

**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	)	Case No. 14-1297-EL-SSO
Authority to Provide for a Standard Service Offer	)	
Pursuant to R.C. §4928.143 in the Form of an	)	
Electric Security Plan.	)	

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**NORTHEAST OHIO PUBLIC ENERGY COUNCIL'S MEMORANDUM CONTRA  
FIRSTENERGY'S APPLICATION FOR REHEARING**

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**I. INTRODUCTION**

The Cleveland Electric Illuminating Company, The Toledo Edison Company, and Ohio Edison Company (collectively, the “Companies”) filed their application for an electric security plan (“ESP IV”) with this Commission on August 4, 2014.<sup>1</sup> The centerpiece of their application was the Retail Rate Stability Rider (“Rider RRS”). The ESP IV application proposed that Rider RRS be structured such that the Companies would enter into a purchase power agreement (“PPA”) with their affiliate, FirstEnergy Solutions (“FES”). Under the PPA, the Companies would purchase the power of FES’s Sammis and Davis Besse generating facilities, as well as FES’s share of power from the Ohio Valley Electric Corporation (collectively, the “PPA Units”). The Companies then would sell the PPA Units’ capacity, energy and ancillary services into PJM Interconnection, LLC. The full costs of the PPA Units plus a return on invested capital, net of associated market revenues, would be recovered from all captive distribution customers through the nonbypassable Rider RRS.<sup>2</sup>

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<sup>1</sup> Companies Ex. 1.

<sup>2</sup> Companies Ex. 1, Application at 9.

By its order issued March 31, 2016 (“Order”), the Public Utilities Commission of Ohio (“Commission”) approved this very structure of Rider RRS,<sup>3</sup> as the Companies requested, with only a few minor modifications.<sup>4</sup> On rehearing, however, the Companies do not seek merely to overturn these slight modifications. Rather, they ask the Commission to reject Rider RRS as structured in the application, and replace it with another rider (“New Rider”)<sup>5</sup> that is not contingent upon entering into a valid affiliate PPA. By seeking to replace Rider RRS with the New Rider, the Companies effectively are rejecting Rider RRS as modified and approved by the Commission. If the Companies wish to reject and replace Rider RRS, their only legal recourse is through filing a new standard service offer (“SSO”) application pursuant to R.C. 4928.143(C)(2)(a). Substituting the New Rider for Rider RRS on rehearing is unlawful and beyond the Commission’s statutory jurisdiction. Accordingly, the Companies’ request for rehearing on this issue must be denied.

## **II. ARGUMENT**

### **A. If an EDU Wishes to Reject Any Portion of a Commission Order in an ESP Proceeding, Its Only Recourse is to File a New SSO Application.**

Am. Sub. S.B. 221 (“SB 221”) requires each electric distribution utility (“EDU”) in the state to provide an SSO available to all distribution customers within its service territory.<sup>6</sup> However, each EDU may choose whether to file an application for an SSO in the form of a

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<sup>3</sup> Order at 86.

<sup>4</sup> The only modifications to Rider RRS of which the Companies complain are (1) the Commission’s refusal to permit capacity performance penalties to be recovered through Rider RRS, and (2) the Commission’s reservation of the right not to allow costs related to any PPA Unit that experience a forced outage exceeding 90 days. Companies App. for Rehearing at 13, Order at 92.

<sup>5</sup> FirstEnergy also refers to the new rider as Rider RRS. However, it is clear that the Companies are offering a new proposal on rehearing and that the two riders are distinct. For this reason, NOPEC will refer to the newly proposed rider as “New Rider.”

<sup>6</sup> R.C. 4928.141.

market rate offer (“MRO”)<sup>7</sup> or an ESP.<sup>8</sup>

In this proceeding, the Companies chose to file an application for an ESP. In doing so, they availed themselves of an advantage not available under an MRO - and, indeed, not available under any other provision in R.C. Title 49 – the ability to reject a Commission order if the Commission makes any modification to the EDU’s application. Specifically, R.C. 4928.143(C)(2)(a) provides:

If the commission modifies and approves an application under division (C)(1) of this section, the electric distribution utility may withdraw the application, thereby terminating it, and may file a new standard service offer under this section or a standard service offer under section 4928.142 of the Revised Code.

S.B. 221 does not permit an EDU to pick and choose which portions of a Commission order to accept – or replace. Rather, if the EDU rejects any portion of an order, it is deemed to have withdrawn its entire application, thereby terminating it. The Commission recognized as much in its Order in this proceeding:

The Commission notes that the Companies voluntarily included Rider RRS as part of their ESP and chose to file an ESP to fulfill the obligation to provide SSO service under R.C. 4928.141. Further, the Companies have the option, under R.C. 4928.143, to reject any Commission modifications to the ESP and withdraw their application for an ESP.<sup>[9]</sup> [Emphasis supplied.]

Thus, if the EDU elects to reject any portion of the Commission’s order, its only legal recourse provided under SB 221 is to file a new SSO application. R.C. 4928.143(C)(2)(a).

**B. It is Unlawful for the Companies to Reject Rider RRS and Attempt to Replace it with the New Rider in a Proceeding on Rehearing.**

As stated above, the Companies proposed Rider RRS in their application filed August 4,

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<sup>7</sup> R.C. 4928.142.

<sup>8</sup> R.C. 4928.143.

<sup>9</sup> Order at 86.

2014. By its Order of March 31, 2016, the Commission approved Rider RRS, with slight modifications. In their application for rehearing filed May 2, 2016, the Companies generally allege that the Commission erred in making the two modifications to Rider RRS noted above. However, their application for rehearing makes clear that their real reason for seeking rehearing and the replacement of Rider RRS is the Federal Energy Regulatory Commission's ("FERC") order issued April 27, 2016.<sup>10</sup> The FERC Order asserted jurisdiction over the affiliate PPA underlying Rider RRS, and required the Companies to submit the proposed PPA to FERC for its review and approval. FERC's concern is that the affiliate PPA would require the Companies' captive customers to subsidize FES's competitive operations. On rehearing, the Companies claim that obtaining FERC approval of the PPA would prevent Rider RRS from becoming effective June 1, 2016, as proposed.<sup>11</sup> For this reason, they ask the Commission to grant rehearing to replace Rider RRS with the New Rider – to avoid FERC review and enable them to commence collecting New Rider revenues from captive customers on June 1, 2016.

The Companies' application for rehearing is doing much more than merely seeking reconsideration of the Commission's modifications to Rider RRS. By asking the Commission to replace Rider RRS with the New Rider, the Companies effectively are rejecting Rider RRS as modified and approved under R.C. 4928.143(C)(1). Moreover, they are rejecting the very

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<sup>10</sup>*Electric Power Supply Assoc., et al. v. FirstEnergy Solutions, et al.*, 155 FERC ¶ 61,101 (2016) ("FERC Order").

<sup>11</sup> The effect of the FERC Order is an unlawful basis for granting rehearing. R.C. 4903.10 specifically provides that the Commission shall not entertain on rehearing "any evidence that, with reasonable diligence, could have been offered upon the original hearing." The Companies unquestionably were aware that FERC could assert jurisdiction to review Rider RRS' underlying affiliate PPA, but mistakenly relied on a affiliate transaction waiver FERC previously had granted the Companies. See Companies Reply Brief, at 169. Mindful of that risk, the Companies could have included the New Rider in their application of August 4, 2014, instead of Rider RRS, as all evidence was available then to support it. Having assumed the risk of FERC review and failed, the Companies are prohibited from presenting the New Rider for consideration when it could have been presented in the original application. As under R.C. 4928.143(C)(2)(a), the Companies recourse is to file a new SSO application to seek approval of the New Rider. In addition, because evidence that could have been prevented at hearing in this case cannot be presented on rehearing, Company witness Mikkelsen's premature and highly prejudicial "Rehearing Testimony" filed with the Companies' application for rehearing should not be considered by the Commission when considering whether to grant rehearing.

structure of Rider RRS that the Commission's Order leaves intact from the Companies own application. As stated above, a rejection of Rider RRS effectively terminates an ESP application. Consequently, the Commission lacks jurisdiction to consider the New Rider in the context of the Companies' current ESP IV application. If the Companies wish to reject Rider RRS and replace it with the New Rider, their only recourse is to file a new SSO. R.C. 4928.143(C)(2)(a). Attempting to do so on rehearing is unlawful and beyond the Commission's jurisdiction.

### **III. CONCLUSION**

For the foregoing reasons, NOPEC respectfully requests that the Companies' application for rehearing be denied.

Respectfully submitted,



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## CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Memorandum Contra was served *via electronic mail* upon the parties of record this 12<sup>th</sup> day of May 2016.



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