

FILE

7

RECEIVED-DOCKETING DIV

BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

2010 APR 19 PM 4:30

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 R.C. § 4928.143 in the Form of an)
Electric Security Plan)

PUCO
Case No. 10-388-EL-SSO

MEMORANDUM CONTRA OF NUCOR STEEL MARION, INC.
TO ENERNOC MOTION TO VACATE

Nucor Steel Marion, Inc. ("Nucor") hereby responds to the April 16, 2010, motion by EnerNOC, Inc. ("EnerNOC") to vacate the Attorney Examiner's March 24, 2010 Entry ("March 24 Entry") establishing the procedural schedule in this proceeding.

I. INTRODUCTION

In its motion, EnerNOC asserts that the existing schedule violates EnerNOC's due process rights. As discussed below, EnerNOC was or should have been on notice that the issues addressed by EnerNOC in this proceeding – namely, the status of FirstEnergy's Riders ELR and OLR following the expiration of the current electric security plan ("ESP") – were fully litigated issues in FirstEnergy's market rate offer ("MRO") proceeding, out of which the ESP Stipulation being considered in this proceeding developed. If EnerNOC were interested in these issues, it could have sought to participate in that proceeding. As a result, EnerNOC's claim that it was not or should not have been on notice that issues regarding the ELR and OLR tariffs would be addressed in the MRO proceeding or the Stipulation has no merit, when anyone paying any attention to the MRO proceeding

This is to certify that the images appearing are an accurate and complete reproduction of a case file document delivered in the regular course of business.
Technician SM Date Processed APR 20 2010

(as well as previous MRO and ESP proceedings) would have known that FirstEnergy's interruptible arrangements are of vital importance to large industrial customers, such as Nucor, who take service under Rider ELR and therefore would have anticipated that these were potential and indeed actual issues in the MRO proceeding. Had EnerNOC participated in that proceeding, they would have had the opportunity to participate in the settlement discussions leading to the Stipulation. EnerNOC's claims that it was not on notice that these issues would be addressed, therefore, do not constitute grounds for vacating the March 24 Entry.

II. ARGUMENT

EnerNOC requests that the March 24 Entry be vacated, claiming that the procedural schedule established in that order violates its due process rights and unduly prejudices EnerNOC. The key argument supporting the motion is that EnerNOC was not and should not have been on notice that issues related to the modification and extension of FirstEnergy's interruptible rates – Riders ELR and OLR – were being addressed in the settlement negotiations, and therefore EnerNOC did not have an opportunity to participate in the negotiations that resolved these issues.¹

As FirstEnergy's Application in this proceeding and the Commission's April 6, 2010 Entry make clear, the Stipulation in this proceeding grew out of FirstEnergy's recent MRO proceeding, Case No. 09-906-EL-SSO.² Parties to the MRO proceeding had

¹ Memorandum in Support at 2.

² Application, Stipulation and Recommendation at 3-4, Case No. 10-388-EL-SSO, April 6 Entry at 4 (noting that the application and stipulation appear to be the culmination of a lengthy process beginning with FirstEnergy's application to FERC for RTO realignment and continuing with the extensive litigation conducted in the MRO proceeding, and noting that Staff recommended that FirstEnergy and the intervenors explore alternatives to the MRO proposed by FirstEnergy).

the opportunity to participate in the settlement discussions that lead to the Stipulation in this proceeding.³ Nothing prevented EnerNOC from becoming a party to the MRO proceeding and participating in the discussions, and EnerNOC's claim that it had "no notice" that Rider ELR and OLR issues would be addressed in that case simply does not hold up under scrutiny.

FirstEnergy's Application in the MRO proceeding proposed to let Riders ELR and OLR expire at the end of the current ESP plan, and proposed a request for proposal ("RFP") process by FirstEnergy to acquire interruptible load in their place.⁴ EnerNOC need not have looked beyond the MRO Application to know that FirstEnergy's interruptible arrangements would, or at least could, be at issue. Beyond the Application itself, even a cursory review of the record in the MRO case reveals that many individual industrial customers and customer groups strongly supported the extension/continuation of Riders ELR and OLR, and opposed (or proposed modifications to) the RFP proposal. Indeed, all of these customers understood that the MRO proceeding was the appropriate forum to address these issues, including continuation of Rider ELR and Rider OLR. In sum, FirstEnergy's interruptible arrangements following the expiration of the current ESP were contested issues in the MRO proceeding, and any reasonable observer would have concluded that the elimination of Riders ELR and OLR was not a foregone conclusion simply because that is what FirstEnergy initially proposed in its MRO application.

³ Application at 3-4.

⁴ See Case No. 09-906-EL-SSO, Application at 24-26 (describing proposed interruptible RFP proposal and changes to Riders DSE and EDR proposed to reflect elimination of Riders ELR and OLR); Volume 2, Direct Testimony of John E. Paganie at 6-7 (describing proposed RFP and explaining proposal that it replace Riders ELR and OLR).

In fact, a review of previous FirstEnergy MRO proceedings and Commission precedent on interruptible rates would have also foreshadowed that these rates would be a hot topic in any MRO proceeding. For example, in the previous MRO proposal FirstEnergy filed in 2008, FirstEnergy did not include interruptible rates, arguing that they were unnecessary in an MRO plan. Parties opposed this aspect of the MRO. The Commission rejected FirstEnergy's position, stating:

The Commission notes that the policy of the state, as codified in Section 4928.02, Revised Code, requires the Commission to ensure the availability of unbundled and comparable retail electric service that provides customers with the supplier, term, price, conditions, and quality options they elect to meet their respective needs. Further, SB 221 amended Section 4928.02, Revised Code, to specifically include the promotion of time differentiated pricing as a policy goal of this state. FirstEnergy has not demonstrated how its proposed rate design advances these policy goals. In fact, the record clearly indicates that FirstEnergy could have proposed a rate design which would advance these goals. The Commission agrees with Kroger that time-of-day rates would recognize that some customers have a higher proportion of usage in lower-cost, off-peak periods (Kroger Ex. 1 at 5). Likewise, the record demonstrates that interruptible rates can be used to reduce generation and transmission capacity needs (Nucor Ex. 1 at 11). Moreover, the Commission notes that FirstEnergy has not demonstrated that time-of-day rates or interruptible rates are impractical or cannot be implemented as part of a competitive bidding process (Tr. I at 159; Tr. V at 21). In fact, the record in this proceeding demonstrates that FirstEnergy included both time-of-day rates and interruptible rates in its prior request, in Case No. 07-796-EL-ATA, for a competitive bidding process (Nucor Ex. 1 at 5, 10). Therefore, because the Commission finds that FirstEnergy has not demonstrated that its proposed rate design advances the state policies enumerated in Section 4928.02, Revised Code, the proposed rate design should not be adopted and approved by the Commission.

Case No. 08-936-EL-SSO, Opinion and Order at 24 (November 25, 2008). Any reasonable observer would understand, based on this decision, that the appropriate design of interruptible rates would be an issue in future MRO proceedings for FirstEnergy. The

issue of appropriate interruptible rates was also contested in FirstEnergy's previous ESP and indeed the genesis of the current Rider ELR and Rider OLR was a stipulation/settlement from that proceeding.

For these reasons, EnerNOC's complaint that it did not participate in the MRO case because the case "as filed . . . did not involve demand response or efficiency issues germane to its business or customers" rings hollow. Memorandum in Support at 1. EnerNOC should have known that the case "as filed" was not determinative of the interruptible arrangements that would ultimately be approved. The Commission can alter elements of FirstEnergy's MRO proposal, including the proposed interruptible arrangements, in ruling on the MRO.

EnerNOC also asserts that it relied on "various representations made to it by FirstEnergy and its representatives" that Riders ELR and OLR would be expiring. Memorandum in Support at 4. Nucor does not know what was said by FirstEnergy to EnerNOC about the status of Riders ELR and OLR. Even taking EnerNOC's claims about FirstEnergy's assertions regarding the expiration of Riders ELR and OLR at face value, however, this still does not absolve EnerNOC of the responsibility to protect its own interests when, as discussed above, it should have been obvious that FirstEnergy's interruptible arrangements following the expiration of the current ESP would be at issue back when the MRO application was first filed.

Finally, regardless of the validity of whatever dispute EnerNOC may have with FirstEnergy, such claims are appropriately pursued elsewhere and do not justify holding up the process to review the Stipulation, nor do these claims go to the merits of

whether the individual interruptible riders are just and reasonable as part of the proposed ESP.

III. CONCLUSION

EnerNOC was, or should have been, on notice that issues concerning FirstEnergy's interruptible arrangements – including the expiration of Riders ELR and OLR and the replacement of those rates with an interruptible RFP proposal – were issues in the MRO proceeding, out of which the ESP proposal under consideration in this proceeding developed. EnerNOC's claims that it was not on notice that these issues would be addressed in the stipulation, based on FirstEnergy's "as filed" MRO application and communications with FirstEnergy regarding the status of Riders ELR and OLR after the expiration of the current ESP, do not justify vacating the March 24 Entry.

Respectfully submitted,

Michael K. Lavanga by John B. Stone

Michael K. Lavanga

Counsel of Record

E-Mail: mkl@bbrslaw.com

Garrett A. Stone

E-Mail: gas@bbrslaw.com

Brickfield, Burchette, Ritts & Stone, P.C.

1025 Thomas Jefferson Street, N.W.

8th Floor, West Tower

Washington, D.C. 20007

(202) 342-0800 (Main Number)

(202) 342-0807 (Facsimile)

Attorneys for Nucor Steel Marion, Inc.

CERTIFICATE OF SERVICE

It is hereby certified that a true copy of the foregoing *Memorandum Contra of Nucor Steel Marion, Inc. To EnerNoc's Motion to Vacate*, was served upon the persons listed below via electronic transmission this 19th day of April, 2010.

amyspiller@kravitzllc.com
aporter@szd.com
beitingm@firstenergycorp.com
burkj@firstenergycorp.com
cmiller@szd.com
cmooney2@columbus.rr.com
Cynthia.brady@constellation.com
dakutik@jonesday.com
dane.stinson@baileycavalieri.com
david.fein@constellation.com
dboehm@bklawfirm.com
dmancinc@mwe.com
drinebolt@aol.com
duane.luckey@puc.state.oh.us
elmiller@firstenergycorp.com
gdunn@szd.com
gkrassen@bricker.com
glawrence@mwe.com
greg.price@puc.state.oh.us
haydenm@firstenergycorp.com
henryechkart@aol.com
jbentine@cwsllaw.com
jclark@mwncmh.com
jlang@calfee.com
jpmeissn@lasclev.org
jroberts@enernoc.com
kim.boiko@puc.state.oh.us
korkosza@firstenergycorp.com
lkeiffer@co.lucas.oh.us

lmcaster@mwncmh.com
lmcbride@calfee.com
mhpeticoff@vorys.com
mkurtz@bklawfirm.com
mparke@firstenergycorp.com
mvincel@lasclev.org
mwarnock@bricker.com
mwhite@cwsllaw.com
myurick@cwllaw.com
nmoser@theOEC.org
poulos@occ.state.oh.us
ricks@ohanet.org
robinson@citizenpower.com
rtoriozzi@city.cleveland.oh.us
small@occ.state.oh.us
smhoward@vorys.com
Thomas.mcnamee@puc.state.oh.us
tobrien@bricker.com
trent@theOEC.org
will@theOEC.org
Williams.toddm@gmail.com
Wis29@yahoo.com

Michael K. Lavanga
Michael K. Lavanga

John Beutime
John Beutime