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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 Authority to  
Establish a Standard Service Offer  
Pursuant to R.C. § 4928.143 in the form  
of an Electric Security Plan

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Case No. 08-935-EL-SSO

**INITIAL POST-HEARING BRIEF OF THE COMMERCIAL GROUP**

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Dated: November 21, 2008

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## TABLE OF CONTENTS

	Page
I. INTRODUCTION.....	1
II. FIRSTENERGY HAS FAILED TO DEMONSTRATE THAT ITS AS FILED ESP SATISFIES THE PROVISIONS OF SB 221 .....	3
A. FirstEnergy's Riders As Proposed Should Be Rejected or Modified.....	4
1. Generation Related Riders .....	6
2. Demand Side Management/Energy Efficiency Rider .....	7
B. FirstEnergy's Proposed Deferrals Should Be Rejected .....	9
C. FirstEnergy's Significantly Excessive Earnings Test Should Be Modified.....	9
III. CONCLUSION .....	11

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**INITIAL POST-HEARING BRIEF OF THE COMMERCIAL GROUP**

COMES NOW, Wal-Mart Stores East, LP, Sam's East, Inc., Macy's, Inc., and BJ's Wholesale Club, Inc. (collectively, the "Commercial Group"), by and through counsel, files this Initial Post-Hearing Brief in the above-captioned proceeding. As discussed below, the Commercial Group respectfully requests that the Public Utility Commission of Ohio ("Commission") deny the application for an electric security plan, as filed, and modify the plan as discussed herein.

**I. INTRODUCTION**

On July 31, 2008, Ohio Edison Company ("OE"), The Cleveland Electric Illuminating Company ("CEI"), and The Toledo Edison Company ("TE") (collectively "FirstEnergy" or "FE") filed an application for approval of a standard service offer ("SSO") with the Commission under Sections 4928.141, 4928.142, and 4928.143 of the Ohio Revised Code ("RC"), pursuant to Amended Substitute Senate Bill 221 ("SB 221"). In SB 221, new laws were created to establish an SSO rate for generation service beginning in 2009 and moving forward. Under SB 221, an electric distribution utility can establish an SSO by applying to implement a market rate offer ("MRO") pursuant to RC Section 4928.142, or a electric security plan ("ESP") pursuant to RC Section 4928.143.

In its application, FirstEnergy proposed an ESP for a three-year term (from 2009 – 2011), with an option to terminate the ESP in the third year. Concurrently on July 31, 2008, FirstEnergy also filed an MRO which would serve as the default SSO option in the event the Commission denied FirstEnergy's ESP application, or in the event the Commission modified FirstEnergy's ESP in a manner unacceptable to FirstEnergy. In reviewing FirstEnergy's ESP application, SB 221 places the burden on the electric distribution utility to demonstrate that, in the aggregate, its proposed ESP is superior to an MRO that satisfies the provisions of Section 4928.143 of the Revised Code.

In determining whether FirstEnergy has met its burden of proof, the Commission may appropriately review whether the proposed ESP ensures the availability to consumers of adequate, reliable, safe, efficient, nondiscriminatory, and reasonably priced retail electric service as provided in SB 221.<sup>1</sup> SB 221 also provides that in reviewing certain proposed cost recovery mechanisms, FirstEnergy must demonstrate to the Commission that such costs are prudently incurred,<sup>2</sup> and that its proposal will not result in significantly excessive earnings as compared to other comparable similarly situated companies, including utilities.<sup>3</sup>

Based on the requirements and principles of SB 221 and the record in this proceeding, FirstEnergy has failed to meet its burden of proof. Accordingly, the Commission should deny FirstEnergy's ESP application as filed, and should modify FirstEnergy's proposed ESP as

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<sup>1</sup> See SB 221, Ohio RC § 4928.02. SB 221 also sets forth general policies for Ohio including, the policy to: (1) ensure the availability of unbundled and comparable retail electric service that provides consumers with the supplier, price, terms, conditions, and quality options they elect to meet their respective needs; (2) ensure diversity of electricity supplies, encourage innovation and market access for cost-effective supply and demand-side retail electric service; and (3) ensure effective competition in the provision of retail electric service by avoiding anticompetitive subsidies flowing from a noncompetitive retail service to a competitive retail electric service or to a product or service other than retail electric service, and vice versa. *Id.* at § 4928.02(A) – (N).

<sup>2</sup> See SB 221, Ohio RC § 4928.143(B)(2)(a).

<sup>3</sup> See SB 221, Ohio RC § 4928.143(E).

discussed herein. The Commercial Group's failure to address any provisions of FirstEnergy's ESP should not be considered as an approval or an endorsement of such provisions. Further, the Commercial Group reserves its rights to address any issues not addressed herein in response to any parties' briefs through its Reply Brief in this proceeding.

## **II. FIRSTENERGY HAS FAILED TO DEMONSTRATE THAT ITS AS FILED ESP SATISFIES THE PROVISIONS OF SB 221**

FirstEnergy has failed to demonstrate that its proposed ESP is, in the aggregate, superior to an MRO, and, therefore, has failed to meet the burden of proof to demonstrate that its proposed ESP satisfies the requirements of SB 221. Specifically, contrary to the testimony of FirstEnergy's witnesses, and as demonstrated in the extensive record in this proceeding, FirstEnergy has failed to prove that its ESP proposal: (1) will result in providing efficient, nondiscriminatory, and reasonably priced retail electric service to FirstEnergy's customers; (2) that certain costs for which FirstEnergy is seeking recovery, will be prudently incurred; or (3) that its proposal will not result in significantly excessive earnings.

Generally, FirstEnergy's ESP application is a very complex and broad plan addressing many long-term issues that will substantially impact all consumers in FirstEnergy's service territory, and ultimately Ohio's economy. Although the Commercial Group appreciates the difficult task undertaken by FirstEnergy in developing an ESP, in reviewing the totality of FirstEnergy's ESP application, the Commission must determine whether in its totality, FirstEnergy's application satisfies the provisions of SB 221 and furthers the policies of the state of Ohio. The Commercial Group appreciates the complex and challenging issues pending before the Commission, especially in today's current economic environment, but given the long-term implications to all ratepayers in Ohio, the Commercial Group respectfully requests that the Commission modify FirstEnergy's ESP as discussed below.

#### **A. FirstEnergy's Riders As Proposed Should Be Rejected or Modified**

Under FirstEnergy's proposed ESP, it is estimated that over 80% of FirstEnergy's revenue requirement will be recovered through its proposed riders.<sup>4</sup> As demonstrated in the record in this proceeding, FirstEnergy's proposed riders are not just and reasonable, and do not further the state policies of Ohio as set forth in RC Section 4928.02 of ensuring reasonably priced retail electric service, or further the goals or benefits of retail competition in Ohio.

Specifically, FirstEnergy's riders may have a number of negative impacts, such as:

- (1) reducing FirstEnergy's incentive to manage costs, because FirstEnergy's proposed riders do not ensure that its costs, which will be automatically passed through in the rider, are prudently incurred or will (after such proposed riders are approved) continue to be prudently incurred;<sup>5</sup>
- (2) inappropriately allocating and shifting costs between customer classes, because FirstEnergy's proposed riders, including its Demand Side Management and Energy Efficiency Rider, its Economic Development Rider, and its Non-Distribution Uncollectible Rider are allocated on a cents per kilowatt-hour basis (*i.e.*, an energy cost allocation) irrespective of whether certain classes of customers are the cause of FirstEnergy incurring such costs and whether such classes of customers are already paying their fair share of such costs;<sup>6</sup>
- (3) eroding ratepayer assurance of paying just and reasonable rates because the riders mask the true impact of total rates associated with the service being provided by FirstEnergy;<sup>7</sup>
- (4) eroding Ohio's competitive business position, by creating unnecessary rate volatility while providing no benefit to consumers;<sup>8</sup> and
- (5) preventing retail customers from shopping in Ohio, because the non-bypassable riders will create an impediment to competition by eliminating any shopping benefit that would be worthwhile for customers.<sup>9</sup>

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<sup>4</sup> See the Commercial Group Exhibit 1, Direct Testimony of Michael P. Gorman, at p. 2.

<sup>5</sup> See the Commercial Group Exhibit 1, Direct Testimony of Michael P. Gorman, at p. 4.

<sup>6</sup> See the Commercial Group Exhibit 1, Direct Testimony of Michael P. Gorman, at p. 3.

<sup>7</sup> See the Commercial Group Exhibit 1, Direct Testimony of Michael P. Gorman, at pp. 5 – 6.

<sup>8</sup> See the Commercial Group Exhibit 1, Direct Testimony of Michael P. Gorman, at pp. 5 – 6.

<sup>9</sup> See Transcript Volume IX, p. 203, lines 11 – 18, cross-examination of Staff witness Turkenton, discussing the impact of non-bypassable riders as proposed by FirstEnergy.

Viewing these potential negative impacts in the aggregate, FirstEnergy has not demonstrated in the record that its proposed riders satisfy the provisions of SB 221.

As discussed in the pre-filed testimony of the Commercial Group witness Michael P. Gorman, Staff witness Tamara S. Turkenton, and the Competitive Suppliers witness David I. Fein, the record demonstrates that FirstEnergy's proposed riders will have a negative impact on FirstEnergy's customers in Ohio for numerous reasons, as outlined above, especially with respect to FirstEnergy's proposed non-bypassable riders.<sup>10</sup> Furthermore, contrary to the testimony of FirstEnergy's witness Kevin T. Warvell (that the determination as to whether a rider would be bypassable or non-bypassable was based on whether such customers contributed to the expense or not), the record clearly demonstrates that FirstEnergy's proposed non-bypassable riders include expenses that not only do not consider whether such customers contribute to such expenses, but also include costs that may not be incurred by FirstEnergy.<sup>11</sup>

For example, as demonstrated in the record through extensive cross-examination of FirstEnergy's witness Warvell, FirstEnergy's Minimum Default Service ("MDS") non-bypassable rider included costs for "risks" that FirstEnergy may or may not have.<sup>12</sup> Accordingly, these riders, as proposed, should be rejected. However, if the Commission elects to accept FirstEnergy's proposed riders, at a minimum, the riders should be modified so they will be subject to an audit and prudence review by the Commission Staff to ensure that the rates collected under such riders are just and reasonable and further the policies and goals of SB 221.

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<sup>10</sup> See generally, the Commercial Group Exhibit 1 (direct pre-filed testimony of Michael P. Gorman), Staff Exhibit 8 (direct pre-filed testimony of Tamara S. Turkenton), the Competitive Suppliers Exhibit 1 (direct pre-filed testimony of David I. Fein).

<sup>11</sup> See Transcript Volume I, p. 96, lines 18 -22, cross-examination of FirstEnergy witness Warvell, discussing the basis for determining whether or not a rider should be bypassable.

The Commission should also allow customers to bypass certain riders under specific criteria established by the Commission to ensure that costs are only being collected for prudently incurred expenses for which a customer can be attributed to causing such an expense.

### **1. Generation Related Riders**

In its ESP application, FirstEnergy has included various non-bypassable generation-related charges, in which all of FirstEnergy's customers are required to pay, regardless of whether they take generation service from FirstEnergy or a competitive retail electric supplier ("CRES").<sup>13</sup> Although the Commercial Group appreciates that the Commission has in the past approved such charges with respect to FirstEnergy's past Rate Stabilization Plans, with respect to an ESP application, charges that automatically pass on costs to customers who are essentially taking service associated with such charges from CRES, create an impediment to customers seeking to shop, as it further hinders and masks the true costs and benefits of a competitive retail electric market in Ohio, and further creates a non-competitive subsidy between non-competitive retail electric service and a competitive retail electric service, which is contrary to the provisions of Section 4928.02 of SB 221.<sup>14</sup> Given these factors, the Commercial Group respectfully requests that the Commission carefully consider the ultimate impact on FirstEnergy's customers of such non-bypassable riders and determine whether such riders are in the best interest of consumers in Ohio, or whether, in fact (as the record supports and demonstrates), such proposals

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<sup>12</sup> See Transcript Volume I, p. 120, line 3 – p. 121 line 5, where FirstEnergy's Witness Warvell testifies in cross-examination that he does not know if there is migration risk of customers, even if the ESP generation component is lower than the market.

<sup>13</sup> See the Competitive Suppliers Exhibit 1, direct testimony of David I. Fein at p. 9.

<sup>14</sup> See the Competitive Suppliers Exhibit 1, direct testimony of David I. Fein at pp. 9 – 10. See also, Ohio RC § 4928.02(H).



hinder the policies and goals of Ohio as outlined in Section 4928.02 of SB 221 and should therefore be denied.

## **2. Demand Side Management/Energy Efficiency Rider**

Another rider of concern is FirstEnergy's proposed Demand Side Management and Energy Efficiency Rider ("DSM/EE rider"). Although the Commercial Group agrees with FirstEnergy's proposal that customers who undertake DSM/EE programs on their own should be able to opt out or avoid paying the DSM/EE rider charges, numerous factors included in FirstEnergy's proposed DSM/EE rider hinder the goals of Section 4928.66 of SB 221. Specifically, Section 4928.66(A)(2)(c) of SB 221 provides that "[a]ny mechanism designed to recover the cost of energy efficiency and peak demand reduction programs...of this section may exempt mercantile customers that commit their demand-response or other customer-sited capabilities, whether existing or new, for integration into the electric distribution utility's demand-response, energy efficiency, or peak demand reduction programs, if the commission determines that that exemption reasonably encourages such customers to commit those capabilities to those programs."

Under FirstEnergy's proposed DSM/EE rider, although FirstEnergy permits customers who commit their demand response/energy efficiency measures to opt-out of its DSM/EE rider charges, numerous unresolved issues associated with how such programs will actually be implemented by FirstEnergy remain. For example, in response to questions regarding how FirstEnergy established its level for determining what amount of energy efficiency or demand response targets a customer must commit in order to be eligible to avoid FirstEnergy's DSM/EE rider, FirstEnergy's witness could not specify what criteria they used to determine what levels

would be required from a customer, other than that the levels would be higher than the targets set forth in Section 4928.66 of SB 221 for FirstEnergy.<sup>15</sup>

FirstEnergy's witness also testified during cross-examination that FirstEnergy has not considered whether customers who commit a portion of their demand response or energy efficiency measures to FirstEnergy's SB 221 requirements should be provided partial relief from its proposed rider, as such partial commitments provide benefits to FirstEnergy's system.<sup>16</sup> Further, FirstEnergy also has not considered whether its opt-out provisions should also allow customers to participate directly in wholesale markets. Given numerous uncertainties associated with FirstEnergy's DSM/EE rider, the Commercial Group respectfully requests that the Commission deny FirstEnergy's proposed DSM/EE rider at this time, or in the alternative suspend the rider and direct FirstEnergy to coordinate with parties in this proceeding to further explore other options in incorporating and committing a customer's demand response and energy efficiency measures to satisfy FirstEnergy's SB 221 targets.

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<sup>15</sup> See Transcript, Volume IV, p. 201 – 208, cross-examination of Gregory F. Hussing by the Commercial Group.

<sup>16</sup> See Transcript, Volume IV, at p. 220, cross-examination of Gregory F. Hussing by the Industrial Energy Users of Ohio ("IEU-Ohio").

**B. FirstEnergy's Proposed Deferrals Should Be Rejected**

As demonstrated in the record and as presented in Staff witness Cahaan's direct testimony, the deferrals requested by FirstEnergy should also be rejected as they fail to further the policies of the state of Ohio. Staff's witness Cahaan is correct that the proposed deferrals present too many distortions and difficulties in implementation.<sup>17</sup> Accordingly, the Commercial Group respectfully requests that FirstEnergy's requested deferrals be rejected.

**C. FirstEnergy's Significantly Excessive Earnings Test Should Be Modified**

The Commercial Group respectfully requests that the Commission reject FirstEnergy's proposed Significantly Excessive Earnings ("SEE") test, as it fails to consider in its determination of what companies are "comparable" to FirstEnergy, the fact that electric utilities, such as FirstEnergy, are traditionally less risky than other companies in the market. Rather, in determining "comparability," FirstEnergy's witness Dr. Michael J. Vilbert used a method based on the "capital intensity" of a company to determine if it was "comparable" to FirstEnergy, and thereby include them in the sample to establish the benchmark for determining whether FirstEnergy's earnings were excessive.<sup>18</sup>

Throughout the record in this proceeding, the question of what companies should be included in a sample of "comparable companies" to establish the benchmark for determining whether FirstEnergy would be recovering "significantly excessive earnings" was widely explored with all parties having diverging views. As FirstEnergy's witness Dr. Vilbert testified to, in response to specific questions from Hearing Examiner Price during cross-examination, parties will disagree on what companies should be included in a comparability analysis, and that

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<sup>17</sup> See Staff witness Richard Cahaan's pre-filed direct testimony at p. 3, lines 9 – 17.

<sup>18</sup> See Transcript Volume XI, p. 84, line 14 – p. 85, line 16.

there are many appropriate and different manners to establish a benchmark to determine what constitutes significantly excessive earnings.<sup>19</sup> In light of such factors, as proposed by Staff, it may be appropriate to establish a collaborative process to agree on the criteria for determining all of the relevant factors in determining what companies should be included in the sample of “comparable” companies to FirstEnergy. The Commercial Group agrees that establishing a collaborative process is appropriate, and accordingly supports any request to establish such a process.

In the alternative, if the Commission is to make a determination at this time on the appropriate methodology (including weighting of each factor included in a methodology) for a SEE test, the Commercial Group respectfully requests that the Commission reject FirstEnergy’s proposed SEE test as it fails to give adequate weight to relevant business and financial risks of other regulated electric utilities in Ohio. Instead, the Commercial Group requests that the Commission adopt a SEE methodology using procedures closer to those proposed by the Commercial Group’s witness Michael P. Gorman, or the other intervenors in this proceeding.

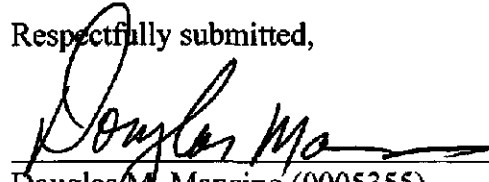
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<sup>19</sup> See Transcript Volume XI, p. 86, line 17 through p. 88, line 14.

### III. CONCLUSION

WHEREFORE, for the foregoing reasons, the Commercial Group respectfully requests that the Commission deny FirstEnergy's application as filed, and modify FirstEnergy's electric security plan as discussed herein.

Respectfully submitted,



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Dated: November 21, 2008

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing Initial Post-Hearing Brief of the Commercial Group was served upon the following parties of record this 21st day of November, 2008, via first class mail, postage prepaid.

  
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