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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 Section 4928.143, Revised Code, in the Form of an Electric Security Plan.	)))))))	Case No. 08-935-EL-SSO

FINDING AND ORDER

The Commission finds:

(1) On July 31, 2008, Ohio Edison Company (OE), The Cleveland Electric Illuminating Company (CEI), and The Toledo Edison Company (TE) (jointly referred to as the Companies) filed an application for a standard service offer (SSO) pursuant to Section 4928.141, Revised Code. The application was for an electric security plan (ESP) in accordance with Section 4928.143, Revised Code. On December 19, 2008, the Commission issued an opinion and order, authorizing the implementation of an SSO pursuant to the Companies' proposed ESP with modifications.

(2) On December 22, 2008, the Companies filed a notice that they were exercising their right pursuant to Section 4928.143(C)(2)(a), Revised Code, to withdraw and thereby terminate their application for an ESP. Also on December 22, 2008, the Companies filed proposed tariff sheets for service to be provided to customers beginning January 1, 2009.

(3) By entry issued December 26, 2008, parties were given until noon on January 5, 2009, to file comments on the Companies' proposed tariff filing and the Companies were given until noon on Tuesday, January 6, 2009, to file reply comments.

(4) On December 23, 2008, a motion to reject the Companies' December 22, 2008, tariff filings under the default provisions for SSOs pursuant to Chapter 4928, Revised Code, and a motion requesting that the Commission direct the Companies to submit tariffs consistent with the statutory default provisions were filed by the Ohio Consumer and

Environmental Advocates (OCEA), which is comprised of the Northwest Ohio Aggregation Coalition, the Office of the Ohio Consumers' Counsel, Sierra Club, city of Cleveland, Northeast Ohio Public Energy Council, and the Citizens' Coalition (which includes the Neighborhood Environmental Coalition, The Empowerment Center of Greater Cleveland, United Clevelanders Against Poverty, Cleveland Housing Network, and The Consumers for Fair Utility Rates). In addition, comments on the Companies' proposed tariffs were timely filed by OCEA; Citizen Power, Inc. (Citizen Power); Ohio Energy Group (OEG); Kroger Company (Kroger); Industrial Energy Users-Ohio (IEU-Ohio); Ohio Partners for Affordable Energy (OPAE); Nucor Steel Marion, Inc. (Nucor); Constellation NewEnergy and Constellation Energy Commodities Group, Inc. (Constellation); the Citizens' Coalition; and the Ohio Manufacturers' Association (OMA). Reply comments were filed by the Companies on January 6, 2009.

(5) In their December 22, 2008, tariff filing, the Companies state that, pursuant to Section 4928.141(A), Revised Code, "the Companies' rate plan shall remain in effect on January 1, 2009," until an SSO is authorized pursuant to either Section 4928.142 or 4928.143, Revised Code. The Companies further state that the vast majority of their tariff sheets will continue into 2009 in their current form. Because some tariff sheets have a termination date of December 31, 2008, absent the provisions of SB 221, the Companies included in their filing several proposed revised tariff sheets that indicate that those tariff sheets shall remain in effect until otherwise revised or terminated. The Companies confirmed their statutory interpretation, among other things, in their reply comments.

Applicability of Sections 4928.141 and 4928.143, Revised Code

(6) In its December 23, 2008, motions, OCEA requests that the Commission reject the Companies' December 22, 2008, tariff filing and order the Companies to file tariffs that provide lawful SSO and generation service. OCEA points out that, in the letter accompanying the compliance tariff filing, the Companies state that the tariffs are being filed pursuant to Section 4928.141(A), Revised Code; however, OCEA submits that this is the wrong section of the Ohio Revised Code for these types of filings. Rather, OCEA argues that Section

4928.143(C)(2)(b), Revised Code, provides for rates in the event of the withdrawal or termination of an ESP by the Companies. Citizen Power, OMA, and Kroger support the motions filed by OCEA.

(7) The Companies, in response, argue that Section 4928.141(A), Revised Code, is the applicable section stating that 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" is clear. According to the Companies, the "rate plan" referred to in this section means those charges and credits to which customers are subject to now, prior to the first authorization of a first ESP or market rate offer (MRO). The Companies believe that Section 4928.143(C)(2)(B), Revised Code, is not applicable in this situation because there has yet to be a "first authorization" of an SSO subsequent to the enactment of SB 221. In the Companies' view, Section 4928.143(C)(2)(b), Revised Code, is not operative until after an ESP or MRO is first authorized, but the section will be applicable after at least one ESP or MRO has been authorized and a subsequent offer is pending.

(8) The relevant statutory provisions are as follows:

Section 4928.141(A), Revised Code, provides that:

> [T]he 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....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.

Section 4928.143(C)(2)(b), Revised Code, provides that:

> 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.

(9) The Commission believes that, in determining which section, Section 4928.141 or 4928.143, Revised Code, is applicable in this situation, it is first necessary to understand the purpose underlying the provisions in question. Section 4928.143(C)(1), Revised Code, provides that, if applications for an MRO and ESP are filed, the Commission must approve, or modify and approve, the ESP if the ESP is more favorable in the aggregate as compared to the expected results that would otherwise apply under an MRO. In our December 19, 2008, order, the Commission concluded that the ESP, as filed in this proceeding and as modified by the order, was more favorable in the aggregate as compared to the expected results that would otherwise apply under an MRO. Therefore, the Commission approved the ESP with the modifications set forth in the order and authorized the implementation of the SSO established pursuant to Section 4928.143, Revised Code, as required by Section 4928.141, Revised Code.

In accordance with Section 4928.143(C)(2)(a), Revised Code, if the Commission modifies and approves an application for an ESP, the electric utility may withdraw the application, thereby terminating it, and file a new ESP or MRO application. Furthermore, if the electric utility terminates an ESP application, Section 4928.143(C)(2)(b), Revised Code, provides that the electric utility's most recent SSO will continue until a subsequent ESP or MRO is authorized. Thus, the Commission has taken action on the Companies' ESP proposal and, in fact, authorized the Companies to file tariffs implementing the ESP, as modified and approved in the December 19, 2008, order. The fact that the Companies have chosen to withdrawal and terminate their ESP application after review of the Commission's order authorizing the ESP, as modified, does not negate the fact that the Commission did take action and

authorized the first SSO under an ESP and the filing of tariffs thereto. In actuality, the Companies termination of its application supports the finding that the provisions of Section 4928.143, Revised Code, govern the SSO to be in effect, since this section specifically addresses the situation in which an electric utility withdraws the ESP application, thus terminating the application. Furthermore, as stated previously, the Companies specifically stated, in the letter attached to their proposed tariffs, that they were withdrawing and, thus, terminating their ESP application pursuant to Section 4928.143(C)(2)(b), Revised Code.

Section 4928.141(A), Revised Code, on the other hand, provides that, until an SSO is first authorized by the Commission in accordance with Section 4928.142 or Section 4928.143, Revised Code, the electric utility's current rate plan shall continue. Therefore, in the instant case, if the Commission had not acted to authorize an ESP or MRO by December 31, 2008, the Companies' SSO rate plan in effect on July 31, 2008, would continue from January 1, 2009, until such time as the Commission would have approved new SSO rates in accordance with Section 4928.142 or Section 4928.143, Revised Code. Thus, Section 4928.141, Revised Code, is applicable in those situations where the Commission has not taken action to approve, modify, or disapprove an ESP or MRO filed by an electric utility pursuant to Section 4928.143(C)(2)(a) and (b), Revised Code.

Accordingly, in light of the fact that the Commission did take action and approved, with modifications, the ESP filed by the Companies in this case, Section 4928.143(C)(2)(b), Revised Code (not Section 4928.141, Revised Code), is the section which defines the applicable SSO that will be in effect until a subsequent ESP or MRO is authorized.

Continuation of the Regulatory Transition Charges (RTCs), Rate Stabilization Charges (RSCs), and Shopping Credits and Shopping Credit Caps

(10) In their December 22, 2008, tariff filing, the Companies propose, pursuant to Section 4928.141, Revised Code, to continue the RTCs, RSCs, and shopping credits and shopping credit caps beyond December 31, 2008.

(11) With respect to the Companies' proposal to continue the RTCs, OCEA, OPAE, and OEG submit that Section 4928.141, Revised Code, provides that the continuation of the SSO requires that transition charges must be excluded from the SSO. These parties insist that the RTCs for OE and TE be terminated on December 31, 2008.

(12) OEG comments that all nonbypassable charges that are barriers to shopping which are contained in the current tariffs, including the RTCs and RSCs must be removed from the proposed tariffs. According to OEG, the RTC and the RSC charges on shoppers yield artificially low shopping credits. Further, OEG avers that the risk of customer shopping was assumed by the winning bidders of the December 31, 2008, request for proposal (RFP) bidding process and, therefore, all nonbypassable charges should be removed from the tariffs.

(13) With respect to the current shopping credits and shopping credit caps, provided for in the Companies' rate stabilization plan (RSP) and the rate certainty plan (RCP) approved in Case Nos. 03-2144-EL-ATA and Case No. 05-1125-EL-ATA, et al., respectively, Constellation points out that the RSP and RCP terminate at the end of 2008. Therefore, Constellation argues that all references to shopping credits and shopping credit caps should be removed from the proposed tariffs because that regulatory paradigm no longer exists as of January 1, 2009. Constellation also notes that shopping credit caps have long been viewed as a barrier to competition. According to Constellation, the new language in Section 4928.02(H), Revised Code, prohibiting the recovery of any generation-related costs through distribution or transmission rates, further supports the termination of the shopping credit paradigm.

Moreover, Constellation points out that the Companies' tariff filing cites Section 4928.141(A), Revised Code, for the proposition that, after January 1, 2009, if an electric utility does not have an ESP or an MRO, then its current "rate plan" remains in effect. Constellation offers that "rate plan" is defined in Section 4928.01(A)(33), Revised Code, as "the standard service offer in effect on the effective date of the amendment of this section by S.B. 221 of the 127th general assembly." According to Constellation, an SSO is the bundled combination of competitive and noncompetitive services that

an electric utility must offer as a default to ensure that all retail customers have service. Constellation maintains that the Companies cannot extend the shopping credit paradigm by virtue of extending the SSO.

(14) In response, the Companies state that the language referred to by OCEA in Section 4928.141, Revised Code, which requires that transition charges must be excluded from the SSO is only applicable to an SSO that is authorized as part of an ESP or MRO. According to the Companies, the exclusion of the RTCs does not apply in this situation because the charges under a pre-existing rate plan, not an ESP or MRO are being carried forward. In the Companies' view, the RTCs must continue because those charges are part of the Companies' existing rate plan. With regard to OEG's proposal that the RSC be eliminated, the Companies state that OEG has provided no support for this proposal and point out that the RSC is included in the shopping credit structure in the rate plan and, therefore, elimination of the RSC would have the effect of lowering the shopping credit.

Furthermore, the Companies contend that Constellation's comments must be rejected because Section 4928.141(A), Revised Code, requires that the Companies' rate plan, including the shopping credits and caps, continue if no ESP or MRO has been authorized by January 1, 2009. Furthermore, the Companies state that nothing in the rate plan violates Section 4928.02(H), Revised Code, since the rate plan that is continuing is the same plan that was previously approved by the Commission and affirmed by the Ohio Supreme Court.

(15) Prior to considering whether the applicable statutory provision set forth in Section 4928.143(C)(2)(b), Revised Code, permits certain exclusions under the current SSO, the Commission finds it necessary to dispel the notion that Section 4928.141, Revised Code, and the language referring to the elimination of transition costs is applicable in this situation. As we determined previously in this order, Section 4928.141, Revised Code, is not the section that controls the SSO to be implemented in a situation such as this one where the Commission has modified and approved an ESP and, in response, the Companies have chosen to terminate the application. Rather, Section 4928.143, Revised Code, which

requires that the provisions, terms, and conditions of the electric utilities' most recent SSO be continued until a subsequent SSO is authorized, controls. Further, as pointed out by the Companies, the language relied on by OCEA for the termination of transition charges is only applicable if there is an effective SSO established pursuant to Section 4928.142 (MRO) or 4928.143 (ESP), Revised Code, which is not the case at this time.

(16) Turning now to our consideration of what constitutes the "provisions, terms, and conditions of the utility's most recent standard service offer" under Section 4928.143(C)(2)(b), Revised Code, the Commission must look to the Companies' most recent SSO contained in the Companies' RCP approved by the Commission in Case No. 05-1125-EL-ATA et al., which incorporates provisions of the RSP approved in Case No. 03-2144-EL-ATA. The provisions of the RCP provided that the RCP would end on December 31, 2008, and established the terms and conditions of the RTCs, RSCs, and the shopping credits and shopping credit caps. One major distinction between RCP provisions addressing the RTCs versus the RSCs and shopping credits is that, while the provisions of the RCP established specific end dates for the RTCs (December 31, 2008, for OE and TE and December 31, 2010, for CEI[1]), the RCP provisions did not specify end dates for the RSCs and the shopping credits and caps separate from the conclusion of the RCP. Because there is no effective ESP or MRO, Section 4928.143(C)(2)(b), Revised Code, requires that the RCP and all of its provisions, terms, and conditions be continued beyond December 31, 2008. Thus, since the provisions of the RCP do not provide for an end for the RSCs and the shopping credits and caps separate from the RCP, these provisions must likewise continue in accordance with the directives of the statute.

(17) However, such is not the case with the RTCs. The provisions of the RCP set forth terms and conditions that require a specific

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1 The RCP stipulation specifically states that the RTC recovery period and the RTC rate level "will be adjusted so that full recovery of all amounts authorized by the Commission to be collected through the RTC rate components (RTC and extended RTC) will occur through usage as of December 31, 2008" for OE and TE, and through usage as of December 31, 2010, for CEI. RCP stipulation at 6 (September 9, 2005).

end date for the RTCs; therefore, the RTCs must be terminated in accordance with the terms and conditions of the RCP on December 31, 2008, for OE and TE. Moreover, as quoted in footnote 1, a term of the RCP was to specifically adjust the RTC recovery periods and RTC rate levels in order to fully recover, by December 31, 2008, for PE and TE, all amounts previously authorized by the Commission. Given that those authorized amounts have been fully recovered, there is no basis for continuing such charges.

(18) Similarly, the Commission notes that the proposed tariffs contain provisions for a Fuel Recovery Mechanism (FRM),[2] an RTC Offset (RTCO) Rider,[3] and a Fuel Cost Recovery (FCR) Rider.[4] The FRM was authorized in the RCP to collect specific amounts in the years 2006, 2007, and 2008, and the FRM offset the RTC amounts pursuant to the RTCO Rider. With regard to the fuel costs permitted by Section 4928.143(C)(2)(b), Revised Code, OCEA notes that, since the Companies have no generating units, there are no fuel costs and, therefore, no fuel cost adjustments should be made to current rates. Given that the fuel cost amounts were previously collected and the fact that we have terminated the RTC, we find that the FRM and the RTCO Rider should also be terminated. However, the FCR Rider, which was implemented to recover the 2008 actual fuel costs, will remain in place for the limited purpose of collecting all remaining 2008 actual fuel costs that may be necessary pursuant to the FCR Rider reconciliation mechanism. As a final note, the Commission would mention that the old FRM and RTCO Rider are no longer necessary in light of the provision in Section 4928.143(C)(2)(b), Revised Code, which permits the Companies to file for any increases or decreases in fuel costs.

(19) The Commission agrees that the shopping credit model may not have a place in an SSO established pursuant to Section 4928.142 or 4928.143, Revised Code. However, at this time, we are not establishing an SSO pursuant to Section 4928.142 or 4928.143, Revised Code; rather, we are continuing the most current SSO pursuant to the statutory requirements and the current SSO includes shopping credits and shopping credit

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2 OE and TE proposed tariffs Original Sheets No. 100 and 99, respectively.

3 OE and TE proposed tariffs Original Sheets No. 99 and 100, respectively.

4 Companies' proposed tariffs Original Sheets No. 107.

caps. This being said, we would also note that this issue may be revisited once a new SSO is implemented under Section 4928.142 or 4928.143, Revised Code.

Interruptible Tariffs

(20) Nucor states that, in *Elyria Foundry Co. v. Ohio Edison Co.*, Case No. 05-796-EL-CSS, Opinion and Order (January 17, 2007) (*Elyria Foundry*), the Commission ruled that the Companies' 2001 policy for calling economic interruptions did not have to be approved under either Section 4909.18 or 4905.31, Revised Code, because it merely documented the Companies' internal policy; however, Nucor states that the Commission did not grant the Companies unlimited discretion as to the practice for calling economic interruptions. Nucor submits that, as of January 1, 2009, the Companies have altered their internal 2001 policy, in violation of Section 4928.143(C)(2)(b), Revised Code. Nucor states that, in the event no SSO is approved by January 1, 2009, the statute provided customers with a measure of rate continuity and certainty prior to the approval of an SSO that meets the requirements of SB 221, by requiring that an electric utility's existing rates, terms, and conditions of service remain in place. According to Nucor, while the words of the Companies' interruptible tariffs remain unchanged, the Companies have, in effect, altered the terms and conditions of the interruptible rates by abandoning their 2001 policy for calling economic interruptions, such that interruptions will be called for in far more hours. Nucor believes that the effect of the Companies' new approach will be to convert the Companies' interruptible rates into *de facto* hourly real-time pricing rates for most hours. Nucor alleges that the abandonment of the 2001 policy violates the statute because the Companies are required to continue the "provisions, terms, and conditions" of the most recent SSO. OMA agrees with Nucor's arguments on this issue. Similarly, IEU-Ohio requests that the Commission provide guidance to the Companies on how they should address the consequences of the end to any reasonable arrangements and urges the Commission to direct the Companies to develop a reasonable transition plan for customers receiving non-firm service. OPAE believes, and the Citizens' Coalition agrees, that the Companies should file energy efficiency and demand response tariffs and immediately convene a collaborative to implement the

programs to meet statutory requirements, and that interruptible tariffs should be extended to achieve demand reduction targets.

(21) In response to Nucor, the Companies acknowledge that they are applying a "newly established internal policy," however, they submit that the interruptible tariffs were not altered as part of this tariff filing. Furthermore, the Companies aver that Nucor's comments are outside the scope of the comments called for in the December 26, 2008, entry, and Nucor mischaracterizes the actions taken by the Companies to administer the existing tariffs. The Companies also state that the recommendations of IEU-Ohio and OPAE are not supported and reiterate issues raised by these parties during the ESP proceedings. The Companies cite Commission and Ohio Supreme Court precedent in support of their position that it was not necessary for them to obtain Commission approval prior to changing their internal operating procedures. See *Elyria Foundry* and *Elyria Foundry v. Pub. Util. Comm. of Ohio*, 118 Ohio St.3d 269 (2008).

(22) The Commission notes that the purpose of our review at this point in time is to determine the applicable SSO and tariff provisions. Nucor's issues seem to go beyond the scope of this review and the proposed tariffs, and extend into the Companies' internal operating procedures. While Nucor may have cause for concern, especially in light of the coincidence that the implementation of the "newly established internal policy" relating to interruptible service happens to correspond with the implementation of the proposed tariffs, this is not the appropriate venue for the Commission's review of this issue. If Nucor believes that the Companies' internal policies have caused or will cause the tariffs to be implemented unlawfully, or if Nucor has a specific complaint with the buy through prices that have been or will be charged, Nucor should file a complaint case setting forth the specific facts and circumstances. Nonetheless, the Commission notes that the Companies should be implementing their tariffs within the spirit of the law. Section 4928.143(C)(2)(b), Revised Code, requires the continuation of the provisions, terms, and conditions of the most recent SSO if the Companies terminate their ESP application. To that end, the Companies should be continuing all provisions, terms, and conditions of their RCP,

which include the rate continuity and rate certainty established by the RCP. Any deviations from the general parameters of the RCP and the current state of the industry, without specific justifications in the RCP, tariffs, or law, that has a significant affect on customers may violate the spirit of the law. Similarly, the Commission believes that our review in this order is not the appropriate forum for consideration of the reasonable arrangements or the energy efficiency and demand response issues raised by various parties.

Miscellaneous Comments

(23) In its comments, IEU-Ohio urges the Commission to require the Companies to pursue compliance with the portfolio obligations set forth in SB 221. In addition, OPAE believes the Companies should be required to develop a short-term procurement strategy, commit to conducting an integrated resource plan, and implement a longer-term portfolio procurement plan. The Companies state that these comments by IEU-Ohio and OPAE have nothing to do with this proposed tariff filing.

OCEA requests that the Companies provide OCC with the response to the December 31, 2008, RFP and that the bid prices submitted during the auction be made available to the public. According to OCEA, it is in the public interest that access to this information be provided to ensure that the auction was conducted properly and that there is no abuse of market power by the Companies' affiliate that bid into the auction. IEU-Ohio agrees that additional information, subject to confidentiality, should be provided to explain how the bidding results were assembled to arrive at the retail rates. The Companies point out that the information request by these parties will be provided in an appropriate proceeding considering the recovery of the incurred purchase power costs consistent with the confidentiality requirements of the RFP process.

As we stated previously, the purpose of our review as this time is to consider the Companies' tariff filing. Therefore, we agree with the Companies that it would not be appropriate to consider the substance of these comments within the context of this order.

(24) Pursuant to Section 4928.143(C)(2)(b), Revised Code, until a subsequent SSO is authorized by the Commission in accordance with Section 4928.142 or Section 4928.143, Revised Code, the Companies' SSO in effect on December 31, 2008, shall continue. Therefore, the Commission finds that, consistent with our conclusions in this order, the Companies' SSO provisions, terms, and conditions, which are contained in the Companies' RCP and the related tariff schedules in effect on December 31, 2008, should continue from January 1, 2009, until such time as the Commission approves new SSO rates in accordance with Section 4928.142 or Section 4928.143, Revised Code.

(25) The Commission finds that the Companies should file final revised tariffs consistent with this finding and order by January 12, 2009. In accordance with our findings in this order, these tariffs should reflect the termination of the RTCs for OE and TE as of December 31, 2008, as well as the FRMs and the RTCO Riders for all three companies. Accordingly, the Commission finds that, by operation of law, the revised tariffs shall be approved effective January 1, 2009, on a services rendered basis.

It is, therefore,

ORDERED, That the Companies' December 22, 2008, tariff filing, as modified by this finding and order, should be approved as set forth in findings (24) and (25). It is, further,

ORDERED, That the Companies be authorized to file by January 12, 2009, in final form four complete copies of tariffs consistent with this finding and order, and to cancel and withdraw their superseded tariffs. The Companies shall file one copy in this case docket and one copy in each company's TRF docket (or may make such filing electronically, as directed in Case No. 06-900-AU-WVR). The remaining two copies shall be designated for distribution to Staff. It is, further,

ORDERED, That the effective date of the new tariffs shall be January 1, 2009, and the new tariffs shall be effective for services rendered on or after the effective date. It is, further,

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

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

THE PUBLIC UTILITIES COMMISSION OF OHIO

Alan R. Schriber, Chairman

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Entered in the Journal

JAN 07 2008

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