

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Regulation of the)
Electric Fuel Component Contained With-) Case No. 99-1007-EL-EFC
In the Rate Schedules of Toledo Edison)
Company and Related Matters.)

In the Matter of the Regulation of the)
Electric Fuel Component Contained With-) Case No. 99-1008-EL-EFC
in the Rate Schedules of Cleveland Electric)
Illuminating Company and Related)
Matters.)

OPINION AND ORDER

The Commission, having reviewed the testimony and exhibits presented at the public hearing, and being otherwise fully advised, hereby issues its opinion and order.

APPEARANCES:

James W. Burk, Ohio Edison Company, 76 South Main Street, Akron, Ohio 44308, on behalf of The Toledo Edison Company and The Cleveland Electric Illuminating Company.

Betty D. Montgomery, Attorney General of the State of Ohio, Duane W. Luckey, Section Chief, by Thomas W. McNamee, Assistant Attorney General, 180 East Broad Street, Columbus, Ohio 43215-3793, on behalf of the staff of the Public Utilities Commission of Ohio.

Robert S. Tongren, Ohio Consumers' Counsel, by Evelyn Robinson-McGriff and Colleen L. Mooney, Assistant Consumers' Counsel, 77 South High Street, 15th Floor, Columbus, Ohio 43266, on behalf of the residential consumers of The Toledo Edison Company and The Cleveland Electric Illuminating Company.

McNees, Wallace & Nurick, by Samuel C Randazzo, Kimberly J. Wile, and Gretchen J. Hummel, Fifth Third Center, 21 East State Street, Suite 1700, Columbus, Ohio 43215, on behalf of the Industrial Energy Users-Ohio.

INTRODUCTION AND SUMMARY OF THE LAW:

During the audit period of these proceedings, the Cleveland Electric Illuminating Company (CEI) and The Toledo Edison Company (TE) were electric light companies within the meaning of Section 4905.03(A)(4), Revised Code, and are, therefore, public utilities subject to the jurisdiction and supervision of this Commission pursuant to Sections 4905.02, 4905.04, 4905.05, and 4905.06, Revised Code, and

electric utilities within the meaning of Rule 4901:1-11-01(L), Ohio Administrative Code (O.A.C.).

Section 4905.301, Revised Code, requires the Commission to review, at least annually, the operations and an audit of the fuel-related policies and practices of each electric utility. Rule 4901:1-11-10(A), O.A.C., provides that each electric utility shall be subject to a management/performance (m/p) audit and a financial audit of its fuel-related policies and practices.

Section 4905.301, Revised Code, requires the Commission to review, at least annually, the operation of the electric fuel component (EFC) contained within the rate schedules of all jurisdictional electric light companies. Section 4909.191(E), Revised Code, requires adjustment of the base rates to be charged during the current period by an electric light company upon establishment of the fuel component for the base period pursuant to chapters 4905 and 4909, Revised Code.

Pursuant to the Commission's approval of the rate plan stipulation filed by the companies, the Office of Consumers' Counsel (OCC), and the Industrial Energy Users-Ohio (IEU) in Case 96-1211-EL-UNC (96-1211), TE's and CEI's EFC rates are frozen until December 31, 2005, subject to limited periodic gross domestic product (GDP) adjustment, the Quarto fixed charge adjustment, and any adjustment to reflect a significant change in environmental, regulatory, or tax laws or regulations or in the interpretation or application of such laws or taxes. See *In the Matter of the Application of FirstEnergy Corp. on behalf of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Authority to Continue and Modify Certain Regulatory Accounting Practices and Procedures, to Transfer Jurisdictional Assets, to Establish Fuel Efficiency Procedures, to Freeze and Reduce Electric Rates and to file and Implement Tariffs not for an Increase in Rates, All in connection With and Subject to the Merger of Ohio Edison Company and Centerior Energy Corporation* (96-1211). In 96-1211, the Commission found that such recovery mechanism will provide for the recovery of prudent and reasonable fuel charges and practices, promote efficiency, and minimize the cost of electric service. The Commission also found that EFC reviews and hearings would be limited to verification of the calculations and implementation of any of the adjustments described above.

SUMMARY OF THE PROCEEDINGS:

Pursuant to Section 4905.301, Revised Code, the Commission issued a finding and order on April 22, 1999, initiating these proceedings to review CEI's and TE's fuel components and related matters and consolidated the above-captioned cases for hearing purposes on February 14, 2000. The order also directed CEI and TE to file all facts, data, and other information pertinent to their fuel procurement practices and policies (prehearing data). On February 2, 2000, CEI and TE, in lieu of such prehearing data, filed a report on their EFC rates arguing that Amended Substitute Senate Bill No. 3 (SB3), regarding electric utility restructuring, did not directly address how the EFC rate

should be determined for the period from October 5, 1999, to January 1, 2000. On February 4, 2000, OCC filed a motion to intervene in these proceedings. On February 7, 2000, staff filed its annual EFC review for CEI and TE. Staff determined that the EFC rates for CEI and TE should be 1.3390¢/kWh and 1.3149¢/kWh, respectively. By entry of February 8, 2000, CEI and TE were directed to file prehearing data as ordered in advance of the February 14, 2000 hearing. Also, the February 8, 2000 entry granted OCC's motion to intervene. By entry of February 10, 2000, IEU was granted intervention in these proceedings. On February 10, 2000, CEI and TE filed its prehearing data calculating EFC rates of 1.3390¢/kWh and 1.3149¢/kWh, respectively, effective March 1, 2000.

The public hearing in both cases was held on February 14, 2000. No public witnesses appeared to offer testimony. Staff and OCC indicated that the only unresolved issue between the parties was whether the current EFC rates should remain in effect until January 1, 2001, or whether CEI and TE were required to adjust their EFC rates to charge a new EFC rate until January 1, 2001. At the hearing, no one objected to the admission of staff's annual EFC review of the companies. Also at the hearing, the staff acknowledged that OCC discovered that an incorrect number of kWh was used in computing the Quarto adjustment of the companies' EFC rates. As a result, the staff and OCC indicated that staff would submit a corrected calculation. On February 17, 2000, staff filed a correction to the annual EFC review. In its revision, staff indicated that it obtained the correct number of kWh from FirstEnergy and calculates the new EFC rates for CEI and TE to be 1.3394¢/kWh and 1.3300¢/kWh, respectively. There have been no objections filed in response to the staff's revised EFC calculations. The parties also requested that, as the only unresolved issue was whether the current EFC rate should remain in effect until January 1, 2001, or whether CEI and TE were required to adjust their EFC rates to charge a new EFC rate until January 1, 2001, that they be permitted to file briefs on the issue. On February 24, 2000, staff, OCC and IEU jointly, and the companies filed briefs. CEI and TE filed a reply brief on February 22, 2000.

THE UNRESOLVED ISSUE

In its brief, CEI and TE argue that the current EFC rates now in effect for CEI and TE of 1.3918¢/kWh and 1.3717¢/kWh, respectively, should remain in effect until January 1, 2001. CEI and TE contend that, there is nothing in SB3 that addresses the subject of rate changes between October 5, 1999, and January 1, 2001, and they argue that it seems likely that the general assembly contemplated that there would not be changes in rates during that period. CEI and TE also contend that the general assembly understood that the resources of the Commission, the electric utilities, and other interested parties would be devoted to the transition plans during that period. As a result, CEI and TE claim that it is unlikely that the general assembly intended that there would be proceedings at the Commission during that same period that would require the Commission and other parties to debate the reasonableness of rate changes that would be effective for a matter of only several months.

CEI and TE also contend that there is some ambiguity in the language of SB3 regarding the intent of the general assembly with respect to the EFC statutes. They argue that a reasonable reading of SB3 is that the statutes requiring EFC filings were repealed on the effective date of SB3, October 5, 1999. CEI and TE argue that it was the likely intent of the general assembly and appears with the general scheme of SB3 to simply continue the EFC rates in effect on October 5, 1999. CEI and TE also contend that their interpretation of SB3 makes more sense given the fact that the EFC rates in effect on October 5, 1999, are the same rates that would be included in CEI's and TE's unbundled rates. Further, CEI and TE point to the Commission's recently issued EFC orders for Dayton Power & Light Company and Cincinnati Gas & Electric Company that permitted those companies to maintain their then existing EFC rates by stipulation through December 31, 2000. Finally, CEI and TE also argue that, because it is unclear what statute or rule controls EFC filings between October 5, 1999 and January 1, 2000, it is reasonable to continue the EFC rates now in effect.

OCC and IEU contend that there is no merit to CEI and TE's contention that SB3 froze EFC rates at its effective date or in any way intended to preclude EFC rate changes in the year 2000. OCC and IEU claim that the FirstEnergy Corp.'s rate plan sets forth the calculation of CEI's and TE's EFC rates including the rates to be set in these proceedings. OCC and IEU contend that the EFC rate to be set in these proceedings will reflect a reduction as a result of this Quarto provision in the rate plan while CEI and TE wish to continue the higher EFC rates now in effect. OCC and IEU claim that CEI and TE are confused by section 2 of SB3, which repeals the EFC hearing and rate statutes and section 9, which states that those statutes as repealed by this act shall take effect on January 1, 2001. OCC and IEU contend that CEI and TE's proposed interpretation of section 9 is illogical and without support. They argue that the legislation is not confused at all. They assert section 2 repeals the EFC statutes and section 9 sets the effective date of that repeal. Section 9 clearly means that the repeal of the EFC statutes as provided in section 2 is effective on January 1, 2001. Therefore, according to OCC and IEU, EFC hearings and rate changes will continue throughout the year 2000. OCC and IEU also contend that the Commission has already acted as such because it scheduled EFC audits and hearing for the year 2000 and acted with the intention of changing EFC rates. OCC and IEU also dispute CEI and TE's claims regarding the recent Commission orders in the EFC cases of DP&L and CG&E because the EFC rate revisions were avoided through stipulations and no such stipulations exist here. OCC and IEU also disagree with CEI and TE's argument that the general assembly could not have intended rate changes that would be effective for a matter of only several months. OCC and IEU claim that, pursuant to CEI's and TE's rate plans, the rates to be effective March 1, 2000, will be in effect for ten months rather than six months.

Staff argues that SB3 is clear and the EFC rates were not frozen. Staff points to the intent of the general assembly. First, staff notes that the EFC is authorized by Sections 4905.301, 4905.69, and 4905.191, Revised Code. Staff notes that SB3 intends the repeal of these sections and the end of the EFC. But, staff argues that the only question is when the elimination occurs. Staff notes that the sections of SB3 that follow section 2

provides specific details about the implementation of the repeals included in the long list in section 2. Staff also argues that section 9 of SB3 provides that the EFC repeals shall take effect on January 1, 2001, unless retail competition is delayed by order. Thus it appears to staff that the general assembly meant to eliminate the fuel component only when the new structure of the industry was in place. Staff also points to Section 4928.05(B), Revised Code, which provides that nothing in this chapter affects the authority of the Commission under Title 49 of the Revised Code to regulate an electric light company in this state or an electric service supplied in this state prior to the starting date of competitive retail electric service. Thus, according to staff, the general assembly meant economic regulation under prior law to continue until the beginning of electric choice.

Staff also contends that, had the general assembly intended to freeze the existing EFC rates until electric restructuring begins, it would have stated that intention as it did twice previously. In 1975, when the general assembly enacted the first fuel adjustment clause, it specifically used language to keep the Commission's prior fuel orders in force until the new rates could be implemented. Also, in 1980, when the general assembly decided to eliminate the fuel adjustment clause proceedings and create the current EFC, it explicitly preserved the existing fuel adjustment clause rates. Therefore, staff argues that, had the general assembly wished fuel rates to be frozen until January 1, 2001, it would have stated that intention, but SB3 contains no such language. Finally, staff argues that maintaining the EFC rate in these cases means that consumers would not obtain the benefit of reductions to which customers are entitled.

Upon review of the briefs and SB3, the Commission finds that CEI's and TE's EFC rates were not frozen by SB3 and, therefore, the staff's proposed EFC rates for CEI and TE should become effective March 1, 2000. There is no question that section 2 of SB3 repealed Sections 4905.301, 4905.69, and 4909.191, Revised Code, authorizing EFC rates and proceedings. The only question is the timing of that repeal. What is at issue in this case is whether the current EFC rates of CEI and TE should remain in effect until January 1, 2001, or whether CEI and TE should institute new EFC rates. Section 9 of SB3 clearly states that the repeal of the EFC shall take effect on January 1, 2001, unless retail competition is delayed by order. A review of SB3 reveals no intention by the general assembly to eliminate EFC rate proceedings or hearings or the implementation of new EFC rates for any electric utility between the date of passage of SB3 and January 1, 2001. Clearly, in enacting SB3, the general assembly could have eliminated Commission hearings on EFC rates during the interim period or the implementation of new EFC rates for electric utilities during this interim period. Further, the general assembly could have stated that all existing EFC rates for electric utilities remain in effect until January 1, 2001. However, SB3 contains no such directive or language. We believe that, just as the general assembly set forth a specific date for the repeal of EFC rate setting, had the general assembly intended that the Commission cease all further EFC rate proceedings or changes in EFC rates between the passage of the bill and January 1, 2001, the general assembly would have stated that intention in the bill. Therefore, we believe the intent of the general assembly was for the Commission to go forward on EFC

rate proceedings in this interim period and order electric utilities to institute new EFC rates to take effect for this interim period. Accordingly, the new EFC rates for CEI and TE should be implemented.

Proposed EFC Rates

We find that the proposed EFC mechanism will provide for recovery of prudent and reasonable fuel charges and practices for this audit period and will promote efficiency and minimize costs of electric service. We also find that the EFC rates are reasonable and supported by the record. Based upon the foregoing, the Commission concludes that CEI's next EFC rate should be 1.3394¢/kWh and TE's next EFC rate should be 1.3300¢/kWh. CEI and TE are directed to file EFC tariff riders setting forth the new rates no later than March 1, 2000. The tariff rider will become effective March 1, 2000, and will remain in effect until January 1, 2001.

FINDINGS OF FACT AND CONCLUSIONS OF LAW:

- (1) TE and CEI are electric light companies as defined by Section 4905.03(A)(4), Revised Code, and are, therefore, public utilities under the jurisdiction of this Commission, and electric utilities subject to Rule 4901:1-11-01(L), O.A.C.
- (2) By finding and order issued April 22, 1999, the Commission initiated these proceedings to review the companies' EFC calculations and related matters, pursuant to Section 4905.301, Revised Code.
- (3) OCC and IEU were granted intervention in both cases on February 8 and 10, 2000.
- (4) A public hearing was conducted at the Commission's offices on February 14, 2000, and notice of the hearing was published by the companies in accordance with Section 4909.191(A), Revised Code and Rule 4901:1-11-11(C), O.A.C.
- (5) The proposed EFC mechanism is in accordance with 92-1222 and will provide for recovery of prudent and reasonable fuel charges and practices for this audit period and will promote efficiency and minimize costs of electric service.
- (6) A review of SB3 reveals no intention by the general assembly to eliminate EFC rate proceedings or hearings or the implementation of new EFC rates for any electric utility between the date of passage of SB3 and January 1, 2001.

- (7) After accounting for the refunds, TE's EFC rate should be 1.3300¢/kWh, and CEI's EFC rate should be 1.3394¢/kWh. These EFC rates will be effective from March 1, 2000, until January 1, 2001.

ORDER:

It is, therefore,

ORDERED, That TE and CEI comply with all directives set forth in the stipulation and this order. It is, further,

ORDERED, That the EFC rate charged by TE beginning March 1, 2000, shall be 1.3300¢/kWh, that TE file an EFC tariff rider incorporating this rate no later than March 1, 2000, and such EFC tariff rider become effective for all bills rendered on and after March 1, 2000, and remain in effect until January 1, 2001. It is, further,

ORDERED, That the EFC rate charged by CEI beginning March 1, 2000, shall be 1.3394¢/kWh, that CEI file an EFC tariff rider incorporating this rate no later than March 1, 2000, and that such EFC tariff rider become effective for all bills rendered on and after March 1, 2000, and remain in effect until January 1, 2001. It is, further,

ORDERED, That the Commission serve a copy of this opinion and order upon all parties of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO

Alan R. Schriber, Chairman

Ronda Hartman Fergus

Craig A. Glazer

Judith A. Jones

Donald L. Mason

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