ORIGINAL

IN THE SUPREME COURT OF OHIO

CARL DIFRANCO, et al. Appellees, v. FIRSTENERGY CORP., THE CLEVELAND ELECTRIC ILLUMINATING COMPANY & OHIO EDISON COMPANY Appellants.	))))))))))))	CASE NO. 2011-2025 On Appeal from the Geauga County Court of Appeals, Eleventh Appellate District Court of Appeals Case No. 2010-G-2990

APPELLANTS' MERIT BRIEF

Michael E. Gilb (0029868)
7547 Central Parke Blvd.
P.O. Box 773
Mason, Ohio 45040

James E. Grendell, Esq. (0088098)
904 Bellwood Dr.
Highland Heights, OH 44113

Attorneys for Plaintiffs-Appellees

David A. Kutik (0006418)
Counsel of Record
dakutik@jonesday.com
Jeffrey Saks (0071571)
jsaks@jonesday.com
Jones Day
North Point
901 Lakeside Avenue
Cleveland, Ohio 44114
Telephone: (216) 586-3939
Facsimile: (216) 579-0212

Chad A. Readler (0068394)
careadler@jonesday.com
Jones Day
P.O. Box 165017
Columbus, Ohio 43216-5017
Telephone: (614) 469-3939
Facsimile: (614) 461-4198

Attorneys for Defendants-Appellants FirstEnergy Corp., The Cleveland Electric Illuminating Company and Ohio Edison Company

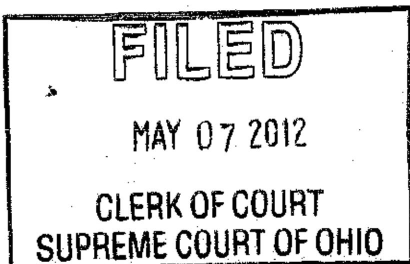


TABLE OF CONTENTS

TABLE OF AUTHORITIES iv

I. INTRODUCTION 1

II. STATEMENT OF THE CASE AND FACTS 3

A. The History of the Special Electric Heating Rates 3

B. S.B. 3 and the Disappearance of the Rationale for Offering Special Electric Heating Rates 5

C. The Inconsistency of Declining Block Rates with the Policies of Efficiency and Conservation in S.B. 221 6

D. The Phase Out of the Separate Electric Heating Rate Schedules and the Uninterrupted Continuation of a Discount for Electric Heating Customers 7

1. The Rate Certainty Plan ("RCP") case and the elimination of special electric heating rates for new customers 7

2. The Companies' 2007 Distribution Rate Case and Rider RDC 8

3. The Companies' Electric Security Plan and the creation of another discount for electric heating customers 9

E. The Commission Investigation and the Adoption of Rider RGC 10

F. The Commission Acknowledges Its Jurisdiction Over the Allegations in the Instant Case 11

1. Commission-sponsored public hearings 12

2. The Commission's five-day evidentiary hearing and Opinion in Case No. 10-176-EL-ATA 13

G. Plaintiffs' Allegations in Their Complaint Before The Court of Common Pleas 15

III. PROCEDURAL HISTORY 16

A. The Court of Common Pleas Properly Dismissed The Complaint 16

B. The Court of Appeals Properly Affirmed The Dismissal of Most of The Complaint But Improperly Reversed The Dismissal of The Fraud Claim 17

IV. ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW 19

TABLE OF CONTENTS
(Continued)

Proposition of Law No. 1:

No matter how they are labeled, claims challenging the propriety of rates to be charged to utility customers are subject to the exclusive jurisdiction of the Public Utilities Commission of Ohio. *Kazmaier Supermarket, Inc. v. Toledo Edison Co.*, 61 Ohio St. 3d 147, 153, 573 N.E.2d 655 (1991) 19

Proposition of Law No. 2:

A claim brought under a theory of fraud is not a pure tort claim when that claim challenges utility rates approved by the Commission, and as such that claim falls under the exclusive jurisdiction of the Commission. *Hull v. Columbia Gas of Ohio, Inc.*, 110 Ohio St. 3d 96, 2006-Ohio-3666, 850 N.E.2d 1190, ¶ 28-38. 24

A. Plaintiffs' Fraud Claim Is Not A "Pure Tort" Claim and Thus May Only Be Heard By The Commission 24

B. The Court of Appeals' Erroneously Invoked Article IV Of The Ohio Constitution To Entirely Override the General Assembly's Enactment Of Title 49 of the Ohio Revised Code. 28

Proposition of Law No. 3:

When a claim seeks (a) a determination of the propriety of utility rates, (b) damages based on the difference between lawful and unlawful rates, and (c) a review of the marketing practices of utilities, the claim involves the expertise of the Public Utilities Commission and constitutes a practice authorized by a utility company such that the claim should be heard by the Public Utilities Commission. *Allstate Ins. Co. v. Cleveland Elec. Illuminating Co.*, 119 Ohio St. 3d, 2008-Ohio-3917, 893 N.E.2d 824, ¶11-16. 29

V. CONCLUSION 34

PROOF OF SERVICE

APPENDIX — Appx. Page

Notice of Appeal to the Ohio Supreme Court (Dec. 5, 2011) 1

Judgment Entry of the Geauga County Court of Appeals (Oct. 21, 2011) 4

Opinion of the Geauga County Court of Appeals (Oct. 21, 2011) 5

TABLE OF CONTENTS
(Continued)

Order of the Geauga County Court of Common Pleas
(Sept. 7, 2010) 28

Class Action Complaint, Case No. 10-M-000164
(Feb. 17, 2010) 35

Finding and Order, Case No. 10-176-EL-ATA
(Mar. 3, 2010) 55

Second Entry on Rehearing, Case No. 10-176-EL-ATA
(Apr. 15, 2010) 61

Entry, Case No. 10-176-EL-ATA
(Oct. 8, 2010) 66

Entry, Case No. 10-176-EL-ATA
(Oct. 14, 2010) 71

Fifth Entry on Rehearing, Case No. 10-176-EL-ATA
(Nov. 10, 2010) 77

Opinion and Order, Case No. 10-176-EL-ATA
(May 25, 2011) 85

CONSTITUTIONAL PROVISIONS; STATUTES; RULES:

Ohio Constitution, Article IV 116

R.C. 4905.22 122

R.C. 4905.26 123

R.C. 4928.02 124

R.C. 4928.03 126

R.C. 4928.16 127

R.C. 4928.17 129

R.C. 4928.66 131

Ohio Adm.Code 4901:1-1-03 134

Ohio Adm.Code 4901:1-10-30 137

TABLE OF AUTHORITIES

CASES

Allstate Ins. Co. v. Cleveland Elec. Illuminating Co.,
119 Ohio St. 3d 301, 2008-Ohio-3917, 893 N.E.2d 824 .... passim

City of Akron v. Pub. Util. Comm'n,
5 Ohio St. 2d 237, 215 N.E.2d 366 (1966) 4

DiFranco v. FirstEnergy Corp.,
2011-Ohio-5434, -- N.E.2d -- .... passim

Firestone v. Indus. Comm'n,
144 Ohio St. 398, 59 N.E.2d 147 (1945) 4

Higgins v. Columbia Gas of Ohio, Inc.,
136 Ohio App. 3d 198, 736 N.E.2d 92 (7th Dist. 2000) 21

Hubbell v. City of Xenia,
115 Ohio St. 3d 77, 2007-Ohio-4839, 873 N.E.2d 878 27

Hull v. Columbia Gas of Ohio, Inc.,
110 Ohio St. 3d 96, 2006-Ohio-3666, 850 N.E.2d 1190 .... passim

Kazmaier Supermarket, Inc. v. Toledo Edison Co.,
61 Ohio St. 3d 147, 573 N.E.2d 655 (1991) .... passim

Keco Indus., Inc. v. The Cincinnati & Suburban Bell Tel. Co.,
166 Ohio St. 254, 141 N.E.2d 465 (1957) 20

Kohli v. Pub. Util. Comm.,
18 Ohio St. 3d 12, 479 N.E.2d 840 (1985) 26

Milligan v. Ohio Bell Tel. Co.,
56 Ohio St. 2d 191, 383 N.E.2d 575 (1978) 22, 26

New Bremen v. Pub. Util. Comm.,
103 Ohio St. 23, 132 N.E.2d 162 (1921) 28

North Ridge Investment Corp. v. Columbia Gas of Ohio, Inc.,
49 Ohio App. 2d 74, 359 N.E.2d 443 (9th Dist. 1973) 22

Ohio v. Smorgala,
50 Ohio St. 3d 222, 553 N.E.2d 672 (1990) 26, 27

Painter v. Graley,
70 Ohio St. 3d 377, 1994-Ohio-334, 639 N.E.2d 51 27

TABLE OF AUTHORITIES
(Continued)

Southgate Dev. Corp. v. Columbia Gas Transmission Corp.,
48 Ohio St. 2d 211, 358 N.E.2d 526 (1976) 4

Sparks v. Pub. Util. Comm.,
69 Ohio St. 2d 47, 430 N.E.2d 924 (1982) 20

State ex rel. Columbia Gas of Ohio, Inc. v. Henson,
102 Ohio St. 3d 349, 2004-Ohio-3208, 810 N.E.2d 953 .... 21, 22, 25

State ex rel. Columbus S. Power Co. v. Fais,
117 Ohio St. 3d 340, 2008-Ohio-849, 884 N.E.2d 1 20

State ex rel. Duke Energy Ohio, Inc. v. Hamilton County Court of Common Pleas,
126 Ohio St. 3d 41, 2010-Ohio-2450, 930 N.E.2d 299 32

State ex rel. The Illuminating Co. v. Cuyahoga Cty. Court of Common Pleas,
97 Ohio St. 3d 69, 2002-Ohio-5312, 776 N.E.2d 92 .... 21, 22, 25

State ex rel. Ohio Edison Co. v. Shaker,
68 Ohio St. 3d 209, 211, 1994-Ohio-450, 625 N.E.2d 608 26

Suleiman v. Ohio Edison Co.,
146 Ohio App. 3d 41, 2002-Ohio-3414, 764 N.E.2d 1098 (7th Dist.) 25

<u>CONTITUTIONAL PROVISIONS; STATUTES; RULES:</u>

Ohio Constitution, Article IV 2, 28

R.C. 4905.22 32

R.C. 4905.26 .... 25, 26

R.C. 4928.02 .... 7, 28, 30

R.C. 4928.03 3

R.C. 4928.16 30

R.C. 4928.17 6

R.C. 4928.66 7

Ohio Adm.Code 4901:1-1-03 30

Ohio Adm.Code 4901:1-10-30 30

I. INTRODUCTION

The decision below undercuts settled case law and the comprehensive statutory scheme that vest the Public Utilities Commission of Ohio (the "Commission") with exclusive jurisdiction over rate disputes between customers and their utilities. Indeed, prior to the decision below, a case that "in any respect" involved "unjust, unreasonable or unlawful [rates]" was exclusively "designated [to] the [C]ommission." *Kazmaier Supermarket, Inc. v. Toledo Edison Co.*, 61 Ohio St. 3d 147, 151, 573 N.E.2d 655 (1991). The Eleventh District Court of Appeals ignored this authority. Although that Court required that certain rate-based claims proceed before the Commission, it permitted one such claim based on the same set of facts to proceed in common pleas court. In doing so, the decision below undoes settled precedent, creates the risk of duplicative litigation, and promotes forum shopping and inconsistent results.

This case involves a dispute by residential electric utility customers claiming that their utility companies promised them "discounted rate[s]" essentially forever. *DiFranco v. First Energy*, 2011-Ohio-5434, -- N.E.2d --, at ¶ 3 (11th Dist.) (hereinafter "DiFranco App. Op.") (attached at Appx. 4) (quoting Plaintiffs' Compl.). In February 2010, Plaintiffs filed suit in common pleas court, alleging that "the discounted rate . . . was terminated." *Id.*. Based upon the same alleged promises and actions, Plaintiffs sought to bring, among other claims, actions for breach of contract and fraud against defendants The Cleveland Electric Illuminating Company ("CEI") and Ohio Edison Company ("Ohio Edison") (collectively the "Companies") and FirstEnergy Corp.[1] *Id.* at ¶ 4, Appx. 6. The Companies moved to dismiss those rate-based

[1] While FirstEnergy Corp. is a named defendant, it is not an electric utility and does not provide electric service. Nor does it charge rates for electric services to any customers. It is a holding company. CEI and Ohio Edison are wholly owned subsidiaries of FirstEnergy Corp.

claims on the grounds that they were subject to the Commission's exclusive jurisdiction. The trial court granted the motion as to all claims.

On appeal, the Eleventh District correctly affirmed the trial court's dismissal of Plaintiffs' contract claim, holding that this claim was at base a "promise that [Plaintiffs] would permanently be charged the discounted rate." *Id.* at ¶ 56, 59, Appx. 21, 22-23. The appeals court, however, reinstated Plaintiffs' fraud claim even though it was predicated upon the very same alleged promise as the contract claim, i.e., a promise that Plaintiffs would receive a "discounted rate." *Id.* The decision below thus flies in the face of settled precedent establishing the Commission as the exclusive forum in which to pursue a rate dispute against a utility. It further enables litigants to pursue duplicative litigation in competing fora by allowing them to split their claims and shop for the forum most likely to grant the most favorable result relative to each claim.

Indeed, the appellate court's decision ignores the Court's precedent that only "pure tort" claims should proceed in the courts, *Hull v. Columbia Gas of Ohio, Inc.*, 110 Ohio St. 3d 96, 2006-Ohio-3666, 850 N.E.2d 1190, ¶ 28-38, and that claims related to rates, even if framed as sounding in tort, should be heard by the Commission. *Kazmaier Supermarket, Inc.*, 61 Ohio St. 3d at 153, 573 N.E.2d 655. Because it is a challenge to their electric utility, Plaintiffs' fraud claim is not a pure tort. In invoking Article IV of the Ohio Constitution to justify removing Plaintiffs' claim from the Commission's exclusive jurisdiction, DiFranco App. Op. at ¶ 27, the court below entirely overrode Title 49 of the Ohio Revised Code, through which the General Assembly vested the Commission with exclusive authority to hear rate-based disputes such as those raised by Plaintiffs' fraud claim. Only if Plaintiffs' fraud claim was a pure tort (which it is not) would it count as a "justiciable matter" properly brought before a court of common pleas. Ohio Const. art. IV § 4.04(B).

Because the Commission's expertise is necessary to resolve this dispute and the act complained of – the phase-out of a tariff rate – constitutes a practice normally authorized by the Companies, only the Commission has jurisdiction to hear Plaintiffs' fraud claim. *Allstate Ins. Co. v. Cleveland Elec. Illuminating Co.*, 119 Ohio St. 3d 301, 2008-Ohio-3917, 893 N.E.2d 824, ¶ 11-16. Confirming as much, the Commission specifically considered and disposed of the very issues Plaintiffs now seek to try in common pleas court. Because the decision below is both inconsistent with the Court's precedent and Revised Code Title 49 and authorizes claim splitting and forum shopping, the Court should reverse.

II. STATEMENT OF THE CASE AND FACTS

Plaintiffs received special electric rates that were established by the Commission decades ago. These rates were discounted from standard residential electric rates. Since the establishment of the special rates, the electric industry, like many industries, has changed. In Ohio, the General Assembly deregulated part of how customers purchase electric services. The Commission, empowered by the General Assembly to effect deregulation,[2] ultimately came to address the discounted rates and, in fact, the very grievances that Plaintiffs seek to try in common pleas court. The history of the special rates, the changes in the electric industry and the consequent effects on Plaintiffs' rates and the Commission's efforts to redress Plaintiffs' grievances are discussed below.

A. The History of the Special Electric Heating Rates

During the energy crisis of the 1970s, there was a perceived shortage of natural gas, the preferred fuel used for space heating. In light of this perceived shortage, CEI requested permission from the Commission to offer – and the Commission approved – special electric rates

---

[2] *See, e.g.*, R.C. 4928.03, Appx. 126.

for customers who used electricity as their main source of energy for space heating or for water heating. Ohio Edison later applied for and was granted permission to offer similar rates for electric heating customers. "These rate structures were declining block structures such that the customer's rate declined with greater electricity usage." (Commission Finding and Order in Case No. 10-176-EL-ATA, March 3, 2010 (hereinafter "March 3, 2010 Order"), at ¶ 2 (attached at Appx. 55).)[3]

Importantly, concerns about natural gas availability were not the only reason for the special rates. Prior to 2000, both CEI and Ohio Edison were fully integrated utilities (as were virtually all electric utility companies in Ohio). (Opinion and Order, Case No. 10-176-EL-ATA, May 25, 2011 ("May 25, 2011 Order"), at p. 2 (attached at Appx. 86).) Given the growing popularity of air-conditioning in the late 1960s and 1970s, summer peak electricity usage was increasing at a much faster rate than winter peak usage. In turn, and problematically, the Companies had to build sufficient generating capacity to meet their peak summer load, but that capacity went underutilized during the winter months. (*Id.* at p. 9, Appx. 93.)

The special electric heating rates addressed this issue in two ways. First, they increased the total amount of electricity – kilowatt hours ("kWhs") – that the utilities sold during the year, thereby allowing the CEI and OE to spread their fixed costs over a greater number of kWhs. That, in turn, reduced the price per-kWh that any residential customer would otherwise pay for electricity. Second, the increase in generation plant operations during the winter months

---

[3] In evaluating a motion to dismiss under Rule 12(B)(1) of the Ohio Rules of Civil Procedure, this Court has held that courts are not limited to the allegations of the complaint. *Southgate Dev. Corp. v. Columbia Gas Transmission Corp.*, 48 Ohio St. 2d 211, 358 N.E.2d 526 (1976), syl. ¶ 1. Further, this Court has held that it may take judicial notice of orders issued by a government agency, including those of the Commission. *See City of Akron v. Pub. Util. Comm'n*, 5 Ohio St. 2d 237, 246, 215 N.E.2d 366 (1966); *Firestone v. Indus. Comm'n*, 144 Ohio St. 398, 59 N.E.2d 147 (1945), syl. ¶ 2 ("This court will take judicial notice of the administrative orders of the Interstate Commerce Commission.").

decreased the need for the Companies to cycle their generating plants (*i.e.*, to repeatedly start up and shut down generators). This decrease in cycling reduced the Companies' operation and maintenance expenses. Again, these savings ultimately benefitted all residential customers in the form of lower rates. (*Id.*)

In short, at one time the special electric heating rates benefited both the Companies and customers – a "win-win-win" situation. The recipients of the special rates received lower rates during the winter season. Other customers, by virtue of the cost-spreading effects of winter heating load, paid lower rates than they otherwise would. And the utilities could mitigate the cycles of high summer peaks and low winter valleys (and consequently achieve lower maintenance costs) and receive more revenue.

B. S.B. 3 and the Disappearance of the Rationale for Offering Special Electric Heating Rates

In 1999, the General Assembly enacted S.B. 3, which restructured the electric industry in Ohio. S.B. 3 required electric distribution utilities to unbundle electric services and sought to create a fully competitive market for retail electric generation services. (March 3, 2010 Order at ¶ 3, Appx. 55.) Thus, S.B. 3 provided that pricing, marketing and production of electric generation would be separate from the other rate components of electric service.[4] Retail generation service thereby became a competitive service, which customers could purchase either through an electric utility or through a competitive supplier.

S.B. 3 also provided that an electric distribution utility such as CEI or Ohio Edison could not provide both a competitive retail electric service and a noncompetitive retail electric service,

[4] There are three primary components of electricity service: generation, transmission and distribution. (May 25, 2011 Order at p. 2, Appx. 86.) Generation involves the production of electrical power at generation plants. Transmission comprises the bulk-transfer of electrical power from generating plants to electrical substations. At the culmination of the process, distribution encompasses the delivery of electricity from electrical substations to individual customers.

except pursuant to a Commission-approved corporate separation plan. (*Id.*) *See also* R.C. 4928.17, Appx. 129-130 (providing for the implementation of a corporate separation plan). As a result of S.B. 3, the Companies transferred their generating plants to a corporate affiliate as contemplated by their Commission-approved transition plan and now no longer own generation plants. (May 25, 2011 Order at p. 2, Appx. 86.)

Once CEI and OE no longer owned any generation plants, these companies were required to purchase generation for their customers. Thus, the Companies' generation costs – the amount that they paid for power – now became essentially the same to serve all customers. (*Id.* at p. 9, Appx. 93.) Because the Companies no longer owned generation facilities, they also no longer had fixed generation costs. Similarly, the Companies did not need to make investments or incur expenses relating to the operation, maintenance, installation or expansion of such facilities.

Given that the Companies' cost structure has changed, the increased winter usage that electric heating customers provide no longer benefits the Companies' other customers by putting downward pressure on rates. (*Id.*) Because the Companies have no fixed costs for generation service, the electric heating revenues do not help to defray such costs. Nor does the additional winter usage decrease the Companies' generation expense by allowing the Companies to operate generation facilities more economically because the Companies do not have generation facilities. For customers that chose to receive generation service through the Companies, Ohio Edison and CEI merely pass through all generation charges from their wholesale suppliers. (*Id.*)

C. The Inconsistency of Declining Block Rates with the Policies of Efficiency and Conservation in S.B. 221

In 2008, the General Assembly enacted S.B. 221, which further undercut the rationale for providing special electric heating rates that encourage electric usage during the winter period. Among other things, S.B. 221 established a state policy of encouraging conservation and energy

efficiency. R.C. 4928.02, Appx. 124-25. The bill further imposed certain energy efficiency and peak demand reduction requirements. R.C. 4928.66, Appx. 131-133. The special electric heating rates, with their declining block structure, were inconsistent with this newly-enacted state policy. In particular, under the declining block rates, the greater a customer's electric usage, the greater the discount that customer would receive. (May 25, 2011 Order at p. 2, Appx. 86.) Thus, the special electric heating rates were antithetical to state policy by encouraging consumption, not conservation.

D. The Phase Out of the Separate Electric Heating Rate Schedules and the Uninterrupted Continuation of a Discount for Electric Heating Customers

Because the special electric heating rates are no longer consistent with state policy – nor cost-justified in light of the change in utility structure – the Commission was required to address those rates. In particular, while the Commission discontinued the separate special rates, it approved riders providing credits that have preserved discounts for electric heating customers. (*See, e.g.* March 3, 2010 Order at ¶ 4-8, Appx. 55-56.) Thus, electric heating customers have continued, without interruption, to receive electricity at discounted rates, and discounts remain in place today and into the future. The discounts have remained in effect without interruption, through the implementation of credits to a bill rather than through a specific discounted rate. (*See* May 25, 2011 Order at p. 23, Appx. 107.) As explained below, electric heating customers did experience an increase in their bills in December 2009, but so did the Companies' other customers. Nonetheless, electric heating customers have received without interruption, and continue to receive, a discount relative to standard residential customers.

1. The Rate Certainty Plan ("RCP") case and the elimination of special electric heating rates for new customers

Since the enactment of S.B.3, the Commission has addressed the special electric heating rates in a series of gradual steps. The first notable change to the rate structure for residential

customers occurred when the Commission approved a Rate Certainty Plan ("RCP")[5] for the Companies in January 2006 as a part of Case No. 05-1125-EL-ATA. (March 3, 2010 Order at ¶ 4, Appx. 55.) As a result of the RCP and in light of the changes in how the Companies would provide generation, customers who were then receiving service under the special electric heating rates were notified that they would be permitted to remain on those rates as long as the rate continued to be offered and the customer continued to qualify for the rate. As part of its Order in the RCP case, the Commission determined that new electric heating customers applying for service on and after January 1, 2007, however, would not be eligible to receive the special discounted rate. (May 25, 2011 Order at p. 2, Appx. 86.)

2. The Companies' 2007 Distribution Rate Case and Rider RDC

While the Companies were transitioning to a deregulated competitive environment for generation, they also applied for an increase in their distribution rates. That case, Case No. 07-551-EL-AIR (the "2007 Distribution Rate Case"), resulted in increases and other changes to the distribution component of the special electric heating rate. (May 25, 2011 Order at p. 3, Appx. 87.) The Companies proposed and the Commission approved a simplified residential distribution rate structure. Previously, CEI and Ohio Edison each had seven residential tariff schedules. The 2007 Distribution Rate Case consolidated those various tariff schedules into a single cost-of-service-based residential distribution tariff for each company. (*Id.*) The approved tariff included a flat per-kWh charge for all residential customers, eliminating the special declining block charge that some residential customers, such as electric heating customers, had previously received. This flat per-kWh charge was then combined with a number of riders,

---

[5] The RCP was established as part of the transition from a fully regulated market to a competitive retail market. (*See* May 25, 2011 Order at pp. 2-3, Appx. 86-87.)

providing charges and credits, to determine the total customer distribution charge per kWh. In particular, a residential distribution credit, Rider RDC, was established to mitigate the adverse impact on residential customers, including those receiving the special electric heating rates. (*Id.*) This consolidation into a single rate meant the end of the special electric heating rates for those customers who had been grandfathered under the RCP, but led to the creation on new credits for electric heating customers.

3. The Companies' Electric Security Plan and the creation of another discount for electric heating customers

S.B. 221 required electric utilities to apply to establish standard service offer generation rates for customers who did not seek to purchase generation from another company. One method to establish such rates is through an Electric Security Plan ("ESP"), which the Companies filed in Case No. 08-935-EL-SSO for service starting in June 2009. Thus, the third change that impacted residential rates (and thus impacted the special electric heating rates) resulted from the Companies' ESP. Like the 2007 Distribution Rate Case did for the Companies' distribution rates, the ESP eliminated the various numerous residential rate schedules for generation and in their place implemented a consolidated rate schedule structure. This new generation rate structure was based on the structure approved in the distribution case. (March 3, 2010 Order at ¶ 5, Appx. 55-56.)

More specifically, the ESP required the Companies to procure all of their generation through a competitive bidding process. This competitive bidding process did not differentiate power procurement among different residential customer classes (*e.g.*, electric heating customers and non-electric heating customers). Moreover, under the ESP, not only would the Companies not differentiate among residential customers in procuring generation, but all residential customers would be charged the same generation rate. (*See* May 25, 2011 Order at p. 3, Appx.

87.) The ESP tariffs became effective on June 1, 2009. (*Id.*) As in the distribution case, concurrent with the adoption of a single generation rider, the ESP established other riders that provided discounts to the generation charge for certain customers. Specifically, as part of Rider EDR[6], electric heating customers who received generation services from the Companies, received a discount on generation rates otherwise paid by residential customers receiving the same services from the Companies. Together, the discounts from Riders RDR and EDR represented a credit of 3.6 cents per kWh for the November through March winter period. (*See* May 25, 2011 Order at pp. 4; 20, Appx. 88.)

E. The Commission Investigation and the Adoption of Rider RGC

Beginning in the winter period of 2009-2010, customers experienced the changes from the cumulative effect of the 2007 Distribution Case and the ESP case. As noted, most of the Companies' customers received a rate increase. Notably, electric heating customers continued to receive a discount compared to other residential customers. Nevertheless, the combined impact of the changes made in the distribution and ESP cases resulted in vocal customer complaints, particularly from the electric heating customers. (March 3, 2010 Order, at ¶ 9, Appx. 57.)

On February 12, 2010, in an effort to address customers' concerns, the Companies filed an application with the Commission, Case No. 10-176-EL-ATA, seeking to establish a new credit that would allow electric heating customers to transition toward standard residential rates. This transition would have been even more gradual than that which had been previously approved by the Commission through the establishment of Riders RDC and EDR. These new tariffs would have limited the amount of bill-increases for the vast majority of electric heating customers.

---

[6] Rider EDR stands for Economic Development Rider.

The Commission, however, rejected the Companies' proposal. (*Id.* at ¶ 10, Appx. 57.) Instead, on March 3, 2010, the Commission directed the Companies to file tariffs for non-standard residential rate customers (including electric heating customers) that would provide "bill impacts" commensurate with rate levels that existed on December 31, 2008. (*Id.*) On March 17, 2010, the Companies filed these new tariffs as directed. The Companies achieved the Commission's desired bill impacts by establishing a third credit for electric space heating customers, Rider RGC, in addition to the existing credits provided by Riders RDC and EDR. This new rider significantly increased the generation credit that electric heating customers received.

The Commission further directed the Staff to continue its investigation "and to develop a process, which ensures that interested parties and stakeholders have a meaningful opportunity to participate in the resolution of the issues raised in this proceeding." (Second Entry on Rehearing, Case No. 10-176-EL-ATA, April 15, 2010 at ¶ 7 (attached at Appx. 61-62).)

F. The Commission Acknowledges Its Jurisdiction Over the Allegations in the Instant Case

The complaint in this case was filed in February 2010, while the 10-176-EL-ATA case was proceeding before the Commission. In April 2010, the Commission initially rejected the argument of intervenor Office of the Ohio Consumers' Counsel ("OCC") that the Commission should conduct an investigation into the "alleged promises and inducements made by the Companies to 'all-electric' residential customers." (*Id.* at ¶ 9, Appx. 63.) The Commission found that the discounts themselves "were provided pursuant to [the Companies'] Commission-approved tariffs." (*Id.*) The OCC had alleged that additional "promises and inducements" outside of the scope of the tariffs had been made to the customers receiving the special electric heating rates. (*Id.*) The Commission, without further findings of fact or law, denied the OCC's

application for rehearing on this point. The Commission held that such allegations were not within its purview and best brought before "a court of general jurisdiction," which, in fact, had essentially already occurred with the filing of the instant case in February 2010 before the Geauga County Court of Common Pleas. (*Id.*)

In September 2010, the trial court dismissed all of Plaintiffs' claims for lack of subject matter jurisdiction and found that Ohio law vested the Commission with exclusive jurisdiction over such claims. In an order issued on November 10, 2010, the Commission took note of the trial court's actions and expressly acknowledged that "the Geauga County Court of Common Pleas has issued a decision holding that it lacks jurisdiction over allegations pertaining to the Companies' rates and marketing practices" (i.e., the decision under appeal here). (Fifth Entry on Rehearing, Case No. 10-176-EL-ATA, Nov. 10, 2010, at p. 5 (attached at Appx. 81).) The Commission held that it "agrees with the Court that claims that customers were to receive rates that are in violation of PUCO-approved tariffs or which were not authorized by the PUCO are issues that the PUCO is empowered to decide." (*Id.*) Accordingly, the Commission "will exercise [its] jurisdiction over FirstEnergy's rates and marketing practices ...."[7] (*Id.*) The Commission further authorized "discovery regarding these issues," and noted that it would allow parties to present evidence on those issues at a series of public hearings. (*Id.*)

1. Commission-sponsored public hearings

To that end, in October and November of 2010, the Commission conducted a series of six public hearings across northern Ohio on the issue of the special rates. The purpose of the hearings was "to provide customers of FirstEnergy a reasonable opportunity to provide public testimony regarding potential rates to be charged all-electric customers." (Entry, Case No. 10-

[7] The Commission's reference to "FirstEnergy" was to CEI, Ohio Edison and The Toledo Edison Company.

176-EL-ATA, October 8, 2010, at ¶ 7 (attached at Appx. 68).) In a later Entry, the Commission stated that it was "particularly interested in receiving more information at the public hearings" about three topics. (Entry, Case No. 10-176-EL-ATA, October 14, 2010, at ¶ 7 (attached at Appx. 73).) The first topic expressly addressed the same allegations of "promised rates" and deceptive marketing practices that Plaintiffs allege in this case. The Commission specifically sought testimony from all-electric customers about written documentation or contracts regarding their rates, and whether there was "a commitment that the rate would remain with the home for future owners." (*Id.*)[8] Dozens of individuals testified at these hearings on the topic of the special rates and the marketing practices that the Companies used in offering those rates.

2. The Commission's five-day evidentiary hearing and Opinion in Case No. 10-176-EL-ATA

Following the conclusion of these public hearings, in February 2011, the Commission conducted a five-day evidentiary hearing that focused, in part, on the existence of any "promises" or "agreements" regarding the alleged indefinite duration of the special electric rates and any supposedly deceptive marketing practices engaged in by the Companies to purchasers of so-called "all-electric" homes. (May 25, 2011 Order at p. 23, Appx. 107.) Specifically, the Commission heard extensive testimony from members of a consumer group called Citizens for Keeping the All-Electric Promise ("CKAP") that "employees of the Companies enticed customers to switch to electric heating by offering a discounted electric rate." (*Id.* at pp. 14-16; 19-20, Appx. 103-104.) The Commission also heard similar testimony from the OCC's expert

[8] The other topics addressed were: (1) whether all-electric customers through the Commission should take into account in setting rates the difference in cost between heating a home with natural gas or electricity; and (2) recognizing that policy changes "make it necessary to alter the discount" that may be provided to all-electric homeowners, what is a "fair way to move or phase in all-electric home bills to accommodate these changes without causing rate shock and without burdening other customers." (Entry, Case No. 10-176-EL-ATA, October 14, 2010, ¶ 7, Appx. 73.)

witness alleging "pervasive unfair and deceptive marketing practices" on the part of the Companies. (*Id.* at pp. 22-23, Appx. 106-107.)

On May 25, 2011, the Commission issued its order for Case No. 10-176-EL-ATA. The Commission ordered that the phase-out of the previously ordered discount provided through Rider RGC extend over an eight-year period for most customers who previously had received service under an all electric rate. (*See* May 25, 2011 Order at pp. 8, 20, Appx. 92, 104.) The Commission also ordered that the two other discounts being provided to electric heating customers through Riders RDC and EDR be continued without change. For the first two years of the program ordered by the Commission, discounts for many electric heating customers would be larger than they ever were. (*Id.* at p. 23, Appx. 107.)

Notably, in its May 25, 2011 Order, the Commission addressed the evidence and arguments presented about the Companies' alleged promises regarding discounted rates. The Commission determined that CEI and Ohio Edison had not acted improperly. (*Id.*) The Commission held that, with regard to

> [C]laims that the Companies unfairly and deceptively enticed residential customers and housing developers to commit to electric heating before the Companies abandoned support for favorable rate treatment, . . . the evidence demonstrates that discounts for electric heating customers have never been eliminated and that electric heating customers have always received a minimum of two discounts.

(*Id.*) Moreover, the Commission specifically observed that the evidence "does not demonstrate how electric heating customers have been misled by FirstEnergy[9] when these customers have always received a significant discount on the rates paid by standard service offer customers." (*Id.*)

[9] The reference to "FirstEnergy" was to FirstEnergy Corp.'s Ohio electric utilities, *i.e.*, CEI, Ohio Edison and Toledo Edison.

G. Plaintiffs' Allegations in Their Complaint Before The Court of Common Pleas

In their Complaint filed in the Geauga County Court of Common Pleas, Plaintiffs made essentially the same allegations regarding the special electric rates that the Commission considered and rejected in the 10-176-EL-ATA case. Plaintiffs repeatedly alleged that they relied to their detriment on alleged "inducements…oral agreements, covenants, promises and representations" by the Companies regarding the special electric rates. (Compl. at ¶ 30-31, Appx. 47; *see also id.* at ¶ 17-19, 24, 28, 40, 49, Appx. 45-47, 49-51.) Plaintiffs alleged breach of contract and fraudulent inducement. (Compl. at ¶ 45-47, 48-51, Appx. 50-51.) Plaintiffs also requested a declaratory judgment that the Companies were contractually obliged to provide the special rates essentially in perpetuity and a permanent injunction that would prevent the Companies from eliminating the special rates. (Compl. at ¶ 39-44, 52-55, Appx. 49-52.)

No doubt cognizant that the Commission has exclusive jurisdiction over claims involving rates, Plaintiffs stated that theirs was not a "'rate' setting case." (Compl. at ¶ 12, Appx. 44.) Yet references to the special electric rates, and alleged associated promises and representations, permeated the Complaint. Plaintiffs, for example, alleged that "Defendants agreed to charge Plaintiffs … special volume based or off peak usage based rates commonly known as the all electric home rate, electric water heating rate, and load management discount rate indefinitely with no limit as to time." (Compl. at ¶ 1, Appx. 42.) Further, "Defendant[s] agreed, covenanted and represented to Plaintiffs … who installed electric heat pumps that they would receive a special discounted rate regardless if Defendants removed the rate from their filed rate schedule with the Ohio PUCO." (*Id.*)

Likewise, Plaintiffs allege that "each were parties to the oral agreements, representations, covenants and inducements made by Defendants assuring Plaintiffs … that they would receive

the all electric home rate, electric water heating rate and/or load management discount." (*Id.* at ¶ 2, Appx. 42.) Similarly, Plaintiffs alleged the existence of a "guaranteed" rate. (*Id.* at ¶ 20, Appx. 46.) Plaintiffs also repeatedly used the term "discounts" to refer to the rates to which they claim they were entitled. (*Id.* at ¶ 3-4, 15, 21-22, 25, 27, 29, 31, Appx. 42-43, 45-47.) Specifically to their fraud claim, Plaintiffs alleged that Defendants "falsely represented to Plaintiffs" that if Plaintiffs maintained all-electric homes, they would "permanently" receive "a reduced rate, which in the case of the all electric home customers was approximately 1.9 cents in January, 2009." (*Id.* at ¶ 49, Appx. 51.)

III. PROCEDURAL HISTORY

A. The Court of Common Pleas Properly Dismissed The Complaint.

On September 7, 2010, the Geauga County Court of Common Pleas dismissed all of Plaintiffs' claims for lack of subject matter jurisdiction. The trial court found that the Commission had exclusive jurisdiction to hear Plaintiffs' claims pursuant to Chapter 4905 of the Ohio Revised Code and settled case law. (*See* Order of Geauga Cty. C.P. (Sept. 7, 2010) at p. 3 (attached at Appx. 30).)

The trial court specifically held that Plaintiffs' allegations of breach of contract and fraud failed to sound in pure contract or pure tort. The trial court held that pure tort or pure contract claims against utilities involve "disputes that do not concern rates or service" (*Id.*) "[T]he courts should not be dissuaded from finding a claim to be within the exclusive jurisdiction of PUCO simply because it is cloaked in terms of breach of contract or tort." (*Id.* at p. 5, Appx. 32.) The court further correctly held that only if Plaintiffs' claims were not in any way related to rates or service could Plaintiffs' proceed in a court of common pleas. (*Id.*)

The trial court dismissed Plaintiffs' claims because they were manifestly about utility rates and thus fell under the exclusive jurisdiction of the Commission, despite Plaintiffs' efforts

to characterize them as sounding in contract or tort. Further, the trial court held, "Plaintiffs arguments, while thorough, creative and imaginative, cannot survive" the pure tort/pure contract test, articulated by this Court in *Hull v. Columbia Gas of Ohio, Inc.*, 110 Ohio St. 3d 96, 2006-Ohio-3666, 850 N.E.2d 1190, because "the dispute between the Companies and the plaintiffs is over rate increases." (*Id.* at p. 6, Appx. 33.) The trial court also held that the Commission's expertise was necessary to resolve the instant dispute, observing, "The establishment of rates necessarily involves expertise in weighing the effect of increases upon different classes of users … [t]he very establishment of PUCO as the exclusive entity to set fair rates" results from such expertise. (*Id.*) Therefore, Plaintiffs had raised their claims in an improper forum and the trial court dismissed them accordingly.

B. The Court of Appeals Properly Affirmed The Dismissal of Most of The Complaint But Improperly Reversed The Dismissal of The Fraud Claim.

The Court of Appeals affirmed the trial court's dismissal of Plaintiffs' contract claim. The Court of Appeals observed, "While appellants argue their contract claims, i.e., their breach of contract claim, their claim for declaratory relief, and their claim for injunction as it relates to contract, are based on the companies' alleged breach of a promise to charge a discounted rate, the essence of these claims is that the rate approved by the Commission and imposed by the companies after the all-electric program was eliminated was unjust, unreasonable or unlawful." DiFranco App. Op. at ¶ 54, Appx. 20. Indeed, according to the appellate court, "a pure contract claim is one *having nothing to do with the utility's service or rates.*" *Id.* at ¶ 56, Appx. 21 (original emphasis). The court continued: "Here, the subject matter of the alleged promise is *the rate to be charged the customers.*" *Id.* (original emphasis). Moreover, Plaintiffs predicated their breach of contract claim upon an alleged "promise that [they] would permanently be charged *the discounted rate.*" *Id.* (original emphasis). The Court of Appeals likewise affirmed the dismissal

of Plaintiffs' claim for the injunction related to the contract claim because it was "based on the companies' alleged breach of a promise to charge a discounted rate." *Id.* at ¶ 54, Appx. 20. Hence, the appellate court ruled that the trial court had correctly dismissed Plaintiffs' claims for breach of contract and declaratory and injunctive relief due to lack to subject matter jurisdiction. *See id.* at ¶ 56, Appx. 21.

The Court of Appeals reached a similar conclusion with regard to Plaintiffs' contract claim upon its application of the test in *Allstate Ins. Co. v. Cleveland Elec. Illuminating Co.*, 119 Ohio St. 3d 301, 2008-Ohio-3917, 893 N.E.2d 824.[10] *Id.* at ¶ 58, Appx. 18. The Court of Appeals held that this claim required the Commission's expertise. Specifically, the Commission would have to review and determine whether Plaintiffs "were promised rates that were in violation of the PUCO-approved tariffs" and also "the amount of rate overcharge" based upon the difference between the special discount rates and the new rates. *Id.* Further, because the contract claim involved a "challenge[]" to the "imposition of [a] higher rate," it clearly fell within the purview of a "practice normally authorized by a utility." *Id.* at ¶ 59, Appx. 22-23. Therefore, "the trial court did not err in finding such claims are within the PUCO's exclusive jurisdiction." *Id.* ¶ 54, Appx. 20.

In contrast to the detailed reasoning with respect to the other claims, the reversal of the dismissal of Plaintiffs' fraud claim provided minimal reasoning. The Court of Appeals simply stated, "[B]ecause fraud is a civil action that existed at common law in Ohio and [Plaintiffs] alleged a fraud claim in their complaint," a court of common pleas had jurisdiction to hear it. *Id.* at ¶ 55, Appx. 20-21. The Court of Appeals stated that this was so even though "the trial court did not err in dismissing appellants' claim for <u>injunction as it relates to the fraud claim</u> since this

[10] The *Allstate* test is discussed at length below under Proposition of Law No. III.

would require a determination of the proper rate to be charged." *Id.* (emphasis added). The Court of Appeals provided no further analysis or explanation as to why it held that the fraud claim was a pure tort, even though the fraud claim was based upon the same alleged promise regarding the special rates as the breach of contract claim.

Noting the *Allstate* test, the Court of Appeals stated the Commission's expertise would not be necessary to resolve Plaintiffs' fraud claim, but gave no explanation or guidance as to why this was true. *Id.* at ¶ 58, Appx. 22. The Court of Appeals also held that Plaintiffs' fraud claim somehow fell outside of a practice normally authorized by a utility, but again it provided no fuller explanation as to why this was so. *Id.* at ¶ 59, Appx. 22-23. The Court of Appeals cursorily observed that the fraud claim "will require appellants to prove that, when they made the alleged promise, the companies misrepresented their present state of mind in that they had no intention of performing the promise." *Id.* Based on this brief analysis, the Court of Appeals held that the trial court had jurisdiction to hear the fraud claim and reversed and remanded it accordingly.

IV. ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law No. 1:
No matter how they are labeled, claims challenging the propriety of rates to be charged to utility customers are subject to the exclusive jurisdiction of the Public Utilities Commission of Ohio. *Kazmaier Supermarket, Inc. v. Toledo Edison Co.*, 61 Ohio St. 3d 147, 153, 573 N.E.2d 655 (1991).

Notwithstanding the tort or contract labels that Plaintiffs placed on their claims, these claims are intrinsically about rates and under the exclusive jurisdiction of the Commission. On this issue, this Court's precedent makes two points abundantly clear. First, the Commission has plenary jurisdiction to hear customer complaints related to utility rates or service. Second, simply pleading a claim to sound in tort or contract is not sufficient to avoid the exclusive

jurisdiction of the Commission. In reinstating Plaintiffs' fraud claim, the Court of Appeals decision ignores these two points, thereby undermining the settled precedent of this Court.

To begin, the Commission unquestionably has plenary jurisdiction to hear customer complaints regarding utility rates or service. "The General Assembly has created a broad and comprehensive statutory scheme for regulating the business activities of public utilities. R.C. Title 49 sets forth a detailed statutory framework for the regulation of utility service and the fixation of rates charged by public utilities to their customers." *Kazmaier Supermarket, Inc. v. Toledo Edison Co.*, 61 Ohio St. 3d 147, 150, 573 N.E.2d 655 (1991). "The jurisdiction specifically conferred by statute upon the Public Utilities Commission over public utilities of the state, including the regulation of rates . . . is so complete, comprehensive and adequate as to warrant the conclusion that it is likewise exclusive." *Id.* at 152. "There is perhaps no field of business subject to greater statutory and governmental control than that of the public utility. This is particularly true of the rates of a public utility. Such rates are set and regulated by a general statutory plan in which the Public Utilities Commission is vested with the authority to determine rates in the first instance...." *Keco Indus., Inc. v. The Cincinnati & Suburban Bell Tel. Co.*, 166 Ohio St. 254, 256, 141 N.E.2d 465 (1957). *See also Sparks v. Pub. Util. Comm.*, 69 Ohio St. 2d 47, 49, 430 N.E.2d 924 (1982) (holding that the "plenary jurisdiction granted the commission" over the rates and tariffs cannot be "reduce[d]"); *State ex rel. Columbus S. Power Co. v. Fais*, 117 Ohio St. 3d 340, 2008-Ohio-849, 884 N.E.2d 1, ¶ 16-20 (holding that the Commission has exclusive jurisdiction over all matters involving rates and tariffs).

Second, this Court has regularly rejected attempts at creative pleading that try to make a complaint about utility rates or service appear to sound in tort or contract. In *Kazmaier*, the plaintiff sought redress in a court of common pleas, alleging that it had been overcharged by the

utility. 61 Ohio St. 3d at 153. The trial court dismissed the plaintiff's complaint for lack of subject matter jurisdiction and the appellate court reversed. In its reversal of the appellate court's ruling, this Court held that the plaintiff's claim "does have the elements and characteristics of a common-law right to be asserted in tort or in contract." *Id.* at 150. Nonetheless, this Court reversed the appellate court decision because, at base, the dispute was about the propriety of a utility rate. *Id.* at 153. "Although the allegations of the complaint seem to sound in tort and contract law, it must not be forgotten that the contract involved is the utility rate schedule." *Id.* "[V]iewed in the light of public policy considerations and pronouncements by the General Assembly and by this court," the plaintiff's rate-based claim belonged before the Commission. *Id.* at 150.

Similarly, in *State ex rel. The Illuminating Co. v. Cuyahoga Cty. Court of Common Pleas*, 97 Ohio St. 3d 69, 2002-Ohio-5312, 776 N.E.2d 92, ¶ 3-7, the relator utility company sought a writ of prohibition to preclude the respondent's counterclaim for fraud from being heard in a court of common pleas. In granting the utility's writ, this Court held that the respondent's "claim of common-law fraud is expressly premised upon" the violation of "commission regulations" and "public utilities statutes." *Id.* at ¶ 24-28. Even though the respondent had framed its counterclaim to sound in tort, this Court held "'casting the allegations in the complaint to sound in tort or contract is not sufficient to confer jurisdiction upon a trial court' when the basic claim is one that the commission has exclusive jurisdiction to resolve." *Id.* at ¶ 21 (quoting *Higgins v. Columbia Gas of Ohio, Inc.*, 136 Ohio App. 3d 198, 202, 736 N.E.2d 92 (7th Dist. 2000)). *See also State ex rel. Columbia Gas of Ohio, Inc. v. Henson*, 102 Ohio St. 3d 349, 2004-Ohio-3208, 810 N.E.2d 953, ¶ 16-21 (same).

One appellate court has directly addressed claims arising from a utility's alleged representations regarding utility service. In *North Ridge Investment Corp. v. Columbia Gas of Ohio, Inc.*, 49 Ohio App. 2d 74, 359 N.E.2d 443 (9th Dist. 1973), the plaintiff, a developer, alleged that a natural gas company had stated that gas service would be made available in an area that the plaintiff proposed to develop. The plaintiff alleged that in reliance on the utility's representations, it commenced to develop the area. Subsequently, the gas company imposed a ban on new residential installations and refused to provide service. The appellate court affirmed the dismissal of the complaint on the basis that the court lacked jurisdiction. The appellate court held that a court "is without jurisdiction, either in mandamus or injunction, to order a public utility to provide service and facilities . . . ." *Id.* at 76. Similarly here, a court cannot order what rate a utility customer should pay or should have paid. These are matters for the Commission. Indeed, the Commission addressed these issues here.

In seeking to preserve their fraud claim, Plaintiffs here attempt to circumvent this Court's settled precedent on this issue by relying on *Milligan v. Ohio Bell Tel. Co.*, 56 Ohio St. 2d 191, 383 N.E.2d 575 (1978). (*See* Appellees' Mem. in Response Opposing Jurisdiction, at p. 3.) Plaintiffs' reliance is misplaced. In its review of this very issue in *Allstate Ins. Co. v. Cleveland Elec. Illuminating Co.*, 119 Ohio St. 3d 301, 2008-Ohio-3917, 893 N.E.2d 824, this Court observed that "[a]t one time the mere allegation that a complaint sounded in tort may have been enough to confer jurisdiction on the court of common pleas." *Id.* at ¶ 8. (citing to *Milligan*, at 195.) "We have held, however, that in cases involving public utilities, jurisdiction is not conferred based solely on the pleadings." *Id.* (citing to *Henson*, at 353 and *State ex. rel. The Illuminating Co.*, at 73). Indeed, "In this regard, we must review the substance of the claims

rather than mere allegations that the claims sound in tort or contract." *Kazmaier*, 61 Ohio St. 3d at 154, 573 N.E.2d 655 (1991).

Here, the Court of Appeals ignored that Plaintiffs' fraud claim, though labeled as a tort, is predicated on the propriety of an electricity rate. The Court of Appeals inexplicably reinstated Plaintiffs' fraud claim even though the Complaint expressly alleges that the promise underlying both the contract claim and the fraud claim is one and the same. Indeed, the Complaint repeatedly refers to "agreements, misrepresentations and fraudulent inducements" together with no distinction between the contract claim and the fraud claim. (*See, e.g.*, Compl. at ¶ 10, 16, 17, 18, 29, 30, 31, Appx. 44-45, 47.) The fraud count alleges that the Companies "falsely represented to Plaintiffs . . . that if they maintained all electric homes . . . Defendants would permanently include them as all electric home . . . at a reduced rate." (*Id.* at ¶ 49, Appx. 51.) Both claims are thus based upon the same promise that Plaintiffs would receive discounted rates for electric service indefinitely.

Moreover, as the great weight of this Court's precedent holds, rate disputes belong before the Commission, not a court of common pleas. Plaintiffs' fraud claim manifestly involves rates. Indeed, the first paragraph of the Complaint references rates four times: "Defendants agreed to charge Plaintiffs . . . special volume based or off peak usage based *rates* commonly known as the all electric home *rate*, electric water heating *rate*, and load management discount *rate* indefinitely with no limit as to time. (*Id.* at ¶ 1, Appx. 42; emphasis added.) The fraud claim is predicated upon alleged misrepresentations about Plaintiffs "permanently" receiving "a *reduced rate*, which in the case of the all electric home customers was approximately 1.9 cents in January, 2009." (*Id.* at ¶ 49, Appx. 51; emphasis added.) Further, calculating Plaintiffs' damages claim

would require calculating the difference between rates that Plaintiffs claimed they were promised with what they have allegedly received.

Labels aside, the substance of Plaintiffs' fraud claim concerns the propriety of a utility rate. Simply because Plaintiffs have framed their dispute about the special electric heating rates in terms of fraud does not make it so. Following *Kazmaier*, *State ex. rel. Illuminating Company* and *Henson*, only the Commission, subject to this Court's review, has jurisdiction to hear it.

Proposition of Law No. II:
A claim brought under a theory of fraud is not a pure tort claim when that claim challenges utility rates approved by the Commission, and as such that claim falls under the exclusive jurisdiction of the Commission. *Hull v. Columbia Gas of Ohio, Inc.*, 110 Ohio St. 3d 96, 2006-Ohio-3666, 850 N.E.2d 1190, ¶ 28-38.

A. Plaintiffs' Fraud Claim Is Not A "Pure Tort" Claim and Thus May Only Be Heard By The Commission.

Ohio law is settled that courts of common pleas can only hear a complaint against a utility if it involves a "pure tort" or "pure contract," i.e., a claim that "has nothing to do with the utility's service or rates." *Hull*, at ¶ 28-38. A claim against a utility that does not sound in pure tort or pure contract must be brought before the Commission. The court below failed to recognize that Plaintiffs' fraud claim is not a pure tort because it is predicated upon utility rates.

In *Hull*, the plaintiff sued both a competitive natural gas supplier and a utility for breach of contract in a court of common pleas. *Id.* at ¶ 1-2. The competitive gas supplier had defaulted on its contract with the plaintiff and the plaintiff had been placed on the higher tariff rate for residential gas service provided by the utility. *Id.* at ¶ 22-28. In his contract suit against the utility, the plaintiff sought to have the utility pay him the difference between the higher tariff rate and the lower competitive rate. *Id.* The court of common pleas dismissed the contract claim for lack of subject matter jurisdiction and the appellate court reversed.

In its reversal of the appellate court's ruling, this Court rejected the plaintiff's characterization of his allegations as sounding in "pure contract" because at base the plaintiff's dispute with the utility involved the propriety of a rate. "[T]he entirety of [the plaintiff's] complaint against [the utility] is the rate he believes he should have been charged for natural gas." *Id.* at ¶ 38. This Court stated:

> [T]he dispute in this case is the antithesis of the pure contract case envisioned by the exception to the PUCO's jurisdiction. A pure contract case is one having nothing to do with the utility's service or rates – such as perhaps a dispute between a public utility and one of its employees or a dispute between a public utility and its uniform supplier. This case only involves the rates charged by [the utility] for natural gas.

Id. at ¶ 34. Because it was wholly predicated on utility rates, the plaintiff's contract claim fell "squarely within the PUCO's exclusive jurisdiction." *Id.* at ¶ 38.

While *Hull* involved an allegedly pure contract claim, its reasoning applies equally to putative pure torts as well. Indeed, claims against utilities brought in a court of common pleas that do not sound in pure tort or pure contract must be dismissed for lack of subject matter jurisdiction. *See State ex rel. Columbia Gas of Ohio, Inc. v. Henson*, 102 Ohio St. 3d 349, 2004-Ohio-3208, 810 N.E.2d 953 (upholding dismissal of plaintiff's tortious interference claim because it was "manifestly service-related"); *State ex rel. The Illuminating Co. v. Cuyahoga Cty. Court of Common Pleas*, 97 Ohio St. 3d 69, 2002-Ohio-5312, 776 N.E.2d 92 (granting writ of prohibition to prevent a court of common pleas from hearing a fraud claim because the alleged representations involved required a finding that the utility had "violated the public-utilities statutes and regulations"); *Suleiman v. Ohio Edison Co.,* 146 Ohio App. 3d 41, 2002-Ohio-3414, 764 N.E.2d 1098 (7th Dist.) (upholding dismissal of fraudulent billing claim because "R.C. 4905.26 expressly states that the commission will hear complaints that any rate or charge is unjust, unreasonable, or unjustly discriminatory. A customer being charged a higher rate than authorized by the rate schedule is within the exclusive jurisdiction of PUCO.").

This Court has routinely held that claims against a utility are pure torts only if those claims are completely unrelated to utility rates or service. For example, in *Milligan v. Ohio Bell Tel. Co.*, the plaintiff sued a utility in a court of common pleas for charging an unreasonable rate, wrongful termination of service, and invasion of privacy. 56 Ohio St. 2d at 192, 383 N.E.2d 575. This Court held that an invasion of privacy claim against a utility could proceed in a court of common pleas, but upheld the dismissal of the rest of the plaintiff's claims because they were manifestly rate- and service-related. *Id.* at 195. Similarly, in *Kohli v. Pub. Util. Comm.*, 18 Ohio St. 3d 12, 14, 479 N.E.2d 840 (1985), the complainants sought redress against a utility for harm to their dairy cattle, alleging negligent failure to warn regarding the negative impact of neutral-to-earth voltage. The Commission, of its own accord, had dismissed the complaint for lack of subject matter jurisdiction. *Id.* This Court affirmed and agreed with the Commission that "there is no precedent to expand R.C. Title 49 for a utility's failure to warn of a potential danger." *Id.* Lastly, in *State ex rel. Ohio Edison Co. v. Shaker*, 68 Ohio St. 3d 209, 211, 1994-Ohio-450, 625 N.E.2d 608, a personal injury claim was held to be a "genuine tort" unrelated to service. As these instances thus show, under settled Ohio law the epitome of a pure tort is one that is completely outside the scope of utility rates or service.

Moreover, the stated policy preference of the General Assembly in its enactment of Title 49 of the Ohio Revised Code, and specifically Section 4905.26, is that claims related to rates or service must proceed before the Commission and cannot be brought in a court of common pleas. "[T]he legislature is the final arbiter of public policy, unless its acts contravene the state or federal Constitutions. The Ohio Constitution vests the legislative power to resolve policy issues in the General Assembly. Section 1, Article II, Ohio Constitution." *Ohio v. Smorgala*, 50 Ohio St. 3d 222, 224, 553 N.E.2d 672 (1990) (superseded by statute on other grounds). *See also,*

Hubbell v. City of Xenia, 115 Ohio St. 3d 77, 2007-Ohio-4839, 873 N.E.2d 878, ¶ 22 ("Judicial policy preferences may not be used to override valid legislative enactments, for the General Assembly should be the final arbiter of public policy.") (quoting *Smorgala* at 223); *Painter v. Graley*, 70 Ohio St. 3d 377, 385, 1994-Ohio-334, 639 N.E.2d 51 ("Where the General Assembly has spoken, and in so speaking violated no constitutional provision, the courts of this state must not contravene the legislature's expression of public policy.").

In the case of public utilities, "[t]he General Assembly has by statute pronounced the public policy of the state that the broad and complete control of public utilities shall be within the administrative agency, the Public Utilities Commission. This court has recognized this legislative mandate." *Kazmaier Supermarket, Inc.*, 61 Ohio St. 3dat 150-151, 573 N.E.2d 655. Hence, bringing a claim that is not a pure tort or pure contract against a public utility in a court of common pleas violates the expressed public policy of this State.

As Plaintiffs' Complaint makes clear, their fraud claim is not a pure tort because it relates to rates. Plaintiffs allege the existence of a "guaranteed rate." (Compl. at ¶ 20, Appx. 46.) Plaintiffs repeatedly employ the term "discounts" to refer to the rates to which they claim they are entitled. (*Id.* at ¶ 3-4, 15, 21-22, 25, 27, 29, 31, Appx. 42-43, 45-47.) Plaintiffs expressly predicate their fraud claim on the allegation that they were misled about "permanently" receiving "a reduced rate, which in the case of the all electric home customers was approximately 1.9 cents in January, 2009." (*Id.* at ¶ 49, Appx. 42.) Plaintiffs allege that "each were parties to oral agreements, representations, covenants and inducements made by Defendants assuring Plaintiffs . . . that they would receive the all electric home rate, electric water heating rate and/or load management discount." (*Id.* at ¶ 2, Appx. 42.)

Allegations concerning such "representations," "inducements" or other marketing practices regarding the electricity rates that Plaintiffs claim they were promised fall within the Commission's jurisdiction. *See, e.g.*, R.C. 4928.02(I) , Appx. 125 (providing that the Commission protect electricity consumers from "unreasonable sales"). The Commission thus exercised jurisdiction over the same allegations regarding marketing practices in the 10-1716-El-ATA case and found that there was no evidence that the Companies had acted improperly. (*See* May 25, 2011 Order at pp. 22-24, Appx. 106-108.) Plaintiffs' fraud claim thus does not fall into the category of such paradigmatically pure torts as invasion of privacy, failure to warn and personal injury, which might properly proceed in a court of common pleas. The Court of Appeals thus erred in holding that Plaintiffs' fraud claim could proceed in the trial court.

B. The Court Of Appeals' Erroneously Invoked Article IV Of The Ohio Constitution To The Entirely Override The General Assembly's Enactment Of Title 49 of the Ohio Revised Code.

In removing Plaintiffs' fraud claim from the expertise and exclusive jurisdiction of the Commission, the court below made a passing reference to *New Bremen v. Pub. Util. Comm.*, 103 Ohio St. 23, 132 N.E.2d 162 (1921) and the Ohio Constitution. To be sure, Article IV of the Ohio Constitution affords common pleas courts with jurisdiction over "all justiciable matters." Ohio Const. art. IV, § 4.04(B) But Title 49 of the Ohio Revised Code makes plain that legal disputes relating to utility rates are not "justiciable matters," but instead are matters subject to the exclusive jurisdiction of the Commission. Because Plaintiffs' fraud claim relates to rates, it is not a pure tort and therefore belongs within the exclusive purview of the Commission. To hold otherwise, as did the court below, overrides the comprehensive statutory scheme put in place by the General Assembly in its enactment of Title 49 of the Ohio Revised Code. Simply put, Article IV of the Ohio Constitution does not authorize removing this utility rate-based case from the Commission, where the General Assembly envisioned such disputes would be resolved. *See*

Dumas v. Estate of Dumas, 68 Ohio St. 3d 405, 408 (1994) (holding that "the power to define the jurisdiction of the courts of common pleas rests in the General Assembly and such courts may exercise only such jurisdiction as is expressly granted to them by the legislature").

Proposition of Law No. III:
When a claim seeks (a) a determination of the propriety of utility rates, (b) damages based on the difference between lawful and unlawful rates, and (c) a review of the marketing practices of utilities, the claim involves the expertise of the Public Utilities Commission and constitutes a practice authorized by a utility company such that the claim should be heard by the Public Utilities Commission. *Allstate Ins. Co. v. Cleveland Elec. Illuminating Co.*, 119 Ohio St. 3d 301, 2008-Ohio-3917, 893 N.E.2d 824, ¶ 11-16.

In *Allstate*, this Court established a clear test to determine when a matter involving a utility company belongs before the Commission. The test has two prongs:

> First, is PUCO's administrative expertise required to resolve the issue in dispute? Second, does the act complained of constitute a practice normally authorized by the utility?

119 Ohio St. 3d at ¶ 12. If either prong is answered in the negative then the claim may properly proceed before a court of common pleas. *Id.* at ¶ 13.

The Court of Appeals erred by misapplying the *Allstate* test. In this regard, the observations made by the appellate court about the breach of contract and injunctive relief claims equally apply to the fraud claim. The "fraud" was an allegedly false promise about a utility rate. One key aspect of the Plaintiffs' claim is that their discounts were discontinued. (*See* Compl. at ¶ 21-24, Appx. 46.) The determination of whether the promise was false, requires a determination of what rates were promised and what rates were charged, *i.e.*, did Plaintiffs receive and continue to receive "discounted" rates? Thus, this requires a comparison of the rates that Plaintiffs were charged with the rates ultimately paid by other residential customers. Similarly, as should be the case with Plaintiffs' breach of contract claim, Plaintiffs' fraud damages would require a determination of the amount of any overcharge and, in turn, a

comparison of what Plaintiffs were charged with what they allegedly should have been charged. That issue is quintessentially the type of inquiry that should be made by the Commission.[11]

Further, the Ohio Revised Code expressly provides the Commission with jurisdiction to deal with deceptive practices in providing electric service. In particular, under Section 4928.16, the Commission has authority "to determine whether an electric utility has violated or failed to comply with any provision of sections 4928.01 to 4928.15 … or any rule or order adopted or issued under those sections." R.C. 4928.16(A)(2) , Appx. 127. Section 4928.02(I) of the Ohio Revised Code, in turn, allows the Commission to "[e]nsure retail electric service consumers protection against unreasonable sales practices, market deficiencies, and market power." Appx. 125.

The Commission's authority includes the power to regulate a utility's communications with its customers, including advertisements – another issue raised in Plaintiffs' Complaint. The Commission further regulates disclosures by utilities of changes to rates and to the terms and conditions upon which they are available. *See* Ohio Adm.Code 4901:1-1-03(A)(4) , Appx. 135. The Commission also has the right to review and request modification of a utility's promotional materials and advertisements. In turn, Rule 4901:1-10-30 of the Ohio Administrative Code empowers the Commission to subject a utility that fails to comply with the rules to civil fines, orders for corrective action, and payment of restitution to affected customers. Appx. 137. Given

---

[11] In a foreshadowing of the first prong of the *Allstate* test, in *Kazmaier* this Court addressed at length the necessity of relying upon the Commission's expertise with regards to utility rate structures and overcharges:

> A dollar determination of the amount of the rate overcharge, if any, would require an analysis of the rate structure and various charges that were in effect under each of the tariff schedules during the period. This process of review and determination of any overcharges, and of the duty of the utility, under the circumstances, to disclose any lower rates available to the customer, is <u>best accomplished by the commission with its expert staff technicians familiar with the utility commission provisions</u>.

61 Ohio St. 3d at 153, 573 N.E.2d 655, (emphasis added).

these statutes and administrative rules, every aspect of Plaintiffs' Complaint directly implicates the Commission's expertise.

The Court of Appeals clearly recognized that Plaintiffs' contract claim and claims for injunctive relief (including injunctive relief relating to the fraud claim) required the Commission's expertise for proper resolution. DiFranco App. Op. at ¶ 58, Appx. 18. The court below, however, inexplicably held otherwise with regards to Plaintiffs' fraud claim – even though the contract claim, the claims for injunctive relief, *and* the fraud claim are all based on the same alleged promise regarding the special rates. The Commission's expertise is thus necessary to address Plaintiffs fraud claim per the first prong of the *Allstate* test.

Indeed, the Commission has applied its expertise to these very same allegations and found the fraud allegations without merit. In Case No. 10-176-EL-ATA, the Commission considered extensive documents and testimony from dozens of witnesses at several public hearings and held a five-day evidentiary hearing in part to address the purported existence of alleged promises and deceptive marketing practices regarding the special electric heating rates. (*See* May 25, 2011 Order at pp. 22-24, Appx. 106-108.) The Commission held that there was no evidence to substantiate claims that "the Companies unfairly and deceptively enticed residential customers . . . to commit to electric heating." (*Id.* at 23, Appx. 107.) Indeed, "the evidence demonstrates that discounts for electric heating customers have never been eliminated and that electric heating customers have always received a minimum of two discounts, Rider RDC and Rider EDR." (*Id.*)

Ignoring the Commission's application of its expertise to the Plaintiffs' fraud claim further opens the door to the risk of duplicative litigation and inconsistent results. In filing their Complaint in a court of common pleas, Plaintiffs in effect began pursuing parallel litigation

involving identical subject matter that was properly before the Commission and over which the Commission subsequently explicitly acknowledged that it had exclusive jurisdiction.[12] (*See* Fifth Entry on Rehearing, Case No. 10-176-EL-ATA, Nov. 10, 2010 at p. 5, Appx. 81.) The Commission has already found that claims of alleged promises and deceptive marketing practices regarding the special rates on the part of the Companies are baseless. (*See* May 25, 2011 Order at p. 23, Appx. 107.) In reinstating the fraud claim, the appellate court's decision makes possible that the trial court, without the benefit of the Commission's expertise, could rule in the other direction and thereby create inconsistent results in competing fora.

Regarding the second prong of the *Allstate* test, the act complained of constitutes a practice normally authorized by the Companies. There is no dispute that the special electric rates were eliminated and the new rates and credits were established pursuant to the Commission's orders. The charging of tariff rates to customers is certainly a "practice normally authorized by the utility." In fact, it is required. *See* R.C. 4905.22, Appx. 122.

Plaintiffs also complain about certain alleged representations made by the Companies to their customers about the terms of their rates. (*See* Compl. ¶ 15-16, Appx. 45.) Although those communications must be proven, efforts to attract more business or other communications with customers about their rates – communications that are subject to Commission oversight – are indisputably a "practice normally authorized by the utility." *Cf. State ex rel. Duke Energy Ohio, Inc. v. Hamilton County Court of Common Pleas*, 126 Ohio St. 3d 41, 2010-Ohio-2450, 930 N.E.2d 299, ¶ 23 (termination of utility service for nonpayment is a "practice[] normally authorized by the utility"). Moreover, given that Plaintiffs allege that the Companies made

[12] In fact, Plaintiffs' now former counsel testified in the Commission's public hearings. (*See* Merit Brief of Appellees First Energy Corp., The Cleveland Electric Illuminating Company & Ohio Edison Company, *DiFranco v. FirstEnergy Corp.*, Case No. 2010-G-2990, at p. 2 (filed: Jan. 31, 2011).)

misstatements to thousands of customers over several decades, it would be hard to see how such statements could not have been authorized, if in fact they were made.

The Court of Appeals, however, drew an incorrect distinction here between Plaintiffs' contract claim and the fraud claim:

> [T]he act that is actually being challenged by appellants with respect to their contract claims is the imposition of the higher rate following the elimination of the all-electric program. It should be obvious that charging a customer based on rates approved by the PUCO is a practice normally authorized by the utility. However, such is not the case with respect to appellants' fraud claim since such claim will require appellants to prove that, when they made the alleged promise, the companies misrepresented their present state of mind in that they had no intention of performing the promise.

(DiFranco App. Op. at ¶ 59, Appx. 18-19.) The Court of Appeals was wrong. There is no difference between the alleged promise that forms the basis of Plaintiffs' contract claim and the promise or representation upon which the fraud claim is based. Both relate to the very same alleged promise that Plaintiffs would receive a discounted rate and would have such a rate indefinitely. Hence, just as the contract claim involves a practice normally authorized by the utility, so does the fraud claim, on pain of logical inconsistency. The second prong of the *Allstate* test is met here as well.

Plaintiffs' fraud claim is not a pure tort. Further, both prongs of the *Allstate* test are met here. Thus, the Commission has exclusive jurisdiction over Plaintiffs' fraud claim and the Court of Appeals erred in holding otherwise.

V. CONCLUSION

For the foregoing reasons, this Court should reverse the reinstatement of Plaintiffs' fraud claim by the court below.

Respectfully Submitted,

David A. Kutik / per authority AEH

David A. Kutik (0006418)
Counsel of Record
dakutik@jonesday.com
Jeffrey Saks (0071571)
jsaks@jonesday.com
Jones Day
North Point
901 Lakeside Avenue
Cleveland, Ohio 44114
Telephone: (216) 586-3939
Facsimile: (216) 579-0212

Chad A. Readler (0068394)
careadler@jonesday.com
Jones Day
P.O. Box 165017
Columbus, OH 43216-5017
Telephone: (614) 469-3939
Facsimile: (614) 461-4198

Attorneys for Defendants-Appellants FirstEnergy Corp., The Cleveland Electric Illuminating Company and Ohio Edison Company

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Appellants' Merit Brief was served by First-Class U.S. Mail, this 7th day of May, 2012 upon the following parties:

Michael E. Gilb, Esq.
7547 Central Park Blvd.
P.O. Box 773
Mason, Ohio 45040

James E. Grendell, Esq.
904 Bellwood Dr.
Highland Heights, OH 441143

Attorneys for Plaintiffs-Appellees

David A. Kutik / per authority AEH
David A. Kutik (0006418)

An Attorney for Appellants FirstEnergy Corp.,
The Cleveland Electric Illuminating Company
and Ohio Edison Company

IN THE SUPREME COURT OF OHIO

CARL DIFRANCO, et al. Appellees, v. FIRSTENERGY CORP., THE CLEVELAND ELECTRIC ILLUMINATING COMPANY & OHIO EDISON COMPANY Appellants.	))))))))))))	CASE NO. 2011-2025 On Appeal from the Geauga County Court of Appeals, Eleventh Appellate District Court of Appeals Case No. 2010-G-2990

APPENDIX TO APPELLANTS' MERIT BRIEF

Michael E. Gilb (0029868)
7547 Central Parke Blvd.
P.O. Box 773
Mason, Ohio 45040

Attorney for Plaintiffs-Appellees

David A. Kutik (0006418)
Counsel of Record
dakutik@jonesday.com
Jeffrey Saks (0071571)
jsaks@jonesday.com
Jones Day
North Point
901 Lakeside Avenue
Cleveland, Ohio 44114
Telephone: (216) 586-3939
Facsimile: (216) 579-0212

Chad A. Readler (0068394)
careadler@jonesday.com
Jones Day
P.O. Box 165017
Columbus, Ohio 43216-5017
Telephone: (614) 469-3939
Facsimile: (614) 461-4198

Attorneys for Defendants-Appellants FirstEnergy Corp., The Cleveland Electric Illuminating Company and Ohio Edison Company

ORIGINAL

IN THE SUPREME COURT OF OHIO

CARL DIFRANCO, et al. Appellees, v. FIRSTENERGY CORP., THE CLEVELAND ELECTRIC ILLUMINATING COMPANY & OHIO EDISON COMPANY Appellants.	)	11-2025 CASE NO._______ On Appeal from the Geauga County Court of Appeals, Eleventh Appellate District Court of Appeals Case No. 2010-G-2990

NOTICE OF APPEAL OF APPELLANTS, FIRSTENERGY CORP., THE CLEVELAND ELECTRIC ILLUMINATING COMPANY AND OHIO EDISON COMPANY

Michael E. Gilb (0029868)
7547 Central Parke Blvd.
P.O. Box 773
Mason, Ohio 45040

Attorney for Plaintiffs-Appellees

David A. Kutik (0006418)
Counsel of Record
dakutik@jonesday.com
Jeffrey Saks (0071571)
jsaks@jonesday.com
Jones Day
North Point
901 Lakeside Avenue
Cleveland, Ohio 44114
Telephone: (216) 586-3939
Facsimile: (216) 579-0212

Chad A. Readler (0068394)
careadler@jonesday.com
Jones Day
P.O. Box 165017
Columbus, Ohio 43216-5017
Telephone: (614) 469-3939
Facsimile: (614) 461-4198

Attorneys for Defendants-Appellants FirstEnergy Corp., The Cleveland Electric Illuminating Company and Ohio Edison Company

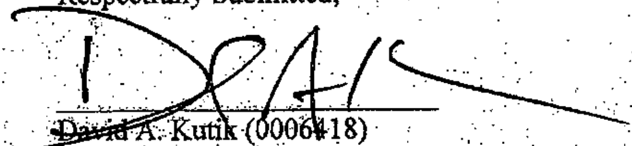
FILED
DEC 05 2011
CLERK OF COURT
SUPREME COURT OF OHIO

CLI-1945834v1

Appellants FirstEnergy Corp., The Cleveland Electric Illuminating Company, and Ohio Edison Company hereby give notice of their appeal to the Supreme Court of Ohio from the judgment of the Geauga County Court of Appeals, Eleventh Appellate District, entered in Court of Appeals Case No. 2010-G-2990 on October 21, 2011.

This case is one of public or great general interest. A Memorandum in Support of Jurisdiction has been filed simultaneously with this Notice of Appeal.

Respectfully Submitted,



David A. Kutik (0006418)
Counsel of Record
dakutik@jonesday.com
Jeffrey Saks (0071571)
jsaks@jonesday.com
Jones Day
North Point
901 Lakeside Avenue
Cleveland, Ohio 44114
Telephone: (216) 586-3939
Facsimile: (216) 579-0212

Chad A. Readler (0068394)
careadler@jonesday.com
Jones Day
P.O. Box 165017
Columbus, Ohio 43216-5017
Telephone: (614) 469-3939
Facsimile: (614) 461-4198

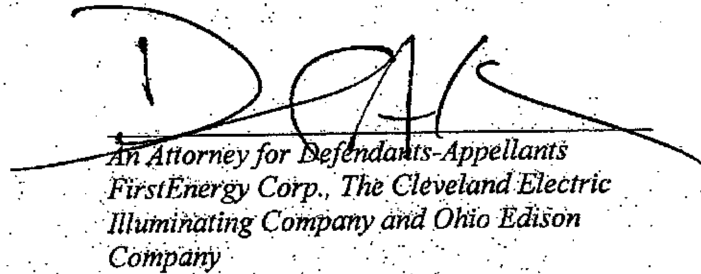
Attorneys for Defendants-Appellants FirstEnergy Corp., The Cleveland Electric Illuminating Company and Ohio Edison Company

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Appellants' Notice of Appeal was served by First-Class U.S. Mail, this 5th day of December, 2011 upon the following parties:

Michael E. Gilb, Esq.
7547 Central Parke Blvd.
P.O. Box 773
Mason, Ohio 45040

Attorney for Plaintiffs-Appellees



An Attorney for Defendants-Appellants FirstEnergy Corp., The Cleveland Electric Illuminating Company and Ohio Edison Company

CLI-1945834v1

FILED
IN COURT OF APPEALS
OCT 21 2011
DENISE M. KAMINSKI
CLERK OF COURTS
GEAUGA COUNTY

STATE OF OHIO

COUNTY OF GEAUGA

IN THE COURT OF APPEALS

ELEVENTH DISTRICT

CARL DiFRANCO, et al.,

Plaintiffs-Appellants,

- vs -

FIRST ENERGY, et al.,

Defendants-Appellees.

JUDGMENT ENTRY

CASE NO. 2010-G-2990

For the reasons stated in the opinion of this court, it is the judgment and order of this court that the judgment of the Geauga County Court of Common Pleas is affirmed in part and reversed in part; and this case is remanded for further proceedings consistent with the opinion.

Costs to be taxed against the parties equally.

On September 20, 2011, co-counsel for appellants, Timothy J. Grendell, moved to withdraw as counsel instanter and requested 30 days for appellants to secure additional co-counsel. The motion to withdraw is hereby granted. The request for 30 days to secure additional co-counsel is denied as moot.

PRESIDING JUDGE TIMOTHY P. CANNON

FOR THE COURT

FILED
IN COURT OF APPEALS
OCT 21 2011
DENISE M. KAMINSKI
CLERK OF COURTS
GEAUGA COUNTY

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

GEAUGA COUNTY, OHIO

CARL DiFRANCO, et al.,	:	**OPINION**
Plaintiffs-Appellants,	:	
- vs -	:	**CASE NO. 2010-G-2990**
FIRST ENERGY, et al.,	:	
Defendants-Appellees.	:	

Civil Appeal from the Court of Common Pleas, Case No. 10 M 000164.

Judgment: Affirmed in part, reversed in part, and remanded.

Timothy J. Grendell, Grendell & Simon Co., L.P.A., 6640 Harris Road, Broadview Heights, OH 44147 and *Michael E. Gilb*, 7547 Central Parke Boulevard, P.O. Box 773, Mason, OH 45050 (For Plaintiffs-Appellants).

David A. Kutik and *Jeffrey W. Saks*, Jones Day, North Point, 901 Lakeside Avenue, Cleveland, OH 44114; and *Douglas R. Cole* and *Grant W. Garber*, Jones Day, 325 John H. McConnell Boulevard, Suite 600, Columbus, OH 43215-2673 (For Defendants-Appellees).

TIMOTHY P. CANNON, P.J.

{¶1} Appellants, Carl DiFranco and other named residents of northeast Ohio, appeal the judgment of the Geauga County Court of Common Pleas dismissing their complaint for declaratory and other relief against appellees, First Energy, Cleveland Electric Illuminating Company, and Ohio Edison Company ("the companies"), for lack of subject matter jurisdiction. At issue is whether appellants' complaint represents a

challenge to the rate they were charged by the companies for electrical service and is therefore within the exclusive jurisdiction of the Public Utilities Commission of Ohio ("PUCO"). For the reasons that follow, we affirm in part, reverse in part, and remand.

{¶2} Appellants filed this action against the companies, which are public utilities providing electricity in Ohio. Appellants alleged they represent a class of similarly-situated individuals and requested class action status for their lawsuit.

{¶3} In their complaint, appellants, who are residential customers of the companies, alleged that, during the last 40 years, the companies established the "all-electric program" with the approval of the PUCO. Pursuant to this program, the companies offered to charge them a discounted rate for electricity if they purchased all-electric homes or equipped their homes with all-electric heating systems and appliances. Appellants alleged the companies promised to provide this discounted rate to them permanently as long as they continued to maintain all-electric appliances in their homes, even if the PUCO eliminated the discounted rate. Appellants alleged that, in exchange for this promise, they purchased all-electric homes or electric heating systems and other appliances, instead of natural gas or oil-operated appliances. Appellants alleged the companies provided this discounted rate to them until May 2009, when the discount was terminated. Appellants alleged that, due to the discontinuation of the reduced rate, they have been damaged in that they are now required to pay a higher rate for electricity charged to other customers.

{¶4} In their four-count complaint, appellants asserted claims for (1) declaratory judgment, based on the parties' alleged contract, to require the companies to continue to charge appellants the discounted rate for electrical service they paid prior to May

2009 and to require the companies to refund all excess charges appellants paid; (2) breach of contract, as a result of the companies' termination of the discount program; (3) fraud, for inducing appellants to purchase electrical heating systems by misrepresenting they would permanently be provided with discounted rates; and (4) an injunction, based on appellees' alleged breach of contract and fraud, to prevent the companies from charging appellants more than the discounted rate.

{¶5} In response, the companies filed a motion to dismiss the complaint for lack of subject matter jurisdiction, pursuant to Civ.R. 12(B)(1). They argued that this case is within the exclusive jurisdiction of the PUCO because, in effect, it represents a challenge to the rate charged by utilities, which the PUCO has exclusive jurisdiction to address.

{¶6} In their brief in opposition, appellants argued that the PUCO does not have jurisdiction of their claims. They argued that this case does not represent a challenge to the rate charged by the companies, but rather presents a "pure contract" claim and a "pure tort" claim, which are not within the PUCO's jurisdiction. In support of their contract claim, appellants argued the companies breached their promise to charge appellants the discounted rate. In support of their tort claim, they maintained that the companies fraudulently induced them to enter the all-electric program by misrepresenting the rate appellants would be charged.

{¶7} The factual history that follows is derived from the evidentiary materials submitted by the parties in their filings concerning the companies' motion to dismiss, including various rate schedules approved by the PUCO and orders entered by that agency. Beginning in the early 1970s, the PUCO approved discounted rates for

electricity for residential customers using electricity as their sole source of energy. These rates remained in effect until the end of 2008.

{¶8} In 2008, the General Assembly enacted Senate Bill 221, which established a statewide policy encouraging energy efficiency and conservation. Because the discount to all-electric users in effect for some 40 years encouraged increased usage by charging a lower rate for electricity, the companies determined the discount conflicted with this change in state policy. As a result, in January 2009, the companies filed, and the PUCO approved, a tariff that consolidated the different residential rates then in effect, including the all-electric rate, into one residential rate, beginning in May 2009. The effect of such request was to terminate the discounted rate for all-electric users and to require those users to pay the same rate charged to the companies' other customers. At the same time, the companies requested, and the PUCO approved, credits to the all-electric customers in order to mitigate the impact on these customers of this consolidation. Thus, while the PUCO approved the rate structure that eliminated the all-electric discount, these customers continued to receive discounts.

{¶9} However, despite the continued discounts provided to the all-electric users, during the winter of 2009-2010, several of these customers complained about increases in their bills. In response to these complaints, on February 12, 2010, the companies filed an application for approval of new tariffs with the PUCO, being case No. 10-176-EL-ATA ("the PUCO case"), aimed at limiting the amount of bill increases for their all-electric customers. Four days later, on February 16, 2010, appellants filed their complaint in the trial court.

{¶10} On March 3, 2010, the PUCO entered a finding and order in the PUCO case, in which it found that, "until such time as the [PUCO] determines the best long-term solution to this issue, rate relief should be given to the all-electric residential customers." To that end, the PUCO ordered the companies to file tariffs for these customers that would provide bill impacts commensurate with the companies' December 31, 2008 charges for them prior to the elimination of the discount. The companies responded to the PUCO's order on March 17, 2010, by filing new tariffs designed to restore the discounts. It is undisputed that the all-electric customers are now receiving a discount that is the same as or greater than the discount that existed in December 2008, before the discount was terminated.

{¶11} On September 7, 2010, the trial court in a detailed, seven-page judgment entry granted the companies' motion to dismiss. The court noted that, pursuant to R.C. 4905.26, the PUCO has exclusive jurisdiction to determine cases against public utilities, such as the companies, claiming that any rate or charge "is in any respect, unjust, unreasonable, *** or in violation of law." The court further noted that, while the PUCO's jurisdiction is broad and extensive, claims characterized as pure contract or pure tort, which have nothing to do with rates or service, are excluded from the PUCO's jurisdiction. After describing the tests adopted by the Supreme Court of Ohio to determine whether a claim is a pure contract or a pure tort claim, the trial court found:

{¶12} "The dispute between the Companies and the plaintiffs is over the rate increases. There is no separate rate 'contract' between the utility and the plaintiffs. The contract is set *by the tariff*, not by agreement. The rate of a public utility is determined by PUCO, not by bargaining between the utility and customers."

{¶13} Finally, the court noted that, by its ruling, appellants were not left without a remedy because their claims can be determined by the PUCO and the Supreme Court of Ohio, which has jurisdiction to review decisions of the PUCO.

{¶14} Subsequent to the trial court's ruling, the PUCO, in its November 10, 2010 Fifth Order on Rehearing entered in the PUCO case, stated it agreed with the trial court's finding that the PUCO has jurisdiction over appellants' claims that they were promised rates that are in violation of PUCO-approved tariffs or that were not authorized by the PUCO. The PUCO stated it will exercise jurisdiction over the companies' rates and marketing practices and that the parties may conduct discovery regarding these issues and present evidence at upcoming hearings. In October and November 2010, the PUCO held six public hearings regarding the all-electric rates.

{¶15} Appellants appeal the trial court's judgment, asserting four assignments of error. Because appellants' first and fourth assigned errors are related, we shall consider them together. They allege:

{¶16} "[1.] The common pleas court erred when it ruled that it lacked jurisdiction to adjudicate homeowners' breach of contract and tort claims against First Energy based on First Energy's unilateral breach of First Energy's promises, covenants and representations that in consideration of homeowners' agreement to purchase or maintain all-electric homes, homeowners would be included in First Energy's all-electric home discount program.

{¶17} "[4.] The lower court erred by ruling that homeowners' claims based on First Energy's breach of its pre-delivery promises and reliance or promissory estoppel are not pure contract or tort."

{¶18} Appellants argue the trial court erred in finding their claims were not pure contract and pure tort claims and that it consequently lacked subject matter jurisdiction to address them.

{¶19} Subject matter jurisdiction is the power conferred upon a court, either by constitutional provisions or by statute, to decide a particular matter or issue on its merits. *State ex rel. Jones v. Suster* (1998), 84 Ohio St.3d 70, 75. A motion to dismiss for lack of subject matter jurisdiction is made pursuant to Civ.R. 12(B)(1), and "[t]he standard of review for a dismissal pursuant to Civ.R. 12(B)(1) is whether any cause of action cognizable by the forum has been raised in the complaint." *State ex rel. Bush v. Spurlock* (1989), 42 Ohio St.3d 77, 80. (Citations omitted.) This court has held:

{¶20} "'[I]n determining whether the plaintiff has alleged a cause of action sufficient to withstand a Civ.R. 12(B)(1) motion to dismiss, the trial court is not confined to the allegations of the complaint and it may consider material pertinent to such inquiry without converting the motion into one for summary judgment.'" *Kinder v. Zuzak*, 11th Dist. No. 2008-L-167, 2009-Ohio-3793, at ¶10, quoting *McHenry v. Indus. Comm. of Ohio* (1990), 68 Ohio App.3d 56, 62, citing *Southgate Dev. Corp. v. Columbia Gas Transm. Corp.* (1976), 48 Ohio St.2d 211, paragraph one of the syllabus.

{¶21} Further, in ruling on a Civ.R. 12(B)(1) motion, the court is not required to take the allegations in the complaint at face value. *N. Central Local Edn. Assn. v. N. Central Local School Dist. Bd. of Edn.* (Oct. 2, 1996), 9th Dist. No. 96CA0011, 1996 Ohio App. LEXIS 4349, *3. "'[N]o presumptive truthfulness attaches to plaintiff's allegations[.] ***'" Id., quoting *Mortensen v. First Fed. S. & L. Assn.*, 549 F.2d 884, 891 (C.A.3, 1977). Further, we review an appeal of a dismissal for lack of subject matter

jurisdiction under Civ.R. 12(B)(1) de novo. *Washington Mut. Bank v. Beatley*, 10th Dist. No. 06AP-1189, 2008-Ohio-1679, at ¶8.

{¶22} The Supreme Court of Ohio has on numerous occasions considered whether the PUCO, as opposed to Ohio courts, has jurisdiction over claims of customers against Ohio's public utilities.

{¶23} In *Milligan v. Ohio Bell Tel. Co.* (1978), 56 Ohio St.2d 191, the Supreme Court of Ohio held:

{¶24} "A Court of Common Pleas is without jurisdiction to hear a claim alleging that a utility has violated R.C. 4905.22 by charging an unjust and unreasonable rate *** since such matters are within the exclusive jurisdiction of the Public Utilities Commission. ***

{¶25} "A Court of Common Pleas has jurisdiction pursuant to R.C. 2305.01 to hear a properly stated claim alleging an invasion of privacy brought against a utility." Id. at paragraphs two and three of the syllabus.

{¶26} In explaining paragraph three of its syllabus, the *Milligan* Court stated:

{¶27} "In *New Bremen v. Pub. Util. Comm.* (1921), 103 Ohio St. 23, at pages 30-31, this court noted that the commission has no power to judicially ascertain and determine legal rights and liabilities, since such power has been vested in the courts by the General Assembly pursuant to Article IV of the Ohio Constitution. Thus, claims sounding in contract or tort have been regarded as reviewable in the Court of Common Pleas, although brought against corporations subject to the authority of the commission. See *State ex rel. Dayton Power & Light Co. v. Riley* (1978), 53 Ohio St.2d 168, 169-170; *Richard A. Berjian, D.O. Inc., v. Ohio Bell Tel. Co.* (1978), 54 Ohio St.2d 147.

{¶28} "Whereas the right of privacy has been recognized as a legal right existing at common law in this state, see *Housh v. Peth* (1956), 165 Ohio St. 35, it follows that the Court of Common Pleas has subject-matter jurisdiction pursuant to R.C. 2305.01 to hear a complaint alleging a violation of this right by a utility. The claim of invasion of privacy confers power upon the court to hear the claim, and it is incumbent for it to do so unless the claim is alleged solely for the purpose of obtaining jurisdiction or is wholly insubstantial or frivolous. See *Binderup v. Pathe Exchange* (1923), 263 U.S. 291, at pages 305-308; *Ouzts v. Maryland Nat. Ins. Co.* (C.A.9, 1972), 470 F.2d 790, 791." *Milligan*, supra, at 195.

{¶29} In *Kazmaier Supermarket, Inc. v. Toledo Edison Co.* (1991), 61 Ohio St.3d 147, the Court considered a claim that the utility charged the customer an excessive rate. Before addressing this issue, the Court provided a pertinent analysis of the PUCO's jurisdiction, as follows:

{¶30} "The General Assembly has created a broad and comprehensive statutory scheme for regulating the business activities of public utilities. R.C. Title 49 sets forth a detailed statutory framework for the regulation of utility service and the fixation of rates charged by public utilities to their customers. As part of that scheme, the legislature created the Public Utilities Commission and empowered it with broad authority to administer and enforce the provisions of Title 49. *The commission may fix, amend, alter or suspend rates charged by public utilities* to their customers. R.C. 4909.15 and 4909.16. Every public utility in Ohio is required to file, for commission review and approval, tariff schedules that detail rates, charges and classifications for every service

offered. R.C. 4905.30. And a *utility must charge rates that are in accordance with tariffs approved by, and on file with, the commission.* R.C. 4905.22.

{¶31} "The General Assembly has by statute pronounced the public policy of the state that the broad and complete control of public utilities shall be within the administrative agency, the Public Utilities Commission. This court has recognized this legislative mandate.

{¶32} "'There is perhaps no field of business subject to greater statutory and governmental control than that of the public utility. This is particularly true of the rates of a public utility. Such rates are set and regulated by a general statutory plan in which the *Public Utilities Commission is vested with the authority to determine rates in the first instance, and in which the authority to review such rates is vested exclusively in the Supreme Court* by Section 4903.12, Revised Code ***.' ***

{¶33} "*The General Assembly has provided a rather specific procedure by which customers may challenge rates or charges of a public utility that are 'in any respect' unjust, unreasonable, or unlawful, and has designated the commission as the appropriate forum before which such claims are to be heard.* R.C. 4905.26, in this regard, provides as follows:

{¶34} "'Upon complaint in writing against any public utility by any person, firm, or corporation, or upon the initiative or complaint of the public utilities commission, that any rate, *** charge, *** or service *** is in any respect unjust, unreasonable, *** or in violation of law, *** if it appears that reasonable grounds for [the] complaint are stated, the commission shall fix a time for hearing and shall notify complainants and the public

utility thereof, and shall publish notice thereof in a newspaper of general circulation in each county in which complaint has arisen. ***'

{¶35} "Accordingly, it is readily apparent that the General Assembly has provided for commission oversight of filed tariffs, *including the right to adjudicate complaints involving customer rates and services.* This court has previously had occasion to discuss such authority of the commission. In *State, ex rel. Northern Ohio Tel. Co. v. Winter* (1970), 23 Ohio St.2d 6, 9, it was stated:

{¶36} "'*** The General Assembly has enacted an entire chapter of the Revised Code dealing with public utilities, requiring, inter alia, adequate service, and providing for permissible rates and review procedure. E.g., R.C. 4905.04, 4905.06, 4905.22, 4905.231 and 4905.381. Further, R.C. 4905.26 provides a detailed procedure for filing service complaints. *This comprehensive scheme expresses the intention of the General Assembly that such powers were to be vested solely in the Commission.* [Emphasis added by the *Kazmaier* Court.] As this court said in *State, ex rel. Ohio Bell Telephone Co. v. Court of Common Pleas* (1934), 128 Ohio St. 553 at 557:

{¶37} "'"*The jurisdiction specifically conferred by statute upon the Public Utilities Commission over public utilities of the state, including the regulation of rates and the enforcement of repayment of money collected *** during the pendency of the proceeding *** is so complete, comprehensive and adequate as to warrant the conclusion that it is *** exclusive.*" ***'" (Internal citations omitted; original emphasis removed; and emphasis added.) *Kazmaier*, supra, at 150-152.

{¶38} In *Kazmaier*, the customer alleged it was billed under the wrong rate schedule; that the utility wrongfully charged a higher rate than that which was

authorized under its tariff; and that it was consequently charged an excessive fee. As a result, it demanded reimbursement for any excess amount it paid plus interest. The customer argued its claims were for breach of contract and tort and therefore were within the trial court's jurisdiction. The Supreme Court disagreed, holding:

{¶39} "This type of claim is one which by way of complaint may be properly raised before the commission pursuant to R.C. 4905.26. The root of the complaint is that the rate imposed by Toledo Edison was unreasonable and in violation of law. Although the allegations of the complaint seem to sound in tort and contract law, it must not be forgotten that the contract involved is the utility rate schedule. A dollar determination of the amount of the rate overcharge, if any, would require an analysis of the rate structure and various charges that were in effect under each of the tariff schedules during the period. This process of review and determination of any overcharges, and of the duty of the utility, under the circumstances, to disclose any lower rates available to the customer, is best accomplished by the commission with its expert staff technicians familiar with the utility commission provisions." Id. at 153.

{¶40} In *State ex rel. Ohio Power Co. v. Hamishfeger* (1980), 64 Ohio St.2d 9, the Supreme Court of Ohio recognized an exception to the general rule of exclusivity of PUCO jurisdiction based on a contract or tort claim. The Court stated:

{¶41} "Admittedly, the power of the Public Utilities Commission under the legislative scheme of R.C. Title 49 is comprehensive and plenary. (See, especially, R.C. 4905.26 and 4905.61.) However, *this does not mean that exclusive original jurisdiction over all complaints of individuals against public utilities is lodged in the commission.*

{¶42} "'*** [C]ourts of this state are available to supplicants who have claims sounding in contract against a corporation coming under the authority of the Public Utilities Commission. *New Bremen v. Pub. Util. Comm.* (1921), 103 Ohio St. 23 ***. As noted in *New Bremen*, supra, at pages 30-31, '*[t]he public utilities commission is in no sense a court. It has no power to judicially ascertain and determine legal rights and liabilities, or adjudicate controversies between parties as to contract rights or property rights.*' This court, also stated in *Milligan v. Ohio Bell Tel. Co.* (1978), 56 Ohio St.2d 191, at page 195, that 'claims sounding in contract or tort have been regarded as reviewable in the Court of Common Pleas, although brought against corporations subject to the authority of the commission. *** ***.'" (Internal citations omitted and emphasis added.) *Harnishfeger*, supra, at 10.

{¶43} In *Hull v. Columbia Gas of Ohio*, 110 Ohio St.3d 96, 2006-Ohio-3666, the Supreme Court of Ohio addressed facts similar to those presented here. Columbia Gas, a public utility and natural gas provider, established a program pursuant to which its customers could purchase gas from other natural gas suppliers, while Columbia remained responsible for the delivery of the gas. The PUCO approved the tariff filed by Columbia that included the specifics of the program, including the rate to be charged. After the supplier selected by the customer, Energy Max, defaulted, pursuant to the program, Columbia terminated the contract and applied the default rate included in the tariff. The customer sued Columbia for the difference between Columbia's tariff rate and the lower contract rate based on his contract with Energy Max. The customer argued his claim was a pure contract claim and so not subject to the PUCO's exclusive jurisdiction. The Court disagreed, stating:

{¶44} *** "[C]asting the allegations in the complaint to sound in tort or contract is not sufficient to confer jurisdiction upon a trial court" when the basic claim is one that the commission has exclusive jurisdiction to resolve.' *** [T]he dispute in this case is the antithesis of the pure contract case envisioned by the exception to the PUCO's jurisdiction. A pure contract case is one *having nothing to do with the utility's service or rates* -- such as perhaps a dispute between a public utility and one of its employees or a dispute between a public utility and its uniform supplier. This case involves only the rates charged by Columbia for natural gas.

{¶45} ****

{¶46} "Despite Hull's attempts to characterize it otherwise, his claim against Columbia was that Columbia should have charged for the natural gas supplied to Hull at the Energy Max contract rate, which was lower than the Columbia tariff rate that Columbia in fact charged. *** Columbia is a public utility ***. As such, Columbia was and is subject to the regulatory jurisdiction of the PUCO. That regulation required Columbia to file PUCO-approved tariffs containing rate schedules, obtain approval of its Customer Choice program, and abide by the terms and conditions of its tariffs and the Customer Choice program, all of which Columbia did. It could not legally have provided service to Hull or charged for that service other than it did.

{¶47} "While Hull characterizes his complaint against Columbia as a pure contract claim, it is not. His complaint against Columbia is that the rate he was charged exceeded the Energy Max contract rate and, thus, that he was overcharged. A dispute so founded is squarely within the exclusive jurisdiction of the PUCO." (Internal citations omitted.) *Hull*, supra, at ¶34, ¶40-41.

{¶48} In *Allstate Ins. Co. v. Cleveland Elec. Illuminating Co.*, 119 Ohio St.3d 301, 2008-Ohio-3917, the insurer filed a subrogation claim against CEI, alleging it was negligent in responding to an emergency of Allstate's insured. Allstate argued it was obligated to pay the claim of its insured when a fire and property damage occurred. The electric company filed a motion to dismiss, asserting the PUCO had exclusive jurisdiction. The Supreme Court held that the PUCO did not have jurisdiction. Id. at ¶14. In arriving at its decision, the Court adopted the following two-step test to determine when a trial court, rather than the PUCO, has jurisdiction over a case involving a public utility alleged to have committed a tort:

{¶49} "First, is PUCO's administrative expertise required to resolve the issue in dispute? Second, does the act complained of constitute a practice normally authorized by the utility?"

{¶50} "If the answer to either question is in the negative, the claim is not within PUCO's exclusive jurisdiction." (Internal citation omitted.) *Allstate*, supra, at ¶12-13.

{¶51} In finding that the PUCO did not have exclusive jurisdiction over Allstate's claim, the Supreme Court stated:

{¶52} "We now apply this test to the case before us. The substance of Allstate's claim is that CEI was negligent in failing to respond to emergency calls from the Harris residence. This claim is no different from those brought against a business that negligently fails to correct a known dangerous condition on its property. *** The ultimate question in this case is whether the delay between CEI's receipt of the emergency calls and arrival at the Harris residence was reasonable. That issue is

particularly appropriate for resolution by a jury. The expertise of PUCO is not necessary to the resolution of this case." Id.

{¶53} Turning our attention to the instant case, appellants do not challenge any specific rate and concede that at all times, they were charged according to rates that were on file with and approved by the PUCO. Instead, they maintain that the companies breached their promises and fraudulently induced them to enter the all-electric program by misrepresenting that a discounted rate would be permanently provided to them in exchange for appellants' equipping their homes with all-electric appliances. Consequently, they argue their claims are pure contract and pure tort claims and are, therefore, excluded from the PUCO's exclusive jurisdiction.

{¶54} First, pursuant to *Milligan*, supra, the common pleas court has no jurisdiction to consider a claim alleging that a utility has been charging an unjust, unreasonable, or unlawful rate since such matter is within the exclusive jurisdiction of the PUCO. While appellants argue their contract claims, i.e., their breach of contract claim, their claim for declaratory relief, and their claim for injunction as it relates to contract, are based on the companies' alleged breach of a promise to charge a discounted rate, the essence of these claims is that the rate approved by the PUCO and imposed by the companies after the all-electric program was eliminated was unjust, unreasonable, or unlawful. Pursuant to *Milligan*, supra, the trial court did not err in finding such claims are within the PUCO's exclusive jurisdiction.

{¶55} However, pursuant to *Milligan*, because fraud is a civil action that existed at common law in Ohio and appellants alleged a fraud claim in their complaint, the court of common pleas has subject matter jurisdiction pursuant to R.C. 2305.01 to adjudicate

that claim. In so holding, we do not, of course, address the merits of such claim, which will have to be determined based on the evidence presented at trial or on summary judgment. With regard to the request for injunctive relief, the trial court did not err in dismissing appellants' claim for injunction as it relates to their fraud claim since this would require a determination of the proper rate to be charged. In addition, based on the claim presented related to the fraud, appellants have an adequate remedy at law.

{¶56} Further, according to the standard announced in *Hull*, supra, a pure contract claim is one *having nothing to do with the utility's service or rates*—such as a dispute between a public utility and one of its employees or a dispute between a public utility and its uniform supplier. By noting these examples, the Supreme Court obviously meant to convey that in order for a claim to be properly considered as a pure contract claim, the contract at issue must be completely unrelated to the utility's service or rates. Here, the subject matter of the alleged promise is *the rate to be charged the customers*. Appellants argue that the companies are liable in contract because they breached their promise that appellants would permanently be charged *the discounted rate*. We therefore cannot say that appellants' contract claim has nothing to do with the utilities' rates. *Hull*, supra. Thus, pursuant to *Hull*, the trial court did not err in finding it did not have jurisdiction of appellants' contract claims.

{¶57} We next apply the two-step test announced by the Court in *Allstate*, supra. As noted above, if the answer to either prong is in the negative, the claim is not within the PUCO's exclusive jurisdiction. As a preliminary matter, we note that, while the Supreme Court of Ohio applied this test in the context of a tort claim, we see no reason why it would not also apply to contract claims. The same considerations apply to both

types of claims. Moreover, the Supreme Court has referenced the same considerations incorporated in the *Allstate* test in the past in connection with contract claims. See, e.g., *Kazmaier.* Finally, appellants do not dispute that the *Allstate* test applies when the claims asserted sound in contract or tort.

{¶58} According to the *Allstate* test, we first consider whether the PUCO's administrative expertise would be required to resolve the issue in dispute. Here, with respect to appellants' contract claims, decisions would have to be made concerning: (1) whether appellants were promised rates that were in violation of the PUCO-approved tariffs or were not authorized by the PUCO; and (2) the amount of the rate overcharge, if any, based on an analysis of the difference between the charges imposed using the former discounted rates and the amounts charged based on the rates, discounts, and credits subsequently imposed after the discount program was eliminated. This process of review and determination would therefore require the expertise of the PUCO's staff technicians familiar with the statutes and regulations the PUCO administers and enforces. See *Kazmaier.* Such would not be the case, however, with respect to appellants' fraud claim.

{¶59} Second, under the *Allstate* test, we must consider whether the acts complained of constitute a practice normally authorized by the utility. While appellants argue that the "all-electric promise" was not a normal practice authorized by the PUCO, the act that is actually being challenged by appellants with respect to their contract claims is the imposition of the higher rate following the elimination of the all-electric program. It should be obvious that charging a customer based on rates approved by the PUCO is a practice normally authorized by the utility. However, such is not the case

with respect to appellants' fraud claim since such claim will require appellants to prove that, when they made the alleged promise, the companies misrepresented their present state of mind in that they had no intention of performing the promise. *Link v. Leadworks* (1992), 79 Ohio App.3d 735, 742.

{¶60} Thus, because the *answer to* both prongs of the *Allstate* test is in the affirmative with respect to appellants' contract claims, such claims are within the PUCO's exclusive jurisdiction. However, because the answer to both questions under the *Allstate* test is in the negative with respect to appellant's fraud claim, that claim is within the trial court's subject matter jurisdiction.

{¶61} Appellants' first and fourth assignments of error are overruled.

{¶62} For their second assigned error, appellants allege:

{¶63} "The common pleas court erred in ruling that the PUCO has exclusive jurisdiction over homeowners' all-electric home breach of contract and tort claims against First Energy when the PUCO has no legal authority to award monetary damages, equitable relief, or retroactive relief to homeowners for First Energy's contractual breach and tortuous misconduct."

{¶64} Appellants argue that because the PUCO has no authority to award damages, declaratory relief, an injunction, or retroactive relief, the trial court's dismissal of their contract claims constitutes a denial of the right to redress in Ohio's courts. We do not agree. While the plight of the homeowners is significant and real, we are bound by the clear constraints of the statutory scheme that requires these claims to be addressed by the PUCO.

{¶65} First, we note that appellants have not cited clear pertinent authority in support of this argument. Specifically, there is no reference to any pertinent authority for the proposition that the inability of the PUCO to issue certain *remedies* means that it lacks jurisdiction to address related *claims*.

{¶66} The Supreme Court of Ohio held in *Kazmaier*, supra, that, although the customer sought reimbursement for any excess amount it paid, the claim was in the PUCO's exclusive jurisdiction. Further, pursuant to R.C. 4909.15, the PUCO has the authority to amend, alter, or suspend rates charged by public utilities to their customers. While not referring to its orders as declaratory judgments or injunctions, an order of the PUCO amending, altering, or suspending an approved rate would be the functional equivalent of ordering the companies to charge appellants pursuant to the former discounted rates, and/or to issue an appropriate credit due to the affected customer for overpayment.

{¶67} Further, contrary to appellants' contention that there is no meaningful avenue of obtaining their full complement of damages, R.C. 4905.61 provides:

{¶68} "If any public utility *** does, or causes to be done, any act or thing prohibited by Chapters 4901., 4903., 4905., 4907., 4909., 4921., 4923., and 4927. of the Revised Code, or declared to be unlawful, or omits to do any act or thing required by the provisions of those chapters, or by order of the public utilities commission, the public utility *** is liable to the person, firm, or corporation injured thereby in treble the amount of damages sustained in consequence of the violation, failure, or omission. Any recovery under this section does not affect a recovery by the state for any penalty provided for in the chapters."

{¶69} Thus, if appellants are able to establish their claims before the PUCO and the PUCO determines the companies' conduct is prohibited by R.C. 4905.61, appellants can then seek an award of treble damages against them in court. *Milligan*, supra, at paragraph one of the syllabus. R.C. 4905.61 therefore provides for enhanced damages that would not otherwise be available to claimants damaged by a public utility. However, because the PUCO has not yet made this determination, appellants' claim for such damages is simply premature.

{¶70} We also note that, in addition to the remedies available to consumers from the PUCO, final orders of the PUCO are subject to review by the Supreme Court of Ohio. R.C. 4903.13. Thus, contrary to appellants' argument, the fact that they must challenge the applicable rate before the PUCO does not imply that the trial court's dismissal amounted to a violation of any right to redress. Further, because we hold that appellants may pursue their fraud claim in the trial court, their argument as to such claim is moot.

{¶71} Appellants' second assignment of error is overruled.

{¶72} For their third assignment of error, appellants allege:

{¶73} "The common pleas court erred when it totally ignored the PUCO's determination and ruling that the PUCO has no legal authority or jurisdiction to decide homeowners' breach of contract and tort claims against First Energy raised in this action, leaving homeowners with no means of redress."

{¶74} Appellants argue that the trial court erred in not following the PUCO's Second Entry on Rehearing, dated April 15, 2010, that "the adjudication of [appellants']

alleged agreements, promises, or inducements made by the Companies is best suited for a court of general jurisdiction rather than the Commission."

{¶75} Once again, appellants have failed to draw our attention to any pertinent authority in support of this argument. For this reason alone, the argument lacks merit. App.R. 16(A)(7).

{¶76} In any event, while appellants also referenced in their brief the PUCO's subsequent Fifth Entry on Rehearing, dated November 10, 2010, they failed to mention that in this later order, the PUCO revised its April 15, 2010 order regarding its jurisdiction over appellants' claims, as follows:

{¶77} "*** [T]he Geauga County Court of Common Pleas has issued a decision holding that it lacks jurisdiction over allegations pertaining to the Companies' rates and marketing practices. The Commission agrees with the Court that *claims that customers were to receive rates that are in violation of Commission-approved tariffs or which were not authorized by the Commission are issues that the Commission is empowered to decide.* *** The Commission will exercise [its] jurisdiction over FirstEnergy's *rates and marketing practices* ***, and the parties are not precluded from conducting discovery regarding these issues nor from presenting evidence during the hearing ***." (Emphasis added.)

{¶78} Further, in addition to finding that it has jurisdiction over appellants' claims, the PUCO has actually asserted jurisdiction over them. In the PUCO case, the PUCO has entered orders and held at least six public hearings concerning the same issues raised by appellants in the trial court.

{¶79} Thus, contrary to appellants' argument, the PUCO in its last entry on the subject of its jurisdiction and in its conduct has made it clear that, in its view, it has exclusive jurisdiction to address appellants' claims.

{¶80} Appellants' third assignment of error is overruled.

{¶81} We therefore affirm all aspects of the trial court's dismissal of appellants' claims, except with respect to their claim for common law fraud. Despite the difficulties inherent in proving the companies' alleged representations concerning future events were fraudulently made, we believe such claim should be resolved based on the evidence.

{¶82} For the reasons stated in this opinion, it is the judgment and order of this court that the judgment of the Geauga County Court of Common Pleas is affirmed in part and reversed in part; and this case is remanded for further proceedings consistent with the opinion.

MARY JANE TRAPP, J.,

THOMAS R. WRIGHT, J.,

concur.

FILED
IN COMMON PLEAS COURT
2010 SEP -7 AM 9:50
DENISE M. KAMINSKI
CLERK OF COURTS
GEAUGA COUNTY

IN THE COURT OF COMMON PLEAS
GEAUGA COUNTY, OHIO

CARL L. DIFRANCO, et al., : CASE NO: 10 M 000164 A-8

Plaintiffs :

JUDGE DAVID L. FUHRY

-vs- :

FIRST ENERGY CORP. et al., : ORDER OF THE COURT

Defendants :

CLAIMS

This matter comes on for consideration on First Energy Corp., The Cleveland Electric Illuminating Co. and Ohio Edison Company ("Companies") Motion to Dismiss for Lack of Jurisdiction. Plaintiffs claim they, and all other similarly situated customers ("class") of the Companies, have been harmed because they were promised discounted electric rates in exchange for the customers equipping their homes with all electric heating systems and appliances ("all electric homes"), or otherwise equipping their homes with specific types of electrical systems. First, they seek a declaratory judgment on their own behalf and on behalf of the class. The judgment they seek is one which orders the Companies to essentially rescind rate increases imposed in April, 2009 and to declare plaintiffs and the class as contractually entitled to "all electric" rates. Plaintiffs maintain a second, separate claim for breach of contract with respect to the charges imposed after the Companies terminated "all electric" rates. A third claim alleges that the Companies fraudulently induced the class members to go "all electric" by promising them permanently discounted rates. Last, the plaintiffs seek an injunction enjoining the Companies from charging or collecting amounts in excess of the original, discounted all electric rate.

The Plaintiffs have responded and, on April 16 and April 19, 2010 further supplemented their response. The supplemented responses point out to the Court the Public Utility Commission of Ohio ("PUCO") finding #9 set forth in its Second

Entry on Rehearing. That finding provides that a court of general jurisdiction should adjudicate any alleged agreements or inducements made by the Companies outside the express terms of PUCO's tariffs. In response to the Court's order of May 25, 2010 the parties then further addressed the "Pure Contract" exceptions to the PUCO's exclusive jurisdiction over utility related matters.

ISSUE

At issue is whether the Plaintiffs have brought this case in the wrong forum. Ordinarily this would not be an issue because the Court of Common Pleas is a court of general jurisdiction. As such it is generally empowered to hear all types of disputes including declaratory judgments, breach of contract, as well as fraud and injunctive actions. The instant case would ordinarily be heard by the Common Pleas Court. It is in fact essentially a breach of contract action. It is brought by "all electric" and similar users against the Companies because the Companies are alleged to be in breach of their promise to provide deeply discounted rates to all electric homes.

JURISDICTION

While the Court of Common Pleas is a Court of a general jurisdiction the Ohio legislature has in certain areas limited that jurisdiction. Some jurisdiction has been delegated to other entities who then have exclusive authority to decide the types of disputes delegated to them. Such is the grant of authority to the PUCO. Ohio Revised Code Title 49 grants PUCO jurisdiction over a multitude of matters concerning the provision of public utilities. In many types of disputes concerning those matters the Courts of Common Pleas are prohibited from exercising their jurisdiction because the power over such matters is vested exclusively in the PUCO.

One matter involving public utilities over which the PUCO has jurisdiction to the exclusion of the Common Pleas courts concerns disputes over rates. Ohio Revised Code §4905.26 grants PUCO authority to hear and determine cases wherein the complaint is against a public utility (such as electric providers) and claims that "any rate, fare, change [or] toll is in any respect unjust, unreasonable, unjustly discriminatory [or] preferential, or in violation of law . . . .". The Ohio Supreme Court has expressly provided that such disputes are exclusively within the jurisdiction of the PUCO, meaning the Common Pleas Court is without any authority whatsoever to determine such disputes: "The commission has exclusive jurisdiction over various

matters involving utilities, such as rates and charges, classifications, and service, effectively denying to all Ohio courts [except the Ohio Supreme Court] *any* jurisdiction over such matters." (Emphasis added), *State ex rel. Cleveland Elec. Illum. Co. v Cuyahoga Cty. Court of Common Pleas* (2000), 88 Ohio St. 3d 447. Therefore, "[t]he jurisdiction specifically conferred by statute upon the Public Utilities Commission over public utilities of the state *** is so complete, comprehensive and adequate, as to warrant the conclusion that it is likewise exclusive." *State ex rel. N. Ohio Tel. Co v. Winters* (1970), 23 Ohio St. 2d 6, 9, quoting *State ex rel. Ohio Bell Tel Co. v. Cuyahoga Cty. Court of Common Pleas* (1934), 128 Ohio St. 553 557; see, also *Kazmaier Supermarket, Inc. v. Toledo Edison Co.* (1991), 61 Ohio St. 3d 147, 152.

"PURE" CONTRACT OR TORT

Not within the jurisdiction of PUCO are disputes that do not concern rates or service. These are disputes whose subject matter is so far removed from rates or service issues as to be labeled "pure" contract or tort disputes. Such disputes involve a claim that the defendant broke a duty imposed by agreement or one created by law, and which duty is not related to rates or service issues over which PUCO has exclusive jurisdiction. The vexing question that has repeatedly challenged the courts is: where is the dividing line between "pure" contract or tort versus the exclusive jurisdiction of PUCO because rates or utility service is involved?

The Courts have had to decide the issue in a variety of settings. Some examples, in no particular order, include the following:

1. A dispute over the contracting utilities' delay in providing foreign exchange lines requiring the customer to use more expensive WATS lines. *Marketing Research Services, Inc. v. Public Utilities Commission of Ohio*, 34 Ohio St. 3d 52 (1997). The court found that the case involved a contract not subject to the exclusive jurisdiction of PUCO.
2. A dispute over contracting utilities' provision of "3 phase" service to a church being constructed. The church was promised there would be no cost but then it was billed $13,193 by the utility. The court found that the case was a contract not subject to the exclusive jurisdiction of the PUCO. State *ex rel. Ohio Power Co. v. Harnishseger*, 64 Ohio St. 2nd 9 (1980).
3. A claim against the public utility for trespass and damage to property which alleges acts relating to a service furnished by the utility. The court held the

matter is exclusively vested in the PUCO's jurisdiction since it is service related. *Farra v. Dayton*, 62 Ohio App. 3d 487 (1989).

4. A dispute between a utility and a guarantor of one of the utility customer's accounts. The issue with respect to the guarantee was held to be outside the jurisdiction of the PUCO. The State *ex rel. The Illuminating Co. v. Cuyahoga County Court of Common Pleas* 97 Ohio St. 3d 69 (2002).
5. A dispute between an individual and a public utility with respect to the existence or non-existence of long distance telephone calls, and the billing therefor. The court determined that rates for such calls were not an issue because the dispute was over the existence or non-existence of long distance calls, not the amount of charges for each. *Senchisin v. Ameritch*, 1997 Ohio App Lexus 3788 (8/22/97), 11th Dist. Court of Appeals.
6. A claim by a customer who had ordered a second line installed in his barn which went dead a short time after its installation. For eight years thereafter the utility charged for the non-functioning second line. The customer sued for negligence and fraudulent conduct. The appeals court affirmed the trial court's dismissal for lack of subject matter jurisdiction since this was a service complaint that should have been brought before the PUCO. *Weiler v. Ohio Bell Telephone Co.* (1997) Ohio App. Lexus 819, Montgomery County Court of Appeals.
7. The negligent placement upon a residence of temporary power lines after a storm. The public utility performed this work which then led to a power surge damaging the customer's property. The court found the matter was a "pure tort" outside of the PUCO's jurisdiction. *Pacific Indemnity Insurance Co. v. The Illuminating Company, 2003 WL 21710787* (2003) Ohio App. 8th Dist.
8. An act of Common Pleas Court in enjoining the construction and operations of a transmission line adjudged to be a public utility matter within the exclusive jurisdiction of the Ohio Power Siting Board (similar to PUCO). The *State ex rel. Ohio Edison Company v. Parrott, Judge* 73 Ohio St. 3d 705 (1995).

The cases go on. With respect to torts and related service related claims and the PUCO's exclusive jurisdiction, the *Pacific Indemnity* case, *supra*, has provided a test for determining whether or not the PUCO has exclusive jurisdiction. The case of *Hull v.*

Columbia Gas of Ohio 11 Ohio St. 3d 96 (2006) similarly provides a test for "pure" contract disputes.

In *Pacific Indemnity*, at page 3 of the decision, the court provides a litany of examples of what kinds of cases courts may hear. At paragraph 16 of the decision it provides a two step test for determining whether an action is service related thereby bringing it within the ambit of PUCO's exclusive jurisdiction. The first question is whether PUCO's administrative expertise is required to resolve the issue in dispute. Second, does the act complained of constitute a "practice" normally authorized by the utility? If the answer to either question is in the negative, courts routinely find that those claims fall outside PUCO's exclusive jurisdiction.

With respect to "pure" contract, the *Hull* case recites: "a pure contract case is one having nothing to do with the utility's service or rates – such as perhaps a dispute between a public utility and one of its employees or a dispute between a public utility and its uniform supplier." *Id.* at 101.

ANALYSIS

In applying the foregoing tests the Ohio Supreme Court has made one principle very clear. That is that the courts should not be dissuaded from finding a claim to be within the exclusive jurisdiction of PUCO simply because it is cloaked in terms of breach of contract or tort.

The Ohio Supreme Court has ruled that, "... despite the nature of the allegation, [if] the substance of the claim involved is a dispute over the rate charged [it is] a matter patently within the jurisdiction of the PUCO." *Allstate Insurance Company v. Cleveland Electric Illuminating Company* 119 Ohio St. 3d 301, 303, citing the *Kazmaier* case, *supra*. And restated: "This court recently confirmed its earlier holding that "[c]asting the allegations in the complaint to sound in tort or contract is not sufficient to confer jurisdiction upon a trial court when the basic claim is one that the commission has exclusive jurisdiction to resolve." *Hull*, Id. at 102 citing *State ex rel. Illuminating Company vs. Cuyahoga County Court of Common Pleas Id.* quote of *Higgins v. Columbia Gas of Ohio, Inc.* (2000), 136 Ohio App. 3d 198.

FINDINGS

THE COURT FINDS THAT the Plaintiffs' claims are not pure contract or tort. Plaintiffs' arguments, while thorough, creative and imaginative, cannot survive

application of the foregoing tests. The dispute between the Companies and the all electric homeowners are not like a dispute between "a public utility and one of its employees or a dispute between a public utility and its uniform supplier." The dispute between the Companies and the plaintiffs is over the rate increases. There is no separate rate "contract" between the utility and the plaintiffs. The contract is set *by the tariff*, not by agreement. The rate of a public utility is determined by PUCO, not by bargaining between the utility and customers. "It has been said that the tariff *constitutes the service contract* between a [utility] company and a member of the general public who applies for [utility] service." (Emphasis added). *Sanchisin v. Ameritech*, Lexis 3788 (1997) 11th District Court of Appeals, citing *Sonstegard v. General Telephone Co.* (C.P. 1969), 27 Ohio Misc. 112. The cases in "pure" contract or tort (including *Senchisin, supra*,) wherein the Common Pleas Courts maintain jurisdiction are those cases which are not "claims which are in essence rate or service oriented . ." *Kazmaier*, Id., at 12, 573 N.E. 2d 655. The General Assembly has in fact specifically authorized the Commissions' complaint jurisdiction to include contract disputes involving retail electric service. See R.C. §4928.16.

Plaintiffs further claim that the PUCO's expertise is not involved in resolving the instant claims. The Court finds this argument unconvincing. The establishment of rates necessarily involves expertise in weighing the effect of increases upon different classes of users and providing for a fair rate of return to the utility. The very establishment of PUCO as the exclusive entity to set rates was premised upon its ability to set fair rates because it has the benefit of the expertise of economists and others at its disposal.

The Plaintiffs have also cited the language of the Commission in its Second Entry on Rehearing that suggests that the Common Pleas Court has jurisdiction. This Court regards that language as no more than a suggestion on the part of the Commission. The Court finds such suggestion is inaccurate for the reasons aforestated.

THE COURT FURTHER FINDS THAT because the Commission did not authorize the alleged improper conduct set forth in the Complaint that does not mean the Commission has no jurisdiction over the conduct. Claims that customers were to receive rates that are in violation of Commission tariffs or which were not authorized by the Commission are issues that the Commission is expressly empowered to decide pursuant to R.C. Chapter 4905.

Last, this Court finds that while the Common Pleas Court lacks jurisdiction to hear and decide this case, the Plaintiffs are not denied a forum to seek redress of their claims. The matter may proceed before the PUCO, and the Ohio Supreme Court has original jurisdiction as well. The Commissions' rules authorize it to regulate a utility's marketing activities and to punish unfair or deceptive sales practices. R.C. §4928.16 and 4928.02(I); O.A.C. 4901:1-10-24(C) & (D).

CONCLUSION

The Court of Common Pleas lacks jurisdiction to hear and decide this case. The case is one which the General Assembly has determined is exclusively within the jurisdiction of the Public Utilities Commission of Ohio.

RULING

The motion to dismiss Plaintiffs' Complaint is hereby granted. Costs to Plaintiff.

IT IS SO ORDERED.

DAVID L. FUHRY, JUDGE

cc: Michael E. Gilb, Esq.
Timothy Grendell, Esq.
Christina F. Londrico, Esq.
Jeffrey Saks, Esq.
Grant Garber, Esq.

sb

TO THE CLERK:
Serve upon all parties, not in default for failure to appear (per Civil Rule 5-(B), notice of this Judgment and its date of journalization.

2/17/00

IN THE COURT OF COMMON PLEAS
GEAUGA COUNTY, OHIO

Carl DiFranco Nancy Difranco 9969 Mulberry Rd. Chardon, Ohio 44024	) Case No. 10M000164))) Judge David L. Fuhry
Andrew T. Wyatt 14771 Sisson Rd. Chardon, Ohio 44024	)
Lisette Roy Robert Roy 13645 Fisher Rd. Burton, Ohio 44021	) <u>CLASS ACTION</u>) <u>COMPLAINT FOR DECLARATORY</u>) <u>JUDGMENT AND OTHER RELIEF</u>) <u>(JURY DEMAND ENDORES HEREON)</u>
Richard Jordon 11430 Twin Mills Lane Chardon, Ohio 44024	)
Herbert J. Shubick 15850 Leggett Rd. Montrille, Ohio 44064	)
Jon J. Rowles 12084 Heath Rd. Chesterland, Ohio 44026	)
Beth Lockitski 10576 Hemlock Ridge Lane Chardon, Ohio 44024	)
Jeannette Hardesty 525 Bear Dr. Chardon, Ohio 44024	)
Vicki Lowry 11968 Auburn Rd. Chardon, Ohio 44024	)

Sandra Pfeiffer
180 Lakeview Lane
Hiram, Ohio 44234

Charlotte A. Brown
34 Cardinal Dr.
Hiram, Ohio 44234

Sandra Kosteinshek
14700 Munnberry Lane
Newbury, Ohio 44065

Joe Meyers
Linda Meyers
8547 Fairlane Dr.
Olmsted Twp., Ohio 44138

Steve Kinnett
Nancy Kinnett
17155 S. Franklin
Chagrin Falls, Ohio 44023

Frederick Schoenig
Marguerite Schoenig
12527 Concord Hambden Rd
Chardon, Ohio 44024

Jamie Davis
Sean Davis
8201 Pettibone Rd.
Chagrin Falls, Ohio 44023

Glenn H. Frohring
Joretta B. Frohring
11835 Bell Rd.
Newbury, Ohio 44065

Eileen Fisco)
14451 Hunting Hills Dr.)
Russell Twp., Ohio 44072)
)
Danah M. Dews)
Connie J. Dews)
166 87 Falmouth Dr.)
Strongsville, Ohio 44136)
)
Eleanor M. Spitz)
8670 Prescott Dr.)
Chesterland, Ohio 44026)
)
Tom Janes)
Lorraino Janes)
13039 Livery Lanes)
Chardon, Ohio 44024)
)
Robert E. Robertson)
9811 Bell Street)
Newbury, Ohio 44065)
)
Gregg Soltis)
Jeannine Soltis)
13475 Stoney Springs Dr.)
Chardon, Ohio 44024)
)
Michelle Guarniere)
10860 Stafford Rd.)
Auburn Twp. Ohio 44023)
)
Edward Leskovec)
14455 Essex Ct.)
Chardon, Ohio 44024)
)
Jean Wurst)
9290 Kingsley Dr.)
Chagrin Falls, Ohio 44023)
)

Charles Lafferty
Shannon Lafferty
14530 Essex Ct.
Chardon, Ohio 44024

Terrace Glen Estates
c/o Dan Ledenican
16 Lois Lane
Chardon, Ohio 44024

Rich D. Koller
Donna Koller
18550 Shaw Rd.
Auburn Twp., Ohio 44023

Robert S. Cipiti
17819 Chillicothe Rd.
Chagrin Falls, Ohio 44023

Charles Blour
Helen Blour
9162 Willson Dr.
Chagrin Falls, Ohio 44023

Harry G. Sherer
75 Cardinal Dr.
Hiram, Ohio 44234

Richard N. Angelino
18066 Haskins Rd.
Chagrin Falls, Ohio 44023

Bryon L. Banks
11281 Clark Rd.
Chardon, Ohio 44024

Thomas Mozz
11240 Highland View Rd.
Chardon, Ohio 44024

Richard Ward)
8982 Williams Rd.)
Chardon, Ohio 44024)
)
Stephen M. Karaffa)
11524 Upper Chelsea Cir.)
Chardon, Ohio 44024)
)
Lori A. Gilbert)
25 Wayne Lane)
Chardon, Ohio 44024)
)
Robert S. Schreiner)
Harriet Schreiner)
9761 Whisperwood Circle)
Auburn Twp. Ohio 44023)
)
David J. Cillian)
11645 Colchester Lane)
Auburn Twp., Ohio 44023)
)
James E. Terpay)
14524 Crestview Dr.)
Novelty, Ohio 44072)
)
John M. Bitonti)
12080 Auburn Rd.)
Chardon, Ohio 44024)
)
Dan Buatois)
Sue Buatois)
15082 Sperry Rd)
Novelty, Ohio 44072)
)
Donald H. Yaecker)
15061 Sperry Rd)
Newbury, Ohio 44065)
)
Rolf R. Tinge)
189 Sunrise Lane)
Hiram, Ohio 44234)

Mary Zimmer
10858 Kile Rd.
Chardon, Ohio 44024

Ronald Ernst
13410 Gar Hwy.
Chardon, Ohio 44024

Rosemarie Davidson
182 Sunrise Lane
Hiram, Ohio 44234

Thomas H. Logan
June A. Logan
9276 Youngstown Salem road
Canfield, Ohio 44406

Peter R. Richmond
5790 Chapel Rd.
Madison, Ohio 44057

Jeffery D. Nick
381 Manhattan Pkwy
Painesville, Ohio 44077

Burt Abel
Mary Ellen Abel
391 Manhattan Pkwy
Painesville, Ohio 44077

Jim Wetzel
8254 Deepwood Blvd #14
Mentor, Ohio 44060

Ronald Neuger
Judy Neuger
4500 Chagrin River Rd.
Moreland Hills, Ohio 44022

Raymond Gabor
8818 Valley Lane
Chagrin Falls, Ohio 44022

Gerald M. Yosowitz MD
28251 Cambridge Lane
Pepper Pike, Ohio 44124

James F. Budzick
Mary Jane Budzick
17139 S. Red Rock Drive
Strongsville, Ohio 44136

Plaintiffs,

vs.

First Energy
76 South Main Street
Akron, Ohio 44308

and

Cleveland Electric Illuminating Company
c/o CT Corporation, Statutory Agent
1360 E. 9th Street
Cleveland, Ohio 44114

and

Ohio Edison Company
76 South Main Street
Akron, Ohio 44308

Defendants.

Plaintiffs, as identified in the caption of this Complaint, whose names are incorporated by reference herein, ("Plaintiffs") each on their own behalf and on behalf of all others similarly situated, complain as follows against Defendants, First Energy ("First Energy"), Cleveland Electric Illuminating Company ("CEI"), and Ohio Edison Company ("Edison"), (First Energy, CEI and Edison are collectively referred to herein as ("Defendants"), to wit:

INTRODUCTION

1. This action is brought by the named Plaintiffs, on their own behalf and on behalf of all other similarly situated customers of Defendants, who have been and continue to be harmed by Defendants unilateral breach of their prior oral agreements, covenants, representations and commitments inducing Plaintiffs, and all others similarly situated, to equip their homes with all electric heating systems and appliances ("all electric homes"), or electric hot water heating systems ("electric water heating"), and /or electric load management systems ("load management") in consideration for which Defendants agreed to charge Plaintiffs, and all others similarly situated, special volume based or off peak usage based rates commonly known as the all electric home rate, electric water heating rate, and load management discount rate indefinitely with no limit as to time. Additionally, Defendant agreed, covenanted, and represented to Plaintiffs, and others similarly situated, who installed electric heat pumps that they would receive a special discounted rate regardless if Defendants removed the rate from their filed rate schedule with the Ohio PUCO.

2. Plaintiff, and members of the Plaintiff Class, each were parties to the oral agreements, representations, covenants and inducements made by Defendants assuring Plaintiffs, and the Plaintiff class, that they would receive the all electric home rate, electric water heating rate and/or load management discount. In return for such promises, agreements and representations, Plaintiffs justifiably relied upon and partially or substantially performed by maintaining all electric homes, electric water heating systems, and/or load management equipment in their respective homes, in lieu of natural gas, oil or other equipment or appliances.

3. Plaintiffs, Glenn H. Frohring, Joretta Frohring, Eileen Fisco, Dana M. Dews, Connie J. Dews, Eleanor M. Spitz, Tom Janes, Lorraine Janes, and Robert E. Robertson were induced by Defendants' agreements, promises, covenants, and representations and justifiably relied on Defendants' agreements, promises, representations, and inducements into equipping their homes with electric load management devices that allowed Defendants' to manage electric load to their homes in exchange for Defendants' unlimited promise to provide said Plaintiffs, and others similarly situated, with a load management discount. These Plaintiffs are representative of all

of those homeowners in Geauga County and Northeastern Ohio designated as "all electric load" customers by Defendants, which customers constitute a subclass of the Plaintiff class in this action.

4. Plaintiffs, Gregg Soltis and Jeannine Soltis, were induced by Defendants' promises, covenants, agreements, and representations and justifiably relied on Defendants' agreements, promises, covenants, and inducements into equipping their home with electric water heating systems in exchange for Defendants' unlimited promise to provide said Plaintiffs, and others similarly situated, with an electric water heating discount. These Plaintiffs are representative of all of those homeowners in Geauga County and Northeastern Ohio designated as electric water heating customers, which customers constitutes another subclass of the Plaintiffs' Class in this action.

5. The Plaintiff Class, including both subclasses, upon information and belief, consists of more than 100,000 residential homeowners (and perhaps as many as 300,000 homeowners), residing in Geauga County and surrounding Northeast Ohio Counties who are customers of Defendants and it is impracticable to bring them all before the Court and would be contrary to the principles of judicial economy to do so; there are questions of law or fact presented which are common to the entire class, or respective subclasses accordingly; the claims of the named Plaintiffs, and named subclass representative Plaintiffs, respectively, are typical of the claims of the class, or respective subclass, as applicable; and the named Plaintiffs will fairly and adequately represent and protect the interest of the class and subclasses.

PARTIES/JURISDICTION/VENTUE

6. The named Plaintiffs are residents and residential property owners and/or occupants residing in Northeast Ohio, sixty (60) of the named Plaintiffs reside in Geauga County, Ohio.

7. The named Plaintiffs are customers of Defendants. Defendants, First Energy, and its affiliated companies, CEI and Edison, conduct business in Ohio and Defendant, First Energy, by and through CEI, conducts business in Geauga County, Ohio, including, without limitation, entering into contracts with the Geauga County residents named as Plaintiffs and thousands of similarly situated residents residing in Geauga County, Ohio.

8. The real property owned by the Geauga County residents named as Plaintiffs, and thousands of similarly situated Geauga County residents, adversely affected by Defendants' breach of contract, tortious, and statutory misconduct described below is located in Geauga County, Ohio.

9. Defendants, First Energy and CEI maintain facilities, equipment and employees in Geauga County, Ohio

10. The Contractual agreements, misrepresentations, and fraudulent inducements, complained of below, as to the Geauga County residents named as Plaintiffs, occurred in Geauga County, Ohio.

11. This action is brought for Declaratory Relief pursuant to O.R.C Chapter 2721.

12. This Court has Jurisdiction over the genuine contract disputes and genuine tort claims raised in this Complaint even though the case involves public utilities; to clarify, this action is not a "rate" setting case but rather a case related to contractual rights existing between Plaintiffs and members of Plaintiff Class, and Defendants by reason of a contract entered between said parties.

13. Plaintiffs are entitled to access to this Court to redress their genuine tort claims and genuine contract claims pursuant to the Ohio Constitution.

14. The Ohio Public utilities Commission is not a court of general jurisdiction and has no power to issue a declaratory judgment or to determine finally the legal rights and liabilities with regard to Plaintiffs' contractual rights as to programs promised by Defendants; nor to determine finally Defendants' liability for their tortious conduct alleged in this Complaint.

BACKGROUND

15. During the last approximately forty (40) years, Defendants, at various times, entered into oral agreements with Plaintiffs and other similarly situated, whereby Defendants agreed to provide an all electric home discount in consideration of Plaintiffs equipping their homes with all electric heating systems and appliances.

16. Defendants placed no time limitations on their agreements, covenants, promises, and inducements as to the all electric homes programs.

17. Plaintiff and others similarly situated justifiably relied on Defendants' agreements, covenants, representations and inducements and equipped their homes with all electric heating equipment, appliances, geothermal heating systems and other electric used in lieu of natural gas or oil operated heating systems and appliances.

18. Numerous Plaintiffs and others similarly situated purchased their homes in reliance on Defendants' "all electric home" agreements, promises, and inducements, which were not limited or conditional as to duration.

19. Defendants, by and through their agents, distributors, representatives, or employees represented that the "all electric home" program would be "permanent" or unlimited as to time or would be perpetual as long as the homeowners maintained the all electric usage.

20. Defendant, First Energy's affiliate represented to Plaintiffs residing in Geauga County and Northeast Ohio, Thomas M. Logan, and others similarly situated, as far back as 1988, that the all electric home program rate would not be affected or forfeited, by the removal of the rate from the files and that this rate would be "guaranteed" as long as they wished to use it.

21. To induce Plaintiffs, and others similarly situated, to purchase all electric homes or to continue to use electric appliances and heating systems in their homes in lieu of natural gas or other appliances or utilities, Defendants' maintained and provided to Plaintiffs and others similarly situated discounts until May, 2009.

22. Until May, 2009, Defendants admitted and agreed that owners of all electric homes were "grandfathered" or permanently entitled to the all electric home discount.

23. Plaintiffs' and others similarly situated, entitled to the all electric home status were charged 1.9 cents per k wh.

24. Since Defendants unilaterally breached their agreement, promise and commitment to Plaintiffs, and others similarly situated, with respect to all electric home status, Defendants have increased their charge to 4 cents or more per k wh.

25. Defendants also induced the named subclass Plaintiffs, and other similarly situated, in the electric water heating subclass into installing and/or maintaining electric water heating system at those homeowners cost, by promising those individuals a special discounted charge for electricity usage.

26. Defendants unilaterally terminated that electric water heating commitment, promise, and agreement in May, 2009.

27. Defendants also induced the named subclass Plaintiffs, and others similarly situated, in the load management subclass into installing load management equipment in their homes in exchange for a load management discount that allowed Defendants to manage electric usage service provided to those homes.

28. The named subclass Plaintiffs, and others similarly situated, justifiably relied on Defendants' agreements, covenants, promises, and inducements and installed load management devices at those Plaintiffs', and others', cost.

29. By Defendants actions and practices over forty (40) years, Defendants have admitted that Plaintiffs, and others similarly situated, are entitled to participate in the all electric home, electric water heating program, and load management discount programs as a result of Ohio contract law based on oral contracts, inducements, justifiable reliance on those inducements, and the partial performance doctrine.

30. In justifiable reliance on Defendant's representations and inducements, Plaintiffs, and others similarly situated, (a) purchased all electric homes; (b) installed, maintained, and replaced, electric appliances and heating systems in their homes, and refrained from using natural gas, heating oil or other non-electric utility services or appliances in their homes, even though such alternative may have been less costly.

31. In reliance on Defendants' oral agreements, covenants, promises, and representations as to all electric home, electric water heating, and load management discounts, Plaintiffs, and others similarly situated, partially performed their obligations, duties, and conditions with respect to said contracts by purchasing and maintaining all electric homes and electric water heating and load management systems.

32. Defendants benefited by Plaintiffs actions by selling off-peak electricity in Geauga County and Northeast Ohio, and now having a captive electric usage reliant group of homeowners in Geauga County and Northeast Ohio.

CLASS ALLEGATIONS

33. The named Plaintiffs bring this action on behalf of a class of all other persons similarly situated which class consists of all persons who satisfy the following criteria:

    a. They are customers of Defendants who prior to May 2009, were classified by Defendants as all electric home customers, or for subclass purposes, as electric water heating and/or load management.

    b. They had received the lower charges attributed to the all electric homes or electric water heating or load management classifications.

    c. After June 1, 2009, they no longer are so classified by Defendants and no longer receive the full discount attributable to those classifications; and

    d. They are and have been residential customers of Defendants.

34. Upon information and belief, the Plaintiff class, including the subclasses, consists of at least 106,000 customers of Defendants and is sufficiently numerous that joinder of all members is impractical.

35. There are questions of law and fact common to the class, which questions predominate over any questions peculiar to individual class members.

36. The named Plaintiffs, and named subclass Plaintiffs, have the same claims as the members of the class, and subclasses, respectively. All of the claims are based on the same factual and legal theories.

37. The named Plaintiffs, and named subclass Plaintiffs, will fairly and adequate represent the interest of the class, and subclass, members and have retained experienced counsel. There is no reason why the named Plaintiffs and their counsel

will not vigorously pursue this action.

38. Certification of a class pursuant to Ohio R. Civ. P. 23 (b)(1)(a) or (b)(2) or (3) is appropriate. A class action is the only appropriated means of resolving this controversy. In the absence of a class action, a failure of justice will result.

COUNT ONE

DECLARATORY JUDGMENT

39. Plaintiffs incorporate by reference paragraphs 1 through 38 above as if fully rewritten herein.

40. Plaintiffs assert and maintain that Defendants have entered into an oral agreement with Plaintiffs, and others similarly situated with respect to the all electric home, electric water heating and load management discounts, Plaintiffs, and others similarly situated, justifiably relied on Defendants' oral covenants, and promises by installing, and maintaining all electric homes, electric water heating systems, and load management systems at Plaintiffs' cost and to their detriment.

41. Defendants assert and maintain that they have no contractual duty or obligation to Plaintiffs or others similarly situated with respect to the all electric home, electric water heating or load management programs or that the Ohio PUCO somehow had the power to absolve Defendants of their contractual commitments and agreements with Plaintiffs and other similarly situated, despite Defendants' approximately forty (40) years of conduct and practices to the contrary.

42. A controversy exists between the parties as to the contractual duties owned by Defendants to Plaintiffs and others similarly, situated with respect to the all electric home, electric water heating, and load management programs.

43. This action is brought under O.R.C Section 2721.03 and 2721.04 and involves an actual controversy between the parities, Plaintiff class members and Defendants for which there is no adequate remedy at law.

44. Plaintiffs, and Plaintiffs' class, are entitled to a declaratory judgment ordering that Defendants are contractually obligated to classify Plaintiffs, and Plaintiffs' class, as customers entitled to the all electric home, electric water heating, and load management discounts that they received as of April, 2009, retroactive to June 1, 2009, and ordering Defendants to refund all excess funds obtained by Defendants from Plaintiffs and the Plaintiffs' class as a result of Defendants unilateral termination of the all electric home, electric water heating, and load management program.

COUNT TWO

BREACH OF CONTRACT

45. Plaintiffs incorporate by reference paragraphs 1 through 44 above as if fully rewritten herein.

46. Defendants have breached their contractual obligation and commitments to Plaintiffs, and Plaintiffs' Class, by unilaterally terminating the all electric home, electric water heating, and load management programs.

47. As a result of Defendants' breach, Plaintiff and the Plaintiffs' class, have been damaged and continued to be damaged economically by the excess charges resulting from Defendants and unilateral conduct in an amount that exceeds Fifty-Million Dollars ($50,000,000.00) as shall be more fully shown at trial, to which Plaintiffs and Plaintiffs class are entitled to judgment and relief.

COUNT THREE

FRAUDULENT INDUCEMENT/JUSTIFIABLE RELIANCE

48. Plaintiffs incorporate by reference paragraph 1 through 47 as if fully rewritten herein.

49. During the period starting in the early 1990's until spring 2009, Defendants, by and through their agents, representatives and/or employees, falsely represented to Plaintiffs, and the Plaintiffs' class, that if they maintained all electric homes, electric water heating, and/or load bearing devices, Defendants would permanently include them as all electric home, electric water heating and/or load management customers, as applicable, at a reduced rate, which in the case of all electric home customers was approximately 1.9 cents in January, 2009.

50. Plaintiffs, and members of Plaintiffs' class, justifiably believed and relied on said representations by Defendants and purchased and maintained all electric homes, refrained from purchasing homes with non-electric heat and appliances, installed electric water heating systems, and/or installed load management devices, all at their expenses.

51. Plaintiffs, and members of Plaintiffs class, would not have taken the actions described in paragraph 50 above except for the fact that they relied upon the false representations made as alleged above, and as a result Plaintiffs and the Plaintiffs Class have suffered injury, damage and loss in excess of Fifty-Million Dollars ($50,000,000.00) shall be shown at trial.

COUNT FOUR

INJUNCTIVE RELIEF

52. Plaintiffs incorporates by reference paragraph 1 through 51 above as if fully rewritten herein.

53. To the extent Defendants breach of its agreement with Plaintiffs, and the Plaintiffs' class members, and Defendants' tortious conduct has resulted in Defendants charging Plaintiffs and Plaintiffs' class members two to three times the monthly amount that was charged under the all electric home, electric water heating and/or load management programs, numerous Plaintiffs, and class members are at risk of losing their electricity service, receiving a bad credit rating, or the reduction in the market value of their property; all of which harm is irreparable and is not redressed by an adequate remedy at law.

54. Unless preliminarily and permanently enjoined, Defendants' actionable conduct will continue to cause irreparable harm to numerous Plaintiffs and members of the Plaintiff class.

55. To prevent such ongoing irreparable harm, Plaintiffs, and Plaintiffs' Class, are entitled to an order preliminarily and permanently enjoining Defendants from collecting or pursuing collections against Plaintiffs, and Plaintiffs' class, in excess of the charges assessed as of January 1, 2009, with respect to the all electric home, electric water heating, and load management programs.

WHEREFORE, Plaintiffs request that this Court grant the following relief in their favor, on their own behalf and on behalf of the Plaintiff class, and subclasses, as applicable, and against Defendants, as appropriate, to wit:

A. To certify this action as a class action and the class and subclasses above pursuant to Ohio Civil Rule 23;

B. On Count One, A declaratory judgment ordering that Defendants are contractually obligated to classify Plaintiffs, and Plaintiffs' class members, as customers entitled to the all electric home, electric water heating, and load management discounts effective as of January, 2009 and ordering Defendants to refund all excess funds collected to date to Plaintiffs and Plaintiff class member;

C. On Counts Two and Three, a judgment in favor of Plaintiff and the Plaintiff Class and against Defendants in excess of Fifty-Million Dollars

($50,000,000.00) as shall be more fully shown at trial;

D. On Count Four, an order enjoining Defendants collections of excess charges as described in paragraph 55 of the Complaint;

E. For compensatory, incidental, and consequential damages, in such amount as shall be determined at trial;

F. For attorney's fees, litigation expenses, and costs to the extent permitted by law; and

G. For such other relief as this Court deems equitable, necessary, proper or just.

Respectfully submitted,

Timothy J. Grendell, Esq. (0005827)
6640 Harris Road
Broadview Heights, Ohio
(P) 216-904-0029
(F) 614-220-0833

Michael E. Gilb, Esq. (0029868)
7547 Central Parke Blvd.
P.O. Box 773
Mason, OH 45040
(P)513-204-6703

Christina F. Londrico, Esq., (0085091)
P.O. Box 56
Richfield, Ohio 44286
(P) 216-376-8320

Attorneys for Plaintiffs

JURY DEMAND

Plaintiffs demand a trial by jury as to all factual issues in this action, including, without limitation, any factual issues predicate to the declaratory judgment claim in Count One of the Complaint.

Timothy J. Grendell, Esq. (0005827)
Attorney for Plaintiffs

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Approval of a New Rider and Revision of an Existing Rider.	)	Case No. 10-176-EL-ATA

FINDING AND ORDER

The Commission finds:

(1) Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company (collectively, FirstEnergy) are electric utilities as defined by Section 4928.01(A)(11), Revised Code.

(2) Various residential all-electric rates were implemented and revised over the years in the service territories of FirstEnergy, beginning in January 1974. These rate structures were declining block structures such that the customer's rate declined with greater electricity usage.

(3) On July 6, 1999, Amended Substitute Senate Bill No. 3 (S.B. 3) was signed by the Governor and most provisions became effective on October 5, 1999. Among other things, S.B. 3 unbundled generation rates and froze distribution rates at their current levels through the end of the five-year market development period.

(4) On January 4, 2006, the Commission issued its Opinion and Order in FirstEnergy's rate certainty plan adopting an agreement among the parties that included a provision that certain all-electric residential rate schedules for FirstEnergy would no longer be available to new customers or new premises beginning January 1, 2007. *In re FirstEnergy*, Case No. 005-1125-EL-ATA, et al., Opinion and Order (January 4, 2006) (citing Stipulation at 12 (September 9, 2005)).

(5) On January 21, 2009, the Commission issued its Opinion and Order in FirstEnergy's distribution rate case. *In re FirstEnergy*, Case No. 07-551-EL-AIR, et al., Opinion and Order (January 21, 2009). In order to simplify FirstEnergy's existing rate structure,

consistent with S.B. 3 mandates, the Commission also approved FirstEnergy's proposed consolidation of 32 different residential distribution rate schedules into a single residential distribution rate schedule for each electric utility. However, in order to mitigate the impact upon residential customers affected by the consolidation of the rate schedules, the Commission approved a residential distribution credit for certain residential customers. *Id.* at 23-24. These customers included many who had been taking service under all-electric residential rate schedules. Those customers had received a substantial discount on their winter rates prior to this rate schedule consolidation and received a discount after the consolidation based upon the Commission's principle of gradualism. *Id.* at 29.

(6) On March 25, 2009, the Commission issued its Second Opinion and Order in FirstEnergy's electric security plan (ESP) proceeding, approving the stipulations filed by various parties. *In re FirstEnergy,* Case No. 08-935-EL-SSO, et al., Second Opinion and Order (March 25, 2009). Among other terms, the ESP stipulations provided that, for the period between June 1, 2009, and May 31, 2011, generation rates would be determined by a competitive bid process (CBP). Further, in order to create a generation rate structure that would be consistent with the distribution rate structure approved in FirstEnergy's distribution rate case, the Commission approved the consolidation of the various residential generation rate schedules into a single residential generation rate schedule for each electric utility. *Id.* at 9-10. The Commission also approved a residential generation credit for customers who were impacted by the generation rate schedule consolidation in order to mitigate the impact of the consolidation. *Id.* Again, the impacted customers included a number of customers taking service under the discounted all-electric residential rate schedules.

(7) The distribution and generation credits provided to customers affected by the rate schedule consolidation in both proceedings represent total rate discounts of 3.6 cents per kWh.

(8) In Case No. 08-935-EL-SSO, the Commission approved the implementation of Rider DDC for FirstEnergy to allow for the recovery of certain accounting deferrals and carrying charges for post date-certain distribution expenses, line extension charges,

and transition taxes. Rider DDC was to take effect on January 1, 2011, and exist for 25 years. However, on August 19, 2009, we determined that it would be beneficial to both residential and nonresidential customers to reduce carrying costs on these deferrals by beginning to recover the deferrals in an accelerated manner (i.e., over the period September 2009 through May 2011, excluding summer months). *In re FirstEnergy*, Case No. 09-641-EL-ATA, et al., Finding and Order (August 19, 2009) at 4. The revised riders were implemented to replace the existing riders and reduce the length of the recovery periods. The early recovery of the deferrals was estimated to save $178 million for residential customers and $142 million for nonresidential customers. *Id.*

(9) There has been substantial public concern expressed regarding certain all-electric residential customers' bills, notwithstanding the discounts provided to these customers.

(10) The Commission finds that, until such time as the Commission determines the best long-term solution to this issue, rate relief should be provided for all-electric residential customers. Accordingly, we direct FirstEnergy to file tariffs for the all-electric residential subscribers that will provide bill impacts commensurate with FirstEnergy's December 31, 2008, charges for those customers.

(11) Given that, in the ESP stipulations, the parties agreed that FirstEnergy should procure generation through a CBP and that all wholesale generation costs should be recovered through retail rates, further proceedings regarding the recovery of the revenue shortfall are necessary. In the interim, the Commission will authorize FirstEnergy, pursuant to Section 4905.13, Revised Code, to modify its accounting procedures to defer the difference between the rates and charges to be charged to the all-electric residential customers as the result of the Commission's order in this proceeding and the rates and charges that would otherwise be charged to those customers.

(12) However, the Commission acknowledges that this is not a long-term solution to this issue. Therefore, we direct Staff to investigate and file a report in this proceeding regarding the appropriate long-term rates that should be provided to all-electric residential customers of FirstEnergy. In this report, Staff

should include a range of options regarding proposed rates and discounts to be provided to all-electric residential customers. Each option should be supported by a thorough statistical analysis, which includes the bill impact upon all-electric residential customers at various ranges of consumption levels and the number of all-electric residential customers within each range. Further, the report should include a range of options for the Commission regarding the recovery of the revenue shortfall as a result of the discounts provided to all-electric residential customers, including from which customer classes and rate schedules FirstEnergy should recover the revenue shortfall and the bill impacts on those customers.

(13) Unless otherwise ordered by the Commission, Staff should file its report with the results of its investigation in this docket within 90 days. After the Staff has filed its report, the Commission will establish, by subsequent entry, a period for the filing of comments by interested persons.

(14) Moreover, pursuant to Rule 4901:1-18-04, O.A.C., we find that FirstEnergy shall work with impacted customers, upon contact by a customer whose account is delinquent or who desires to avoid a delinquency, to make reasonable extensions or other extended payment plans appropriate for both the customer and FirstEnergy. Additionally, FirstEnergy shall inform the customer of the one-sixth payment plan, the one-third winter heating season payment plan, and the availability of the percentage of income payment plan if eligible, in the event that a mutual payment arrangement cannot be worked out.

It is, therefore,

ORDERED, That rate relief be provided as directed herein. It is, further,

ORDERED, That FirstEnergy be authorized to modify its accounting procedures as set forth in Finding (11). It is, further,

ORDERED, That FirstEnergy file, in final form, four complete copies of the tariffs, consistent with this Finding and Order, within 14 days of the issuance of this Finding and Order. FirstEnergy shall file one copy in its TRF docket (or make such filing electronically as directed in Case No. 06-900-AU-WVR) and one copy in this case docket. The remaining two copies shall be designated for distribution to the Rates and

Tariffs, Energy and Water Division of the Commission's Utilities Department. It is, further,

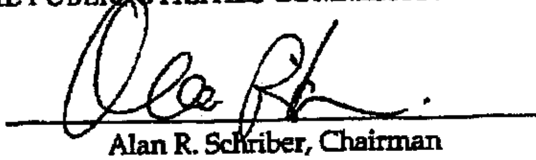
ORDERED, That the effective date of the revised tariffs shall be a date not earlier than the date of this Finding and Order and the date upon which four complete copies are filed with the Commission. The new tariffs shall be effective for services rendered on or after such effective date. It is, further,

ORDERED, That FirstEnergy notify its all-electric residential customers of the tariff revisions via a bill message, bill insert, or separate mailing within 30 days of the effective date of the tariffs. A copy of the customer notice shall be submitted to the Commission's Service Monitoring and Enforcement Department, Reliability and Service Analysis Division, at least 10 days prior to its distribution to customers. It is, further,

ORDERED, That nothing in this Finding and Order shall be binding upon this Commission in any future proceeding or investigation involving the justness or reasonableness of any rate, charge, rule, or regulation. It is, further,

ORDERED, That a copy of this Finding and Order be served all parties of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO



Alan R. Schriber, Chairman

Paul A. Centolella

Ronda Hartman Fergus

Valerie A. Lemmie

Cheryl L. Roberto

GAP/KWB/dah

Entered in the Journal

MAR 0 3 2010

Reneé J. Jenkins
Secretary

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Approval of a New Rider and Revision of Existing Rider.	)))))	Case No. 10-176-EL-ATA

SECOND ENTRY ON REHEARING

The Commission finds:

(1) Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company (FirstEnergy or the Companies) are public utilities as defined in Section 4905.02, Revised Code, and, as such, are subject to the jurisdiction of this Commission.

(2) On February 12, 2010, FirstEnergy filed an application in this proceeding to revise its current tariffs in order to provide rate relief to certain "all-electric" customers.

(3) On March 3, 2010, the Commission issued its Finding and Order in this proceeding, approving FirstEnergy's application as modified by the Commission.

(4) Section 4903.10, Revised Code, states that any party to a Commission proceeding may apply for rehearing with respect to any matters determined by the Commission within 30 days of the entry of the order upon the Commission's journal.

(5) On March 8, 2010, the Ohio Consumers' Counsel (OCC) filed a request for clarification and, in the alternative, application for rehearing. In the application for rehearing, OCC alleges that the Finding and Order was unjust and unreasonable on four separate grounds.

(6) On March 18, 2010, FirstEnergy filed a memorandum contra OCC's application for rehearing.

(7) In OCC's first assignment of error, OCC contends that the Commission erred when providing rate relief for "all-electric" customers without specifying that those customers are the

same customers who would benefit from lower rates as proposed by OCC. The Commission will clarify that the Finding and Order applies to all residential customers who had previously been billed under the "all-electric" rate schedules specified in FirstEnergy's application in this proceeding as well as to any other residential customer who is the successor account to a customer who had previously qualified under the "all-electric" rate schedules, notwithstanding the provisions of the stipulation in *In re FirstEnergy*, Case No. 05-1125-EL-ATA, et al.

Further, the Commission expects that, at a minimum, the rate relief will remain in effect through the next winter heating season. With these clarifications and based upon the public interest in this docket, we believe that the 90-day deadline for the Staff investigation to be completed is not advisable. Therefore, we direct Staff to continue its investigation and to develop a process, which ensures that interested parties and stakeholders have a meaningful opportunity to participate in the resolution of the issues raised in this proceeding.

Accordingly, in light of these clarifications, the Commission finds that OCC's first assignment of error is moot. However, the Commission notes that the tariffs submitted by FirstEnergy on March 17, 2010, in this proceeding appear to limit the residential generation credit rider (RGC) to customers who were taking service from the Companies on April 30, 2009, under the "all-electric" rate schedules. The Commission finds that this provision is inconsistent with our clarification and directs the Companies to file revised tariffs, within seven days, which are consistent with the Finding and Order, as clarified by the Commission.

(8) In its second assignment of error, OCC argues that the relationship between residential rate schedules and the "all-electric" rate schedules should be restored concerning customer, kilowatt-hour, and demand charges in distribution and generation rates. Thus, OCC claims, every residential customer would be responsible for unchanged additional charges and riders.

The Commission finds that rehearing on this assignment of error should be denied. In our Finding and Order, the

Commission intended that the rate relief provided to "all-electric" residential customers result in bill impacts which are commensurate with the charges paid by these customers as of December 31, 2008. OCC's proposed changes would not return "all-electric" residential customers to their prior rates and, thus, would undermine the rate relief provided to "all-electric" residential customers by the Finding and Order.

(9) In support of its third assignment of error, OCC argues that an investigation should be conducted regarding alleged promises and inducements made by the Companies to "all-electric" residential customers.

The discounts previously provided to "all-electric" residential customers, which were restored by the Commission in our Finding and Order, were provided pursuant to the terms of FirstEnergy's Commission-approved tariffs. OCC alleges that FirstEnergy made additional promises and inducements, directly or indirectly, to residential customers outside of the express terms of those tariffs. OCC's claims appear to be made under laws governing contracts and equitable remedies. However, the Supreme Court has held that the Commission has no power to determine legal rights and liabilities in cases solely involving contract rights even though a public utility is involved. *Marketing Research Service, Inc., v. Pub. Util. Comm.* (1987), 34 Ohio St.3d 52, 56. Therefore, the adjudication of any alleged agreements, promises, or inducements made by the Companies outside of the express terms of its tariffs, as alleged by OCC, is best suited for a court of general jurisdiction rather than the Commission. Therefore, the Commission finds that rehearing on this assignment of error should be denied.

(10) With respect to OCC's fourth assignment of error, OCC claims that the Commission erred because it failed to grant OCC's motion to intervene in this proceeding. However, the Commission granted intervention to OCC in our Entry on Rehearing dated April 6, 2010. Accordingly, OCC's assignment of error is moot.

It is, therefore,

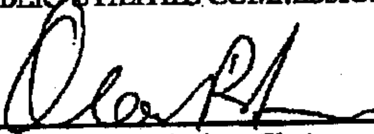
ORDERED, That the application for rehearing filed by OCC be denied. It is, further,

ORDERED, That, within 7 days, FirstEnergy File, in final form, four complete copies of the tariffs, consistent with this Second Entry on Rehearing. FirstEnergy shall file one copy in its TRF docket (or make such filing electronically as directed in Case No. 06-900-AU-WVR) and one copy in this case docket. The remaining two copies shall be designated for distribution to the Rates and Tariffs, Energy and Water Division of the Commission's Utilities Department. It is, further,

ORDERED, That the effective date of the new tariffs shall be a date not earlier than the date of this Second Entry on Rehearing and the date upon which four complete copies are filed with the Commission. The new tariffs shall be effective for services rendered on or after such effective date. It is, further,

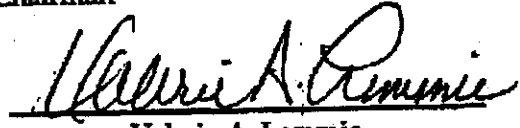
ORDERED, That a copy of this Entry on Rehearing be served upon all parties of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO



Alan R. Schriber, Chairman

Paul A. Centolella



Valeria A. Lemmie

Steven D. Lesser

Cheryl L. Roberto

GAP/sc

Entered in the Journal

APR 1 5 2010

Reneé J. Jenkins
Secretary

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Approval of a New Rider and Revision of an Existing Rider.	)))))	Case Nos. 10-176-EL-ATA

ENTRY

The attorney examiner finds:

(1) Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company (FirstEnergy or the Companies) are public utilities as defined in Section 4905.02, Revised Code, and, as such, are subject to the jurisdiction of this Commission.

(2) On February 12, 2010, FirstEnergy filed an application in this proceeding to revise its current tariffs in order to provide rate relief to certain all-electric customers.

(3) On March 3, 2010, the Commission issued its Finding and Order in this proceeding, approving FirstEnergy's application as modified by the Commission and providing interim rate relief for all-electric residential customers. On March 8, 2010, the Ohio Consumers' Counsel (OCC) filed an application for rehearing. On April 6, 2010, the Commission granted rehearing for the purpose of further consideration of the matters specified in the application for rehearing. Subsequently, on April 15, 2010, the Commission denied rehearing in our Second Entry on Rehearing (April 15 Entry) in this proceeding.

On April 2, 2010, FirstEnergy also filed an application for rehearing regarding the Commission's March 3, 2010, Finding and Order. The Commission granted rehearing on April 28, 2010, in the Third Entry on Rehearing in this proceeding.

On May 14, 2010, FirstEnergy filed an application for rehearing regarding the April 15 Entry. Further, on May 17, 2010, Industrial Energy Energy Users-Ohio (IEU-Ohio) and OCC each filed applications for rehearing arguing that the April 15

Entry is unreasonable and unlawful on two separate grounds. On June 9, 2010, the Commission granted rehearing for the purpose of further consideration of the matters specified in the May 14, 2010 FirstEnergy application for rehearing and the May 17, 2010 applications for rehearing filed by IEU-Ohio and by OCC.

(4) In the Finding and Order issued on March 3, 2010, the Commission directed Staff to file a report regarding the appropriate long-term rates that should be provided to all-electric residential customers of FirstEnergy. The Commission further directed that Staff provide a range of options regarding proposed rates and discounts for all-electric residential customers and that each option be supported by a thorough statistical analysis, including the bill impact upon all-electric customers at various levels of consumption and the number of all-electric residential customers at each consumption level.

(5) On September 24, 2010, the Staff filed its report as directed by the Commission. The Staff Report outlines six different options for the reduction or elimination of the discounts provided to all-electric customers as well as the bill impacts for each option.

(6) The attorney examiner finds that the following procedural schedule should be established for these proceeding:

(a) Motions to intervene in this proceeding should be filed by November 1, 2010.

(b) Testimony on behalf of the Companies and intervenors should be filed by November 15, 2010.

(c) A prehearing conference should be held on November 18, 2010, at 10:00 a.m., at the offices of the Commission, 180 E. Broad Street, 11th Floor, Hearing Room 11-A, Columbus, Ohio 43215.

(d) The evidentiary hearing shall commence on November 29, 2010, at 10:00 a.m., at the offices of the Commission, 180 E. Broad Street, 11th Floor, Hearing Room 11-A, Columbus, Ohio 43215.

(7) In order to provide customers of FirstEnergy a reasonable opportunity to provide public testimony regarding potential rates to be charged to all-electric customers, the following local public hearings will be conducted on the following dates:

(a) Monday, October 25, 2010, at 6:00 p.m., at the Sandusky Community Church of the Nazarene, 1617 Milan Road, Sandusky, Ohio 44870.

(b) Tuesday, October 26, 2010, at 6:00 p.m., at the Maumee Municipal Building, 400 Conant Street, Maumee, Ohio 43537.

(c) Wednesday, October 27, 2010, at 6:00 p.m., at the Strongsville High School, 20025 Lunn Road, Strongsville, Ohio 44149.

(d) Wednesday, November 17, 2010, at 6:00 p.m., at the North Ridgeville Education Center Community Room, 5490 Mills Creek Lane, North Ridgeville, Ohio 44039.

(e) Wednesday, November 17, 2010, at 6:00 p.m., at Timmons Elementary School, 9595 East Washington Street, Chagrin Falls, Ohio 44023.

(f) Thursday, November 18, 2010, at 6:00 p.m., at the Springfield City Hall, City Forum - 1st Floor, 76 East High Street, Springfield, Ohio 45502.

(8) Pursuant to Rule 4901:1-35-06(A), Ohio Administrative Code (O.A.C.), FirstEnergy should publish legal notice of the application and scheduled local and evidentiary hearings in a newspaper of general circulation in each county in its service territory. Publication of the notice should be completed by October 22, 2010. The hearing notice should not appear in the legal notices section of the newspaper. The notice should read as follows:

LEGAL NOTICE

The Public Utilities Commission of Ohio has scheduled local hearings and an evidentiary hearing in Case No. 10-176-EL-ATA, *In the Matter of the Application of Ohio Edison Company, The*

Cleveland Electric Illuminating Company, and The Toledo Edison Company for Approval of a New Rider and Revision of an Existing Rider. In this proceeding, the Commission will consider the companies' application to provide rate relief for certain all-electric residential customers. On September 24, 2010, the staff of the Public Utilities Commission of Ohio issued a report of its investigation into the application filed by the companies. In the staff report, staff provided a range of options regarding potential rates to be charged to all-electric residential customers.

The local hearings are scheduled for the purpose of providing an opportunity for interested members of the public to testify in this proceeding regarding potential rates to be charged to all-electric customers. The local hearings will be held as follows:

(a) Monday, October 25, 2010, at 6:00 p.m., at the Sandusky Community Church of the Nazarene, 1617 Milan Road, Sandusky, Ohio 44870.

(b) Tuesday, October 26, 2010, at 6:00 p.m., at the Maumee Municipal Building, 400 Conant Street, Maumee, Ohio 43537.

(c) Wednesday, October 27, 2010, at 6:00 p.m., at the Strongsville High School, 20025 Lunn Road, Strongsville, Ohio 44149.

(d) Wednesday, November 17, 2010, at 6:00 p.m., at the North Ridgeville Education Center Community Room, 5490 Mills Creek Lane, North Ridgeville, Ohio 44039.

(e) Wednesday, November 17, 2010, at 6:00 p.m., at Timmons Elementary School, 9595 East Washington Street, Chagrin Falls, Ohio 44023.

(f) Thursday, November 18, 2010, at 6:00 p.m., at the Springfield City Hall, City Forum - 1st Floor, 76 East High Street, Springfield, Ohio 45502.

The evidentiary hearing regarding the provisions of the companies' electric security plan will commence on Monday, November 29, 2010, at 10:00 a.m., at the offices of the

Commission, 11th Floor, Hearing Room 11-A, 180 East Broad Street, Columbus, Ohio 43215.

Further information or a copy of the staff report may be obtained by contacting the Public Utilities Commission of Ohio, 180 East Broad Street, Columbus, Ohio 43215-3793; by calling the PUCO hotline at 1-800-686-7826; or by going to the PUCO website at www.puco.ohio.gov, selecting DIS, and inserting the case number referenced above.

It is, therefore,

ORDERED, That the procedural schedule set forth in finding (6) be adopted. It is, further,

ORDERED, That local public hearings in this proceeding be held as set forth in finding (7). It is, further,

ORDERED, That FirstEnergy publish notice of the hearings as set forth in finding (8). It is, further,

ORDERED, That a copy of this Entry be served upon all parties of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO

By: Henry H. Phillips-Gary
Attorney Examiner

/vrm

Entered in the Journal
OCT 0 8 2010

Reneé J. Jenkins
Secretary

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Approval of a New Rider and Revision of an Existing Rider.	)))))	Case No. 10-176-EL-ATA

ENTRY

The attorney examiner finds:

(1) Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company (FirstEnergy or the Companies) are public utilities as defined in Section 4905.02, Revised Code, and, as such, are subject to the jurisdiction of this Commission.

(2) On February 12, 2010, FirstEnergy filed an application in this proceeding to revise its current tariffs in order to provide rate relief to certain all-electric customers.

(3) On March 3, 2010, the Commission issued its Finding and Order in this proceeding, approving FirstEnergy's application as modified by the Commission and providing interim rate relief for all-electric residential customers. On March 8, 2010, the Ohio Consumers' Counsel (OCC) filed an application for rehearing. On April 6, 2010, the Commission granted rehearing for the purpose of further consideration of the matters specified in the application for rehearing. Subsequently, on April 15, 2010, the Commission denied rehearing in its Second Entry on Rehearing (April 15 Entry) in this proceeding. On April 2, 2010, FirstEnergy also filed an application for rehearing regarding the Commission's March 3, 2010, Finding and Order. The Commission granted rehearing on April 28, 2010, in the Third Entry on Rehearing in this proceeding.

On May 14, 2010, FirstEnergy filed an application for rehearing regarding the April 15 Entry. Further, on May 17, 2010, Industrial Energy Energy Users-Ohio (IEU-Ohio) and OCC each filed applications for rehearing regarding the

April 15 Entry. On June 9, 2010, the Commission granted rehearing for the purpose of further consideration of the matters specified in these applications for rehearing.

(4) In the Finding and Order issued on March 3, 2010, the Commission directed Staff to file a report regarding the appropriate long-term rates that should be provided to all-electric residential customers of FirstEnergy. The Commission further directed that Staff provide a range of options regarding proposed rates and discounts for all-electric residential customers and that each option be supported by a thorough statistical analysis, including the bill impact upon all-electric customers at various levels of consumption and the number of all-electric residential customers at each consumption level.

(5) On September 24, 2010, the Staff filed its report as directed by the Commission. In the Staff Report, the Staff provided six different options for the reduction or elimination of the discounts provided to all-electric customers as well as the bill impacts for each option.

(6) On October 8, 2010, the attorney examiner issued an entry setting a procedural schedule for this proceeding and ordering the Companies to publish notice of the local public hearings. However, due to unforeseen scheduling conflicts, the attorney examiner finds that the schedule for public hearings should be revised and that the local public hearings will be conducted on the following dates:

(a) Monday, October 25, 2010, at 6:00 p.m., at the Sandusky Community Church of the Nazarene, 1617 Milan Road, Sandusky, Ohio 44870.

(b) Tuesday, October 26, 2010, at 6:00 p.m., at the Maumee Municipal Building, 400 Conant Street, Maumee, Ohio 43537.

(c) Wednesday, October 27, 2010, at 6:00 p.m., at the Strongsville High School, 20025 Lunn Road, Strongsville, Ohio 44149.

(d) Thursday, November 18, 2010, at 6:00 p.m., at the Springfield City Hall, City Forum - 1st Floor, 76 East High Street, Springfield, Ohio 45502.

(e) Monday, November 22, 2010, at 6:00 p.m., at the North Ridgeville Education Center Community Room, 5490 Mills Creek Lane, North Ridgeville, Ohio 44039.

(f) Tuesday, November 23, 2010, at 6:00 p.m., at Lakeland Community College, 7700 Clocktower Drive, Kirtland, Ohio 44094-5198.

(7) Anyone wishing to share information with the Commission regarding any aspect of potential future all-electric rates is encouraged to attend and participate in one of the local public hearings. The Commission has been contacted by more than 650 people through emails, letters and phone calls expressing concerns about all-electric rates. After reviewing these letters, the Commission is particularly interested in receiving more information at the public hearings about the following:

Commitments: If you are in an all-electric home, what contracts or written documentation do you have regarding your electric rates now and in the future? Was there a commitment that the rate would remain with the home for future owners?

Electric vs. Natural Gas: If you are in an all-electric home, do you think the Commission should take into account, in setting rates, any difference in cost between heating a home with natural gas or with electricity?

Rate Shock: All-electric homes have had discounted rates for many years. However, future events and policy changes, such as federal environment regulations and wholesale market changes, could make it necessary to alter the discount that may be approved in this case. What is a fair way to move or phase in all-electric home bills to accommodate these changes without causing rate shock and without burdening other customers?

(8) FirstEnergy should publish legal notice of the application and scheduled local and evidentiary hearings in a newspaper of general circulation in each county in its service territory. Publication of the notice should be completed by October 22, 2010. The hearing notice should not appear in the legal notices section of the newspaper. The notice should read as follows:

LEGAL NOTICE

The Public Utilities Commission of Ohio has scheduled local hearings and an evidentiary hearing in Case No. 10-176-EL-ATA, In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Approval of a New Rider and Revision of an Existing Rider. In this proceeding, the Commission will consider the companies' application to provide rate relief for certain all-electric residential customers. On September 24, 2010, the staff of the Public Utilities Commission of Ohio issued a report of its investigation into the application filed by the companies. In the staff report, staff provided a range of options regarding potential rates to be charged to all-electric residential customers.

The local hearings are scheduled for the purpose of providing an opportunity for interested members of the public to testify in this proceeding regarding potential rates to be charged to customers in all-electric customers. Major issues in this case include:

Commitments: If you are in an all-electric home, what contracts or written documentation do you have regarding your electric rates now and in the future? Was there a commitment that the rate would remain with the home for future owners?

Electric vs. Natural Gas: If you are in an all-electric home, do you think the Commission should take into account, in setting rates, any difference in cost between heating a home with natural gas or with electricity?

Rate Shock: All-electric homes have had discounted rates for many years. However, future events and policy changes, such as federal environment regulations and wholesale market changes, could make it necessary to alter the discount that may be approved in this case. What is a fair way to move or phase in all-electric home bills to accommodate these changes without causing rate shock and without burdening other customers?

The local hearings will be held as follows:

(a) Monday, October 25, 2010, at 6:00 p.m., at the Sandusky Community Church of the Nazarene, 1617 Milan Road, Sandusky, Ohio 44870.

(b) Tuesday, October 26, 2010, at 6:00 p.m., at the Maumee Municipal Building, 400 Conant Street, Maumee, Ohio 43537.

(c) Wednesday, October 27, 2010, at 6:00 p.m., at the Strongsville High School, 20025 Lunn Road, Strongsville, Ohio 44149.

(d) Thursday, November 18, 2010, at 6:00 p.m., at the Springfield City Hall, City Forum - 1st Floor, 76 East High Street, Springfield, Ohio 45502.

(e) Monday, November 22, 2010, at 6:00 p.m., at the North Ridgeville Education Center Community Room, 5490 Mills Creek Lane, North Ridgeville, Ohio 44039.

(f) Tuesday, November 23, 2010, at 6:00 p.m., at Lakeland Community College, 7700 Clocktower Drive, Kirtland, Ohio 44094-5198.

The evidentiary hearing in this proceeding will commence on Monday, November 29, 2010, at 10:00 a.m., at the offices of the Commission, Hearing Room 11-A, 180 East Broad Street, Columbus, Ohio 43215.

> Further information or a copy of the staff report may be obtained by contacting the Public Utilities Commission of Ohio, 180 East Broad Street, Columbus, Ohio 43215-3793; by calling the PUCO hotline at 1-800-686-7826; or by going to the PUCO website at www.puco.ohio.gov, selecting DIS, and inserting the case number referenced above.

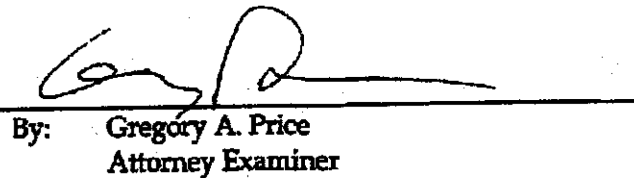
It is, therefore,

ORDERED, That the local public hearings in this proceeding be rescheduled as set forth in finding (6). It is, further,

ORDERED, That FirstEnergy publish notice of the hearings as set forth in finding (8). It is, further,

ORDERED, That a copy of this Entry be served upon all parties of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO



By: Gregory A. Price
Attorney Examiner

/sc

Entered in the Journal

OCT 14 2010

Reneé J. Jenkins
Secretary

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Approval of a New Rider and Revision of an Existing Rider.)	Case No. 10-176-EL-ATA

FIFTH ENTRY ON REHEARING

The Commission finds:

(1) Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company (FirstEnergy or the Companies) are public utilities as defined in Section 4905.02, Revised Code, and, as such, are subject to the jurisdiction of this Commission.

(2) On February 12, 2010, FirstEnergy filed an application in this proceeding to revise its current tariffs in order to provide rate relief to certain all-electric customers.

(3) On March 3, 2010, the Commission issued its Finding and Order in this proceeding, approving FirstEnergy's application as modified by the Commission. On March 8, 2010, the Ohio Consumers' Counsel (OCC) filed an application for rehearing. On April 6, 2010, the Commission granted rehearing for the purpose of further consideration of the matters specified in the application for rehearing. Subsequently, on April 15, 2010, the Commission denied rehearing in our Second Entry on Rehearing (April 15 Entry) in this proceeding.

Further, on April 2, 2010, FirstEnergy filed an application for rehearing regarding the Commission's March 3, 2010 Finding and Order. The Commission granted rehearing on April 28, 2010 in the Third Entry on Rehearing (April 28 Entry) in this proceeding.

(4) Section 4903.10, Revised Code, states that any party to a Commission proceeding may apply for rehearing with respect to any matters determined by the Commission within 30 days of the entry of the order upon the Commission's journal.

(5) On May 14, 2010, FirstEnergy filed an application for rehearing. In its application for rehearing, FirstEnergy alleges that the April 15 Entry is unreasonable and unlawful on two separate grounds.

(6) Further, on May 17, 2010, Industrial Energy Energy Users-Ohio (IEU-Ohio) filed an application for rehearing alleging that the April 15 Entry is unreasonable and unlawful on two separate grounds.

(7) OCC also filed an application for rehearing on May 17, 2010. In its application for rehearing, OCC alleges that the April 15 Entry is unjust and unreasonable on three separate grounds.

(8) On May 24, 2010, OCC filed a memorandum contra FirstEnergy's application for rehearing. Further, on May 27, 2010, IEU-Ohio filed a memorandum contra OCC's application for rehearing, and FirstEnergy filed a memorandum contra the applications for rehearing filed by OCC and IEU-Ohio.

(9) In our Fourth Entry on Rehearing, issued on June 9, 2010, the Commission, after finding that further consideration of the matters specified in the applications for rehearing filed by FirstEnergy, IEU-Ohio, and OCC was warranted, granted rehearing on all three applications for rehearing.

(10) In its first assignment of error, FirstEnergy claims that the April 15 Entry is unreasonable and unlawful because it fails to provide the Companies with authorization to accrue carrying charges on deferred costs of the rate relief. FirstEnergy argues that the April 15 Entry requires the Companies, without adequate explanation, to extend all-electric credits to tens of thousands of new customers who would not have qualified for the credit under the stipulations adopted in prior cases, and to extend these credits to both new and existing customers indefinitely. According to the Companies, this results in approximately $80 million in discounts to all-electric customers every year that the Companies are not collecting. Although the April 15 Entry authorized the Companes to defer incurred costs equivalent in amount to these discounts, it imposes substantial harm on the Companies by denying

them carrying charges on those deferred amounts. FirstEnergy contends that the failure to authorize carrying charges changes the recovery contemplated by the stipulations approved by the Commission on Case No. 05-1125-EL-ATA, Case No. 07-551-EL-ATA, and Case No. 08-935-EL-SSO.

OCC initially responds by arguing that FirstEnergy failed to timely file for rehearing on the issue of carrying charges on the deferred costs of the rate relief, since FirstEnergy's application for rehearing was filed more than 30 days after the Commission made its original ruling on this issue. If the Commission determines that it retains jurisdiction to hear FirstEnergy's application for rehearing on the carrying charges, OCC argues that, contrary to FirstEnergy's contentions, there can be no controlling precedent that presumes one particular outcome, because the decision to allow carrying charges requires a case-by-case determination. OCC argues that, in general, the Commission has previously approved deferred accounting and carrying charges only when a utility faces the possibility of significant financial harm, and has denied deferrals when not necessary for maintenance of a utility's financial integrity. OCC contends that the Companies have not claimed that denial of the carrying charges will impose a significant financial burden nor that the carrying charges are necessary to maintain their financial integrity.

(11) The Commission finds that rehearing on this assignment of error should be denied. The Commission will address the question of carrying charges when it addresses the recovery of any deferrals authorized in this proceeding.

(12) In its second assignment of error, FirstEnergy alleges that the April 15 Entry is unreasonable and unlawful because it defines the scope of the Commission's jurisdiction in a way that is inconsistent with its exclusive jurisdiction over matters pertaining to rates and marketing practices. FirstEnergy notes that the April 15 Entry held that the Commission lacked jurisdiction to review allegations by OCC that the Companies made false promises and inducements to customers regarding the duration of the all-electric discounts. FirstEnergy claims

that, because the alleged promises and inducements relate directly and unequivocally to the rates that the Companies charge, OCC's allegations fall within the Commission's exclusive jurisdiction over rates. Moreover, the Companies argue that the Commission has express statutory and administrative authority to investigate alleged deceptive trade practices.

In its first assignment of error, OCC claims that the April 15 Entry is unreasonable and unlawful because of its determination that the adjudication of any alleged agreements, promises and inducement is outside of the Commission's jurisdiction. OCC contends that this determination precludes Staff from inquiring into these issues for relevant purposes such as assessing the culpability of the Companies in evaluating the options for recovery of the costs of the rate relief provided to all-electric customers. Moreover, in its second assignment of error, OCC claims that, in the April 15 Entry, the Commission unreasonably and unlawfully failed to fulfill its responsibility under Sections 4905.22, 4905.37, 4928.02(I), and 4928.10, Revised Code, and Rule 4901:1-10-24, Ohio Administrative Code.

In its memorandum contra OCC's application for rehearing, FirstEnergy argues that, although OCC is correct that the Commission has jurisdiction over allegations regarding improper marketing practices, OCC is wrong in failing to recognize that the Commission's jurisdiction is exclusive and that this proceeding is not the appropriate forum to investigate OCC's allegations. FirstEnergy agrees with OCC that Section 4928.02(I), Revised Code, and Rule 4901:1-10-24(D), O.A.C., place the responsibility for protecting consumers against a public utility's unfair marketing practices on the Commission. However, FirstEnergy disputes OCC's conclusion that the Commission's jurisdiction over such allegations should not preclude other parties from pursuing other avenues of inquiry into the Companies marketing practices, including pursuing claims in court. FirstEnergy argues that the Commission's authority over utility regulation is exclusive except for "pure contract" or "pure tort" actions. According to the Companies, OCC essentially admits that its allegations are not "pure contract" or "pure tort" claims

because, if that were true, the Commission would not have jurisdiction to consider the claims at all.

FirstEnergy also disputes OCC's claim that the allegations, even if proven, would provide a basis for setting future rates. FirstEnergy notes that OCC has not cited a single statute, Commission decision or court case suggesting that the Commission may rely upon evidence relating to unjust marketing practices as a basis to disallow the recovery of costs in setting rates.

(13) In the April 15 Entry, the Commission determined that the scope of the Staff's investigation should not be expanded, as requested by OCC, because we believed that the adjudication of any alleged agreements, promises, or inducements made by the Companies outside of the express terms of its tariffs, as alleged by OCC, is best suited for a court of general jurisdiction rather than the Commission.

However, in the interim, the Geauga County Court of Common Pleas has issued a decision holding that it lacks jurisdiction over allegations pertaining to the Companies' rates and marketing practices. The Commission agrees with the Court that claims that customers were to receive rates that are in violation of Commission-approved tariffs or which were not authorized by the Commission are issues that the Commission is empowered to decide. Therefore, the Commission finds it necessary to grant rehearing to clarify the scope of our decision in the April 15 Entry. The Commission will exercise our jurisdiction over FirstEnergy's rates and marketing practices, pursuant to Section 4928.02(I), Revised Code, and Rule 4901:1-10-24(D), O.A.C., and the parties are not precluded from conducting discovery regarding these issues nor from presenting evidence during the hearing provided that such evidence is otherwise properly admissible in Commission proceedings. However, the Commission will reiterate that we lack jurisdiction to hear "pure contract" claims, including claims based on reliance or promissory estoppel or claims seeking equitable remedies.

(14) OCC's third assignment of error contends that the Commission unreasonably and unlawfully permitted

discriminatory rates, in violation of Sections 4905.22, 4905.33, and 4905.35, Revised Code, by limiting rate relief to those customers specified in FirstEnergy's application, thereby excluding electric water heating customers.

FirstEnergy responds that limiting rate relief to all-electric customers is not inappropriate or illegal, as different rate treatments for different rate classifications are proper when there are "real differences" with a "reasonable basis" between two groups of customers. FirstEnergy contends that, because all-electric customers use electricity to heat their homes, significant differences exist between these two groups of customers, rendering the differential rate treatment appropriate. IEU-Ohio concurs, arguing that it is inappropriate to expand rate relief to electric water heating customers, since OCC has not shown that these customers experience the same hardships as space heating customers during the winter period. Both FirstEnergy and IEU-Ohio caution that expansion of the customer group receiving rate relief increases the potential financial impact for the Companies' other customers when the Companies seek recovery of the deferred revenue shortfall.

(15) The Commission finds that OCC's third assignment of error lacks merit and, accordingly, rehearing on this basis should be denied. As both FirstEnergy and IEU-Ohio point out, rate relief was provided to all-electric customers because all-electric customers rely upon electricity for winter heating. Electric water heating customers, on the other hand, do not rely upon electricity for winter heating. Therefore, the Commission finds that the rates are not discriminatory and do not violate Sections 4905.22, 4905.33, and 4905.35, Revised Code.

(16) In its first assignment of error, IEU-Ohio asserts that the Commission exceeded its authority in the April 15 Entry by unilaterally modifying the rates and charges established by prior final Commission orders. IEU-Ohio claims that the rate relief authorized by the Commission in this proceeding is not the product of any authority that has been delegated to the Commission by the General Assembly and that the rate relief is not the product of any process that has been established by

the General Assembly as a predicate for the Commission's exercise of its delegated authority.

(17) The Commission finds that rehearing on this assignment of error should be denied. FirstEnergy's application was filed pursuant to Section 4909.18, Revised Code, and the application was expressly identified as an application not for an increase in rates. In our Finding and Order dated March 3, 2010, the Commission approved FirstEnergy's application, as modified by the Commission, on that basis. IEU-Ohio did not seek rehearing of our March 3, 2010 Finding and Order within 30 days of the entry of the Finding and Order upon the Commission's journal, and the Commission finds that rehearing should be denied on that basis. Nonetheless, the Commission also notes that IEU-Ohio has not demonstrated that the Commission's determination that the application constituted an application not for an increase rates was erroneous, and rehearing would be denied on that basis, even if IEU-Ohio's application for rehearing had been filed within 30 days of the entry of the Finding and Order upon the Commission's journal.

(18) In its second assignment of error, IEU-Ohio claims that the Commission's grant of authority to defer the revenue shortfall created by the rate relief is unreasonable and unlawful.

(19) The Commission finds that rehearing on this assignment of error should be denied. In our March 3, 2010, Finding and Order, the Commission authorized FirstEnergy to modify its accounting procedures pursuant to the statutory authority granted to the Commission by Section 4905.13, Revised Code. IEU-Ohio did not seek rehearing of our March 3, 2010 Finding and Order within 30 days of the entry of the Finding and Order upon the Commission's journal, and the Commission finds that rehearing should be denied on that basis. Nonetheless, the Commission also notes that IEU-Ohio has not demonstrated that the Commission's exercise of our authority under Section 4905.13, Revised Code, was unlawful, even if IEU-Ohio's application for rehearing had been filed within 30 days of the entry of the Finding and Order upon the Commission's journal.

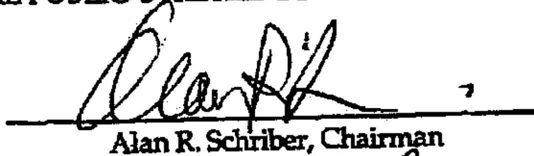
It is, therefore,

ORDERED, That the applications for rehearing filed by OCC and FirstEnergy be granted, in part, and denied, in part. It is, further,

ORDERED, That the application for rehearing filed by IEU-Ohio be denied. It is, further,

ORDERED, That a copy of this Fifth Entry on Rehearing be served upon all parties of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO



Alan R. Schriber, Chairman

Paul A. Centolella

Valerie A. Lemmie

Steven D. Lesser

Cheryl L. Roberto

HPG/sc

Entered in the Journal
NOV 10 2010

Reneé J. Jenkins
Secretary

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, the The Toledo Edison Company for Approval of a New Rider and Revision of an Existing Rider.	))) Case No. 10-176-EL-ATA))

OPINION AND ORDER

The Commission, considering the above-entitled application, hereby issues its opinion and order in this matter.

APPEARANCES:

James W. Burk, FirstEnergy Service Company, 76 South Main Street, Akron, Ohio 44308, and Jones Day, by David A. Kutik and Jeffrey Saks, North Point, 901 Lakeside Avenue, Cleveland, Ohio 44114-1190, and Grant A. Garber, 325 John H. McConnell Blvd., Suite 600, Columbus, Ohio 43215, on behalf of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company.

Mike DeWine, Ohio Attorney General, by John H. Jones, Assistant Section Chief, and Thomas G. Lindgren, Assistant Attorney General, 180 East Broad Street, Columbus, Ohio 43215, on behalf of the staff of the Public Utilities Commission of Ohio.

Janine L. Migden-Ostrander, Ohio Consumers' Counsel, by Jeffrey L. Small, Maureen M. Grady and Christopher J. Allwein, Assistant Consumers' Counsel, 10 West Broad Street, Columbus, Ohio 43215-3485, on behalf of the residential utility consumers of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company.

McNees, Wallace & Nurick, LLC, by Samuel C. Randazzo and Scott Elisar, 21 East State Street, 17th Floor, Columbus, Ohio 43215-4228, on behalf of Industrial Energy Users-Ohio.

Bricker & Eckler, LLP, by Thomas J. O'Brien, 100 South Third Street, Columbus, Ohio 43215, on behalf of the Ohio Manufacturers' Association.

Bricker & Eckler, LLP, by Thomas J. O'Brien, 100 South Third Street, Columbus, Ohio 43215, and Richard L. Sites, General Counsel and Senior Director of Health Policy, 155 East Broad Street, 15th Floor, Columbus, Ohio 43215-3620, on behalf of the Ohio Hospital Association.

Corcoran & Associates Co., LPA, by Kevin Corcoran, 8501 Woodbridge Court, North Ridgeville, Ohio 44039 on behalf of Sue Steigerwald, Citizens for Keeping the All-Electric Promise, Joan Heginbotham and Bob Schmitt Homes, Inc.

David C. Rinebolt and Colleen L. Mooney, 231 West Lima Street, P.O. Box 1793, Findlay, Ohio 45839-1793, on behalf of Ohio Partners for Affordable Energy.

Vorys, Sater, Seymour & Pease, LLP, by M. Howard Petricoff, Stephen M. Howard, and Matthew J. Settineri, 52 East Gay Street, Columbus, Ohio 43216-1008, and Cynthia Fonner Brady, Constellation Energy Group, Inc., 550 West Washington Street, Suite 3000, Chicago, Illinois 60661, on behalf of Constellation NewEnergy, Inc., and Constellation Energy Commodities Group, Inc.

OPINION:

I. HISTORY OF THE PROCEEDING

Ohio Edison Company (OE), The Cleveland Electric Illuminating Company (CEI), and The Toledo Edison Company (TE) (collectively, FirstEnergy or the Companies) are public utilities as defined in Section 4905.02, Revised Code, and, as such, are subject to the jurisdiction of this Commission. Beginning in January 1974, the three electric utilities, which were not affiliated at the time, implemented various residential all-electric rates, which were subsequently revised over the years in each Company's service territory. These bundled rates used declining block rate structures such that the customer's rate declined with greater energy usage.

However, on July 6, 1999, Am. Sub. Senate Bill 3 (SB 3) was enacted, effective October 5, 1999. SB 3 deregulated generation service in this state, unbundled generation, transmission, and distribution rates, froze distribution rates at their existing levels through the end of a five-year market development period, and mandated electric utilities to divest their generation assets.

Subsequently, on January 4, 2006, the Commission approved FirstEnergy's rate certainty plan, which included a provision that certain all-electric residential rate schedules for FirstEnergy would no longer be available to new customers or new premises beginning January 1, 2007. In response to an application for rehearing filed by Bob Schmitt Homes, Inc., the Commission noted that the purpose of eliminating the

all-electric rate schedules was to promote energy conservation by eliminating discounts to customers who used large amounts of electricity. The Commission further noted that there is no guarantee that a rate currently in a utility's tariffs will remain there forever and that rate schedules are always subject to review and modification. The Commission determined that the elimination of the all-electric rate schedules, with grandfather provisions for existing customers as of January 1, 2007, instead of April 1, 2006, provided a reasonable balance of promoting conservation while not unduly affecting homebuilders and customers served by a grandfathered rate. *In re FirstEnergy*, Case Nos. 05-1125-EL-ATA et al., Entry on Rehearing (March 1, 2006) (*FirstEnergy RCP Case*) at 8-9.

Further, on January 21, 2009, the Commission issued its Opinion and Order in the most recent FirstEnergy distribution rate case. *In re FirstEnergy*, Case No. 07-551-EL-AIR, et al., Opinion and Order (January 21, 2009). Among other issues, in order to simplify FirstEnergy's existing rate structure, the Commission approved the consolidation of 32 different residential distribution rate schedules into a single residential distribution rate schedule for each electric utility. However, in order to mitigate the impact upon residential customers who would be adversely affected by the consolidation of the rate schedules, the Commission approved a residential distribution credit (Rider RDC) for certain residential customers. *FirstEnergy*, Case No. 07-551-EL-AIR, at 23-24. These adversely impacted customers included a number of customers taking service under the all-electric residential rate schedule, who had received more substantial discounts on their winter rates prior to the rate schedule consolidation.

In addition, the Commission issued its Second Opinion and Order in FirstEnergy's electric security plan proceeding on March 25, 2009, approving the stipulations filed by various parties. *In re FirstEnergy*, Case No. 08-935-EL-SSO, et al., Second Opinion and Order (March 25, 2009) (*FirstEnergy 2009 ESP Case*). Among other terms, the stipulations provided that, for the period between June 1, 2009, and May 31, 2011, retail generation rates would be determined by a competitive bid process (CBP). Further, in order to facilitate the transition to a standard service offer (SSO) sourced through a CBP and to create a generation rate structure which was consistent with the distribution rate structure approved in the distribution rate case, the Commission approved the consolidation of the various residential generation rate schedules into a single residential generation rate schedule for each electric utility. The Commission also approved a residential generation credit (Rider EDR) to customers who were adversely impacted by the generation rate schedule consolidation in order to mitigate the impact of the consolidation. *FirstEnergy 2009 ESP Case*, at 9-10. Again, the adversely impacted customers included a number of customers taking service under all-electric residential rate schedules. Further, the Commission extended Rider EDR until May 31, 2014, in FirstEnergy's second electric security plan proceeding. *In re FirstEnergy*, Case No. 10-388-EL-SSO, Opinion and Order (August 25, 2010) (*FirstEnergy*

2010 ESP Case). The distribution and generation credits provided to customers adversely affected by the rate schedule consolidation in both proceedings represent a total rate discount of approximately 3.6 cents per kWh (Staff Ex. 1A, Attachment 1).

However, there was substantial public concern regarding the magnitude of the rate increases upon certain all-electric residential customers, notwithstanding the discounts provided to these customers. In order to provide rate relief to those residential customers who were adversely impacted by the rate schedule consolidation, on February 12, 2010, FirstEnergy filed an application in this proceeding to revise its current tariffs.

Intervention in this proceeding was granted to the Ohio Consumers' Counsel (OCC); Industrial Energy Users-Ohio (IEU-Ohio); the Ohio Manufacturers' Association (OMA); the Ohio Hospital Association (OHA); Ohio Partners for Affordable Energy (OPAE), Constellation NewEnergy, Inc., and Constellation Energy Commodities Group, Inc.; and Sue Steigerwald, Citizens for Keeping the All-Electric Promise, Joan Heginbotham, and Bob Schmitt Homes, Inc. (collectively, the CKAP Parties).

On March 3, 2010, the Commission issued its Finding and Order in this proceeding, approving FirstEnergy's application as modified by the Commission and providing interim rate relief for all-electric residential customers. On March 8, 2010, OCC filed an application for rehearing. On April 6, 2010, the Commission granted rehearing for the purpose of further consideration of the matters specified in the application for rehearing. Subsequently, on April 15, 2010, the Commission denied rehearing in our Second Entry on Rehearing (April 15 Entry) in this proceeding. On April 2, 2010, FirstEnergy also filed an application for rehearing regarding the Commission's March 3, 2010, Finding and Order. The Commission granted rehearing on April 28, 2010, in the Third Entry on Rehearing in this proceeding.

On May 14, 2010, FirstEnergy filed an application for rehearing regarding the April 15 Entry. Further, on May 17, 2010, IEU-Ohio and OCC each filed applications for rehearing regarding the April 15 Entry, arguing that it is unreasonable and unlawful on two separate grounds. On June 9, 2010, the Commission, in our Fourth Entry on Rehearing, granted rehearing for the purpose of further consideration of the matters specified in these applications for rehearing. Subsequently, on November 10, 2010, in the Fifth Entry on Rehearing in this proceeding, the Commission granted, in part, and denied, in part, the applications for rehearing filed by OCC and FirstEnergy, and denied the application for rehearing filed by IEU-Ohio.

In the Finding and Order issued on March 3, 2010, the Commission directed Staff to file a report regarding the appropriate long-term rates that should be provided to all-electric residential customers of FirstEnergy. The Commission further directed that

Staff provide a range of options regarding proposed rates and discounts for all-electric residential customers and that each option be supported by a thorough statistical analysis, including the bill impact upon all-electric customers at various levels of consumption and the number of all-electric residential customers at each consumption level. On September 24, 2010, the Staff filed its report as directed by the Commission. In the Staff Report, the Staff provided six different options for the reduction or elimination of the discounts provided to all-electric customers as well as the bill impacts for each option.

On September 8, 2010, OCC filed a motion requesting that the Commission establish a procedural schedule in this proceeding. FirstEnergy filed a memorandum contra OCC's motion on September 23, 2010. In addition, in the Staff Report, Staff recommended that, in light of the recent decision by the Geauga County Court of Common Pleas to dismiss the class action lawsuit brought against FirstEnergy by all-electric customers, further review and hearings be conducted regarding the recovery of any revenue shortfall resulting from the discounts provided to all-electric customers.

Accordingly, on October 8, 2010, the attorney examiner issued an entry setting a procedural schedule for this proceeding and ordering the Companies to publish notice of the local public hearings. However, due to unforeseen scheduling conflicts, on October 14, 2010, the attorney examiner revised the procedural schedule and scheduled local public hearings in Sandusky, Maumee, Strongsville, Springfield, North Ridgeville, and Kirtland, Ohio. Due to weather conditions, the public hearing in Maumee was rescheduled to November 18, 2010.

On November 8, 2010, the attorney examiner granted a motion to compel discovery filed by OCC. On January 7, 2011, a prehearing conference was held in order to resolve several outstanding discovery disputes. At the prehearing conference, the attorney examiners granted a motion to compel filed by OCC and motions to compel filed by FirstEnergy. A second prehearing conference was held on January 8, 2011, in order to conduct an *in camera* review of documents subject to the motion to compel. On January 27, 2011, the Commission denied an interlocutory appeal of the attorney examiner's decision to grant the motions to compel filed by FirstEnergy.

The evidentiary hearing commenced on November 29, 2010, and was continued to February 16, 2011. The hearing concluded on February 21, 2011. Two witnesses testified on behalf of FirstEnergy, one witness testified on behalf of Staff, and one witness testified on behalf of OPAE. OCC called two witnesses, and the CKAP Parties called four witnesses. Post hearing briefs were filed by the Companies, OPAE, OCC, Staff, IEU-Ohio, OMA and OHA, and the CKAP Parties. Reply briefs were filed by the Companies, OPAE, OCC, Staff, IEU-Ohio, and the CKAP Parties.

II. APPLICABLE LAW

The Companies are electric light companies as defined by Section 4905.03(A)(3), Revised Code, and public utilities pursuant to Section 4905.02, Revised Code. The Companies are, therefore, subject to the jurisdiction of the Commission pursuant to Sections 4905.04 and 4905.05, Revised Code.

Section 4905.30, Revised Code, in pertinent part, provides that "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." Pursuant to Section 4909.18, Revised Code, in pertinent part, "any public utility desiring to establish any rate, joint rate, toll, classification, charge, or rental, to modify, amend, change, increase, or reduce any existing 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." In accordance with Section 4905.22, Revised Code, all charges for service shall be just and reasonable and not more than allowed by law or by order of the Commission.

III. DISCUSSION AND CONCLUSIONS

A. Procedural Issues

Initially, we note that IEU-Ohio renews its objection to the attorney examiner's denial of its motion to strike testimony of OCC's witness, Mr. Yankel. During the evidentiary hearing, the Companies moved to strike certain prefiled testimony of Mr. Yankel on the basis that, by sponsoring his testimony, OCC allegedly breached its duty to be bound to the stipulation adopted by the Commission in the *FirstEnergy 2009 ESP Case*, and IEU-Ohio joined the Companies' motion (Tr. I at 203). Specifically, IEU-Ohio argues that, in his testimony on behalf of OCC, Mr. Yankel made recommendations contrary to the rate design and revenue distribution results that OCC agreed to support as part of the stipulation. The attorney examiner denied IEU-Ohio's motion to strike (Tr. I at 210). IEU-Ohio renews its assertion that the attorney examiner's ruling was improper and argues that the Commission should reverse this ruling pursuant to Rule 4901-1-15(F), Ohio Administrative Code (O.A.C.).

OCC responds that the Commission should uphold the attorney examiner's ruling on the basis that the objection at the hearing was poorly articulated and unsupported and that IEU-Ohio's brief does not further explain or support its objection. Further, OCC points out that the stipulation that is the subject of IEU-Ohio's objection was part of the case that determined the Companies' standard service offer rates for the

period ending May 31, 2011, and that Mr. Yankel's testimony was a proposal for prospective rates that explicitly recognized the Commission had made determinations regarding Rider RGC levels through the end of May 2011 (OCC Ex. 1 at 3).

The Commission agrees with OCC that the attorney examiner was correct in overruling IEU-Ohio's objection. The Commission notes that Mr. Yankel's testimony addressed a proposal for rates commencing after May 2011, at which time the rates at issue in the *FirstEnergy 2009 ESP Case* will no longer be in effect (OCC Ex. 1 at 3; *FirstEnergy 2009 ESP Case*, at 8). Consequently, the stipulation at issue in *FirstEnergy 2009 ESP Case* is not an appropriate basis to strike Mr. Yankel's testimony.

B. Issues in the proceeding

The substantive issues before the Commission may be summarized into the following key questions: (1) which customers should receive a discount; (2) what is the amount of the discount that should be provided to customers; (3) is there any basis to deny the Companies recovery of the cost of the discount provided to customers; (4) how should the cost of the discount be recovered from customers; and (5) should an alternate proposal, such as that proposed by OPAE, be adopted.

(1) Which customers should receive a discount?

In the Finding and Order issued on March 3, 2010, in this proceeding, the Commission provided interim rate relief for all-electric residential customers of FirstEnergy. Therefore, the first question before the Commission is which customers should receive a discount as part of a long-term resolution of the issues raised in this proceeding.

The Companies propose that the Rider RGC credit should apply only to those residential customers who use electricity as the primary or sole source of heat (electric heating customers). The Companies contend that the evidence in the record demonstrates that nearly half of the 318,000 customers receiving interim rate relief are not using electricity as their primary source of heat (Company Ex. 1 at 38-39). Staff also recommends that, beginning September 1, 2011, only customers who heat with electricity should be eligible for the discount provided by Rider RGC (Staff Ex. 1 at 4).

OCC notes that this proceeding has revealed that many customers receiving the interim rate relief ordered by the Commission do not have electricity as the major energy source for heating their homes. OCC recommends that the new rates resulting from this proceeding should be charged to residential customers who heat with electricity. OCC further notes that the process proposed by FirstEnergy's witness, Mr. Ridmann, recognizes that a statistical review of customer accounts only provides

indications of which residences are less likely to be primarily heated using electricity and that FirstEnergy's proposed procedure provides protections against the arbitrary removal of customers from the group of electric heating customers. OCC recommends that any communications from FirstEnergy regarding the potential removal of customers from the group of electric heating customers be subject to review by Staff and OCC.

The Commission agrees with the recommendations of the Companies, OCC, and Staff on this issue. We find that any discounts provided over the long term should be limited to residential electric heating customers rather than residential all-electric customers generally. Limiting future discounts to electric heating customers will provide rate relief to the customers most in need while serving to mitigate the cost of providing discounts (Company Ex. 1 at 38-39). Further, the Commission finds that the proposed process outlined at the hearing is an appropriate method for determining which customers are electric space heating customers (Company Ex. 1 at 38-40).

Consistent with our determination to extend discounts to electric heating customers, while mitigating the cost of such discounts to other customers, the Commission will focus the discounts in those months when electric heating is used most heavily. In doing so, the Commission notes that evidence indicates that the discount has been applied during months reflecting air conditioning usage (Tr. V at 857-859). As this case concerns discounts for electric heating, the Commission finds it is appropriate to limit the RGC discount to billing periods beginning on October 31 and ending on March 31. The RGC discount will not apply during the generally milder autumn and spring shoulder periods. This refinement better accomplishes the objectives of avoiding significant rate shock for electric heating customers while mitigating the impact of the discounts on other customers.

(2) <u>What is the amount of the discount that should be provided to electric heating customers?</u>

The next issue before the Commission is determination of the appropriate amount of discount that should be provided to electric heating customers. The proposals provided by the parties include (a) an approximate three-year phase out of Rider RGC characterized by a 12 percent cap on increases above the prior year's bill at the same usage, as proposed by the Companies; (b) a five-year phase out of Rider RGC characterized by frozen rates for the first year and a 25 percent decrease in the RGC discount for each subsequent year until its elimination in year five, as proposed by Staff; and (c) an annual band assessment whereby the RGC rider and electric heating discount would be continued indefinitely to maintain a range of 30 to 40 percent discount for electric heating customers relative to standard customers, as proposed by OCC.

a. The Companies' Proposal

The Companies begin their discussion by explaining that special rates for electric heating customers were first adopted in response to concerns about a natural gas shortage and that the rates initially offered benefits to both utilities and consumers (Company Ex. 1 at 8). The Companies continue that, with the establishment of a competitive generation market by SB 3 in 1999, the rationale for continuing to offer special electric hearing rates changed. Specifically, the Companies explain that, as a result of SB 3, the Companies no longer own generation plants and, consequently, the Companies' generation costs are currently the same for all customers (Company Ex. 65 at 18-19). Further, the Companies point out that the passage of Senate Bill 221 (SB 221) established a state policy encouraging energy efficiency and conservation. The Companies contend that discounted electric heating rates, which provide a higher level of discount for customers utilizing more electricity, run counter to the energy efficiency and conservation goals of SB 221. In light of this legislation, the Companies conclude that discounts to electric heating customers cannot be based upon historic cost justification, as undisputed evidence shows that the rationales for special electric heating rates or discounts have been eliminated (Company Ex. 1 at 12-13).

The Companies propose that the Commission phase out Rider RGC gradually while Riders RDC and EDR are maintained. Specifically, the Companies propose that, beginning with the 2011-2012 winter heating season, Rider RGC be reduced so that electric heating customers will experience no more than a 12 percent increase in their bills as compared to their 2010-2011 winter heating season bills at the same usage, and that a similar reduction of Rider RGC occur each subsequent year (with the same 12 percent cap on the prior year's bill at the same usage) until Rider RGC falls to zero. The Companies also note that, although the Commission phased out the separate electric heating rate schedules, electric heating customers have continued to receive a discount relative to standard residential customers. Further, the Companies claim that their proposal is the least costly for the residential customers who bear the burden of paying the costs of Rider RGC.

Staff states that it supports the portion of the Companies' proposal suggesting a gradual phase out of Rider RGC; however, Staff contends that a three-year phase out period is not long enough to appropriately mitigate the rate impact for the residential electric heating customers. Without commenting on the specific time frame for the phase out, IEU-Ohio also expresses its support for the Companies' recommendation to phase out the special rates available to electric heating customers.

OPAE disputes the Companies' proposal, contending that Rider RGC must be maintained for as long as possible in order to minimize the rate shock that would result if rates for electric heating customers were to reflect the rates for standard electric

customers. OPAE reasons that, even if the RGC discount is not sustainable at its current levels due to its impact on other customers, its permanent continuation in some amount is essential to the economic health of residential communities. OPAE states that, if Rider RGC must be phased out entirely, it should be phased out over a minimum eight-year period.

OCC opposes the Companies' proposal, arguing that the Companies erroneously focus only on the Companies' cost of acquiring generation and fail to recognize the overall cost differences to serve customers with different demand profiles. OCC admits that, after the passage of SB 221, the Companies acquire generation by contract with successful bidders in generation supply auctions; however, OCC avers that the Commission has continued to distinguish between the contractual cost of acquiring wholesale generation supply and the cost of service that should be considered in developing appropriate retail pricing for customers, citing *FirstEnergy 2009 ESP Case*, Opinion and Order (December 19, 2008) at 23. Additionally, OCC submits that the Companies' witness, William Ridmann, acknowledged that, to his knowledge, the Companies do not collect load information that permits cost of service studies to differentiate between electric heating and standard residential customers (Tr. I at 153-154).

b. OCC's Proposal

In its brief, OCC requests restoration of the discounted relationship between the standard residential distribution and generation rates and the discounted electric heating residential distribution and generation rate that existed prior to elimination of the discounted rates. OCC proposes that this be accomplished by an annual band assessment. In support of its position, OCC advocates the application of two regulatory principles, cost of service and gradualism. Additionally, OCC contends that the passage of legislation, including SB 221, has not modified these principles. Regarding cost of service principles, OCC argues that rates going forward should recognize the reduced cost of serving electric-heated residences. In support of this proposition, OCC cites Mr. Yankel's testimony that it is a "long recognized fact that All-Electric customers tend to be less expensive to serve than Standard service customers" (OCC Ex. 1 at 35). Mr. Yankel supported his statement by opining that cost-of-service studies conducted by the Companies in 1989 and 1995 reflect that the cost of serving electric heating customers is less than that for its standard residential customers, and that deregulation of the generation function has no effect on the costs of serving specific load patterns (Tr. I at 223; OCC Ex. 1 at 13-15, 20-21, 26-27).

Mr. Yankel testified that the specific costs of service are presently unknown because the Companies have not conducted a cost of service study during the last fifteen to twenty years (OCC Ex. 1 at 33). However, Mr. Yankel testified that, because

rates were developed in order to meet a utility's revenue requirement and in order to reflect the differences in cost causation between rate schedules, use of a band that reflects the traditional rate relationship between standard and electric heating customers will establish a discount that is sensitive to overall costs of providing service (OCC Ex. 1 at 33). Consequently, Mr. Yankel surveyed the relative relationships between standard bills and electric heating bills for OE, CEI, and TE in the mid 1990s and in December 2008, and averaged the percentages for all three companies (OCC Ex. 1 at 34-35). Based on the average relationship, Mr. Yankel proposes that setting electric heating rates at 65 percent of the standard rate would be consistent with the traditional relationship between electric heating and standard customers (OCC Ex. 1 at 34-35). Finally, regarding the gradualism principle, OCC argues that the adjustment of electric heating rates from their current level of discount to the relationship recommended by Mr. Yankel be gradual to prevent a period of rate shock.

Consequently, OCC proposes that, in accordance with Mr. Yankel's recommendation, the total bill for electric heating customers at a 3,500 kWh usage level be set at 65 percent of the bill for a similarly situated standard customer, with an annual review to determine the present relationship between the standard rate and the rate for electric heating customers at the 3,500 kWh usage level (OCC Ex. 1 at 34-35, 37-38). That relationship would then determine the amount of Rider RGC that is necessary. After the mid-point of the annual band assessment is reached, OCC proposes that the electric heating rates should be examined on an annual basis and adjusted if the relationship between the rate levels strays beyond the band (the 35 percent discount, plus or minus five percent). Further, OCC argues that the rates proposed by Mr. Yankel should be available for all electric-heated homes, despite changes in ownership.

The Companies assert that OCC's proposal should be rejected. The Companies argue that the discount calculated by Mr. Yankel, OCC's witness, is flawed because it is based on outdated cost-of-service studies and no other evidence was presented to support OCC's cost-of-service justification. To the contrary, the Companies argue that, per the testimony of the Companies' witness, Mr. Ridmann, it is undisputed that the Companies pay the same price for generation service for electric heating customers as standard residential customers (Tr. I at 152-153; Company Ex. 65 at 18-19).

Finally, the Companies argue that OCC has provided no justification for continuing Rider RGC indefinitely. In support of its argument, the Companies contend that "gradualism" supports a transition period, not an ongoing discount, and that no credible evidence demonstrated that the Companies promised that a specific rate, rate schedule, or discount would be available forever. More specifically, as to oral promises, the Companies point out that some of the oral promises testified to at the public hearings involved assurances the witnesses received from their homebuilders, and not from the Companies, or involved statements whereby the Companies merely advised

individuals regarding their eligibility for a discounted rate, but made no promises about the duration or amount of the rate (Sandusky Tr. 15-16, 36, 72-76, 80-81, 86, 88-89, 98-99; Strongsville Tr. 15, 39, 44, 119-120, 172; North Ridgeville Tr. 38-39, 46, 63-64, 125-126, 141, 146; Kirtland Tr. 33-34, 106, 110-111, 128, 130-131, 161, 169, 173-174, 180-181).

Additionally, as to written promises, the Companies question the authenticity of a letter allegedly authored by a former representative of the Companies (Andreatta letter) and assert that the content of the letter was unquestionably wrong. The Companies assert that another such letter (Willitts letter) was merely informational and did not form a contract (Strongsville Ex. 2; CKAP Ex. 31). Further, the Companies contend that, even if an oral or written promise was made, it would not be binding or enforceable against the Companies. The Companies also argue that, contrary to the testimony of OCC's witnesses, the Companies' marketing materials were not deceptive because the materials did not promise that the rates were permanent and, further, that no reasonable consumer would have interpreted such materials that were silent about the term of the rate as a guarantee of the rate or discount forever.

Staff also recommends that OCC's proposal not be adopted. Staff argues that OCC's witness, Mr. Yankel, admitted that he was not aware of whether OCC's proposal was inconsistent with any statutory mandates requiring that the Companies reduce usage in order to meet energy efficiency benchmarks, and that Mr. Yankel's justification for the discount was based on outdated cost-of-service studies from the Companies (Tr. I at 220-224). Staff further points out that Mr. Yankel did not know whether the Companies' rates were currently cost-based or what percentage of an electric heating customers' bill and an average residential customers' bill represented distribution costs (Tr. I at 224-227). Additionally, Staff points out that Mr. Yankel proposed the discount should begin at 1000 kWh per month, but admitted that he did not know if this represented the typical base load for an electric heating customer (Tr. I at 244).

c. Staff's Proposal

Staff initially notes that, even after the deregulation of generation, electric heating customers have continually received a discounted rate in comparison to standard service customers. Staff further points out that the bills of electric heating customers are expected to decrease in terms of percentage and dollar amount per kWh when Rider RDD terminates in May 2011. Additionally, Staff avers that changes in the Companies' rate design that eliminated the special electric heating rates were necessary due to changes in law that restructured the electric industry and established a policy encouraging conservation. Consequently, Staff concludes that a discounted rate is no longer an option as it cannot be justified on the grounds upon which it was established.

Further, Staff asserts that the lengthy duration of the discounted rates alone is not a sufficient reason to continue the rates permanently.

Staff proposes adoption of a long-term strategy of moving in the direction of cost causation and avoidance of practices that result in cross-subsidies from other customers. Further, Staff emphasizes the rate-making principle of gradualism and correspondingly recommends that prices be increased gradually to give electric heating customers time to adjust and respond to the ultimate target price change. The specific tenets of Staff's proposal include (a) that the RDC and EDR credits remain in place for electric heating customers; (b) a gradual phase out of Rider RGC over a five-year period; (c) elimination of the "water heating only" EDR discount beginning in the 2012-2013 winter heating season; (d) that whichever electric heating credits are applicable to the grandfathered electric heating accounts should stay with the property regardless of change of ownership; and (e) that customers who are former load management customers that do not heat with electricity should be eligible for the RDC and EDR discount, but should not be eligible for the RGC discount beginning September 1, 2011.

Regarding the gradual phase out of the RGC discount, Staff specifically recommends that, in the first year (2011-2012 winter heating season), electric heating customers' rates remain frozen at current levels. In the second year (2012-2013 winter heating season), Staff recommends that electric heating customers receive 75 percent of the RGC discount, for usage up to 7500 kWh. In the third year (2013-2014 winter heating season), Staff recommends that electric heating customers receive 50 percent of the RGC discount, up to a usage of 7500 kWh. In the fourth year (2014-2015 winter heating season), Staff proposes that electric heating customers receive 25 percent of the RGC discount up to 7500 kWh. Finally, in the fifth year (2015-2016 heating season) and beyond, Staff recommends that electric heating customers receive no RGC discount. Staff notes, however, that even with elimination of Rider RGC, electric heating customers will continue to enjoy a 25 percent discount in comparison to other standard service offer customers under Staff's proposal.

IEU-Ohio states that it supports Staff's recommendation to the extent it proposes the special rates available to electric heating customers be phased out. The Companies, however, assert that Staff's proposal should be rejected. Specifically, the Companies contend that Staff's proposal is the most costly to standard residential customers and that the Companies' proposal can accomplish many of the same goals at a lower cost. Specifically, the Companies point out that Staff's proposal utilizes a five-year phase out period, which consequently imposes higher costs on residential consumers than the approximate three-year phase out period included in the Companies' proposal. Additionally, the Companies contend that Staff offers no justification to permit the discounted rate to stay with the residence despite change of ownership. The

Companies assert that, in contrast, allowing the rate to stay with the residence would be contrary to the Companies' practice and the Commission's order in *In re FirstEnergy*, Case No. 05-1125-EL-ATA, Entry on Rehearing (March 1, 2006) at 8-9, which provided that the electric heating rate would not be available to customers who purchased homes primarily or exclusively with electric heat after January 1, 2007. Additionally, the Companies point out that the record contains no credible evidence that the Companies ever promised the discounts would remain with the residence and no evidence that electric-heated homes will suffer loss in value absent special rates. The Companies support this assertion by challenging the accuracy of the calculations and analysis of the CKAP Parties' witness, Mr. Frawley.

Staff replies to the Companies' criticism of Staff's proposal by opining that a five-year phase out period will better accomplish the goal of mitigating rate impact for electric heating customers than a three-year phase out period. Additionally, Staff states that, contrary to the Companies' contention, its proposal that the rate stay with the residence is based upon a prior Commission order in this case, citing the Second Entry on Rehearing (April 15, 2010) at 2.

OPAE initially challenges Staff's proposition of a straight fixed variable (SFV) design as an alternative to use of Rider RGC. OPAE opposes the SFV rate design on the basis that it believes this rate design is harmful to low-use, low-income customers because it frustrates the efforts of customers to reduce their bills through energy efficiency and conservation. Additionally, as with its argument against the Companies' proposal, OPAE proposes that, if Rider RGC is phased out entirely, the phase out period should be eight years at a minimum.

d. CKAP Parties' claims

The CKAP Parties argue that the Companies' marketing practices operated to form contracts. First, the CKAP Parties contend that the Companies undertook an advertising campaign to tout the benefits of electric-heated residences and to entice customers to convert to electric heating by offering a discounted rate and setting eligibility requirements (See, e.g., Kirtland Tr. at 95-100). Additionally, CKAP asserts that the Companies and their customers mutually benefitted from the electric heating relationship for over fifty years. Consequently, the CKAP Parties request that the Commission order reinstatement of the previously available electric heating discount.

Initially, the CKAP Parties argue that the Companies entered into contracts with homebuilders by enticing them to build electric-heated residences with incentives such as advertising dollars and equipment rebates (Strongsville Tr. at 56-57; Kirtland Tr. at 84-86; Sandusky Tr. at 44-45). The CKAP Parties specifically point to the testimony of their witness, Michael Schmitt, concerning agreements entered into between his

company, Bob Schmitt Homes, and FirstEnergy that specifically provided for a discounted electric rate to his homebuyers and referred to the discounted electric heating rate (Tr. II at 348-349). Additionally, the CKAP Parties argue that, because of the exclusive nature of the electric heating program and the fact that many of these homes were built without gas lines, a permanent captive audience was created (See Tr. III at 577). Correspondingly, the CKAP Parties contend that the electric heating discount should have the same permanency.

Additionally, the CKAP Parties contend that the Companies created contracts with customers through direct contact, communicating their offer of discounted rates to customers in exchange for customers' use of electricity to heat their homes. In support, the CKAP Parties cite to a public comment filed by an HVAC contractor who stated that employees of the Companies told heating contractors to tell their customers the discounted rate would be available through 2005, but that there would always be a special rate for electric homes (Public Comment (November 4, 2010) at 1). The CKAP Parties also point to the Andreatta letter, which informed a customer of OE that the discounted rate would be guaranteed for as long as the customer intended to use it (Strongsville Ex. 2). The CKAP Parties further cited to testimony by various customers at the public hearings that a promise was made that they would be "grandfathered" into the electric heating discount and that there was no communication that suggested the discount could ever be terminated (Strongsville Tr. at 72-75, 87-90, 125-126; Kirtland Tr. at 37-38, 77-78; Tr. II at 455-457).

The CKAP Parties also aver that employees of the Companies enticed customers to switch to electric heating by offering a discounted electric rate. In support, the CKAP Parties cite the testimony of several former employees of the Companies offered at the public hearings that they were encouraged by the Companies to inform customers that the Companies were committed to selling the electric heating lifestyle going forward and that "the rate is still here" (North Ridgeville Tr. at 116-118; Maumee Tr. at 23-25; Kirtland Tr. at 38-40, 44-45; Tr. III at 558, 569). Further, the CKAP Parties state that the former employees testified to demonstrate that the Companies also encouraged its employees to push the sale of electric homes by offering incentives (Kirtland Tr. at 41-42).

Next, the CKAP Parties address the potential consequences of removal of the discounted rate. The CKAP Parties contend that testimony at the public hearings demonstrated that customers experienced large bill increases or "rate shock" during the 2009-2010 winter heating season after the discount was removed (Kirtland Tr. at 130-131, 144; Strongsville Tr. at 18, 24, 32-33, 36, 39-40, 53, 71, 78, 110, 120, 142, 167-168, 183-184; North Ridgeville Tr. at 101-103, 147-148). Additionally, the CKAP Parties argue that testimony at the public hearing demonstrated that many electric heating homeowners did not have the ability to convert to another energy system due to lack of

the necessary infrastructure in the neighborhood or in their homes, or had obtained estimates showing a high cost to convert their homes from electric heating to mixed-utility (Kirtland Tr. at 128-129, 146-147; Strongsville Tr. at 142-143). The CKAP Parties continue that homeowners and realtors testified at the public hearings that the stigma of high heating bills had made electric-heated homes unmarketable (Strongsville Tr. at 115-118, 142-143, 173-174; North Ridgeville Tr. at 20; Kirtland Ex. 94). Additionally, the CKAP parties' witness, Larry Frawley, testified that owners of electric-heated homes were receiving less for the sale of their homes than owners of mixed-utility homes (CKAP Ex. 1 at 4.)

Based upon the preceding, the CKAP Parties recommend that the Commission order restoration of the previously available electric heating discounted rates and, additionally, that the Commission should take measures to remedy the losses imposed by the actions of the Companies.

The Companies initially address the CKAP Parties' argument by contending that the CKAP Parties orchestrated a campaign to manipulate the proceedings and generate testimony favorable to a certain outcome (See Company Ex. 3A at 33; Company Exs. 31-39). In particular, the Companies argue that the CKAP Parties improperly influenced the public hearings (See Company Ex. 3A at 192; Company Exs. 16, 17, 19). Consequently, the Companies argue that, in light of evidence of the campaign, the Commission should give no weight to the emails and letters submitted by customers to the Commission urging restoration of the discount.

Next, the Companies contend that no evidence was presented to support the CKAP Parties' contention that the Companies made promises to homeowners that the special rates would be permanent. Specifically, the Companies argue that the few documents presented at the hearing did not support any promise or guarantee. In contrast, the Companies point out that some of the marketing materials presented specifically disclaimed that rates were subject to change or referenced tariff schedules that contained that information (Kirtland Exs. 16, 17; Sandusky Ex. A; Company Exs. 53, 54; CKAP Ex. 32). The Companies argue that even the marketing materials presented that did not contain such a disclaimer still gave rise to a reasonable inference that any utilities' rates were subject to change.

Staff recommends that no weight be assessed to the CKAP Parties' real estate witness, Mr. Frawley, on the basis that he was not competent to perform an analysis of real estate value comparisons and that his testimony demonstrated that he relied on reports in his analysis that he knew contained inaccurate information (See Tr. II at 290, 303-306). Additionally, as to CKAP's assertion that homeowners and realtors testified at the public hearings that the stigma of high heating bills had made electric-heated homes unmarketable and caused them to lose significant value, Staff asserts that it is

not possible to determine what portion of decline in value, if any, was attributable to the heating method of the home.

Similar to the Companies' proposition, Staff also argues that no credible evidence was heard to demonstrate that the Companies promised a permanent discounted rate to electric heating customers. Staff posits that the two letters produced at the hearing allegedly containing a promise were able to be explained in their proper context or shown to be in conflict with the Companies' rules and regulations (Strongsville Ex. 2; CKAP Ex. 31). Additionally, Staff points out that the CKAP Parties' witness, Michael Schmitt, testified that Bob Schmitt Homes had received documents from CEI and OE advising that the rates were subject to change (Tr. II at 425). Staff concludes that, considering the two letters in the context of the other evidence presented as to the Companies' tariffs, standard rules and regulations, and the total number of electric heating customers being served, there is insufficient credible evidence that the Companies promised a discounted rate to electric heating customers forever.

Staff additionally points to the testimony of the CKAP Parties' witness, Michael Challender, a former marketing representative of the Companies, that he never made misleading statements during his employment with the Companies (Tr. III at 592), that there could have been no contract or promise for certain electric service rates between the Companies and Bob Schmitt Homes because customers take service under the terms of a tariff approved by the Commission (Tr. III at 586-587), that an analysis form provided to prospective homebuyers by the Companies contained a disclaimer that rates were subject to change (Tr. III at 593-594; Company Ex. 53), and that he never promised any customer that a specific rate was guaranteed (Tr. III at 601).

OMA and OHA urge the Commission, in considering the CKAP Parties' argument, to recognize that a significant number of the 1,220 letters (and many form letters) filed in the docket urging continuation of the discount came from members of CKAP. OMA and OHA further assert that the CKAP Parties' advocacy in this case was funded by Bob Schmitt Homes, one of Ohio's largest builders of electric-heated homes (Tr. II at 413, 439).

OMA and OHA further argue that the record is devoid of any apples-to-apples comparison of energy costs demonstrating that electric heating customers' electric rates would be unreasonable absent a discount. OMA and OHA argue that mixed utility residential heating customers have endured the volatility of the global energy markets for decades, and question whether customers who have enjoyed the electric heating discounts would be willing to subsidize their neighbors' natural gas costs should those prices spike. OMA and OHA further note that the record contains no credible analysis comparing the overall energy costs of mixed utility residential customers to electric

heating residential customers to demonstrate any disparity that might justify a cross-class subsidy.

e. Commission Decision

Initially, the Commission wishes to emphasize that a solution to the issues presented in this case requires a balancing of many different important factors, including cost causation, the avoidance of rate shock, the principle of gradualism, and the structural and policy changes that occurred with the passage of SB 3 and SB 221.

The Commission further notes that the parties have proposed discounts for electric heating customers ranging from approximately 23 percent to 40 percent of the standard residential bill. This includes the Companies' proposal of retaining Riders RDC and EDR, which result in an approximate 25 percent discount for electric heating customers, along with the approximate three-year phase out of the Rider RGC using a 12 percent cap on increases above the prior year's bill at the same usage (Company Ex. 1 at 6-7, 41); Staff's proposal of retaining Riders RDC and EDR, along with a five-year phase out of Rider RGC with frozen rates for the first year and a 25 percent decrease in the RGC discount for each subsequent year until its elimination in year five (Staff Ex. 1 at 3); and OCC's proposal of retaining Riders RDC and EDR and creation of an annual band assessment whereby Rider RGC and would be continued indefinitely and adjusted to maintain an approximate 30 to 40 percent overall discount for electric heating customers relative to standard customers (OCC Ex. 1 at 4-5).

To more thoroughly illustrate the effect of the parties' proposed discounts, the Commission notes the following bill comparison information for CEI under several different scenarios at the 2000 kWh usage level. If Riders RDC and EDR are retained and Rider RGC is reduced to 50 percent of its current level, an electric heating customer's bill will be $135.98 or 59 percent of a standard residential bill of $231.98. If Riders RDC and EDR are retained and Rider RGC is reduced to 25 percent of its current level, an electric heating customer's bill will be $156.98 or 68 percent of a standard residential bill of $231.98. Finally, if Riders RDC and EDR are retained and Rider RGC is eliminated, an electric heating customer's bill will be $177.98 or 77 percent of a standard residential bill of $231.98 (Staff Ex. 1A, Attachment 2(a)). On the other hand, under OCC's proposal, an electric heating customer's bill may vary between 60 and 70 percent of a standard residential bill, or $139.19 to $162.39.

The Commission believes that the proposal by the OCC is flawed because it abandons any pretense of gradualism and runs the risk of rate shock in the first year. OCC's proposal would significantly increase rates for electric heating customers this year. For example, according to the testimony of OCC's witness, Mr. Yankel, OCC's proposal would result in a winter bill of $261.48 for a CEI electric heating customer

using 3500 kWh per month (OCC Ex. 1 at 36), an increase of 44 percent above the 2010/2011 winter bill of $181.91 for the same usage (Staff Ex. 1A, Attachment 2(a)). Further, this abrupt increase, which OCC proposed to take effect on September 1, 2011, would leave electric heating customers little time to prepare for higher bills or to take steps to help conserve electricity.

At the same time, OCC's proposal fails to take any steps to gradually reduce the discount over time. OCC's proposal fails to acknowledge the significant restructuring of the electric industry by the General Assembly in SB 3 and SB 221. In SB 3, generation, distribution, and transmission rates were unbundled (Company Ex. 1 at 10-11). SB 3 also directed electric utilities to divest their generation assets (Company Ex. 1 at 11). Consequently, as a result of the stipulations approved by the Commission in the *FirstEnergy 2009 ESP Case* and the *First Energy 2010 ESP Case*, the Companies' generation costs are the same for all customers (Company Ex. 65 at 18-19). Further, the Commission agrees with the Companies that generation rates which charge the customer less than the cost of obtaining generation are antithetical to the energy efficiency policy goals embodied in SB 221.

The Commission notes that the proposals by Staff and FirstEnergy do provide for the phase out of the discounts, consistent with the principle of cost causation and with the legislative changes embodied in SB 3 and SB 221 (Staff Ex. 1 at 3; Company Ex. 1 at 6-7, 41). However, the Commission finds that the three-year and five-year phase outs of Rider RGC proposed by FirstEnergy and Staff also fail to provide electric heating customers with sufficient time to adjust to the gradual elimination of the discount.

With respect to the arguments regarding the existence of contracts raised by the CKAP Parties, the Commission initially finds that the CKAP Parties have not demonstrated that such claims are subject to our jurisdiction. As the Commission noted in our Second Entry on Rehearing in this proceeding, the Commission has no power to determine legal rights and liabilities involving contract rights even though a public utility is involved. *Marketing Research Service, Inc., v. Pub. Util. Comm.* (1987), 34 Ohio St.3d 52, 56. Second Entry on Rehearing (April 15, 2010) at 3. In addition, in the Fifth Entry on Rehearing, the Commission reiterated that, although we would exercise our jurisdiction over FirstEnergy's rates and marketing practices in this proceeding, we lack jurisdiction to hear "pure contract" claims, including claims based upon reliance or promissory estoppel. Fifth Entry on Rehearing (November 10, 2010) at 5. Further, even if the CKAP Parties had demonstrated our jurisdiction over these claims, the Commission finds that the evidence in the record does not demonstrate that a contract exists, or has ever existed, between electric heating customers and the Companies. Although the CKAP Parties summarily claim that contracts exist, the CKAP Parties have never produced a written contract between the Companies and any customer, and the CKAP Parties did not even attempt to establish that any alleged statements by the

Companies met the requirements for an oral contract under Ohio law. Further, the CKAP Parties do not address the fact that electric heating customers have continuously received discounts from standard service offer rates in the form of Riders RDC and EDR (Staff Ex. 1A, Attachment 1).

The Commission notes that Section 4928.144, Revised Code, authorizes the just and reasonable phase in of any rate established under Section 4928.143, Revised Code, as the Commission considers necessary to ensure rate stability for consumers. Therefore, the Commission finds that, in light of the regulatory changes resulting from SB 3 and SB 221, and after balancing the need to avoid rate shock with the principles of gradualism and cost causation, the appropriate solution is to extend the current freeze on customer rates for two years, consistent with Staff's recommendation, through May 31, 2013. This will allow electric heating customers time to prepare for increased rates and to take steps to mitigate their usage. During this time, FirstEnergy should annually adjust Rider RGC to maintain the rate freeze. Moreover, the Commission agrees with OPAE that an eight-year phase out is optimal. Therefore, following this two-year freeze, the Commission directs FirstEnergy to phase out Rider RGC from its March 31, 2013, level by implementing six equal annual reductions, effective October 31 of each year. However, nothing in this Opinion and Order should be construed as reducing the existing discounts provided by Riders EDR and RDC. Finally, the Commission directs that any educational materials produced by the Companies should be reviewed by staff prior to distribution to the public and that the Companies and Staff explore an online tool to assist electric heating customers to calculate their bills.

In conjunction with the principles of gradualism, the Commission additionally finds that options should be created for electric heating customers to offset the decline of the discount in a substantive way. The Commission finds that this goal could be accomplished through collaborative efforts with the purpose of increasing energy efficiency for electric heating customers. Therefore, the Commission directs the Companies to discuss potential programs for electric heating customers with its energy efficiency collaborative and to include any resulting programs in its next three-year program portfolio plan.

Further, the Commission notes that we have initiated a docket to investigate the potential for better aligning electric utility rate designs with state policy regarding energy efficiency and peak demand reduction. *In the Matter of Aligning Electric Distribution Utility Rate Structure With Ohio's Public Policies to Promote Competition, Energy Efficiency, and Distributed Generation*, Case No. 10-3126-EL-UNC, Entry (December 29, 2010). The Commission believes that potential changes in rate design resulting from this investigation may also better reflect cost causation principles and serve to mitigate the phase out of the discounts provided to electric heating customers.

Finally, although the Commission was not persuaded by the testimony that home values are directly related to the level of the discounts provided to electric space heating customers, the Commission wishes to minimize any risk of our action today in impeding the recovery of the housing market in the Companies' service territories. Therefore, the Commission finds that homebuyers who purchase a home that uses electricity as the sole or primary source of space heating will be entitled to receive the same discount described herein as long as the homeowner otherwise qualifies for such discounts, maintains electricity as the sole or primary source of heating, and the discounts remain in effect. However, nothing in this Opinion and Order should be construed to extend the electric heating discount to homes constructed after January 1, 2007, as previously ordered by the Commission. *FirstEnergy RCP Case* at 8-9.

(3) Is there any basis to deny the Companies recovery of the costs of the discount provided to electric heating customers?

The Companies propose that they should be authorized to recover the deferrals resulting from Rider RGC with carrying charges. Additionally, the Companies argue that they should be permitted to accrue deferred costs equal to the difference between what customers would have otherwise been billed and what they were actually billed.

OCC maintains that the Companies engaged in unfair and deceptive marketing practices and that, consequently, collections on deferrals should not be permitted. Specifically, OCC argues that the Companies unfairly and deceptively enticed residential customers and housing developers to commit to electric heating before the Companies eliminated the discounted rates. As examples, OCC cites to customers' testimony at the public hearings that they relied on the Companies' representations when building or converting their homes to electric heat, as well as the Andreatta letter allegedly authored by a former representative of the Companies which made representations regarding the discounted rate for electric heating customers (Sandusky Tr. at 71-77, 80-81, 86-87; Strongsville Tr. at 7, 14-16, 24, 44-45, 57-58, 124-125, 142; North Ridgeville Tr. at 51, 64, 71, 140-143; Kirtland Tr. at 24, 33-34, 106, 110-111, 166-167 174, 180, 184; Strongsville Ex. 2).

Additionally, OCC contends that the Companies should not be permitted to accrue carrying charges resulting from reinstatement and extension of electric heating rates or collect on the deferrals because the Companies have failed to demonstrate that significant harm will result if the Companies are denied the carrying charges. Alternatively, OCC argues that, even if carrying charges are permitted, they should be calculated net of tax, instead of the Companies' position that carrying charges should be calculated without reduction for accumulated deferred income tax.

The Companies reply to OCC's assertion by arguing that there is no requirement that the Companies demonstrate significant harm in order to recover carrying charges. Additionally, the Companies allege that OCC has cited no authority that justifies it forgo deferrals previously authorized by the Commission due to alleged unfair and deceptive marketing practices.

The Commission notes that the deferrals in this case reflect the difference between the Companies' prudently incurred generation costs and the rates paid by customers after the interim rate relief provided by Rider RGC. OCC seeks an extraordinary remedy on this issue. OCC has not cited to a single Commission precedent in which the Commission denied recovery of prudently incurred costs based upon alleged deceptive marketing practices by a public utility in this state. OCC has not cited to a single precedent from another state in which a public utility was denied recovery of costs based upon alleged deceptive practices. Further, despite the unprecedented nature of OCC's arguments, OCC did not present a single expert witness in support of its position. Instead of presenting the testimony of an expert witness demonstrating that FirstEnergy's alleged conduct was so egregious that recovery of prudently incurred generation costs should be denied, OCC relies solely on the testimony of witnesses at the public hearings. Although the Commission understands and is sympathetic to the concerns raised by consumers at the public hearings, the Commission finds that such testimony is insufficient to support the denial of recovery of FirstEnergy's generation costs.

Moreover, OCC summarily claims in its brief that FirstEnergy has violated 4901:1-10-24(D), O.A.C., which provides that no electric utility shall commit an unfair or deceptive act or practice in connection with the promotion or provision of service, including an omission of material information. However, OCC does not differentiate between testimony describing FirstEnergy's alleged actions which occurred prior to the effective date of the Rule from testimony regarding alleged actions which occurred after the Rule was effective. Obviously, testimony regarding alleged conduct prior to the effective date of a Commission rule cannot be used to support a finding that a utility violated that rule.

With respect to alleged conduct prior to the effective date of 4901:1-10-24(D), O.A.C., OCC presented no expert testimony in this proceeding demonstrating that FirstEnergy violated a customary industry practice or standard of care. This failure to present expert testimony regarding customary industry practices or the applicable standard of care is fatal to OCC's claim. OCC has offered no evidence that FirstEnergy's conduct was any different from other utilities that engage in marketing or from other electric utilities that offered special tariff rates to electric heating customers. The Commission cannot deny FirstEnergy recovery of prudently-incurred generation

costs in the absence of evidence demonstrating a violation of a Commission rule or a violation of a customary industry practice or standard of care.

With respect to conduct after the effective date of Rule 4901:1-10-24(D), O.A.C., the specific claims made by OCC are not supported by the evidence in the record in this case. OCC claims that the Companies unfairly and deceptively enticed residential customers and housing developers to commit to electric heating before the Companies abandoned support for favorable rate treatment; however, the evidence demonstrates that discounts for electric heating customers have never been eliminated and that electric hearing customers have always received a minimum of two discounts, Rider RDC and Rider EDR (Staff Ex. 1A, Attachment 1; OCC Ex. 1 at 29-30). OCC does not demonstrate how electric heating customers have been misled by FirstEnergy when these customers have always received a significant discount on the rates paid by standard service offer customers.

In support of its claim of pervasive unfair and deceptive marketing practices, OCC relies upon a letter to Thomas Logan from an OE sales representative, Elio Andreatta, in which Mr. Andreatta represents to Mr. Logan that "if Ohio Edison ever removes this rate from our files you would not be in jeopardy of forfeiting this rate. This rate will be guaranteed for you as long as you wish to utilize it" (Strongsville Ex. 2). The Commission notes that, at a minimum, the letter communicated inaccurate information to the consumer, including the position of the author within OE (Tr. I at 123-124), the nature of "experimental" tariffs (Company Ex. 65 at 3), and statements in conflict with the terms of OE's tariffs (Tr. I at 126-128; Company Ex. 46). At most, the letter represents a commitment for a given rate to a single customer, Mr. Logan. However, the testimony in the record clearly demonstrates that such letters were not a common practice of either Mr. Andreatta or OE (Tr. I at 113, 122-123, 130). As such, the letter does not support OCC's claim of pervasive unfair and deceptive marketing practices. Further, OCC failed to demonstrate any nexus between the letter and the marketing practices of CEI or TE, which were not affiliated with OE at the time the letter was allegedly sent.

Further, the Commission finds that the expert testimony of OCC's witness, Mr. Yankel, undermines its arguments on this issue. Although OCC claims in its brief that the Companies increased their sales of electricity by promoting the use of electric heating through unfair and deceptive practices, the testimony presented by Mr. Yankel indicates that the electric space heating rates were not developed for purposes of load retention. Mr. Yankel testified that the electric space heating rate of each utility was not "promotional," which Mr. Yankel defined as a rate below cost causation and being offered for the purpose of retaining load in the face of competitive alternatives (OCC Ex. 1 at 9, 19, 25). Instead, Mr. Yankel testified that the electric space heating rates were independently developed by three unaffiliated utilities on the basis of cost causation

(OCC Ex. 1 at 2, 6). Further, according to Mr. Yankel, "even with the additional differential provided to the summer rates, the rate of return for the All-Electric rate (Res H) was above cost of service" (OCC Ex. 1 at 20, 28). This testimony, from OCC's own expert witness, undercuts OCC's claim that FirstEnergy promoted use of electric heating rates in a manner that was unsustainable at those rates in order to increase its sales of electricity.

Moreover, OCC's arguments regarding the recovery of the costs of any generation discount are at odds with the testimony of its own expert witness. At the hearing, Mr. Yankel testified that the Companies should be permitted to recover the costs of any discount provided to electric space heating customers from other FirstEnergy customers (OCC Ex. 1 at 39-40). Mr. Yankel bases his conclusion that other customers should pay for the discount provided to electric space heating customers on two key facts: the Companies obtain a single average price per kWh from their generation suppliers, and electric space heating customers benefit the system with high usage during times of low hourly energy costs (OCC Ex. 1 at 40). Nowhere does Mr. Yankel claim that the Companies benefit from the discount provided to electric space heating customers.

Therefore, the Commission finds that the evidence in this proceeding does not support OCC's claim that FirstEnergy should be precluded from recovering its prudently incurred costs of generation. Likewise, the evidence in this proceeding provides no basis for the denial of carrying costs related to the deferrals accrued by the Companies as the result of providing discounts to all-electric customers, as ordered by the Commission in this proceeding. Therefore, the Commission finds that, pursuant to Section 4928.144, Revised Code, FirstEnergy should accrue carrying charges, equal to its weighted average cost of debt and without reduction for accumulated deferred income taxes, for all deferrals accrued since the Commission's Finding and Order issued on March 3, 2010.

(4) <u>How should the cost of the discount be recovered from customers?</u>

The Companies propose accruing Rider RGC deferrals for CEI and OE through May 31, 2011, with carrying charges, and then collecting those deferrals from residential customers over the three-year period spanning from June 1, 2011, through May 31, 2014. For TE, the Companies propose collection of the Rider RGC deferral as of May 31, 2011, with carrying charges, over a one-year period from June 1, 2011, through May 31, 2012, from residential customers, as the accrued deferrals from TE are expected to be significantly less than those of CEI and OE.

Staff addresses allocation of shortfall in revenue recovery by recommending that residential customers, and not other customer classes, should be responsible for Rider RGC and associated deferrals and carrying costs. Staff supports its position by claiming that there is no justification for requiring general service customers to pay for revenue shortfalls created by members of the residential class.

OCC argues that the discounted rate for electric-heated homes is analogous to a reasonable arrangement and should be borne by all customer classes, consistent with the Commission's rules regarding reasonable arrangements, which provide that recovery for the reduced revenue is "spread to all customers in proportion to the current revenue distribution between and among classes." Rule 4901:1-38-08(A)(4), O.A.C. OCC argues that the electric heating discount is similar and that charging a broad range of customers for class rate reductions is not unusual.

The Companies dispute OCC's position on this issue by arguing that there is no justification for analogizing the electric heating discount with a reasonable arrangement. In contrast, the Companies point out that OCC's witness, Mr. Yankel, stated that the electric heating discount was not for economic development purposes (OCC Ex. 1 at 9, 19, 25).

IEU-Ohio expresses its support for Staff's proposal to confine the responsibility for the incremental revenue shortfall to the residential customer class. In support of its position, IEU-Ohio points to testimony at the evidentiary hearing by Mr. Fortney, Staff's witness, recommending that the residential class pay the revenue shortfalls created by the electric heating discount deferral on the rationale that the residential class benefited from the electric heating rate deferrals and should therefore pay the costs associated with the benefit (Tr. II at 511).

OMA and OHA argue that financial repercussions associated with the voluntary decision to purchase a residential, electric-heated home should not be borne by commercial or industrial consumers. OMA and OHA aver that the electric heating discount program was not created as a social welfare program, and that, like all consumers of energy, electric heating customers have always faced the prospect that costs could change. OMA and OHA further argue that Rider EDR, which is funded by the Companies' commercial and industrial customers, provides a significant portion of the electric heating discounts. OMA and OHA contend that, based on the thin record in this case, the Commission should not reopen FirstEnergy's ESP stipulations and add to the burden already shouldered by the Companies' commercial and industrial customers. OMA and OHA further assert that the only reliable testimony presented at the hearing was that of Mr. Ridmann and Mr. Fortney, who both recommended that no rate classes other than the residential rate classes should shoulder any portion of the electric heating subsidy beyond that provided by the terms of the *FirstEnergy 2010 ESP*

Case (Tr. I at 184-185; Tr. II at 511). OMA and OHA also argue that Mr. Yankel's opinion that all customer classes should fund Rider RGC is baseless in light of the evidence in the record that the Companies' generation procurement process is reflective of the cost to serve the residential class as a whole (Company Ex. 65 at 18).

OPAE recommends that the recovery of deferrals resulting from Rider RGC should be from all customer classes because, OPAE contends, all classes have benefitted from the winter usage of electric heating customers.

The Commission finds that revenue shortfalls resulting from Rider RGC should be recovered solely from the residential class. As Staff argues, there has been no legitimate reason set forth to justify recovery from all customer classes (Staff Ex. 1 at 4). Despite OCC's assertion that the discounted rate is analogous to a reasonable arrangement, which is typically spread among all customer classes, as the Companies point out, OCC's own witness stated that the discounted rate was not for economic development purposes (OCC Ex. 1 at 9, 19, 25). No other reason for analogizing is apparent. Further, as OMA and OHA point out, nonresidential customers already fund Rider EDR which provides a significant portion of the discount for electric space heating customers.

The Commission further notes that nonresidential customers' obligation to fund Rider EDR was established pursuant to stipulations approved by the Commission in the *FirstEnergy 2009 ESP Case* and the *FirstEnergy 2010 ESP Case*. There is no evidence in the record of new facts or changed circumstances since the adoption of these stipulations. Therefore, there is no basis in the record of this proceeding to modify our orders approving these stipulations or to adjust the nonresidential customers' obligation to fund discounts provided to electric heating customers.

(5) Should OPAE's proposal be adopted?

OPAE recommends that the Commission should order the Companies to implement the long-term pilot program using solar energy incentives as proposed by Ms. Harper. OPAE supports its recommendation by stating that solar resources would allow the Companies to secure generation at a price below that set by auction, which could then be dedicated to electric heating customers in the percentage of income payment plan (PIPP) program in order to ameliorate costs and weatherize their homes (OPAE Ex. 1).

The Companies assert that OPAE's proposal should be rejected. Specifically, the Companies argue that OPAE's proposal is not an actionable recommendation that the Commission can adopt in this proceeding. The Companies point out that OPAE's witness, Ms. Harper, proposed construction of a power plant but lacked basic details

such as where the plant should be built, who would be responsible for the plant's construction and cost, and who would own and/or operate the plant (Tr. III at 536-537). The Companies conclude that, because OPAE's plan is merely conceptual, it would be difficult for the Commission to implement OPAE's recommendation. Further, the Companies assert that, even if its proposal were more than a concept, OPAE failed to offer even minimal evidence to demonstrate that the proposal warrants further consideration, either in a formal collaborative process or otherwise. Specifically, the Companies point out that Ms. Harper admitted that, in formulating the proposal, she never calculated the amount of revenue that would be produced by the sale of renewable energy credits in connection with the proposed plan, that she did not research the amount of federal or state incentive funding that would be available for the proposed plan, that, although she suggested excess revenue could fund the weatherization of homes for electric heating PIPP customers, she had no estimate of how much that excess revenue would be, and that she did not calculate the probable price of power from the proposed power plant, but that those figures were calculated by an outside entity (Tr. III at 539-543).

OPAE argues that the Companies' criticism as to the proposal's lack of detail is unfair, as OPAE could not more thoroughly develop the proposal without the Companies' assistance. OPAE contends that the purpose of Ms. Harper's testimony was to cause the Companies to consider an innovative solution by obtaining power at a cost lower than the auction price.

The Commission finds that OPAE's proposal should not be adopted. As the Companies point out, OPAE's proposal lacks such basic details as location of the proposed power plant, payment for the plant's construction, and ownership of the plant (Tr. III at 536-537). Additionally, the OPAE witness who formulated the proposal admitted that she had no estimate as to how much revenue and excess revenue would be produced in connection with the proposed plan, that she did not know what amount of federal or state incentive funding would be available, and that she did not calculate the probable price of power from the proposed plant (Tr. III at 539-543). As OPAE's proposal appears at this time to be no more than a loosely developed concept, the Commission finds that the proposal cannot be adopted as a solution to the issues presented in this case.

C. Commission's Conclusions

On March 3, 2010, the Commission approved FirstEnergy's application filed on February 12, 2010, as modified by the Commission, in order to provide interim relief to all-electric customers. In this Opinion and Order, the Commission makes further modifications to FirstEnergy's application in order to provide a long-term solution to the issues raised in this proceeding.

Accordingly, the Commission finds that, as modified by this Opinion and Order, FirstEnergy's application is not unjust or unreasonable and should be approved. Further, FirstEnergy should file proposed tariffs, consistent with this Opinion and Order, within 30 days.

FINDINGS OF FACT AND CONCLUSIONS OF LAW:

(1) The Companies are electric light companies as defined by Section 4905.03(A)(3), Revised Code, and public utilities pursuant to Section 4905.02, Revised Code; therefore, the Companies are subject to the jurisdiction of the Commission pursuant to Sections 4905.04 and 4905.05, Revised Code.

(2) On February 12, 2010, FirstEnergy filed an application in this proceeding to revise its current tariffs in order to provide rate relief to certain all-electric customers.

(3) Intervention in this proceeding was granted to OCC, IEU-Ohio, OMA, OHA, OPAE, Constellation and the CKAP Parties.

(4) On March 3, 2010, the Commission issued its Finding and Order in this proceeding, providing interim rate relief for all-electric residential customers.

(5) On September 24, 2010, the Staff filed its report as directed by the Commission.

(6) Local public hearings were held pursuant to published notice in Sandusky, Maumee, Strongsville, Springfield, North Ridgeville, and Kirtland, Ohio.

(7) The evidentiary hearing commenced on November 29, 2011, and was continued to February 16, 2011. The hearing concluded on February 21, 2011.

(8) As modified by this Opinion and Order, FirstEnergy's application is not unjust or unreasonable and should be approved.

ORDER:

It is, therefore,

ORDERED, That the application filed by FirstEnergy be approved, as modified herein. It is, further,

ORDERED, That FirstEnergy file proposed revised tariffs, consistent with this Opinion and Order, within 30 days of the date of 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

Todd A. Snitchler, Chairman

Paul A. Centolella

Steven D. Lesser

Andre T. Porter

Cheryl L. Roberto

MLW/GAP/sc

Entered in the Journal
MAY 25 2011

Betty McCauley
Secretary

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, the The Toledo Edison Company for Approval of a New Rider and Revision of an Existing Rider.	)	Case No. 10-176-EL-ATA

CONCURRING AND DISSENTING OPINION
OF COMMISSIONER CHERYL L. ROBERTO

With the exception of the following two matters, I concur in the majority opinion.

Transferability of Discount

The Commission's sole reasoning for the continuation of a discount for all-electric homes is the principle of gradualism and the mitigation of rate shock. The majority finds that homebuyers who purchase a home that uses electricity as the sole or primary source of space heating will be entitled to receive the same discount as the existing homeowner. See Opinion and Order at pp. 21-22. A new customer has never been the beneficiary of the discount and thus, could not be experiencing rate shock as the result of losing a discount.

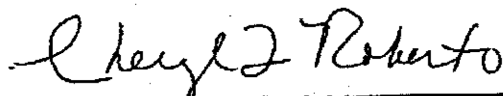
The majority expresses the wish today to minimize any risk the action taken today impedes the recovery of the housing market in the Companies' service territories. Id. at p.21. I cannot agree that this Commission should take into account the relative utility burden of all-electric homes and multi-fuel homes in establishing rates or those impacts on real estate. For these reasons, I dissent from the portion of the Opinion and Order that extends the discount to new customers.

Unfair and Deceptive Marketing Practices

The majority finds that the evidence in this proceeding does not support claims that FirstEnergy should be precluded from recovering its prudently incurred costs of generation. See Opinion and Order at p. 25. I concur in this finding.

I do not agree, however, with the reasoning in the Opinion and Order at p. 23 that seems to indicate that expert testimony is required to establish an unfair or deceptive practice. An unfair deceptive act or practice may be established upon the

testimony of any witness, expert or otherwise. I cannot find on the record in this case, however, that FirstEnergy engaged in unfair or deceptive marketing practices. If the Commission had concluded that unfair or deceptive marketing practices occurred, it would then be a separate question as to what remedies are available to the Commission. Because the Commission did not find that FirstEnergy engaged in unfair or deceptive marketing practices, there is no need to reach the question of whether this Commission could consider denying recovery of prudently incurred costs or could order a utility to incur additional expenses, resulting from a discounted rate design, without the means to recover those costs.



Cheryl L. Roberto
Commissioner

Entered in the Journal
MAY 25 2011

Betty McCauley
Secretary

The Ohio Constitution

(with amendments to 2010)

Table of Contents

Preamble 3

Article I: Bill of Rights 3

Article II: Legislative 6

Article III: Executive 16

Article IV: Judicial 20

Article V: Elective Franchise 24

Article VI: Education 25

Article VII: Public Institutions 27

Article VIII: Public Debt and Public Works 27

Article IX: Militia 61

Article X: County and Township Organizations 62

Article XI: Apportionment 64

Article XII: Finance and Taxation 67

Article XIII: Corporations 69

Article XIV: Ohio Livestock Care Standards Board 70

Article XV: Miscellaneous 71

Article XVI: Amendments 75

Article XVII: Elections 76

Article XVIII: Municipal Corporations 77

SCHEDULES 1851 CONSTITUTION 79

SCHEDULES 1912 CONSTITUTION 82

ARTICLE IV: JUDICIAL

JUDICIAL POWER VESTED IN COURT.

§1 The judicial power of the state is vested in a supreme court, courts of appeals, courts of common pleas and divisions thereof, and such other courts inferior to the Supreme Court as may from time to time be established by law.

(1851, am. 1883, 1912, 1968, 1973)

ORGANIZATION AND JURISDICTION OF SUPREME COURT.

§2 (A) The Supreme Court shall, until otherwise provided by law, consist of seven judges, who shall be known as the chief justice and justices. In case of the absence or disability of the chief justice, the judge having the period of longest total service upon the court shall be the acting chief justice. If any member of the court shall be unable, by reason of illness, disability or disqualification, to hear, consider and decide a cause or causes, the chief justice or the acting chief justice may direct any judge of any court of appeals to sit with the judges of the Supreme Court in the place and stead of the absent judge. A majority of the Supreme Court shall be necessary to constitute a quorum or to render a judgment.

(B)(1) The Supreme Court shall have original jurisdiction in the following:

(a) Quo warranto;
(b) Mandamus;
(c) Habeas corpus;
(d) Prohibition;
(e) Procedendo;
(f) In any cause on review as may be necessary to its complete determination;
(g) Admission to the practice of law, the discipline of persons so admitted, and all other matters relating to the practice of law.

(2) The Supreme Court shall have appellate jurisdiction as follows:

(a) In appeals from the courts of appeals as a matter of right in the following:
  (i) Cases originating in the courts of appeals;
  (ii) Cases in which the death penalty has been affirmed;
  (iii) Cases involving questions arising under the constitution of the United States or of this state.
(b) In appeals from the courts of appeals in cases of felony on leave first obtained.
(c) In direct appeals from the courts of common pleas or other courts of record inferior to the court of appeals as a matter of right in cases in which the death penalty has been imposed.
(d) Such revisory jurisdiction of the proceedings of administrative officers or agencies as may be conferred by law;
(e) In cases of public or great general interest, the Supreme Court may direct any court of appeals to certify its record to the Supreme Court, and may review and affirm, modify, or reverse the judgment of the court of appeals;
(f) The Supreme Court shall review and affirm, modify, or reverse the judgment in any case certified by any court of appeals pursuant to section 3(B)(4) of this article.

(3) No law shall be passed or rule made whereby any person shall be prevented from invoking the original jurisdiction of the Supreme Court.

(C) The decisions in all cases in the Supreme Court shall be reported together with the reasons therefor.

(1851, am. 1883, 1912, 1944, 1968, 1994)

ORGANIZATION AND JURISDICTION OF COURT OF APPEALS.

§3 (A) The state shall be divided by law into compact appellate districts in each of which there shall be a court of appeals consisting of three judges. Laws may be passed increasing the number of judges in any district wherein the volume of business may require such additional judge or judges. In districts having additional judges, three judges shall participate in the hearing and disposition of each case. The court shall hold sessions in each county of the district as the necessity arises. The county commissioners of each county shall provide a proper and convenient place for the court of appeals to hold court.

(B)(1) The courts of appeals shall have original jurisdiction in the following:

(a) Quo warranto;
(b) Mandamus;
(c) Habeas corpus;
(d) Prohibition;
(e) Procedendo
(f) In any cause on review as may be necessary to its complete determination.

(2) Courts of appeals shall have such jurisdiction as may be provided by law to review and affirm, modify,

or reverse judgments or final orders of the courts of record inferior to the court of appeals within the district, except that courts of appeals shall not have jurisdiction to review on direct appeal a judgement that imposes a sentence of death. Courts of appeals shall have such appellate jurisdiction as may be provided by law to review and affirm, modify, or reverse final orders or actions of administrative officers or agencies.

(3) A majority of the judges hearing the cause shall be necessary to render a judgment. Judgments of the courts of appeals are final except as provided in section 2(B)(2) of the article. No judgment resulting from a trial by jury shall be reversed on the weight of the evidence except by the concurrence of all three judges hearing the cause.

(4) Whenever the judges of a court of appeals find that a judgment upon which they have agreed is in conflict with a judgment pronounced upon the same question by any other court of appeals of the state, the judges shall certify the record of the case to the Supreme Court for review and final determination.

(C) Laws may be passed providing for the reporting of cases in the courts of appeals.

(1968, am. 1994)

ORGANIZATION AND JURISDICTION OF COMMON PLEAS COURT.

§4 (A) There shall be a court of common pleas and such divisions thereof as may be established by law serving each county of the state. Any judge of a court of common pleas or a division thereof may temporarily hold court in any county. In the interests of the fair, impartial, speedy, and sure administration of justice, each county shall have one or more resident judges, or two or more counties may be combined into districts having one or more judges resident in the district and serving the common pleas court of all counties in the district, as may be provided by law. Judges serving a district shall sit in each county in the district as the business of the court requires. In counties or districts having more than one judge of the court of common pleas, the judges shall select one of their number to act as presiding judge, to serve at their pleasure. If the judges are unable because of equal division of the vote to make such selection, the judge having the longest total service on the court of common pleas shall serve as presiding judge until selection is made by vote. The presiding judge shall have such duties and exercise such powers as are prescribed by rule of the Supreme Court.

(B) The courts of common pleas and divisions thereof shall have such original jurisdiction over all justiciable matters and such powers of review of proceedings of administrative officers and agencies as may be provided by law.

(C) Unless otherwise provided by law, there shall be probate division and such other divisions of the courts of common pleas as may be provided by law. Judges shall be elected specifically to such probate division and to such other divisions. The judges of the probate division shall be empowered to employ and control the clerks, employees, deputies, and referees of such probate division of the common pleas courts.

(1968, am. 1973)

POWERS AND DUTIES OF SUPREME COURT; RULES.

§5 (A)(1) In addition to all other powers vested by this article in the Supreme Court, the Supreme Court shall have general superintendence over all courts in the state. Such general superintending power shall be exercised by the chief justice in accordance with rules promulgated by the Supreme Court

(2) The Supreme Court shall appoint an administrative director who shall assist the chief justice and who shall serve at the pleasure of the court. The compensation and duties of the administrative director shall be determined by the court.

(3) The chief justice or acting chief justice, as necessity arises, shall assign any judge of a court of common pleas or a division thereof temporarily to sit or hold court on any other court of common pleas or division thereof or any court of appeals or shall assign any judge of a court of appeals temporarily to sit or hold court on any other court of appeals or any court of common pleas or division thereof and upon such assignment said judge shall serve in such assigned capacity until the termination of the assignment. Rules may be adopted to provide for the temporary assignment of judges to sit and hold court in any court established by law.

(B) The Supreme Court shall prescribe rules governing practice and procedure in all courts of the state, which rules shall not abridge, enlarge, or modify any substantive right. Proposed rules shall be filed by the court, not later than the fifteenth day of January, with

the clerk of each house of the General Assembly during a regular session thereof, and amendments to any such proposed rules may be so filed not later than the first day of May in that session. Such rules shall take effect on the following first day of July, unless prior to such day the General Assembly adopts a concurrent resolution of disapproval. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.

Courts may adopt additional rules concerning local practice in their respective courts which are not inconsistent with the rules promulgated by the Supreme Court. The Supreme Court may make rules to require uniform record keeping for all courts of the state, and shall make rules governing the admission to the practice of law and discipline of persons so admitted.

(C) The chief justice of the Supreme Court or any judge of that court designated by him shall pass upon the disqualification of any judge of the courts of appeals or courts of common pleas or division thereof. Rules may be adopted to provide for the hearing or disqualification matters involving judges of courts established by law.

(1968, am. 1973)

ELECTION OF JUDGES; COMPENSATION.

§6 (A)(1) The chief justice and the justices of the Supreme Court shall be elected by the electors of the state at large, for terms of not less than six years.

(2) The judges of the courts of appeals shall be elected by the electors of their respective appellate districts, for terms of not less than six years.

(3) The judges of the courts of common pleas and the divisions thereof shall be elected by the electors of the counties, districts, or, as may be provided by law, other subdivisions, in which their respective courts are located, for terms of not less than six years, and each judge of a court of common pleas or division thereof shall reside during his term of office in the county, district, or subdivision in which his court is located.

(4) Terms of office of all judges shall begin on the days fixed by law, and laws shall be enacted to prescribe the times and mode of their election.

(B) The judges of the Supreme Court, courts of appeals, courts of common pleas, and divisions thereof, and of all courts of record established by law, shall, at stated times, receive for their services such compensation as may be provided by law, which shall not be diminished during their term of office. The compensation of all judges of the Supreme Court, except that of the chief justice, shall be the same. The compensation of all judges of the courts of appeals shall be the same. Common pleas judges and judges of divisions thereof, and judges of all courts of record established by law shall receive such compensation as may be provided by law. Judges shall receive no fees or perquisites, nor hold any other office of profit or trust, under the authority of this state, or of the United States. All votes for any judge, for any elective office, except a judicial office, under the authority of this state, given by the General Assembly, or the people shall be void.

(C) No person shall be elected or appointed to any judicial office if on or before the day when he shall assume the office and enter upon the discharge of its duties he shall have attained the age of seventy years. Any voluntarily retired judge, or any judge who is retired under this section, may be assigned with his consent, by the chief justice or acting chief justice of the Supreme Court to active duty as a judge and while so serving shall receive the established compensation for such office, computed upon a per diem basis, in addition to any retirement benefits to which he may be entitled. Laws may be passed providing retirement benefits for judges.

(1968, am. 1973)

REPEALED. PROBATE COURTS.

§7

(1851, am. 1912, 1947, 1951, rep. 1968)

REPEALED. PROBATE COURT; JURISDICTION.

§8

(1851, rep. 1968)

REPEALED. JUSTICES OF THE PEACE.

§9

(1851, rep. 1912)

REPEALED. OTHER JUDGES; ELECTION.

§10

(1851, rep. 1968)

REPEALED. CLASSIFICATION OF SUPREME COURT JUDGES.

§11

(1851, rep. 1883)

REPEALED. VACANCIES, HOW FILLED.

§12

(1851, am. 1912, rep. 1968)

VACANCY IN OFFICE OF JUDGE, HOW FILLED.

§13 In case the office of any judge shall become vacant, before the expiration of the regular term for which he was elected, the vacancy shall be filled by appointment by the governor, until a successor is elected and has qualified; and such successor shall be elected for the unexpired term, at the first general election for the office which is vacant that occurs more than forty days after the vacancy shall have occurred; provided, however, that when the unexpired term ends within one year immediately following the date of such general election, an election to fill such unexpired term shall not be held and the appointment shall be for such unexpired term.

(1851, am. 1942)

REPEALED. REFERRED TO COMPENSATION AND INELIGIBILITY FOR OTHER OFFICE FOR SUPREME COURT JUSTICES AND COMMON PLEAS JUDGES.

§14

(1851, rep. 1968)

CHANGING NUMBER OF JUDGES; ESTABLISHING OTHER COURTS.

§15 Laws may be passed to increase or diminish the number of judges of the Supreme Court, to increase beyond one or diminish to one the number of judges of the court of common pleas in any county, and to establish other courts, whenever two-thirds of the members elected to each house shall concur therein; but no such change, addition or diminution shall vacate the office of any judge; and any existing court heretofore created by law shall continue in existence until otherwise provided.

(1851, am. 1912)

REPEALED. CLERKS OF COURT ELECTIONS.

§16

(1851, rep. 1933)

JUDGES REMOVABLE.

§17 Judges may be removed from office, by concurrent resolution of both houses of the General Assembly, if two-thirds of the members, elected to each house, concur therein; but, no such removal shall be made, except upon complaint, the substance of which shall be entered on the journal, nor, until the party charged shall have had notice thereof, and an opportunity to be heard.

(1851)

POWERS AND JURISDICTION OF JUDGES.

§18 The several judges of the Supreme Court, of the common pleas, and of such other courts as may be created, shall, respectively, have and exercise such power and jurisdiction, at chambers, or otherwise, as may be directed by law.

(1851)

COURTS OF CONCILIATION.

§19 The General Assembly may establish courts of conciliation, and prescribe their powers and duties; but such courts shall not render final judgment in any case, except upon submission, by the parties, of the matter in dispute, and their agreement to abide such judgment.

(1851)

STYLE OF PROCESS, PROSECUTION, AND INDICTMENT.

§20 The style of all process shall be, "The state of Ohio;" all prosecutions shall be carried on, in the name, and by the authority, of the state of Ohio; and all indictments shall conclude, "against the peace and dignity of the state of Ohio."

(1851)

SUPREME COURT COMMISSION.

§[21]22 A commission, which shall consist of five members, shall be appointed by the governor, with the advice and consent of the Senate, the members of which shall hold office for the term of three years from and after the first day of February, 1876, to dispose of such part of the business then on the dockets of the Supreme Court, as shall, by arrangement between said commission and said court, be transferred to such commission; and said commission shall have like jurisdiction and power in respect to such business as are or may be vested in said court; and the members of said commission shall receive a like compensation for the time being, with the judges of said court. A majority of the members of said commission shall be necessary to form a quorum or pronounce a deci-

sion, and its decision shall be certified, entered, and enforced as the judgments of the Supreme Court, and at the expiration of the term of said commission, all business undisposed of shall by it be certified to the Supreme Court and disposed of as if said commission had never existed. The clerk and reporter of said court shall be the clerk and reporter of said commission, and the commission shall have such other attendants not exceeding in number those provided by law for said court, which attendants said commission may appoint and remove at its pleasure.

Any vacancy occurring in said commission, shall be filled by appointment of the governor, with the advice and consent of the Senate, if the Senate be in session, and if the Senate be not in session, by the governor, but in such last case, such appointment shall expire at the end of the next session of the General Assembly. The General Assembly may, on application of the Supreme Court duly entered on the journal of the court and certified, provide by law, whenever two-thirds of such [each] house shall concur therein, from time to time, for the appointment, in like manner, of a like commission with like powers, jurisdiction and duties; provided, that the term of any such commission shall not exceed two years, nor shall it be created oftener than once in ten years.

(1875)

JUDGES IN LESS POPULOUS COUNTIES; SERVICE ON MORE THAN ONE COURT.

§23 Laws may be passed to provide that in any county having less than forty thousand population, as determined by the next preceding federal census, the board of county commissioners of such county, by a unanimous vote or ten percent of the number of electors of such county voting for governor at the next preceding election, by petition, may submit to the electors of such county the question of providing that in such county the same person shall serve as judge of the court of common pleas, judge of the probate court, judge of the juvenile court, judge of the municipal court, and judge of the county court, or of two or more of such courts. If a majority of the electors of such county vote in favor of such proposition, one person shall thereafter be elected to serve in such capacities, but this shall not affect the right of any judge then in office from continuing in office until the end of the term for which he was elected.

Elections may be had in the same manner to discontinue or change the practice of having one person serve in the capacity of judge of more than one court when once adopted.

(1965)

ARTICLE V: ELECTIVE FRANCHISE

WHO MAY VOTE.

§1 Every citizen of the United States, of the age of eighteen years, who has been a resident of the state, county, township, or ward, such time as may be provided by law, and has been registered to vote for thirty days, has the qualifications of an elector, and is entitled to vote at all elections. Any elector who fails to vote in at least one election during any period of four consecutive years shall cease to be an elector unless he again registers to vote.

(1851, am. 1923, 1957, 1970, 1976, 1977)

BY BALLOT.

§2 All elections shall be by ballot.

(1851)

NAMES OF CANDIDATES ON BALLOT.

§2a The names of all candidates for an office at any election shall be arranged in a group under the title of that office. The General Assembly shall provide by law the means by which ballots shall give each candidate's name reasonably equal position by rotation or other comparable methods to the extent practical and appropriate to the voting procedure used. At any election in which a candidate's party designation appears on the ballot, the name or designation of each candidate's party, if any, shall be printed under or after each candidate's name in less prominent type face than that in which the candidate's name is printed. An elector may vote for candidates (other than candidates for electors of president and vice-president of the United States, and other than candidates for governor and lieutenant governor) only and in no other way than by indicating his vote for each candidate separately from the indication of his vote for any other candidate.

(1949, am. 1975, 1976)

C

Baldwin's Ohio Revised Code Annotated Currentness
Title XLIX. Public Utilities
Chapter 4905. Public Utilities Commission--General Powers (Refs & Annos)
Facilities and Services
→→ 4905.22 Service and facilities required; unreasonable charge prohibited

Every public utility shall furnish necessary and adequate service and facilities, and every public utility shall furnish and provide with respect to its business such instrumentalities and facilities, as are adequate and in all respects just and reasonable. All charges made or demanded for any service rendered, or to be rendered, shall be just, reasonable, and not more than the charges allowed by law or by order of the public utilities commission, and no unjust or unreasonable charge shall be made or demanded for, or in connection with, any service, or in excess of that allowed by law or by order of the commission.

CREDIT(S)

(1953 H 1, eff. 10-1-53; GC 614-12, 614-13)

Current through all 2011 laws and statewide issues and 2012 Files 80, 82 through 88, 91, 92, 96, and 97 of the 129th GA (2011-2012).

(C) 2012 Thomson Reuters. No Claim to Orig. US Gov. Works.

END OF DOCUMENT

C

Baldwin's Ohio Revised Code Annotated Currentness
Title XLIX. Public Utilities
Chapter 4905. Public Utilities Commission--General Powers (Refs & Annos)
Regulatory Provisions
→→ **4905.26 Written complaints; hearing**

Upon complaint in writing against any public utility by any person, firm, or corporation, or upon the initiative or complaint of the public utilities commission, that any rate, fare, charge, toll, rental, schedule, classification, or service, or any joint rate, fare, charge, toll, rental, schedule, classification, or service rendered, charged, demanded, exacted, or proposed to be rendered, charged, demanded, or exacted, is in any respect unjust, unreasonable, unjustly discriminatory, unjustly preferential, or in violation of law, or that any regulation, measurement, or practice affecting or relating to any service furnished by the public utility, or in connection with such service, is, or will be, in any respect unreasonable, unjust, insufficient, unjustly discriminatory, or unjustly preferential, or that any service is, or will be, inadequate or cannot be obtained, and, upon complaint of a public utility as to any matter affecting its own product or service, if it appears that reasonable grounds for complaint are stated, the commission shall fix a time for hearing and shall notify complainants and the public utility thereof. The notice shall be served not less than fifteen days before hearing and shall state the matters complained of. The commission may adjourn such hearing from time to time.

The parties to the complaint shall be entitled to be heard, represented by counsel, and to have process to enforce the attendance of witnesses.

CREDIT(S)

(2010 S 162, eff. 9-13-10; 1997 H 215, eff. 9-29-97; 1982 S 378, eff. 1-11-83; 125 v 613; 1953 H 1; GC 614-21)

Current through all 2011 laws and statewide issues and 2012 Files 80, 82 through 88, 91, 92, 96, and 97 of the 129th GA (2011-2012).

(C) 2012 Thomson Reuters. No Claim to Orig. US Gov. Works.

END OF DOCUMENT

Baldwin's Ohio Revised Code Annotated Currentness
Title XLIX. Public Utilities
Chapter 4928. Competitive Electric Retail Service
General Provisions
4928.02 State policy

It is the policy of this state to do the following throughout this state:

(A) Ensure the availability to consumers of adequate, reliable, safe, efficient, nondiscriminatory, and reasonably priced retail electric service;

(B) Ensure the availability of unbundled and comparable retail electric service that provides consumers with the supplier, price, terms, conditions, and quality options they elect to meet their respective needs;

(C) Ensure diversity of electricity supplies and suppliers, by giving consumers effective choices over the selection of those supplies and suppliers and by encouraging the development of distributed and small generation facilities;

(D) Encourage innovation and market access for cost-effective supply- and demand-side retail electric service including, but not limited to, demand-side management, time-differentiated pricing, and implementation of advanced metering infrastructure;

(E) Encourage cost-effective and efficient access to information regarding the operation of the transmission and distribution systems of electric utilities in order to promote both effective customer choice of retail electric service and the development of performance standards and targets for service quality for all consumers, including annual achievement reports written in plain language;

(F) Ensure that an electric utility's transmission and distribution systems are available to a customer-generator or owner of distributed generation, so that the customer-generator or owner can market and deliver the electricity it produces;

(G) Recognize the continuing emergence of competitive electricity markets through the development and implementation of flexible regulatory treatment;

(H) Ensure effective competition in the provision of retail electric service by avoiding anticompetitive subsidies flowing from a noncompetitive retail electric service to a competitive retail electric service or to a product or

© 2012 Thomson Reuters. No Claim to Orig. US Gov. Works.

service other than retail electric service, and vice versa, including by prohibiting the recovery of any generation-related costs through distribution or transmission rates;

(I) Ensure retail electric service consumers protection against unreasonable sales practices, market deficiencies, and market power;

(J) Provide coherent, transparent means of giving appropriate incentives to technologies that can adapt successfully to potential environmental mandates;

(K) Encourage implementation of distributed generation across customer classes through regular review and updating of administrative rules governing critical issues such as, but not limited to, interconnection standards, standby charges, and net metering;

(L) Protect at-risk populations, including, but not limited to, when considering the implementation of any new advanced energy or renewable energy resource;

(M) Encourage the education of small business owners in this state regarding the use of, and encourage the use of, energy efficiency programs and alternative energy resources in their businesses;

(N) Facilitate the state's effectiveness in the global economy.

In carrying out this policy, the commission shall consider rules as they apply to the costs of electric distribution infrastructure, including, but not limited to, line extensions, for the purpose of development in this state.

CREDIT(S)

(2008 S 221, eff. 7-31-08; 1999 S 3, eff. 10-5-99)

Current through all 2011 laws and statewide issues and 2012 Files 80, 82 through 88, 91, 92, 96, and 97 of the 129th GA (2011-2012).

(C) 2012 Thomson Reuters. No Claim to Orig. US Gov. Works.

END OF DOCUMENT

C

Baldwin's Ohio Revised Code Annotated Currentness
Title XLIX. Public Utilities
Chapter 4928. Competitive Electric Retail Service
General Provisions

→→ 4928.03 Obtaining competitive retail electric services; access to noncompetitive retail electric services

Beginning on the starting date of competitive retail electric service, retail electric generation, aggregation, power marketing, and power brokerage services supplied to consumers within the certified territory of an electric utility are competitive retail electric services that the consumers may obtain subject to this chapter from any supplier or suppliers. In accordance with a filing under division (F) of section 4933.81 of the Revised Code, retail electric generation, aggregation, power marketing, or power brokerage services supplied to consumers within the certified territory of an electric cooperative that has made the filing are competitive retail electric services that the consumers may obtain subject to this chapter from any supplier or suppliers.

Beginning on the starting date of competitive retail electric service and notwithstanding any other provision of law, each consumer in this state and the suppliers to a consumer shall have comparable and nondiscriminatory access to noncompetitive retail electric services of an electric utility in this state within its certified territory for the purpose of satisfying the consumer's electricity requirements in keeping with the policy specified in section 4928.02 of the Revised Code.

CREDIT(S)

(1999 S 3, eff. 10-5-99)

Current through all 2011 laws and statewide issues and 2012 Files 80, 82 through 88, 91, 92, 96, and 97 of the 129th GA (2011-2012).

(C) 2012 Thomson Reuters. No Claim to Orig. US Gov. Works.

END OF DOCUMENT

C

Baldwin's Ohio Revised Code Annotated Currentness
Title XLIX. Public Utilities
Chapter 4928. Competitive Electric Retail Service
General Provisions

→→ 4928.16 Jurisdiction upon complaint; forum for commercial disputes; alternative dispute resolution procedures; remedies or forfeitures

(A)(1) The public utilities commission has jurisdiction under section 4905.26 of the Revised Code, upon complaint of any person or upon complaint or initiative of the commission on or after the starting date of competitive retail electric service, regarding the provision by an electric utility, electric services company, electric cooperative, or governmental aggregator subject to certification under section 4928.08 of the Revised Code of any service for which it is subject to certification.

(2) The commission also has jurisdiction under section 4905.26 of the Revised Code, upon complaint of any person or upon complaint or initiative of the commission on or after the starting date of competitive retail electric service, to determine whether an electric utility has violated or failed to comply with any provision of sections 4928.01 to 4928.15, any provision of divisions (A) to (D) of section 4928.35 of the Revised Code, or any rule or order adopted or issued under those sections; or whether an electric services company, electric cooperative, or governmental aggregator subject to certification under section 4928.08 of the Revised Code has violated or failed to comply with any provision of sections 4928.01 to 4928.10 of the Revised Code regarding a competitive retail electric service for which it is subject to certification or any rule or order adopted or issued under those sections.

(3) If a contract between a mercantile commercial customer and an electric services company states that the forum for a commercial dispute involving that company is through a certified commercial arbitration process, that process set forth in the contract and agreed to by the signatories shall be the exclusive forum unless all parties to the contract agree in writing to an amended process. The company shall notify the commission for informational purposes of all matters for which a contract remedy is invoked to resolve a dispute.

(4) The commission, by rule adopted pursuant to division (A) of section 4928.06 of the Revised Code, shall adopt alternative dispute resolution procedures for complaints by nonmercantile, nonresidential customers, including arbitration through a certified commercial arbitration process and at the commission. The commission also by such rule may adopt alternative dispute resolution procedures for complaints by residential customers.

(B) In addition to its authority under division (C) of section 4928.08 of the Revised Code and to any other remedies provided by law, the commission, after reasonable notice and opportunity for hearing in accordance with section 4905.26 of the Revised Code, may do any of the following:

© 2012 Thomson Reuters. No Claim to Orig. US Gov. Works.

(1) Order rescission of a contract, or restitution to customers including damages due to electric power fluctuations, in any complaint brought pursuant to division (A)(1) or (2) of this section;

(2) Order any remedy or forfeiture provided under sections 4905.54 to 4905.60 and 4905.64 of the Revised Code upon a finding under division (A)(2) of this section that the electric utility has violated or failed to comply with any provision of sections 4928.01 to 4928.15, any provision of divisions (A) to (D) of section 4928.35 of the Revised Code, or any rule or order adopted or issued under those sections. In addition, the commission may order any remedy provided under section 4905.22, 4905.37, or 4905.38 of the Revised Code if the violation or failure to comply by an electric utility related to the provision of a noncompetitive retail electric service.

(3) Order any remedy or forfeiture provided under sections 4905.54 to 4905.60 and 4905.64 of the Revised Code upon a finding under division (A)(2) of this section that the electric services company, electric cooperative, or governmental aggregator subject to certification under section 4928.08 of the Revised Code has violated or failed to comply, regarding a competitive retail electric service for which it is subject to certification, with any provision of sections 4928.01 to 4928.10 of the Revised Code or any rule or order adopted or issued under those sections.

(C)(1) In addition to the authority conferred under section 4911.15 of the Revised Code, the consumers' counsel may file a complaint under division (A)(1) or (2) of this section on behalf of residential consumers in this state or appear before the commission as a representative of those consumers pursuant to any complaint filed under division (A)(1) or (2) of this section.

(2) In addition to the authority conferred under section 4911.19 of the Revised Code, the consumers' counsel, upon reasonable grounds on and after the starting date of competitive retail electric service, may file with the commission under section 4905.26 of the Revised Code a complaint for discovery if the recipient of an inquiry under section 4911.19 of the Revised Code fails to provide a response within the time specified in that section.

(D) Section 4905.61 of the Revised Code applies to a violation by an electric utility of, or to a failure of an electric utility to comply with, any provision of sections 4928.01 to 4928.15, any provision of divisions (A) to (D) of section 4928.35 of the Revised Code, or any rule or order adopted or issued under those sections.

CREDIT(S)

(1999 S 3, eff. 10-5-99)

Current through all 2011 laws and statewide issues and 2012 Files 80, 82 through 88, 91, 92, 96, and 97 of the 129th GA (2011-2012).

(C) 2012 Thomson Reuters. No Claim to Orig. US Gov. Works.

END OF DOCUMENT

© 2012 Thomson Reuters. No Claim to Orig. US Gov. Works.

C

Baldwin's Ohio Revised Code Annotated Currentness
Title XLIX. Public Utilities
Chapter 4928. Competitive Electric Retail Service
General Provisions
→→ **4928.17 Corporate separation plan**

(A) Except as otherwise provided in sections 4928.142 or 4928.143 or 4928.31 to 4928.40 of the Revised Code and beginning on the starting date of competitive retail electric service, no electric utility shall engage in this state, either directly or through an affiliate, in the businesses of supplying a noncompetitive retail electric ser-vice and supplying a competitive retail electric service, or in the businesses of supplying a noncompetitive retail electric service and supplying a product or service other than retail electric service, unless the utility implements and operates under a corporate separation plan that is approved by the public utilities commission under this sec-tion, is consistent with the policy specified in section 4928.02 of the Revised Code, and achieves all of the fol-lowing:

(1) The plan provides, at minimum, for the provision of the competitive retail electric service or the nonelectric product or service through a fully separated affiliate of the utility, and the plan includes separate accounting re-quirements, the code of conduct as ordered by the commission pursuant to a rule it shall adopt under division (A) of section 4928.06 of the Revised Code, and such other measures as are necessary to effectuate the policy specified in section 4928.02 of the Revised Code.

(2) The plan satisfies the public interest in preventing unfair competitive advantage and preventing the abuse of market power.

(3) The plan is sufficient to ensure that the utility will not extend any undue preference or advantage to any affil-iate, division, or part of its own business engaged in the business of supplying the competitive retail electric ser-vice or nonelectric product or service, including, but not limited to, utility resources such as trucks, tools, office equipment, office space, supplies, customer and marketing information, advertising, billing and mailing systems, personnel, and training, without compensation based upon fully loaded embedded costs charged to the affiliate; and to ensure that any such affiliate, division, or part will not receive undue preference or advantage from any affiliate, division, or part of the business engaged in business of supplying the noncompetitive retail electric ser-vice. No such utility, affiliate, division, or part shall extend such undue preference. Notwithstanding any other division of this section, a utility's obligation under division (A)(3) of this section shall be effective January 1, 2000.

(B) The commission may approve, modify and approve, or disapprove a corporate separation plan filed with the commission under division (A) of this section. As part of the code of conduct required under division (A)(1) of this section, the commission shall adopt rules pursuant to division (A) of section 4928.06 of the Revised Code

© 2012 Thomson Reuters. No Claim to Orig. US Gov. Works.

regarding corporate separation and procedures for plan filing and approval. The rules shall include limitations on affiliate practices solely for the purpose of maintaining a separation of the affiliate's business from the business of the utility to prevent unfair competitive advantage by virtue of that relationship. The rules also shall include an opportunity for any person having a real and substantial interest in the corporate separation plan to file specific objections to the plan and propose specific responses to issues raised in the objections, which objections and responses the commission shall address in its final order. Prior to commission approval of the plan, the commission shall afford a hearing upon those aspects of the plan that the commission determines reasonably require a hearing. The commission may reject and require refiling of a substantially inadequate plan under this section.

(C) The commission shall issue an order approving or modifying and approving a corporate separation plan under this section, to be effective on the date specified in the order, only upon findings that the plan reasonably complies with the requirements of division (A) of this section and will provide for ongoing compliance with the policy specified in section 4928.02 of the Revised Code. However, for good cause shown, the commission may issue an order approving or modifying and approving a corporate separation plan under this section that does not comply with division (A)(1) of this section but complies with such functional separation requirements as the commission authorizes to apply for an interim period prescribed in the order, upon a finding that such alternative plan will provide for ongoing compliance with the policy specified in section 4928.02 of the Revised Code.

(D) Any party may seek an amendment to a corporate separation plan approved under this section, and the commission, pursuant to a request from any party or on its own initiative, may order as it considers necessary the filing of an amended corporate separation plan to reflect changed circumstances.

(E) No electric distribution utility shall sell or transfer any generating asset it wholly or partly owns at any time without obtaining prior commission approval.

CREDIT(S)

(2008 S 221, eff. 7-31-08; 1999 S 3, eff. 10-5-99)

Current through all 2011 laws and statewide issues and 2012 Files 80, 82 through 88, 91, 92, 96, and 97 of the 129th GA (2011-2012).

(C) 2012 Thomson Reuters. No Claim to Orig. US Gov. Works.

END OF DOCUMENT

© 2012 Thomson Reuters. No Claim to Orig. US Gov. Works.

Baldwin's Ohio Revised Code Annotated Currentness
Title XLIX. Public Utilities
Chapter 4928. Competitive Electric Retail Service
Energy Efficiency Revolving Loan Program
→→ **4928.66 Energy efficiency programs; implementation**

(A)(1)(a) Beginning in 2009, an electric distribution utility shall implement energy efficiency programs that achieve energy savings equivalent to at least three-tenths of one per cent of the total, annual average, and normalized kilowatt-hour sales of the electric distribution utility during the preceding three calendar years to customers in this state. The savings requirement, using such a three-year average, shall increase to an additional five-tenths of one per cent in 2010, seven-tenths of one per cent in 2011, eight-tenths of one per cent in 2012, nine-tenths of one per cent in 2013, one per cent from 2014 to 2018, and two per cent each year thereafter, achieving a cumulative, annual energy savings in excess of twenty-two per cent by the end of 2025.

(b) Beginning in 2009, an electric distribution utility shall implement peak demand reduction programs designed to achieve a one per cent reduction in peak demand in 2009 and an additional seventy-five hundredths of one per cent reduction each year through 2018. In 2018, the standing committees in the house of representatives and the senate primarily dealing with energy issues shall make recommendations to the general assembly regarding future peak demand reduction targets.

(2) For the purposes of divisions (A)(1)(a) and (b) of this section:

(a) The baseline for energy savings under division (A)(1)(a) of this section shall be the average of the total kilowatt hours the electric distribution utility sold in the preceding three calendar years, and the baseline for a peak demand reduction under division (A)(1)(b) of this section shall be the average peak demand on the utility in the preceding three calendar years, except that the commission may reduce either baseline to adjust for new economic growth in the utility's certified territory.

(b) The commission may amend the benchmarks set forth in division (A)(1)(a) or (b) of this section if, after application by the electric distribution utility, the commission determines that the amendment is necessary because the utility cannot reasonably achieve the benchmarks due to regulatory, economic, or technological reasons beyond its reasonable control.

(c) Compliance with divisions (A)(1)(a) and (b) of this section shall be measured by including the effects of all demand-response programs for mercantile customers of the subject electric distribution utility and all such mercantile customer-sited energy efficiency and peak demand reduction programs, adjusted upward by the appropriate loss factors. Any mechanism designed to recover the cost of energy efficiency and peak demand reduction

© 2012 Thomson Reuters. No Claim to Orig. US Gov. Works.

programs under divisions (A)(1)(a) and (b) of this section may exempt mercantile customers that commit their demand-response or other customer-sited capabilities, whether existing or new, for integration into the electric distribution utility's demand-response, energy efficiency, or peak demand reduction programs, if the commission determines that that exemption reasonably encourages such customers to commit those capabilities to those programs. If a mercantile customer makes such existing or new demand-response, energy efficiency, or peak demand reduction capability available to an electric distribution utility pursuant to division (A)(2)(c) of this section, the electric utility's baseline under division (A)(2)(a) of this section shall be adjusted to exclude the effects of all such demand-response, energy efficiency, or peak demand reduction programs that may have existed during the period used to establish the baseline. The baseline also shall be normalized for changes in numbers of customers, sales, weather, peak demand, and other appropriate factors so that the compliance measurement is not unduly influenced by factors outside the control of the electric distribution utility.

(d) Programs implemented by a utility may include demand-response programs, customer-sited programs, and transmission and distribution infrastructure improvements that reduce line losses. Division (A)(2)(c) of this section shall be applied to include facilitating efforts by a mercantile customer or group of those customers to offer customer-sited demand-response, energy efficiency, or peak demand reduction capabilities to the electric distribution utility as part of a reasonable arrangement submitted to the commission pursuant to section 4905.31 of the Revised Code.

(e) No programs or improvements described in division (A)(2)(d) of this section shall conflict with any statewide building code adopted by the board of building standards.

(B) In accordance with rules it shall adopt, the public utilities commission shall produce and docket at the commission an annual report containing the results of its verification of the annual levels of energy efficiency and of peak demand reductions achieved by each electric distribution utility pursuant to division (A) of this section. A copy of the report shall be provided to the consumers' counsel.

(C) If the commission determines, after notice and opportunity for hearing and based upon its report under division (B) of this section, that an electric distribution utility has failed to comply with an energy efficiency or peak demand reduction requirement of division (A) of this section, the commission shall assess a forfeiture on the utility as provided under sections 4905.55 to 4905.60 and 4905.64 of the Revised Code, either in the amount, per day per undercompliance or noncompliance, relative to the period of the report, equal to that prescribed for noncompliances under section 4905.54 of the Revised Code, or in an amount equal to the then existing market value of one renewable energy credit per megawatt hour of undercompliance or noncompliance. Revenue from any forfeiture assessed under this division shall be deposited to the credit of the advanced energy fund created under section 4928.61 of the Revised Code.

(D) The commission may establish rules regarding the content of an application by an electric distribution utility for commission approval of a revenue decoupling mechanism under this division. Such an application shall not be considered an application to increase rates and may be included as part of a proposal to establish, continue, or expand energy efficiency or conservation programs. The commission by order may approve an application under this division if it determines both that the revenue decoupling mechanism provides for the recovery of revenue

© 2012 Thomson Reuters. No Claim to Orig. US Gov. Works.

that otherwise may be foregone by the utility as a result of or in connection with the implementation by the electric distribution utility of any energy efficiency or energy conservation programs and reasonably aligns the interests of the utility and of its customers in favor of those programs.

(E) The commission additionally shall adopt rules that require an electric distribution utility to provide a customer upon request with two years' consumption data in an accessible form.

CREDIT(S)

(2008 S 221, eff. 7-31-08)

Current through all 2011 laws and statewide issues and 2012 Files 80, 82 through 88, 91, 92, 96, and 97 of the 129th GA (2011-2012).

(C) 2012 Thomson Reuters. No Claim to Orig. US Gov. Works.

END OF DOCUMENT

Ohio Admin. Code 4901:1-1-03

C

Baldwin's Ohio Administrative Code Annotated Currentness
4901 Public Utilities Commission (Refs & Annos)
4901:1 Utilities (Refs & Annos)
Chapter 4901:1-1. General Utility Matters (Refs & Annos)
→→ **4901:1-1-03 Duty to disclose tariffs**

(A) Definitions. For purposes of this rule, and this rule only, the following shall apply:

(1) "A utility" is:

(a) An electric light company as defined by division (A)(4) of section 4905.03 of the Revised Code;

(b) A gas company or a natural gas company as defined by divisions (A)(5) and (A)(6) of section 4905.03 of the Revised Code having more than five thousand customers; or

(c) A water-works company or sewage disposal system as defined by divisions (A)(8) and (A)(14) of section 4905.03 of the Revised Code having more than five thousand customers.

(2) "An applicant" is a person, partnership, corporation, association, or organization which makes application or requests electric, gas, water, or sewage service from a utility. An applicant includes those persons or entities who are currently a customer and are seeking to receive service at another or a new location and those persons or entities who already receive one type of utility service (e.g., electric or water) and want to receive another type of utility service (e.g., gas or sewer) at the same or a different location.

(3) "An eligible customer" is a customer who, based on the information available to the utility, may meet or may become able to meet the criteria or terms and conditions of service of a particular tariff offering or rate schedule. For example, if an electrical residential load management schedule were open to electric residential customers with a monthly minimum demand of four kilowatt hours, an eligible customer would be any residential customer regardless of his or her historical monthly level of demand. Likewise, if a rate schedule were available to any residential electric customer with an electric water heater, all residential customers would be eligible customers. In these two examples, all residential customers are eligible customers (although many of these eligible customers may not actually qualify to receive service under these tariffs) because they may meet or may become able to meet the criteria or terms and conditions of service. However, if an industrial or commercial rate schedule were changed or modified, residential customers would not be considered as eligible customers.

© 2012 Thomson Reuters. No Claim to Orig. US Gov. Works.

(4) "Disclose" means to inform by use of a brief, one-to-four-sentence (more if necessary) message contained on a bill, on a bill insert, or in a special mailing. A utility may supplement the disclosure by a notice published in a newspaper or newspapers of general circulation in the service territory of the utility. The disclosure must state:

(a) That a new rate is available or that the criteria or terms and conditions of an existing rate schedule have been modified;

(b) The nature of the new rate schedule or the modification of the existing rate schedule;

(c) That further information can be obtained by calling or writing a specific telephone number or address.

(5) "Changes in the criteria or terms and conditions of service" includes all authorized modifications in a particular tariff schedule or offering except for increases and decreases in the base rate, emergency or excise tax surcharge, or the gas cost recovery ("GCR") rate.

(6) "Explanation of the rates, charges, and provisions applicable to the service furnished or available" means a brief summary of the effective rates and the distinctive character of service which distinguish this rate schedule from an alternative one. The explanation may:

(a) Include a typical bill summary and a brief listing of the characteristics of the service or criteria which must be met in order to qualify to receive service under this schedule;

(b) Be oral or written, however, if the customer or applicant specifically requests a written explanation, the utility must provide a written explanation.

(B) Duty to disclose.

(1) Within ninety days after a new rate schedule becomes effective, or within ninety days after modifications or changes in the criteria or terms and conditions of service of an existing tariff schedule or offering become effective, the utility shall disclose to the eligible customers the availability of the new tariff schedule or the fact that the criteria or terms and conditions of service of such an existing tariff have changed. A copy of such notice shall be filed with the public utilities commission prior to its distribution to customers.

(2) Upon the request of any customer or applicant, the utility shall provide an explanation of the rates, charges, and provisions applicable to the service furnished or available to such customers or applicant, and shall provide any information and assistance, such as the availability of alternative tariff schedules, necessary to enable the customer to obtain the most economical utility service conforming to his or her stated needs. Nothing in this rule shall be construed so as to delay the prompt initiation of service if requested by

© 2012 Thomson Reuters. No Claim to Orig. US Gov. Works.

an applicant.

HISTORY: 2002-03 OMR 1868 (A), eff. 3-1-03; 1985-86 OMR 706 (E), eff. 12-26-85

RC 119.032 rule review date(s): 9-30-07; 10-8-02

CROSS REFERENCES

RC 4905.30, Printed schedules of rates must be filed

4901:1-1-03, OH ADC 4901:1-1-03

Rules are complete through February 29, 2012; Appendices are current to February 28, 2010

©2012 Thomson Reuters

END OF DOCUMENT

© 2012 Thomson Reuters. No Claim to Orig. US Gov. Works.

Ohio Admin. Code 4901:1-10-30

C

Baldwin's Ohio Administrative Code Annotated Currentness
4901 Public Utilities Commission (Refs & Annos)
4901:1 Utilities (Refs & Annos)
Chapter 4901:1-10. Electric Service and Safety Standards (Refs & Annos)
→→ **4901:1-10-30 Failures to comply with the rules or commission orders**

(A) Any electric utility or CRES provider that fails to comply with the rules and standards in this chapter, or with any commission order, direction, or requirement promulgated thereunder, may be subject to any and all remedies available under the law, including but not limited to the following:

(1) Forfeiture to the state of not more than ten thousand dollars for each such failure, with each day's continuance of the violation being a separate offense.

(2) Corrective action to effectuate compliance.

(3) Restitution or damages to the customer/consumer.

(B) Enforcement of any rule in this chapter or commission order, direction or requirement promulgated thereunder, will be conducted in accordance with Chapter 4901:1-23 of the Administrative Code.

HISTORY: 2008-09 OMR pam. #12 (A), eff. 6-29-09; 2003-04 OMR 1706 (A), eff. 1-1-04; 2000-2001 OMR 311 (E), eff. 9-18-00

RC 119.032 rule review date(s): 9-30-12; 11-26-08; 11-30-07; 7-30-03; 9-30-02

CROSS REFERENCES

RC 4905.04, Power to regulate public utilities and railroads
RC 4928.06, Effectuation of state policy; rules; monitoring and evaluation of service; reports; determination of effective competition; authority of commission
RC 4928.08, Certification of managerial, technical and financial capability
RC 4928.11, Minimum service quality, safety, and reliability requirements for noncompetitive retail electric services
RC 4928.16, Jurisdiction upon complaint; forum for commercial disputes; alternative dispute resolution procedures; remedies or forfeitures

4901:1-10-30, OH ADC 4901:1-10-30

© 2012 Thomson Reuters. No Claim to Orig. US Gov. Works.

Ohio Admin. Code 4901:1-10-30

Rules are complete through February 29, 2012; Appendices are current to February 28, 2010

©2012 Thomson Reuters

END OF DOCUMENT

© 2012 Thomson Reuters. No Claim to Orig. US Gov. Works.