparent precedent is misplaced. Elyria Foundry notes that the Commission considered multiple applications for rehearing in *In the Matter of the Application of The Cincinnati Gas & Electric Company to Modify its Non-Residential Generation Rates to Provide for Market-Based Standard Service Offer Pricing and to Establish an Alternative Competitively Bid Service Rate Option Subsequent to Market Development Period*, Case No. 03-93-EL-ATA et al. Although Elyria Foundry is correct that the Commission considered multiple applications for rehearing in that proceeding, the situation is not analogous to the present one. In the cited case, the Commission had made substantial changes to its order as a result of the first application on rehearing, giving rise to the possibility for a second such application. In the present case, the

Commission's response to the first application for rehearing was a total denial. No changes were made. Thus, this precedent does not support Elyria Foundry's position.

- (10) Elyria Foundry's second citation to precedent is more relevant. The Supreme Court of Ohio considered the need to file multiple applications for rehearing in *Discount Cellular, Inc. v. Pub. Util. Comm.*, 112 Ohio St. 3d 360, 375-6 (2007). The court, in that case, stated that the Commission had substantively erred in its entry on rehearing when it cited, for the first time in its rehearing order, an additional reason for dismissing the complaint. The court, however, found that the appellant failed to preserve that issue for appeal because it did not file a second application for rehearing, challenging the substantive error. Thus, the court's holding clarifies that an allegation that a new error was made in an entry on rehearing, where that allegation could not have been made previously, can be the subject of a subsequent application for rehearing, even when the entry on rehearing denied rehearing on all grounds.
- (11) Finally, Elyria Foundry quotes, at some length, the court's language from a 1988 opinion considering the appeal of a Commission order. In *Senior Citizens Coalition v. Pub. Util. Comm.*, 40 Ohio St.3d 329 (1988), the court explained that the rehearing process is an integrated whole and that the window, during which appeals may be filed with the court, commences only after a rehearing where no subsequent rehearing application is filed. Elyria Foundry appears to cite this case as proof of its right to file this particular second application. However, the case does not address the propriety of claims made in sequential applications for rehearing, only showing that, in some circumstances, multiple applications for rehearing may be permissible. Thus, it is not helpful in our analysis of the situation.
- (12) We find that the *Discount Cellular* opinion is instructive in this situation. That opinion shows that an error that arose in an entry on rehearing can give rise to a subsequent application for rehearing. However, it is clear that the case does not say that the Commission's mere disagreement with a party's position is such an error. A party's claim that an error has been made on a substantive issue, with which the Commission disagreed, was

preserved for appeal to the court by the filing of the previous application for rehearing, making the new filing superfluous. Thus, only if a claimed error arose for the first time in the entry on rehearing, whether by the granting of rehearing and resultant modification of the underlying order or by the Commission erring in some new manner in the entry, is that claim an appropriate ground for a second application for rehearing.

- (13) With an understanding of the applicable law, we can now consider Ohio Edison's motion to dismiss the second application. We will consider each ground for rehearing set forth in the second application and review it in light of the standard just discussed.
- (14) Elyria Foundry's first ground for rehearing claims that the content of the entry on rehearing was statutorily deficient. That is an argument that could not have arisen previously. Therefore, Elyria Foundry can only preserve this issue for appeal by filing an application for rehearing. This ground for rehearing, therefore, should not be stricken.
- (15) Elyria Foundry's second, third, fourth, and fifth grounds for rehearing in the second application are restatements of the fifth group of grounds in the first application for rehearing (grounds then numbered 16 through 20). They are specifically based on the Commission's agreement, in the entry on rehearing, with the position taken by Ohio Edison in its memorandum contra the first rehearing application. In the last ground, Elyria Foundry even makes specific reference to grounds 16 through 20 in the first application. These are not new issues. By raising them again, Elyria Foundry is merely attempting to reargue issues about which the Commission has already denied rehearing. Therefore, these grounds for rehearing should be stricken.
- (16) We will now consider the substance of the one proper ground for rehearing. As noted above, Elyria Foundry contends that the Commission's entry on rehearing was deficient. Section 4903.09, Revised Code, the basis for Elyria Foundry's contention, provides that "[i]n all contested case heard by the public utilities commission, a complete record of all of the proceedings shall be made, including a transcript of all testimony and of all exhibits, and the commission shall file, with the records of such cases,

findings of fact and written opinions setting forth the reasons prompting the decisions arrived at, based upon said findings of fact." Elyria Foundry contends that the Commission, in the entry on rehearing, "failed to set forth some factual basis and the reasoning used in reaching its conclusion to deny rehearing Grounds 16-20 as required by R.C. 4903.09."

- (17) Elyria Foundry is incorrect in its reading of Section 4903.09, Revised Code. This statute requires the Commission, in all contested cases, to create a complete record of the basis for its opinion. Such a record must include testimony, exhibits, findings of fact and a written opinion setting forth the rationale for the decisions, which rationale is to be based on the findings of fact. This was done, in this proceeding, in the opinion and order. The statute does not require the Commission to restate its decision or to include any particular level of detail in an entry on rehearing. In fact, Section 4903.10, Revised Code, specifically provides for the possibility that the Commission might not issue any entry at all, pursuant to an application for rehearing, as such applications may be denied by operation of law. Thus, it cannot be an error for an entry denying rehearing not to include "some factual basis and the reasoning used . . .," as suggested by Elyria Foundry. The case cited by Elyria Foundry to support its reading is also helpful in understanding the meaning of Section 4903.09, Revised Code. In that opinion, the Supreme Court of Ohio, citing prior decisions, noted that the purpose of this section is to ensure that it will be able to determine whether the facts found by the Commission lawfully and reasonably justify the conclusions reached. *Tongren v. Pub. Util. Comm.*, 85 Ohio St.3d 87 (1999). In the present proceeding, the Commission's findings of fact and legal rationales are duly set forth in the opinion and order. No further compliance with Section 4903.09, Revised Code, is required. Therefore, rehearing will be denied.

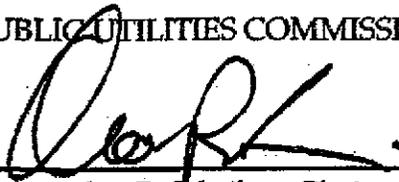
It is, therefore,

ORDERED, That rehearing on Elyria Foundry's first claimed ground be denied. It is, further,

ORDERED, That Elyria Foundry's second, third, fourth, and fifth grounds for rehearing be stricken. It is, further,

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

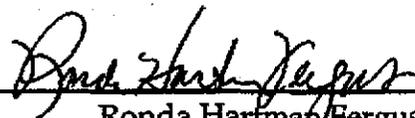
THE PUBLIC UTILITIES COMMISSION OF OHIO



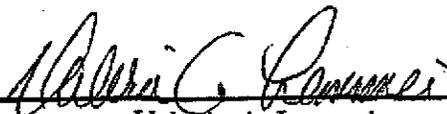
Alan R. Schriber, Chairman



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Ronda Hartman Fergus



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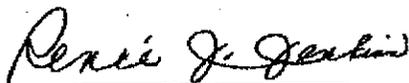


Donald L. Mason

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Entered in the Journal

MAY 02 2007



Renee J. Jenkins

Renee J. Jenkins
Secretary

BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

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In the Matter of the Complaint of Elyria
Foundry Company,

Complainant

V.

Case No. 05-796-EL-CSS

Ohio Edison Company

Respondent

APPLICATION FOR REHEARING
BY ELYRIA FOUNDRY COMPANY

Elyria Foundry Company]["Elyria Foundry"] applies for rehearing, pursuant to ORC Sec. 4903.10 and Ohio Administrative Code Section 4901-1-35, from the Opinion and Order, dated January 17, 2007, ["Opinion and Order"] by the Public Utilities Commission of Ohio ["Commission"] in this proceeding to assert the following grounds that the Opinion and Order is unlawful or unreasonable, in that:

GROUNDS FOR REHEARING

1. The Commission erred by not finding that ORC Sec. 4909.18 required Ohio Edison to apply for and receive approval of its "2001 Policy" used to establish or modify a regulation or practice affecting Rider 75 rates. [O&O at 5]
2. The Commission erred by not finding that ORC Sec. 4905.30 required Ohio Edison to file as a schedule its "2001 Policy" as it contains the rules and regulations affecting Rider 75 rates. [O&O at 6]
3. The Commission erred by not finding that Ohio Edison's use of a single strike price resulted in undue or unreasonable prejudice or disadvantage under ORC Sec. 4905.35 because Elyria Foundry received the same service priority at higher rates

A-36

for the same risks of interruptions as paid for by lower priced interruptible customers. [O&O at 7]

4. The Commission erred by finding that different strike prices applied to customers with different rate structures could be viewed as prejudicial. [O&O at 7]
5. The Commission erred by finding that a single strike price, based on Ohio Edison's incremental costs and resources, is reasonable in light of the wide variety of billing determinants and circumstances. [O&O at 7]
6. The Commission erred by finding that insufficient evidence was presented to convince it that Ohio Edison's approach in this circumstance is unlawful or discriminatory. [O&O at 7]
7. The Commission erred by rejecting Elyria Foundry's definition of incremental expenses upon which to notice economic interruptions under Rider 75 at page 6. [O&O at 8-10]
8. The Commission erred by rejecting Elyria Foundry's analysis to establish that Ohio Edison unreasonably and unlawfully noticed interruptions for a minimum of 623 hours during 2005, and caused a minimum of an additional \$94,555 in replacement power costs. [O&O at 8-10]
9. The Commission erred by not finding that Ohio Edison's incremental expense used as a basis for calling economic interruptions under Rider 75 at page 6 should have been determined before FES made competitive market sales. [O&O at 9-10]
10. The Commission erred by rejecting Elyria Foundry's assignment of incremental costs based upon FES' competitive market load being incremental to [coming after] Ohio Edison's retail interruptible load. [O&O at 9-10]
11. The Commission erred by finding the purchase power adjustment formula at Exhibit A of the PSA were the true measure of Ohio Edison's incremental costs. [O&O at 9-10]
12. The Commission erred when finding under its Interruptible Guidelines that Ohio Edison may include all of the obligations of FES, including nearly 3,000 MW of competitive retail sales within MISO, when determining its incremental cost of serving interruptible retail customers, because the Guidelines intended to provide low costs energy options to help large consumers compete in the global market. [O&O at 9-10]
13. The Commission erred when relying on its Interruptible Guidelines to include all of the obligations of FES when Ohio Edison determines its anticipated incremental cost of serving interruptible customers because the term "firm electric service customers" at Guideline 5 (a) refers to Ohio Edison's firm service; Ohio

Edison, not FES, has the obligation to maintain system integrity and service to firm customers as the provider of last resort services; Elyria Foundry receives service from Ohio Edison, not from FES; and Elyria Foundry never assumed the risks of service interruptions to enable FES to sell approximately 3,000 MW of competitive generation when its costs exceeded forecasted prices, or resulted in less planned for resources than actual loads. [O&O at 9-10]

14. The Commission erred in relying on its Interruptible Guidelines (used to approve Rider 75) for the conclusion that the anticipated incremental expense of Ohio Edison to supply incremental service should include competitive market loads [non-PSA] expenses of FES. [O&O at 9-10]

15. The Commission erred by reversing or modifying its approval under the Interruptible Guidelines that the term "firm electric service customers", as used in CEI Rider 11, and Toledo Edison Rider 11, mean those customers within their service territories receiving retail electric services from those companies not subject to interruptions except for system emergencies. [O&O at 9-10]

16. The Commission erred by not finding that FES' incremental costs for competitive services were streamed through to retail interruptible customers because Ohio Edison failed to allocate expenses [costs] of purchased power as required by the PSA adjustment formula of Exhibit A before it determined whether those costs (after being allocated to Ohio Edison) exceeded the incremental revenues of Elyria Foundry upon which to notice economic interruptions under Rider 75 at page 6. [O&O at 8-10]

17. The Commission erred by not finding that FES' incremental costs for competitive services were streamed through to retail interruptible customers, because the full cost of energy purchased by FES was used as the proxy for anticipated incremental expenses, without Ohio Edison using the allocation procedure under the purchase power adjustment formula of Exhibit A of the PSA, before determining whether those costs exceeded the incremental revenues of Elyria Foundry prior to noticing economic interruptions under Rider 75 at page 6. [O&O at 8-10]

18. The Commission erred in finding that Ohio Edison noticed economic interruptions after allocating its incremental costs during 2005 under the purchase power adjustment formula of Exhibit A of the PSA. [O&O at 9-10]

19. The Commission erred in its Opinion and Order by failing to make the required allocation of those costs before finding that Ohio Edison reasonably and lawfully noticed economic interruptions of Elyria Foundry during 2005. [O&O at 8-10]

20. The Commission erred by approving Ohio Edison's definition of the term "anticipated incremental expense" by using at its proxy the unallocated "cost of energy obtained or generated by the Company on a best efforts basis at the lowest

cost after all other prior obligations are met" under Rider 75 at page 7. [O&O at 9]

21. The Commission erred when finding that \$450,000 in savings established compliance with and reasonable administration of Rider 75 by Ohio Edison since the amount of savings did not determine whether the incremental expense to supply interruptible service exceeded the incremental expense from Elyria Foundry for rendering such service, and, in fact, Elyria Foundry was entitled to \$550,000 without excessively called for economic interruptions. [O&O at 10]

22. The Commission erred in finding that Elyria Foundry had not provided sufficient evidence that Ohio Edison's charges, under its Rider 75, violated any applicable statute, regulation, or guideline, or that Ohio Edison failed to comply with any filing or notice requirement concerning its implementation of Rider 75. [O&O at 11]

Wherefore, the Commission should abrogate or modify its Opinion and Order, pursuant to ORC Sec. 4903.10 (B), consistent with the grounds raised for rehearing by Elyria Foundry. The Memorandum for Rehearing, attached hereto, sets forth reasons for granting this Application for Rehearing.

Submitted by:



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Attorney for Elyria Foundry Company

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Application for Rehearing by Elyria Foundry Company was served on February 15th 2007 upon Kathy J. Kolich, Esq, FirstEnergy Service Company, counsel for Ohio Edison, by first class mail, postage prepaid, addressed to 76 South Main Street, Akron, Ohio 44308.



Craig I. Smith

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

**In the Matter of the Complaint of Elyria
Foundry Company,**

Complainant

V.

Case No. 05-796-EL-CSS

Ohio Edison Company

Respondent

**MEMORANDUM IN SUPPORT OF APPLICATION FOR
REHEARING
BY ELYRIA FOUNDRY COMPANY**

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10. The Commission erred by rejecting Elyria Foundry's assignment of incremental costs based upon FES' competitive market load being incremental to [coming after] Ohio Edison's retail interruptible load. [O&O at 9-10] 13
11. The Commission erred by finding the purchase power adjustment formula at Exhibit A of the PSA were the true measure of Ohio Edison's incremental costs. [O&O at 9-10] 14
12. The Commission erred when finding under its Interruptible Guidelines that Ohio Edison may include all of the obligations of FES, including nearly 3,000 MW of competitive retail sales within MISO, when determining its incremental cost of serving interruptible retail customers, because the Guidelines intended to provide low costs energy options to help large consumers compete in the global market. [O&O at 9-10] 18
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**MEMORANDUM IN SUPPORT OF APPLICATION FOR
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In support of its Application for Rehearing, Elyria Foundry Company [“Elyria Foundry”] presents reasons for the Commission to modify or abrogate its Opinion and Order [“O&O”].

STATEMENT OF FACTS

In this proceeding, FirstEnergy Corporation [“FirstEnergy” or “FE”] referred collectively to the overall organization, policies, parent, and affiliates, including Ohio Edison and FirstEnergy Solutions [“FES”], whether regulated or unregulated by the Commission. Ohio Edison is the regulated electric distribution company providing service to Elyria Foundry under firm Rate 23 and Rider 75 for interruptible service.

Toledo Edison and CEI are also affiliated electric distribution companies of FirstEnergy in Ohio. These affiliate distribution companies are referred to as the Ohio operating companies.

FirstEnergy Solutions is an affiliate of FirstEnergy. As a FERC licensed power marketer, FES sells full power requirements under a FERC approved Purchase Sales Agreement ["PSA"] to its affiliate Ohio Edison, and the other affiliated FE operating companies within MISO. FES also makes non-PSA competitive market sales as well as unaffiliated wholesale sales. [See Tr. II at 89]

Since Ohio restructuring began under ORC Chapter 4928, Ohio Edison, as well as FE's other Ohio operating companies, became "wires companies". During 2005 the Ohio operating companies purchased all of their electricity requirements from the affiliate FirstEnergy Solutions under the FERC approved PSA.

FES provides PSA generation from plants formerly owned or controlled by Ohio Edison and the other operating companies. FES also purchases power in the wholesale market when its generation is insufficient to meet customer demands. [OE Ex. 2 at 4-7]

The price of generation provided by FES to Ohio Edison and the other operating companies is fixed by PSA Exhibit A, parts 1 and 2. Additionally, the formula of Exhibit A, at part 3, allocates FES' purchased power costs to Ohio Edison, each of the other operating companies, and to FES itself. Ohio Edison is allocated approximately 45% of those purchase power costs. [EF Ex. 5 at AJY-7]

Using the power it obtains from the generation it owns and/or controls, plus the

power it purchases, FES makes sales that are in addition to those required under the PSA. FES sells large amounts of power to competitive market loads, as well as wholesale loads. FES corporate obligations in the MISO area for the June or July summer peak are an estimated 12,500 MW. Its PSA obligations totaled 9,500 MW, which included power requirements for Ohio Edison to serve its remaining wholesale obligations in its name. The remaining 3,000 MW of non-PSA obligations is associated with FES' competitive market load in the MISO footprint. [Tr. II at 24-30]

FES uses a single portfolio to manage its energy resources within its MISO control area. FES adds its competitive obligations to the PSA requirements forecast. [Tr. II at 41-42] FES considers its resources in the MISO area to include all of FES generation, long-term power purchases, and the retail interruptible load of the operating companies. FES is obligated in the MISO area to supply its competitive market loads and its PSA requirements (including the remaining wholesale requirements of the operating companies, and the retail interruptible loads of Ohio Edison and the other Ohio operating companies). [OE Ex. 2 at 9, CJI-2 (A-J)]

Rider 75 requires Elyria Foundry to fully interrupt its non-firm service during system operating emergencies within ten minutes of notice from Ohio Edison. Buy-through power is not available during system emergencies. In keeping with standard utility practice, Elyria Foundry receives a reduced rate in exchange for its acceptance of interruptible service.

In addition to interruptions for operating emergencies, Ohio Edison may

call/notice economic interruptions under Rider 75 whenever the incremental revenue received from Elyria Foundry is less than the anticipated expense to supply Elyria Foundry with the interruptible energy for the hours of the requested interruption. [OE Ex. 1, SEO-3 at 6] Noticed economic interruptions require Elyria Foundry to curtail its interruptible load or arrange for the purchase of replacement electricity to buy-through the interruption. [OE Ex. 1, SEO-3 at 7-8] If an economic interruption is called/noticed, buy-through prices charged are established by Ohio Edison. [OE Ex. 1, SEO-3 at 7] Buy-through rates for 2005 are part of the record in this case. [See OE Ex. 2, CJI-4; EF Ex. 3, AJY-6]

FES followed the prerequisites of the Utility Services Economic Interruption Policy as of July 24, 2001 ["2001 Policy"] to notice economic interruptions during 2005 of Elyria Foundry. [Tr. II at 64-69] The 2001 Policy calls for economic interruptions whenever FES' incremental, out-of-pocket, costs to supply exceed \$65/MWh, and current or expected load obligations exceed available planned resources. Under the policy, interruptions are called at the same time, for the same duration, at the same replacement power costs, for all economically interruptible customers served under contract or tariff of Ohio Edison, CEI, and Toledo Edison. FES must anticipate high prices for at least three hours before interrupting, and follow all contract and tariff restrictions. Surplus power resulting from the economic interruptions is sold on an hourly basis into the wholesale power market. [OE Ex. 1, SEO-4]

During 2005, Elyria Foundry purchased replacement power during the 44 days

that economic interruptions were called [ten times the historic average], for a total of 642 hours, in order to avoid shutting down its six-days-a-week operations. Many economic interruptions lasted 16 hours or more, and more interruptions occurred during January and December 2005, than the summer months. [EF Ex. 2, AJY-1; EF Ex. 1 at 5-6; Tr. Vol. I at 31-32] Elyria Foundry incurred at a minimum \$94,555 in additional electric expenses to buy-through 623 hours of unreasonable, unjust and unlawful economic interruptions. [EF Ex. 3 at 33; EF Ex 5 at 36-37]

GROUND FOR REHEARING

- 1. The Commission erred by not finding that ORC Sec. 4909.18 required Ohio Edison to apply for and receive approval of its "2001 Policy" used to establish or modify a regulation or practice affecting Rider 75 rates. [O&O at 5]**
- 2. The Commission erred by not finding that ORC Sec. 4905.30 required Ohio Edison to file as a schedule its "2001 Policy" as it contains the rules and regulations affecting Rider 75 rates. [O&O at 6]**

The 2001 Policy used to implement Rider 75 was not approved under ORC Sec. 4909.18, or filed for public inspection under ORC Sec. 4905.30. ORC Sec. 4909.18 requires that:

“Any public utility desiring to establish any rate *** or to modify, amend, [or] change *** any regulation or practice affecting the same, shall file a written application with the public utilities commission***.”

Ohio law requires Ohio Edison to file an application to establish or modify any regulation or practice affecting the rates charged Elyria Foundry. Ohio Edison is legally required to print and file with the Commission all rules and regulations affecting Rider 75 rates for use and information of the public. [ORC Sec. 4905.30]

The Commission determined the 2001 Policy merely documented Ohio Edison’s internal operational standards of an already approved interruptible program set forth in Ohio Edison’s tariffs. The Commission found a “tariff amendment application under Section 4909.18, Revised Code, was unnecessary.” [O&O at 5]

The Commission further determined that matters of the 2001 Policy “were not ‘rules and regulations’ affecting rates” and, therefore, ORC Sec. 4905.30 did not apply. According to the Commission, the 2001 Policy merely documented the internal means that Ohio Edison used to implement its approved tariffs. [O&O at 6]

The legal standard for filing and Commission approval is whether the regulation, rule, or practice affected any rate. The 2001 Policy affected Elyria Foundry’s rates by setting forth the prerequisites and practices for noticing economic interruptions during which higher priced replacement power costs (greater than the incremental revenue of 5.135 cents per kWh) was the result. Rider 75’s published rates no longer applied during an economic interruption. The 2001 Policy established the rules, regulations and practices affecting when the published rates of Rider 75 no longer applied. The 2003

modification, amendment or change to the rules, regulations and practices of the 2001 Policy to lower the strike price further affected the rates of Rider 75 by resulting in higher overall rates/costs and more frequent interruptions.

The 2001 Policy substantively supplanted Rider 75 terms and conditions by setting incremental revenues at \$65/MWh for all interruptible program participants of the Ohio operating companies. The policy interrupted all customers at the same time, for the same duration, and at the same strike price to create a 300 MW pool of interruptible load served by higher priced replacement power. The 2001 Policy's prerequisites and practices sharply contrast to the language of Rider 75 that only addresses the relationship between the rates (revenues) of individual customers and the incremental expense of supply to Ohio Edison.

It is uncontested that the strike price in the 2001 Policy was changed from \$85 per MWh to \$65 per MWh. [OE Ex. 1, SEO-4] Lowering the strike price clearly changed the rate level at which economic interruptions were called. This change in the rules, regulations and practices affecting Rider 75 rates significantly impacted when and how often economic interruptions were called, and the rates paid by Elyria Foundry during those economic interruptions —almost half of the economic interruptions in 2005 would not have been called if the \$85/MWh (8.5 cents/kWh) strike price was in effect. [EF Ex. 2, AJY-1]

The preamble to the 2001 Policy further established the intent for a stand-alone document separate and apart from Rider 75. The 2001 Policy did not merely document

Ohio Edison's internal operational standards or internal means to implement its approved tariffs. Ohio Edison actually reserved the right:

*** on any given day *** without notice, to depart from the policy set forth below and interrupt to the full extent permitted by a customer's contract or tariff. [OE Ex. 1, SEO-4]

The 2001 Policy established or modified the rules, regulations or practices affecting Rider 75 rates, as well as those of CEI's Rider 8 and Toledo Edison's Rider 11, without Commission approval. [EF Ex. 2 at 7-8] The 2001 Policy completely negated the approved language of CEI Rider 8 and Toledo Edison Rider 11 establishing for interruptible customers the hierarchy of service coming right after firm retail customers. [EF Ex. 2 at 12-13]

The 2001 Policy remained hidden by Ohio Edison (and the other operating companies) from Elyria Foundry because it was never filed for public inspection under ORC Sec. 4905.30.

The Commission should grant rehearing to find that Ohio Edison under ORC Sec 4909.18 and Sec. 4905.30 unlawfully used its 2001 Policy during 2005. An application for approval by Ohio Edison would have asserted Commission jurisdiction to determine whether its terms were just and reasonable. An application and hearing on the 2001 Policy would have given the Commission and customers an opportunity to eliminate the discrepancies between the 2001 Policy and the approved tariffs/contracts. Commission review and approval would have made the 2001 Policy a lawful and reasonable rule, regulation or practice affecting Rider 75 rates in a publicly available schedule.

3. **The Commission erred by not finding that Ohio Edison's use of a single strike price resulted in undue or unreasonable prejudice or disadvantage under ORC Sec. 4905.35 because Elyria Foundry received the same service priority at higher rates for the same risks of interruptions as paid for by lower priced interruptible customers. [O&O at 7]**

4. **The Commission erred by finding that different strike prices applied to customers with different rate structures could be viewed as prejudicial. [O&O at 7]**

5. **The Commission erred by finding that a single strike price, based on Ohio Edison's incremental costs and resources, is reasonable in light of the wide variety of billing determinants and circumstances. [O&O at 7]**

6. **The Commission erred by finding that insufficient evidence was presented to convince it that Ohio Edison's approach in this circumstance is unlawful or discriminatory. [O&O at 7]**

The Commission found that a single strike price based on Ohio Edison's incremental costs and resources appears reasonable because of the wide variance in billing determinants and circumstances among customers. [O&O at 6 and 7]

ORC Sec. 4905.35 prohibits Ohio Edison from subjecting Elyria Foundry to “undue or unreasonable prejudice or disadvantage.”

Elyria Foundry raised this issue in the context of the noticing provision under Rider 75. The notice provision sets the threshold for calling economic interruptions whenever “the incremental revenue to be received from the customer is less than the anticipated incremental expense to supply” that incremental energy. [OE Ex. 1, SEO-3 at pg. 6]

The Commission erred first in its analysis of the issue. Ohio Edison’s interruptible Riders 73, 74, and 75 require a customer by customer comparison of incremental revenue with Ohio Edison’s anticipated incremental expense for interruptible supply during hours of potential economic interruption. Incremental revenues may or may not be equal among Ohio Edison’s interruptible customers served by each of those riders. For all customers on Riders 74, the incremental on-peak revenues are equal at 6.5 cents per kWh, i.e., all Rider 74 customers get the same rate, no matter the variation in billing determinants or circumstances. For all customers on Rider 75, taking service at 23 and 34.5 kV, the incremental on-peak revenues are equal at 5.135 cents per kWh—once again, these customers get the same rate, no matter the variation in billing determinants or circumstances. Customers on Rider 75 taking service at higher voltages have lower incremental rates/revenues, while customers taking service on that rider at lower voltages have higher incremental rates/revenues. Customers on Rider 73 have different incremental rates/revenues because for each customer the rates paid depend upon load

factor. Incremental revenues for Ohio Edison interruptible customers vary from somewhere in the 3-cent range up to 6.5 cents per kWh. The incremental revenue for Elyria Foundry is 5.135 cents/kWh. [Tr. I at 168-172]

Unequal incremental revenues may occur when the pricing of interruptible service considers such factors as avoided costs, service priority, historic interruptions, customer operating characteristics, and risks associated with interruptions. [*In Re Interruptible Guidelines, Case No. 95-866-El-UNC, Finding and Order, dated February 15, 1996 at pg. 2-3, par. 5.*] The Commission Guidelines called for a review of rates to ensure similarly situated customers are not treated discriminatorily. [*id at pg. 6-7, par. 12*] Finally, the Guidelines require that the interruptible tariff specify with:

*** as much detail as is reasonably possible, the conditions and circumstances under which the customers service may be interrupted and the priority of the service provided therein.” [*In Re Interruptible Guidelines, supra, Entry on Rehearing, dated April 11, 1996, Appendix A., at par. 1*]

The Commission approved Riders 73, 74, and 75 for Ohio Edison interruptible service under its Guidelines. Contrary to Rider 75 language related to the incremental revenue of an individual customer, Ohio Edison used the 2001 Policy (without Commission approval) to change its Riders by noticing economic interruptions based only on a uniformly applied strike price of 6.5 cents/kWh. CEI and Toledo Edison did likewise.

Interruptible customers of Ohio Edison with incremental revenues in the range of 3-cents/kWh gained an advantage by nearly a factor of two with the same interruptible

risks as Elyria Foundry. Rider 75 customers paying incremental revenues in the low 5 cents/kWh range are entitled to a higher service priority, with less economic interruptions and lower buy-through costs, than customers receiving interruptible service at lower incremental rates in the 3 cents/kWh range.

ORC Sec. 4905.35 prohibits undue or unreasonable prejudice or disadvantage. This section prohibits different rates being charged for the utility performing “a like and contemporaneous service under substantially the same circumstances and conditions.” *Ohio Consumers’ Counsel v. Pub. Util. Comm., 109 Ohio St. 3d 328 at 336, 2006-Ohio-2010* The single strike price causes Ohio Edison to provide economically interruptible power under substantially the same circumstances and conditions, but at different prices for assuming the same interruptible risks. The spread between customers with the lowest and highest incremental revenues is huge. A single strike price unduly or unreasonably prejudices or disadvantages Elyria Foundry. A like and contemporaneous service under substantially the same circumstances and conditions is received at much higher incremental rates.

The Commission determined that Ohio Edison’s use of a single strike price was reasonable “in light of the wide variation of billing determinants and circumstances of individual customers.” [O&O at 7] The Commission erred in not recognizing that all Rider 75 customers are charged the same incremental rate (with the only difference related to voltage level), without regard to the individual billing determinants or circumstances. Likewise, Rider 74 customers were all charged a single incremental rate,

no matter what the billing determinants or circumstances. A single strike is inappropriate.

Elyria Foundry seeks rehearing for the Commission to abrogate or modify its Opinion and Order. Elyria Foundry should have received incremental rates at the same low levels as other Ohio Edison customers receiving interruptible service under substantially the same circumstances in conformance with ORC Sec 4905.35.

7. The Commission erred by rejecting Elyria Foundry's definition of incremental expenses upon which to notice economic interruptions under Rider 75 at page 6.

[O&O at 8-10]

8. The Commission erred by rejecting Elyria Foundry's analysis to establish that Ohio Edison unreasonably and unlawfully noticed interruptions for a minimum of 623 hours during 2005, and caused a minimum of an additional \$94,555 in

replacement power costs. [O&O at 8-10]

9. The Commission erred by not finding that Ohio Edison's incremental expense used as a basis for calling economic interruptions under Rider 75 at page 6 should have been determined before FES made competitive market sales. [O&O at 9-10]

10. The Commission erred by rejecting Elyria Foundry's assignment of incremental

costs based upon FES' competitive market load being incremental to [coming after] Ohio Edison's retail interruptible load. [O&O at 9-10]

11. The Commission erred by finding the purchase power adjustment formula at Exhibit A of the PSA were the true measure of Ohio Edison's incremental costs. [O&O at 9-10]

Rider 75 requires Elyria Foundry to fully interrupt its non-firm service during system operating emergencies within ten minutes of notice from Ohio Edison. Buy-through power is not available during system emergencies.

Ohio Edison may notice economic interruptions under Rider 75 "whenever the incremental revenue to be received from the customer is less than the anticipated incremental expense to supply the interruptible energy for the particular hour(s) of the interruption request." [OE Ex. 1 at SEO-3 at 6]

Noticed economic interruptions require Elyria Foundry to curtail load or arrange for the purchase of replacement electricity to buy-through the interruption. [OE Ex. 1, SEO-3 at 7-8]

The Ohio operating companies purchased all of their electric requirements during 2005 under the FERC approved PSA on a firm basis. [OE Ex. 2, CJI-1 at 2, paragraph II-A] This firm obligation included the requirements of interruptible customers such as

Elyria Foundry.

FES also makes non-PSA sales from its portfolio of generation and purchase power to competitive market customers and unaffiliated power marketers within MISO. [See Tr. II at 89]

The PSA fixes the generation prices for service from FES to Ohio Edison and the other operating companies under Exhibit A, parts 1 and 2. The formula of Exhibit A, at part 3, allocates total purchased power costs into the control area between Ohio Edison, the other operating companies receiving PSA, and FES unregulated [non-PSA] load. [OE Ex. 2, CJI-1 at 10]

FES' total obligations in MISO for the June or July summer peak periods are estimated at 12,500 MW. PSA obligations (Ohio Edison, Toledo Edison, and CEI) totaled 9,500 MW, which included Ohio Edison's remaining wholesale obligations. Non-PSA obligations of FES for competitive market load and wholesale sales totaled 3,000 MW. [Tr. II at 24-30]

FES manages its energy resources within its control area of MISO as a single portfolio. FES adds its competitive obligations to the PSA requirements forecast. [Tr. II at 41-42] Resources of the MISO portfolio include all of FES generation, long-term power purchases, and the interruptible buy-through load. FES obligations in the MISO area are for competitive market loads, and its PSA requirements (that include Ohio Edison's wholesale requirements, and interruptible loads of the Ohio operating companies). [OE Ex. 2 at 9, CJI-2 (A-J)]

The Commission concluded that Rider 75 does not specifically define “incremental expense to supply”. [O&O at 8]

The Commission found that the “anticipated incremental expense to supply the interruptible energy” during the interrupted hours could be determined by the purchased power adjustment of the PSA pricing formula. [O&O at 9] The Purchase Power Adjustment Formula [OE Ex. 1, CJI-1 at 10] charged Ohio Edison for its monthly-allocated share of FES’ total purchased power costs. Ohio Edison’s monthly allocation percentage is based upon Ohio Edison’s monthly supply requirements divided by FES’ total control area deliveries during that month. [O&O at 8]

On a monthly basis during 2005, Ohio Edison was only responsible for 44.08% to 46.11% of those PSA purchase power costs. [EF Ex. 5 at AJY-7]

The Commission unlawfully and unreasonably rejected Elyria Foundry’s assignment of incremental costs that was based upon the premise that FES’ competitive market load was incremental to [came after] Ohio Edison’s retail interruptible load. As a result, Ohio Edison assigned higher costs to its regulated customers than FES assigned to its competitive market by ignoring the clear language in the PSA that the competitive market sales that FES made outside of the PSA were “at its own risk”. [OE Ex. 2, CJI-1 at 3, paragraph III-C] Simply, Ohio Edison used economic interruptions of retail customers to lower FES’ cost to supply its competitive market customers.

The 2001 Policy voided the protections of the noticing provision of Rider 75 at pg. 6 where incremental cost for regulated interruptible load was priced right after

regulated firm load from 1996 (when Rider 75 was first implemented) until five years later (when the 2001 Policy was written). In the 1996-2001 timeframe the regulated firm load had consisted of both Ohio Edison's retail load as well as its FERC wholesale load—it did not include competitive market sales.

Both the PSA and the 2001 Policy (as well as the separation of regulated and unregulated activities) came well after the establishment of the implementation language of Rider 75. It is unlawful and unreasonable to define the terms “incremental expenses” for Rider 75 based upon parameters and documents that were developed five years after that rider went into effect. The 2001 Policy used FES' highest system incremental costs to subsidize FES' “at risk” competitive market loads, and, as discussed *supra*, streamed FES' incremental costs for competitive services through to retail interruptible customers.

Elyria Foundry's expert Anthony Yankel defined “incremental expense to supply” per Rider 75 as was the original intent of Rider 75, which remained unchanged until the 2001 Policy. Mr. Yankel defined “incremental expense to supply” as the lowest additional cost incurred to supply retail interruptible customers after the lowest possible costs were assigned to firm retail customers. [EF Ex. 2, at 6]

Mr. Yankel quantified the impact on Elyria Foundry of Ohio Edison assigning costs to its retail customers after FES provided its customers with up to 3,000 MW of competitive market load. Ohio Edison interrupted retail customers for 642 hours during 2005. Under Mr. Yankel's definition, the lawful and reasonable number of interruptions noticed under Rider 75 is a maximum of only 19 hours. At a minimum Elyria Foundry

incurred \$94,555 in unreasonable or unlawful charges. [EF Ex. 2 at 32-33]

The Commission erred in finding that a true measure of Ohio Edison's incremental expense for purposes of Rider 75 is the purchase power adjustment formula of PSA Exhibit A. The PSA does not define the term incremental expense. It does not specifically assign hourly "incremental expenses" to Ohio Edison for the high cost hourly purchases incurred by FES. Total monthly expenses were allocated very generally to Ohio Edison on a total monthly energy basis through the PSA. [EF Ex. 5 at 8-9] Hourly or even daily "incremental" expense for the last block of costs were not contextually or mathematically defined by Exhibit A of the PSA upon which to interrupt retail interruptible customers under Rider 75.

For these reasons Elyria Foundry seeks rehearing for the Commission to abrogate or modify its Opinion and Order to calculate the "incremental expenses" for Rider 75 after removal of the highest costs associated with FES' competitive market load. Removal of such costs would disallow 623 hours of economic interruptions during 2005. The incremental costs associated with Rider 75 customers should consist of the "increment" of costs above that required to meet Ohio Edison's firm load requirements, but below FES' competitive market costs.

12. The Commission erred when finding under its Interruptible Guidelines that Ohio Edison may include all of the obligations of FES, including nearly 3,000 MW of competitive retail sales within MISO, when determining its incremental cost of

servicing interruptible retail customers, because the Guidelines intended to provide low costs energy options to help large consumers compete in the global market.

[O&O at 9-10]

13. The Commission erred when relying on its Interruptible Guidelines to include all of the obligations of FES when Ohio Edison determines its anticipated incremental cost of servicing interruptible customers because the term “firm electric service customers” at Guideline 5 (a) refers to Ohio Edison’s firm service; Ohio Edison, not FES, has the obligation to maintain system integrity and service to firm customers as the provider of last resort services; Elyria Foundry receives service from Ohio Edison, not from FES; and Elyria Foundry never assumed the risks of service interruptions to enable FES to sell approximately 3,000 MW of competitive generation when its costs exceeded forecasted prices, or resulted in less planned for resources than actual loads. [O&O at 9-10]

14. The Commission erred in relying on its Interruptible Guidelines (used to approve Rider 75) for the conclusion that the anticipated incremental expense of Ohio Edison to supply incremental service should include competitive market loads [non-PSA] expenses of FES. [O&O at 9-10]

15. The Commission erred by reversing or modifying its approval under the

Interruptible Guidelines that the term “firm electric service customers”, as used in CEI Rider 11, and Toledo Edison Rider 11, mean those customers within their service territories receiving retail electric services from those companies not subject to interruptions except for system emergencies. [O&O at 9-10]

Riders 73, 74, and 75 of Ohio Edison were approved under the Guidelines. *[In Re Interruptible Guidelines, Case No. 95-866-EL-UNC, Entry on Rehearing, dated April 11, 1996.]* The Guidelines generally intended for Rider 75 (as well as other tariffs and special contract provisions) to provide increased competitive options for Ohio's businesses without unduly harming the interests of utility shareholders or ratepayers. *[In Re Interruptible Guidelines, supra, Entry on Rehearing, dated April 11, 1996, at pg. 1, par. 1]* The guidelines provided options for avoiding interruptions and guidance on receiving Commission approvals of tariffs and contracts. *[id at pg. 1, par. 2]* The Commission made clear that all jurisdictional electric utilities must offer interruptible service with buy-through options. *[id at pg. 2, par. 7]* Buy-through options are necessary for providing the quality of service that Ohio Edison's largest customers expect and need. *[id at pg. 3, par. 7]*

In this case, the Commission relied on its interruptible electric service Guidelines to distinguish firm from non-firm [interruptible] service upon which to conclude that both Ohio Edison and FirstEnergy Solutions provide firm services with higher service priorities than non-firm Ohio Edison retail service. The Commission concluded that firm

and non- firm services are distinctly separated services no matter the provider.

Consequently, the Commission erroneously concluded that Ohio Edison's anticipated incremental expense under Rider 75 shall consider all of the:

obligations of FES, including sales that are made by FES outside of the PSA [O&O at 9-10]

The part of the Guidelines relied upon by the Commission pertain to replacement electricity, not the determination of anticipated incremental expenses for noticing economic interruptions. Guideline 5(a) calls for the utility to obtain the lowest cost replacement electricity using best efforts, "excluding that obtained for firm electric service customers", for each interruptible service class. *[In Re Interruptible Guidelines, supra, Entry on Rehearing, dated April 11, 1996, at App. A, pg. 3, par. 5]* The Guidelines provide no support for the Commission's decision to give FES' 3,000 MW of competitive market load higher service priority over its affiliate [Ohio Edison] retail interruptible load. The anticipated incremental expenses of Ohio Edison supplying interruptible service should not include FirstEnergy's non-PSA costs. This Commission's holding contradicts its approval of the CEI and Toledo Edison interruptible riders using the Guidelines.

Guideline 5 (a) provides that "firm electric service customers" are the only customer group to receive power at a lower than best efforts pricing offered to retail interruptible customers. CEI's Rider 11 and Toledo Edison's Rider 8, approved by the Commission under the Guidelines, defined "firm electric service customers" as

customers within their service territories receiving retail electric service not interruptible except for System Emergencies. [EF Ex. 3 at 12-13] Firm electric service customers of CEI and Toledo Edison receive the same service as Ohio Edison's firm retail customers. However, FES is a FERC licensed power marketer supplying competitive electric service in Ohio. FES is an affiliate separated from Ohio Edison. Elyria Foundry receives service from Ohio Edison under rate schedules approved by the Commission. Elyria Foundry has no legal relationship with FES.

The Commission erred in relying on the Guidelines for determining anticipated incremental expenses for Ohio Edison to supply interruptible energy. Elyria Foundry seeks rehearing for the Commission to modify or abrogate its Opinion and Order by finding that its Interruptible Guidelines do not support giving FES' competitive market load priority over retail interruptible load.

The decision in this case contradicts the Commission's previous interpretation of the Guidelines used when approving the interruptible riders for CEI and Toledo Edison. The decision further contradicted the intent of the Guidelines to provide increased competitive options to Ohio Edison's largest business customers.

16. The Commission erred by not finding that FES' incremental costs for competitive services were streamed through to retail interruptible customers because Ohio Edison failed to allocate expenses [costs] of purchased power as required by the PSA adjustment formula of Exhibit A before it determined whether

those costs (after being allocated to Ohio Edison) exceeded the incremental revenues of Elyria Foundry upon which to notice economic interruptions under Rider 75 at page 6. [O&O at 8-10]

17. The Commission erred by not finding that FES' incremental costs for competitive services were streamed through to retail interruptible customers, because the full cost of energy purchased by FES was used as the proxy for anticipated incremental expenses, without Ohio Edison using the allocation procedure under the purchase power adjustment formula of Exhibit A of the PSA, before determining whether those costs exceeded the incremental revenues of Elyria Foundry prior to noticing economic interruptions under Rider 75 at page 6. [O&O at 8-10]

18. The Commission erred in finding that Ohio Edison noticed economic interruptions after allocating its incremental costs during 2005 under the purchase power adjustment formula of Exhibit A of the PSA. [O&O at 9-10]

19. The Commission erred in its Opinion and Order by failing to make the required allocation of those costs before finding that Ohio Edison reasonably and lawfully noticed economic interruptions of Elyria Foundry during 2005. [O&O at 8-10]

20. The Commission erred by approving Ohio Edison's definition of the term "anticipated incremental expense" by using at its proxy the unallocated "cost of energy obtained or generated by the Company on a best efforts basis at the lowest cost after all other prior obligations are met" under Rider 75 at page 7. [O&O at 9]

These assignments of error assume without accepting as true, that: 1) the 2001 Policy did not have to be filed or approved by the Commission; 2) it was unnecessary to have a priority of service among interruptible customers based upon the incremental revenues each customer paid—hence all customers could be interrupted at the same time, for the same length of time, and offered the same buy-through price; and 3) that the incremental expense to be used to establish the right to call an economic interruption is the highest incremental cost to serve all of FES' load, including all of its competitive market load.

The Commission's Order recognized that:

“*** The cost of power under the PSA is based on fixed prices for power from the generating units owned or operated by FES plus a portion of the cost of purchased power. The *purchased power costs are allocated among the FE operating companies based on a formula that determines each operating company's proportion of all electricity used in FE's entire service territory.*” [O&O at 4] (Cites deleted, Emphasis added)

Mr. Idle's testimony clearly recognized the need for allocation of purchase power costs, by stating that:

“ ***The price of this purchased power is allocated to Ohio Edison based

on the formula set forth on Exhibit A of the PSA. Generally, the cost of purchased power is allocated to Ohio Edison based on the percentage of all purchased power by FES that was used to serve all Ohio Edison obligations.***." [OE Ex. 2 at 6-7]

Mr. Idle then described how FES decides to call an economic buy-through event without making the necessary allocation. He explained that:

**** If it is estimated that FES will be short for 16 hours or more, then FES will purchase firm next day blocks of energy on a bilateral basis, if they are available in the marketplace. If the price of these blocks is \$65/MWh or more, then a next day economic buy through event is called." [OE Ex. 2 at 7]

Ohio Edison, according to Mr. Idle, called economic interruptions when FES' purchase price was \$65/MWh or greater. However, Ohio Edison never takes into account that its allocated costs are only on the order of 45% of the FES' purchase costs. More specifically, if Elyria Foundry used the last 10 MWh of interruptible energy at a time when FES was purchasing it from the market at a maximum price of \$100/MWh, the cost to FES for this last 10 MWh of purchase would be \$1,000 or \$100/MWh. However, the amount that would be allocated to Ohio Edison would only be \$450 ($\$1,000 \times 0.45 = \450) or \$45 for each of the 10 MWh used by Elyria Foundry.

The record shows that Ohio Edison's monthly allocated percentage of purchase power costs ranged in 2005 from a low of 44.08% to a high of 46.11%. [EF Ex. 2, AJY-7]

However, Ohio Edison implemented Rider 75 without making this approximately

45% allocation. Rider 75 at page 6 only reserves the right for Ohio Edison to “interrupt service to the customer’s interruptible load whenever the incremental revenue to be received from the customer is less than the anticipated incremental expense to supply the interruptible energy for the particular hour(s) of the interruption request.” (Emphasis added) Ohio Edison failed to use allocated costs per the PSA’s purchase power adjustment formula to determine its actual “incremental costs”. Consequently, Ohio Edison used FES’ highest incremental costs and not the incremental expense that Ohio Edison would incur to supply the incremental energy.

Costs were streamed because Ohio Edison used a proxy for the anticipated “incremental expenses” without the allocations required by the purchased power adjustment formula found in Exhibit A of the PSA.

The Commission erred in its Opinion and Order by failing to make the required allocation of those costs before finding that Ohio Edison reasonably and lawfully noticed economic interruptions of Elyria Foundry during 2005. The Opinion and Order treated the incremental cost to serve Elyria Foundry as the full buy-through cost when stating:

“*** On the other hand, if an interruptible customer, such as Elyria Foundry, chooses to buy through the interruption, Ohio Edison’s costs under the PSA will increase by the amount of the buy-through.***” [O&O at 9]

The Commission erred by approving Ohio Edison’s definition of “anticipated incremental expense” for Rider 75. Ohio Edison defined that term by using as its proxy the unallocated “cost of energy obtained or generated by the Company on a best efforts

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basis at the lowest cost after all other prior obligations are met". [OE Ex. 1, SEO-3 at 7] Ohio Edison passed off to retail interruptible customers the highest unallocated system costs of FES, including those costs of providing competitive generation services in excess of its PSA requirements.

Proper allocation of costs would have resulted in zero interruptions during 2005. Assuming the highest monthly allocation percentage (even though it is not applied every month) to Ohio Edison of 46.11% [EF Ex.3, AJY-7], the minimum price of purchase power would have to be \$141/MWh before the strike price of \$65/MWh is reached ($\$141 \times 0.4611 = \65). The maximum purchase price for the FES system in 2005 during economic buy-through events was only \$125/MWh (12.5 cents per kWh) on August 4, 2005. [EF Ex. 2, AJY-1] A proper allocation of costs to Ohio Edison would have never resulted in the calling of an economic interruption during 2005 even conceding for sake of argument the use of the 2001 Policy.

Further, assuming use of 46.11% as the maximum allocation factor (even though it is not applied every month), and that Ohio Edison called economic interruptions by following a priority of service, Elyria Foundry would need to buy-through during only seven days instead of the 44 days of called for economic interruptions in 2005. With a priority of service used, Elyria Foundry would have to buy-through or curtail when purchase power prices were \$111/MWh or higher because the incremental expense would have met or exceeded Elyria Foundry's \$51.35/MWh incremental revenue to Ohio Edison ($\$111 \times 0.4611 = \51.18). The purchase power rate of \$111/MWh was

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exceeded in 2005 on August 3 and 4; September 26; and December 5, 6, 12, and 13. [EF Ex. 2, AJY-1]

For the reasons stated above, Elyria Foundry seeks rehearing to modify or abrogate the Opinion and Order because Ohio Edison failed to properly define the term “anticipated incremental expense” and further failed to follow the PSA allocation procedure when calling an economic interruption as required by the Commission’s findings.

21. The Commission erred when finding that \$450,000 in savings established compliance with and reasonable administration of Rider 75 by Ohio Edison since the amount of savings did not determine whether the incremental expense to supply interruptible service exceeded the incremental expense from Elyria Foundry for rendering such service, and, in fact, Elyria Foundry was entitled to \$550,000 without excessively called for economic interruptions. [O&O at 10]

Ohio Edison noticed 623 hours of unlawful and unreasonable interruptions of Elyria Foundry. The interruptions resulted in Elyria Foundry incurring a minimum of \$94,555 in additional electric costs for buy-through electricity to avoid shutting down its casting operations and melt furnaces. Elyria Foundry incurred these buy-through cost because interruptions would result in forever lost production because of its six-day-a-week operations.

The Commission erred by implying that savings achieved demonstrated lawfully and reasonably noticed economic interruptions. The Commission found it:

“*** difficult to imagine how unreasonable the implementation of the program can be, when the customer, having hedged its bets through its participation in the interruptible program, has ended up with a substantial economic advantage.” [O&O at 10]

The Commission may view \$450,000 on a \$3.0 million electric bill as providing a substantial economic advantage; however, over who. Elyria Foundry (as one of Lorain County’s largest employer with 400 high paying jobs and a major taxpayer) uses every dollar of Rider 75 savings to compete for business in a thinly margined industry with competitors within and outside Ohio with much lower base electric costs. During 2005, FirstEnergy Corporation captured for its shareholders a minimum of nearly \$100,000 in additional savings rightfully due Elyria Foundry under a properly administered interruptible buy-through program.

Elyria Foundry seeks rehearing in order for the Commission to modify or abrogate its Opinion and Order by applying the terms of Rider 75 at par. 6 instead of relying upon inferences drawn by the level of savings realized by Elyria Foundry.

22. The Commission erred in finding that Elyria Foundry had not provided sufficient evidence that Ohio Edison’s charges, under its Rider 75, violated any applicable statute, regulation, or guideline, or that Ohio Edison failed to comply

with any filing or notice requirement concerning its implementation of Rider 75.

[O&O at 11]

Elyria Foundry presented evidence and the legal basis for meeting its burden of proof under the required preponderance standard that Ohio Edison unlawfully and unreasonably noticed economic interruptions during 2005 contrary to the noticing provision of Rider 75 at page 6, as approved by the Commission's interruptible guidelines. The Commission erred, as enumerated herein, by finding that Elyria Foundry had not provided sufficient evidence that Ohio Edison's charges, under its Rider 75, violated any applicable statute, regulation, or guideline, or that Ohio Edison failed to comply with any filing or notice requirement concerning its implementation of Rider 75.

Respectfully submitted



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Attorney for Elyria Foundry Company

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Memorandum in Support for Rehearing, by Elyria Foundry Company was served on February 15th 2007 upon Kathy J. Kolich, Esq, FirstEnergy Service Company, counsel for Ohio Edison, by first class mail, postage prepaid, addressed to 76 South Main Street, Akron, Ohio 44308.



Craig I. Smith

BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

RECEIVED-DOCKETING DIV

2007 APR -4 AM 10: 26

In the Matter of the Complaint of Elyria
Foundry Company,

PUCO

Complainant

V.

Case No. 05-796-EL-CSS

Ohio Edison Company

Respondent

SECOND APPLICATION FOR REHEARING
BY ELYRIA FOUNDRY COMPANY

Elyria Foundry Company ["Elyria Foundry"] applies for a second rehearing, pursuant to R.C. 4903.10 and Ohio Administrative Code Section 4901-1-35, from the Entry on Rehearing, dated March 14, 2007, ["Entry on Rehearing"] by the Public Utilities Commission of Ohio ["Commission"] in this proceeding to assert the Entry on Rehearing is unlawful or unreasonable, in that:

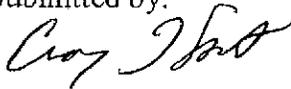
1. The Commission erred by denying rehearing without complying with R.C. 4903.09 to provide the factual basis and reasoning used for agreeing with the Ohio Edison position.
2. The Commission erred in denying rehearing by agreeing with the unreasonable position of Ohio Edison to allocate volume by MWH.
3. The Commission erred in denying rehearing by allowing, contrary to its findings, Ohio Edison to call for economic interruptions without determining its incremental costs under the PSA formula of Exhibit A.

4. **The Commission erred in denying rehearing by agreeing with the unreasonable position of Ohio Edison to notice economic interruptions based on the total cost of purchased power provided by FirstEnergy Solutions.**

5. **The Commission erred by agreeing with the unreasonable position of Ohio Edison to notice economic interruptions based on total purchased power costs, even though almost 20% of those total costs were absorbed by FES and not charged under the PSA formula.**

Wherefore, the Commission, pursuant to R.C. 4903.10 (B), should abrogate or modify its Entry on Rehearing to grant rehearing for grounds 16-20 from its Opinion and Order, dated January 17, 2007. The attached Memorandum In Support sets forth reasons for granting rehearing.

Submitted by:



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Attorney for Elyria Foundry Company

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the Second Application for Rehearing by Elyria Foundry Company was served on March 30 2007 upon Kathy J. Kolich, Esq, FirstEnergy Service Company, counsel for Ohio Edison, by first class mail, postage prepaid, addressed to 76 South Main Street, Akron, Ohio 44308.



Craig I. Smith

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

**In the Matter of the Complaint of Elyria
Foundry Company,**

Complainant

V.

Case No. 05-796-EL-CSS

Ohio Edison Company,

Respondent

**MEMORANDUM IN SUPPORT OF
SECOND APPLICATION FOR REHEARING
BY ELYRIA FOUNDRY COMPANY**

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**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

**In the Matter of the Complaint of Elyria
Foundry Company,**

Complainant

V.

Case No. 05-796-EL-CSS

Ohio Edison Company,

Respondent

**MEMORANDUM IN SUPPORT OF
SECOND APPLICATION FOR REHEARING
BY ELYRIA FOUNDRY COMPANY**

I. INTRODUCTION

Elyria Foundry Company applies for a second rehearing on the basis that the Commission's Entry on Rehearing, dated March 14, 2007, is unreasonable or unlawful by denying rehearing for Grounds 16-20¹ that averred Ohio Edison wrongly called for economic interruptions without using the PSA formula to allocate its incremental costs.

In denying rehearing, the Commission concluded that Elyria Foundry erred in its mathematical argument by agreeing with the position presented by Ohio Edison that:

“... if the total cost is to be allocated based on the percentage of consumption to get the unit cost, so too must the volume.” *Entry on Rehearing at 7, par. 22*

¹ Appendix A to this Memorandum sets forth Grounds for Rehearing 16-20 denied by the Commission.

II. SECOND GROUNDS FOR REHEARING

1. **The Commission erred by denying rehearing without complying with R.C. 4903.09 to provide the factual basis and reasoning used for agreeing with the Ohio Edison position.**

The Commission failed to set forth some factual basis and the reasoning used in reaching its conclusion to deny rehearing Grounds 16-20 as required by R.C. 4903.09. *See Tongren v. Pub. Util. Comm. (1999), 85 Ohio St. 3d 87, 89, 706 N.E. 2d 1255, 1257* The Entry on Rehearing merely states the “Commission agrees with Ohio Edison on this issue” and then quotes language used by Ohio Edison in its Memorandum Contra. *See Entry on Rehearing at 7, par. 21 & 22* The Commission failed to reveal the factual basis and reasoning used to reject Elyria Foundry’s argument, and for its agreeing with Ohio Edison.

2. **The Commission erred in denying rehearing by agreeing with the unreasonable position of Ohio Edison to allocate volume by MWH.**

The Commission agreed with and adopted the Ohio Edison position that unfathomably distinguishes between the terms “consumption” and “volume”. The words “consumption” and “volume” reflect a single concept—the amount of energy purchased. Both terms mean MWH. The nonsensical nature of Ohio Edison’s argument becomes apparent with substitution of “MWH” for those words used in the quoted language:

“... if the total cost is to be allocated based on the percentage of [MWH] to get the unit cost, so too must the [MWH].”

Costs are the commodity that must be “allocated” based upon the ratio of Ohio Edison’s MWH usage compared to the total of FES’ MWH usage, in order to determine what portion of FirstEnergy Solutions purchase power costs are assigned/allocated to Ohio Edison (based on the formula in Exhibit A of the PSA). Consumption or volume in MWH is the measured quantity that Ohio Edison used. MWH are not allocated or assigned—they are measured.

3. The Commission erred in denying rehearing by allowing, contrary to its findings, Ohio Edison to call for economic interruptions without determining its incremental costs under the PSA formula of Exhibit A.

Ohio Edison calls for an economic interruption without determining its incremental costs under the PSA formula. Ohio Edison acts contrary to Commission determinations that the “pricing formula in the PSA is a true measure of incremental expenses” and the means to determine the incremental expense for Ohio Edison to provide interruptible energy. *See Opinion & Order* at 9, par. 1; *Entry on Rehearing* at 7, par. 19.

The Commission abrogates use of the PSA formula method by allowing Ohio Edison and/or FES to notice economic interruptions without the allocation of expenses.² The Commission allows Ohio Edison to assign as its incremental expense the unallocated total expenses of FirstEnergy Solutions’ purchased power. This directly conflicts with Rider 75 requirements that economic interruptions should be based on the incremental expenses of Ohio Edison.

The PSA is the method by which Ohio Edison is assigned costs/expenses and

² *Opinion & Order* at pg. 4

thus, the PSA pricing formula derives the incremental expenses of Ohio Edison. The PSA allocation formula applies when noticing economic interruptions because Rider 75 only allows for economic interruptions when Ohio Edison's incremental revenues are less than its anticipated incremental expense to supply the interruptible energy.

Purchased power costs are allocated to Ohio Edison, or other applicable operating Companies, based upon the percentage of their usage³ to that of the whole system. The PSA allocates costs under a simple formula fully set forth in Exhibit A, and presented in abbreviated format as:

$$\frac{\text{Buyer's Requirement (MWH)}}{\text{divided by}} \\ \frac{\text{Sellers Total Delivered (MWH)}}{\text{times}} \\ \text{Sum of Purchased Power Costs (\$)}$$

The ratio/percentage⁴ of Ohio Edison's MWH to the total of the Control Area MWH is the ratio/percentage used to allocate the Ohio Edison portion of total purchase power expenses incurred by FirstEnergy Solutions. The PSA's total purchased power expenses are allocated to Ohio Edison in the 45% range of the total operating companies' load under Exhibit A of the PSA formula. The allocated monthly percentage of total operating companies' purchase power expenses for Ohio Edison in 2005 ranged from a low of 44.08% to a high of 46.11%. *EF Ex. 5, AJY-7*

Ohio Edison violated Rider 75 by using the unallocated total costs for purchased power incurred by FirstEnergy Solutions to call for economic interruptions when FES' (not Ohio Edison's) maximum total purchased power prices were \$65/MWH or greater, and the other conditions of the 2001 Policy were met. *OE Ex. 2 at 7* This allowed Ohio

³ Allocation is made on the basis of monthly usage as opposed to usage during specific hours.

⁴ The ratio used for allocation is simply the first part of this equation which is Buyer's Requirements (MWH) divided by the Total Delivered (MWH).

Edison to notice economic interruptions based on 100% of FirstEnergy Solutions' highest unallocated total costs for purchased power.

Ohio Edison did not use the PSA to allocate expenses during an economic buy through event. Ohio Edison's witness Mr. Idle testified that:

"Second, Mr. Yankel refuses to acknowledge that there are two distinct transactions involved in an interruptible buy through event: (i) the billing by FES to each of the Operating Companies for their respective portion of all purchased power costs incurred by FES during a given month, including those costs incurred by FES to purchase power to fulfill the demand of interruptible customers that elect to buy through during an economic buy through event; and (ii) the billing by each of the Operating Companies to their respective interruptible customers for the power the customers elect to purchase from those Operating Companies during the economic buy through event. The PSA only governs the first transaction between FES and Ohio Edison. The second transaction, between Ohio Edison and Elyria Foundry, is governed by Rider 75. (Emphasis added)
OE Ex. 5 at 2

The unallocated total expenses of FirstEnergy Solutions far exceeded the incremental expense actually incurred by Ohio Edison (allocated to Ohio Edison) to supply the incremental energy to Elyria Foundry during economic interruptions. Consequentially, costs were streamed through to Elyria Foundry because Ohio Edison used FirstEnergy Solutions' total expense as a proxy for Ohio Edison's anticipated "incremental expense."

The Commission erred, when agreeing with the Ohio Edison position, by not distinguishing between "total" expenses used by Ohio Edison and "incremental" expenses as determined by the PSA formula for noticing economic interruptions under Rider 75.

Incremental expenses of Ohio Edison properly allocated under the formula in

Exhibit A of the PSA would not have exceeded Elyria Foundries incremental revenues during each of the 2005 economic interruptions. The incremental revenues of other interruptible customers that were paying less than \$51.35 per MWH could have been subject to interruptions during some of those economic interruptible events called by Ohio Edison during 2005.

Denial of rehearing unreasonably and unlawfully permits Ohio Edison to pass off to retail interruptible customers the highest unallocated total system costs of FES, including those costs of providing competitive generation services in excess of its PSA requirements.

4. The Commission erred in denying rehearing by agreeing with the unreasonable position of Ohio Edison to notice economic interruptions based on the total cost of purchased power provided by FirstEnergy Solutions.

Denial of rehearing approved the Ohio Edison position that calls for economic interruptions based on the total cost of purchased power provided by FirstEnergy Solutions. This approval is inconsistent with Commission reliance on Exhibit A of the PSA to define and determine the incremental expense to Ohio Edison. The total cost of purchased power is not the same as the incremental expenses to Ohio Edison that are flowed through the PSA formula.

Using economic interruptions based on FES' unallocated total expenses for purchased power instead of Ohio Edison's allocated incremental expenses under the PSA violates Rider 75.

A base example demonstrates how all purchase power expenses are allocated in a given month:

1. Ohio Edison used 1,800,000 MWH of the total PSA supply of 4,000,000 MWH or 45% of the total energy;
2. FES purchased 200,000 MWH of that total 4,000,000 MWH supply at an average rate of \$50 per MWH for a total of \$10,000,000 in purchase power costs.
3. Per the formula in Exhibit A of the PSA, Ohio Edison's share of these purchase power costs is \$4,500,000 ($\$10,000,000 \times 45\%$) using the formula on Exhibit A of the PSA.

This base example is a simplified version designed to approximately reflect actual July 2005 conditions. Importantly, the example does not show the allocation of incremental usage or buy through power, since not shown in the PSA billing⁵ (although economic interruptions were called). Also, the PSA billing does not record specific purchases for any of the operating companies in the PSA. There are no "usage of purchase power figures" (MWH) that can be used to divide the costs allocated to Ohio Edison in order to come up with a rate for Ohio Edison's purchase power expenses.

Even so, the Ohio Edison position on rehearing approved by the Commission deviates from reality by "out of the blue" incorporating a simple "pro rata allocation of the volume" to miraculously come up with the same rate that FES is paying in total. This is pure fiction because the incremental expense of Ohio Edison should be determined by defining its (OE's) incremental load (not the incremental load of the FES system), and then by applying the PSA formula.

The calculation of incremental load and associated incremental costs can be demonstrated by assuming that an Ohio Edison incremental load is added to the base

⁵ EF Exhibit 5, AJY-6

example given above. Assume that Ohio Edison's customers are solely responsible for an identified additional purchase of 100,000 MWH at \$100 per MWH, resulting in \$10,000,000 of additional purchase power costs to FirstEnergy Solutions.

Allocating through the PSA this identified additional load, it can be seen that Ohio Edison never incurs \$10,000,000 of incremental costs for its incremental usage of 100,000 MWH because:

1. Ohio Edison's consumption would have gone up from 1,800,000 MWH to 1,900,000 and the PSA supply would have gone from 4,000,000 MWH to 4,100,000 MWH;
2. Ohio Edison's allocated share of purchase power costs would have increased to 46.34% ($1,900,000 / 4,100,000 = 0.4634$);
3. Ohio Edison's billed purchase power expense would have increased from \$4,500,000 to \$9,268,000 ($\$20,000,000 \times 0.4634 = \$9,268,000$);
4. Ohio Edison's net increase in costs would be \$4,768,000 ($\$9,268,000 - \$4,500,000 = \$4,768,000$) for this incremental consumption of 100,000 MWH.

Therefore, the incremental cost to Ohio Edison would have been only \$47.68 per MWH, even though the incremental cost to FirstEnergy Solutions would have been at \$100 per MWH. In contrast to this, Ohio Edison's calculation would include all of the incremental energy from all of the FirstEnergy affiliates. This is inappropriate under Rider 75 as it only addresses the incremental load of the customer, not of all of Ohio Edison's affiliates.

5. The Commission erred by agreeing with the unreasonable position of Ohio Edison to notice economic interruptions based on total purchased power costs, even though almost 20% of those total costs were absorbed by FES and not charged under the PSA formula.

Ohio Edison witness Idle acknowledged⁶ that FirstEnergy Solutions picks up 14% to 20% of the total purchased power costs before the PSA allocated costs to Ohio Edison and the other participant affiliates.

It is mathematically impossible for FirstEnergy Solutions to absorb up to 20% of the total purchase power costs, and yet have Ohio Edison (in association with the other operating companies) still incur 100% of those costs for purpose of determining their incremental costs for supplying service upon which to notice economic interruptions.

If up to 20% of these purchase power costs are not allocated to the operating companies, as Mr. Idle testified, and assuming \$65 per MWH, the operating companies as a whole would incur only \$52 per MWH ($\$65 \times 0.8 = \52) of those costs. If Ohio Edison interrupted when FES' costs were at \$100 per MWH, the operating companies as a whole under the PSA would only incur \$80 per MWH of costs. However, Ohio Edison still used \$100 per MWH as its incremental expense upon which it called interruptions under Rider 75.

The Commission erred when denying rehearing for Grounds 16-20 by allowing Ohio Edison to notice interruptions of its customers based on FES' unallocated total cost of purchased power.

⁶ Transcript Vol. III at 83-84

III. CONCLUSION

Wherefore, Elyria Foundry requests modification or abrogation of the Entry on Rehearing to grant rehearing on Grounds 16-20 from the Opinion and Order in this proceeding.

Respectfully submitted



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APPENDIX A

Grounds for Rehearing 16-20:

Elyria Foundry requested rehearing on the grounds that:

16. The Commission erred by not finding that FES' incremental costs for competitive services were streamed through to retail interruptible customers because Ohio Edison failed to allocate expenses [costs] of purchased power as required by the PSA adjustment formula of Exhibit A before it determined whether those costs (after being allocated to Ohio Edison) exceeded the incremental revenues of Elyria Foundry upon which to notice economic interruptions under Rider 75 at page 6. [O&O at 8-10]
17. The Commission erred by not finding that FES' incremental costs for competitive services were streamed through to retail interruptible customers, because the full cost of energy purchased by FES was used as the proxy for anticipated incremental expenses, without Ohio Edison using the allocation procedure under the purchase power adjustment formula of Exhibit A of the PSA, before determining whether those costs exceeded the incremental revenues of Elyria Foundry prior to noticing economic interruptions under Rider 75 at page 6. [O&O at 8-10]
18. The Commission erred in finding that Ohio Edison noticed economic interruptions after allocating its incremental costs during 2005 under the purchase power adjustment formula of Exhibit A of the PSA. [O&O at 9-10]
19. The Commission erred in its Opinion and Order by failing to make the required allocation of those costs before finding that Ohio Edison reasonably and lawfully noticed economic interruptions of Elyria Foundry during 2005. [O&O at 8-10]
20. The Commission erred by approving Ohio Edison's definition of the term "anticipated incremental expense" by using as its proxy the unallocated "cost of energy obtained or generated by the Company on a best efforts basis at the lowest cost after all other prior obligations are met" under Rider 75 at page 7. [O&O at 9]

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Memorandum in Support for Second Rehearing, by Elyria Foundry Company was served on March 30 2007 upon Kathy J. Kolich, Esq, FirstEnergy Service Company, counsel for Ohio Edison, by first class mail, postage prepaid, addressed to 76 South Main Street, Akron, Ohio 44308.



Craig I. Smith

4903.09 Written opinions filed by commission in all contested cases.

In all contested cases heard by the public utilities commission, a complete record of all of the proceedings shall be made, including a transcript of all testimony and of all exhibits, and the commission shall file, with the records of such cases, findings of fact and written opinions setting forth the reasons prompting the decisions arrived at, based upon said findings of fact.

Effective Date: 10-26-1953

4903.10 Application for rehearing.

After any order has been made by the public utilities commission, any party who has entered an appearance in person or by counsel in the proceeding may apply for a rehearing in respect to any matters determined in the proceeding. Such application shall be filed within thirty days after the entry of the order upon the journal of the commission.

Notwithstanding the preceding paragraph, in any uncontested proceeding or, by leave of the commission first had in any other proceeding, any affected person, firm, or corporation may make an application for a rehearing within thirty days after the entry of any final order upon the journal of the commission. Leave to file an application for rehearing shall not be granted to any person, firm, or corporation who did not enter an appearance in the proceeding unless the commission first finds:

(A) The applicant's failure to enter an appearance prior to the entry upon the journal of the commission of the order complained of was due to just cause; and,

(B) The interests of the applicant were not adequately considered in the proceeding.

Every applicant for rehearing or for leave to file an application for rehearing shall give due notice of the filing of such application to all parties who have entered an appearance in the proceeding in the manner and form prescribed by the commission.

Such application shall be in writing and shall set forth specifically the ground or grounds on which the applicant considers the order to be unreasonable or unlawful. No party shall in any court urge or rely on any ground for reversal, vacation, or modification not so set forth in the application.

Where such application for rehearing has been filed before the effective date of the order as to which a rehearing is sought, the effective date of such order, unless otherwise ordered by the commission, shall be postponed or stayed pending disposition of the matter by the commission or by operation of law. In all other cases the making of such an application shall not excuse any person from complying with the order, or operate to stay or postpone the enforcement thereof, without a special order of the commission.

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Where such application for rehearing has been filed, the commission may grant and hold such rehearing on the matter specified in such application, if in its judgment sufficient reason therefor is made to appear. Notice of such rehearing shall be given by regular mail to all parties who have entered an appearance in the proceeding.

If the commission does not grant or deny such application for rehearing within thirty days from the date of filing thereof, it is denied by operation of law.

If the commission grants such rehearing, it shall specify in the notice of such granting the purpose for which it is granted. The commission shall also specify the scope of the additional evidence, if any, that will be taken, but it shall not upon such rehearing take any evidence that, with reasonable diligence, could have been offered upon the original hearing.

If, after such rehearing, the commission is of the opinion that the original order or any part thereof is in any respect unjust or unwarranted, or should be changed, the commission may abrogate or modify the same; otherwise such order shall be affirmed. An order made after such rehearing, abrogating or modifying the original order, shall have the same effect as an original order, but shall not affect any right or the enforcement of any right arising from or by virtue of the original order prior to the receipt of notice by the affected party of the filing of the application for rehearing.

No cause of action arising out of any order of the commission, other than in support of the order, shall accrue in any court to any person, firm, or corporation unless such person, firm, or corporation has made a proper application to the commission for a rehearing.

Effective Date: 09-29-1997

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4903.11 Proceeding deemed commenced.

No proceeding to reverse, vacate, or modify a final order of the public utilities commission is commenced unless the notice of appeal is filed within sixty days after the date of denial of the application for rehearing by operation of law or of the entry upon the journal of the commission of the order denying an application for rehearing or, if a rehearing is had, of the order made after such rehearing. An order denying an application for rehearing or an order made after a rehearing shall be served forthwith by regular mail upon all parties who have entered an appearance in the proceeding.

Effective Date: 09-29-1997

4903.12 Jurisdiction.

No court other than the supreme court shall have power to review, suspend, or delay any order made by the public utilities commission, or enjoin, restrain, or interfere with the commission or any public utilities commissioner in the performance of official duties. A writ of mandamus shall not be issued against the commission or any commissioner by any court other than the supreme court.

Effective Date: 10-01-1953

4903.13 Reversal of final order - notice of appeal.

A final order made by the public utilities commission shall be reversed, vacated, or modified by the supreme court on appeal, if, upon consideration of the record, such court is of the opinion that such order was unlawful or unreasonable.

The proceeding to obtain such reversal, vacation, or modification shall be by notice of appeal, filed with the public utilities commission by any party to the proceeding before it, against the commission, setting forth the order appealed from and the errors complained of. The notice of appeal shall be served, unless waived, upon the chairman of the commission, or, in the event of his absence, upon any public utilities commissioner, or by leaving a copy at the office of the commission at Columbus. The court may permit any interested party to intervene by cross-appeal.

Effective Date: 10-01-1953

4905.30 Printed schedules of rates must be filed.

Every public utility shall print and file with the public utilities commission schedules showing all rates, joint rates, rentals, tolls, classifications, and charges for service of every kind furnished by it, and all rules and regulations affecting them. Such schedules shall be plainly printed and kept open to public inspection. The commission may prescribe the form of every such schedule, and may prescribe, by order, changes in the form of such schedules. The commission may establish and modify rules and regulations for keeping such schedules open to public inspection. A copy of such schedules, or so much thereof as the commission deems necessary for the use and information of the public, shall be printed in plain type and kept on file or posted in such places and in such manner as the commission orders.

Effective Date: 10-01-1953

Public Utilities
Commission
Washington, D.C.

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Washington, D.C.

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4905.35 Prohibiting discrimination.

(A) No public utility shall make or give any undue or unreasonable preference or advantage to any person, firm, corporation, or locality, or subject any person, firm, corporation, or locality to any undue or unreasonable prejudice or disadvantage.

(B)(1) A natural gas company that is a public utility shall offer its regulated services or goods to all similarly situated consumers, including persons with which it is affiliated or which it controls, under comparable terms and conditions.

(2) A natural gas company that is a public utility and that offers to a consumer a bundled service that includes both regulated and unregulated services or goods shall offer, on an unbundled basis, to that same consumer the regulated services or goods that would have been part of the bundled service. Those regulated services or goods shall be of the same quality as or better quality than, and shall be offered at the same price as or a better price than and under the same terms and conditions as or better terms and conditions than, they would have been had they been part of the company's bundled service.

(3) No natural gas company that is a public utility shall condition or limit the availability of any regulated services or goods, or condition the availability of a discounted rate or improved quality, price, term, or condition for any regulated services or goods, on the basis of the identity of the supplier of any other services or goods or on the purchase of any unregulated services or goods from the company.

Effective Date: 09-17-1996

4909.18 Application to establish or change rate.

Any public utility desiring to establish any rate, joint rate, toll, classification, charge, or rental, or to modify, amend, change, increase, or reduce any existing rate, joint rate, toll, classification, charge, or rental, or any regulation or practice affecting the same, shall file a written application with the public utilities commission. Except for actions under section 4909.16 of the Revised Code, no public utility may issue the notice of intent to file an application pursuant to division (B) of section 4909.43 of the Revised Code to increase any existing rate, joint rate, toll, classification, charge, or rental, until a final order under this section has been issued by the commission on any pending prior application to increase the same rate, joint rate, toll, classification, charge, or rental or until two hundred seventy-five days after filing such application, whichever is sooner. Such application shall be verified by the president or a vice-president and the secretary or treasurer of the applicant. Such application shall contain a schedule of the existing rate, joint rate, toll, classification, charge, or rental, or regulation or practice affecting the same, a schedule of the modification amendment, change, increase, or reduction sought to be established, and a statement of the facts and grounds upon which such application is based. If such application proposes a new service or the use of new equipment, or proposes the establishment or amendment of a regulation, the application shall fully describe the new service or equipment, or the regulation proposed to be established or amended, and shall explain how the proposed service or equipment differs from services or equipment presently offered or in use, or how the regulation proposed to be established or amended differs from regulations presently in effect. The application shall provide such additional information as the commission may require in its discretion. If the commission determines that such application is not for an increase in any rate, joint rate, toll, classification, charge, or rental, the commission may permit the filing of the schedule proposed in the application and fix the time when such schedule shall take effect. If it appears to the commission that the proposals in the application may be unjust or unreasonable, the commission shall set the matter for hearing and shall give notice of such hearing by sending written notice of the date set for the hearing to the public utility and publishing notice of the hearing one time in a newspaper of general circulation in each county in the service area affected by the application. At such hearing, the burden of proof to show that the proposals in the application are just and reasonable shall be upon the public utility. After such hearing, the commission shall, where practicable, issue an appropriate order within six months from the date the application was filed.

If the commission determines that said application is for an increase in any rate, joint rate, toll, classification, charge, or rental there shall also, unless otherwise ordered by the commission, be filed with the application in duplicate the following exhibits:

(A) A report of its property used and useful in rendering the service referred to in such application, as provided in section 4909.05 of the Revised Code;

(B) A complete operating statement of its last fiscal year, showing in detail all its receipts, revenues, and incomes from all sources, all of its operating costs and other expenditures, and any analysis such public utility deems applicable to the matter referred to in said application;

(C) A statement of the income and expense anticipated under the application filed;

(D) A statement of financial condition summarizing assets, liabilities, and net worth;

(E) A proposed notice for newspaper publication fully disclosing the substance of the application. The notice shall prominently state that any person, firm, corporation, or association may file, pursuant to section 4909.19 of the Revised Code, an objection to such increase which may allege that such application contains proposals that are unjust and discriminatory or unreasonable. The notice shall further include the average percentage increase in rate that a representative industrial, commercial, and residential customer will bear should the increase be granted in full;

(F) Such other information as the commission may require in its discretion.

Effective Date: 01-11-1983

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4928.01 Competitive retail electric service definitions.

(A) As used in this chapter:

- (1) "Ancillary service" means any function necessary to the provision of electric transmission or distribution service to a retail customer and includes, but is not limited to, scheduling, system control, and dispatch services; reactive supply from generation resources and voltage control service; reactive supply from transmission resources service; regulation service; frequency response service; energy imbalance service; operating reserve-spinning reserve service; operating reserve-supplemental reserve service; load following; back-up supply service; real-power loss replacement service; dynamic scheduling; system black start capability; and network stability service.
- (2) "Billing and collection agent" means a fully independent agent, not affiliated with or otherwise controlled by an electric utility, electric services company, electric cooperative, or governmental aggregator subject to certification under section 4928.08 of the Revised Code, to the extent that the agent is under contract with such utility, company, cooperative, or aggregator solely to provide billing and collection for retail electric service on behalf of the utility company, cooperative, or aggregator.
- (3) "Certified territory" means the certified territory established for an electric supplier under sections 4933.81 to 4933.90 of the Revised Code as amended by Sub. S.B. No. 3 of the 123rd general assembly.
- (4) "Competitive retail electric service" means a component of retail electric service that is competitive as provided under division (B) of this section.
- (5) "Electric cooperative" means a not-for-profit electric light company that both is or has been financed in whole or in part under the "Rural Electrification Act of 1936," 49 Stat. 1363, 7 U.S.C. 901, and owns or operates facilities in this state to generate, transmit, or distribute electricity, or a not-for-profit successor of such company.
- (6) "Electric distribution utility" means an electric utility that supplies at least retail electric distribution service.
- (7) "Electric light company" has the same meaning as in section 4905.03 of the Revised Code and includes an electric services company, but excludes any self-generator to the extent it consumes electricity it so produces or to the extent it sells for resale electricity it so produces.
- (8) "Electric load center" has the same meaning as in section 4933.81 of the Revised Code.
- (9) "Electric services company" means an electric light company that is engaged on a for-profit or not-for-profit basis in the business of supplying or arranging for the supply of only a competitive retail electric service in this state. "Electric services company" includes a power marketer, power broker, aggregator, or independent power producer but excludes an electric cooperative, municipal electric utility, governmental aggregator, or billing and collection agent.

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- (10) "Electric supplier" has the same meaning as in section 4933.81 of the Revised Code.
- (11) "Electric utility" means an electric light company that is engaged on a for-profit basis in the business of supplying a noncompetitive retail electric service in this state or in the businesses of supplying both a noncompetitive and a competitive retail electric service in this state. "Electric utility" excludes a municipal electric utility or a billing and collection agent.
- (12) "Firm electric service" means electric service other than nonfirm electric service.
- (13) "Governmental aggregator" means a legislative authority of a municipal corporation, a board of township trustees, or a board of county commissioners acting as an aggregator for the provision of a competitive retail electric service under authority conferred under section 4928.20 of the Revised Code.
- (14) A person acts "knowingly," regardless of the person's purpose, when the person is aware that the person's conduct will probably cause a certain result or will probably be of a certain nature. A person has knowledge of circumstances when the person is aware that such circumstances probably exist.
- (15) "Level of funding for low-income customer energy efficiency programs provided through electric utility rates" means the level of funds specifically included in an electric utility's rates on October 5, 1999, pursuant to an order of the public utilities commission issued under Chapter 4905. or 4909. of the Revised Code and in effect on October 4, 1999, for the purpose of improving the energy efficiency of housing for the utility's low-income customers. The term excludes the level of any such funds committed to a specific nonprofit organization or organizations pursuant to a stipulation or contract.
- (16) "Low-income customer assistance programs" means the percentage of income payment plan program, the home energy assistance program, the home weatherization assistance program, and the targeted energy efficiency and weatherization program.
- (17) "Market development period" for an electric utility means the period of time beginning on the starting date of competitive retail electric service and ending on the applicable date for that utility as specified in section 4928.40 of the Revised Code, irrespective of whether the utility applies to receive transition revenues under this chapter.
- (18) "Market power" means the ability to impose on customers a sustained price for a product or service above the price that would prevail in a competitive market.
- (19) "Mercantile commercial customer" means a commercial or industrial customer if the electricity consumed is for nonresidential use and the customer consumes more than seven hundred thousand kilowatt hours per year or is part of a national account involving multiple facilities in one or more states.
- (20) "Municipal electric utility" means a municipal corporation that owns or operates facilities to generate, transmit, or distribute electricity.
- (21) "Noncompetitive retail electric service" means a component of retail electric service that is noncompetitive as provided under division (B) of this section.

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(22) "Nonfirm electric service" means electric service provided pursuant to a schedule filed under section 4905.30 of the Revised Code or pursuant to an arrangement under section 4905.31 of the Revised Code, which schedule or arrangement includes conditions that may require the customer to curtail or interrupt electric usage during nonemergency circumstances upon notification by an electric utility.

(23) "Percentage of income payment plan arrears" means funds eligible for collection through the percentage of income payment plan rider, but uncollected as of July 1, 2000.

(24) "Person" has the same meaning as in section 1.59 of the Revised Code.

(25) "Advanced energy project" means any technologies, products, activities, or management practices or strategies that facilitate the generation or use of electricity and that reduce or support the reduction of energy consumption or support the production of clean, renewable energy for industrial, distribution, commercial, institutional, governmental, research, not-for-profit, or residential energy users. Such energy includes, but is not limited to, wind power; geothermal energy; solar thermal energy; and energy produced by micro turbines in distributed generation applications with high electric efficiencies, by combined heat and power applications, by fuel cells powered by hydrogen derived from wind, solar, biomass, hydroelectric, landfill gas, or geothermal sources, or by solar electric generation, landfill gas, or hydroelectric generation.

(26) "Regulatory assets" means the unamortized net regulatory assets that are capitalized or deferred on the regulatory books of the electric utility, pursuant to an order or practice of the public utilities commission or pursuant to generally accepted accounting principles as a result of a prior commission rate-making decision, and that would otherwise have been charged to expense as incurred or would not have been capitalized or otherwise deferred for future regulatory consideration absent commission action. "Regulatory assets" includes, but is not limited to, all deferred demand-side management costs; all deferred percentage of income payment plan arrears; post-in-service capitalized charges and assets recognized in connection with statement of financial accounting standards no. 109 (receivables from customers for income taxes); future nuclear decommissioning costs and fuel disposal costs as those costs have been determined by the commission in the electric utility's most recent rate or accounting application proceeding addressing such costs; the undepreciated costs of safety and radiation control equipment on nuclear generating plants owned or leased by an electric utility; and fuel costs currently deferred pursuant to the terms of one or more settlement agreements approved by the commission.

(27) "Retail electric service" means any service involved in supplying or arranging for the supply of electricity to ultimate consumers in this state, from the point of generation to the point of consumption. For the purposes of this chapter, retail electric service includes one or more of the following "service components": generation service, aggregation service, power marketing service, power brokerage service, transmission service, distribution service, ancillary service, metering service, and billing and collection service.

(28) "Small electric generation facility" means an electric generation plant and associated facilities designed for, or capable of, operation at a capacity of less than two megawatts.

(29) "Starting date of competitive retail electric service" means January 1, 2001, except as provided in division (C) of this section.

(30) "Customer-generator" means a user of a net metering system.

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(31) "Net metering" means measuring the difference in an applicable billing period between the electricity supplied by an electric service provider and the electricity generated by a customer-generator that is fed back to the electric service provider.

(32) "Net metering system" means a facility for the production of electrical energy that does all of the following:

(a) Uses as its fuel either solar, wind, biomass, landfill gas, or hydropower, or uses a microturbine or a fuel cell;

(b) Is located on a customer-generator's premises;

(c) Operates in parallel with the electric utility's transmission and distribution facilities;

(d) Is intended primarily to offset part or all of the customer-generator's requirements for electricity.

(33) "Self-generator" means an entity in this state that owns an electric generation facility that produces electricity primarily for the owner's consumption and that may provide any such excess electricity to retail electric service providers, whether the facility is installed or operated by the owner or by an agent under a contract.

(B) For the purposes of this chapter, a retail electric service component shall be deemed a competitive retail electric service if the service component is competitive pursuant to a declaration by a provision of the Revised Code or pursuant to an order of the public utilities commission authorized under division (A) of section 4928.04 of the Revised Code. Otherwise, the service component shall be deemed a noncompetitive retail electric service.

(C) Prior to January 1, 2001, and after application by an electric utility, notice, and an opportunity to be heard, the public utilities commission may issue an order delaying the January 1, 2001, starting date of competitive retail electric service for the electric utility for a specified number of days not to exceed six months, but only for extreme technical conditions precluding the start of competitive retail electric service on January 1, 2001.

Effective Date: 10-05-1999; 01-04-2007

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4928.44 Service offering for nonfirm electric service customers.

(A) The public utilities commission may determine, by order and after reasonable notice and opportunity for hearing, that customers that are nonfirm electric service customers of electric utilities on the effective date of this section would be assisted by the implementation by each such utility of a service schedule that complies with division (C) of this section. In the order, the commission shall specify the period of time, ending not later than December 31, 2005, during which the service offering would be available to any such nonfirm electric service customers or a group of such customers. Upon the issuance of the order, any such nonfirm electric service customer or a group of such customers shall be, for the purposes of this section, eligible customers in each electric utility's transmission tariff subject to the jurisdiction of the federal energy regulatory commission for the period specified in the order, and each electric utility with nonfirm customers shall file a service schedule pursuant to section 4909.18 of the Revised Code to effectuate this service offering.

(B) The service schedule authorized under division (A) of this section, for the period ending not later than December 31, 2005, as specified in the commission's order under that division, shall provide for direct, comparable and nondiscriminatory access to the transmission and distribution services, capacities, functions, and facilities of the electric utility by any customer that is a nonfirm electric service customer on the effective date of this section or by a group of any such customers, for the purpose of securing from a supplier or suppliers of the customer's or group's choice all or a portion of the customer's or group's electric power and energy requirements not served by an electric utility during a time of nonemergency curtailment or interruption.

The failure of an electric utility to file such schedule constitutes inadequate service under Title XLIX [49] of the Revised Code.

(C) The service offering authorized pursuant to this section shall be in addition to any service options otherwise available to a nonfirm electric service customer or group of nonfirm electric service customers. If a customer that is a nonfirm electric service customer on the effective date of this section or a group of such customers elects to meet all or a portion of the customer's or group's electric power and energy requirements not served by an electric utility during a time of nonemergency curtailment or interruption, by purchasing electricity and related services from a supplier or suppliers other than that electric utility, any existing service arrangement under section 4905.31 of the Revised Code or any existing schedule under section 4905.30 of the Revised Code shall be modified to permit this election to occur without economic penalty and to facilitate the customer's or group's access to the electric market for the purpose of managing supply and price volatility risks.

(D) Nothing in divisions (A) to (C) of this section affects any obligation of an electric utility to curtail or interrupt electric transmission or distribution service to the extent required to protect the interests of firm electric service customers from an injury that is otherwise unavoidable but for the curtailment or interruption. Nothing in those divisions shall be construed or applied to increase rates and charges for firm electric service customers including residential firm electric service customers.

Effective Date: 10-05-1999

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