

IN THE SUPREME COURT OF OHIO

WPS Energy Services, Inc.,	)	Case No. 06-830
	)	
Appellant,	)	
	)	Appeal from the Public
v.	)	Utilities Commission of Ohio
	)	
The Public Utilities Commission of Ohio,	)	
	)	Public Utilities Commission of Ohio
Appellee.	)	Case Nos.: 05-704-EL-ATA, 05-
	)	1125-EL-ATA, 05-1126-EL-AAM,
	)	05-1127-EL-UNC
	)	

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APPELLANT WPS ENERGY SERVICES, INC.  
MEMORANDUM OPPOSING MOTION FOR RECONSIDERATION  
OF INTERVENING APPELLEE FIRSTENERGY CORP.

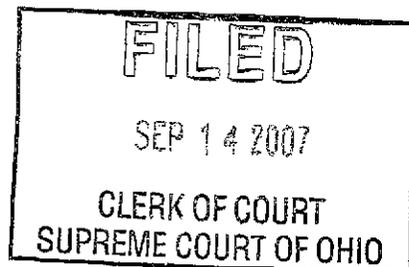
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## I. INTRODUCTION

The Court in its August 29, 2007 decision in the matter at bar found that the Rate-Certainty Plan approved by the Public Utilities Commission of Ohio (the “Commission” or “PUCO”) violated the Ohio Electric Restructuring Act’s (S.B. 3) requirement for the “unbundling” of the costs associated with competitive service (principally generation) from the regulated services (principally transmission and distribution).<sup>1</sup> Specifically, the Court found that the Rate-Certainty Plan violated R.C. 4928.02(G) because it authorized collecting deferred fuel costs which is a competitive service cost component via the monopoly, regulated distribution fee.<sup>2</sup>

On September 7, 2007 the Intervenor Appellee FirstEnergy Corp. (the “Intervenor Appellee”) filed a motion for reconsideration of the above ruling arguing that “[t]here cannot be a violation of R.C. 4928.02(G) unless there is an anticompetitive subsidy.”<sup>3</sup> The Commission (the “Appellee”) raised the same argument in its brief, which the Court specifically rejected in its decision. Nevertheless, the Intervenor Appellee has repackaged the argument now claiming that while recovering deferred fuel payments through regulated distribution fees may be a subsidy it is not an anticompetitive subsidy.

Intervenor Appellee’s motion for reconsideration should be rejected for two reasons. First, Intervenor Appellee’s motion is precluded by Rule of Practice XI(2)(A), because Intervenor Appellee’s motion is based on the same argument made to this Court in brief and at oral argument. Second, the subsidy created by deferring fuel costs used to supply competitive

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<sup>1</sup> See ¶53 -54 *Elyria Foundry v. Pub. Util. Comm.* 114 Ohio St. 3<sup>rd</sup> 305, 316, 2007-Ohio-4164.

<sup>2</sup> See *id.* at ¶58

<sup>3</sup> See Motion for Reconsideration of Intervenor Appellee FirstEnergy Corp. on Behalf of Ohio Edison, The Cleveland Electric Illuminating Company, and the Toledo Edison Company, p. 4.

generation customers, and then collecting the costs back along with deferred carrying costs from *all* regulated distribution customers is clearly anticompetitive, as the Court as already concluded.

## II. ARGUMENT

The Intervenor Appellee bases its motion for reconsideration on the sole argument that while the fuel deferrals may be a subsidy, the subsidy is permissible because it is not intentionally anticompetitive.<sup>4</sup> The Commission raised the same underlying argument in its merit brief, and the Court rejected that argument in its opinion. Now, after briefing and oral argument, the Intervenor Appellee seeks, a second time around, to make the Commission's argument more persuasive than it was the first time around, by cutting and pasting in its previously-presented arguments concerning shopping credits, which the Court accepted, and then by analogy arguing that if the shopping credit paradigm is not anticompetitive, neither is the subsidy created by letting the monopoly distribution utility recover competitive generation revenues from all distribution customers.

Every losing litigation party who has brought a claim in good faith believes the Court erred when it ruled against them. Further, the belief lingers in the mind of the losing party that its position would prevail if only the Court would reconsider the rejected facts or legal interpretations. To prevent an endless cycle of such petitions, the Supreme Court adopted Rule of Practice XI(2)(A), which expressly states that “[a] motion for reconsideration ... shall not constitute a reargument of the case[.]” The Court has strictly applied this rule, and has,

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<sup>4</sup> Appellant notes that the Intervenor Appellee claims, at page 9 of its motion, that Appellant has not demonstrated the prejudicial effect of the anticompetitive subsidy created by the Commission's order. This claim has no merit as the Court's finding, that the deferral accounting created an anticompetitive subsidy in violation of R.C. 4929.02(G), by itself clearly establishes the harm to the competitive market and the order's prejudicial effect on providers of competitive retail electric service such as the Appellant.

accordingly, dismissed arguments for reconsideration when those same arguments were raised in the initial briefs.<sup>5</sup>

The Intervenor Appellee presents its single issue for reconsideration on page 4 of its motion, where it argues that Section 4928.02(G) only prohibits “anticompetitive” subsidies, the same argument raised by the Appellee in its merit brief.<sup>6</sup> The Intervenor Appellee then presents a test for what constitutes an anticompetitive subsidy.

For an anticompetitive cross-subsidization to occur between these two elements [competitive and regulated], the Operating Companies would have to design rates with the intent of overstating the cost of distribution for the purpose of artificially understating the cost of generation so that marketers would be competing against an artificially low rate and thereby be disadvantaged competitively.<sup>7</sup> (emphasis added)

However, there is no legal citation following the above statement to support the mistaken assertion that “intent” is required before a scheme can be found to be anticompetitive. Section 4928.02(G), Revised Code has no language that justifies the Intervenor Appellee’s position that intent must be shown. Competitors like the Appellant are harmed regardless of whether a subsidy was conceived to be anticompetitive, or just merely turns out to be anticompetitive. Moreover, it should also be noted that Section 4928.02(G), Revised Code is not a criminal statute where establishing intent is an essential element.

In addition to adding an element of intent, the Intervenor Appellee on page 5 of its motion for reconsideration cuts and pastes its previously-made argument that independent electric suppliers do not compete against the cost of electricity, but against the shopping credit. This argument was raised by the Intervenor Appellee in its merit brief at page 14. The Court did

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<sup>5</sup> See e.g. *State ex rel. Shemo v. Mayfield Hts.*, (2002), 96 Ohio St.3d 379, 775 N.E.2d 493.

<sup>6</sup> Merit Brief of the Appellee, Public Utilities Commission of Ohio, at p. 28, n.12.

<sup>7</sup> See Motion for Reconsideration of the Intervenor Appellee FirstEnergy Corp., at p. 4.

find that the shopping credits, which the Appellant also challenged, were not improper.<sup>8</sup> The Intervenor Appellee now seeks to boot strap the fact that the shopping credits were not rejected, hence not anticompetitive, to conclude that collecting competitive generation fuel expenses through the monopoly distribution service rates should also not be anticompetitive. Fortifying the Appellee's old argument that the subsidy is not anticompetitive because the shopping credits are found to be competitive is exactly the type of re-argument prohibited by Practice Rule XI (2)(A).

Even if the argument was not bared by the rule, the Intervene Appellee is incorrect by implying that the Court cannot have different ruling on the legality of the shopping credits and on the accounting subsidy. The requirement to unbundled and to keep subsidies from flowing between the competitive and the non competitive services is statutory. The Court merely followed the law that competitive and noncompetitive revenues and charges must be kept separate. That is an issue separate and apart from the failure of the Appellant to convince the Court that the shopping credit paradigm complete with the shopping credit caps are anticompetitive.<sup>9</sup> Shopping credits are a creation of the utility when approved by the Commission. Shopping credits are not referred to in the Revised Code. Thus, the Court's view that the record in the matter at bar does not require toppling the shopping credit paradigm is not inconsistent with its statutory rulings.

Finally, as detailed on page 20 of Appellant's Merit Brief, it is highly and unduly anticompetitive when an independent electric supplier, like the Appellant, is forced to sell electricity, a significant amount of the cost of which is fuel, in competition with a utility, who is

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<sup>8</sup> See ¶73 *Elyria Foundry v. Pub. Util. Comm.* 114 Ohio St. 3<sup>rd</sup> 305, 319-320 (2007).

<sup>9</sup> Appellant also holds the view that if it could reargue this point the Court would change its mind and find that both the subsidy and the shopping credits are anticompetitive and in violation of R.C. 4928.02(G).

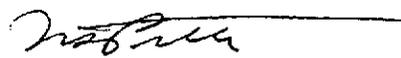
granted the authorization to shift part of its generation costs to *all* of its monopoly distribution customers. The Court correctly analyzed the facts concerning the accounting, and then correctly found it to be a subsidy when under the Rate-Certainty Plan a utility is permitted to transfer fuel costs from the generation of electricity – a competitive service – to monopoly distribution service – a non competitive service. Thus, the Court dispatched the argument raised by the Commission, that the collection of generation revenues through a utility charge may be a subsidy, but was not anticompetitive. Specifically, the Court held:

The PUCO contends in the alternative that even if there was a subsidy, R.C. 4928.02(G) bans only *anticompetitive* subsidies. According to the PUCO, the commission ordered that the fuel deferrals cannot be made for an anticompetitive purpose. But the commission's statement here was made in the context of its discussion of the distribution deferrals and was not directed to the fuel-cost deferrals. In fact, the commission's order failed to directly address WPS's claim that the fuel deferrals violated R.C. 4928.02(G).<sup>10</sup>

### III. CONCLUSION

For the reasons stated above, Intervenor Appellee's motion for reconsideration should be denied both pursuant to Rule of Practice XI(2)(A) and on its merits.

Respectfully submitted,



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<sup>10</sup> See ¶55 *Elyria Foundry v. Pub. Util. Comm.* 114 Ohio St. 3<sup>rd</sup> 315, 316 (2007).

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**CERTIFICATE OF SERVICE**

I certify that a copy of this Reply Brief of the Appellant was sent by ordinary, first class U.S. Mail and by electronic mail where indicated, upon the following persons this 14<sup>th</sup> day of September, 2007.

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