FILE

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 APPLICATION FOR REHEARING FILED BY THE OHIO CONSUMER AND ENVIRONMENTAL ADVOCATES

I. INTRODUCTION

The Ohio Consumer and Environmental Advocates ("OCEA") request rehearing of the Commission's Finding and Order issued January 14, 2009 (the "January 14 Order"), which approved the Application for Rider FUEL filed by Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company ("OE", "CEI", "TE", respectively, and collectively, the "Companies"). The five arguments made by OCEA lack merit and, in particular, demonstrate a lack of understanding of both Ohio and federal law that necessitates their rejection:

- Fuel Costs – OCEA claims in its first argument that the Commission exceeded its authority in approving the Companies' recovery of their purchased power costs as fuel costs. Ample authority for recovery is found in R.C. § 4928.143(C)(2)(b), R.C. § 4909.16, Ohio Supreme Court precedent authorizing recovery of Provider of Last Report ("POLR") costs, and the filed rate doctrine.

- Creature of Statute – OCEA's second argument – that the Commission cannot violate Ohio law based upon a constitutional interpretation – misses the mark. The January 14 Order is consistent with and authorized by Ohio law while remaining faithful to constitutional mandates.
- Deferrals – OCEA's third argument is that the Commission's directive to CEI to defer a portion of its wholesale purchased power costs was unlawful and unreasonable. The Commission's *nunc pro tunc* entry issued January 29, 2009, clarified that CEI is authorized to collect now through Rider FUEL its purchased power costs less its unbundled generation revenues (including net RTC revenues). The difference between the purchased power cost and the sum of Rider Fuel and other generation revenues, minus net RTC revenues, is then deferred.
- Refunds – OCEA's fourth argument requests clarification that Rider FUEL is "subject to refund" to the extent the Commission determines in this proceeding that the Companies' purchased power transactions were imprudent. This request ignores that Rider FUEL is subject to reconciliation.
- New SSO – OCEA's fifth and last argument is that the Commission somehow erred by not requiring the Companies to submit a new SSO for the Commission's approval. Ohio law clearly does not countenance such an order, particularly while the Companies' MRO Application remains pending following the Commission's January 21, 2009 entry granting rehearing in Case No. 08-936-EL-SSO. In any event, this issue is essentially superseded in light of the Commission's January 29, 2009 Entry issued in Case No. 08-935-EL-SSO, which encourages the Companies to consider a new Staff proposal distributed on February 2, 2009.

Because OCEA's Application for Rehearing is contrary to law and misconstrues the January 14 Order, the Commission should deny it in its entirety.

II. ARGUMENT

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

OCEA states in its first assignment of error that, until an ESP or MRO is approved and implemented, the Commission must continue the "default pricing provisions" in the Companies' existing rate plan without any adjustment, except that (1) transition costs must be excluded, and (2) increases in the cost of fuel used to generate electricity, but no other fuel costs, can be recovered. Rehearing App. at pp. 2-6. OCEA's argument in support of its first assignment of error focuses only on the second point.[1] This argument should be rejected by the Commission because it applies an unreasonably strained and narrow interpretation of controlling law.

The Commission's approval of the Companies' fuel costs in the form of purchased power costs was well within the authority granted to the Commission by R.C. § 4928.143(C)(2)(b) and R.C. § 4909.16, and further it was required by the federal filed rate doctrine as well as Ohio Supreme Court precedent governing recovery of POLR costs.[2] *See* 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); *Constellation*

[1] The Companies previously have demonstrated the error of the first point in their Application for Rehearing of the Commission's January 7, 2009 Finding and Order in Case No. 08-935-EL-SSO, as well as in their Memorandum Contra to OCEA's Motion to Dismiss filed January 30, 2009 in the instant case.

[2] The Companies' Application described bases, in addition to R.C. § 4928.143(C)(2)(b), upon which the rationale for Rider FUEL rested, including the provisions of R.C. § 4909.16 as amplified by the filed rate doctrine. *See* Application at ¶¶ 28-37; *Public Service Co. of New Hampshire v. Patch*, 87 F. Supp. 2d 57, 64-65 (D. N.H. 2000) ("*Patch VII*") (ordering state commission to allow electric distribution utility to pass through its wholesale costs to its retail customers). Because OCEA fails to challenge these other independent bases for the Commission's approval of Rider FUEL, it has not demonstrated prejudice.

NewEnergy, Inc. v. Pub. Util. Comm., 104 Ohio St. 3d 530, 2004-Ohio-6767, ¶ 39-40 (electric distribution utility is entitled to recover costs associated with fulfilling its POLR responsibility). Indeed, OCEA's attempt to limit the meaning of "fuel costs" as this term is used in R.C. § 4928.143(C)(2)(b) to one specific type of fuel costs is unreasonable. By contrasting the General Assembly's specific listing of types of fuel costs in R.C. § 4928.143(B)(2)(a) and R.C. § 4928.142(D) with the General Assembly's use of the general term "fuel costs" in R.C. § 4928.143(C)(2)(b), OCEA effectively proves this point.

When defining provisions that may be included in an ESP, the General Assembly provided in R.C. § 4928.143(B)(2)(a) that an ESP may include automatic recovery of several types of fuel costs:

> Automatic recovery of any of the following costs of the electric distribution utility, provided the cost is prudently incurred: **the cost of fuel used to generate the electricity supplied under the offer; the cost of purchased power supplied under the offer,** including the cost of energy and capacity, and including purchased power acquired from an affiliate; the cost of emission allowances; and the cost of federally mandated carbon or energy taxes.

(Emphasis added). If the General Assembly had intended specifically to limit the adjustments allowed by R.C. § 4928.143(C)(2)(b) to the "cost of fuel used by generation facilities to generate electricity" – which is what OCEA argues here – the General Assembly certainly knew how to be this specific. Instead, the General Assembly lists in Division (B)(2)(a) the various forms of third-party costs that prudently can be incurred by electric distribution utilities in fulfilling their POLR obligation and then, in Division (C)(2)(b), the General Assembly uses the known and accepted shorthand for those same costs – "fuel costs." Thus, R.C. § 4928.143(C)(2)(b) provides authority to the Commission to approve recovery of purchased power costs as fuel costs.

This interpretation of the term "fuel costs" as used in R.C. § 4928.143(C)(2)(b) finds support in 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). 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." *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). 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.

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*. Rehearing App. at p. 5. However, by positing that the inclusion of one thing excludes another, one must first determine what the General Assembly intended to include. Here, the

General Assembly consistently has intended that "fuel costs" includes purchased power costs, so there is no "other" to exclude. This doctrine is to be given no consideration when its application contravenes legislative intent. *Wachendorf v. Shaver*, 149 Ohio St. 231 (1948), syll. ¶ 3. Because the General Assembly has a long history of including purchased power costs within the meaning of "fuel costs," it has no applicability here.

In striving to invent legal support for its argument, OCEA misrepresents the scope of the Commission's January 7, 2009 Finding and Order in Case No. 08-935-EL-SSO (the "January 7 Order"). *See* Rehearing App. at pp. 5-6. OCEA claims that the January 7 Order was an irrevocable decision concerning the Companies' right to recover its purchased power costs, but that order addressed a separate issue – the continuation or lack thereof of the Companies' existing rate plan. 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 p. 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.[3]

OCEA's first argument provides the Commission with no lawful basis for rehearing the January 14 Order.

[3] OCEA's intemperate comment that the Companies are attempting to evade regulation in order to collect more revenues from captive customers is off the mark. Rehearing App. at p. 6. The Companies are merely seeking to recover actual costs that they are required by Ohio law to incur in order to fulfill their POLR obligation.

B. The Commission Acted Reasonably and Lawfully in Fulfilling Its Statutory Authority Consistent with State and Federal Law.

OCEA mistakenly claims that the Commission approved Rider FUEL after determining that the "default rate provisions" in R.C. § 4928.143 were unconstitutional. Rehearing App. at pp. 6-7. As explained above, this disregards that the Commission had multiple, independent statutory bases upon which to rely in approving Rider FUEL. More importantly, OCEA's argument also demonstrates a complete lack of understanding of how the Commission is entrusted with carrying out its statutory responsibilities in a manner consistent with the Ohio and United States Constitutions.

OCEA notes that the Commission lacks authority to declare a statute unconstitutional. Rehearing App. at p. 7. Yet nowhere in the January 14 Order did the Commission declare a statute to be unconstitutional. Instead, in issuing the January 14 Order, the Commission exercised its statutory authority under R.C. § 4928.143(C)(2)(b) and R.C. § 4909.16 in a manner consistent with its constitutional obligations as expressed in the filed rate doctrine. *See Entergy La., Inc. v. La. PSC*, 539 U.S. 39, 47 (2003) (filed rate doctrine requires that rates for wholesale power sales are given binding effect by state utility commissions as a matter of federal preemption through the Supremacy Clause of the U.S. Constitution). The Commission must consider constitutional issues when necessary in determining how to apply state regulatory principles. *See Ohio Consumers' Counsel v. Pub. Util. Comm.*, 111 Ohio St. 3d 384, 393, 2006-Ohio-5853, ¶ 44 ("A PUCO order is unlawful if it is inconsistent with relevant statutes *or with the state or federal constitutions*" (emphasis added)); *see also In re Columbia Gas of Ohio, Inc.*, Case Nos. 07-478-GA-UNC, 07-237-GA-AAM, Opinion and Order at p. 14 (April 9, 2008). In this case, the filed rate doctrine clearly mandates how the Commission should exercise its authority, whether under R.C. § 4928.143(C)(2)(b) or R.C. § 4909.16. The Companies' costs

incurred through market-based wholesale purchases are recoverable costs that cannot be denied by limitations imposed at the state level. The Commission's January 14 Order generally[4] is consistent both with the Commission's statutory authority and the filed rate doctrine.

OCEA's description of the Companies' withdrawal of their proposed ESP as an "important feature" to be considered is curious, given that OCEA readily recognizes that the Companies had a clear statutory right to withdraw the proposed ESP. Rehearing App. at pp. 2-3, 7-8. The Companies withdrew the ESP after giving due consideration to and exercising their rights under Ohio law to continue their existing rate plan as well as their rights under Ohio and federal law to recover their purchased power costs. The Companies' December 22, 2008 tariff filing – which was made before the Companies incurred purchased power costs – addressed the former, while this proceeding is intended to address the latter. OCEA notes that the Commission's January 7 Order in Case No. 08-935-EL-SSO did not grant the Companies the rate adjustments at issue in this proceeding, but that order was limited to the first set of rights and specifically noted that the Companies retained the right to recover their fuel costs. January 7 Order at p. 9. The January 7 Order provides no support to OCEA's second argument, which should be denied.

C. OCEA's Objection to the Commission's Deferral of Part of CEI's Wholesale Costs Was Addressed by the Commission's January 29, 2009 *Nunc Pro Tunc* Entry.

OCEA objects that the second paragraph of finding 11 in the January 14 Order is unclear and appears to authorize CEI to recover in deferrals more than the amount necessary for the Companies to recover their cost of purchased power. Rehearing App. at pp. 8-9. The

[4] As demonstrated in the Companies' Application for Rehearing, the Commission fell short of its responsibilities under Ohio law and the filed rate doctrine by not allowing the Companies current recovery of *all* of their costs directly related to purchasing wholesale power. *See* Application for Rehearing filed January 26, 2009, at pp. 17-18.

Companies shared OCEA's concern that the Commission's finding lacked clarity.[5] Fortunately, the Commission addressed this issue in its January 29, 2009 *Nunc Pro Tunc* Entry.

As originally stated in the January 14 Order, the Commission did not clearly distinguish between the generation-related costs to be recovered through current cash collection and those costs to be deferred for future collection. The January 29 Entry clarified that CEI is authorized to collect now through Rider FUEL its purchased power costs less its unbundled generation revenues, including net RTC revenues. Because of the offset of net RTC revenues, Rider FUEL does not provide current recovery of 100% of CEI's purchased power costs. As a result, CEI is authorized to defer that part of its purchased power costs that exceeds the sum of the Rider FUEL amount and generation-related revenues, minus net RTC revenues. There is no "extra" recovery as assumed by OCEA.

D. OCEA's Request that Refund Language be Added to the January 14 Order Ignores that Rider FUEL is Reconcilable.

OCEA's fourth argument in its Application for Rehearing seeks "subject to refund" language. According to OCEA, this would make clear that the Companies could be required to refund a portion of Rider FUEL to customers to the extent the Commission determines that the Companies imprudently entered into purchased power transactions at the beginning of this year. OCEA's proposal in this regard is unnecessarily redundant and, accordingly, does not present a reasonable basis for rehearing.

The Commission approved Rider FUEL to recover the Companies' "actual, reasonable and prudently incurred purchased power costs." January 14 Order at p. 6. The rider itself already includes a reconciliation mechanism, the operation of which would permit, effectively, any recovered expenses which are later found to be imprudent to be returned to customers. Thus,

[5] See the Companies' Application for Rehearing filed January 26, 2009, at pp. 18-19.

as stated in Rider FUEL, the issue presented by OCEA is subsumed within the fact that the Rider is reconcilable. Accordingly, OCEA has not presented a basis for granting rehearing.

E. The Commission Lacks Authority to Order the Companies to File a New SSO Application.

OCEA's last argument for rehearing is that the Commission erred in not directing the Companies to file a new MRO or ESP for the Commission's consideration. Rehearing App. at pp. 11-12. However, OCEA resorts to more than one misrepresentation in order to support this specious argument. OCEA claims that the Companies have failed to apply to the Commission for approval of an SSO. In fact, the Companies have applied twice to the Commission: once for approval of an ESP in Case No. 08-935-EL-SSO and once for approval of an MRO in Case No. 08-936-EL-SSO. OCEA also claims that the Companies have no application before the Commission to provide an SSO. In fact, the Commission recently granted rehearing to further consider the MRO application and also recently issued an entry in the ESP proceeding asking the Companies and other parties to reconsider a new ESP proposal from Staff. Thus, OCEA's argument for rehearing has no basis in fact.

Moreover, this argument has no basis in law. R.C. § 4928.141 obligated the Companies to apply to the Commission for approval of an ESP or MRO, and they have twice satisfied that statute. Both R.C. § 4928.141 and R.C. § 4928.143(C)(2)(b) establish baseline rates if the Companies and the Commission are unable to agree on an MRO or ESP, subject to adjustment, as should be obvious by now, to allow the Companies to recover their purchased power costs. While proceedings continue on the Companies' initial applications, the Commission lacks statutory authority to compel the Companies to submit a new SSO application for review. Indeed, the Commission appears to recognize this fact in its January 29, 2009 Entry issued in Case No. 08-935-EL-SSO, which encourages the Companies to consider a new Staff proposal

but does not require that the Companies do so. As requested, the Companies will give serious consideration to the Staff proposal.

OCEA's fifth argument fails to provide a basis for rehearing.

III. CONCLUSION

OCEA has failed to demonstrate any legitimate basis for rehearing of the Commission's January 14 Order. Therefore, for the reasons set forth above, the Commission should deny OCEA's Application for Rehearing in its entirety.

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CERTIFICATE OF SERVICE

A copy of the foregoing was served upon the following via regular U.S. Mail, this 5th day of February, 2009. A copy was also served via electronic mail on those parties with email addresses listed below.

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