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**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of an Application for the)
Approval of a Corporate Separation Plan) Case No. 09-462-EL-UNC
Section 4928.17 and 4901:1-37, Ohio)
Administrative Code)

**NORTHEAST OHIO PUBLIC ENERGY COUNCIL'S SUR-REPLY TO THE
REPLY OF OHIO EDISON COMPANY, THE TOLEDO EDISON COMPANY
AND THE CLEVELAND ELECTRIC ILLUMINATING COMPANY**

This proceeding is of critical import to the development of a viable competitive retail electric service marketplace in Ohio. Thus, the Northeast Ohio Public Energy Council ("NOPEC") respectfully submits this brief Sur-Reply to Ohio Edison Company's ("OE"), The Cleveland Electric Illuminating Company's ("CEI"), and The Toledo Edison Company's ("TE" and collectively the "Companies") Reply to NOPEC's Unauthorized Comments filed September 22, 2009 ("Companies' Reply") to NOPEC's September 1, 2009 Motion for Leave to Intervene, Initial Comments, and Request for a Procedural Schedule and Hearing.¹ The purpose of this Sur-Reply is to correct the Companies' wholly inaccurate mischaracterization of NOPEC's position in this case as "disdain for competing for customers" based on "the length of the Companies' Plan" (Companies' Reply at 3). To the contrary, fair competition is exactly what NOPEC seeks to promote through this case, and the length of the plan simply highlights its absolute lack of substance.

Similar to the Companies' August 7, 2009 reply to the intervention and comments of the Ohio Consumers' Counsel ("OCC"), the Companies' Reply essentially argues that 1) NOPEC's

¹ The Companies have characterized NOPEC's comments as being "unauthorized". The Companies' claim that NOPEC's comments have not yet been authorized by the Commission in this proceeding is of no importance as comments and objections are expressly provided for by Ohio law in O.R.C. 4928.17(B). Moreover, the Commission has not yet established a procedural schedule for this case.

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initial comments were not procedurally authorized and therefore should be totally ignored by the Commission; and 2) the Commission should approve the Companies' Application as filed without further process or comment by other parties or any modification by the Commission. The Companies' Reply makes statements like "[t]he code of conduct policy, which NOPEC says the Plan is lacking, is set forth on pages 8 – 9 of the Plan." Yet, that code of conduct merely recites the PUCO rules virtually verbatim, without regard to the unique circumstances of the Companies, including the fact that its unregulated subsidiary, FES, has a dominant competitive market position in its affiliated Companies' service territories. The Companies' blithe Reply merely magnifies the need for a full evidentiary hearing in this case.

The Commission should establish a procedural schedule in this case. After the completion of discovery in this case, NOPEC anticipates that it – and others – will file statutorily-authorized objections and recommendations providing necessary substantive changes to the Companies' corporate separation plan application ("Application") for the Commission's consideration.² NOPEC seeks a full evidentiary hearing in this case, as formally requested by NOPEC in its Motion to Intervene.³

The Companies' Reply mischaracterizes NOPEC's Initial Comments as failing to describe any shortcomings or deficiencies in the Companies' application. To be clear, NOPEC alleges and intends to show in this case that the Companies' Application fails to satisfy the requirements of Ohio law, fails to achieve the policies set forth in Ohio Rev. Code 4928.02, and fails to comply with specific requirements of the Commission's rules. As currently written, the plan effectively requires the Commission to take the Companies at their word that they know the

² Ohio Rev. Code § 4928.17(B) (expressly authorizing the filing of specific objections to the plan).

³ NOPEC understands that the OCC also supports NOPEC's request for a full evidentiary hearing.

rules (as the only substance of their application is to recite them) and will follow them without additional substantive oversight from the Commission. As noted in NOPEC's filing, Ohio law governing corporate separation plan requirements as well as the Commission's rules, require much more than the Companies' lip service.

NOPEC's specific concerns include ensuring the approved plan includes specific and measurable programs, processes, and controls to ensure that no undue preference or advantage is extended to the Companies' unregulated affiliate, FirstEnergy Solutions ("FES"), *vis a vis* competitors of FES. FES is actively soliciting retail customers in its affiliated Companies' service territories, and has a dominant generation market position in those service territories. Under the circumstances, NOPEC's specific concerns relate to FES receiving undue preference or advantage through, among other means, the reassignment of employees from the regulated Companies to unregulated FES; the use and extent of the references to "First Energy" and/or the Companies' attributes in FES's retail advertising; and the implications of shared executive decision-making between the Companies and FES. In this case, NOPEC will propose specific recommendations for the Commission's consideration to address these concerns, as well as others to be raised, to ensure they are effectively addressed as required by Ohio Rev. Code 4928.17 and the Commission's rules.

Finally, the Companies have been operating for the past nine years under an "interim" plan established under a now-outdated electric transition plan regulatory scheme. Similar to the electric transition plan itself, that initial corporate separation plan may have achieved the first step of transitioning towards corporate separation. However, it is now time for the Companies' corporate separation plan to be updated to reflect the evolving competitive retail marketplace as

it exists today, as well as to protect the continuing development of retail competition in Ohio in the next decade.

NOPEC respectfully requests the Commission recognize the critical importance of effective corporate separation in the Companies' service territories by establishing a procedural schedule providing for a thorough review of the Application, full participation by NOPEC and other interested parties, and the scheduling of a full evidentiary hearing in this case.

Respectfully submitted,

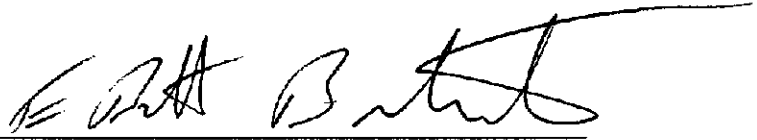
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CERTIFICATE OF SERVICE

I hereby certify that this pleading is being served by fax, first class mail, electronic mail or personal delivery, to the following persons, this 29th day of September 2009.



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