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Douglas M. Mancino
Attorney at Law
dmancino@mwe.com
+1 310 551 9323

December 12, 2008

VIA FACSIMILE AND FEDERAL EXPRESS

Public Utilities Commission of Ohio
Docketing Division
180 East Broad Street
Columbus, OH 43215-3793

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PUCO

Re: Case No. 08-935-EL-SSO

Dear Sir or Madam:

Enclosed for filing please find an original and 20 copies of The Commercial Group's Reply Brief in the above-referenced case.

Also enclosed are two extra copies of the document to be date-stamped and returned to me in the enclosed, self-addressed, Federal Express envelope. Please do not hesitate to contact me at the number above if you have any questions.

Thank you for your assistance in this matter.

Sincerely,

Douglas M.

Douglas M. Mancino

Enclosures

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	)))))))	Case No. 08-935-EL-SSO

REPLY BRIEF OF THE COMMERCIAL GROUP

Douglas M. Mancino (0005355)
McDermott Will & Emery LLP
2049 Century Park East
Suite 3800
Los Angeles, CA 90067-3218
Telephone: (310) 551-9323
Fax: (310) 277-4730
dmancino@mwe.com

Grace C. Wung
McDermott Will & Emery LLP
600 Thirteenth Street, N.W.
Washington, DC 20005
Tel: (202) 756-8160
Fax: (202) 756-8087
gwung@mwe.com

Counsel for Wal-Mart Stores East, LP, Sam's East, Inc., Macy's Inc., and BJ's Wholesale Club, Inc.

Dated: December 12, 2008

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

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REPLY 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 Reply Brief in the above-captioned proceeding. As discussed in its initial brief and below, the Commercial Group continues to respectfully requests that the Public Utility Commission of Ohio ("Commission") deny the application for an electric security plan ("ESP"), as filed, by Ohio Edison Company ("OE"), The Cleveland Electric Illuminating Company ("CEI"), and The Toledo Edison Company ("TE") (collectively "FirstEnergy" or "FE"), and modify the plan as discussed herein.

I. INTRODUCTION

On November 21, 2008, following the hearings in the above-captioned proceeding, parties to the proceeding filed their initial briefs with respect to FirstEnergy's ESP application. In the initial briefs, parties addressed the extensive disputed issues surrounding FirstEnergy's proposed ESP. As demonstrated in the record and in the initial briefs of the intervenors in this proceeding, FirstEnergy has failed to satisfy its burden of proof to demonstrate that its proposed ESP is, in the aggregate, superior to a market rate offer ("MRO") that satisfies Amended

Substitute Senate Bill 221 ("SB 221").[1] Accordingly, the Commercial Group continues to request that the Public Utilities Commission of Ohio ("Commission") deny FirstEnergy's ESP application as filed.

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

A. FirstEnergy Must Satisfy the Burden of Proof That its ESP Meets the Requirements of SB 221

In response to FirstEnergy's statements in its initial brief, contrary to FirstEnergy's position, the record demonstrates that FirstEnergy's proposed ESP does not meet the tests as established by the legislature. Indeed, the record demonstrates that FirstEnergy's proposed ESP will not benefit customers, but will have a detrimental impact on all consumers in Ohio. Further, the record also demonstrates that FirstEnergy's proposed ESP fails to consider the state policies and goals of Ohio. As the Commission noted in its MRO Order, "Chapter 4928 of the Revised Code provides a roadmap of regulation in which specific provisions were put forth to advance state policies of ensuring access to adequate, reliable, and reasonably priced electric service in the context of significant economic and environmental challenges."[2]

In reviewing FirstEnergy's MRO, the Commission indicated that it was "guided by the policies of the state as established by the General Assembly in Section 4928.02, Revised Code, as amended by Amended Substitute Senate Bill No. 221 (SB 221), effective July 31, 2008."[3] The same policies apply to FirstEnergy's proposed ESP, and all aspects of its proposed ESP must

[1] On November 25, 2008, the Commission issued an order denying FirstEnergy's market rate offer proposal for failing to meet specific requirements of SB 221 ("MRO Order").

[2] MRO Order at p. 6.

[3] *Id.*

be viewed in the light of Section 4928.02 of the Revised Code. Specifically, Section 4928.02 of the Revised Code provides that it is the policy of the state of Ohio to:

> (1) ensure the availability to consumers of adequate, reliable, safe, efficient, nondiscriminatory, and reasonably priced retail electric service;
>
> (2) ensure the availability of unbundled and comparable retail electric service;
>
> (3) ensure diversity electric supplies and suppliers;
>
> (4) encourage innovation and market access for cost-effective supply and demand-side retail electric service including, but not limited to, demand-side management (DSM), time-differentiated pricing, and implementation of advanced metering infrastructure (AMI);
>
> (5) encourage cost-effective and efficient access to information regarding the operation of the transmission and distribution systems in order to promote both effective customer choice and the development of performance standards and targets for service quality;
>
> (6) ensure effective retail competition by avoiding anticompetitive subsidies;
>
> (7) ensure retail consumers protection against unreasonable sales practices, market deficiencies, and market power;
>
> (8) provide a means of giving incentives to technologies that can adapt to potential environmental mandates;
>
> (9) encourage implementation of distributed generation across customer classes by reviewing and updating rules governing issues such as interconnection, standby charges, and net metering; and
>
> (10) protect at-risk populations including, but not limited to, when considering the implementation of any new advanced energy or renewable energy resource.

In reviewing FirstEnergy's proposed ESP in light of the policies of the state of Ohio, and under the requirements of Section 4928.142 of the Revised Code, FirstEnergy has not demonstrated that its ESP is in the aggregate, superior to an MRO that satisfies the provisions of Section 4928.143 of the Revised Code or that its ESP meets the state policies of Ohio. Throughout these proceedings, and indeed even in FirstEnergy's initial brief, the companies continue to fail to recognize that although SB 221 permitted electric distribution utilities to file an ESP (which is a departure from the filing requirements of traditional regulation) the underlying framework still requires that an ESP ensure the availability to consumers of adequate, reliable, safe, efficient, non-discriminatory, and reasonably priced retail electric service, as well as meet the many policy goals of the state of Ohio. These basic, fundamental policies continue to underlie any analysis and review of FirstEnergy's proposed ESP. Taken in the context and framework established under SB 221, FirstEnergy's proposed ESP does not meet the SB 221 requirements, has not been shown to be in the aggregate superior to an MRO, and does not provide the purported benefits to customers that FirstEnergy alleges for all of the reasons enumerated by the intervening parties in this proceeding.

Further, in response to FirstEnergy's arguments that intervenors failed to even examine or opine on its proposed MRO in examining whether its proposed ESP was in fact superior in the aggregate than an MRO,[4] FirstEnergy again fails to recognize that the burden of proof remains with FirstEnergy, and that intervenors correctly reviewed its proposed ESP under the policy framework of SB 221 to analyze whether its proposal satisfied the policies of the state of Ohio. As demonstrated in the record, when analyzed under the provisions of SB 221, FirstEnergy's proposed ESP does not benefit customers, but rather will hinder and impede the policy goals of the state of Ohio, preclude competition, erode ratepayer assurance of paying just and reasonable rates, prevent retail customers from shopping, and erode Ohio's competitive business position.

B. FirstEnergy's Test for What Constitutes Significantly Excessive Earnings Is Unjust and Unreasonable

In response to FirstEnergy's arguments in its initial brief that its significantly excessive earnings ("SEE") test is reasonable, contrary to FirstEnergy's position, the record demonstrates

[4] *See* FirstEnergy's initial brief at p. 5, FN 8.

that FirstEnergy's proposed SEE test is not just and reasonable because of the companies it has included in its "comparability" analysis.[5] As stated in the Commercial Group's initial brief, the record clearly demonstrates that there is disagreement regarding the appropriate benchmark to determine what constitutes significantly excessive earnings. Rather, any of the other proposed SEE tests presented in this proceeding by the intervenors would be more reasonable than FirstEnergy's proposed SEE test. FirstEnergy has not demonstrated in the record that its plan is just and reasonable, or even on par with the other SEE tests proposed by the intervenors. In fact, in FirstEnergy's initial brief, the companies state that "[s]ince the statute provides only limited guidance as to how the test is to be performed, the Plan sets forth a framework under which a test for significantly excessive earnings ("SEE") should be administered."[6] Even FirstEnergy recognizes that there are many methodologies that can be used to establish a benchmark of what constitutes significantly excessive earnings.[7] In terms of determining what is a just and reasonable SEE test, the Commercial Group continues to request that the Commission establish a collaborative process to establish the appropriate benchmarks for the reasons stated in the Commercial Group's initial brief.

III. INDUSTRIAL ENERGY USERS-OHIO RECOMMENDATIONS

In response to the issues raised by the Industrial Energy Users-Ohio ("IEU-Ohio") regarding providing specific recommendations on how the Commission can best respond to FirstEnergy's ESP application, the Commercial Group agrees that in the alternative, if the Commission does not modify FirstEnergy's ESP as recommended by the Commercial Group,

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[5] *See* FirstEnergy's initial brief at p. 65.

[6] *Id.*

[7] *See* Transcript Volume XI, p. 86, line 17 through p. 88, line 14 and the Commercial Group's initial brief at pp. 9 – 10.

IEU-Ohio's recommendation that the Commission issue an order neither accepting, modifying nor rejecting the ESP application and continue to leave the record open to allow the ESP proposal to be considered further as additional information becomes available and is received in the record in an appropriate alternative. The Commercial Group also agrees that pending any order that may accept, modify or reject the ESP application or any order that may establish an Standard Service Offer ("SSO") pursuant to Sections 4928.142 of the Revised Code, Section 4928.141 provides that the FirstEnergy's last approved SSO should remain in effect until such time as an SSO is authorized under either Sections 4928.142 or 4928.132 of the Revised Code.

IV. CONCLUSION

WHEREFORE, for the foregoing reasons and the reasons stated in the Commercial Group's initial brief, the Commercial Group respectfully requests that the Commission deny FirstEnergy's ESP as filed, modify the ESP as proposed in the Commercial Group's Direct Testimony of Michael P. Gorman and its initial brief, or in the alternative, accept the recommendation of IEU-Ohio and continue to leave the record open to determine what additional information the Commission will require in order to reach a reasoned decision.

Respectfully submitted,

Douglas M. Mancino

Douglas M. Mancino (0005355)
McDermott Will & Emery LLP
2049 Century Park East
Suite 3800
Los Angeles, CA 90067-3218
Telephone: (310) 551-9323
Fax: (310) 277-4730
dmancino@mwe.com

Grace C. Wung
McDermott Will & Emery LLP
600 Thirteenth Street, N.W.
Washington, DC 20005
Tel: (202) 756-8160
Fax: (202) 756-8087
gwung@mwe.com

Dated: December 12, 2008

CERTIFICATE OF SERVICE

I hereby certify that a copy of "The Commercial Group's Reply Brief " was served either via first class mail or electronic mail upon the following parties of record this 12th day of December, 2008.

Douglas M. Mancino

FirstEnergy List: 08-935-EL-SSO

Harvey L. Wagner 76 S. Main Street Akron, OH 44308	Arthur Korkosz, Senior Attorney James Burk, Esq. Mark A. Hayden Ebony L. Miller, Esq. First Energy Service Company 76 South Main Street Akron, OH 44308-1890
Howard Petricoff Stephen M. Howard M. Petricoff Vorys, Sater, Seymour and Pease LLP 52 East Gay Street Columbus, OH 43215	David Boehm, Esq. Michael L. Kurtz, Esq. Boehm, Kurtz & Lowry 36 East Seventh Street, Suite 1510 Cincinnati, OH 45202-4454
Laura McBride James Lang Trevor Alexander Calfee Halter & Griswold LLP 800 Superior Avenue Cleveland, OH 44114	Jacqueline Roberts, Esq. Gregory J. Poulos, Esq. Richard Reese, Esq. Jeffrey Small, Esq. Ohio Consumers' Counsel 10 West Broad Street, Suite 1800 Columbus, OH 43215
David A. Muntean Sean W. Vollman Max Rothal, Director of Law 161 South High Street, Suite 202 Akron, OH 44308	Andrew J. Campbell, Esq. Mark A. Whitt, Esq. Jones Day 325 John H. McConnell Blvd. Suite 600 Columbus, OH 43215-2673
Kevin Schmidt 33 North High Street Columbus, OH 43215	Sheilah McAdams 204 W. Wayne Street Maumee, OH 43537
Gary Reese Director of Environmental Service Memorial Hospital of Union County Marysville, OH 43040	Steven Beeler Assistant Director of City of Cleveland Department of Law 601 Lakeside Avenue, Room 106 Cleveland, OH 44114
Nolan Moser The Ohio Environmental Council 1207 Grandview Avenue, Suite 201 Columbus, OH 43212	Gregory H. Dunn, Esq. Andre T. Porter, Esq. Christopher L. Miller Schottenstein Zox & Dunn Co., LPA 250 West Street Columbus, OH 43215

Cynthia A. Fonner David I. Fein Constellation Energy Group, Inc. 550 W. Washington Street, Suite 300 Chicago, IL 60661	Brett E. Breitschwerdt Teresa Orahood Glenn Krasen Sally Bloomfield Terrence O'Donnell Bricker & Eckler LLP 100 South Third Street Columbus, OH 43215
Lisa McAlister Daniel J. Neilsen, Esq. Samuel C. Randazzo, General Counsel Joseph M. Clark McNees, Wallace & Nurick 21 East State Street, 17th Floor Columbus, OH 43215-4228	Paul Skaff 353 Elm Street Perrysburg, OH 43551
Robert J. Triozzi Cleveland City Hall 601 Lakeside Avenue Room 206 Cleveland, OH 44114-1077	Sheilah McAdams 400 Conant Street Maumee, OH 43537
Brian J. Ballenger Law Director Ballenger & Moore Co., L.P.A. 3401 Woodville Road, Suite C Toledo, OH 43619	Paul Goldberg 5330 Seaman Road Oregon, OH 43616
James E. Moan 4930 Holland-Sylvania Road Sylvania, OH 43560	John Orr VP Regulatory Affairs Constellation Energy Commodities Group, Inc. 111 Market Place, 5th Floor Baltimore, MD 21202
Eric Stephens 5400 Frantz Road Suite 250 Dublin, OH 43016	Gary A. Jeffries 501 Martindale Street Suite 400 Pittsburgh, PA 15212-5817
Barth E. Royer Langdon Bell Bell & Royer Co., LPA 33 South Grant Avenue Columbus, OH 43215-3927	F. Mitchell Dutton FPL Energy Power Marketing Inc. 700 Universe Boulevard Ctr/JB Juno Beach, FL 33408

Bobby Singh 300 West Wilson Bridge Road Suite 350 Worthington, OH 43085	Matthew S. White John Bentine Mark Yurick Chester Wilcox & Saxbe LLP 65 East State Street Suite 1000 Columbus, OH 43215
Denis George 1014 Vine Street, G-07 Cincinnati, OH 45202-1100	Thomas Hays, Solicitor 3315 Centennial Road, Suite A-2 Sylvania, OH 43560
Lance Keiffer 711 Adams, 2nd Floor Toledo, OH 43624	Craig G. Goodman National Energy Marketers Association 3333 K Street, NW, Suite 110 Washington, DC 20007
Henry Eckhart, Esq. 50 West Broad Street, Suite 2117 Columbus, OH 43215-3301	Glenn Krassen, Esq. Bricker & Eckler LLP 1375 East Ninth Street, Suite 1500 Cleveland, OH 44114-1718
Garrett A. Stone, Esq. Shaun C. Mohler, Esq. Michael K. Lavanga, Esq. Damon Xenopoulos, Esq. Brickfield, Burchette, Ritts & Stone, P.C. 1025 Thomas Jefferson Street, NW 8th Floor, West Tower Washington, DC 20007	Wind on the Wires 1619 Dayton Avenue Suite 203 Saint Paul, MN 55104
Dale Arnold Director, Energy Services Ohio Farm Bureau Federation, Inc. P.O. Box 182383 Columbus, OH 43218	Larry Gearhardt Ohio Farm Bureau Federation, Inc. 280 N. High Street P.O. Box 479 Columbus, OH 43216
Richard L. Sites 155 E. Broad Street 15th Floor Columbus, OH 43215-3620	David C. Rinebolt Ohio Partners for Affordable Energy 231 W. Lima Street Findlay, OH 45839-1793
Brandi Whetstone 131 N. High Street, Suite 605 Columbus, OH 43215	City of Cleveland 1300 Lakeside Avenue Cleveland, OH 44114

City of Toledo Suite 2250 One Government Center Toledo, OH 43604	Northeast Ohio Public Energy Council One Cleveland Center, Suite 1500 1375 E. Ninth Street Cleveland, OH 44114
Northwest Ohio Aggregation Coalition One Government Center, Suite 2250 Toledo, OH 43604	Nucor Steel Marion, Inc. 912 Cheney Avenue Marion, OH 43302
Ohio Manufacturers Association 33 N. High Street Columbus, OH 43215	Natural Resources Defense Council 101 N. Wacker Drive, Suite 609 Chicago, IL 60606
American Wind Energy Association 1101 14th Street, NW 12th Floor Washington, DC 20005	David Hughes Theodore S. Robinson Citizen Power 2121 Murray Avenue, 3rd Floor Pittsburgh, PA 15217
Steve Millard 100 Public Square, Suite 201 Cleveland, OH 44113	Craig I. Smith 2824 Coventry Road Cleveland, OH 44120
City of Akron 166 S. High Street, Room 200 Akron, OH 44308	Ohio Schools Council 6133 Rockside Road, Suite 10 Independence, OH 44131
Nicholas C. York Eric D. Weldele Tucker Ellis & West LLP 1225 Huntington Center 41 South High Street Columbus, OH 43215-6197	Jennifer D. Duffer Armstrong & Okey, Inc. 185 South Fifth Street, Suite 101 Columbus, OH 43215
Joseph Meissner Director of Urban Development Attorney at Law 1223 West Sixth Street Cleveland, OH 44113	Dane Stinson Attorney Bailey Cavalier LLC 10 W. Broad Street, Suite 2100 Columbus, OH 43215
Tim Walters The May Dugan Center 4115 Bridge Avenue Cleveland, OH 44113	Village of Walton Hills, Ohio 7595 Walton Road Walton Hills, OH 44146

Neighborhood Environmental Coalition Rev. Mike Frank, Co-Chair 5920 Engle Avenue Cleveland, OH 44127	Cleveland Housing Network 2999 Payne Avenue Cleveland, OH 44114
Empowerment Center of Greater 3030 Euclid Avenue Unit 100 Cleveland, OH 44115	