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November 21, 2008

**VIA HAND DELIVERY**

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Docketing Division, 10th Floor
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**RE: Case No. 08-~~936~~935-EL-SSO**

Dear Sir/Madam:

I am enclosing for filing with your agency, an original and twenty (20) copies of Post - Hearing Brief Submitted on Behalf of The City of Cleveland, pursuant to Rule 4901-1-02 of the Ohio Administrative Code.

Please provide one (1) time-stamped copy of the enclosed document to the representative hand-delivering this information.

Very truly yours,

Gregory J. Dunn

Encl.



(H1328418.1)

**BEFORE**
**THE PUBLIC UTILITIES COMMISSION OF OHIO**

| | | |
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| In the Matter of the Application of The 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 | ) ) ) ) ) ) ) | Case No. 08-935-EL-SSO |

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**POST – HEARING BRIEF SUBMITTED ON BEHALF OF THE CITY OF CLEVELAND**

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**BEFORE**
**THE PUBLIC UTILITIES COMMISSION OF OHIO**

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**POST – HEARING BRIEF SUBMITTED ON BEHALF OF THE CITY OF CLEVELAND**

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## I. STATEMENT OF THE CASE

On May 1, 2008, Amended Substitute Senate Bill 221 ("SB 221") was signed into law by Governor Strickland. SB 221 contained a wholesale restructuring of Ohio's electric utility law requiring that, beginning January 1, 2009, electric utility companies make Standard Service Offers ("SSO") of electric utility service by either a Market Rate Offer ("MRO") or by an Electric Security Plan ("ESP"). Under an MRO, an electric utility company would make its SSO after conducting a competitive bidding process and purchasing generation service on the open market. Additionally, under the MRO, distribution rates would be set based upon the price paid for generation on the open market. *See R.C. 4928.142.* Under the ESP option, electric utility companies would set rates at a level allowing the companies a sufficient rate of financial return along with specified riders, charges, and surcharges. SB 221 requires that electric utility companies file an ESP application, but allows the Public Utility Commission of Ohio (the "Commission") to approve them only if they are more advantageous than allowing an electric utility company to proceed under a proposed MRO filing.

On July 31, 2008, the same day that SB 221 became effective, the above captioned proceeding was initiated by The Ohio Edison Company, The Cleveland Electric Illuminating Company ("CEI"), and The Toledo Edison Company (collectively "First Energy"). First Energy initiated the proceeding by filing its Application to obtain Commission review and approval of its proposed ESP. Simultaneous with its ESP Application, First Energy filed an Application for approval of a MRO.

Pursuant to R.C. 4928.14 *et. seq.*, the Commission accepted jurisdiction over the MRO and the ESP and set procedural schedules for separate consideration of the MRO and ESP. The MRO was assigned case number 08-936-EL-SSO and has been separately argued and briefed and is still currently pending before the Commission. This brief covers only issues related to the above captioned First Energy ESP Application.

Based upon the Commission's procedural schedule, established by entry dated August 5, 2008, the City of Cleveland ("Cleveland" or "City") filed its motion to intervene in the ESP proceeding on September 3, 2008. Cleveland sought intervention in the Commission's consideration of the ESP Application because it has a real and substantial interest in the proceeding, which can not be adequately represented by any other party. The ESP, as proposed, would dramatically change the rates, terms and conditions under which the City and its citizens receive electric utility service. Additionally, Cleveland sought intervention because the Commission's disposition of the Application would potentially impair or impede the City's ability to protect those interests. On October 2, 2008, the Commission granted Cleveland's request to intervene in the ESP proceeding.

Beginning October 16, 2008, and ending on October 31, 2008, the Commission held an evidentiary hearing in the above captioned proceeding. As part of this proceeding, Cleveland

presented expert testimony, filed motions and briefs, and participated as a party at the evidentiary hearing. At the culmination of the evidentiary hearing, the Attorney Examiners requested that First Energy, as well as the intervenors in the proceeding, submit briefs on the issue of whether the ESP, as proposed, should be approved, modified, or denied by the Commission. This brief is being submitted pursuant to the request of the Attorney Examiners and to make Cleveland's arguments that the ESP, as proposed, should not be approved. Instead, the Commission should issue an Order denying the ESP, or, at a minimum, modifying it so that it complies with Revised Code and Ohio Administrative Code requirements.

## II. STATEMENT OF THE FACTS

First Energy's ESP Application is a situation of first impression. The electric utility structure established by SB 221 has not previously been implemented by electric utilities in the state of Ohio. Ohio consumers of electric utility service have not previously been exposed to most of the novel concepts presented in SB 221 and the ESP filing. Perhaps, most importantly, the SB 221 ESP structure is being considered by the Commission for the first time as well.

With all of these firsts, it is a surprise to no one that electric consumers, commercial, residential, and governmental alike, have intervened or otherwise weighed in on First Energy's ESP Application. One theme seems to be constantly expressed by all concerned – the January 1, 2009, deadline for implementation of the new SSO is much too short of a timeframe for the electric utility companies, consumers, and the Commission to review, discuss, and make reasonable and responsible decisions regarding the ESP Application filed by First Energy, proposing to provide a SSO over the next three years that would begin on January 1, 2009.

Creating further complexity, the Commission not only must consider the ESP and MRO filed by First Energy, but, simultaneously, it must also do the same for ESP filings made by

Duke Energy, American Electric Power, and Dayton Power & Light, all electric utility companies regulated by the Commission. The Commission is required to issue its decision on the ESP applications within 150 days of their filing. SB 221 provides the Commission with very little time to consider and approve, modify, or deny any of the applications filed by these companies, one at a time, let alone all together in concert.

SB 221 allows approval of an ESP when its terms and provisions are more favorable than what may be achieved on the open market. The Commission, therefore, must consider the energy market as it existed on July 31, 2008, where prices were high and it must consider the market today, where economic forces have caused dramatic decreases in energy futures. Additionally, the Commission must determine whether the base rates, riders, and surcharges are permissible under the provisions of SB 221. Upon reviewing and considering all the evidence, the Commission has authority to approve, modify, or deny the ESP. Cleveland submits that for the following reasons, in addition to those submitted in the post hearing brief of the Ohio Consumers Counsel which the City supports and has signed onto as a party, that the ESP, as proposed, fails to meet the requirements of SB 221 and should be modified or denied by the Commission.

## III. LAW & ARGUMENT

### *a. First Energy Must Comply With The Alternative Energy Requirements Of Senate Bill 221.*

A major focus of SB 221 was the stabilization of energy prices and procurement of energy from alternative energy resources. SB 221 establishes extensive alternative energy requirements, including mandates to generate renewable energy and advanced energy. The Commission cannot accept the ESP, as written, to the extent that it fails to comply with the

alternative energy requirements. Alternatively, at a minimum, the Commission could modify the ESP to ensure that the SB 221 alternative energy portfolio requirements are met.

The First Energy ESP Application provides very little explanation regarding the company's planned compliance with the SB 221 alternative energy requirements. On page 11 of its ESP, First Energy simply states that "renewable energy resources will be acquired in sufficient amounts to comply with the requirements of [SB 221]." Since First Energy provides such minimal and insufficient detail regarding its alternative energy plans, the Commission Order should provide specific detail and direction to First Energy regarding how it must comply with the alternative energy provisions of SB 221.

Under SB 221, First Energy is required "by 2025. . .[to] provide, from alternative energy resources, . . . twenty-five percent of the total number of kilowatt hours of electricity" that it sells to its customers. "Alternative energy resources" includes "advanced energy resources" and "renewable energy resources." Renewable energy resources includes wind, solar, and geothermal. Advanced energy resources include sources such as clean coal, nuclear enhancements, and fuel cells. SB 221 requires that the twenty-five percent (25%) mandate be fulfilled half from "advanced energy resources" and the other half from "renewable energy resources." *R.C. 4928.64(B).*

SB 221 establishes an escalating benchmark schedule regarding the renewable energy resource portfolio. There is no comparable benchmark schedule for the advanced energy requirements. For example, in 2009, an electric utility is required to generate .25% of overall generation from renewable energy sources with .004% of the total renewable energy generation being generated from solar energy sources. Further, in 2010, the renewable energy resources

requirement increases to .50% and requires that .010% of that total come from solar energy sources. *R.C. 4928.64(B)(2.*

SB 221 requires that the Commission annually review an electric utility company's compliance with the renewable energy benchmarks. SB 221 does not establish a similar process for review of the advanced energy resource mandates. Upon review of the renewable energy resource portfolio of an electric utility, if the Commission determines that there has been "avoidable undercompliance or noncompliance" with the benchmarks, it "shall impose a renewable energy compliance payment" upon the electric utility company. *R.C. 4928.64(C)(2).*

Utility companies, however, may obtain an exception from the annual renewable energy benchmarks. SB 221 sets forth a process whereby the Commission may, upon request by an electric utility company for a hearing and a force majeure determination, issue a ruling that sufficient renewable energy resources were not readily available in the market to permit compliance with the renewable energy resource requirement and order a modification of the statutory escalating compliance schedule.

Additionally, under SB 221, electric utility companies are not required to meet the renewable energy requirements or the advanced energy requirements "to the extent that it is reasonably expected that the cost of that compliance exceeds its reasonably expected cost of otherwise producing or acquiring the requisite electricity by three percent or more." *R.C. 4928.64(C)(3).*

SB 221 delegates authority to the Commission to implement rules regarding enforcement of the alternative energy requirements. A provision within the Commission's proposed rules provides that the Commission may waive any of the alternative energy requirements for "good cause shown." *Proposed O.A.C.4901:1-40-02(B).*

This provision is outside the scope of the authority delegated to the Commission and would lead to unlawful enforcement of the SB 221 alternative energy requirement. Cleveland has previously stated this position in its Reply Comments filed as part of the Commission's proceeding for adoption of the rules. *08-888-EL-ORD.* In that proceeding, Cleveland stated that "the City believes this broad language oversteps the excused compliance process set forth in the Revised Code." *Cleveland Reply Comments At pg. 2.*

Cleveland renews its opposition to any determination by the Commission that alternative energy requirements may be waived or otherwise forgiven for "good cause shown." The proposed rules fail to define or even describe the term "good cause." Further, as stated above, Cleveland maintains that SB 221 provides for only two scenarios under which an electric utility may obtain a waiver from the alternative energy requirements. The first being a waiver based upon a force majeure determination by the Commission that renewable energy resources sufficient to meet the SB 221 benchmarks did not exist on the market and were otherwise unavailable to an electric utility company. The second, a waiver from the alternative energy requirement because the cost to comply with the statutory mandated level of alternative energy would exceed by three percent (3%) or more than the cost by which an electric utility could have otherwise produced or acquired the energy.

The Commission must make clear in its Order modifying or denying First Energy's ESP that it takes notice of and shall apply the alternative energy requirements of SB 221 as statutorily mandated and that First Energy will be in violation of any approved ESP and the Revised Code if it fails to comply with the alternative energy requirements. Additionally, the Commission should make clear that any determination waiver exempting First Energy from an alternative energy

requirement "for good cause shown" will be narrowly limited to the aforementioned two exceptions provided for in the Ohio Revised Code.

Further, the Commission Order should address First Energy's proposed deferrals and base generation rate phase-in approach. As stated by Staff witness Stuart M. Siegfried, the three percent (3%) cost cap exemption from the alternative energy requirement presents implementation issues that should be addressed in the Commission's Order. *Siegfried Testimony at pg. 4.* Mr. Siegfried states that "while the Commission's rules on this cost cap provision have not yet been finalized, it would seem that reducing the base generation prices through the use of deferrals could potentially impact the implementation of SB 221's alternative energy requirements." Cleveland is in agreement that a comparison of the expected statutory cost of compliance to the expected cost of otherwise producing or acquiring the requisite electricity, when the deferrals and base generation rate phase-ins are accounted for, would effectively reduce the absolute value of the three percent cap that is to be available for compliance with SB 221's alternative energy portfolio requirements.

Cleveland submits that, in order to ensure that First Energy's proposed deferrals and base generation rate deferrals do not change the implementation of the alternative energy requirement, the Commission must address this issue in its ESP Order.

***b. The Minimum Default Service Charge Provides An Economic Disincentive For Customers To Switch Electric Suppliers And Should Be Disallowed.***

The decision of the Commission regarding switching fees and standby charges requested under First Energy's proposed minimum default service charge ("MDS Charge") will determine whether Cleveland residents will have the economic and financial ability to switch to alternative suppliers of electric service. First Energy proposes as its MDS Charge, a 1.0 cent per kWh, non-bypassable charge, claimed to be necessary to recover, among other things, generation related

administrative costs and hedging costs associated with its obligation to serve the entire load of their retail customers, which is included in the Companies' proposed base generation charges. *Application, pg. 14.*

First Energy fails to provide a quantitative analysis or any substantive empirical detail supporting the MDS Charge. Thus, no evidence has been presented showing that the MDS Charge requested is in any way related to any potential risk that will actually be incurred by First Energy as a result of customers switching to alternative suppliers. Without even a specter of supporting data, it is difficult to reach any other conclusion other than that the MDS Charge is simply an arbitrary and punitive attempt to prevent customers from having real alternative electric supply choice. Cleveland submits that the MDS Charge is merely intended as mechanism to allow the base generation price to be offered at a lower level than otherwise would have been achievable.

Cleveland suggests that First Energy will receive an unreasonable rate of return if it is allowed to realize revenue from the MDS Charge. Moreover, the MDS Charge represents a punitive effort to prevent consumers from switching to an alternative supplier. Accordingly, the Commission Order should eliminate the MDS Charge as well as any other switching and return charges that provide disincentives for consumers to choose to obtain electric service from providers other than First Energy.

***c. First Energy's "Rear Lot Reduction Factor" Should Be Disallowed Because It Is Unsupported By Reliable Evidence And Against The Interest Of The Customer.***

First Energy has created a concept of a "Rear Lot Reduction Factor" ("RLRF") whereby the CEI circuits that serve fifty percent (50%) or more of customers via rear lot facilities, would have their System Average Interruption Duration Index ("SAIDI") minutes target reduced by

fifty percent (50%) each year. The practical result is that for the 439 circuits in the CEI service territory, the SAIDI targets for optimal reliability performance would be double that of the other circuits. In other words CEI service standard targets will be significantly worse or only half as good as consumers served by circuits with fifty percent (50%) rear lots.

The RLRF concept has a number of significant problems. First, the RLRF concept is unsupported by any form of reliable evidence. There was no quantitative analysis or other study conducted regarding the creation of the RLRF. The lack of reliable evidence was highlighted by Attorney Examiner Price during the evidentiary hearing:

> EXAMINER PRICE: That all sounds like a very anecdotal review. Have you performed any analytical studies which would demonstrate that rear lot outages take twice as long to perform.
>
> THE WITNESS: That just comes from my experience, sir, just talking to my lineman. I don't do that work but I talked to several of the lineman and I went and actually visited them where they do this work. *Tr. Vol. III at 274-275 (October 20, 2008) (Schneider).*

Second, in addition to the wholly anecdotal support for the continuation and implementation of the RLRF, CEI did not take into consideration any particular maintenance advantages it would have regarding rear lots. In Mr. Schneider's testimony, he stated that: "If you compare two communities, communities that have lots of rear lots, you have a higher customer count for those facilities than a rural area, say, out towards Ashtabula. So I would agree in general that the areas that have rear lot facilities would have a higher customer density per plant." *Id. at pages 304-305.* Mr. Schneider stated the following on further cross-examination:

Q. By the question, though, is that there are advantages to higher densities, that you have less plant to maintain.

A. I would have to do an analysis around that. The top of my head I think that the difficulty you have in maintaining those rear lot facilities outweighs the fact that you have higher density of customers.

I understand where you are – what you are thinking.

Q. And you have not done that analysis?

A. I have not done that analysis.

Q. But we don't know if there are certain advantages to maintenance in high density areas?

A. I have not done an analysis.

In other words, CEI considered anecdotally the difficulties of serving rear lots but failed to account for the obvious advantages such as higher density, (meaning less plant to maintain per customer). In any event there was no analysis of the advantages or disadvantages of serving rear lots.

Third, the RLRF concept, creates a permanent second class of CEI customers. Under cross-examination, Mr. Schneider further admitted that the billion dollars that CEI is ostensibly "committing" to improvements in its distribution system, may not include improving the facilities that serve the rear lots. Mr. Schneider testified to a "pretty sophisticated methodology of racking and stacking one project against another project for any capital expenditures," but failed to give any assurance that the billion dollar "commitment" would be spent on improving the reliability of customers served by rear lots. *Id. at pg. 303.*

The net result is that if the RLRF is adopted, the customer served via rear lots will probably expect their service to be restored in approximately twice the time of the other CEI customers, with, no commitment by CEI to provide improvements to customers with their architectural design make-up. This, in effect, creates a permanent second class customer. Consequently, Cleveland requests that the Commission disallow the RLRF, as proposed.

## IV. CONCLUSION

For all these reasons, Cleveland respectfully requests that the Commission deny the ESP in each respect that it is not supported by reliable evidence and does not comply with the Revised Code or proposed Ohio Administrative Code provisions mentioned herein. Alternatively, if the Commission approves the ESP, Cleveland respectfully requests that it be modified so that approved ESP provisions are supported by reliable evidence and meet the aforementioned Revised Code and proposed Ohio Administrative Code requirements. Finally, Cleveland respectfully requests that the Commission issue an Order consistent with the requests made in the post hearing brief filed on behalf of the Ohio Consumers Counsel, to which Cleveland has signed onto as a party.

Respectfully Submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing **Post Hearing Brief of The City of Cleveland** was served via electronic mail to the parties listed on the attached Exhibit A attached hereto and made a part hereof, and via United States Mail, postage prepaid, to the parties listed on the attached Exhibit B attached hereto and made a part hereof, this 21st day of November, 2008.

Andre T. Porter

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**Case 08-935-EL-SSO**
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**EXHIBIT B**

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