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BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

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NUCOR STEEL MARION, INC.)
Complainant)
v.)
OHIO EDISON COMPANY;)
THE CLEVELAND ELECTRIC)
ILLUMINATING COMPANY; AND)
THE TOLEDO EDISON COMPANY)
Respondents)

Case No. 09-46-EL-CSS

**NUCOR STEEL MARION, INC.'S MEMORANDUM CONTRA
THE FIRSTENERGY OHIO OPERATING COMPANIES' MOTION TO
DISMISS ALL ACTIONS ARISING UNDER R.C. 4909.16**

Pursuant to Ohio Administrative Code 4901-1-12(B)(1), Nucor Steel Marion, Inc. ("Nucor") submits this Memorandum Contra the FirstEnergy Operating Companies' Motion to Dismiss All Actions Arising Under R.C. 4909.16 ("Motion to Dismiss") and Memorandum in Support. FirstEnergy¹ offers no valid reasons or persuasive legal arguments why Nucor's request for emergency relief under Section 4909.16 of the Revised Code should be dismissed. Accordingly, the Motion to Dismiss should be denied.

¹ "FirstEnergy" is intended to refer to Ohio Edison Company, the Cleveland Electric Illuminating Company ("CEI"), and the Toledo Edison Company, collectively and individually. While Nucor is a customer only of Ohio Edison, Nucor named CEI and Toledo Edison in its Complaint on the belief that the interruptible rates operate in the same way for all three operating companies and to permit the Commission to decide these issues for all three companies in a single proceeding. Further, it is unclear whether Ohio Edison operates its interruptible program on its own, or in conjunction with CEI and Toledo Edison.

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I. INTRODUCTION

On January 21, 2009, Nucor filed a complaint in this proceeding against FirstEnergy ("Complaint"). As detailed in the Complaint, effective January 1, 2009, FirstEnergy implemented a new internal policy for calling economic interruptions that resulted in a drastic increase in the number of economic interruptions for Nucor. Starting January 5, 2009 and continuing through to today, economic interruptions have been called for Nucor in every hour of every day. As a result of these 24 x 7 economic interruptions, FirstEnergy essentially has gutted its interruptible program, caused a dramatic rate increase for Nucor and other interruptible customers, and is violating Section 4928.143(C)(2)(b) of the Revised Code, which mandates the continuation of "the provisions, terms, and conditions of the utility's most recent standard service offer" in the event a utility withdraws its electric security plan ("ESP").

In the Complaint, Nucor requested emergency relief under Section 4909.16 of the Revised Code. In particular, Nucor requested that the Commission issue a stay directing FirstEnergy to immediately cease calling economic interruptions until new reasonable guidelines for calling economic interruptions and establishing buy-through prices are developed and approved by the Commission, and that the Commission order FirstEnergy not to charge Nucor and other interruptible customers for buy-through prices for economic interruptions called starting January 1, 2009, but instead to price all energy purchased at standard tariff rates.

In its Motion to Dismiss, FirstEnergy maintains that Nucor's request for emergency relief is procedurally deficient and fails to state reasonable grounds on which to sustain an action under Section 4909.16 of the Revised Code. As discussed below,

FirstEnergy's Motion to Dismiss is based on a stilted reading of the statute and a disregard for the relevant case law, which supports broad Commission discretion and authority to take emergency action in cases such as this.

II. ARGUMENT

FirstEnergy's first argument is that, under Section 4909.16 of the Revised Code, the Commission must look at injury to the business or interests of "the public" and not to a single customer. Motion to Dismiss at 2. Presumably, FirstEnergy's point is that the statute does not allow the Commission to provide emergency relief when injury is to a single customer. However, as Nucor noted in its Complaint, all interruptible customers, not just Nucor, have been affected by FirstEnergy's actions. This is clearly demonstrated by the complaint filed by Praxair, a large manufacturer served by CEI, complaining of the same 24 x 7 economic interruptions experienced by Nucor.² Also, in the ESP case, Industrial Energy Users-Ohio has asked the Commission to rule on the economic interruption issues, which further demonstrates that Nucor is not the only interruptible customer affected by FirstEnergy's actions.³ The public interest is also affected in this case because by taking the action it has, FirstEnergy has eviscerated its interruptible programs at a time when both the General Assembly and the Commission have reaffirmed the need for the peak demand reduction benefits interruptible rates provide.⁴

² *In the Matter of the Complaint of Praxair, Inc. v. The Cleveland Electric Illuminating Company*, Case No. 09-88-EL-CSS.

³ Case No. 08-935-EL-SSO, IEU-Ohio Memorandum in Support and Memorandum in Reply to FirstEnergy's Motion for Stay at 2 (January 12, 2009).

⁴ See Section 4928.66(A)(1)(b), Revised Code (establishing mandatory annual peak demand reduction targets for distribution utilities beginning in 2009); November 25, 2008 Opinion and Order in Case No. 08-936-EL-SSO at 24 (recognizing that interruptible rates provide important benefits to the system).

Even if only a single customer were affected by a utility's unlawful action, this does not mean that severe injury to this customer would not constitute an injury to the public. For example, a typical interruptible customer is a large industrial customer that employs many people and contributes to the local and state economy. Especially in these extraordinarily difficult economic times, ensuring that a utility applies its rates in a lawful manner so as to ensure the availability of reliable and reasonably priced electric service for such a customer is vital to the public interest. Moreover, the very idea that an injury has to be to more than one customer in order for an injury to be considered to "the public" is seriously flawed. Any time a utility is applying its tariff in an unlawful manner such that it is causing injury – whether to one customer or several customers – the utility is causing an injury to the public. FirstEnergy's argument that Nucor's claim for emergency relief should be dismissed because it pertains only to an injury to one large industrial customer, and therefore does not constitute an injury to the interests of the public under Section 4909.16 of the Revised Code (an argument that FirstEnergy supports with no case law), should be rejected.

FirstEnergy's second argument is that Nucor is asking the Commission to suspend the rates pertaining to economic buy-through events, which the Commission cannot do without consent of FirstEnergy under Section 4909.16. Motion to Dismiss at 2-3. Section 4909.16 of the Revised Code provides:

When the public utilities commission deems it necessary to prevent injury to the business or interests of the public or of any public utility for this state in case of any emergency to be judged by the commission, it may temporarily alter, amend, or with the consent of the public utility concerned, suspend any existing rates, schedules, or order relating to or affecting any public utility or part of any public utility in this state.

While the Commission may or may not be authorized to “suspend” an existing rate under Section 4909.16 without the consent of the utility, it is certainly has the power to “temporarily alter or amend” existing rates to prevent injury to the public. That is what Nucor is requesting here – that the Commission temporarily alter or amend the existing interruptible rates to the extent necessary to halt all economic interruptions, pending resolution of Nucor’s Complaint.

Third, FirstEnergy argues that Nucor has failed to state grounds sufficient to sustain a Section 4909.16 proceeding, and that Nucor failed to provide any specifics to justify emergency relief. Motion to Dismiss at 3. FirstEnergy observes that Nucor provides no detail supporting the claim that Nucor’s rates may increase between 50 and 100%. *Id.* FirstEnergy is incorrect that Nucor failed to state sufficient grounds.

In *Cleveland Electric Illuminating Co. v. Public Util. Comm. of Ohio*, 76 Ohio St. 3d 521 (1996), the Ohio Supreme Court explained the standard for dismissal of a complaint for failure to state a claim:

In a civil case before a court, “it must appear beyond doubt from the complaint that the plaintiff can prove no set of facts entitling him to recovery” before a motion to dismiss can be granted. Further, in ruling on the motion to dismiss, all material factual allegations of the complaint must be taken as true. The commission has adopted the same standard in reviewing a motion to dismiss brought under R.C. 4905.26, i.e., that all of the complainants’ factual allegations must be taken as true.

Id. at 524 (citations omitted).

FirstEnergy has not met the standard for a motion to dismiss. To begin with, FirstEnergy has already admitted to many of the key factual assertions Nucor made its

Complaint, which are the same facts supporting Nucor's request for emergency relief.⁵ Also, the rate impact on Nucor from FirstEnergy's policy change resulting in constant economic interruptions is readily apparent from the data provided in the Complaint. The only reason Nucor did not discuss actual bill impacts in the Complaint was that Nucor had not received its January bill at the time the Complaint was filed. Nucor has since received the January bill, which confirms the rate impact anticipated in the Complaint. As a result of FirstEnergy's new internal policy for calling economic interruptions, Nucor saw a rate increase in January of roughly 50% over the average price per kWh it paid in 2008 including economic buy throughs. Also, we estimate that the rates Nucor is paying as an interruptible customer are approximately one third higher than the rates Nucor would be paying if it were taking firm service. When firm service costs much less than interruptible service, it is clear that the interruptible rates are not operating as intended. Under Ohio Edison's new approach to economic interruptions, it is likely that Nucor will pay even more per kWh in the coming months than it did in January.

FirstEnergy also states that Nucor failed to acknowledge that the economic buy through program allows customers to find alternative suppliers to meet their electricity needs during economic interruptions, and that Nucor could have obtained buy-through power from an alternative supplier if the other supplier could supply it at prices less than that quoted by FirstEnergy. Motion to Dismiss at 3. This is entirely beside the point. When Nucor signed up for its interruptible rates, Nucor expected to receive power supply at a discounted rate from FirstEnergy, in return for being subject to reasonable economic interruptions and emergency interruptions. Under Section 4928.143(C)(2)(b) of the

⁵ See Case No. 09-46-EL-CSS, Answer of Ohio Edison Company (February 2, 2009). For example, Ohio Edison admitted that it implemented a new internal policy for calling economic buy through events which commenced on January 1, 2009. *Id.* at 3.

Revised Code, FirstEnergy is required to continue “the provisions, terms, and conditions of the utility’s most recent standard service offer” until such time as a new ESP or market rate offer is approved. By altering its procedures for calling economic interruptions and establishing economic buy through prices, FirstEnergy has massively changed the operation of its interruptible rates through the back door, in violation of Section 4928.143(C)(2)(b), regardless of whether Nucor may find an alternate supplier to provide buy-through power.

FirstEnergy’s next argument is that Nucor failed to show the presence of extraordinary circumstances by clear and convincing evidence as required to sustain emergency relief under Section 4909.16 of the Revised Code. Motion to Dismiss at 4. FirstEnergy states that the “fact that Ohio Edison has called more economic buy through events than Complainant believes should have been called does not create extraordinary circumstances.” *Id.* Nucor is not quibbling over a few economic interruptions here, and a few economic interruptions there. At issue here is a new, unilaterally-imposed internal operating procedure that results in economic interruptions in every hour of every day. Nucor submits that this level of interruptions, which undermines the rationale for interruptible rates (*i.e.*, a customer receives a discounted rate in return for being subject to reasonable economic and emergency interruptions) and thereby destroys such rates, constitutes extraordinary circumstances – particularly at a time when FirstEnergy is bound by statute to be continuing the provisions, terms, and conditions of its most recent rate plan.

The bottom line is that the level of economic interruptions Nucor and other interruptible customers are experiencing is an extraordinary circumstance justifying the

extraordinary remedy of emergency relief under Section 4909.16 of the Revised Code. Nucor and other interruptible customers are required to make operational decisions (such as when to run their plants and how much product they should produce) based on the very high buy-through energy prices those customers currently see in every hour of every day. Even if Nucor's claims were addressed under the standard complaint process and Nucor were to prevail, Nucor and other interruptible customers cannot go back and "redo" these day-to-day operational decisions. With every day that passes, therefore, Nucor and other interruptible customers are experiencing injury that, at best, could be only partially remedied through economic relief Nucor could receive if it were to prevail after a full complaint proceeding. This is why immediate emergency relief is justified and necessary in this case.

Finally, FirstEnergy argues that Nucor's request for emergency relief under Section 4909.16 of the Revised Code is procedurally deficient because it was part of Nucor's Complaint, and was not made in the form of an "application" under Section 4909-1-01(D) of the Ohio Administrative Code. Motion to Dismiss at 4-5. There is nothing in Section 4909.16 of the Revised Code or in the Administrative Code that specifies that a request for emergency relief must come in the form of an application, rather than as part of a complaint. Also, while Section 4909-1-01(D) addresses emergency rate proceedings, the Commission has broad authority to grant emergency relief Under Section 4909.16, and may even grant such relief *sua sponte* and in the absence of a hearing on the necessity for emergency relief. *See Duff v. Pub. Util. Comm.*, 56 Ohio St. 2d 367, 378 (1978). It is clear that Section 4909.16 of the Revised Code endows the Commission with broad authority to act – and to act very quickly if necessary

– in the case of an emergency situation, without being constrained by rigid procedural requirements.

In this case, Nucor complied with the requirements of Section 4909.16 and the case law interpreting the statute when making its request for emergency relief as part of its Complaint. The facts justifying Nucor request for emergency relief are set forth in the Complaint. There can be no doubt that an emergency exists for Nucor and other large industrial interruptible customers when their rates have escalated so far so fast, and they have to make day-to-day operational decisions (that cannot be undone) based on very high buy-through prices.

III. CONCLUSION

For the reasons discussed above, Nucor respectfully requests that the Commission deny FirstEnergy's motion to dismiss, and grant the emergency relief Nucor requested pursuant to Section 4909.16 of the Revised Code.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Garrett A. Stone", is written over a horizontal line. To the right of the signature, there is a smaller, less legible handwritten note that appears to say "by Matt [unclear]".

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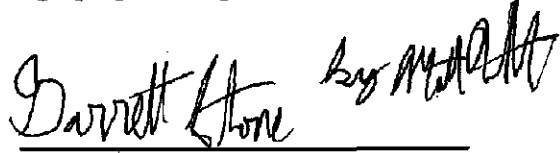
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing pleading was served upon the following party of record or as a courtesy, via U.S. Mail postage prepaid, express mail, hand delivery, or electronic transmission on February 17, 2009.



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