

IN THE SUPREME COURT 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 Provide for a Standard Service)
Offer Pursuant to R.C. §4928.143 in the Form of)
an Electric Security Plan.)

Case No. 2013-0513
On Appeal From the Public
Utilities Commission of Ohio
PUCO Case No. 12-1230-EL-SSO

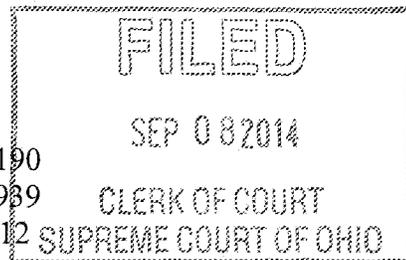
**RESPONSE OF INTERVENING APPELLEES OHIO EDISON COMPANY, THE
CLEVELAND ELECTRIC ILLUMINATING COMPANY, AND THE TOLEDO EDISON
COMPANY TO MOTION OF APPELLANT NORTHEAST OHIO PUBLIC ENERGY
COUNCIL TO EXPEDITE ORAL ARGUMENT AND OPINION**

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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. 2013-0513
)	On Appeal From the Public Utilities Commission of Ohio
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RESPONSE OF INTERVENING APPELLEES OHIO EDISON COMPANY, THE CLEVELAND ELECTRIC ILLUMINATING COMPANY, AND THE TOLEDO EDISON COMPANY TO MOTION OF APPELLANT NORTHEAST OHIO PUBLIC ENERGY COUNCIL TO EXPEDITE ORAL ARGUMENT AND OPINION

I. INTRODUCTION

The motion by Appellant Northeast Ohio Public Energy Council (“NOPEC”) seeks to have this Court expedite this case and decide an issue that NOPEC failed to raise properly before the Court. Moreover, the reason given to expedite the decision on this issue is neither unique to this case nor one requiring expedition. This matter involves a review of a decision by the Public Utilities Commission of Ohio (the “Commission”) to approve the third Electric Security Plan (“ESP 3”) of Intervening Appellees Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company (collectively, the “Companies”). The so-called “pivotal question” in this case (according to NOPEC) is the application of the statutory test to be used to approve an ESP, *see* R.C. 4928.143(C)(1). (Memorandum in Support of Appellant NOPEC’s Motion to Expedite Oral Argument and Opinion at 2.) Not surprisingly, that test is used in every ESP case and has been an issue in practically every appeal of Commission orders approving ESPs. *See generally, In the Matter of the Application of the Dayton Power and Light*

Company from Approval of an Electric Security Plan, Case No. 2014-1505 (appeal from PUCO Case No. 12-425-EL-SSO); *The Kroger Company v. The Public Utilities Commission of Ohio*, Case No. 2013-0521 (appeal from Case No. 11-346-EL-SSO); *Industrial Energy Users-Ohio v. The Public Utilities Commission of Ohio*, Case No. 2009-2022 (appeal from PUCO Case No. 2009-2022). Indeed, one of the issues raised (albeit improperly) by NOPEC regarding the application of the statutory test here – i.e., the consideration of non-price conditions of an ESP as part of the statutory test – has already been decided by this Court. Further, given that ESPs are for a finite term (normally, three years), ESP cases are a regular part of the Commission’s and, necessarily, this Court’s docket. Because it is likely that appeals of prior ESPs will be pending when electric distribution utilities file applications for approval of subsequent ESPs, the special treatment that NOPEC seeks here could be argued for every ESP appeal before this Court. No such rule for special treatment of ESP cases is necessary.

II. ARGUMENT

A. NOPEC Has Failed To Perfect The Issue For Which It Seeks An Expedited Decision.

For an issue to be properly before this Court in an appeal from a Commission order, the appellant must “specifically” set forth the issue in appellant’s application for rehearing before the Commission. *Ohio Consumers’ Counsel v. Pub. Util. Comm.*, 114 Ohio St.2d 340, 2007-Ohio-4276, 872 N.E.2d 269, ¶ 40 (quoting R.C 4903.10). A party’s failure to do so “deprive[s] the Commission of an informed opportunity to set things right.” *In re Application of Columbus S. Power Co.*, 129 Ohio St.3d. 271, 2011-Ohio-2638, 951 N.E.2d 751, ¶ 19. Here, NOPEC seeks to have this Court decide on an expedited basis whether the Commission is permitted to consider “qualitative” (i.e., non-price or non-cost) factors in determining under Revised Code Section 4928,143(C)(1) “if ... the electric security plan so approved, including price and all other terms

and conditions ..., is more favorable in the aggregate as compared to the expected results that would otherwise apply under Section 4928.142 of the Revised Code.” (NOPEC Motion to Expedite at 2.) Yet, NOPEC failed to raise that issue in its application for rehearing at the Commission. (See NOPEC App. for Rehearing at 7-9; App. Appx. at 000124-000126.)

Similarly, other issues raised by NOPEC regarding the Commission’s interpretation of the statutory ESP approval test were also not raised. For example, NOPEC argues that the Commission cannot consider qualitative benefits not listed in Ohio Revised Code Sections 4928.143(B)(1) and (B)(2). (NOPEC Br. at 22, 27-28.) NOPEC also asserts that the Commission’s interpretation of the statutory test is contrary to the legislative history of the statute. (*Id.* at 5-11.) A review of NOPEC’s application for rehearing reveals neither of these issues. (NOPEC App. for Rehearing at 7-9; App. Appx. at 000124-000126.)

Because the Commission did not have the “opportunity to set things right,” the issues that NOPEC seeks to raise now regarding the Commission’s application of the statutory ESP approval test are not properly before this Court. Given that these issues are not properly before the Court in the first instance, there are no grounds for NOPEC to seek a decision on those issues, much less an expedited decision. Consequently, NOPEC’s motion should be denied for this reason alone.

B. This Case Does Not Present A Unique Issue That Would Merit Expedited Treatment.

The question of what the Commission can consider as part of its review under Section 4928.143(C)(1) is not an issue unique to this case. Indeed, this Court has already answered that question raised here. In *In re Application of Columbus S. Power Co.*, 128 Ohio St.3d 402, 2011-Ohio-958, 945 N.E.2d 501, ¶ 27, this Court held that the statute “does not bind the commission to a strict price comparison.” This conclusion follows from the plain words of the statute which

refers to a consideration of “pricing *and all other terms and conditions....*” R.C. 4928.143(C)(1) (emphasis added). By contrasting pricing with “all other terms and conditions” the General Assembly commanded the Commission to review things other than price. Given that the specific issue on which NOPEC seeks an expedited ruling has already been effectively decided, there is no reason why the Court needs to decide that issue on an expedited basis.

C. There Are No Special Circumstances In This Case That Require Special Treatment.

Revised Code Chapter 4928 requires each electric utility to provide a standard service offer (“SSO”) that sets the terms and conditions of retail electric service that the utility can offer for customers who do not shop to procure their own retail electric service. One way to provide an SSO is through an ESP.¹ Because an ESP governs the conditions under which service will be provided for a specified term, electric distribution utilities have filed applications for approval of subsequent ESPs while the prior ESPs have been in effect. For every case in which this Court has been asked to review a Commission decision regarding an ESP, the ESP appealed from has been in effect. In virtually every such appeal, a “pivotal question” has been the proper application of the statutory ESP approval test. *See generally, In the Matter of the Application of the Dayton Power and Light Company from Approval of an Electric Security Plan*, Case No.

¹ The other way to provide an SSO is through a Market Rate Offer (“MRO”) under Revised Code Section 4928.142. The Commission, however, has never approved an MRO. In *In the Matter of Duke Energy Ohio, Inc. for Approval of A Market Rate Offer to Conduct A Competitive Bidding Process for a Standard Service Offer Electric Generation Supply, Accounting Modifications, and Tariffs for Generation Service*, PUCO Case No. 10-2586-EL-SSO, Opinion and Order at 75-77 (Feb. 23, 2011), the Commission held that Duke’s MRO application was in non-compliance with the relevant statute. *See* <http://dis.puc.state.oh.us/DocumentRecord.aspx?DocID=b862b5de-b3b2-45f3-96ca-857585edda91> (accessed Sept. 8, 2014). In *In the Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Approval of A Market Rate Offer to Conduct A Competitive Bidding Process for a Standard Service Offer Electric Generation Supply, Accounting Modifications Associated with Reconciliation Mechanism, and Tariffs for Generation Service*, PUCO Case No. 09-906-EL-SSO, the Companies decided to file an ESP application after receiving comments from the Commission Staff strongly urging the Companies to pursue an ESP as opposed to an MRO. *See* PUCO Case No. 09-906-EL-SSO, Comments Submitted on Behalf of the Staff of the Public Utilities Commission of Ohio at 21-22 (Nov. 24, 2009) <http://dis.puc.state.oh.us/TiffToPdf/A1001001A09K24B52430A40461.pdf> (accessed Sept. 8, 2014). Thus, all electric utilities have provided (and, for the foreseeable future, will likely provide) SSO service through ESPs.

2014-1505 (appeal from PUCO Case No. 12-425-EL-SSO); *The Kroger Company v. The Public Utilities Commission of Ohio*, Case No. 2013-0521 (appeal from Case No. 11-346-EL-SSO); *Industrial Energy Users-Ohio v. The Public Utilities Commission of Ohio*, Case No. 2009-2022 (appeal from PUCO Case No. 2009-2022). Thus, it should not be surprising that an appeal of an ESP decision should be pending when a subsequent ESP application is filed. And it should not be surprising that the “pivotal issue” of the ESP appeal would not be decided while an application for approval of a subsequent ESP is pending.

NOPEC has offered no special grounds why this proceeding should be treated differently than other appeals from ESP cases before the Commission. There is no reason for such a special treatment in the current circumstance. Certainly, NOPEC has offered no grounds for one.

III. CONCLUSION

For the foregoing reasons, NOPEC’s motion for expedited oral argument and opinion should be denied.

Dated: September 8, 2014

Respectfully submitted,

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CERTIFICATE OF SERVICE

The foregoing was served upon the following parties of record this 8th day of
September 2014, via electronic mail and regular United States mail.

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