BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

Northeast Ohio Public Energy Council,	)	
	)	
Complainant,	)	
	)	
v.	)	Case No. 09-423-EL-CSS
	)	
Ohio Edison Company and The Cleveland Electric Illuminating Company,	)	
	)	
Respondents.	)	

OHIO EDISON COMPANY'S AND THE CLEVELAND ELECTRIC ILLUMINATING COMPANY'S APPLICATION FOR REHEARING AND REQUEST FOR EXPEDITED CONSIDERATION

Now come Ohio Edison Company and The Cleveland Electric Illuminating Company ("Companies"), by and through counsel, and respectfully submit their Application for Rehearing of the Entry issued by the Commission on July 8, 2009 ("Entry"), wherein the Commission granted the Motion to Stay filed by the Northeast Ohio Public Energy Council ("NOPEC").

The Companies request expedited consideration of this Application with a decision issued on or before July 29, 2009.[1] Absent the stay, the Companies would charge the switching fee at issue beginning soon after that date, and the harm caused to the Companies by the stay will begin to accrue at that time. Likewise, the Entry has placed the Companies in the untenable position of exempting only one specified governmental aggregation supplier, to the apparent exclusion of all other governmental aggregation suppliers, from the provisions of their Supplier Tariff, which urgently requires a remedy.

[1] The opt-out notice filed by NOPEC in Case No. 00-2317-EL-GAG states that the opt-out period is scheduled to end on or about July 29, 2009. The Companies do not certify that no party objects to expedited consideration.

I. Introduction

The Commission should reconsider its Entry and lift the stay imposed by that Entry. NOPEC is not entitled to a stay because 1) the clear and unambiguous language of the rule does not prohibit switching fees, 2) NOPEC has failed to show irreparable harm, and 3) the Companies and other customers will be substantially harmed if the stay is granted. The Commission should reverse its Entry and deny the stay.

II. Background

While the Commission is well aware of the background of this issue, a few facts are worth highlighting:

- The customer processing fee, more generally referred to as a switching fee, is part of the Companies' approved Supplier Tariff under which all competitive suppliers provide competitive retail generation service to distribution customers of the Companies. *Supplier Tariff*, p. 45, para. (A)(2).
- This tariff was approved by the Commission and initially went into effect in 2001.
- The required $5.00 charge has remained in effect and unchanged during the entire period from 2001 to the present and is designed to compensate the Companies for the costs incurred related to the process of a customer selecting or switching to a competitive supplier for retail generation service.
- This fee is not charged to customers or applied to customer accounts. It is also not charged to the governmental aggregator, which is NOPEC in this instance. It is charged to the Certified Supplier, Gexa in this instance, as previously authorized by the Commission.
- The Commission's newly-adopted rule governing switching fees – Rule 4901:1-10-32(D) (hereinafter the "Rule") – clearly states that a "switching fee shall not be assessed *to customer accounts* that switch to or from a governmental aggregation." (emphasis added.)
- Gexa is not required to pass this fee along to customers.
- This charge is neither unreasonable nor unlawful.[2]

[2] The Commission initially approved the Supplier Tariff as a compliance filing by Entry dated November 21, 2000 in Case Nos. 99-1212-EL- ETP *et al.* The Supreme Court of Ohio later refused to disturb the switching fee

III. Law and Argument

Before a stay may be granted the Commission must find that the following four factors support the issuance of a stay: 1) whether the party seeking the stay is likely to prevail on the merits; 2) whether the party seeking the stay would suffer irreparable harm absent the stay; 3) whether the stay would cause substantial harm to other parties; and 4) the public interest.[3] Because NOPEC cannot prevail on the first three prongs of this test, the stay must be lifted.

A. The Commission Must Apply The Plain Language Of The Rule.

The Commission erred in finding that NOPEC has a strong likelihood of success on the merits. The plain language of the Commission's Rule is restricted to customer accounts and quite clearly does not prohibit the Companies from charging a processing fee to NOPEC's supplier.

The Ohio Supreme Court has repeatedly held that "[w]here the language of a statute is clear and unambiguous, it is the duty of the court to enforce the statute as written, making neither additions to the statute nor subtractions therefrom. If it is ambiguous, we must then interpret the statute to determine the General Assembly's intent. **If it is not ambiguous, then we need not interpret it; we must simply apply it.**" *Howard v. Miami Twp. Fire Div.* 119 Ohio St. 3d 1, 2008-Ohio-2792, ¶ 20 (internal citations omitted) (emphasis added); *See also Hubbard v. Canton City School Bd. of Educ.*, 97 Ohio St. 3d 451, 454, 2002-Ohio-6718, ¶ 14; *State v. Hairston*, 101 Ohio St. 3d 308, 310, 2004-Ohio-969, ¶ 13.

Likewise, the Commission itself has noted that, "If the meaning of the statute is unambiguous and definite, it must be applied as written and **no further interpretation is**

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provision when the governmental aggregation rules were initially challenged, finding that "the fees were established in a stipulation, and they were implemented in a tariff, both of which were approved by the commission in a case entirely different from the commission case on appeal." *City of Maumee v. Pub. Util. Comm.*, 101 Ohio St. 3d 54, 59, 2004-Ohio-7, ¶ 22.

[3] Entry at ¶ 6.

necessary." *In re XO Ohio, Inc. v. City of Upper Arlington*, PUCO Case No. 03-870-AU-PWC, ¶ 13, 2003 WL 22020281, at *3 (July 1, 2003) (quoting *State ex. rel. Savarese v. Buckeye Local School Dist. Bd. of Educ.*, 74 Ohio St. 3d 543, 545, 660 N.E.2d 463, 465 (1996)). Earlier this year the Ohio Power Siting Board reiterated this bedrock principle. "[W]e agree . . . that is a well settled principle of statutory construction that, where the statute is clear and unambiguous, statutory interpretation is not necessary and the statute must be applied giving effect to the words used. Further, where the statute is clear and unambiguous, the agency must give effect to the words in the statute without deleting words used or inserting words not used in the statute." *In the Matter of the Power Siting Board's Adoption of Chapter 4906-17 of the Ohio Administrative Code and the Amendment of Certain Rules in Chapters 4906-1,4906-5 and Rule 4906-7-17 of the Ohio Administrative Code to Implement Certification Requirements for Electric Generating Wind Facilities*, OPSB Case No. 08-1024-EL-ORD, Entry on Rehearing ¶ 14, 2009 WL 225378 (Jan. 26, 2009).

In reviewing whether NOPEC is likely to prevail on the merits of its complaint, the Commission unreasonably resorted to a discussion of what the Commission may have actually intended instead of simply applying the clear language of the rule it has adopted. Entry at ¶ 9. However, what the Commission may have intended is irrelevant and cannot be a legitimate basis for NOPEC's claim. Ohio law is clear – the Commission's intent is found in the plain language of its rule and not in speculation about what actually may have been intended. Rule 4901:1-10-32(D) clearly and unambiguously states that "the electric utility shall switch customer accounts to or from a governmental aggregation under the same processes and time frames provided in published tariffs for switching other customer accounts. A switching fee shall not be assessed to customer accounts that switch to or from a governmental aggregation."

The Rule has two components: 1) the switch will be done in the same manner as provided for in the tariff, and 2) the utility cannot assess a switching fee to customer accounts. Thus, the first component mandates that the Companies assess the switching fee equally to any and all suppliers as set forth in its Commission-approved tariff. The second component creates a limited exception to this mandate by prohibiting the Companies and other utilities from assessing a switching fee to customer accounts. The Companies' application of their switching fee is consistent with the Rule, because the fee is charged to a Certified Supplier, not assessed to customer accounts.

The plain language of the Rule dictates the result here. "Customer" is defined in Rule 4901:1-10-01(G) to mean "any person who has an agreement, by contract and/or tariff with an electric utility or by contract with a competitive retail electric service provider, to receive service." Moreover, a "competitive retail electric service provider" is "a provider of competitive retail electric service, subject to certification under section 4928.08 of the Revised Code." Quite simply, a customer is not a competitive retail electric service provider but is, instead, a person receiving service from a competitive retail electric service provider. The Companies' Supplier Tariff governs its relationship with competitive retail electric service providers, not with customers. The switching fee included in the Companies' Supplier Tariff is charged to competitive retail electric service providers, not to customers or to customer accounts.

NOPEC cannot succeed on the merits because neither it nor Gexa can cite to a single section of the Rule for the proposition that a switching fee cannot be assessed to a competitive retail electric service provider. Had the Rule been intended to cover suppliers then it could have said, "a switching fee shall not be charged to customers or to competitive retail electric service providers." Or, "no switching fees shall be charged." The Rule does not say that. Indeed, given

that the Companies' switching fee charged to suppliers has been in place for several years, it is improbable that the Commission could have intended to prohibit that fee by using language that does not apply to it. Instead the Rule very clearly states that switching fees shall not be charged to customer accounts, leaving the Companies obligated to charge suppliers a lawful switching fee as required by tariff and as approved by the Commission.

The Commission also erred through misdirection by stating that the Companies "should seek recovery of those costs as it would any other distribution cost." This is exactly what the Supplier Tariff does. Does the Commission intend that the costs incurred related to the switching process be transferred to and subsidized by all of the Companies' distribution customers, both shopping and non-shopping? It should clearly state this policy choice if such a policy is legally required in order to comply with R.C. § 4928.20(K). Indeed, this policy choice should be clearly stated in a Commission rule. Consistent with the precedent set forth above, parties must be able to rely upon the plain language of the Commission rules as promulgated. The Commission cannot properly interpret its own rule in such a fashion so as to be inconsistent with the plain language of the very same rule.

It is unreasonable and unlawful for the Commission to change the meaning and effectively alter the language of the Rule outside of a rulemaking process. Nothing in the Rule prohibits the charging of switching fees to Certified Suppliers and, in fact, the Supplier Tariff requires it.

B. NOPEC Will Not Suffer Irreparable Harm.

NOPEC has offered no support for its position that it will suffer irreparable harm. Quite to the contrary – NOPEC will not suffer harm if the Motion for Stay is denied. The Companies do not charge NOPEC or its customers the switching fee. Rather, the switching fee is charged to

the supplier – in this case, Gexa. Importantly, NOPEC has not shown that Gexa's payment of the fee will prejudice NOPEC in any manner. Indeed, the opt-out notice filed by NOPEC in Case No. 00-2317-EL-GAG leaves unclear whether Gexa will pass through the cost of the switching fee to its customers. The notice states that this cost "may be added" to customer bills. Regardless, how and whether Gexa attempts to recover the cost of the Companies' switching fee is not at issue in this matter.

The Commission erred in finding in the Entry that NOPEC demonstrated irreparable injury because NOPEC may not be entitled to a refund. As the Commission is well aware, NOPEC will never be entitled to a refund because NOPEC is not legally obligated to pay the switching fee – Gexa is, as it agreed to do when it executed the supplier coordination agreement with the Companies.

The Commission also noted in the Entry that the Companies had not committed to refund the switching fees to NOPEC or its supplier if NOPEC ultimately prevails. The Companies hereby commit to refund any switching fees collected to the entity that paid the fees if the Commission finds in this proceeding that the Companies are prohibited from charging such fees. If the stay remains in place and the Companies ultimately succeed on the merits (as they must do given the plain language of the Commission's rules), the Companies anticipate that NOPEC will not make the same promise.

C. The Companies, Other Suppliers And Customers Are Harmed By The Stay.

The Commission erred in finding that the Companies and their other customers will not suffer harm if the stay is maintained. The Companies' $5.00 switching fee covers prudently-incurred administrative costs such as training and registering suppliers, drafting and mailing letters to customers, fielding and responding to requests from customers and suppliers, and managing the customer switching process. The fee was approved by the Commission as part of

the Companies' Supplier Tariff. The Companies have retained staff in reasonable reliance upon their Supplier Tariff's provisions allowing for timely cost recovery.

The stay issued by the Commission will harm the Companies in three respects. First, while the Companies are willing to agree that they will refund any customer switching fees to the entity which paid them should the Companies fail on the merits, NOPEC cannot reciprocate. It is Gexa, not NOPEC that will incur these costs. Gexa has so far failed to state that it is willing to pay back to the Companies all of the switching fees levied during the pendency of this proceeding and, if necessary, appeal, once the Companies ultimately prevail.

Second, even if Gexa were to agree to pay back the total amount of switching fees that NOPEC seeks to avoid, the Commission has ignored that the Companies will incur carrying costs related to the NOPEC-caused delay in collecting the switching fees. Absent Gexa's commitment to pay all switching fees and to compensate the Companies for its carrying costs directly caused by the stay, the Companies will be harmed by the stay.

Third, because the stay is limited by its express terms to "any customer accounts associated with the NOPEC aggregation" (Entry ¶ 19), maintenance of the stay forces the Companies to discriminate in favor of Gexa and against other governmental aggregation suppliers. NOPEC essentially has convinced the Commission to tilt an otherwise level playing field in favor of Gexa, thereby giving it a competitive advantage over other governmental aggregation suppliers. Absent a lifting of the stay, Gexa will not incur costs that other governmental aggregation suppliers are required to pay. Although due to the granting of the stay Gexa is now exempted from the switching fee provision of the Supplier Tariff with respect to all NOPEC communities, the Companies remain obligated to apply all provisions of their Supplier Tariff to all other governmental aggregation suppliers. Thus, the stay affords Gexa a competitive

advantage vis-à-vis other suppliers to governmental aggregation programs. Not only does this harm such other suppliers, but it also places the Companies in the position of potentially violating non-discrimination provisions of Ohio law and runs afoul of state policy as set forth in R.C. 4928.02. The Commission should not put the Companies in this position.[4]

Customers will also be harmed by the stay because it prevents customers in NOPEC communities who are receiving opt-out notices from making a fully informed decision about whether to opt out from the NOPEC offer. The opt-out notice itself does little to assist customers by ambiguously stating that switching fees "may be added to Your base price through price adjustments." Now that the Commission has decreed that the Companies cannot, for now, collect switching fees from Gexa as was previously authorized (and as Gexa previously agreed), customers are left even more in the dark. Not only do customers not know whether Gexa would pass through such a fee to them, but now they don't know whether such a fee will be collected in the first instance. Thus, customers are wholly unable to take the potential cost of this fee into account when deciding whether to opt out from the NOPEC offer.

Tariffs exist to ensure openness, accountability and a level playing field. The Commission's stay violates these principles and causes harm to the Companies, governmental aggregation suppliers other than Gexa, and customers in NOPEC communities. The Commission's findings to the contrary are unreasonable and unlawful.

D. The Commission's Stay Unreasonably and Unlawfully Exceeds the Relief Sought by NOPEC.

NOPEC's Motion to Stay sought an order prohibiting the Companies from collecting the switching fee from Gexa until such time as Rule 4901:1-10-32(D) took effect. *See* Motion for Stay at p. 5 ("Without a stay of this provision of the Respondent Companies' supplier

[4] Alternatively, the Commission should modify the Entry to state that the stay applies evenly to all governmental aggregation suppliers.

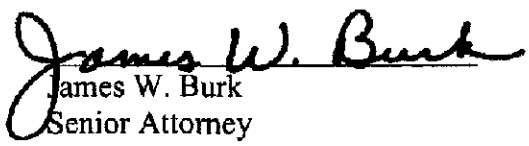
coordination tariffs until Rule 4901:1-10-32(D) becomes effective"); *Id.* ("the PUCO should stay the application of the switching fee provision of Respondent Companies' supplier coordination tariffs until such provision is eliminated by Respondent Companies pursuant to then effective Rule 4901:1-10-32(D).") NOPEC made clear that it was seeking a stay only "until the completion of the JCARR process and the effective date of the Rule prohibiting assessment of switching fees." *Id.* at p. 9. The Rule became effective on June 29, 2009. Thus, the Commission should have denied the Motion as moot.

The Commission erred by giving NOPEC relief that it had not sought and which the parties had not briefed. Indeed, the Commission specifically stated that it would not consider any filings related to the Motion that were filed after May 26, 2009. Entry ¶ 5. The Commission's consideration of the question of whether switching fees could be applied under the Supplier Tariff after June 29, 2009 is beyond the scope of the Motion and contrary to the Commission's own ruling at paragraph 5 of the Entry. Therefore, the Commission should grant rehearing and immediately vacate the Entry.

IV. Conclusion

The Companies respectfully request that the Commission act on an expedited basis to vacate its Entry of July 8, 2009. Each of the Commission's findings in that Entry with respect to success on the merits, irreparable injury, and harm to the Companies and others are clearly erroneous. For these reasons, the Companies request that the Entry be vacated and the stay lifted.

Respectfully submitted,



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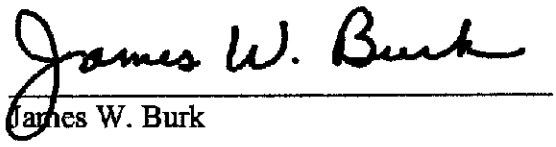
Certificate of Service

This is to certify that the foregoing Application for Rehearing was served this 13th day of July, 2009, upon the following *via* electronic mail and U.S. Mail, First Class, postage prepaid.



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