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January 8, 2009

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Secretary to the Commission  
Docketing Division  
The Public Utilities Commission of Ohio  
180 East Broad Street  
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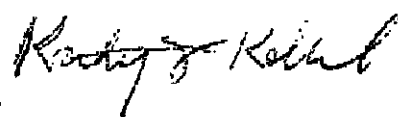
Dear Ms. Jenkins:

**Re: Motion of Ohio Edison Company, The Cleveland Electric Illuminating  
Company and The Toledo Edison Company to Dismiss the Request for  
Investigation  
Case No. 08-1299-EL-UNC**

Enclosed for filing, please find the original and fifteen (15) copies of the *Motion* regarding the above-referenced case. Please file the enclosed *Motion*, time-stamping the two extras and returning 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,



kag

Enclosures

cc: Parties of Record

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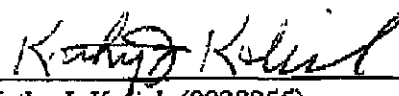
BEFORE THE  
PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of a Commission	)	
Investigation Into the Reliability of the	)	
Electric Distribution Service Provided	)	Case No. 08-1299-EL-UNC
by Ohio's Investor-Owned	)	
Electric Companies	)	
	)	

**MOTION OF OHIO EDISON COMPANY, THE CLEVELAND ELECTRIC  
ILLUMINATING COMPANY AND THE TOLEDO EDISON COMPANY  
TO DISMISS THE REQUEST FOR INVESTIGATION**

Ohio Edison Company ("OE"), The Cleveland Electric Illuminating Company ("CEI") and The Toledo Edison Company ("TE") (collectively referred to herein as the "FE Companies") respectfully ask this Commission to dismiss the pleading filed by Consumers for Reliable Electricity in Ohio ("CREO") on the basis that it is deficient and unlawful. As more fully discussed in the attached Memorandum in Support, CREO, (i) fails to meet the requirements set forth in RC 4905.26; (ii) attempts to usurp the Commission's authority; and (iii) attempts to collaterally attack prior Commission proceedings. Accordingly, CREO's pleading should be summarily rejected and this matter dismissed.

Respectfully submitted,

  
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**FE Companies' Memorandum in Support of its Motion to Dismiss**

CREO asks the Commission to open an investigation into "the overall distribution service reliability provided by Ohio's electric utilities over the last five years, [including] a thorough review of the utilities' response to the windstorm of September 14, 2008...." (CREO Pleading, p. 2.) In support of its request, CREO *guesses* that "[t]he scope and duration of the outages, [caused by a September 14, 2008 windstorm, which was the result of the remnants of Hurricane Ike that roared through Ohio as the equivalent of a Category I hurricane], "appears to exceed what can be explained by severe weather alone." (CREO Memorandum in Support (hereinafter referred to as "CMIS"), p. 1 (emphasis added.)). CREO then goes on to *speculate* that "[t]he cause of the outage ... may have its origins in inadequate utility maintenance programs." *Id.* Clearly such guessing and speculation are not sufficient to warrant the initiation of an investigation, especially when, as is discussed in Sections B and C below, there are other proceedings and activities already in place to address reliability issues, many of which either have recently been completed or are currently in progress.

**A. CREO's Pleading Fails to Meet the Requirements of RC 4905.26.**

CREO refers to the 2004-2005 winter ice storm, the September 2008 "hurricane" and the 2003 blackout as examples of outages that "heighten [its] concern." (CMIS at 11.) Clearly the first two dealt with unusual and severe weather, while the third was the subject of its own review and litigation and focused mainly on transmission reliability. *See e.g.*, Case No. 03-2325-EL-COL and Case Nos. 04-28- EL-CSS, 05-803-EL-CSS, 05-1011-EL-CSS, and 05-1012-EL-CSS. But nowhere in its pleading did CREO, when attempting to support its "concern", allege any *specific* instances in which any of the

targeted utilities provided inadequate service. Nor has it alleged that any of the targeted utilities otherwise violated any statute, regulation or order.

If CREO has *facts* to substantiate a claim of unreliable service or related violations, the state legislature provided a process through which such complaints can be heard. Revised Code Section 4905.26 provides in pertinent part:

Upon complaint in writing against any public utility by any person, firm or corporation ... that any service is, or will be inadequate ..., *if it appears that reasonable grounds for complaint are stated*, the commission shall fix a time for hearing and shall notify complainants and the public utility thereof. [Italics added.]

CREO's speculation and conjecture is nothing more than a fishing expedition that clearly does not constitute reasonable grounds for complaint. Accordingly, its pleading should be dismissed.<sup>1</sup>

#### B. CREO is Attempting to Usurp the Authority of the Commission.

CREO argues that Ohio law provides the basis for opening an investigation into the reliability of a utility's service. (CMS at 5.) In support of its assertion, CREO, on pages 5-7 of its memorandum in support of its pleading, provides a litany of statutes that, when all is said and done, add up to a conclusion that *the Commission* is empowered to open an investigation. (This however, is not in dispute.)<sup>2</sup> For example, CREO acknowledges that "the Ohio General Assembly *charged the PUCO* with the responsibility to ensure that electric utilities provide 'necessary and adequate' service to Ohio consumers and businesses. R.C. 4905.22." (Id.) It also recognized that

<sup>1</sup> It is telling that CREO did not file its pleading as a complaint case. Perhaps CREO also recognized the deficiencies surrounding its actions.

<sup>2</sup> While RC 4905.26 allows the Commission to initiate a complaint, and clearly the Commission is empowered to initiate investigations on its own motion, it is for the Commission to decide to do so and not parties like CREO. Nowhere in Ohio law is a party authorized to request such investigations. Moreover, to grant CREO's request would set a dangerous precedent in which any party could make a similar filing, regardless of its merit, thus requiring the Commission to unnecessarily dedicate resources to an issue that might never should have been raised.

"R.C. 4928.11 mandates that, '[f]or the protection of consumers in this state, *the public utilities commission* shall adopt rules \*\*\* that specify minimum service quality, safety, and reliability requirements'" ... (id at 6) (italics added), and that "R.C. 4928.11(B) mandates that *the Commission* shall 'require each electric utility to report annually to the commission \*\*\* regarding its compliance with [rules related to reliability and safety.]'" Id. (italics added.) And finally it notes that "perhaps most importantly," R.C. 4928.11(B) requires *the Commission* to perform a periodic review of utility reliability reports and enforce compliance as necessary. Id.

Again, however, nowhere in its pleading does CREO cite a statute that empowers a group of trade associations and the residential consumer advocate to initiate an investigation into issues of service reliability -- and for good reason. As Columbus Southern Power Company and Ohio Power Company ("the AEP Companies") explained in great detail at pages 4-10 of their Memorandum Contra CREO's Request, the Commission staff already takes an active role in service reliability matters.<sup>3</sup>

In light of all of the activities currently performed by Commission Staff in this area, surely the Office of the Ohio Consumers' Counsel ("OCC") has better things to do with its state budget than to initiate redundant activities to be performed by two state agencies. Similarly, with the current economic situation, members of the coalitions represented by other CREO parties may find more appropriate uses for their respective budgets if they fully understood the extent to which reliability issues are already being investigated by the Commission's staff.

<sup>3</sup> Inasmuch as the FE Companies wholeheartedly agree with the arguments made by the AEP Companies regarding this issue, rather than reiterate herein the Staff's actions and related rules and regulations empowering them to do the same, the FE Companies incorporate by reference the comments made on pages 4-10 of the AEP Companies' Memorandum Contra.

In sum, it is the Commission that possesses the authority to investigate service reliability matters, *if it deems such an investigation is necessary*. And, it is the Commission Staff that has the authority to review reliability data and perform actions necessary to provide the Commission with the facts upon which to make such a decision. It is *not* CREO's responsibility to dictate to the Commission when any issue is ripe for review. The Commission has in the past dismissed actions seeking to initiate an "investigation." *See e.g.*, Case No. 98-1616-EL-CSS (dismissing complaint requesting an investigation into the labor practices of FirstEnergy companies and the effect of such practices on reliability). It should do so again in this instance.

**C. CREO's Pleading is an Attempt to Collaterally Attack Prior Commission Proceedings.**

Reliability issues related both to the FE Companies individually and to the targeted utilities as a whole have already been reviewed in several different dockets. First, in the FE Companies' distribution rate case (Case No. 07-551-EL-AIR), OCC -- one of the parties to CREO's pleading -- spent almost 40 pages of its initial brief focusing on purported concerns regarding the Companies' reliability performance. Yet, in that proceeding, OCC, as CREO has done in this instance, failed to demonstrate a single issue that actually affected customer reliability as a whole, or a violation of the Electric Service and Safety Standards ("ESSS"). Similarly, in that same docket, OCC failed, like CREO has done herein, to identify a reliability related issue or practice that the FE Companies had not already remedied or were not actively addressing. Further, OCC, as well as the rest of the members of CREO, either intentionally or simply because they are unaware, ignore TE's exemplary record of meeting its service reliability targets, and OE's 2007 record in which it too met all of its reliability targets and performed better-than-target on

its CAIDI results in seven of the last eight years. CREO also fails to mention in its pleading that CEI hired UMS Consulting Group, Inc. ("UMS") and aggressively addressed reliability issues raised in UMS' report, having, at the time of the distribution rate case hearings, incorporated or actively pursued 22 of the 25 UMS recommendations – all of which were reviewed and endorsed by Commission Staff.<sup>4</sup>

Second, the Commission has pending a rulemaking docket in which the ESSS rules are being reviewed. *See* Case No. 06-653-EL-ORD. All of the members of CREO are also parties to the Ohio Consumer and Environmental Advocates ("OCEA") which actively participated in this rulemaking process. Indeed, CREO incorporates at page 4 of its Memorandum in Support of its Pleading in this matter an excerpt from the comments made by OCEA in the ESSS Rulemaking.

And finally, with regard to the 2003 blackout, that event was the subject of a separate Commission investigation and several complaint cases. *See e.g.*, Case No. 03-2325-EL-COI, and Case Nos. 04-28- EL-CSS, 05-803-EL-CSS, 05-1011-EL-CSS, and 05-1012-EL-CSS.

In sum, CREO's pleading is nothing more than an attempt at a second, third, and fourth bite at the apple. For obvious reasons such collateral attacks on prior Commission proceedings should not be permitted.

#### **D. Conclusion**

Through its pleading, CREO is asking this Commission to create a dangerous precedent by ignoring state law and recognizing a right for *any* party to dictate to the Commission the issues that the Commission should investigate, regardless of merit. Ohio law has no provision to allow such a request and the Commission should not create one

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<sup>4</sup> For evidence in support of each of these assertions related to the FE Companies' actions and prior performance, see the companies' distribution rate case, Case No. 07-551-EL-AIR.

for obvious reasons. Such a precedent would require the expenditure of Commission and other parties' valuable resources on matters that may not be of any interest to the Commission. Moreover, if CREO has a substantive complaint *based on facts*, rather than speculation and conjecture, it must follow the procedure outlined in R.C. 4905.26. CREO has failed to cite a specific incident related to the reliability of service provided by any of the *targeted utilities*. Therefore, even if the Commission converts CREO's pleading to a R.C. 4905.26 complaint, clearly there are no reasonable grounds to sustain it as required by R.C. 4905.26. And finally, CREO is asking this Commission to devote valuable resources to a redundant process that is already subject to constant monitoring by Commission Staff. At least with regard to OCC, the Commission should not condone the use of two state agencies' budgets to perform virtually identical oversight functions.

For all of these reasons, the FE Companies respectfully request that CREO's request be denied and this matter be dismissed.


Respectfully submitted,

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## CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that a copy of The FE Companies' Motion to Dismiss CREO's Request for an Investigation was served upon the parties set forth below by regular U.S. Mail, postage prepaid, this 8<sup>th</sup> day of January, 2009.

  
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