

FILE

**FirstEnergy**

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*Via Federal Express  
and Facsimile (614-466-0313)*

February 24, 2009

Ms. Renee J. Jenkins  
Director, Administration Department  
Secretary to the Commission  
Docketing Division  
The Public Utilities Commission of Ohio  
180 East Broad Street  
Columbus, OH 43215-3793

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PUCO

Dear Ms. Jenkins:

**Re: Ohio Edison Company's Reply To Nucor Steel Marion, Inc.'s  
Memorandum Contra Motion To Dismiss All Actions Arising  
Under R.C. 4909.16  
Case No. 09-46-EL-CSS**

Enclosed for filing, please find the original and twelve (12) copies of Ohio Edison Company's Reply To Nucor Steel Marion, Inc.'s Memorandum Contra Motion To Dismiss All Actions Arising Under R.C. 4909.16. Please file the enclosed Reply in the above-referenced docket, time-stamping the two extras and returning them to the undersigned in the enclosed envelope.

Thank you for your assistance in this matter. Please contact me if you have any questions concerning this matter.

Very truly yours,

*Kathy J. Kolich*

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Enclosures

cc: Parties of Record

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BEFORE THE  
PUBLIC UTILITIES COMMISSION OF OHIO

Nucor Steel Marion, Inc.	)	
	)	
Complainant,	)	
vs.	)	CASE NO. 09-46-EL-CSS
	)	
The Ohio Edison Company, et al	)	
	)	
Respondent.	)	

**OHIO EDISON COMPANY'S REPLY TO NUCOR STEEL MARION, INC.'S  
MEMORANDUM CONTRA MOTION TO DISMISS ALL  
ACTIONS ARISING UNDER R.C. 4909.16**

Pursuant to Rule 4901-1-12(B)(2) of the Ohio Administrative Code, Respondent, Ohio Edison Company ("OE")<sup>1</sup>, submits its reply to the Memorandum Contra OE's Motion to Dismiss all Actions Arising Under R.C. 4909.16 submitted by Nucor Steel Marion, Inc. ("Nucor").

Nucor's complaint goes to the issue of whether Ohio Edison's actions surrounding its economic buy through program violate either its tariff or state statute; nothing more, nothing less. Such issues are to be addressed under R.C. 4905.26, which provides in pertinent part:

Upon complaint in writing against any public utility by any person, firm, or corporation, ... that *any rate, ... schedule ... or service, ... rendered, charged, demanded, exacted ... is in any respect unjust, unreasonable, unjustly discriminatory, or unjustly preferential, or in violation of law*, or that any regulation, measurement, or practice affecting or relating to any service furnished by the public utility, or in connection with such service is, or will be, in any

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<sup>1</sup> This proceeding was filed against Ohio Edison Company, The Cleveland Electric Illuminating Company ("CEI") and The Toledo Edison Company ("TE"), the latter two of which filed a motion to dismiss. This reply should be construed as that of CEI and TE to the extent necessary in the event that they are not dismissed as parties to this proceeding.

respect unreasonable, unjust, insufficient, unjustly discriminatory or unjustly preferential, or that any service is, or will be, inadequate or cannot be obtained, ... if it appears that reasonable grounds for complaint are stated, the commission shall fix a time for hearing and shall notify [the parties.] (*Italics added.*)

Additionally, Nucor seeks emergency rate relief under R.C. 4909.16 which provides:

When the public utilities commission deems it necessary to prevent injury to the business or interests *of the public* or 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<sup>2</sup> any existing rates, schedules, or order relating to or affecting any public utility.... [*Italics added.*]

No matter how Nucor spins it, its complaint does not constitute an emergency under R.C. 4909.16 and, accordingly all actions brought under this statute should be dismissed. As indicated above, this statute is reserved for emergency situations in which the public at large, and not a single customer, is injured. Nucor claims that its complaint affects the public at large based on two theories – first, that *all* interruptible customers have been affected by FirstEnergy's [sic]<sup>3</sup> actions (Nucor memo contra, p. 3); and second, that an injury to the public occurs “[a]ny time a utility is applying its tariff in an unlawful manner such that it is causing injury ....” (*Id.* at 4.) As is discussed below, the first argument is based on speculation, not fact, and the second violates basic rules of statutory interpretation that, if adopted, creates a dangerous precedent.

Nucor claims to know how each and every interruptible customer is affected. It is unclear from its pleading whether Nucor's alleged knowledge goes to each and every customer of Ohio Edison, CEI and TE, or whether this alleged knowledge is limited only to each and every customer of Ohio Edison. Regardless, its claims of knowledge are

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<sup>2</sup> While Nucor claims that Ohio Edison's consent is not required because Nucor is only asking that the Commission “halt” the application of the interruptible program, rather than suspend it (Nucor Memo contra, p. 5) Nucor's argument is a distinction without a difference.

<sup>3</sup> Nucor's reference to FirstEnergy includes OE, CEI and TE.

contradicted by its own pleadings and the nature of the information that it claims to know. As indicated in footnote 1 on page 1 of its memorandum contra, Nucor admits that it is “*unclear* [to Nucor] whether Ohio Edison operates its interruptible program on its own, or in conjunction with CEI and Toledo Edison.”(Italics added.) And while Nucor *believes* that they operate the same, (Nucor Memo Contra, p. 1, fn.1) such beliefs are not facts. If Nucor does not know how the economic buy through programs of CEI and TE operate, it cannot possibly know how economic buy through customers of these companies are affected.<sup>4</sup> Similarly, in its Complaint at page 1, Nucor only *presumes* that other customers are adversely affected by “FirstEnergy’s” actions. On page 3 of the Complaint Nucor, again, *assumes* that other customers are no longer receiving discounts under “FirstEnergy’s” interruptible program. Clearly such presumptions and assumptions are not actual knowledge.<sup>5</sup> Indeed, given the confidential nature of other customers’ price and consumption information, it is impossible for Nucor to *know* how each and every interruptible customer of Ohio Edison (or CEI and TE) is affected by “FirstEnergy’s” actions, especially when each interruption called is based on the incremental revenues received from each individual customer. In light of this, the impact on Nucor from Ohio Edison’s actions will not be the same as to a customer who, for example, is paying a greater incremental rate. Accordingly, Nucor’s bold claim of having

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<sup>4</sup> While Nucor cites to a single complaint filed against CEI (Nucor Memo Contra, p. 3) to support its knowledge of how all customers are affected, one additional complaint does not constitute knowledge of the circumstances surrounding each and every customer in a given class; nor does the fact that the Industrial Energy Users- Ohio asked the Commission to rule on the “economic interruption issues.” (Id.)

<sup>5</sup> As Nucor points out in its memorandum contra at page 5, the Ohio Supreme court only requires the Commission to consider “all material *factual* allegations of the complaint” as true. *Cleveland Electric Illuminating Co. v. Pub. Util. Comm.*, 76 Ohio St. 3d 521 (1996)(italics added.)

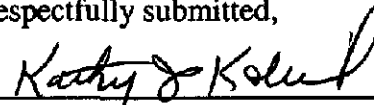
perfect knowledge as to how each and every interruptible customer is affected is contrary not only to the nature of the information it claims to know, but also to Nucor's own admissions.

Nucor's second argument is equally without merit. Under Nucor's interpretation of R.C. 4909.16, an emergency that affects the public at large exists each and every time "a utility is applying its tariff in an unlawful manner" (Nucor Memo Contra, p. 4). If Nucor's interpretation is adopted, virtually every complaint filed at the Commission would give rise to an emergency rate proceeding. Such an interpretation renders the R.C. 4905.26 complaint process unnecessary, which violates several basic rules of statutory interpretation. Statutes, when possible, should be construed based on their plain meaning, *State ex rel. Plain Dealer Publishing Co. v. Cleveland*, 106 Ohio St. 3d 70, 76-77, 2005-Ohio-3807, ¶ 38, consistent with other related statutes, *State ex rel. Choices for South-Western City Schools v. Anthony*, 108 Ohio St. 3d 1, 9, 2005-Ohio-5362, ¶ 46, and legislative intent. *Dircksen v. Greene County Bd. of Revision*, 109 Ohio St. 3d 470, 472, 2006-Ohio-2990, ¶ 16. In this instance, there is no ambiguity surrounding the meaning of the word "public." The plain meaning of the word "public" does not constitute a single customer (or for that matter, a handful of customers) of a utility. Further, in order to give effect to the R.C. 4905.26 complaint process, R.C. 4909.16 cannot be interpreted, as Nucor claims, to mean that the public is injured anytime a utility may have misapplied its tariff. The same can be said for Nucor's macro economic argument that the public at large is injured because a large customer who employs workers and contributes to the local and state economy believes that it is paying more than it should under a utility's tariff. (Nucor Memo Contra, p. 4.) Clearly if these were the standards on which to

determine if the public at large is injured, virtually every complaint filed at the Commission would qualify for emergency relief. This could not have been the intent of the legislature when enacting R.C. 4909.16 and should not be a precedent established by the Commission.

In sum, Nucor confuses a complaint proceeding with an emergency rate proceeding. Nucor's sense of urgency notwithstanding, the instant action is a basic complaint case involving a question of whether a utility violated its tariff or statute -- a question clearly within the scope of R.C. 4905.26.<sup>6</sup> If the Commission were to transform this complaint case into an emergency rate relief case it would be based on assumptions and presumptions, rather than facts. Further, such a transformation is contrary to basic rules of statutory interpretation and establishes a dangerous precedent under which virtually any complaint involving the application of a utility's tariff could be brought under an emergency rate proceeding. Accordingly, Ohio Edison Company again asks that all claims brought under R.C. 4909.16 be dismissed.

Respectfully submitted,



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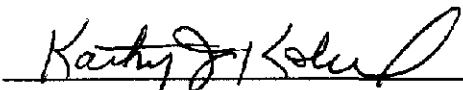
On behalf of Ohio Edison Company  
(and to the degree necessary, The  
Cleveland Electric Illuminating  
Company and The Toledo Edison  
Company)

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<sup>6</sup> With such a sense of urgency, Nucor should have requested an expedited procedural schedule.

## CERTIFICATE OF SERVICE

**THIS IS TO CERTIFY** that a copy of Ohio Edison Company's Reply to Nucor Steel Marion Inc.'s Memorandum Contra Motion to Dismiss all Actions Arising Under R.C. 4909.16 was served upon Garrett A. Stone and Michael K. Lavanga, Brickfield, Burchette, Ritts & Stone, P.C., 1025 Thomas Jefferson Street, N. W., 8<sup>th</sup> Floor, West Tower, Washington, D.C. 20007, by regular U.S. Mail, postage prepaid, and by electronic mail to [gas@bbrslaw.com](mailto:gas@bbrslaw.com) and [mkl@bbrslaw.com](mailto:mkl@bbrslaw.com), this 24<sup>th</sup> day of February, 2009.

  
Kathy J. Kolich, Esquire