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 R.C. 4928.143, Revised Code, in the form of an Electric Security Plan	)	**Case No. 08-935-EL-SSO**
In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company for Approval of Rider FUEL and Related Accounting Authority	)	**Case No. 09-21-EL-ATA** **09-22-EL-AEM** **09-23-EL-AAM**

MEMORANDUM CONTRA NUCOR STEEL MARION, INC. MOTION FOR AN ORDER DIRECTING FIRSTENERGY TO APPLY STATUTORY 3% COST CAP AND TO INITIATE AN INVESTIGATION OF FIRSTENERGY ALTERNATIVE ENERGY COMPLIANCE COSTS

I. Introduction

Pursuant to OAC 4901-1-12(B)(1), and for the reasons more fully discussed below, Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company (collectively, "Companies") hereby respectfully ask the Commission to deny the September 9, 2011 Motion ("Motion") of Nucor Steel Marion, Inc. ("Nucor") for an Order to reduce the Companies' Rider AER and to initiate an investigation into the Companies' alternative energy compliance costs as described by Nucor.

II. Background

Section 4928.64(B), Revised Code, establishes benchmarks for electric distribution utilities ("EDUs") to acquire a portion of their standard service offer ("SSO") from renewable energy resources. Specifically, the statute provides that a portion of the EDU's electricity supply for its SSO must come from alternative energy resources ("AERs"), including a certain portion from solar energy resources ("SERs"). In 2009, the Companies' AER benchmark was 0.25%, and in 2010 it was 0.5%.

On March 9, 2010, the Companies filed an amended application for a force majeure determination in which the Companies claimed there were insufficient SERs to meet their respective 2009 statutory benchmarks.[1] In a March 10, 2010 Finding and Order, the Commission agreed and so found that a force majeure condition existed with regard to the Companies' 2009 SER requirements. This finding, however, was made "contingent upon [the Companies] meeting revised 2010 SER benchmarks, which [were] increased to include the shortfall for the 2009 SER benchmarks."[2]

On December 2, 2010, the Companies filed an application for approval to conduct a Request for Proposal ("RFP") to purchase Renewable Energy Credits ("RECs") through ten-year contracts. The application specifically sought authorization to elicit competitive bids to purchase through ten year contracts the annual delivery of 5,000 in-state SRECs and 20,000 overall RECs.[3] On June 8, 2011, the Commission approved the Companies' request.[4] In so approving the Companies' request, the Commission referred to the 2009 shortfall and emphasized that "the Companies are obligated to meet their statutory benchmark for RECs and nothing in this Finding and Order precludes the Companies from procuring part of the 2010 shortfall from the RFP."[5]

On April 15, 2011, the Companies filed an application in which they sought a force majeure determination with regard to the 2010 SER in-state benchmark requirement.[6] The Attorney Examiner in the 2010 Application Case established a procedural schedule allowing for comments and reply comments

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[1] *In re Application of [the Companies] for Approval of a Force Majeure Determination for a Portion of the 2009 solar Energy Resources Benchmark requirement Pursuant to Section 4928.64(C)(4) of the Ohio Revised Code*, Case No. 09-1922-EL-ACP, Amended Application (March 9, 2010) (hereinafter, "2009 Application Case").

[2] 2009 Application Case, Finding and Order, p. 4 (March 10, 2010).

[3] *In re the Application of [the Companies] for Approval of Request for Proposal to Purchase Renewable Energy Credits Through Ten Year Contracts*, Case No. 10-2891-EL-ACP, Application (Dec. 10, 2010) (hereinafter "RFP Application Case").

[4] RFP Application Case, Finding and Order (June 8, 29011).

[5] Id. at 10.

[6] In re Annual Alternative Energy Status Report of [the Companies], Case No. 11-2479-EL-ACP, Application (April 15, 2011) (hereinafter, "2010 Application Case").

by interested parties.[7] In their comments, some parties complained that the Companies had done too much,[8] while others asserted that they had done too little.[9] The Commission again concluded that the Companies "presented sufficient grounds for the Commission to reduce the Companies' overall 2010 SER benchmark to the level of [solar] RECs acquired in 2010."[10] And again, the Commission's approval was made "contingent on [the Companies] meeting [their] revised 2011 SER benchmark, which [were] increased to include the shortfall for the 2010 SER benchmark, including any shortfall carried over from the Companies' 2009 SER benchmark."[11]

On September 1, 2011, the Companies filed their quarterly updates for several riders, including the Alternative Energy Resource Rider ("Rider AER"), consistent with the terms set forth therein. On September 9, 2011, Nucor filed a motion in the above referenced dockets in which it asked the Commission for an Order to reduce the Companies' Rider AER to a 3% "cap" included in R.C. §4928.64(C), and to initiate an investigation into the Companies' AER compliance costs.

As more fully discussed below, Nucor's Motion is unlawful on its face and has been rendered moot by a recent Commission ruling. Further, Nucor's reliance on the applicable statute is misplaced. Accordingly Nucor's Motion should be denied.

A. Nucor's Motion is Unlawful, Unreasonable and is now Moot.

Nucor asks the Commission to reduce the Companies' Riders AER to a level that represents 3% of the costs in excess of the Companies' reasonable expected cost of otherwise producing or acquiring the

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[7] 2010 Application Case, Entry, p. 2 (May 6, 2011).

[8] *See e.g.*, 2010 Application Case, Nucor Comments (May 15, 2011); Ohio Energy Group Comments (May 17, 2011).

[9] *See e.g.*, Environmental Law Policy Center Comments (June 27, 2011); Office of the Ohio Consumers' Counsel/ Citizen Power Comments (June 27, 2011); Commission Staff Comments (June 27, 2011); Solar Alliance Comments (June 2, 2011).

[10] 2010 Application Case, Finding and Order, p. 14 (Aug. 3, 2011).

[11] Id.

electricity necessary to meet its SSO requirements.[12] Such a request, without the opportunity to be heard, is unlawful and unreasonable as a violation of the Companies' right to due process. Accordingly, Nucor's Motion should be rejected. Further, Nucor's request has been rendered moot by recent events.

In a recent Entry on Rehearing in the 2010 Application Case, the Commission indicated that it opened a new docket (*In the Matter of the Review of the Alternative Energy Rider Contained in the Tariffs of [the Companies],* Case No. 11-5201-EL-RDR) "for purposes of reviewing the Companies' Rider AER, including the Companies' procurement of renewable energy credits for purposes of compliance with Section 4928.64, Revised Code."[13] In light of this recent event, Nucor's Motion is unnecessary and therefore should be denied as being moot.

B. Nucor Misinterprets R.C. §4928.64(C).

Nucor relies on the "plain meaning" of R.C. § 4928.64(C)(3) to argue that the Companies' "fourth quarter Rider AER charge for Ohio Edison far exceeds the 3% cap."[14] Nucor, however, misinterprets R.C. § 4928.64(C)(3) which provides:

> An [EDU] or an electric services company *need not comply* with a benchmark under division (B)(1) or (2) of this section to the extent that its reasonably expected cost of that compliance exceeds its reasonably expected cost of otherwise producing or acquiring the requisite electricity by three per cent or more. [italics added.]

Contrary to Nucor's claims, the plain meaning of the above statute does not *cap* an EDU's spending at three percent above its expected cost of producing or acquiring the requisite electricity for its SSO. Rather, it provides the EDU with the *option* not to comply if the costs of compliance exceed the three percent threshold. Therefore, there is no violation of R.C. §4928.64(C)(3) if spending exceeds three percent levels.

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[12] Nucor Memorandum in Support of Motion, p. 3.

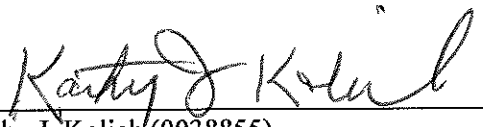
[13] 2010 Application Case, Entry on Rehearing at 3 (Sept. 20, 2011).

[14] Nucor Motion, p. 3. Nothing herein should be construed as the Companies' acceptance of the calculations included in Nucor's Motion.

III. Conclusion

In sum, Nucor's Motion should be denied as being unlawful, moot and unsupported by the law.

Respectfully submitted,



Kathy J. Kolich (0038855)
FIRSTENERGY SERVICE COMPANY
76 South Main Street
Akron, OH 44308
(330) 384-4580 Telephone
(330) 384-3875 Fax
kjkolich@firstenergycorp.com
ONE OF THE ATTORNEYS FOR OHIO EDISON COMPANY, THE CLEVELAND ELECTRIC ILLUMINATING COMPANY AND THE TOLEDO EDISON COMPANY

CERTIFICATE OF SERVICE

I hereby certify that the Memorandum Contra Nucor Motion, of Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company, was electronically filed through the docketing system of the Public Utilities Commission of Ohio, with an electronic courtesy copy emailed to the parties set forth below on this 26th day of September, 2011.

Kathy J. Kolich (0038855)
FIRSTENERGY SERVICE COMPANY
76 South Main Street
Akron, OH 44308
(330) 384-4580 Telephone
(330) 384-3875 Fax
kjkolich@firstenergycorp.com

Public Utilities Commission of Ohio
Robert Fortney
180 East Broad St.
3rd Floor
Columbus, OH 43215
robert.fortney@puc.state.oh.us

Ohio Energy Group (OEG)
Michael L. Kurtz
David F. Boehm
Kurt J. Boehm
Boehm, Kurtz & Lowry
36 East Seventh Street, Suite 1510
Cincinnati, OH 45202
mkurtz@ BKLawfirm.com
dboehm@BKLlawfirm.com

Ohio Consumers' Counsel
Jeffrey L. Small
Ohio Consumers' Counsel
10 West Broad Street
18th Floor
Columbus, OH 43215-3485
small@occ.state.oh.us

Kroger Co.
John W. Bentine
Mark S. Yurick
Chester Wilcox & Saxbe, LLP
65 E. State St., Suite 1000
Columbus, OH 43215
jbentine@cwslaw.com
myurick@cwslaw.com

Ohio Environmental Council
Barth E. Royer
Nolan Moser
Trent A Dougherty
Bell & Royer, LPA
33 South Grant Avenue
Columbus, OH 43215
barthroyer@aol.com
nmoser@theoec.org
trent@theoec.org

Industrial Energy Users (IEU)
Samuel C. Randazzo
Daniel J. Neilsen
McNees Wallace & Nurick LLC
21 East State St., 17th Floor
Columbus, OH 43215
sam@mwncmh.com
dneilsen@mwncmh.com

Ohio Partners for Affordable Energy
David C. Rinebolt
Colleen L. Mooney
(OPEA)
231 West Lima Street
PO Box 1793
Findlay, OH 45839-1793
drinebolt@aol.com
cmooney2@columbus.rr.com

Nucor Steel Marion, Inc.
Garrett A. Stone
Michael K. Lavanga
Brickfield, Burchette, Ritts & Stone
1025 Thomas Jefferson Street, NW
Eighth Floor, West Tower
Washington, DC 20007-5201
gas@bbrslaw.com
mkl@bbrslaw.com

Northwest Ohio Aggregation Coalition (NOAC)
NOAC - Toledo
Leslie A. Kovacik
420 Madison Ave., Suite 100
Toledo, OH 43604-1219
leslie.kovacik@toledo.oh.gov

NOAC - Lucas
Lance M. Keiffer
Lucas County Assist Prosecuting Atty
711 Adams St., 2nd Floor
lkeiffer@co.lucas.oh.us

NOAC- Holland
Paul Skaff
Leatherman Witzler Dombey & Hart
353 Elm St.
Perrysburg, OH 43551
paulskaff@justice.com

NOAC- Lake
Thomas R. Hays
Lake Township – Solicitor
3315 Centennial Road, Suite A-2
Sylvania, OH 43560
hayslaw@buckeye-express.com

NOAC - Maumee
Sheilah H. McAdams
Marsh & McAdams – Law Director
204 West Wayne Street
Maumee, OH 43547
sheilahmca@aol.com

NOAC- Northwood
Brian J. Ballenger
Ballenger & Moore – Law Director
3401 Woodville Rd., Suite C
Toledo, OH 43619
ballengerlawbjb@sbcglobal.net

NOAC- Oregon
Paul S. Goldberg
Oregon – Law Director
6800 W. Central Ave.
Toledo, OH 43617-1135
pgoldberg@ci.oregon.oh.us

NOAC- Sylvania
James E. Moan
Sylvania – Law Director
4930 Holland-Sylvania Rd.
Sylvania, OH 43560
jimmoan@hotmail.com

Constellation Energy Commodities Group, Inc., and Constellation NewEnergy, Inc.
M. Howard Petricoff
Stephen M. Howard
Vorys, Sater, Seymore and Pease, LLP
52 East Gay Street
PO Box 1008
Columbus, OH 43216-1008
mhpetricoff@ vorys.com

Cynthia A. Fonner
Constellation Energy Resources, LLC
550 West Washington Blvd., Suite 300
Chicago, IL 60661

David I. Fein
Constellation Energy Group, Inc.
550 West Washington Blvd., Suite 300
Chicago, IL 60661

Integrys Energy Services, Inc,
M. Howard Petricoff
Stephen M. Howard
Vorys, Sater, Seymore and Pease, LLP
52 East Gay Street
PO Box 1008
Columbus, OH 43216-1008
mhpetricoff@ vorys.com

Bobby Singh
300 West Wilson Bridge Road, Suite 350
Worthington, OH 43085
bsingh@integrysenergy.com

Ohio Association of School Business Officials, Ohio School Boards Association, Buckeye Association of School Administrators,
M. Howard Petricoff
Stephen M. Howard
Vorys, Sater, Seymore and Pease, LLP
52 East Gay Street
PO Box 1008
Columbus, OH 43216-1008
mhpetricoff@ vorys.com

Direct Energy Services, LLC
M. Howard Petricoff
Stephen M. Howard
Vorys, Sater, Seymore and Pease, LLP
52 East Gay Street
PO Box 1008
Columbus, OH 43216-1008
mhpetricoff@ vorys.com

Dominion Retail, Inc.
Barth E. Royer
Bell & Royer, LPA
33 South Grant Avenue
Columbus, OH 43215
barthroyer@aol.com

Gary A. Jeffries
Dominion Resources Services, Inc.
501 Martindale Street, Suite 400
Pittsburg, PA 15212-5817
Gary.A.Jeffries@dom.com

Ohio Hospital Association
Richard L. Sites
155 E. Broad Street, 15th Floor
Columbus, OH 43215-3620
ricks@ohanet.org

Neighborhood Environmental Coalition, Consumers for Fair Utility Rates, United Clevelanders Against Poverty, Cleveland Housing Network, The Empowerment Center of Greater Cleveland (Citizens Coalition)
Joseph P. Meissner
The Legal Aid Society of Cleveland
1223 West 6th Street
Cleveland, OH 44113
jpmeissn@lasclev.org

National Energy Marketers Assoc.
Craig G. Goodman, Esq.
3333 K. Street, NW, Suite 110
Washington, DC 20007
cgoodman@energymarketers.com

City of Akron
Sean W. Vollman
161 S. High Street, Suite 202
Akron, OH 44308
vollmse@ci.akron.oh.us
munteda@ci.akron.oh.us

The Ohio Manufacturers' Association
Langdon D. Bell
Bell & Royer Co., LPA
33 South Grant Avenue
Columbus, OH 43215-3927
lbell33@aol.com

Kevin Schmidt
The Ohio Manufacturers' Association
33 North High Street
Columbus, OH 43215-3005
kschmidt@ohiomfg.com

Ohio Farm Bureau Federation
Larry Gearhardt
Chief Legal Counsel
280 North High Street
Columbus, OH 43218-2383
lgearhardt@ofbf.org

Material Sciences Corporation
Craig I. Smith
15700 VanAken Boulevard, Suite 26
Cleveland, Ohio 44120
wis29@yahoo.com

FPL Energy Power Marketing, Inc. (PMI/GEXA)
F. Mitchell Dutton
FPL Energy Power Marketing, Inc.
700 Universe Blvd.
Juno Beach, Florida 33408
mitch.dutton@fpl.com

Dane Stinson
Bailey Cavalieri LLC
10 West Broad Street, Suite 2100
Columbus, Ohio 43215
Dane.Stinson@BaileyCavalieri.com

The City of Cleveland
Steven Beeler
Gregory J. Dunn
Christopher Miller
Schottenstein Zox & Dunn Co., LPA
250 West Street
Columbus, OH 43215
gdunn@szd.com
cmiller@szd.com

OmniSource Corporation
Damon E. Xenopoulos, Esq.
Brickfield, Burchette, Ritts & Stone, P.C.
1025 Thomas Jefferson Street, N.W.
8th Floor, West Tower
Washington, DC 20007
dex@bbrslaw.com

Citizen Power
Theodore S. Robinson
2121 Murray Avenue
Pittsburgh, PA 15217
robinson@citizenpower.com

Ohio Schools Council,
Glenn S. Krassen
Matthew W. Wannock
Bricker & Eckler LLP
1001 Lakeside Avenue, East
Suite 1350
Cleveland, OH 44114-1142
gkrassen@bricker.com
mwannock@bricker.com

NOPEC
Glenn S. Krassen
Matthew W. Wannock
Bricker & Eckler LLP
1001 Lakeside Avenue, East
Suite 1350
Cleveland, OH 44114-1142
gkrassen@bricker.com
mwannock@bricker.com

COSE
Steve Millard
The Higbee Building
100 Public Square, Suite 201
Cleveland, OH 44113
smillard@cose.org

COSE
Matthew R. Cox
McDonald Hopkins LLC
600 Superior Avenue, East
Suite 2100
Cleveland, OH 44114
mcox@mcdonaldhopkins.com

COSE
Nicholas C. York
Tucker Ellis & West LLP
1225 Huntington Center
41 South High Street
Columbus, OH 43215
nicholas.york@tuckerellis.com

Wal-Mart Stores East LP and Sam's Club East, LP, Macy's Inc., and BJ's Wholesale Club, Inc. (Collectively, the "Commercial Group")
Douglas M. Mancino
McDermott Will & Emory LLP
2049 Century Park East
Suite 3800
Los Angeles, CA 90067-3218
dmancino@mwe.com

Grace C. Wung
McDermott Will & Emery, LLP
600 Thirteenth Street, N.W.
Washington, DC 20005
gwung@mwe.com

American Wind Energy Association, Wind on the Wires, Ohio Advanced Energy
Sally W. Bloomfield
Terrence O'Donnell
Bricker & Eckler LLP
100 South Third Street
Columbus, OH 43215-4291
sbloomfield@bricker.com
todonnell@bricker.com

Morgan Stanley Capital Group Inc.
Douglas M. Mancino
McDermott Will & Emory LLP
2049 Century Park East
Suite 3800
Los Angeles, CA 90067-3218
dmancino@mwe.com

Gregory K. Lawrence
28 State Street
McDermott Will & Emory LLP
Boston, MA 02109
glawrence@mwe.com

Natural Resources Defense Council,
Henry W. Eckhart
50 West Broad Street, #2117
Columbus, Ohio 43215
henryeckhart@aol.com

The Sierra Club
Ohio Chapter
Henry W. Eckhart
50 West Broad Street, #2117
Columbus, Ohio 43215
henryeckhart@aol.com

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Summary: Memorandum Contra Nucor Steel Marion. Inc.'s Motion to Reduce Companies Rider AER and Open Investigation electronically filed by Ms. Kathy J Kolich on behalf of Ohio Edison Company and The Cleveland Electric Illuminating Company and The Toledo Edison Company