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 TO THE APPLICATION FOR REHEARING FILED BY THE OHIO CONSUMER AND ENVIRONMENTAL ADVOCATES

I. INTRODUCTION

In its Application for Rehearing, the Ohio Consumer and Environmental Advocates ("OCEA"), repeating many of the arguments that they have made in Case Nos. 09-21-EL-ATA et al., contend that the January 7, 2009 Order in this case was in error for four reasons: (1) the Order improperly allowed the Companies to recover their transition costs; (2) the Order improperly allowed Ohio Edison Company ("OE"), The Cleveland Electric Illuminating Company ("CEI") and The Toledo Edison Company ("TE") (collectively, the "Companies") to recover purchased power costs; (3) the Order improperly failed to modify the Companies' current standard service offer ("SSO") and change tariff provisions relating to Shopping Credits; and (4) the Commission failed to order the Companies to file an application for an SSO under R.C. 4928.143. As it has been demonstrated previously, OCEA's arguments are without merit and its Application should be denied. Because OCEA's arguments are repetitive of the arguments that it made in its Application for Rehearing in Case Nos. 09-21-EL-ATA et al., the

Companies incorporate by reference here the Companies' Memorandum Contra to OCEA's Application for Rehearing in that case.

II. ARGUMENT

A. The Companies Should Be Allowed To Collect Transition Charges.

Although it successfully argued in its Comments that R.C. 4928.143(C)(2)(b) applied upon the Companies' rejection of the Commission's modified ESP, OCEA now argues that R.C. 4928.141(A) should also apply. OCEA contends that 4928.141(A) prohibits transition charges from being recovered in any SSO "under R.C. 4928.142 or 4928.143." Because the Commission's Order established an SSO under R.C. 4928.143(C)(2)(b), according to OCEA, R.C. 4928.141(A) should prohibit transition charges.

There are numerous things wrong with OCEA's argument. First, having labored mightily to argue that R.C. 4928.143(C)(2)(b) – and not R.C. 4928.141 – applied, OCEA cannot now credibly argue that R.C. 4928.141 now applies.

Second, OCEA misapplies R.C. 4929.141(A). The SSO under which the Companies are collecting charges did not arise from R.C. 4928.143. That SSO was in effect before the enactment of S.B. 221. Although the Companies disagree with the Commission's determination that R.C. 4928.143(C)(2)(b) applies, that section only describes what happens if an ESP application is rejected. It does not create an SSO, and did not create the SSO under which the Companies are currently operating.

Third, OCEA's argument construing R.C. 4928.141 ignores 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. It also ignores that the Commission is authorized by R.C. 4909.16 to grant interim emergency relief to the Companies.

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.[1] The Commission acted reasonably and lawfully in approving Rider FUEL, and OCEA provides the Commission with no lawful basis for reversing that action.

B. The Commission Acted Lawfully In Allowing the Companies to Recover Their Purchased Power Costs.

OCEA suggests that by not foreclosing the recovery of purchased power costs, the Commission erred. OCEA's argument fails serious scrutiny. 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. Further, it was required by the federal filed rate doctrine as well as Ohio Supreme Court precedent governing recovery of POLR costs. *See* Application (in Case No. 09-21-EL-ATA et al.) 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 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)

[1] *Monongahela Power Co. v. Schriber*, 322 F.Supp.2d 902, 920 (S.D. Ohio 2004).

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.* (1978), 56 Ohio St. 2d 319, 322-24 (affirming a Commission order which authorized recovery of purchased power costs as fuel costs); *Office of Consumers' Counsel v. Pub. Util. Comm.* (1979), 57 Ohio St. 2d 78, 80, 84-85 (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.* (1994), Ohio St. 3d 559, 565 (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. 6. 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* (1948), 149 Ohio St. 231, syll. ¶ 3. Because the General Assembly has a long history of including purchased power costs within the meaning of "fuel costs," the cited principle has no applicability here.

C. The Companies' Shopping Credit Riders Should Not be Modified.

OCEA appears to support the arguments made by the Northeast Ohio Public Energy Council and the Northwest Ohio Aggregation Coalition (collectively, "NOPEC/NOAC") regarding an alleged need to modify the Companies' Shopping Credit Riders. Rehearing App. at pp. 6-7. In their Application, NOPEC/NOAC contended that Shopping Credits needed to be modified to account for Rider FUEL charges and to modify the dates for notices to include Rate Stabilization Charges (or designated percentages thereof) in the Shopping Credit. OCEA only addresses the latter point in its Application.[2]

Relating to the need to modify the Shopping Credit provisions, the logic of the argument appears to be as follows: (1) since Rider FUEL was part of the Companies' most recent SSO, the SSO was "updated" through the implementation of Rider FUEL; and thus (2) it is now perfectly acceptable to change the Shopping Credit Rider tariff. This is wrong at every turn.

To begin, Rider FUEL is not part of the Companies' SSO continued under 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

[2] OCEA's Application makes an oblique reference to NOPEC/NOAC's argument to have the Shopping Credits reflect Ride FUEL charges by citing, in a footnote, NOPEC/NOAC's Application pages 14 to 20. (OCEA's Rehrg App., p. 6, n. 17.) The arguments made by NOPEC/NOAC at that part of their Application have been addressed in the Companies Memorandum Contra to NOPEC/NOAC's Application for Rehearing at pages 3-6. That portion of the Memorandum Contra is incorporated here by reference.

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, the RTC must terminate on December 31, 2008. This result was reached because, in the Commission's view, the RCP set forth a specific termination date of December 31, 2008 for RTC for OE and TE.[3] 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 a 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

[3] 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.

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. OCEA's request should be denied.

D. 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. 7-9. 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. *Id.* At 8. In fact, the Companies have applied twice to the Commission: once for approval of an ESP in this case 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 and permitted an application for an MRO. 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,

which encourages the Companies to consider a new Staff proposal but does not require that the Companies do so.

III. CONCLUSION

For the foregoing reasons, and for the reasons stated by the Companies in their Memoranda Contra to OCEA's Application for Rehearing in Case No. 09-21-EL-ATA and contra NOPEC/NOAC's Application for Rehearing in this case, OCEA's Application for Rehearing here should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Copies of the foregoing 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 were served by first class United States Mail, postage prepaid, (with copies provided electronically) to the persons on the attached Service List on this 12th day of February 2009.

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