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BEFORE THE
PUBLIC UTILITIES COMMISSION OF OHIO

In the matter of the Application of Ohio Edison Company, the Cleveland Electric Company, and The Toledo Edison Company for Authority to Establish a Standard Service Offer Pursuant to Section 4928.43, Revised Code in the Form of an Electric Security Plan	:	Case No. 08-935-EL-SSO

REPLY BRIEF OF THE OHIO MANUFACTURERS ASSOCIATION (OMA) ON THE ISSUE OF FIRST ENERGY'S PROPOSED ESP

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I.

The Essence of These Applications and the OMA's Reply Brief

On November 21, 2008 the First Energy Operating Companies' Ohio Edison, Cleveland Electric Illuminating Company, and Toledo Edison Company filed their initial brief, a seventy-four page recitation of the basis upon which these Applicants urge the Commission to approve their constructed $1,577,100,000.00 "ESP" rate increase proposal[1] as being "*more beneficial, in the aggregate,*" than the same companies' alternatively constructed "MRO" proposal which would result in an increased rate burden to their customers of $2,880,500,000.00.[2] Based solely upon this construction, one might conclude the answer to the question posed is obvious. The

[1] Applicant's Initial Brief, p. 8.
[2] Applicant's Initial Brief, p. 9.

OMA submits it is anything but obvious. Quite to the contrary, the Applicants have woefully failed to carry their burden of proof, just as they failed to carry the same in their MRO proposal.[3]

It is readily acknowledged that the economy prevailing in the State of Ohio (and particularly within the northern Ohio service area of the Applicants) was distinctly healthier on the July 31, 2008 date these applications were filed than on the dates subsequent hearings were held and briefs thereon were filed. As such the aggressiveness of the subject applications must be placed in proper perspective. Yet, *the sheer magnitude* of the rate increases requested gives cause to scrutinize every aspect of these requests -- seemingly proffered to the Commission on an "all or nothing" basis.[4] The instant ESP proposal, and those offered by other operating electric distribution utilities,[5] constitutes the largest single year multi-billion rate increases sought in the history of this Commission.

Paradoxically, these massive rate increases are being sought in response to legislation specifically enacted by the Ohio General Assembly for the purpose of avoiding the "rate shock" that would *otherwise* occur in an "unregulated" environment. Stated differently, the subject legislation (SB 221) was intended to inject a degree of "re-regulation" into the otherwise unregulated generation market that was produced by Senate Bill 3, enacted nearly ten years ago.

Stripped to its naked form, the Companies' ESP is simply a **"$1.577 billion** rate increase filing made in response to a legislative enactment designed to avoid "rate shock" by re-establishing a degree of "regulation" over the heretofore unregulated generation component of Ohio retail jurisdictional electric distribution service. Common sense would strongly suggest

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[3] Case No. 08-936-EL-SSO, Opinion and Order issued November 25, 2008.

[4] Initial application, p. 6 footnote 7: *"It should be understood that this Plan* is not presented as if by each Company so that it may be approved with respect to one, but not another. It is presented on behalf of all three Companies collectively and *must be accepted with respect to all of them."* This was re-enforced in the Applicant's post-hearing brief, at page 4, wherein Applicants state: "... *[T]he plan here is – and, intrinsically, must be – a comprehensive, indivisible package to be accepted in its totality."*

[5] Duke-Ohio, Ohio Power Company, Columbus Southern Power Company.

that the subject applications of these FirstEnergy operating companies[6] run counter to, and frustrates, the intended avoidance of "rate shock" by "re-regulating" the generation component of electric service, as intended by SB 221.

The ultimate intended effect of SB 221, was to reinsert the "public service obligation" into the provision of retail electric standard service by investor owned public utilities subject to the jurisdiction of this Commission. The objective of this "reply" brief is to encourage the Commission to *exercise its enlightened judgment in evaluating the substance (as opposed to the appearance) of the Applicants' proposal so as to fulfill the requirements of SB 221, in the public interest.* As demonstrated hereinafter, the Applicants' ESP proposal is supportable only by a mathematical "net present valuation" exercise mathematically comparing the "rate shock" effects of its ESP proposal to the more egregious "rate shock" effects produced by a similar mathematical exercise crafted MRO "projection," massaged with other illusory non-economic "benefits".

II.

The Companies' ESP Provides "Illusory Benefits"

The FirstEnergy Companies dedicate the first forty pages of its seventy-three page post-hearing brief reciting what they perceive to be both monetary and non-monetary ("Other Tangible") benefits its plan bestows upon their customers. Indeed, this effort is quite an *undertaking* for the FirstEnergy's seven enumerated counsel. It is such in this proceeding

[6] Whose existing electric service rates to customers served by Ohio Edison, Cleveland Electric Illuminating Company, and Toledo Edison Company far exceed those rates of all the other electric utilities subject to the jurisdiction of the Commission.

because, unlike past rate increase proceedings,[7] all of the intervening parties,[8] representing the broadest swath of the Companies' customer base are standing locked arm in arm opposing virtually every aspect of the Applicants' multi-faceted ESP proposal as being contrary to their individual "customer" interests, and contrary to the "public interest." Individually and collectively they want no part of the alleged "benefits" the Companies' plan purportedly bestows upon them.

The "Other Tangible Benefits"[9] the Applicants represent will flow to its customers have not been established to be directly attributable to the Companies' ESP which would not otherwise exist. For instance, the "illusory" half billion in RTC charges its ESP plan disposes of would not cause any increase in rates for the reason such is being recovered in *current* rates. The asserted "stability" and "certainty" to generation rates over the plan period likewise becomes "illusory" when it is recognized the same is produced by only reason of the substantial rate increases beyond the plan period as a result of the Companies' proposed "deferrals," which customers have not requested, and the Staff opposes. Similarly, the Companies' assertion that their ESP's $150 million distribution rate increase provides the benefit of "stable" rates to distribution customers becomes illusory (and quite costly) in the event such distribution rates also remain stable, and at a much lower level ($100 million), as recommended they be established by Staff in the Companies' pending distribution rate case. Stated differently, the

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[7] In which distinct tariff customer classes sought to shift revenue responsibility to other customer classes, thereby realigning the interclass proportional revenue responsibility, while perhaps accepting the companies' overall revenue request.

[8] "All" residential customers (OCC); "At risk" low income residential customers (OPAE); Commercial customers (Kroger and the "Commercial Group," Manufacturing customers (OMA); Large industrials (OEG) (IEU-Ohio); Aggregators (NOAC); Schools (Ohio Schools Council), Hospitals (OHA), Interruptible Customers (Material Sciences, Nucor, Omnisource, and Marketers (Constitution, Integrys).

[9] Pages 20 through pages 40 of the Applicants' brief.

Companies' ESP *assumes* distribution rates will be volatile, an assumption not supported by recent experience!

The Companies' otherwise alluded-to "benefits" in their ESP constitute nothing less than their existing and continuing legal obligations to provide reliable service quality[10] – irrespective of the structure or base upon which the Companies' revenue requirements are determined and authorized in this proceeding. The same may be said of the Companies' nominal Smart Grid "study" as well as their represented 1,000 MW increase in planned generating capacity – the majority of which was committed to in January 2007 with FirstEnergy's acquisition of the Fremont generation facility, well in "advance" of either SB 221's passage and any contemplated filing of its ESP plan on July 31, 2008. These features existed before the ESP was crafted and do not flow from the ESP.

Applicants seek to further the "perception" their Plan would produce "stable" generation rates – a perception forcefully rejected by the three interruptible customer intervenors, and all of the large electrical customer intervenors that, time and time again, have voiced their protests to 30 – 50% increases in their overall bills, caused in large measure by the Applicants' abrupt departure from historically sound rate design and their proposed recovery of demand related components via an energy related assignment of revenue responsibility. And, once again, these Applicants attribute this illusory "stability" in generation rates to their mitigating "deferrals" of current period rate increases to future periods and, their self-administered EDR rider's ability to grant individually selected customers reduced rates from those paid by all similarly situated

[10] Pages 23 & 24 of the Applicants' brief.

customers as mitigating factors.[11] Inter-period manipulation of rate increases does not constitute rate "stability."

Applicants next cite the benefits their ESP bestows in its promotion of "energy efficiency" and "demand side management,[12] which – upon examination -- become illusory benefits given the current prevailing environment. Integrated resource planning is recognized by the OMA as a valuable long-term resource tool. But even its most outspoken advocate[13] in this proceeding acknowledged that its value is diminished during periods in which economic conditions are driving down demand and energy consumption in the absence of such measures. Unfortunately, rising unemployment, layoffs, store closings, and shift reductions are effecting both reductions of electrical demand and energy consumption beyond the fondest objectives of resource planners, and such reductions are not expected to disappear anytime soon.

Perhaps the greatest illusion created by the Applicant's ESP is that "The Plan Helps Achieve Important State Policy Goals" by benefiting ... "The State's Economy" in encouraging economic growth and job retention."[14] Burdening already struggling northern Ohio households, retailers, and manufacturers with an additional $1.5 Billion in rate increases on essential electric utility service is not compatible with the State's policy goals of encouraging growth and job retention during troubled economic times.

Finally, the Companies spend considerable effort in their twenty-seven paged[15] attempt to convince the Commission that its "POLR" proposal is a reasonable measure of compensation for the "POLR" risks to which it is exposed. Those risks are the "risks" of its existing customers

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[11] Pages 31 – 34 of Applicants' brief.
[12] Pages 35 – 37 of Applicants' brief.
[13] OPAE expert witness Barbara Alexander cross-examination by OMA counsel.
[14] Pages 43 – 45 of Applicants' brief.
[15] Pages 46 – 73 of Applicants' brief.

leaving its system (i.e., "shopping") and its "un-collectible" risks associated with customers' non-payment of their electric bills. Woefully absent from this extensive discussion in the Applicants' brief is any mention of the *creation* of such risks, or the *responsibility* therefore -- FirstEnergy's exceedingly high rates and charges.[16] It is only by reason of Applicants' excessive electric rates that it is exposed to risks that its customers may "shop" and not pay their electric bills. It is no wonder that FirstEnergy has labored so hard and long in its brief to convince this Commission that the solution to the problem of customers not paying their electric bills and/or "shopping" for less expensive electric service is to increase its customers' bills by $1.5 Billion! FirstEnergy's tendered solution compounds its problem.

Culminating FirstEnergy's efforts upon brief is its vain attempt to convince the Commission of the merits its ESP possess in providing the Commission with the necessary tools to "manage" (regulate) FirstEnergy's implementation of the Companies' own plan.[17] Effectively, the "management" of the plan would rest solely with FirstEnergy during the plan's first two years – *leaving the Commission with only the option of terminating the plan for its third year, upon which event the Companies' generation service would become totally unregulated.*[18] During the first two years the Commission would be powerless to "manage" the ESP's implementation and address its effects.

However, the Companies do offer the Commission the additional "tool" of allowing Ohio Edison, Toledo Edison and Cleveland Electric Illuminating Company the deferred recovery of charges imposed upon them by their affiliate FirstEnergy Solutions for providing capacity "over

[16] Not surprisingly, more customers "shop" in FirstEnergy's service area than in those of any other of the state's seven distribution utilities which have much lower rates.
[17] Pages 64 *et seq.*
[18] See Application ¶A.7.e,A.7.i; Warvell Testimony, p. 3; Blank testimony.

and above the levels required by FERC, NERC, ISO or other applicable standards"[19] (after the Commission's termination of the plan) via the Companies' continuing CCA Rider.

Additionally, the companies proffer for the Commission's adoption in this proceeding a "Significantly Excessive Earnings Test" ("SEET") not required by SB 221 to be adopted in this proceeding. However, once again we see these Companies attempting to dictate to the Commission what the Commission must do:

> "The Companies' SEE proposal is expressly part of the Plan package, and therefore *must be fully* decided and *approved here*."
>
> Applicants' Brief, p. 67 (Emphasis supplied).

The OMA respectfully submits that the serious concerns raised by the Applicants' statistically based SEET, as discussed in the expert testimonies of intervenors' witnesses Dr. Woolridge, Mr. King, and Mr. Gorman, warrant the deferral of any decision on this issue in these proceedings – as recommended by Staff witness Cahaan.

III.

Vehicles Available To The Commission
To Satisfy The Objectives Of SB 221

As recognized by the Applicants' "Introduction" in its post-hearing brief, Amended Substitute SB 221 "radically changed regulation of electric service in Ohio" by creating a new process for making a standard service offer available to customers via its authorizing "a variety of other features and benefits that can be included within the scope of such an ESP *notwithstanding* any other provision of Title 49 of the Ohio Revised Code." The legislation sets forth a single test for application by the Commission, i.e., whether the ESP is more favorable, in

[19] Page 65, Applicants' brief.

the aggregate, than the expected results from a Market Rate Offer. Wide discretion is granted the Commission in its application of this test.

By its November 25, 2008 Opinion and Order in Case No. 08-936-EL-SSO the Commission soundly rejected FirstEnergy's Market Rate Offer application, specifically finding, *inter alia*, that First Energy failed to meet the requirements of Sections 4928.142 (A)(1)(a), (b), (c), (d) and (e) as well as Sections 4928.143 (B)(1), (2), and (3), Revised Code, and that the Company failed to demonstrate that the proposed rate design advances state policies.[20] In this ESP proceeding, (as in its companion MRO proceeding) the burden of proof rests upon the Applicant "to demonstrate that the ESP is more favorable, in the aggregate, than the expected results from an MRO." As the Applicant's First Energy Companies have failed to submit an acceptable MRO, as determined by the Commission's November 25, 2008 Opinion and Order, there can be no MRO "results" by which its proposed ESP may be determined to be "more favorable." For this reason alone, the Companies' ESP must be denied.

This leaves the Commission with the questionable projections the Applicants make in these proceedings as to what they believe the market price of electricity will be into the next three years. The failure of the FirstEnergy Companies to meet their burden of proof in these proceedings that the monetary and non-monetary benefits of its ESP exceed those of its projected market rates, as detailed herein, requires that the Commission respond accordingly. It may choose to either: (a) issue an Opinion and Order so finding and require the Applicants to re-file an acceptable MRO by which this (or another) ESP may be measured; (b) issue an Opinion and Order modifying the Applicants' proposed ESP – leaving to the Applicants the acceptance or rejection of such modified ESP; or (c) not issue an Order of any kind by reason of the

[20] Conclusions of Laws Nos. (8) – (15).

Companies' failure to provide it an acceptable MRO by which the Commission can carry out the singular test, dictated by SB 221, of measuring the respective results of a ESP with a MRO standard service tariff offer.

It is respectfully submitted that alternative (a) is the preferable and appropriate vehicle for the Commission to carry out the mandate of the legislature. It is incumbent upon the Applicants to present the Commission with both an acceptable MRO and an acceptable ESP so as to permit the Commission to determine which is more favorable. Developing such an MRO and ESP is not the responsibility of the Commission. It is the responsibility of the Companies! A number of reasons dictate this result beyond the singular failure of the FirstEnergy Companies to submit an acceptable MRO by which the benefits of an ESP may be measured.

As delineated in the earlier sections of this Reply brief, the purported "benefits" alleged to exist in the Applicant's proposed ESP is, upon examination, found to be illusory. Additionally, the purported "stability" and "certainty" of the Applicants' future ESP rates are brought about solely by reason of the magnitude of the increases effected: both those which are effected immediately and those which are deferred. Moreover, those increases magnify the very risks of customers shopping and not paying their bills, risks that the proposed ESP is supposedly intended to mitigate.

Finally, the approval of any proposal that would place an increased $1.5 Billion burden upon electric customers in Northern Ohio at this time is contrary to the "public interest". As detailed in the initial OMA brief filed herein, FirstEnergy's own declarations of its reduced capital requirements, increased liquidity, and stable earnings belie any suggestion that its current or prospective financial condition requires rate relief of any kind – let alone the $1.5 Billion it

here demands.[21] The financial condition of FirstEnergy stands in marked contract to that of its customers whose homes are subject to foreclosure, whose credit is non-existent or waning, whose employment has disappeared or is threatened, and whose survival is dependent upon assistance from the federal government – be those seeking such assistance private corporations or governmental entities such as the State of Ohio.

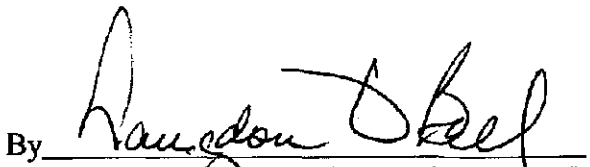
Moreover, given the lack of clarity within SB 221 as to whether the 150 day deadline for Commission action is applicable only to the initially submitted ESP following the effectiveness of such legislation, it is not unreasonable to conclude that the Commission will be accorded a more appropriate period within which to act upon a subsequent ESP proposal, as may be directed by the Commission to be filed. As observed by the Applicants, this is not a traditional rate case in which the Commission may modify a request and order its implementation. In these proceedings it is incumbent upon the Applicants to file an acceptable ESP by carrying their burden of proof.

IV.

Conclusion

For all of the foregoing reasons the OMA respectfully submits the Commission's rejection of the Companies' proposed ESP is in the public interest, in that such action maintains the "economic security of the utility" and its ability to continue to provide adequate and reliable electric service to the citizens of northern Ohio in compliance with the objectives and dictates of SB 221.

[21] It might be appropriate to here observe that the ESP filed by Dayton Power & Light Co., does not appear to increase rates – instead continuing its current rates.

By 

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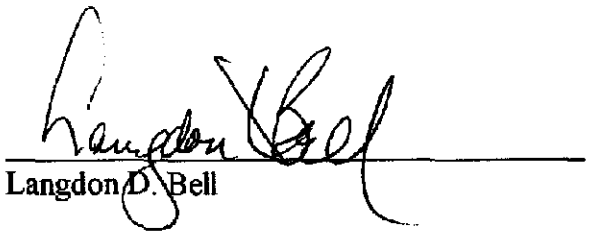
CERTIFICATE OF SERVICE

I hereby certify that this 12th day of December 2008, a copy of the foregoing Brief was served on all parties of record.



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