

James W. Burk  
Senior Attorney

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330-384-5861  
Fax: 330-384-3875**PUCO**

May 16, 2008

Ms. Renee J. Jenkins  
Director, Administration Department  
Secretary to the Commission  
Docketing Division  
The Public Utilities Commission of Ohio  
180 East Broad Street  
Columbus, OH 43215

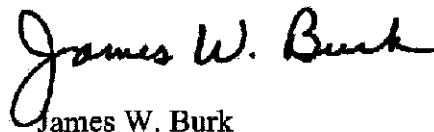
RE: *PUCO Case No. 04-1932-EL-ATA and Cases No. 05-1125-EL-ATA, 05-1126-EL-AAM, 05-1127-EL-UNC - Memorandum of Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company Contra OPAE Motion*

Dear Ms. Jenkins:

Enclosed for filing please find the original and seventeen (17) copies of Memorandum of Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company Contra OPAE Motion for docketing regarding the above-referenced case which was fax-filed today. Please file the attached. File-stamp the two extra copies and return them to the undersigned in the enclosed envelope.

Thank you for your assistance in this matter. Please contact me if you have any questions concerning this matter.

Very truly yours,

  
James W. Burk

jwb:ls  
Enclosures 17  
By Federal Express Priority Mail

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**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 Approval of a Rider for the Collection of RTO Costs and Transmission and Ancillary Service Costs and Authority to Modify their Accounting Procedures.**

**Case No. 04-1932-EL-ATA**

**In the Matter of the Joint Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Authority to Modify Certain Accounting Practices and For Tariff Approvals**

**Case No. 05-1125-EL-ATA  
05-1126-EL-AAM  
05-1127-EL-UNC**

**MEMORANDUM OF OHIO EDISON COMPANY, THE CLEVELAND  
ELECTRIC ILLUMINATING COMPANY, AND THE TOLEDO EDISON  
COMPANY CONTRA OPAE MOTION**

Pursuant to Rule 4901-1-35(B) of the Ohio Administrative Code, Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company (collectively, the "Companies") file their memorandum contra the Ohio Partners for Affordable Energy's ("OPAE") Motion to Enforce the Stipulations and Memorandum in Support filed on May 2, 2008 in the aforementioned dockets, and respectfully request the Commission to deny the Motion as it is wholly without merit.



## **I. Introduction and Background**

On November 4, 2005, as part of the Rate Certainty Plan ("RCP") proceeding, OPAE signed a Supplemental Stipulation. This Supplemental Stipulation, together with the Stipulation and Recommendation filed on September 9, 2005, were approved by the Commission in Case No. 05-1125-EL-ATA et seq. on January 4, 2006. One provision of the Supplemental Stipulation related to the terms and conditions under which the Companies would conduct a demand-side management program entitled the Home Performance Energy Star DSM program ("Home Performance program"). Up to ten million dollars was to be dedicated to this program pursuant to the terms, conditions, and parameters set forth in the Supplemental Stipulation.

Contractors interested in participating in the Home Performance program are required to meet program standards and sign a participation agreement before accessing any program funds. Under the Supplemental Stipulation a provision was made for OPAE so that they were permitted to administer \$500,000 dollars annually for three years for a total of \$1.5 million dollars under the terms, conditions, and parameters of the Home Performance program, as specifically described in the Supplemental Stipulation. The program design has been completed consistent with the parameters agreed to by the signatory parties to the Supplemental Stipulation and contractors have commenced participation in the program.

To date, OPAE has made no effort to comply with the terms, conditions, or parameters of the program, and therefore has not accessed any of the funds available under the Home Performance program. The Companies have implemented the Home Performance program in strict compliance with the terms, conditions, and parameters of



the Supplemental Stipulation. If and when OPAE complies with the terms of the Supplemental Stipulation and the structure of the Home Performance program, the Companies will make the appropriate payments to OPAE, consistent with the terms and conditions of the Supplemental Stipulation. With its Motion, however, OPAE seeks not to uphold the Supplemental Stipulation, but rather urges the Commission to discard the Supplemental Stipulation requirements and somehow force the Companies to just give money to OPAE, which was never agreed to by the Companies or contemplated by the Supplemental Stipulation. OPAE's Motion should be denied.

**II. OPAE's Requested Relief is Wholly Inconsistent with the Clear Requirements of the Supplemental Stipulation.**

OPAE implores the Commission to order the Companies to simply hand over \$1.5 million dollars to OPAE. Doing so, however, would be a blatant violation of the clear and unambiguous terms of the Supplemental Stipulation, which, of course, OPAE signed and agreed to be bound by. While the Supplemental Stipulation allowed OPAE to avoid having to compete to administer \$1.5 million dollars within the Home Performance program, it did *not* relieve OPAE of having to meet the parameters of that program as set forth therein. Quite to the contrary, the Supplemental Stipulation specifically states that: "Payments will be made to OPAE upon receipt of documentation that funds have been spent *under the appropriate parameters of this Energy Star program.*" Supplemental Stipulation at paragraph 2, p. 1. (Emphasis added). The Stipulation in 04-1932-EL-ATA clearly requires OPAE to meet the requirements of the Home Performance program when it states that OPAE may only administer the funds "As contemplated by the Supplemental Stipulation in paragraph 2". Stipulation, Case No. 04-1932-EL-ATA, p. 7. Therefore,



under the plain language of the Supplemental Stipulation, OPAE is not entitled to any funds unless it complies with the requirements of the Home Performance program as set forth in the Supplemental Stipulation.

OPAE has made no attempt to comply with the terms and parameters of the Supplemental Stipulation. They have not signed the participation agreement that all other contractors participating in the Home Performance program have signed, and which has always been available for them to sign. They have submitted no documentation that is required under the Supplemental Stipulation. They have made no showing that the way they propose to administer their part of the Home Performance program is consistent with the parameters as set out in the Supplemental Stipulation. In short, they have done nothing to meet the requirements under the Home Performance program that would entitle them to receive funding.

In its Motion, OPAE seems to suggest that because they conduct a separate program, Community Connections, that somehow means they are entitled to simply be given \$1.5 million dollars by the Companies under the Home Performance program. This suggestion is wrong. There is nothing in the Supplemental Stipulation that ties the Home Performance program with the Community Connections program. There is nothing to suggest that OPAE can use funds from the Home Performance program for its existing Community Connections program in a way that does not meet the parameters of the Home Performance program. The Companies are not required under the Supplemental Stipulation to simply give OPAE \$1.5 million dollars to fund their Community Connections program. As evidenced by the plain language of the Supplemental Stipulation, that was not the agreement.



The Companies have not “failed” to abide by the Supplemental Stipulation, and other parties’ allegations to that effect are wrong. In fact, the Companies are the only parties involved in this issue that have insisted that the terms of the Supplemental Stipulation must be followed.<sup>1</sup> The Commission cannot now, and should not, retroactively change the terms of a stipulation signed by multiple parties simply because one party has after the fact become dissatisfied with the agreement they signed.

The Commission doesn’t have the authority to just order the Companies to make charitable contributions to an organization on an involuntary basis, which would be the effect of granting OPAE’s Motion. The Supplemental Stipulation was negotiated and entered into voluntarily by the Companies, and the Companies are bound to follow the terms and conditions as set forth therein, just as are all the other signatory parties. They cannot be forced to enter into a different agreement, or forced to just give money to OPAE outside the terms and conditions of the Supplemental Stipulation.

### **III. Closing**

The Companies are acting in strict accord with the terms, conditions, and parameters of the Supplemental Stipulation. OPAE has made no attempt to comply with the parameters of the Home Performance program, and therefore they are entitled to no funding under the Supplemental Stipulation. OPAE’s request that the Commission order

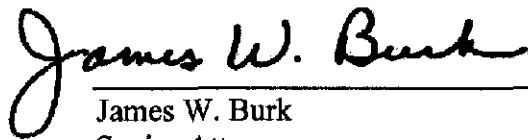
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<sup>1</sup> In this regard, the Neighborhood Coalition’s inflammatory comments directed at the Companies are truly unwarranted. Regarding the instant issue, the Companies are the only party arguing that the Supplemental Stipulation should be implemented as originally agreed to. It is OPAE that seeks to ignore the Supplemental Stipulation, and thereby undermine the stipulation process. Apart from being premised on mistaken facts and an ignorance of the terms of the Supplemental Stipulation, conceptually the Companies agree with the Neighborhood Coalition that the terms of a stipulation must be implemented and enforced as written, and, in fact, that is exactly what the Companies are arguing in this Memo Contra. Unfortunately, OPAE, supported by OCC and Neighborhood Coalition, proposes that the Commission ignore the plain language of the Supplemental Stipulation and force the Companies to just give OPAE \$1.5 million dollars, in violation of the very Supplemental Stipulation they all signed.



the Companies to simply give \$1.5 million dollars to OP&E for its current programs, in total disregard of the agreed-to terms of the Supplemental Stipulation and parameters of the Home Performance program, is inappropriate and beyond the Commission's jurisdiction, and should be denied.

Respectfully submitted,

A handwritten signature in cursive script that reads "James W. Burk". The signature is written in black ink and is positioned above a horizontal line.


James W. Burk  
Senior Attorney  
FIRSTENERGY SERVICE COMPANY  
76 South Main Street  
Akron, OH 44308  
Telephone: (330) 384-5861  
Facsimile (330) 384-3875

ATTORNEY FOR OHIO EDISON  
COMPANY, THE CLEVELAND  
ELECTRIC ILLUMINATING COMPANY,  
AND THE TOLEDO EDISON COMPANY



## CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing Memorandum Contra was served on all of the parties listed below by first-class U.S. Mail, postage prepaid, this 16<sup>th</sup> day of May 2008.

  
James W. Burk

Brian J. Ballenger  
Counsel for Village of Northwood  
Ballenger & Moore Co., LPA  
3401 Woodville Road, Suite C  
Northwood, OH 43619

David F. Boehm  
Michael L. Kurtz  
Boehm, Kurtz & Lowry  
36 East Seventh Street, Suite 1510  
Cincinnati, OH 45202

Trent A. Dougherty  
Ohio Environmental Council  
1207 Grandview Avenue, Suite 201  
Columbus, OH 43212

Robert N. Fronck  
Local Union No. 270  
U.W.U.A., AFL-CIO  
4205 Chester Avenue  
Cleveland, OH 44103

Rick C. Giannantonio  
FirstEnergy Service Company  
76 South Main Street  
Akron, OH 44308

Brian S. Goldberg  
Counsel for Village of Oregon  
6800 West Central Avenue  
Toledo, OH 43617-1135

Peter D. Gwyn  
Counsel for Village of Perrysburg  
110 West Second Street  
Perrysburg, OH 43551

Stephen L. Huntoon  
FPL Energy Power Marketing, Inc.  
801 Pennsylvania Avenue, N.W., Suite  
220  
Washington, D.C. 20004

Lance M. Keiffer  
Counsel for Lucas County  
Commissioners  
711 Adams Street, 2nd Floor  
Toledo, OH 43624-1680

Glenn S. Krassen  
Bricker & Eckler LLP  
1375 East Ninth Street, Suite 1500  
Cleveland, OH 44115-1718

Sheilah McAdams  
Counsel for City of Maumee  
Marsh & McAdams  
204 West Wayne Street  
Maumee, OH 43537

Thomas W. McNamee  
Attorneys General's Office  
Public Utilities Section  
180 East Broad Street, 9<sup>th</sup> Floor  
Columbus, OH 43215-3793



Joseph P. Meissner  
Legal Aid Society of Cleveland  
1223 West Sixth Street  
Cleveland, OH 44113

James E. Moan  
Counsel for City of Sylvania  
Lydy & Moan  
4930 Holland-Sylvania Road  
Sylvania, OH 43560-2149

Daniel J. Neilsen  
McNees, Wallace & Nurick  
21 East State Street  
Columbus, OH 43215-4228

Thomas J. O'Brien  
Bricker & Eckler LLP  
100 South Third Street  
Columbus, OH 43215-4291

William M. Ondrey Gruber  
2714 Leighton Road  
Shaker Heights, OH 44120

M. Howard Petricoff  
Vorys, Sater, Seymour & Pease  
52 East Gay Street  
Columbus, OH 43216-1008

David C. Rinebolt  
Ohio Partners for Affordable Energy  
231 West Lima Street  
P. O. Box 1793  
Findlay, OH 45839-1793

Marvin I. Resnik  
American Electric Power Service Corp.  
1 Riverside Plaza, 29<sup>th</sup> Floor  
Columbus, Ohio 43215

Barth E. Royer  
Bell, Royer & Sanders Co., LPA  
33 South Grant Avenue  
Columbus, OH 43215-3900

Richard L. Sites  
General Counsel  
Ohio Hospital Association  
155 East Broad Street, 15<sup>th</sup> Floor  
Columbus, OH 43215-3620

Paul Skaff  
Counsel for Village of Holland  
Leatherman, Witzler, Dombey  
353 Elm Street  
Perrysburg, OH 43551

Jeffrey L. Small  
Assistant Consumers' Counsel  
Ohio Consumers' Counsel  
10 West Broad Street, Suite 1800  
Columbus, OH 43215-34385

Carl Word  
Utility Workers Union of America  
10103 Live Oak Avenue  
Cherry Valley, CA 02223