

FILE

BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

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NUCOR STEEL MARION, INC.)
Complainant)
v.)
OHIO EDISON COMPANY;)
THE CLEVELAND ELECTRIC)
ILLUMINATING COMPANY; AND)
THE TOLEDO EDISON COMPANY)
Respondents)

Case No. 09-46-EL-CSS

NUCOR STEEL MARION, INC.'S MEMORANDUM CONTRA
THE FIRSTENERGY OHIO OPERATING COMPANIES'
MOTION TO STRIKE ATTACHMENT A

Pursuant to Ohio Administrative Code 4901-1-12(B)(1), Nucor Steel Marion, Inc. ("Nucor") submits this Memorandum Contra the FirstEnergy Ohio Operating Companies' Motion to Strike Attachment A ("Motion to Strike") and Memorandum in Support. FirstEnergy¹ can point to no statute, regulation, or case law to support its claim that Attachment A to the Nucor Complaint is improper and unlawful. The Motion to Strike should be denied.

I. INTRODUCTION

On January 21, 2009, Nucor filed a complaint in this proceeding against FirstEnergy ("Complaint"). As detailed in the Complaint, effective January 1, 2009, FirstEnergy implemented a new internal policy for calling economic interruptions that resulted in a drastic increase in the number of economic interruptions for Nucor. Starting

¹ "FirstEnergy" is intended to refer to Ohio Edison Company, the Cleveland Electric Illuminating Company, and the Toledo Edison Company, collectively and individually.

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January 5, 2009 and continuing through to today, economic interruptions have been called for Nucor in every hour of every day, making FirstEnergy's interruptible rates dysfunctional and implementing a drastic increase in rates for FirstEnergy's interruptible customers. Included with the Complaint was Attachment A, a document entitled "Detailed Supporting Argument." In its Motion to Dismiss, FirstEnergy claims that Attachment A is "improper and unlawful," and requests that the Commission strike Attachment A.

II. ARGUMENT

In its Memorandum in Support, FirstEnergy notes that "Attachment A is somewhat like a brief," and argues that it should be stricken because it was filed before the evidentiary hearing and is based on facts not properly established through an evidentiary proceeding." Memorandum in Support at 1.

FirstEnergy's argument fails for several reasons. First, as FirstEnergy itself recognizes, the statutes and regulations governing complaints contain few specific requirements as to what must be in a complaint and what form a complaint must take. Section 4905.26 of the Revised Code requires only that a complaint must be in writing, and Rule 4909-9-01(B) of the Ohio Administrative Code requires that complaints filed under Section 4905.26 of the Revised Code "shall be in writing and shall contain the name of the public utility complained against, a statement which clearly explains the facts which constitute the basis of the complaint, and a statement of the relief sought." The statute and the rules do not provide a great deal of guidance, which means a complainant has flexibility about what it includes in its complaint. Neither the statute nor the Commission's rules prohibit the filing of a more detailed explanation of the facts,

circumstances, and applicable law underlying a complaint in an attachment such as Attachment A. Also, FirstEnergy cites to no cases where the Commission struck such an attachment or exhibit from a complaint.

Second, while the facts of Nucor's Complaint are relatively straightforward, the legal context of the complaint is more complex. The *Elyria Foundry* proceeding, FirstEnergy's ESP and MRO proceedings and the orders in those proceedings, and the provisions in S.B. 221 pertaining to the withdrawal of an ESP proposal (provisions that have just recently been interpreted by the Commission for the first time, and that have never been construed by the Ohio Supreme Court) all form the backdrop for Nucor's Complaint. Nucor believed that it was important to present this background in order to provide the necessary context for the Complaint, but that it was not necessary to include it in the Complaint itself, which is limited to a list of specific facts and requested relief. The purpose of Attachment A is to provide the Commission with this additional background and context. Again, FirstEnergy provides no statute, regulation, or case law demonstrating that including such information in a Complaint is improper.

Third, as part of its Complaint, Nucor included a request for emergency relief under Section 4909.16 of the Revised Code.² Since Nucor is requesting emergency relief, it was important to include the legal argument supporting Nucor's Section 4909.16 claim along with the Complaint.³ The specific legal arguments supporting Nucor's request for emergency relief are set forth in Attachment A.

² FirstEnergy has filed a motion to dismiss the Section 4909.16 claim. Concurrent with the filing of this memorandum contra, Nucor has also filed a memorandum contra FirstEnergy's motion to dismiss the section 4909.16 claim.

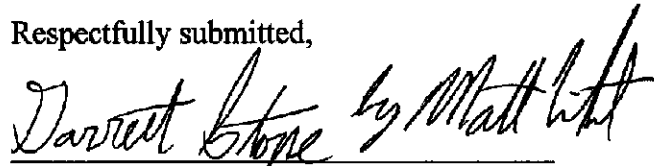
³ As Nucor explains in its memorandum contra FirstEnergy's motion to dismiss the Section 4909.16 claim, there was nothing improper with including a request for emergency relief under Section 4909.16 as part of

Finally, FirstEnergy states that if the Commission were to condone a practice that allows parties to submit a "legal brief based on unsubstantiated facts and unauthenticated documents" there would be no need for an evidentiary hearing. Memorandum in Support at 2. Attachment A is not a legal brief, and it does nothing to short circuit the evidentiary process or to undermine FirstEnergy's due process rights. Should the Commission decide to conduct an evidentiary hearing in this proceeding, neither FirstEnergy, nor Nucor will, in any way, be limited by Attachment A in conducting discovery, offering testimony, cross-examining witnesses, and preparing briefs. FirstEnergy's concerns on this score, therefore, are invalid.

III. CONCLUSION

For the reasons discussed above, Nucor respectfully requests that the Commission deny FirstEnergy's Motion to Strike.

Respectfully submitted,



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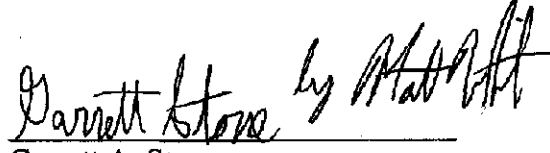
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a complaint, particularly since the factual basis for Nucor's Complaint is the same as that for Nucor's Section 4909.16 claim.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing pleading was served upon the following party of record or as a courtesy, via U.S. Mail postage prepaid, express mail, hand delivery, or electronic transmission on February 17, 2009.


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