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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**

OHIO EDISON COMPANY, THE CLEVELAND ELECTRIC ILLUMINATING COMPANY AND THE TOLEDO EDISON COMPANY'S MEMORANDUM CONTRA NOPEC AND NOAC APPLICATION FOR REHEARING

Pursuant to Section 4901-1-35(B) of the Ohio Administrative Code, Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company (collectively, "Companies") submit their Memorandum Contra Northeast Ohio Public Energy Council ("NOPEC") and Northwest Ohio Aggregation Coalition ("NOAC") (collectively "NOPEC/NOAC") Application for Rehearing of the Commission's January 7, 2009 Finding and Order and January 14, 2009 Entry.

I. INTRODUCTION

NOPEC/NOAC primarily address three issues in their Application for Rehearing. First, they argue that Rider FUEL, as approved by the Commission in Case No. 09-21-EL-ATA et seq., must be bypassable for customers during the period such customers take retail electric generation service from a competitive retail electric service ("CRES") provider. As the Commission knows, the Companies proposed that Rider FUEL be

bypassable as part of their Application in 09-21-EL-ATA. The tariffs in place for Rider FUEL reflect that it is avoidable by shopping customers. Therefore, NOPEC/NOAC's first argument is moot.

Second, NOPEC/NOAC argue that the Commission must change one tariff provision of the Companies' existing standard service offer ("SSO"). They do so despite the language in R.C. 4928.141(A) and R.C. 4928.143(C)(2)(b), which prohibit such a change.

Third, NOPEC/NOAC argues that the Commission should direct the Companies to file another electric security plan ("ESP"). Although no such statutory authority exists for the Commission to do so, with its January 29, 2009 Entry, the Commission has directed its Staff to develop a proposal in this proceeding and has scheduled a conference for February 5, 2009 to allow the parties to consider Staff's proposal. Thus, the Commission had effectively continued the ESP process, as NOPEC/NOAC desire.

Accordingly, NOPEC/NOAC's first and third requests have been, in effect, granted: Rider FUEL is bypassable for shopping customers, and the Commission is taking steps to continue negotiations regarding an ESP for the Companies. No further action need be taken on these matters. Because the remaining request is unlawful on its face, the Companies' urge the Commission to deny NOPEC/NOAC's Application for Rehearing.[1]

NOPEC/NOAC also request expedited treatment of their Application. This rings a little hollow, especially since they waited over two weeks from the issuance of the

[1] Much of NOPEC/NOAC's Application for Rehearing is devoted to a discussion of Rider FUEL. The Commission approved a recovery mechanism for costs through Rider FUEL in Case No. 09-21-EL-ATA et seq. on January 14, 2009. Rider FUEL was not substantively dealt with by the Commission in the instant proceeding. Therefore, consideration of Rider FUEL is beyond the scope of this proceeding and the issue should not be addressed by the Commission in an Entry on Rehearing.

January 7 Order and over a week from the issuance of the January 14 Entry to file their Application for Rehearing. Nothing in the January 7 Order or the January 14 Entry prevents customers from shopping or precludes NOPEC/NOAC from contracting with a supplier to serve its member communities.

II. ARGUMENT

A. Rider FUEL is Bypassable for Customers During the Period that They Take Retail Generation Service from a CRES Provider.

The Companies proposed as part of their Application in Case No. 09-21-EL-ATA et seq. that the Rider FUEL charges would be bypassable, meaning that they would be avoidable for shopping customers. *Application, Attachment A-1, A-2, and A-3*, Case No. 09-21-EL-ATA et seq. Stated in the vernacular of the Application for Rehearing, Rider FUEL are to be added to the shopping credit for shopping customers. Rider FUEL tariff sheets approved by the Commission included the following language regarding the applicability of the rider: "This rider is avoidable for customers who shop with a certified supplier." *Application, Attachment A-1, A-2, and A-3*, Case No. 09-21-EL-ATA et seq.

The Application for Rehearing goes into great depth on this issue, researching historic orders of the Commission and testimony to show that Rider FUEL should be avoidable by shopping customers. All of this is unnecessary and unfortunately, in certain instances, misleading. Rider FUEL is avoidable by shopping customers, as proposed by the Companies in their application, therefore no further discussion is necessary on that point. In fact, it is unclear why it was raised as an issue in the Application for Rehearing

at all. But so the record is clear, certain incorrect assumptions or statements that were made repeatedly in the Application for Rehearing must be addressed.

To begin, recognizing the statutory requirement to continue the most current SSO, the Commission correctly determined that the shopping credit structure, including the shopping credit caps, must remain in place in its entirety until an ESP or MRO is in place. *January 7 Order*, Case No. 08-935-EL-SSO, pp. 9-10. The basis for this finding was that the shopping credit structure, including shopping credit caps, must be continued in their current form because they are part of the Companies' existing SSO. *Id.* at 9. Therefore, as the Commission previously determined, changing the shopping credit structure, including the shopping credit caps, would be unlawful.

The Application for Rehearing states that a primary basis for making Rider FUEL avoidable (actually why it must increase the shopping credit and shopping credit cap) is that it is an increase in the generation rate (Application for Rehearing, p. 6) as part of the Companies' rate plan (Application for Rehearing, p. 13). NOPEC/NOAC's conclusion in this regard is wrong on two counts. First, Rider FUEL is not an increase to a base generation rate. It is a new service that was proposed in a different case from the rate plan and implemented as a rider to base rates. No base generation rates were changed as a result of the implementation of Rider FUEL. Therefore, any conclusions drawn by NOPEC/NOAC on the basis that it is a change to a generation rate are unreliable.

Second, Rider FUEL is not part of the Companies' most recent SSO, as that term is used in R.C. 4928.143(C)(2)(b), which states in pertinent part that:

> "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."

By definition, the statute allows recovery of fuel costs that are not part of the most recent SSO. Rider FUEL was approved under the statutory language addressing increases or decreases in fuel costs different than those contained in the Companies' most recent SSO. These were new costs that were incurred or expected to be incurred by the Companies during the first quarter of 2009, long after the Companies' RSP and RCP plans were approved.

NOPEC/NOAC's request that the shopping credit and shopping credit cap be increased, at least by 6.98 cents/kWh to reflect the amount the Companies are paying as a result of the request for proposal competitive bid process conducted by the Companies at the end of 2008. ("RFP CBP"). Application for Rehearing, p. 20. This statement displays the depth of NOPEC/NOAC's misunderstanding. Most basically, 6.98 cents isn't the wholesale price. That is the retail price based upon the outcome of the RFP CBP, not the amount that the Companies pay to the winning bidders.

More importantly, NOPEC/NOAC wrongly assumes that all customers are paying a flat 6.98 cents/kWh charge for generation. They also ignore the fact that the majority of this amount continues to be collected through existing legacy generation rates. Rider FUEL collects only a fraction of the cost the Companies are incurring for wholesale power. The bulk of the retail generation charges continue to be allocated to customers under the existing legacy generation rate structure. Under this structure, generation charges by rate schedule vary widely: some customers may pay as little as 4 cents or less; some may pay 10 cents or more for retail generation. This variance in the level of

charges results from historic rate designs and the highly inconsistent results from the statutory unbundling process required by S.B. 3. As a result, some customers pay higher generation rates and some pay lower generation rates, even negative in certain circumstances. To blindly change the Companies' existing SSO and increase the shopping credit to at least 7 cents for all customers regardless of what customers pay for generation, and without regard for the continuing generation pricing relationships that underlie the shopping credit structure, has no basis in law or fact.

In summary, the Companies' SSO was not "updated" through the implementation of Rider FUEL, as alleged by NOPEC/NOAC. NOPEC/NOAC's proposal to "update" the shopping credit is wrong, and unlawful. NOPEC/NOAC needed only to look at the Rider FUEL tariff language that was in effect on the day they filed their Application for Rehearing to know that Rider FUEL is avoidable by shopping customers.

B. NOPEC/NOAC Request that Commission Change the Companies' Most Recent SSO is Unlawful and Must Be Rejected.

NOPEC/NOAC build on their misguided views about Rider FUEL, to further conclude that the Commission should change the Companies' Shopping Credit Rider tariff. NOPEC/NOAC's logic appears to be as follows: since Rider FUEL was part of the Companies' most recent SSO, the SSO was "updated" through the implementation of Rider FUEL. Thus, NOPEC/NOAC conclude, it is now perfectly acceptable to change the Shopping Credit Rider tariff. This is wrong at every turn. As demonstrated above, Rider FUEL is not part of the Companies' SSO in terms of R.C. 4928.143(C)(2)(b). Implementation of Rider FUEL did not alter a term or provision of the Companies' most recent SSO; it was authorized under different statutory language. Therefore, as the

Commission has already determined, it would be unlawful to modify provisions of the Companies' shopping credit structure selectively. January 7 Order, p. 9.

In contrast with Rider FUEL, the Shopping Credit Rider is actually part of the Companies' most recent SSO. Under that tariff, in order for the rate stabilization charge, or a portion thereof, to be added to the shopping credit, notice had to be provided by CRES providers by designated dates, all of which have long since expired. The latest of these dates was December 31, 2006. Therefore, this is not a situation where a tariff contained express language that a charge ended on December 31, 2008, which then would continue under the authority of R.C. 4928.141(A) or R.C. 4928.143(C)(2)(b). The inability of shopping customers to add RSCs to Shopping Credits was fixed two years ago. This continues under the most recent SSO and must continue under the relevant provisions of S.B. 221.

Further, both the language in the RSP/RCP, and the Shopping Credit Rider tariff that was implemented as a result thereof, make clear that even if notice had been given on December 31, 2006, the last day that the RSC could be added to the shopping credit based upon such notice was December 31, 2008. Based upon the Commission's prior decisions related to terminating the RTC charge, the dates in the Shopping Credit Rider tariff cannot be extended.

The Commission determined, in the case of RTC in both the January 7 Order and January 9 Entry, that even though the tariff under which RTC was charged had no termination date associated with it, that RTC must terminate on December 31, 2008 because, in the Commission's view, the RCP set forth a specific termination date of

December 31, 2008 for RTC for OE and TE.[2] Clearly, if the RTC charge is not lawfully permitted to continue beyond the end of 2008 under the authority of S.B. 221, then the Shopping Credit Rider cannot be changed so that, as amended, it springs back to life under new terms and conditions in 2009. For the Commission to grant NOPEC/NOAC's request to extend the Shopping Credit Rider under different terms and conditions than those contained in the most recent SSO would be unreasonably inconsistent with their RTC ruling in their January 7 Order and January 14 Entry, unduly prejudicial to the Companies as provisions of their most recent SSO are being arbitrarily continued or terminated, and unlawful as violating both R.C. 4928.141(A) and R.C. 4928.143(C)(2)(b). Under no construct can the Companies' rate plan be said to "continue" where RTC has been terminated, and the terms and provisions of the Shopping Credit Rider have been changed and then put back into effect. NOPEC/NOAC's request should be denied.

C. The Commission Lacks the Authority to Order the Companies to File an ESP.

NOPEC/NOAC argue that the Commission has the authority to order an electric utility to file a subsequent ESP. In making this argument, they rely solely on selected language from R.C. 4928.141(A). But this statute states that only an SSO authorized in accordance with section R.C. 4928.142 or R.C. 4928.143 shall serve as a utility's SSO. NOPEC/NOAC ignore the next provision of the same statutory section that states: "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."

[2] The issue of whether the RCP set forth such a date is an issue pending in the Companies' Application for Rehearing pending in this proceeding.

NOPEC/NOAC's conclusion also ignores the language of R.C. 4928.143(C)(2)(b) that states: "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."

The Companies have fully complied with every aspect of the requirements of S.B. 221 through the filing of its ESP and MRO, notwithstanding NOPEC/NOAC's repeated and unfounded allegations to the contrary. NOPEC/NOAC's conclusions appear to be based on only a partial reading of the statute, and an apparent belief that the Companies should be denied the ability to exercise their statutory rights as expressly set forth in S.B. 221.

III. CONCLUSION

Accordingly, for all of the reasons set forth above, the Companies respectfully request the Commission to deny NOPEC/NOAC's Application for Rehearing.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *Application for Rehearing* was served upon the following parties of record this 2nd day of February, 2009, via electronic transmission or first class mail, postage prepaid.

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