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

REPLY BRIEF OF APPELLANT ELYRIA FOUNDRY COMPANY

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I. INTRODUCTION

The Public Utilities Commission of Ohio (Commission), and Ohio Edison presented an array of arguments in their briefs. This reply mostly focuses on the Commission's brief because Ohio Edison provided essentially no additional arguments in support of the Commission's Opinion and Order.

The Commission began its brief with an incorrect premise:

> "[Elyria] Foundry has the choice to buy electricity from Ohio Edison or from another supplier, and it has chosen to buy from Ohio Edison." (Comm. Br. 1)

Most customers with market choices can choose their generation suppliers. However, Elyria Foundry was precluded from shopping by firm Rate Sheet 23 and interruptible Rider 75. (Supp. 2-4)

The Commission's brief also erroneously stated that:

> "As a large electricity user, it [Elyria Foundry] has a further choice between firm and interruptible service. Firm service is a constant supply of electricity in *any quantity* needed regardless of anything else. This is the sort of service provided to residential customers." (Emphasis added) (Comm. Br. 1)

In fact, Elyria Foundry's contract addendum limits to 3.35 MW the quantity of firm electricity provided by Ohio Edison. (Supp. 2) Elyria Foundry cannot simply take "any quantity needed".

State regulators initiated interruptible power with the buy-through option as the type of service needed by Ohio's largest manufacturers to remain competitive. (Supp. 603-605) Rider 75 interruptible service provided Elyria Foundry with the lowest electric costs possible to compete in the world market place. The state benefited from Elyria Foundry saving money and providing over 400 well paying jobs in northeast Ohio. (Supp. 74, 75) While emphasized by the Commission in its brief, these savings were not relied upon to determine whether Ohio Edison complied with Rider 75 requirements. (Appx. 27-28; Comm. Br. 2, 28)

Elyria Foundry does not ask the Court to "hand it a better deal than it deserves or pays for." (Comm. Br. 2) Elyria Foundry understood the interruptible concept when Rider 75 service began. (Supp. 75) Elyria Foundry understood its contractual relationship with Ohio Edison. Lower Rider 75 rates for interruptible service were charged in exchange for: 1) Ohio Edison's complete right to interrupt during any emergency situation; and 2) Ohio Edison's limited right to economic interruptions during hours that the customer's incremental rates (revenues) were lower than Ohio Edison's expected incremental expenses to supply the interruptible energy. (Supp. 8, 10)

Economic interruptions during 2005 were not driven by unpredictable events as claimed in the Commission's brief. (Comm. Br. 8) Ohio Edison overstated its incremental expenses upon which to request economic interruptions during 44 events, over 642 hours, during 2005. Elyria Foundry incurred nearly $100,000 in higher electric charges from buying through those wrongly requested interruptions. (Supp. 98, 99, 111-114, 119)

FirstEnergy Solutions, on behalf of Ohio Edison, requested economic interruptions under a 2001 Policy referred to by the Commission as a "practical check list" for documenting "internal operational standards." (Comm. Br. 4; Appx. 13) However described, the Policy required Commission approval and publication under R.C. 4909.18 and R.C.4905.30, as a practice or rule affecting Rider 75 rates. During economic interruptions requested under the Policy, the more favorable Rider 75 rates became inapplicable.

The 2001 Policy used a single strike price to interrupt all customers at the same time, for the same duration, at the same strike price, and with the same replacement power costs applied. (Supp. 15) The Commission defended the single strike price as allowing for easier administration of the interruptible program. (Comm. Br. 24) Elyria Foundry should not have paid higher interruptible rates for the same priority of service as those Ohio Edison customers paying much lower interruptible rates. The single strike price unduly disadvantaged Elyria Foundry by resulting in the same service priority regardless of the interruptible rates paid to Ohio Edison.

In rendering these decisions, the Commission erred by improperly applying statutory language, or factually reaching conclusions against the manifest weight of the evidence, or clearly unsupported by the record, as to show misapprehension, mistake or willful disregard of duty.

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.

The Commission brief characterized these issues as:

> "*** whether Ohio Edison called economic interruptions in accordance with Commission-approved Rider 75, *** and whether replacement purchased power costs were properly allocated to Ohio Edison under the *** [FERC] *** approved Power Supply Agreement (PSA) under which Ohio Edison purchases all of its electricity to serve its customers' firm and interruptible loads." (Comm. Br. 8)

In two primary areas, the Commission unlawfully interpreted or misapplied Rider 75, and reached factual determinations against the weight of the evidence, or clearly unsupported by sufficient probative evidence in the record, as to show misapprehension, mistake, or willful disregard of duty.

The Commission first erred by giving FES' competitive market load higher service priority than Ohio Edison's interruptible load. The Commission found that:

> "*** 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)

The Commission's brief mischaracterized Elyria Foundry's position, and recasts priority of service for regulated retail customers in a unique light, by adding an unregulated affiliate's customers to the equation. The Commission stated that:

> "Specifically, Foundry makes a priority of service argument that would give it, as an interruptible customer, priority service after firm retail customers, but before Solutions' wholesale and competitive firm customers, *when Ohio Edison's incremental revenue is less than its incremental expense to supply energy for its customers. But Rider 75 only makes sense, economically,* if all firm service customers are prioritized over interruptible customers. To treat non-firm load over planned, firm load would defeat the purpose of having interruptible load. (Emphasis Added) (Comm. Br. 8)

The Commission did not utilize Rider 75 to determine priority of service simply for Ohio Edison customers, but tried to make sense of Rider 75 in the context of how FES managed all of its obligations (Ohio Edison's load as well as FES' competitive market load). This is evident from the rehearing entry that explained the Commission's belief that; "it is not unreasonable to consider all of the obligations of FES***." (Appx. 26-27)

The Commission erred in prioritizing all of FES' competitive market firm customers (over which it had no jurisdiction) ahead of Ohio Edison's retail interruptible customers. The Commission's Interruptible Service Guidelines used the term firm service customers in context of those served by the operating companies regulated by the Commission. (Supp. 613, 632-633)

Further, the PSA required FES to meet both Ohio Edison's firm and interruptible load on a firm basis. (Supp. 17) The firm obligations of FES included all power provided to Ohio Edison under the PSA, including Ohio Edison's interruptible load. The Commission treated this as an interruptible load of FES', when, in fact, FES was required to supply the Rider 75 load (as all Ohio Edison load) on a firm basis.

The second error captures the essence of this appeal. There is no disagreement that the PSA required the allocation of all FES' purchased power costs to Ohio Edison, and that its purchased power formula defined the incremental cost to supply energy. The Commission relied on the PSA purchased power formula as the measure of incremental expenses under Rider 75. (Appx. 17) However, the Commission's decision that Ohio Edison actually determined its incremental costs under the PSA and its formula to request economic interruptions of Elyria Foundry during 2005 is against the manifest weight of the evidence or is clearly unsupported by the record as to show misapprehension, mistake, or willful disregard of duty.

Witnesses for Elyria Foundry and Ohio Edison (Commission Staff was not a party) testified that the highest FES system costs were used to establish economic curtailments. (Supp. 87, 88, 474-476) These highest system costs were not allocated, but directly assigned to interruptible customers like Elyria Foundry. (Supp.474-480)

Ohio Edison's brief described the sequence of events before noticing the 642 hours of economic interruption. The following sequence of events did not include any allocation of costs per the PSA formula:

> "And when a Buy Through event is called, it is called because Solutions has determined that at least 300 MWs of power for at least three hours at a cost of at least $65/MWH must be purchased because its forecasted needs have proved insufficient to meet actual demands." (OE Br. 17)

Ohio Edison also described how these costs were in fact allocated on a monthly basis. But, as shown, this allocation process was never utilized in order to request economic interruptions during those 642 interrupted hours:

> "Because the PSA will allocate back to Ohio Edison only the portion of the costs of this block of power consumed by Ohio Edison customers (and not that portion consumed by any of Solutions' competitive market customers or customers of the other FE Operation Companies) Ohio Edison only pays the cost for that portion of the purchased power *consumed by its customers*." (Emphasis in Quote) (OE Br. 17)

Ohio Edison's own witness clearly established the fact that a portion of all of FES' purchase power costs were allocated to Ohio Edison (as acknowledged by the Commission), but that the purchase power costs used to notice economic interruptions were not allocated, rather, these power costs were totally assigned (streamed) only to the interruptible customers:

> "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 use of unallocated purchased power costs to request economic interruptions was further supported by Ohio Edison's testimony that:

> "*** 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)

Directly charged and unallocated buy-through costs were the basis for requested economic interruptions. The PSA formula allocated a portion of those buy-through costs to Ohio Edison at the end of the month, but these incremental costs were not used to notice economic interruptions.

For purposes of noticing economic interruptions, Ohio Edison did not determine its incremental expenses consistent with the language of Rider 75. Contrary to the Commission's determination, the PSA and its formula were not used to determine incremental expenses upon which to request economic interruptions. Instead the incremental expenses were based on the total, unallocated, actual purchased power costs of FES.

The Commission correctly determined that the PSA formula, on a monthly basis, billed approximately 20% of all purchase power costs (including highest system costs) to FES, and approximately 45% to Ohio Edison. (Supp. 162) As the evidence and record clearly shows, Ohio Edison did not rely on the PSA formula to determine its pro rata share of those incremental costs to request economic interruptions under Rider 75. These monthly allocation percentages should have been used by Ohio Edison as the basis for developing its pro rata share upon which to determine its incremental costs to notice economic interruptions. There was no other basis for assigning or allocating cost to Ohio Edison other than the PSA formula. There was no provision available for FES to directly bill any of Ohio Edison's customers.

Ohio Edison's witness testified that this allocation never occurred with respect to interruptible-buy through rates that were used to determine incremental costs and request economic interruptions:

> Q. "Does FES recover all of its costs of purchased power?
>
> A. No. FES recovers most, but not all of the costs it incurs through the IBT charges paid by IBT Program participants.
>
> Q. Why is this?
>
> A. Because the customer buys through at the estimated price quoted by FES at the time the event is noticed. Invariably during most economic buy through events, power is purchased at prices above those quoted to the customer. 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)

FES assigned the highest system costs to interruptible customers without allocation as shown by it recovering from interruptible customers 9.2 cents for every 9.4 cents spent. The small amount of under recovery resulted:

> "Because the customer buys through at the estimated price quoted by FES at the time the event is noticed. Invariably during most economic buy through events, power is purchased at prices above those quoted to the customer." Supp. 41)

FES simply assigned all of these "highest system costs" to interruptible customers without allocation. The allocation of 20% of these costs to FES per the PSA formula or 45% to Ohio Edison never occurred. (Supp. 41)

Although the Commission concluded the PSA and its formula defined incremental cost, Ohio Edison ignored the PSA formula by using FES' highest unallocated system power costs to request an economic interruption event.

Ohio Edison's witness further testified during cross examination that incremental costs were not based on the PSA formula, but based on whether customers elected to curtail or buy-through:

> 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)

While all purchased power costs flow through the PSA formula (Supp. 33-34), and Ohio Edison was only billed through the PSA, the Commission failed to recognize that FES' unallocated incremental purchases were used to request economic interruptions. FES' unallocated costs were directly charged to Ohio Edison's interruptible customers. Ohio Edison treated the incremental costs for those incremental purchases differently than the incremental costs of all hourly purchases (8,760 hrs./yr.) allocated and charged to the operating companies under the PSA. (Supp. 579-581)

Even though the Commission found that the PSA formula was the true measure of Ohio Edison's incremental expenses under Rider 75, Ohio Edison never used that formula to allocate its costs of purchased power before determining the costs upon which to notice economic interruptions.

Thus, Ohio Edison overstated its incremental expenses to supply interruptible energy for all or most of the requested 44 economic interruptible events, and 642 total hours, during 2005. Elyria Foundry incurred nearly $100,000 in higher electric charges from buying through those wrongly requested interruptions. (Supp. 98, 99, 111-114, 119)

The Commission's Opinion and Order is unlawful or unreasonable, against the manifest weight of the evidence, clearly unsupported by the record, and shows misapprehension, mistake, or willful disregard of duty. It should be reversed and remanded.

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.

R.C. sections 4909.18 and 4905.30 require that Ohio Edison receive approval of, and publicly file, the practices and rules that affect [impact] any rate. Rider 75 (approved by the Commission) restricted economic interruption requests to whenever the customer's incremental revenues were less than the anticipated incremental expenses to supply the interruptible energy during the interrupted hours. (Supp. 8)

The unapproved and unpublished 2001 Policy used by FES called for economic interruptions of all interruptible customers at the same time, for the same duration, at the same strike price when the expected incremental costs of supply exceeded $65/MWH and the current/expected load obligation of FES exceeded available planned resources. (Supp. 15, 88-89)

Rider 75 was superseded or supplemented by the 2001 Policy by adding the provision that noticing economic interruptions requirement that FES' available planned resources were less than current/expected load obligations. (Supp. 15) Rider 75 made no reference to the availability of planned resources for Ohio Edison, let alone its affiliated and unregulated generation supplier. Under the PSA, no need would exist because FES must supply, and Ohio Edison must purchase, Ohio Edison's full Power Supply Requirements from FES under the PSA. (Supp. 17) The 2001 Policy was, in part, based upon something completely beyond the scope of Rider 75 and gave undue preference to an unregulated affiliate.

The Commission found the 2001 Policy did not affect rates "[a]s [it] 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)

The Commission interpreted the word "affect" to mean "negate" (nullify) when determining whether the 2001 Policy needed approval and publication. In doing so, the Commission characterized the practices and rules as a checklist of operational standards for administrative convenience in implementing Rider 75. (Appx. 13, 24; Comm. Br. 20) However characterized, the 2001 Policy affected Rider 75 rates by becoming the basis for requested economic interruptions during 2005. (Supp. 428)

The Commission and Ohio Edison also argued on brief that Elyria Foundry was not prejudiced by use of the 2001 Policy. (Comm. Br. 21, 25; OE Br. 19) However, the Policy was used to notice 642 hours of economic interruptions during which the more favorable Rider 75 rates were superseded. Elyria Foundry incurred nearly $100,000 in higher electric costs as a result of these interruptions. (Supp 98, 99, 111-114, 119)

In conclusion, the 2001 Policy contained fundamental changes to Rider 75 and resulted in an impact on the rates/charges to customers. Thus, the 2001 Policy required approval and publication. Elyria Foundry was forced to buy-through during those inappropriately noticed interruptions and paid for more expensive replacement power.

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.

The record shows that use of the single strike price and other provisions of the 2001 Policy resulted in 642 hours of economic interruptions during which time the more favorable Rider 75 rates were superseded. Elyria Foundry incurred nearly $100,000 in higher electric costs from buying through those interruptions. (Supp 98, 99, 111-114, 119)

Still, the Commission argued on brief the single strike price did not prejudice Elyria Foundry because more economic interruptions would have occurred if customer specific revenues (rates) were compared to incremental expenses under Rider 75. (Comm. Br. 25-26) This is pure speculation without record support. Rider 75, properly applied, would provide Elyria Foundry with a higher priority of service that would interrupt lower paying customers first and more frequently.

R.C. 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.* A prohibition against different rates does not require "*** [a]bsolute uniformity [since] *** [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., (1979) 58 Ohio St. 2d. 40, 43-44, 12 O.O. 3d 45, 388 N.E. 2d 739*

The Commission concluded that use of a single strike price did not unduly disadvantage Elyria Foundry because:

> "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." (Emphasis added) (Appx. 15)

The Commission and Ohio Edison argued on brief, contrary to the record, that the strike price is not a rate. (Comm. Br. 24-25; OE Br. 27-28) The strike price is a rate equal to the "highest approximate incremental revenue received" from any interruptible customer. (Supp. 67) Economic buy-through events were called when the cost to serve (incremental costs) equaled at least the $65/MWH strike price. (Supp. 66)

The strike price replaced customer specific rates as the basis for comparing incremental revenues to incremental expenses under Ohio Edison's interruptible riders. This is not an overly technical issue, as Ohio Edison contends. (OE Br. 28) Under Ohio Edison's interruptible rider rates individual customer rates (revenues) ranged from the high $30/MWh (3 cents/kWh) up to $65/MWh (6.5 cents/kWh). (Supp. 322, 324, 327, and 330) Elyria Foundry paid $51.35/MWH (5.135 cents/kWh). (Supp. 86)

The riders required the comparison of customer specific incremental revenues received by Ohio Edison with its anticipated incremental expenses to supply interruptible energy when determining whether to request economic interruptions. Under Rider 75:

> "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 hours(s) of interruption request." (Emphasis added) (Supp. 8)

While Ohio Edison's approved interruptible riders compared incremental revenues/rates and incremental expenses as the basis for economic interruptions, the Commission believed a comparison of revenues/rates among different customers was unreasonable because of the "***wide variety of billing determinants and circumstances of individual customers***." (Appx. 15)

However, use of a single strike price changed the comparison required for requested economic interruptions. Ohio Edison interrupted all customers at the same time, for the same duration, at the same strike price, and charged the same buy-through rate. Even so, Ohio Edison continued receiving different revenues for interruptible service. Elyria Foundry paid Ohio Edison $51.35/MWH for interruptible service under the same circumstances and conditions as customers paying for that service in the high $30/MWH range.

The single strike price subjected Elyria Foundry to undue disadvantage in violation of R.C. 4905.35 by paying Ohio Edison much higher revenues (rates) for interruptible service under the same circumstances and conditions with the same service priority as customers paying much lower revenues (rates).

The 2001 Policy eliminated service priorities based on revenues received as provided for by Rider 75, and as contemplated under the Commission's Interruptible Guidelines. Ohio Edison interruptible riders were based on the customer's incremental revenues paid, not on the cost-of-service considerations or billing determinants as relied upon by the Commission. (Comm. Br. 24) Revenues paid by customers under these riders defined commensurate service. A customer paying more should get a higher priority of service because interruptions under those riders were customer specific.

Ohio Edison testified that the 2001 Policy was designed to achieve its corporate administrative objectives, and those of its unregulated affiliate. (Supp. 331-332) These corporate administrative objectives affected Rider 75 rates by changing the noticing provisions. As a result, the 2001 Policy unduly disadvantaged Elyria Foundry when used for each of the economic interruptions during 2005. (Supp. 428)

The remedy lies in charging all customers the same low incremental revenues/rates for the same service priority, interruption risks, interruption duration and buy-through rate. (Supp. 95-97, 117) All other customer rates should be lowered to the "high $30/kWh" range.

Otherwise, Elyria Foundry and other Rider 75 customers paying Ohio Edison higher incremental revenues 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.

Rehearing grounds 16-20 raised errors over the streaming and allocation of purchased power costs. Elyria Foundry's arithmetical example was designed to demonstrate that Ohio Edison overstated its incremental expenses to notice economic interruptions. (Appx. 16-18, 38, 70)

The Commission denied rehearing without basis or factual support on this critical issue, under circumstances described as:

> " ***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.
>
> 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." (Appx. 27)

The Commission, in denying the second requested rehearing, relied on its Opinion and Order for the facts and legal rationales used to comply with R.C. 4903.09. (Appx. 33-34)

However, the Opinion and Order failed to provide in " '*** 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. 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* The Commission needs to set forth "some factual basis and reasoning thereon in reaching its conclusion***." *Tongren, supra, 85 Ohio St. 3d 89, 706 N.E. 2d 1257*

The Commission, on brief, acknowledged that the Opinion and Order failed to set forth the factual basis and reasoning for rejecting the arithmetic example. The Commission now argues that "[t]here is no 'evidence' " other than the evidence of the "error itself." (Comm. Br. 27). This inadequate rejoinder fails to meet the requirements of R.C. 4903.09. The factual basis and reasoning for adopting Ohio Edison's position that consumption (MWH) should be allocated by volume (MWH) requires disclosure.

III. CONCLUSION

The Commission's Opinion and Order determining the incremental cost upon which Ohio Edison noticed economic interruptions was unlawful, and rendered without sufficient probative evidence. The decision was against the manifest weight of the evidence, and so clearly unsupported by the record as to show misapprehension, mistake, or willful disregard of duty. The PSA formula relied upon in the Commission's Opinion and Order to determine Ohio Edison's incremental costs was not, in fact, used to request economic interruptions by Ohio Edison. Ohio Edison overstated its incremental costs when noticing economic interruptions during 2005. Elyria Foundry incurred nearly $100,000 in buy-through replacement power costs because economic interruptions were not noticed as provided for in Rider 75.

The Commission failed to require approval and publication of the practices and rules of the 2001 Policy that affected Rider 75 rates as required by R.C. 4909.18 and 4905.30. The 2001 Policy affected Rider 75 rates by becoming the basis for the requested economic interruptions during which Elyria Foundry incurred higher buy through power electric costs.

Elyria Foundry was unduly disadvantaged under R.C. 4905.35 by use of a single strike under the 2001 Policy used to request economic interruptions. Elyria Foundry was interrupted at the same time, for the same duration, at the same strike price, and offered the same buy-though rates as customers paying much lower rates for interruptible service. Elyria Foundry paid Ohio Edison $51.35/MWH for interruptible service under the same circumstances and conditions as customers paying for that service in the high $30/MWH range. Use of a single strike price unduly disadvantaged Elyria Foundry by eliminating the priority of service that should have resulted from the higher prices (rates) paid.

Finally, the Commission erred in denying rehearing on a critical issue in this appeal without setting forth the factual basis and reasoning for its decision as required by R.C. 4903.09.

Respectfully submitted

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CERTIFICATE OF SERVICE

I herby certify a copy of the Reply Brief of Appellant, Elyria Foundry Company was sent by ordinary mail, postage prepaid, to counsel of record at the addresses shown below this 22 nd day of October 2007.

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