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March 2, 2009

Ms. Renee J. Jenkins
Director, Administration Department
Secretary to the Commission
Docketing Division
The Public Utilities Commission of Ohio
180 East Broad Street
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Dear Ms. Jenkins:

Re: The FirstEnergy Companies' Memorandum Contra the Office of the Ohio Consumers' Counsel Application for Rehearing
Case No. 07-551-EL-AIR

Enclosed for filing, please find the original and twenty-two (22) copies of The FirstEnergy Companies' Memorandum Contra the Office of the Ohio Consumers' Counsel Application for Rehearing. Please file the enclosed Memorandum Contra in the above-referenced docket, 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,

Kathy J. Kolich/JTB

kag
Enclosures

cc: Parties of Record

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THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of Ohio	)	
Edison Company, The Cleveland Electric	)	**Case No. 07-551-EL-AIR**
Illuminating Company, and The Toledo Edison	)	**Case No. 07-552-EL-ATA**
Company for Authority to Increase Rates	)	**Case No. 07-553-EL-AAM**
For Distribution Service, Modify Certain	)	**Case No. 07-554-EL-UNC**
Accounting Practices and for Tariff Approval	)	

THE FIRSTENERGY COMPANIES' MEMORANDUM CONTRA THE OFFICE OF THE OHIO CONSUMERS' COUNSEL APPLICATION FOR REHEARING

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I. INTRODUCTION

Pursuant to Rule 4901-1-35 of the Ohio Administrative Code, Ohio Edison Company ("OE"), The Cleveland Electric Illuminating Company ("CEI") and The Toledo Edison Company ("TE") (collectively "Companies") file their Memorandum Contra Application for Rehearing that was submitted by The Office of the Ohio Consumers' Counsel ("OCC") on February 20, 2009.

OCC alleges assignments of error dealing with (i) the distribution deferrals created in the Companies' Rate Certainty Plan Case (Case No. 05-1125-EL-ATA) ("RCP Deferrals") (OCC AFR, pp. 2-16, 24); (ii) Pension and Other Post-retirement Employment Benefits ("OPEB") (id. at 16-24); (iii) the accounting treatment for storm damage deferrals (id. at 25); and (iv) CEI reliability issues (id. at 26-31.)

The Supreme Court of Ohio has made it clear on numerous occasions that it will not substitute its judgment for that of the Commission, *AK Steel Corp. v. Pub. Util. Comm.* (2002), 95 Ohio St.3d 81, 84, unless it can be demonstrated that the Commission's findings as set forth in the Order are manifestly against the weight of the evidence and so clearly unsupported by the record as to show misapprehension, mistake or willful disregard of duty.[1] *Monongahela Power Co. v. Pub. Util. Comm.*, 104 Ohio St.3d 571, 2004-Ohio-6896, ¶ 29 (quotations omitted). Accordingly, OCC's Application for Rehearing ("AFR") should be reviewed in this light. And, as discussed below, OCC failed to demonstrate any of these prerequisites. Indeed, rather than taking the time to focus its AFR on issues arising out of the Commission's Order, OCC, in two instances

[1] The Court also can perform a *de novo* review of questions of law. *Consumers' Counsel v. Pub. Util. Comm'n* (1983), 4 Ohio St. 3d 111. However, this is not applicable in the instant action as OCC refers to no statutes in its assignments of error.

(involving the RCP Deferrals and Pension/OPEB expenses), simply cut approximately 24 pages of its initial post hearing brief and, except in very limited instances, pasted them verbatim into its AFR. As these arguments were raised in the earlier briefs prior to the issuance of the Order, by definition they do not raise any new issues not already addressed and rejected by the Commission. The few newly restated arguments related to these first two assignments of error, as well as the arguments in support of the final two assignments of error (related to storm damage and CEI reliability) are equally flawed – all of them ignore the evidentiary record. Accordingly OCC's AFR based on its four assignments of error should be summarily rejected.

A. The Commission's Treatment of Distribution Deferrals Created Through the Rate Certainty Plan was Proper.

To borrow a phrase, OCC's arguments related to the RCP Deferrals are "déjà vu all over again." The OCC, with very few exceptions, literally copied its arguments related to the RCP Deferrals from its initial post-hearing brief and pasted them verbatim into its AFR, making virtually no effort to focus its comments on issues arising out of the Commission Order. (*Compare* OCC Brief, pp. 15-27 *with* OCC AFR, pp. 2-15.) In light of this, rather than reiterating in detail the Companies' response to each argument copied into OCC's AFR, the Companies incorporate by reference pages 7 through 16 of their initial brief and Section III (A) of their reply brief. The remaining portion of this Memorandum Contra as it pertains to the RCP Deferrals will focus on the few arguments that vary from OCC's initial brief, pointing out the reasons why each is without merit and, thus, should also be summarily rejected.

First, on page 9 of its AFR, OCC claims that "[t]he Commission acknowledged that Staff's approach erred regarding the inclusion of transmission amounts, stating that

'Staff acknowledged one error in its calculations [footnote omitted.]'" (OCC AFR, p. 9.) OCC, however, takes this statement out of context. If the Commission's statement is read in context, it is clear that this statement, along with several others simply summarizes Staff's testimony and does not constitute the Commission's agreement therewith.

> Staff *responded* to OCC by *stating* that it calculated the distribution O&M amount by starting with the 2006 total O&M and removing amounts which were not distribution-related. Staff *acknowledged* one error in its calculations, which Staff *stated* was easily corrected. Staff *also argued* .... (Order, p. 11) (italics added.)

The Commission's statement of error above is not an acknowledgement of Staff's error, but rather simply a summary of Staff's position on this issue in which Staff claims to have made an error. It is the next paragraph of the Order in which the Commission sets forth its findings on this matter: "*Staff has properly calculated the amount* of the distribution deferrals in accordance with the RCP stipulation and our order adopting the RCP Stipulation." (Id.) (Italics added.) Thus, the Commission's Order indicates that it concluded that Staff properly calculated the distribution O&M balances.

On page 10 of its AFR, OCC alleges that "[t]he Commission does not address the question of the proper definition of the distribution O&M." While the words included in this section of the AFR differ from those included in OCC's initial post hearing brief (at 22-25), the argument is the same -- "The calculation of distribution O&M expenses embedded in existing rates should recognize the *growth in sales* by the FirstEnergy Companies over the time elapsed since their last rate cases." (Italics in original.) (See OCC Initial Brief, p. 23) ("The calculation of distribution O&M expenses embedded in existing rates should recognize the growth in sales....") Thus, the Companies incorporate

by reference pages 10-11 of their initial post-hearing brief and Section III (A)(2) of their reply brief in which they demonstrate the inconsistencies between OCC's position and the RCP Stipulation.

Third, on both pages 10 and 12-13 of OCC's AFR, OCC makes identical arguments that appear to disagree with the Commission's observation at page 11 of the Order that "Staff used the distribution O&M expenses established in the FirstEnergy electric transition plan proceeding, Case No. 99-1212-EL-ETP as the baseline for the distribution O&M expenses currently in base rates" because "Staff included transmission expenses, customer accounting expenses, and administrative and general expenses in the baseline, none of which are 'distribution O&M.'" While it uses different words, this argument is just a restatement of OCC's argument in its earlier briefs that the Staff and Companies, and now the Commission, did not use a "proper definition of O&M." As addressed in the Companies' Initial Brief (p. 10) and Reply Brief (Section III. A. 2.), the definition of distribution O&M expense applicable to the RCP distribution deferrals was set out in Attachment 2 to the RCP Supplemental Stipulation and was explained by Mr. Wagner -- someone who was involved with and familiar with the RCP proceeding. Staff, through Mr. Castle, agreed. In its AFR, OCC continues to rely on a definition proposed by its witness Mr. Effron – who had nothing to do with the RCP proceeding and whose knowledge was limited to his after the fact document review – which proposed definition is restricted to FERC accounts 580-598. His proposal, however, does not capture the intent of the parties as reflected in Attachment 2 to the RCP Stipulation, which the Companies, the Staff, and now the Commission deemed controlling in

determining the "proper definition of O&M". OCC's argument to the contrary must, once again, be rejected.

And finally, on page 24 of the OCC's AFR, it argues that the Commission misstated the issue before it when it rejected OCC's argument that the carrying charge calculation on the RCP Deferral balance be based on a net of accumulated deferred income tax ("ADIT") basis. OCC argues that "[t]here is no reason why the return that accrues during the deferral period should be calculated any differently." (OCC AFR, p. 24.) Of course there is. Not only does the record here support such an approach, but it is consistent with both the stipulation entered into in the RCP Case and past practice with respect to these Companies.

As Mr. Wagner explained, there was nothing in the RCP Stipulation or Commission Orders in that case that authorized deferrals to be calculated on a net of ADIT basis and that such an approach would change the entire economics of the RCP Stipulation. (Co. Exh. 3-C, p. 5.) Mr. Wagner also recalled his testimony in the RCP case in which, during cross examination, he discussed Form 8-K, wherein it was clear that carrying charges would be calculated on the full amount of the Distribution Deferral and that no netting of ADIT was contemplated. Finally, Mr. Wagner pointed out that the Companies filed a Motion for Clarification in the RCP case setting out the methodology to be used to calculate the deferrals. (Co. Exh. 3-C, p. 5.) The methodology and related workpapers were reviewed with the Staff of the Commission, and it was explicitly reflected as being calculated on a gross-of-tax basis on the workpapers that underlie the economic analysis of the stipulation. (Tr. VIII, p. 26.) Mr. Wagner then went on to explain that nothing in the RCP Order or Entries on Rehearing did anything to change

this methodology, and that the Companies have been consistently applying it since the beginning of 2006. This same methodology was provided to the Staff on more than one occasion without objection or protest. (Co. Exh. 3-C, p. 6.) As Mr. Wagner explained, at least with regard to the Companies, the Commission has never calculated the carrying charges on a deferral on a net of ADIT basis. (Tr. VIII, p. 31.) Indeed, quite to the contrary, when the Companies were authorized to defer and recover shopping incentive deferrals in the Companies' transition plan cases commencing in 2001, the carrying charges were calculated on a gross-of-tax basis. (Tr. VIII, pp. 31-32.)

In light of the foregoing, the accuracy of the Commission's framing of the issue is irrelevant. The end result is correct and, thus, there is no reversible error. *Holladay Corp. v. Pub. Util. Comm.* (1980), 61 Ohio St.2d 335 (syllabus).

In sum, the Commission's finding with regard to the determination of distribution RCP Deferrals was correct:

> The Commission finds that *Staff has properly calculated the amount of the distribution deferrals in accordance with the RCP Stipulation and our order adopting the RCP Stipulation.* ... Because the RCP Stipulation does not provide for adjustments to the amounts of distribution expenses currently embedded in base rates, *the Commission does not believe that the adjustments to the baseline proposed by OCC are appropriate to determine the amount of expenses currently in base rates.* [Order, p. 11 (Italics added.)]

OCC has failed to demonstrate anything to the contrary and accordingly its request for rehearing of the issues surrounding the RCP Deferrals should be denied.

B. The Commission's Treatment of Pension and Other Post-retirement Employment Benefits was Proper.

The Companies calculated the test year pension and OPEB expense using the current service cost component of SFAS 87 and SFAS 106, respectively. OCC argued that the Companies should calculate pension expense to reflect net periodic cost under

SFAS 87 and that recognizing only the current service cost component of test year pension and OPEB expense as proposed by the Companies is inconsistent with SFAS 87 and SFAS 106.[2]

Similar to its arguments regarding RCP Deferrals, the OCC again, with only one exception, copied all of its substantive arguments pertaining to pension and OPEB expense from its initial post-hearing brief, pasting them verbatim into its AFR. (*Compare* OCC Initial Brief, pp. 33-38 *with* OCC AFR, pp. 17-24.) Therefore, the Companies again incorporate their detailed responses (at pages 33-35 of the Companies' initial post hearing brief) to OCC's recycled arguments, instead focusing herein on OCC's sole new issue not raised in its initial brief – whether the Commission's findings are adequately supported by the evidentiary record – and explaining why OCC's position is without merit.

On page 17 of its AFR, OCC claims that the Companies failed to meet their burden of proof "when they departed from clear regulatory practice in Ohio." In support, they cite the Commission's statement at page 16 of the Order: "Since there is insufficient information in the record to create the rate base item and calculate a return on that item, we will adopt the approach originally proposed by Staff and the Companies."

[2] Remarkably, while OCC takes the position that the Commission is bound by SFAS 87 and SFAS 106, it does an about face when it comes to SFAS 158. OCC states that "accounting for ratemaking purposes in Ohio is determined by the Commission and not by the issuance of financial accounting standards." (OCC Br., p. 37) This is exactly the Companies' point: just as the Commission is not bound by SFAS 87 or SFAS 106 to establish revenue requirements, it also is not bound by SFAS 158. But OCC cannot have it both ways by stating, in effect, that the Commission *is* bound by SFAS 87 and SFAS 106, but should *disregard* SFAS 158. As the Companies explained in their Initial Brief, the Staff and the Companies' approach to pension and OPEB expense appropriately disregards the effect of financing, actuarial gains and losses and other non-service related portions of these expenses. Today's customers should pay pension and OPEB expense earned by today's employees. Using the current service cost component of SFAS 87 and SFAS 106 accomplishes this goal, and also avoids the unfairness that can result if the timing of a pension or OPEB contribution does not happen to coincide with a planned rate filing.

As a preliminary matter, based on the above, it is difficult to understand how the Companies failed to meet their burden of proof on an issue that the Commission rejected. While not clear from its AFR, it appears that OCC's argument really goes to the Companies' burden of justifying an alleged deviation from past practice. If this is indeed OCC's argument, it is flawed in several material respects. First, OCC relies on a 17 year old order issued in Case No. 92-1751-AU-COI as its "unchallenged precedent" in support of the use of an accrual basis approach. (OCC AFR, p. 17.) In the 1992 order, the Commission announced its intent to account for OPEB costs (the order says nothing about pension expense) in a manner "generally consistent" with the requirements of SFAS 106. It is difficult to understand why OCC believes that this isolated statement represents a policy decision by the Commission that is applicable to a case arising 15 years later, especially when the Commission's order in 92-1751-AU-COI makes "perfectly clear that [the Commission is] not surrendering any of [its] ratemaking authority to FASB." And second, the Companies are in very different situations now regarding their pension and OPEB plans than they were at the time of the 1992 Order. In the intervening 17 years, the Companies have made voluntary cash contributions to their respective pension trust funds and have also experienced significant increases in OPEB costs, all without sufficient funding from ratepayers. (Co. Exh. 4-C, pp. 2-3.)[3]

In light of the foregoing, the Companies provided sufficient grounds to deviate from OCC's precedent, even if it is assumed for the sake of argument (which the

[3] If the Companies had made an investment of $450 million in distribution plant, like they had in their pension funds (see Co. Exh. 4-C, p. 2), there would be no argument that rate levels should reflect the investment by increasing revenue requirements. However in the instant action, under OCC's theory, the Companies' investment of $450 million in the pension fund over the last few years would result in *reducing* their revenue requirements. Not only is such a theory counterintuitive – it is absurd.

Companies do not accept as the case), that OCC's position establishes "clear regulatory practice in Ohio." Moreover, the evidentiary record supports adopting the use of the current service cost component when determining pension and OPEB expense for the Companies. As Mr. Kalata testified on behalf of the Companies:

> The service cost component to pension and OPEB expenses provides for the recovery of current pension benefits earned by plan participants and appropriately ignores the funded status of the plan. This also ensures that today's pension expense earned by today's employees is paid by today's customers. The Companies also believe that the use of the service cost component of the pension and OPEB expense provides a better long-term assessment of actual costs and benefits associated with a utility's pension plan than that provided through a cash contribution approach and avoids the unfairness that can result if the timing of a pension and/or OPEB contribution does not happen to coincide with a planned rate filing. [Co. Exh. 4, p. 8.]

In sum, the fact that the Companies did not submit evidence in support of OCC's position that was ultimately rejected by the Commission certainly does not constitute a failure by the Companies to meet their burden of proof. Moreover, the Companies submitted evidence sufficient to justify the Commission's adoption of the Companies' (and Staff's) approach to calculating pension and OPEB expense in this instance. Accordingly, OCC's assignment of error on this issue should also be summarily rejected.

C. The Commission's Granting of Accounting Authority to Defer Storm Costs was Proper.

OCC argues that "FirstEnergy made absolutely no demonstration that it should be granted deferral authority for storm damage costs."[4] (OCC AFR, p. 26.) OCC, however, fails to recognize the testimony of the Companies' witness, Harvey L. Wagner. As Mr. Wagner testified:

[4] OCC also asks the Commission to disallow recovery of incremental costs associated with Hurricane Ike. (OCC AFR p. 26.) Inasmuch as the Companies have submitted a stipulation in Case No. 08-935-EL-SSO in which they have agreed to refrain from submitting such costs for recovery, the Companies do not oppose this request provided that the stipulation is approved.

> The level of costs that may be incurred by the Companies in the future to restore service to customers and repair distribution facilities following storms is unpredictable and may not be at the level of the operation and maintenance expenses included in the test year in this proceeding for those purposes. Due to the highly variable nature and the potential magnitude of such costs, we request that such costs incurred resulting from storm damage during any calendar year that exceed the annual costs included in the test year be deferred for future recovery from customers, through distribution rates, as a regulatory asset. [Co. Exh. 3, pp. 10-11.]

Both the unpredictable nature of and the volatility in storm related costs as discussed by Mr. Wagner provide good reason and establish an evidentiary record sufficient for the Commission to grant the requested accounting authority. This assignment of error of the OCC's should also be rejected.

D. OCC Failed to Support its Allegations of Commission Error Surrounding the Reliability of CEI's Distribution System.

OCC argues that the Commission's decision surrounding CEI's reliability "was in error and disserves utility customers who need the PUCO to protect them from a lack of adequate reliability of their electric service." (OCC AFR, p. 27.) Yet, OCC fails to cite any basis for this alleged error or disservice, other than to rehash the same arguments that were raised in its post-hearing briefs and rejected by the Commission in it Order.[5]

In the Order, the Commission addressed each of OCC's arguments (at pages 31 – 36), noting, among other things, that "no separate proceeding to investigate the Companies' service quality and reliability" was necessary given the Staff's thorough investigation. (Order, pp. 35.) The Commission observed that "[a]lthough OCC may not agree with Staff's conclusions and recommendation in the Staff Report, OCC has not

[5] OCC also attempts to re-litigate this same issue as a member of Consumers for Reliable Electricity in Ohio in Case No. 08-1299-EL-UNC.

identified any factual issues which have not been thoroughly investigated and litigated in this proceeding. (Id. at 35-36.)

As already discussed, *supra*, the Supreme Court of Ohio has consistently refused to substitute its judgment for that of the Commission on evidentiary matters absent a showing that the Commission's decision is "manifestly against the weight of the evidence" and "so clearly unsupported by the record as to show misapprehension, mistake or willful disregard of duty."[6] OCC has failed to demonstrate any of these prerequisites for error. Accordingly its request for rehearing on CEI's reliability issues should be rejected.

II. SUMMARY AND CONCLUSION

In sum, of the OCC's four assignments of error, two (related to RCP Deferrals and Pension/OPEB costs) were based on arguments made prior to the Commission's Order being released. Arguments raised on brief prior to the issuance of an order that are copied into an application for rehearing on such order cannot possibly raise new issues and, thus, should be summarily rejected. All other arguments that deviate from those copied from the briefs, including those related to the latter two assignments of error, are contrary to the evidentiary record and should also be

[6] While the Court can perform a de novo review of questions of fact, (*FirstEnergy Corp. v. Pub. Util. Comm.*, 95 Ohio St.3d 401, 2002-Ohio-2430, ¶ 11), OCC has failed to make any such allegations in its Application for Rehearing.

rejected. Thus, based upon the foregoing, the Companies respectfully ask that OCC's Application for Rehearing be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Application for Rehearing and Request for Clarification was served by e-mail to the following parties on this 2nd day of March, 2009.

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Kathy J. Kolich

Case No. 07-551-EL-AIR, et al.
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