

**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)	

**MEMORANDUM CONTRA OF NUCOR STEEL MARION, INC.
TO JOINT INTERLOCUTORY APPEAL OF NORTHWEST OHIO AGGREGATION COALITION
AND THE OFFICE OF THE OHIO CONSUMERS' COUNSEL**

Pursuant to Ohio Administrative Code Section 4901-1-15(D), Nucor Steel Marion, Inc. hereby submits this Memorandum Contra the May 16, 2016 Joint Interlocutory Appeal, Request for Certification to Full Commission and Application for Review and Comments on Tariffs by Northwest Ohio Aggregation Coalition and the Office of the Ohio Consumers' Counsel (collectively "NOAC/OCC") ("Interlocutory Appeal").

I. INTRODUCTION

On March 31, 2016, the Commission issued an order in this case modifying and approving FirstEnergy's ESP IV proposal, and directing FirstEnergy to file tariffs consistent with the order by May 1, 2016.¹ On April 27, 2016, the Federal Energy Regulatory Commission ("FERC") granted a complaint rescinding FirstEnergy Solutions' ("FES") market-based rate authority for purposes of the power purchase agreement ("PPA") between FES and the FirstEnergy Ohio operating

¹ *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company for Authority to Provide For a Standard Service Offer Pursuant to R.C. § 4928.143 in the Form of an Electric Security Plan*, Case No. 14-1297-EL-SSO, Opinion and Order ("March 31 Order") at 99.

companies that was intended to underlie FirstEnergy's proposed Retail Rate Stability Rider ("Rider RRS") under the ESP IV proposal.² In response to the FERC order, on April 29, 2016, FirstEnergy requested an extension of time to file tariffs. By entry dated April 29, 2016, the Attorney Examiner granted the extension, noting that the new filing deadline would be established by a subsequent entry. On May 10, 2016, the Attorney Examiner issued an entry ("May 10 Entry") directing FirstEnergy to file tariffs consistent with the March 31 Order by May 13, 2016. On May 13, 2016, in compliance with the May 10 Entry, FirstEnergy filed tariffs reflecting substantially lower standard service offer rates. On May 20, 2016, Staff issued its Review and Recommendation on FirstEnergy's compliance filing, recommending that the tariffs be approved and implemented effective June 1, 2016.

In the May 16 Interlocutory Appeal, NOAC/OCC request that the Commission reverse or modify the May 10 Entry, maintaining that the entry presents a new or novel question of interpretation, law, and policy, departs from past general practices, and is necessary in order to prevent undue prejudice to Ohio customers. According to NOAC/OCC, certifying the appeal is warranted because the May 10 Entry directed FirstEnergy to file tariffs that cannot be implemented due to the FERC ruling in the *EPSA* case.

Nucor opposes the request for interlocutory appeal. This case has been ongoing since mid-2014, and granting the appeal would only perpetuate additional and unwarranted delay. The May 10 Entry was more than reasonable in light of the unusual circumstances in this case, did not raise a new and novel question of interpretation, law and policy, and did not depart from

² *EPSA v. FirstEnergy Solutions*, 155 FERC ¶ 61,101 (2016) ("*EPSA*").

past precedent. NOAC/OCC also have not demonstrated that they will suffer undue prejudice as a result of FirstEnergy filing its tariffs. The motion for interlocutory appeal should be denied.

II. DISCUSSION

A. The May 10 Entry does not raise a new and novel question of interpretation of law or policy and does not depart from past precedent

NOAC/OCC argue that, in light of FERC's decision to rescind FES' market-based rate authority with respect to the proposed PPA between FES and the FirstEnergy utilities, the May 10 Entry directing the filing of tariffs presents a new and novel interpretation of law and policy since the Commission's order approving ESP IV was premised upon a PPA. While the FERC decision in the *EPSA* case is just the latest development in a case that has had no shortage of plot twists, NOAC/OCC fail to justify why the May 10 Entry is invalid in light of FERC's action. In fact, the Entry directing the filing of the tariffs was a completely reasonable response in light of the circumstances in this case.

NOAC/OCC cite a number of cases purporting to demonstrate that the Commission, "when faced with a federal order or ruling squarely preempting its authority, has accepted the preemption and proceeded in accordance with the federal authority."³ In other words, according to NOAC/OCC, not granting the interlocutory appeal effectively would amount to a failure on the part of the Commission to sit quietly and take its FERC-administered medicine. NOAC/OCC, however, read the *EPSA* decision much too broadly, and in a manner that improperly cabins the Commission's jurisdiction. FERC's order said that FES' market-based rate authority is rescinded for purposes of the PPA, but FERC never said that Rider RRS could not go forward. Rider RRS is a

³ Interlocutory Appeal at 5.

retail rider falling under the purview of the Commission's retail ratemaking jurisdiction. All FERC decided in the *EPSA* case is that if FES wishes to go forward with the wholesale PPA, the PPA would have to be filed at FERC for review.⁴ Nothing in the *EPSA* order precludes Rider RRS from being filed and implemented.

Further, when FirstEnergy filed its tariffs on May 13 in compliance with the May 10 Entry, FirstEnergy filed Rider RRS with a zero value. There will be no Rider RRS charge for customers for the time being, and FirstEnergy has proposed to modify the Rider RRS proposal so that it is no longer tied to the PPA. The Commission has indicated that it will review this modification on rehearing. This further demonstrates that the filing of Rider RRS does not contravene a FERC order, since the rider includes no rates that rely on the wholesale transaction that was the subject of the *EPSA* case. In summary, the filing of Rider RRS does not violate the *EPSA* decision and therefore does not depart from past precedent by contravening a directive from FERC.

B. NOAC/OCC have identified no undue prejudice they will suffer if FirstEnergy files tariffs as required by the May 10 Entry

NOAC/OCC claim that if FirstEnergy's tariffs are filed consistent with the March 31 Order, they will suffer undue prejudice because the rates will be fundamentally inconsistent with the *EPSA* ruling.⁵ As discussed above, filing the Rider RRS tariff is in no way inconsistent with the *EPSA* ruling. Moreover, NOAC/OCC's procedural and due process rights are in no way infringed or curtailed by the filing of the tariffs. On May 11, 2016, the Commission granted all requests for rehearing of the March 31 Order – including that of NOAC/OCC – for purposes of further

⁴ *EPSA*, 155 FERC at P 62.

⁵ Interlocutory Appeal at 5-6.

considering the various complex assignments of error in this case.⁶ The Commission has also indicated that there may be further hearings to consider FirstEnergy's modified Rider RRS proposal.⁷ NOAC/OCC's rehearing issues are still preserved and all parties will have the opportunity to weigh in on the modified Rider RRS proposal. In light of this, it is clear that NOAC/OCC will suffer no undue prejudice as a result of the tariffs FirstEnergy filed on May 13.

If the tariffs were not filed, on the other hand, parties would be unable to take advantage of the many benefits of ESP IV. Rider RRS is just one piece of a comprehensive ESP plan that included many other elements, such as the expansion of FirstEnergy's energy efficiency and peak demand reduction programs, the improvement and extension of Rider ELR, the Rider NMB Pilot, and the various incentives and programs included in ESP IV benefiting commercial and low-income customers. If the Commission followed NOAC/OCC's recommended course in the Interlocutory Appeal and directed the reinstitution of the ESP III rates, all of these benefits would be indefinitely and unnecessarily delayed. Allowing the ESP IV rates (including Rider RRS with a zero value) to go into effect while continuing to evaluate rehearing requests is a much more prudent and reasonable approach.

III. CONCLUSION

The filing of Rider RRS does not violate FERC's decision in the *EPSA* case, and NOAC/OCC have not demonstrated that they will suffer any undue prejudice as a result of FirstEnergy filing its tariffs as required by the May 10 Entry. Accordingly, the Interlocutory Appeal should be denied.

⁶ Case No. 14-1297-EL-SSO, Entry on Rehearing at 3 (May 11, 2016).

⁷ *Id.*

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served upon the following parties of record or as a courtesy, via electronic mail on May 23, 2016.

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Summary: Memorandum Memorandum Contra of Nucor Steel Marion, Inc. to Joint Interlocutory Appeal of Northwest Ohio Aggregation Coalition and The Office of the Ohio Consumers' Counsel electronically filed by Mr. Michael K. Lavanga on behalf of Nucor Steel Marion, Inc.