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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 Approval of Ride FUEL and Related Accounting Authority	)	**Case Nos. 09-21-EL-ATA** **09-22-EL-AEM** **09-23-EL-AAM**

OHIO EDISON COMPANY, THE CLEVELAND ELECTRIC ILLUMINATING COMPANY, AND THE TOLEDO EDISON COMPANY'S MEMORANDUM CONTRA TO THE MOTION TO DISMISS AND, IN THE ALTERNATIVE, MOTION FOR EXPEDITED DISCOVERY AND MOTION TO SET THE MATTER FOR HEARING FILED BY THE OHIO CONSUMER AND ENVIRONMENTAL ADVOCATES

I. INTRODUCTION

The Ohio Consumer and Environmental Advocates ("OCEA") seek dismissal of the Application for Rider FUEL filed by Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company (collectively, the "Companies") or, in the alternative, establishment of an expedited schedule to address the issues raised in the Application. Because the Commission approved Rider FUEL by Finding and Order issued January 14, 2009 (the "January 14 Order"), the Motion to Dismiss effectively has been denied and, regardless, lacks a sound legal basis. In particular, although OCEA claims that approval of Rider FUEL is not permitted under R.C. Chapter 4928, the Companies' Application explained in detail why Rider FUEL is mandated by both state and federal law so as to permit the Companies to recover their costs of fulfilling their Provider of Last Resort ("POLR") statutory obligation. *See* Application at ¶¶ 1, 25-37. Importantly, while the Commission's January 14 Order approving Rider FUEL was well within the authority granted to the Commission by R.C. §

4928.143(C)(2)(b) and R.C. § 4909.16,[1] such approval also was and is required under the federal filed rate doctrine. Application at ¶¶ 19-27; *Mississippi Power & Light Co. v. Mississippi ex rel. Moore*, 487 U.S. 354, 372 (1988); *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953, 963 (1986). Because OCEA's Motion asks the Commission to reject both controlling Ohio law and the filed rate doctrine, it should be dismissed.

Moreover, as explained below, OCEA's procedural request is overbroad, confused and now largely rendered moot by the January 14 Order. The expansive and open-ended review and Staff investigation proposed by OCEA is inappropriate and unreasonable here, and OCEA lacks any statutory foundation upon which to seek such a review. Nevertheless, although not required by statute, the Commission's January 14, 2009 Order did instruct the Companies to provide information regarding the wholesale transactions at issue. The Companies have proposed that the Commission's review follow standard practice in presuming prudence but allowing interested parties, including the OCEA, to attempt to make a case why the wholesale transactions were imprudent.[2] Thus, the procedural aspects of OCEA's Motion should be denied.

II. LAW and ARGUMENT

A. OCEA's Request that the Commission Not Consider the Companies' Application Is Now Moot.

The first part of OCEA's motion seeks a dismissal of the Companies' Application on the ground that the Commission lacks statutory authority to approve a surcharge to recover purchased power costs. However, the Commission determined in the January 14 Order that it was required to examine the Companies' Application, and it then proceeded to approve that

[1] As set out in the Companies' Application for Rehearing filed on January 26, 2009, the January 14 Order approving Rider FUEL included unreasonable and unlawful provisions relating to, among other things, deferrals and a confiscation review. Nevertheless, the Commission's approval of Rider FUEL itself was clearly authorized by Ohio law.

[2] *See* Motion for Extension of Time and to Apply Procedural Precedent filed January 23, 2009.

Application. January 14 Order at ¶¶ 9-10. The Commission acted reasonably and lawfully in rejected OCEA's arguments and approving Rider FUEL.

B. The Commission Acted Lawfully in Authorizing the Companies to Recover their Purchased Power Costs.

OCEA argues that the Application should be dismissed because the Commission lacks authority under R.C. § 4928.143(C)(2)(b) to approve the Companies' recovery of their purchased power costs as "fuel costs." Motion at p. 3. Yet OCEA fails to even attempt to distinguish the long and consistent history in Ohio of including purchased power costs within the meaning of fuel costs. *See, e.g., Office of Consumers' Counsel v. Pub. Util. Comm.*, 56 Ohio St. 2d 319, 322-24 (1978) (affirming a Commission order which authorized recovery of purchased power costs as fuel costs); *Office of Consumers' Counsel v. Pub. Util. Comm.*, 57 Ohio St. 2d 78, 80, 84-85 (1979) (affirming Commission order authorizing recovery of demand costs associated with purchased power as fuel costs). Because OCEA agrees with the Commission's prior determination that R.C. § 4928.143(C)(2)(b) is applicable here, OCEA has no logical or legal basis for objecting to the Commission's allowance of the Companies' fuel cost recovery.

OCEA also errs by relying upon the Commission's January 7, 2009 Finding and Order in Case No. 08-935-EL-SSO (the "January 7 Order") – which OCEA calls the "Interim Rate Order." In that Finding and Order, the Commission determined that R.C. § 4928.143(C)(2)(b) "defines the applicable SSO that will be in effect until a subsequent ESP or MRO is authorized." January 7 Order at p. 5. Although the Companies have objected to the Commission's direction in the January 7 Order to terminate selected provisions of the Companies' existing SSO, the Commission made clear in the January 7 Order that the Companies were entitled to recover their purchased power costs as expressly provided by R.C. § 4928.143(C)(2)(b). Indeed, in paragraph 18 of that order the Commission pointed specifically to the fuel cost recovery provisions of R.C.

§ 4928.143(C)(2)(b) as available to the Companies. January 7 Order at 9. OCEA's claim to the contrary is belied by the plain language of the applicable statute and of the Commission's January 7 Order.

OCEA also errs by ascribing to the General Assembly an intent to narrowly define "fuel costs" as used in R.C. § 4928.143(C)(2)(b) in a manner that is contrary to prior use and good sense. The General Assembly conducted extensive hearings on S.B. 221 and was fully aware that the Companies did not own generating facilities while other electric distribution utilities did. Thus, the General Assembly used a broad term in R.C. § 4928.143(C)(2)(b) – fuel costs – that could be applied by the Commission to the different circumstances presented by different electric distribution utilities. The General Assembly can be presumed to understand in selecting this term that the Commission, the Ohio Supreme Court and the General Assembly itself all have a long history of including purchased power costs within the scope of "fuel costs."[3] Thus, contrary to OCEA's argument, the General Assembly clearly intended that "fuel costs" as referenced in R.C. § 4928.143(C)(2)(b) includes purchased power costs.[4]

OCEA also argues that, if R.C. § 4928.141(A) is the applicable provision pursuant to which the Companies' existing rate plan continues in effect, then adjustments for newly-incurred purchased power costs are not permitted. Motion at p. 4-5. This ignores, as set forth in the

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[3] *See, e.g.*, R.C. §§ 4905.01(G), 4905.69 and 4909.159, repealed by S.B. 3 (eff. 1-1-2001); *Industrial Energy Consumers of Ohio Power Co. v. Pub. Util. Comm.*, 68 Ohio St. 3d 559, 565 (1994) (noting that General Assembly enacted R.C. 4909.159 in 1980 specifically to include the recovery of purchased power costs as fuel costs); *In re Ohio Edison Co.*, Case No. 93-04-EL-EFC, 1994 WL 82991, *15 (Feb 24, 1994) (rejecting OCC's argument, as contrary to legislative intent, that purchased power costs should not be included within fuel costs).

[4] OCEA also mistakenly claims that the inclusion of fuel costs in R.C. § 4928.143(C)(2)(b) necessarily excludes purchased power costs under the doctrine of *expressio unius est exclusio alterius*. OCEA Motion at p. 3. However, by positing that the inclusion of one thing excludes another, one must first determine what the General Assembly intended to include. Indeed, this doctrine is to be given no consideration when its application contravenes legislative intent. *Wachendorf v. Shaver*, 149 Ohio St. 231 (1948), syll. ¶ 3. As discussed above, because the General Assembly has a long history of including purchased power costs within the meaning of "fuel costs," this doctrine has no applicability here.

Application, that the Commission nevertheless is required by state and federal law to allow electric distribution utilities to recover their wholesale power costs incurred in fulfilling the POLR obligation. *See* Application ¶¶ 1, 25-27. This also ignores that the Commission is authorized by R.C. § 4909.16 to grant interim emergency relief to the Companies. *See* Application ¶¶ 28-37. OCEA completely ignores in its Motion the applicability of R.C. § 4909.16, and it essentially accepts that the filed rate doctrine applies by encouraging the Commission to conduct a prudence review under *Pike County Light and Power Co. v. Pennsylvania Pub. Util. Comm'n*, 465 A.2d 735 (Pa. Commw. Ct. 1983), a decision viewed as a "limited exception to the filed rate doctrine."[5] OCEA's conflicting positions lack merit and should be rejected.

R.C. § 4928.141(A)'s requirement to continue an existing rate plan cannot be applied in isolation but must be interpreted *in pari materia* with other legal requirements, both state and federal. Indeed, had the Commission continued the Companies' existing rate plan under R.C. § 4928.141(A), including Regulatory Transition Charges and fuel riders, the Companies would remain entitled under the filed rate doctrine to recover through Rider FUEL their purchased power costs that exceed their actual generation-related revenues. The Commission acted reasonably and lawfully in approving Rider FUEL, and OCEA provides the Commission with no lawful basis for reversing that action.

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[5] *Monongahela Power Co. v. Schriber*, 322 F. Supp. 2d 902, 920 (S.D. Ohio 2004). It should be recognized that while the filed rate doctrine has been applied by the United States Supreme Court (*Mississippi Power & Light Co., supra; Nantahala Power & Light Co., supra*), the rule arising from *Pike County* has not. The scope of *Pike County*, of course, should be considered in light of its facts, *i.e.* a direct wholesale power transaction between a utility and its affiliate in circumstances where concerns of affiliate abuse might be inferred.

C. OCEA's Request for a Hearing and Expedited Discovery Is Misdirected, Confused, and Largely Moot.

OCEA seeks a Commission proceeding in which Staff and parties would have an opportunity to review the RFP process used by the Companies to acquire least-cost power. Even assuming, *arguendo*, a narrowly-focused review of the Companies' purchasing decisions may be merited using the procedure outlined by the Companies in their Motion for Extension of Time and to Apply Procedural Precedent filed January 23, 2009, the OCEA's ill-defined procedural proposals should be rejected. In particular, there is no basis in law or reason to expansively review the "openness and accountability" of the RFP process or to launch a Staff investigation of the RFP process. *See* OCEA Motion at p. 5-6.

Although OCEA appears to argue that expansive proceedings somehow are required under the MRO or ESP provisions of R.C. § 4928.142 or R.C. § 4928.143, respectively (*see* Motion at 6), the Companies and the Commission are left to guess as to why this might be the case. Apparently OCEA is misconstruing the Application for approval of Rider FUEL as an application for an MRO or ESP under one of those statutes. However, the Application made clear that the Companies sought approval of Rider FUEL under R.C. § 4928.143(C)(2)(b), R.C. § 4909.16, Ohio Supreme Court precedent authorizing recovery of POLR costs, and the filed rate doctrine, each of which is an independent basis for approval. Because the Companies did not apply for approval of an ESP or MRO in this proceeding, the hearing processes applicable to those types of applications are not applicable here.

Moreover, OCEA's procedural request largely is moot now that the Commission has directed the Companies to submit information in this proceeding sufficient to allow the Commission to review whether the costs incurred in purchasing power were prudently incurred. January 14 Order at ¶ 13. As set forth in the Companies' Motion for Extension of Time and to

Apply Procedural Precedent, the Companies anticipate that this filing could include the Final Post-RFP Report submitted by CRA International, Inc. (the RFP Manager), information that was available to bidders, the RFP Supply Agreement and RFP Frequently Asked Questions. OCEA's request for a hearing will be dealt with in due time by attorney examiner entry, again as directed in paragraph 13 of the January 14 Order.

Thus, the only part of OCEA's Motion left to be resolved by the Commission is OCEA's request for a ten-day response to all data requests. While the Companies assume the timing for the discovery process will be established in the procedural Entry directed by the January 14 Order, they would have no objection to that Entry establishing a requirement, applicable to all parties, shortening the time period for response to discovery requests to 10 days with email service of the responses.

III. Conclusion

The Commission was correct, both legally and factually, to approve the Companies' Rider FUEL. The Commission also has taken steps to put into place a process that, as modified to incorporate adjustments requested by the Companies in recent filings, would provide for a reasonable and limited review of the Companies' purchased power transactions. Therefore, the Commission should deny OCEA's motion in its entirety.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A copy of the foregoing was served upon the following via regular U.S. Mail, this 29th day of January, 2009. A copy was also served via electronic mail on those parties with email addresses listed below.

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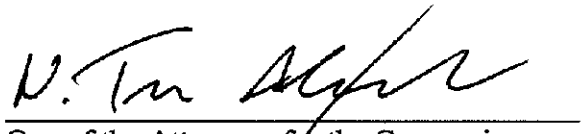

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