FILE

25

FirstEnergy

76 South Main Street
Akron, Ohio 44308

James W. Burk
Senior Attorney

330-384-5861
Fax: 330-384-3875

January 6, 2009

Via Federal Express
and Facsimile (614-466-0313)

Ms. Renee J. Jenkins
Director, Administration Department
Secretary to the Commission
Docketing Division
The Public Utilities Commission of Ohio
180 Broad Street
Columbus, OH 43215-3793

Dear Ms. Jenkins:

Re: ***Reply Comments of Ohio Edison Company, The Toledo Edison Company and Cleveland Electric Illuminating Company***
Case No. 08-935-EL-SSO

Enclosed for filing, please find the original and twenty (20) copies of the *Reply Comments of Ohio Edison Company, The Toledo Edison Company and Cleveland Electric Illuminating Company* regarding the above-referenced case. Please file the enclosed *Reply Comments,* time-stamping the two extras and returning them to the undersigned in the enclosed envelope.

Thank you for your assistance in this matter. Please contact me if you have any questions concerning this matter.

Very truly yours,

James W. Burk

JWB/jhp
Enclosures
cc: Parties of Record

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 Authority to Establish a Standard Service Offer Pursuant to R.C. § 4928.143 in the Form of an Electric Security Plan.	)	Case No. 08-935-EL-SSO

REPLY COMMENTS PURSUANT TO ATTORNEY EXAMINER ENTRY DATED DECEMBER 26, 2008

I. Introduction

Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company (respectively "OE", "CEI", and "TE" individually, and collectively, "Companies") file these Reply Comments in accordance with the December 26th Attorney Examiner Entry issued in this proceeding.[1] Nine parties filed Comments on January 5th.[2] The relief requested in the Comments has no support in the statute and, in certain respects, reflects an interpretation of the statute which is contrary to law and beyond the scope of the Attorney Examiner Entry. Moreover, insofar as the Comments

[1] On December 23, 2008 in this proceeding, the Ohio Consumer and Environmental Advocates ("OCEA") filed Motions related to the Companies' compliance tariff filing. Subsequently, these Motions were incorporated as part of OCEA's Comments in this proceeding. Therefore, the Companies will combine their response to the Motions and the Comments into these Reply Comments, but such Reply Comments may be considered the Companies' Memorandum Contra to the Motions if necessary.

[2] The Entry required that the comments be filed by noon and served upon the Companies by email, since the Companies were required to file reply comments by noon on January 6, 2008, just 24 hours after the filing of initial comments. The nine parties that filed comments include Industrial Energy Users – Ohio, OCEA, Ohio Partners for Affordable Energy ("OPAE"), Ohio Manufacturer's Association ("OMA"), Nucor Steel Marion, Inc. ("Nucor"), Kroger, Ohio Energy Group ("OEG"), Constellation NewEnergy and Constellation Energy Commodities Group Inc. ("Constellation"), and Citizens Coalition. Of those parties, Nucor, Kroger, OPAE, OCEA, OMA, and OEG failed to serve the Companies by the noon deadline, and therefore, technically, should be stricken, particularly those of OMA, which filed near the close of business.

filed on behalf of OCEA are advanced by the Ohio Consumers' Counsel ("OCC"), the position taken regarding the continuation of RTC for OE and TE contradicts the interpretation of the statute advocated by OCC in other, contemporaneous proceedings. Accordingly, as more fully explained as follows, the relief requested in the Comments should be denied.

II. Background

On December 22, 2008, the Companies filed notice, as contemplated by R.C. § 4928.143(C)(2)(a), that in response to the Commission's December 19, 2008 modification and approval of the Electric Security Plan Application filed by the Companies on July 31, 2008, the Companies were withdrawing that Application. Also on December 22, 2008, the Companies, in a compliance tariff filing consistent with R.C. § 4928.141(A), supplied the Commission with a limited group of tariff sheets containing added language intended to clarify that the terms and conditions contained therein would continue beyond 2008. This second filing clarified that in the absence on January 1, 2009 of a Standard Service Offer ("SSO") authorized under R.C. § 4928.141 (i.e. a Market Rate Offer under R.C. § 4928.142 or Electric Security Plan under R.C. § 4928.143), the charges, credits, or pricing calculations as contained in the Companies' rate plan would continue in effect. Importantly, and critical to the analysis here, no SSO as contemplated by R.C. § 4928.141 has ever been authorized for the Companies.

In response to these filings, OCEA, on December 23, 2008, filed two Motions that were subsequently incorporated into OCEA's Comments filed on January 5, 2009. The essence of the relief requested in the Comments is that the Commission direct the Companies to file revised tariffs which exclude continued charges for RTC for OE and

TE after 2008.[3] In support of its Comments, OCEA purports to rely on what it characterizes as the "default provisions" of the statute in R.C. § 4928.143(C)(2)(b) and, in fact, characterizes the Companies' compliance filing pursuant to R.C. § 4928.141(A) as having been made under "the wrong statute." (Memorandum in Support, p. 3). What OCEA overlooks, and what is the fallacy in its position here, is that no SSO pursuant to R.C. § 4928.141 has ever been authorized for these Companies. That factor is the critical distinction as to whether R.C. § 4928.141(A) or R.C. § 4928.143(C)(2)(b) controls here. The Comments filed by OEG likewise miss this critical distinction and, as a result, are similarly off the mark as discussed below. Nucor focused its Comments on the application of the Companies' interruptible tariffs, which were not altered as part of the tariff filing, and therefore Nucor's comments are wholly outside of the scope of the Attorney Examiner Entry and mischaracterize the actions taken by the Companies to administer the existing tariff. Similarly, Constellation seeks to eliminate only selected tariffs that relate to shopping credits, whose elimination would benefit Constellation. The Companies did not propose any changes to those tariffs and did not propose to eliminate any tariffs. As provided by R.C. 4928.141(A), the Companies' tariff filing addressed only the continuation of those tariffs that had a termination date of December 31, 2008.

III. Reply to Various Parties' Comments per the December 26, 2008 Attorney Examiner Entry

A. OCEA Comments Misinterpret S.B. 221 Related to Continuation of the Companies' Rate Plan

In pertinent part, R.C. § 4928.141(A) provides:

> Only a standard service offer authorized in accordance with section 4928.142 or 4928.143 of the Revised Code, shall serve as the utility's

[3] As part of their comments, OPAE, OMA, Kroger, and OEG also make an identical argument or adopt the OCEA position on this issue.

> standard service offer for the purpose of compliance with this section; and that standard service offer shall serve as the utility's default standard service offer for the purpose of section 4928.14 of the Revised Code. *Notwithstanding the foregoing provision, the rate plan of an electric distribution utility shall continue for the purpose of the utility's compliance with this division until a standard service offer is first authorized under section 4928.142 or 4928.143 of the Revised Code*, and, as applicable, pursuant to division (D) of section 4928.143 of the Revised Code, any rate plan that extends beyond December 31, 2008, shall continue to be in effect for the subject electric distribution utility for the duration of the plan's term. A standard service offer *under section 4928.142 or 4928.143 of the Revised Code shall exclude any previously authorized allowances for transition costs*, with such exclusion being effective on and after the date that the allowance is scheduled to end under the utility's rate plan. (Emphasis supplied)

Two critical observations, reflected in the italicized portions of the above quotation, arise from this statutory provision. First, the provision which begins with "Notwithstanding the foregoing . . ." makes this section applicable where, as here, no MRO or ESP, i.e. an SSO pursuant to the enactment of Amended Substitute Senate Bill 221 ("S.B. 221"), has yet been approved by the Commission. The language "the rate plan of an electric distribution utility shall continue for the purpose of the utility's compliance with this division *until a standard service offer is first authorized under section 4928.142 or 4928.143* of the Revised Code" could not be clearer. The "rate plan" referred to, in the context of customer rates, is (and can only logically mean) those charges (and credits) to which customers are subject now, prior to the first authorization of a first ESP or MRO. It is those charges, credits, and price calculations which are, consistent with R.C. § 4928.141(A), carried forward under the Companies' compliance filing.

The second critical observation related to R.C. § 4928.141(A), as captured in the second italicized portion of the above quoted excerpt, is that the statutory exclusion of

charges associated with transition costs (RTC charges) only applies in the case of SSOs which arise as an approved MRO or ESP (R.C. §§ 4928.142 and 4928.143, respectively). That conclusion is plain from the language of the second italicized section in the above excerpt. Only a "standard service offer under section 4928.142 or 4928.143 of the Revised Code" excludes previously-authorized RTC charges, but no such standard service offer has been authorized here. The exclusion of RTC charges does not apply where, as here, the charges under a *pre-existing rate plan* are being carried forward. Accordingly, OCEA's and OEG's reliance on the last sentence of R.C. § 4928.141(A)[4], which they take out of context, is misplaced. (OCEA Memorandum in Support, p. 3; OEG Comments, p. 1.) The statute does not preclude continued RTC charges in the circumstances here where there is no authorized ESP or MRO. In fact, RTC charges *must* continue since those charges are part of the Companies' rate plan.

In contrast to R.C. § 4928.141(A), as discussed above, the provisions of R.C. § 4928.143(C)(2)(b) do not apply in the circumstances here. That portion of the statute in its entirety states:

> If the utility terminates an application pursuant to division (C)(2)(a) of this section or if the commission disapproves an application under division (C)(1) of this section, the commission shall issue such order as is necessary to continue the provisions, terms, and conditions of the utility's most recent standard service offer, along with any expected increases or decreases in fuel costs from those contained in that offer, until a subsequent offer is authorized pursuant to this section or section 4928.142 of the Revised Code, respectively.

Unlike R.C. § 4928.141(A), this provision does not address the instant circumstances, i.e. where there has yet to be a "first authorization" of an SSO subsequent to the enactment of S.B. 221.

[4] The last sentence of the excerpt from R.C. § 4928.141(A) in the blocked quotation above.

Based upon the principle of statutory construction that all words in the statute should be given meaning[5], R.C. § 4928.143(C)(2)(b) only applies in circumstances where there *has* been a previously authorized SSO arising from a previously authorized MRO or ESP. In pertinent part, R.C. § 4928.143(C)(2)(b) provides "the commission shall issue such order as is necessary to continue the provisions, terms, and conditions of the utility's most recent standard service offer . . . until *a subsequent offer is authorized pursuant to this section [4928.143] or section 4928.142 of the Revised Code, respectively*" (emphasis supplied). Hence, the provision is not operative until after an ESP/MRO is first authorized, but will be applicable in the future after at least one ESP/MRO has been authorized and a *subsequent* offer is pending. In the circumstances here, there has not yet been *any* SSO authorized pursuant to R.C. §§ 4928.142 or 4928.143. It follows, therefore, that there certainly cannot have been a *subsequent* SSO authorized pursuant to those sections and this statutory language is not applicable. OCEA's interpretation would improperly ignore terms intentionally placed in the statute by the General Assembly.

The Companies' interpretation applies R.C. § 4928.141(A) in this circumstance – not R.C. § 4928.143(C)(2)(b) – and thus provides symmetry in the application of the statutory provisions. R.C. § 4928.141(A) applies to circumstances where, as here, there *hasn't* been an SSO resulting from authorization of a MRO or ESP. In contrast, R.C. § 4928.143(C)(2)(b) applies only in circumstances where there *has*. This interpretation harmonizes application of the two statutory provisions.[6]

[5] "In looking to the face of a statute or Act to determine legislative intent, significance and effect should be accorded to every word, phrase, sentence and part thereof, if possible." *State v. Wilson*, 77 Ohio St. 3d 334, 336-37 (1997).

[6] Even if, *arguendo*, R.C. § 4928.141(A) and R.C. § 4928.143(C)(2)(b) were not construed to be mutually exclusive in scope but rather overlapping and inconsistent, which laws of statutory construction would prohibit, R.C. § 4928.141(A), with its specific reference to the limited circumstances where an SSO has not

While the above discussion provides ample basis for adopting the Companies' interpretation of the statute, there is an additional basis for the Commission to do so – namely that OCC, the principal advocate on behalf of the Motions, has itself *argued in favor of the Companies' interpretation of the statute* in the contemporaneous SSO proceedings involving American Electric Power.[7]

The prefiled Rebuttal Testimony of Beth E. Hixon, Assistant Director of Analytical Services for OCC, in Case Nos. 08-917-EL-SSO *et al.* illustrates the point. In pertinent part, her testimony, addressing the Staff's proposal regarding continuation of the AEP companies' existing rate plans.[8]:

> Q9. DO YOU AGREE WITH THE PUCO STAFF'S ALTERNATIVE 1/1/09 PLAN RECOMMENDATION?
>
> A9. No. I have determined that parts of PUCO Staff's recommendation to "continue the rate stabilization plan" do not comply with *R.C. 4928.141, which, counsel has advised me, requires that the "rate plan" of a utility shall continue until a utility's first standard service offer is authorized by the Commission under R.C. 4928.142 or 4928.143.* "Rate plan" is defined under R.C. 4982.01(A) (33) as "the standard service offer in effect on the effective date of the amendment of this section by S.B. 221." It is my understanding, based on advice of counsel, that the standard service offer in effect on July 31, 2008 (the effective date of S.B. 221) is the utility's rates in tariffs in effect on that date. Therefore, I have based

---

yet been first authorized, would nonetheless take precedence over any perceived general applicability of R.C. § 4928.143(C)(2)(b). A fundamental principle of statutory construction, set out in R.C. § 1.51, states:

> "If a general provision conflicts with a special or local provision, they shall be construed, if possible, so that effect is given to both. If the conflict between the provisions is irreconcilable, the special or local provision prevails as an exception to the general provision, unless the general provision is the later adoption and the manifest intent is that the general provision prevails."

See also *Springdale v. CSX Ry. Corp.*, 68 Ohio St. 3d 371, 376 (1994). Thus, under all arguably applicable approaches to statutory construction, R.C. § 4928.141(A) prevails.

[7] We request the Commission take administrative notice of its own docket and the record in Case Nos. 08-917-EL-SSO et al., in particular the prefiled Rebuttal Testimony of Beth E. Hixon, OCC Exh.3, and that portion of the transcript of proceedings of November 18, 2008, reflecting the cross-examination of Ms. Hixon. We note that this use of the testimony in that proceeding is not being made with respect to the truth of the statements made – although we believe the testimony does in fact correctly interpret and apply the law – the offer here is made to show that in fact, OCC had (correctly) taken a position in that case which it is here attempting to contradict.

[8] The AEP companies have not filed a MRO application.

my review of PUCO Staff's Alternative 1/1/09 Plan for AEP Ohio in this case on my opinion that, if on January 1, 2009 the Companies do not yet have their first standard service offers approved by the Commission under either an ESP or MRO, then customers are to be charged the Companies' standard service offer rates based on the tariffs that were in effect on July 31, 2008. This means that no changes should be made to the standard service offer rates in tariffs in effect on July 31, 2008.

***

With respect to the CSP RTC, while I believe this would be discontinued after 2008 under a first permanent ESP, based upon my understanding of SB221, the only exception is if there is no new first ESP, the entire July 31, 2008 standard service offer rate continues in effect. This means that the RTC charge would only continue for a short limited time until the first permanent ESP is approved by the Commission. This is consistent with my position that there be no changes in the July 31, 2008 standard service offer rates whatsoever until a new ESP is decided. (Emphasis supplied)

The point was reinforced during cross-examination. Ms. Hixon responded as follows to questioning by Staff's counsel:

220

Q. Let me ask you to turn to page 6 of your testimony, beginning at line 9. Your testimony there states: "It is my understanding, based on the advice of counsel, that the standard service offer in effect on July 31st, 2008 (the effective date of Senate Bill 221) is the utility's rates in tariffs in effect on that date."

That's what your testimony says, correct?

A. Yes.

Q. That's only some of the utility's rates, though.

A. I was referring to the standard service

221

offer tariffs. The standard service offer in the tariff.

Q. So when we read this, we're supposed to read this as utility's rates in standard service tariffs?

A. Yes. I just did not repeat the words.

Q. What is the purpose of the RTC rider?

A. This company I think has what's called a regulatory asset charge, but I think we're referring to it as an RTC rider as well here. My understanding

is that it was designed to recover regulatory transition costs.

Q. Do you know whether those costs have been fully recovered by the companies?

A. No, I do not.

Q. If they have been, would it, in your opinion, be appropriate to continue the rider?

A. For the purposes of my testimony in evaluating what rates should be in effect at 1/1/09, I made the determination by interpreting this particular case in light of Senate Bill 221 that those -- that that rate needed to stay in effect. I don't believe that the regulatory transition charge for this company was tied to recovery of costs but to an actual date.

It could not be clearer that OCC, in the AEP proceedings, views application of the statutory provisions as the Companies do now. While it is, perhaps, not surprising that OCC now wants a different result given the different circumstances here, it should not be permitted to opportunistically jump from one interpretation of the law to another as suits its convenience. OCC got it right the first time, in the AEP proceedings. It reversed course, however, in the instant Motions. Accordingly, for the reasons we set out above – and OCC set out in the AEP proceedings – the Motions here should be denied.

B. Nucor's Comments are Largely Inaccurate and Exceed the Scope of the Attorney Examiner's Entry.

In its comments, Nucor focuses solely on the criteria used by FirstEnergy's Ohio operating companies (which in this specific instance involves OE), to call an economic interruption under OE's Rider 73, the Rider under which Nucor receives interruptible electric service. (Nucor Comments, pp. 3-4.) In its comments, Nucor

claims that "FirstEnergy [sic][9] has drastically changed the 'provisions, terms and conditions' of the interruptible rates and, in effect, changed the interruptible rates themselves, in violation of R.C. § 4928.141(A) of the Revised Code, and R.C. § 4928.143(C)(2)(b) of the Revised Code" (id. at 17) and improperly did so without Commission approval. (Id at 6.) It also alleges that the Companies changed the procedure for establishing buy through prices. (Id. at 1.) These assertions are simply wrong. The Companies actions are consistent with Rider 73 parameters that govern the calling of, and pricing during, an economic interruption, as well as their internal operating procedures. Moreover, based both on Commission and Ohio Supreme Court precedent, it was not necessary to obtain Commission approval prior to these changes. Accordingly, the Companies' actions violate neither R.C. § 4928.141 nor R.C. § 4928.143(C)(2)(b). Nucor's comments and requested relief should be summarily rejected.[10]

1. The Provisions, Terms and Conditions Set Forth in Rider 73 Were Not Modified by the Companies.

In its comments at page 8, Nucor quotes the provisions of R.C. § 4928.141 (A) and R.C. § 4928.143(C)(2)(b) and concludes on page 9 that the intent of these statutes is to allow "a utility's existing rates, terms and conditions of service [to] remain in place ...." Nucor's interpretation of these statutes, however, is irrelevant because none of Rider 73's provisions, terms or conditions under which an economic interruption can be

[9] It is the Companies, and not FirstEnergy, that establishes the prerequisites to calling for an economic interruption.

[10] Alternatively, Nucor's comments should be stricken in their entirety. The Attorney Examiner's December 26th Entry permitted parties to comment on the Companies' proposed tariff filing. Entry at 2. The Companies' tariff filing was designed to clarify that the limited number of tariffs that had a termination date of December 31, 2008 absent the provisions of S.B. 221 were to continue. None of the tariffs filed by the Companies modified the existing interruptible tariffs. Yet, Nucor's entire comments inappropriately (and incorrectly) address this issue.

called were changed. Both before and after January 1, 2009, Rider 73 allowed OE to call an economic interruption "whenever the incremental revenue to be received from the customer is less than the anticipated incremental expense to supply the interruptible energy for the particular hour(s) of the interruption request." (Rider 73, p. 3.)[11] Indeed, Nucor acknowledges that "FirstEnergy [sic] has not changed the wording of its interruptible tariffs." (Nucor Comments, p. 7.) Instead, Nucor confuses Commission approved tariff terms with internal operating procedures – a distinction that may have been ignored by Nucor, but was not ignored by the Ohio Supreme Court when it found that changes to the latter are not changes to a tariff. *Elyria Foundry v. Pub. Util. Comm.* (2008), 118 Ohio St. 3d 269 (hereinafter, "*Elyria Foundry*").

In *Elyria Foundry,* a customer taking service under Rider 75 (which for purposes of this discussion involves provisions virtually identical to those included in Rider 73), argued that OE's internally established criteria for calling an economic interruption (which was referred to as "the 2001 Policy") is a rate-setting practice that required the Commission's approval before it could be modified by the utility.[12] (Id. at 273.) The Court disagreed, stating:

> Ohio Edison's interruptible program was approved by the commission as set forth in its tariffs under Rider 75. ... The terms of that interruptible risk/benefit service are defined in Rider 75. ... *The 2001 policy is an internal operating procedure*, and [the customer's] attacks on the 2001 policy are misplaced. *Tariff provisions define the programs* offered by a regulated utility. However, *tariffs are not a standard operating procedure manual for the utility.* Utilities develop internal policies to run their day-to-day business. As detailed in the record, the 2001 policy streamlines the administrative process and enables [FirstEnergy Solutions] to act timely and efficiently when economic interruption conditions are present. The

[11] No where in Rider 73 is OE required, as implied by Nucor, to maintain a strike price of 6.5¢ per kWh. (*See e.g.*, Nucor comments, p. 7.)

[12] Any such modification must, of course, be consistent with the operable language of the tariff (cited above).

> policy also minimizes the need for contact between the regulated (Ohio Edison) and the unregulated (FES) as required under R.C. 4928.17 and the commission's code of conduct rules. [Id. at 273-274 (Italics added.)]

The Court went on to note that "the 2001 policy exists *as a checklist*, outlining the internal mechanics of OE's process to carry out its optional right to interrupt customers' service as outlined in Rider 75." (Id. at 274.) (Italics added.) Based on these findings, the Court concluded that OE was not required to obtain approval from the Commission before establishing or modifying internal operating procedures because modifications to such procedures do not constitute a change in a rate. (Id.)

Inasmuch as Rider 73's parameters for calling an economic interruption have not been changed, and changes to internal operating procedures that are still within tariff parameters do not constitute changes in tariff provisions, the issue of the applicability of R.C. § 4928.141 and R.C. § 4928.143 is irrelevant. Moreover, Nucor never claims, let alone demonstrates, that any of the interruptions at issue violated Rider 73 as being called when incremental revenues received from Nucor exceeded Ohio Edison's costs to supply Nucor.[13] Accordingly, the Companies' newly established internal criteria cannot be found to be a change to Rider 73 nor a violation of either R.C. § 4928.141 or R.C. § 4928.143(C)(2)(b).

2. The Companies' Internal Operating Procedures Allow for Modifications.

Nucor's arguments also ignore a significant provision included within the Companies' 2001 Policy, which expressly states in its first paragraph:

> Economic interruption may be called whenever such interruption is permitted by the customer's underlying tariff or contract, and the current policy set forth below *in no way undermines or diminishes those tariff or contractual rights.* Therefore, *on any given day, for any or all*

[13] If Nucor believes that OE has violated a Commission approved tariff, it must file a complaint pursuant to R.C. § 4905.26.

> *interruptible customers,* the decision may be made, *without notice,* to *depart from the policy* set forth below and interrupt to the *full extent* permitted by a customer's contract or tariff. [*See* Exh SEO-4 included in the direct testimony of Steven E. Ouellette filed in *Elyria Foundry v. Ohio Edison*, PUCO Case No. 05-796-EL-CSS.)(Italics added.)]

Nucor claims that "it is clear that FirstEnergy is no longer using the procedure outlined in its 2001 Policy as reviewed in *Elyria Foundry* [complaint case.]" (Nucor Comments, p. 10.) On the contrary, based on the above provision, it is clear that the Companies are using the procedure outlined in the 2001 policy, adhering to the provision that expressly allows the Companies to depart from the policy and interrupt to the full extent permitted by a customer's contract or tariff.

As Nucor correctly notes in its comments at page 9, the Commission addressed these guidelines in *Elyria Foundry v. Ohio Edison*, PUCO Case No. 05-796-EL-CSS. And nowhere in its Opinion and Order in that matter, did the Commission modify the above provision.

3. OE's Pricing During the Interruptions at Issue is Consistent with Rider 73 Requirements.

Nucor also alleges that OE has inexplicably "scheduled a full 24 hours of interruption for Monday, January 5 with very high buy-though prices, far above the incremental costs to supply energy reflected in the MISO day-ahead hourly LMP prices. Again, Nucor misrepresents the facts. While Nucor may not understand how the price quote was determined, the explanation it seeks can be found in Rider 73 which provides in pertinent part:

> When an economic interruption is requested and the customer does not specify a replacement electricity source ... the customer shall pay the cost of the interruptible electricity used by the customer with the cost being determined on an after the fact basis with the most expensive power used during such period being assigned to such customer. [OE Rider 73, p. 4.]

No where does Rider 73 say that interruptible customers should pay the MISO day-ahead hourly LMP price as Nucor has requested. Rather, Rider 73 requires OE to charge interruptible customers its cost for the power supplied, based on the most expensive power procured. As this Commission is aware, the Companies issued an RFP for a power supply to flow on January 5, 2009. Clearly the price quoted during the January 5, 2009 interruption reflects the wholesale purchased power costs being incurred by OE, which includes the results of the RFP.[14]

In sum, it is Nucor, and not the Companies, that is attempting to change the Rider 73 criteria under which an economic interruption can be called by (i) trying to force OE to retain prerequisites not required by the Rider; (ii) ignoring an express provision in the Companies' internal operating procedures that allows the Companies to deviate from these prerequisites without notice and call interruptions to the fullest extent permitted by Rider 73; and (iii) rewriting buy through pricing provisions so that they would be based on MISO's hourly LMP rather than OE's cost. Moreover, Nucor is attempting to accomplish all of this not based on any evidence, but rather based solely on unsubstantiated claims and self serving statements.

Both the Commission and the Ohio Supreme Court concluded in their respective reviews of the *Elyria Foundry* case that modifications to internal operating procedures that remain within tariff parameters do not constitute modifications to a rate. In light of this, especially when coupled with the fact that there is no evidence to support a finding that the Companies' changes to the prerequisites for calling an economic interruption

[14] As for the buy through prices quoted by OE for interruptions between January 1, 2009 and January 5, 2009, OE quoted MISO day ahead LMP prices simply because it was buying power on the spot market during this period.

exceed the parameters set forth in Rider 73, the Commission must reject Nucor's comments and requested relief.

C. Constellation's Requested Relief Would Render Moot Provisions of R.C. § 4928.141(A).

The thrust of Constellation's comments is that the Companies' rate plan terminated on December 31, 2008, and with it all provisions related to shopping credits approved as part of that rate plan. Constellation states, "As of January 1, 2009, the RSP/RCP is terminated by its own terms. There is no basis for the continued use of the shopping credit paradigm, let alone the shopping credit caps." (Constellation Comments, p. 4.) This core statement of position by Constellation is incorrect and adoption of this position would simply violate the statute. Constellation simply reads out of the statute the plain language of R.C. § 4928.141(A) that requires that the Companies' rate plan continue if no MRO or ESP has been authorized as of January 1, 2009, as fully discussed above in Section III. For this reason, the relief sought in Constellation's comments must be rejected.

As Constellation correctly points out, the RSP/RCP had a termination date of December 31, 2008. (Constellation Comments, p. 4.) The General Assembly recognized that the Companies' rate plan, as well as those of other electric utilities, had Commission-approved termination dates of December 31, 2008. That is why, for example, the requirement under R.C. § 4928.141(A) for electric utilities to provide an SSO commences on January 1, 2009. Constellation also correctly states that the shopping credits, including shopping credit caps, in place today were approved as part of the Companies' rate plan and were scheduled to end on December 31, 2008 as were numerous other provisions of the Companies' rate plan. (Constellation Comments, p. 3-

4.) But it is precisely because the rate plans were scheduled to terminate on December 31, 2008 that the General Assembly included specific language that required, notwithstanding any termination date an electric utility's rate plan previously approved by the Commission, the rate plan, for purposes of compliance with R.C. § 4928.141(A), will continue until an MRO or ESP was first authorized. R.C. § 4928.141(A).

Constellation's position that it can pick and choose which provisions continue and which ones terminate to best serve Constellation's interests, notwithstanding the statutory language, cannot be sustained. (Constellation Comments, p. 5.) The Companies' effort in making the compliance tariff filing was to assure that all provisions continue.

Finally, contrary to Constellation's assertion, nothing in the Companies' rate plan violates R.C. § 4928.02(H). (Constellation Comments, p. 4.) The shopping credit structure that Constellation continues to oppose was part of the RSP and the RCP cases approved by the Commission and affirmed by the Supreme Court of Ohio. *See Elyria Foundry v. Pub. Util. Comm.*, 114 Ohio St.3d 305, 2007-Ohio-4164. In neither of those cases did the Court make a finding that the shopping credit structure was inappropriate or illegal. Since it is the same rate plan that is continuing under R.C. § 4928.141(A), nothing has changed to affect the legality of that shopping credit structure.[15]

D. Citizen Coalition's Comments Ignore Both the Law and the Facts

The Coalition's characterization in its "First Comment" that the Companies have acted in "bad faith" (Coalition Comments, p. 2) is repugnant and its assertion that "December 22nd rejection should not be allowed" (Coalition Comments, p. 3), demonstrates only that it misunderstands the statute. Upon modification and approval of

[15] Moreover, S.B. 221 continued to give the Commission authority to place limits on customer shopping, R.C. § 4928.143(B)(2)(d), thereby evidencing legislative intent to support shopping credit limitations.

an ESP application by the Commission, it is entirely within the discretion of the Companies to withdraw and terminate their application. R.C. § 4928.143(C)(2)(a). That is what they have done. The Companies have acted entirely consistent with the process established by S.B. 221. There are no "implied" conditions to the Companies' exercise of their rights as the Coalition suggests. The Commission cannot "reject" the Companies' withdrawal and termination.

The Coalition's Second and Third Comments reflect the familiar, from these parties, generalized claims of high rates and their reliance upon comments in the public media rather than the record before the Commission. The Coalition calls for the Commission to "establish rates" that reflect the lower of "market conditions" or the modified and approved ESP. Not surprisingly, it cites no authority for the Commission's power to do so because none exists.

E. Other Comments are Without Basis and Should be Rejected

Several other comments made by the commenting parties have nothing at all to do with the Companies' proposed tariff filing. IEU's recommendation that the Commission encourage the Companies to provide guidance regarding the consequences of R.C. § 4905.31 contracts which are ending (IEU Comments, p. 3) clearly falls in this category as do OPAE's recommendations that tariffs should be immediately established to fund an energy efficiency and demand response collaborative, that funding of existing DSM and low-income efficiency programs should continue, and that interruptible tariffs should be extended to achieve demand reduction targets (with the Companies' absorbing the delta revenue impact) (OPAE Comments, pp. 3-4.) No supportive basis is offered for any of these comments which, for the most part, simply reiterate themes advanced by these

particular parties during the course of the proceedings on the ESP application.[16] OEG's suggestion that RTC charges and RSC charges simply be eliminated from the Companies' tariffs because "the imposition of these charges on shoppers yields artificially low shopping credits" falls in the same category. OEG Comments, p. 3. This proposal is nonsensical since RTC charges have never been included in the shopping credit, therefore it has not affected the level of shopping credit. On the other hand, the RSC charge is included in the shopping credit structure under the Companies' rate plan. Therefore, eliminating this charge will have the effect of lowering the shopping credit, an outcome OEG apparently seeks to avoid. OEG offers no basis in support of this proposal.

F. Information Related to Recent RFP is Subject to Contractual Confidentiality Restrictions

The Request for Proposal ("RFP") is a solicitation process by which the Companies procure *wholesale* energy and capacity for the provision of electric generation service to customers not served by a Competitive Retail Electric Service ("CRES") Supplier for the period January 5, 2009 through March 31, 2009. As a *wholesale* solicitation process for energy and capacity, and as a process not provided pursuant to any Commission proceeding, the solicitation process, the selection of winning bidders and the SSO Supply Agreement reached between the Companies and winning bidders, is therefore not subject to, nor contingent upon, Commission approval. Recovery of incurred purchase power costs will need to be addressed by the Commission, albeit in a different proceeding. At such time, the information will be provided to the parties

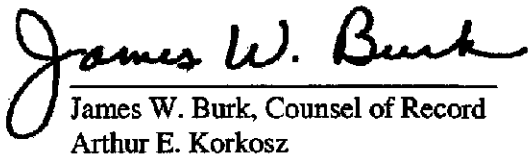
[16] Comments regarding the recovery of utility incurred FERC approved wholesale power costs is an issue that will need to be addressed, albeit in another proceeding.

consistent with the confidentiality requirements of the RFP process which allow for the disclosure of such information in a PUCO proceeding.

IV. Conclusion

For all of the foregoing reasons, the Companies respectfully request the Commission to deny the relief sought by the Comments filed in this proceeding on January 5, 2009.

Respectfully submitted,



James W. Burk, Counsel of Record
Arthur E. Korkosz
Mark A. Hayden
Ebony L. Miller
FIRSTENERGY SERVICE COMPANY
76 South Main Street
Akron, OH 44308

James F. Lang
Laura C. McBride
CALFEE, HALTER & GRISWOLD LLP
1400 KeyBank Center
800 Superior Ave.
Cleveland, OH 44114

David A. Kutik
JONES DAY
901 Lakeside Avenue
Cleveland, OH 44114

ATTORNEYS FOR APPLICANTS, OHIO EDISON COMPANY, THE CLEVELAND ELECTRIC ILLUMINATING COMPANY, AND THE TOLEDO EDISON COMPANY

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Reply Comments Pursuant to Attorney Examiner Entry Dated December 26, 2008 was served by first class United States Mail, postage prepaid, (with copies provided electronically) to the persons on the attached Service List on this 6th day of January 2009.

James W. Burk

James W. Burk

Case 08-935-EL-SSO
Service List

Public Utilities Commission of Ohio
Robert Fortney
180 East Broad St.
3rd Floor
Columbus, OH 43215
E-mail: robert.fortney@puc.state.oh.us

Ohio Energy Group (OEG)
Michael L. Kurtz
David F. Boehm
Kurt J. Boehm
Boehm, Kurtz & Lowry
36 East Seventh Street, Suite 1510
Cincinnati, OH 45202
mkurtz@ BKLlawfirm.com
dboehm@BKLlawfirm.com

Ohio Consumers' Counsel
Jeffrey L. Small
Gregory J. Poulos
Richard C. Reese
Ohio Consumers' Counsel
10 West Broad Street
18th Floor
Columbus, OH 43215-3485
small@occ.state.oh.us
poulos@ occ.state.oh.us
roberts@occ.state.oh.us
reese@occ.state.oh.us

Kroger Co
John W. Bentine
Mark S. Yurick
Matthew S. White
Chester Wilcox & Saxbe, LLP
65 E. State St., Suite 1000
Columbus, OH 43215
jbentine@cwslaw.com
myurick@cwslaw.com
mwhite@cwslaw.com

Ohio Environmental Council
Barth E. Royer
Nolan Moser
Trent A Dougherty
Bell & Royer, LPA
33 South Grant Avenue
Columbus, OH 43215
barthroyer@aol.com
nmoser@theoec.org
trent@theoec.org

Industrial Energy Users (IEU)
Samuel C. Randazzo
Lisa G. McAlister
Daniel J. Neilsen
Joseph M. Clark
McNees Wallace & Nurick LLC
21 East State St., 17th Floor
Columbus, OH 43215
E:mail: sam@mwncmh.com
lmcalister@mwncmh.com
jclark@mwncmh.com
dneilsen@mwncmh.com

Ohio Partners for Affordable Energy
David C. Rinebolt
Colleen L. Mooney
(OPEA)
231 West Lima Street
PO BOX 1793
Columbus, OH 43215
E-mail: drinebolt@aol.com
cmooney2@columbus.rr.com

Nucor Steel Marion, Inc.
Garrett A. Stone
Michael K. Lavanga
Brickfield, Burchette, Ritts & Stone
1025 Thomas Jefferson Street, NW
Eighth Floor, West Tower
Washington, DC 20007-5201
E-mail: gas@bbrslaw.com
mkl@bbrslaw.com

Northwest Ohio Aggregation Coalition (NOAC)
Toledo
Leslie A. Kovacik
420 Madison Ave., Suite 100
Toledo, OH 43604-1219
Phone: 419.245.1893
Fax: 419.245.1853
E-mail: leslie.kovacik@toledo.oh.gov

Lucas
Lance M. Keiffer
Lucas County Assist Prosecuting Atty
711 Adams St., 2nd Floor
Toledo, OH 43624-1680
Phone: 419.213.2001
Fax: 419.213.2011
E-mail: lkeiffer@co.lucas.oh.us

NOAC- Holland

Paul Skaff
Leatherman Witzler Dombey & Hart
353 Elm St.
Perrysburg, OH 43551
P hone: 419.874.3536
Fax: 419.874.3899
E-mail: paulskaff@justice.com

NOAC- Lake
Thomas R. Hays
Lake Township – Solicitor
3315 Centennial Road, Suite A-2
Sylvania, OH 43560
Phone: 419.843.5355
Fax: 419.843.5350
E-mail: hayslaw@buckeye-express.com

NOAC- Maumee
Sheilah H. McAdams
Marsh & McAdams – Law Director
204 West Wayne Street
Maumee, OH 43547
Phone: 419.893.4880
Fax: 419.893.5891
E-mail: sheilahmca@aol.com

NOAC- Northwood
Brian J. Ballenger
Ballenger & Moore – Law Director
3401 Woodville Rd., Suite C
Toledo, OH 43619
Phone: 419.698.1040
Fax: 419.698.5493
E-mail: ballengerlawbjb@sbcglobal.net

NOAC- Oregon
Paul S. Goldberg
Oregon – Law Director
6800 W. Central Ave.
Toledo, OH 43617-1135
Phone: 419.843.5355
E-mail: pgoldberg@ci.oregon.oh.us

NOAC- Sylvania
James E. Moan
Sylvania – Law Director
4930 Holland-Sylvania Rd
Sylvania, OH 43560
Phone: 419.882.7100
Fax: 419.882.7201
E-mail: jimmoan@hotmail.com

Jones Day
Mark A. Whitt
P.O. Box 165017
325 John H. McConnell Blvd. Suite 600
Columbus, OH 43216-5017
Phone: 614-281-3880
Fax: 614-461-4198
E-mail: mawhitt@jonesday.com

Constellation Energy Commodities Group, Inc., and Constellation NewEnergy, Inc.
M. Howard Petricoff
Stephen M. Howard
Vorys, Sater, Seymore and Pease, LLP
52 East Gay Street
PO Box 1008
Columbus, OH 43216-1008
E-mail: mhpetricoff@ vorys.com

Cynthia A. Fonner
Constellation Energy Resources, LLC
550 West Washington Blvd., Suite 300
Chicago, IL 60661

David I. Fein
Constellation Energy Group, Inc.
550 West Washington Blvd., Suite 300
Chicago, IL 60661

Integrys Energy Services, Inc,
M. Howard Petricoff
Stephen M. Howard
Vorys, Sater, Seymore and Pease, LLP
52 East Gay Street
PO Box 1008
Columbus, OH 43216-1008
E-mail: mhpetricoff@ vorys.com

Bobby Singh
300 West Wilson Bridge Road, Suite 350
Worthington, OH 43085
Phone: 614.844.4340
Fax: 614.844.4306
E-mail: bsingh@integrysenergy.com

Ohio Association of School Business Officials, Ohio School Boards Association, Buckeye Association of School Administrators,
M. Howard Petricoff
Stephen M. Howard
Vorys, Sater, Seymore and Pease, LLP
52 East Gay Street
PO Box 1008
Columbus, OH 43216-1008
E-mail: mhpetricoff@ vorys.com

Direct Energy Services, LLC
M. Howard Petricoff
Stephen M. Howard

Vorys, Sater, Seymore and Pease, LLP
52 East Gay Street
PO Box 1008
Columbus, OH 43216-1008
E-mail: mhpetricoff@ vorys.com

Dominion Retail, Inc.
Barth E. Royer
Bell & Royer, LPA
33 South Grant Avenue
Columbus, OH 43215
Email: barthroyer@aol.com

Gary A. Jeffries
Dominion Resources Services, Inc.
501 Martindale Street, Suite 400
Pittsburg, PA 15212-5817
Gary.A.Jeffries@dom.com

Ohio Hospital Association
Richard L. Sites
155 E. Broad Street, 15th Floor
Columbus, OH 43215-3620
Phone: (614) 221-7614
Email: ricks@ohanet.org

Neighborhood Environmental Coalition, Consumers for Fair Utility Rates, United Clevelanders Against Poverty, Cleveland Housing Network, The Empowerment Center of Greater Cleveland (Citizens Coalition)
Joseph P. Meissner
The Legal Aid Society of Cleveland
1223 West 6th Street
Cleveland, OH 44113
Phone: 216.687.1900
Email: jpmeissn@lascley.org

National Energy Marketers Assoc.
Craig G. Goodman, Esq.
3333 K. Street, NW, Suite 110
Washington, D.C. 20007
Email: cgoodman@energymarketers.com

City of Akron
Sean W. Vollman
161 S. High Street, Suite 202
Akron, OH 44308
Phone: 330.375.2030
Fax: 330.375.2041
E-mail: vollmse@ci.akron.oh.us
munteda@ci.akron.oh.us

The Ohio Manufacturers' Association
Langdon D. Bell
Bell & Royer Co., LPA
33 South Grant Avenue
Columbus, OH 43215-3927
Email: lbell33@aol.com

Kevin Schmidt
The Ohio Manufacturers' Association
33 North High Street
Columbus, OH 43215-3005
kschmidt@ohiomfg.com

Ohio Farm Bureau Federation
Larry Gearhardt
Chief Legal Counsel
280 North High Street
Columbus, OH 43218-2383
Email: lgearhardt@ofbf.org

Material Sciences Corporation
Craig I. Smith
2824 Coventry Road
Cleveland, Ohio 44120
Tel. (216) 561-9410
Email: wis29@yahoo.com

FPL Energy Power Marketing, Inc. (PMI/GEXA)
F. Mitchell Dutton
FPL Energy Power Marketing, Inc.
700 Universe Blvd.
Juno Beach, Florida 33408
Email: mitch.dutton@fpl.com

Dane Stinson
Bailey Cavalieri LLC
10 West Broad Street, Suite 2100
Columbus, Ohio 43215
Dane.Stinson@BaileyCavalieri.com

The City of Cleveland
Steven Beeler
Gregory J. Dunn
Christopher Miller
Andre T. Porter
Schottenstein Zox & Dunn Co., LPA
250 West Street
Columbus, OH 4321 5
Email: gdunn@szd.com
cmiller@szd.com
aporter@szd.com

OmniSource Corporation
Damon E. Xenopoulos, Esq.
Brickfield, Burchette, Ritts & Stone, P.C.

1025 Thomas Jefferson Street, N.W.
8th Floor, West Tower
Washington, D.C. 20007
E-Mail: dex@bbrslaw.com

Citizen Power
Theodore S. Robinson
2121 Murray Avenue
Pittsburgh, PA 15217
Email: robinson@citizenpower.com

Ohio Schools Council,
Glenn S. Krassen
E. Brett Breitschwerdt
Bricker & Eckler LLP
1375 E. 9th St., Suite 1500
Cleveland, OH 44114
Email:gkrassen@bricker.com
bbreitschwerdt@bricker.com

NOPEC
Glenn S. Krassen
E. Brett Breitschwerdt
Bricker & Eckler LLP
1375 E. 9th St., Suite 1500
Cleveland, OH 44114
Email: gkrassen@bricker.com
bbreitschwerdt@bricker.com

COSE
Steve Millard
The Higbee Building
100 Public Square, Suite 201
Cleveland, OH 44113
smillard@cose.org

Wal-Mart Stores East LP and Sam's Club East, LP, Macy's Inc., and BJ's Wholesale Club, Inc. (Collectively, the ("Commercial Group")
Douglas M. Mancino
McDermott Will & Emory LLP
2049 Century Park East
Suite 3800
Los Angeles, CA 90067-3218
Email: dmancino@mwe.com

Grace C. Wung
McDermott Will & Emery, LLP
600 Thirteenth Street, N.W.
Washington, DC 20005
gwung@mwe.com

American Wind Energy Association, Wind on the Wires, Ohio Advanced Energy
Sally W. Bloomfield
Terrence O'Donnell
Bricker & Eckler LLP
100 South Third Street
Columbus, OH 43215-4291
sbloomfield@bricker.com
todonnell@bricker.com

Morgan Stanley Capital Group Inc.
Douglas M. Mancino
McDermott Will & Emory LLP
2049 Century Park East
Suite 3800
Los Angeles, CA 90067-3218
Email: dmancino@mwe.com

Gregory K. Lawrence
28 State Street
McDermott Will & Emory LLP
Boston, MA 02109
Email: glawrence@mwe.com

Natural Resources Defense Council,
Henry W. Eckhart
50 West Broad Street, #2117
Columbus, Ohio 43215
henryeckhart@aol.com

The Sierra Club Ohio Chapter
Henry W. Eckhart
50 West Broad Street, #2117
Columbus, Ohio 43215
henryeckhart@aol.com