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April 30, 2010

Public Utilities Commission of Ohio
PUCO Docketing
180 E. Broad Street, 10th Floor
Columbus, Ohio 43215

In re: Case No. 10-388-EL-SSO

Dear Sir/Madam:

Please find enclosed an original and twenty (20) copies of the INITIAL BRIEF OF THE OHIO ENERGY GROUP fax-filed today in the above-referenced matter.

Copies have been served on all parties on the attached certificate of service. Please place this document of file.

Respectfully yours,

Michael L. Kurtz

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MLKkew
Encl.

Cc: Certificate of Service
Gregory Price, Hearing Examiner
Kim Bojko, Hearing Examiner

CERTIFICATE OF SERVICE

I hereby certify that true copy of the foregoing was served by electronic mail (when available) or ordinary mail, unless otherwise noted, this 30th day of April, 2010 to the following:

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BEFORE THE
PUBLIC UTILITY COMMISSION OF OHIO

In The Matter Of Ohio Edison Company, The Cleveland Electric Illuminating Company And The Toledo Edison Company For Authority to Establish A Standard Service Offer Pursuant To Section 4928.143, Revised Code, In The Form Of An Electric Security Plan	:	**Case No. 10-388-EL-SSO**

INITIAL BRIEF OF THE OHIO ENERGY GROUP

The members of the Ohio Energy Group ("OEG") who purchase electric service from the Ohio Edison Company, the Cleveland Electric Illuminating Company and the Toledo Edison Company ("Companies") are: Air Products and Chemicals, Inc., AK Steel Corporation, Aleris International, Inc., Alcoa Inc., ArcelorMittal USA, BP-Husky Refining, LLC, Brush Wellman, Inc., Charter Steel, Chrysler LLC, E.I. DuPont deNemours & Company, Ford Motor Company, General Motors, LLC, Johns Manville, Linde, Inc., North Star BlueScope Steel, LLC, PPG Industries, Inc., Praxair, Inc., Sunoco, Inc. (R&M) and Worthington Industries.

A. The Stipulation Should Be Approved

OEG supports the March 23, 2010 Stipulation because it represents a practical and beneficial resolution to a complex set of inter-related issues.

FirstEnergy's August 17, 2009 corporate decision to leave MISO and move to PJM is primarily subject to the jurisdiction of FERC. *Re: American Transmission Systems, Inc.*, Docket No. ER09-1589-000 and *FirstEnergy Service Company v. PJM Interconnection*, Docket No. EL10-6-000. Once FERC approved the transfer to PJM on December 17, 2009 this Commission was left with two basic options. One, accept for retail ratemaking purposes all FERC approved transmission charges from both MISO and PJM under the doctrine of federal preemption. *See Nantahala Power and Light Co. v. Thornburg*, 476 U.S. 953, 106 S. Ct. 2349 (1986). The option of recovering two separate sets of transmission expenses would have had significant cost implications for consumers in Ohio. The other option would be for this Commission to rule that the voluntary move was imprudent and not allow retail rate recovery of all of the PJM transmission expenses. *See Pike County Light and Power*, 465 A.2d 735 (1983); *Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities*, 123 FERC 61,055 at pp. 114-115 (April 21, 2008); *Monongahela Power Co. v. Schriber*, 322 F. Supp. 2d 902 (S.D. Ohio 2004). This option faced proof issues and would likely have resulted in years of unproductive litigation. The Stipulation results in a favorable compromise on this critical issue.

The Stipulation relieves consumers from paying the $37.5 million MISO exit fee and the $5 million PJM integration fee.[1] Also, the Stipulation relieves consumers from paying PJM Regional Transmission Expansion Plan (RTEP) charges for the five-year period starting June 1, 2011 with a resulting net present value savings for consumers of $257 million.[2] The five-year present value of these avoided costs is $299.5 million.

The Companies calculated the nominal value of avoiding RTEP charges for five years at $321.3 million.[3] Either way, on a nominal or present value basis, these savings are significant. Absent the

[1] Staff Ex. 1 at p. 4.
[2] Staff Ex. 1 at p. 7.
[3] Company Ex. 4, WRR Attachment 1

Stipulation, consumers could be required to pay these additional costs. The certainty of locking in these savings and avoiding the cost of contentious litigation is a significant benefit of the Stipulation.

The Ohio Supreme Court has established a three-part test for approving Stipulations at the Commission. *AK Steel Corp. v. Pub. Util. Comm.*, 95 Ohio St. 3d 81, 765 N.E. 2d 862 (2002). The direct testimonies of Staff witness Turkenton and Company witness Ridmann both did a thorough job of establishing how the Stipulation satisfies that test. We will not belabor the point and repeat those testimonies here. We trust that the Companies will carry that burden in their brief. Suffice it to say that in addition to the Companies and Staff, 15 knowledgeable parties supporting diverse interests have signed on.[4] As this is our second ESP Stipulation in the last year the issues were well defined and thoroughly understood from the beginning. The 2009 ESP Stipulation and resulting rate plan is working well and we believe that the same will hold true here.

Mr. Ridmann and Ms. Turkenton both also provided credible evidence as to how the ESP produced by the Stipulation is more favorable in the aggregate than the expected results of an MRO. We again trust that the Companies will carry their burden of proof and thoroughly brief this issue. We only wish to add this point. Under R.C. Section 4928.142 (F), once an electric distribution utility receives Commission approval for an MRO there is no going back. Once an MRO is approved there can never again be an ESP. An ESP grants the Commission far more flexibility to be responsive to particular consumer needs and to deal with changing circumstances than an MRO. The handling of PJM transition costs is a perfect example. It is questionable if the resolution of this unforeseen issue could have been handled as it was in the Stipulation if the Commission were constrained by the rules of the MRO statute. The utility and consumers both benefit from the increased regulatory flexibility afforded by an ESP. This is an important consideration which always tilts in favor of an ESP.

[4] The Kroger Co. and the PJM Power Providers Group did not oppose the Stipulation.

B. The Positions Of The Opposing Parties Should Be Rejected

1. The Domestic Automaker Production Incentive Is A Reasonable Economic Development Program And Should Be Approved

Section F.3 of the Stipulation establishes an economic development program for the domestic auto producers in the service territories of the Companies. These are Ford (four assembly plants), General Motors (three assembly plants) and Chrysler (one assembly plant). There are no foreign automakers in the service territories of the Companies. The economic development program offers an electric rate discount to the eight Northern Ohio auto assembly plants if their production increases. The non-bypassable discount is 1.0 cents/kwh on increased electric usage (which is directly correlated to production increases) of up to 20% above the 2009 baseline usage level. The discount is 1.2 cents/kwh on increased usage of more than 20% over the 2009 baseline.[5] The incentive is calculated individually for each of the eight plants and is only on the increment above the baseline. If the automakers increase their production at all eight plants to their pre-recession 2008 levels, then the total incentive will be approximately $2.7 million.[6] This level of incentive translates into a charge to the average residential ratepayer of 4.8 cents per month.[7] If production does not increase, then there is no incentive payment.

OCC witness Ibrahim addressed the automaker incentive rate in his testimony. Importantly, he did not address the merits of the plan, only the procedure of the approval process. Mr. Ibrahim believes that the auto incentive rate should not be addressed in this ESP and should instead be subject to the reasonable arrangement administrative regulation and review process. "*[M]y testimony does not address the merits of the proposals. My testimony requests adherence to the process established by the*

[5] Staff Ex. 3 at p. 4.
[6] TE Vol. III at p. 724.
[7] TE Vol. III at p. 727.

Commission in O.A.C. Chapter 4901:1-38 to provide for a review and to provide transparency for all economic development proposals in Ohio."[8]

This argument is legally unsound. The review procedures under the reasonable arrangement regulation do not apply to economic development programs contained in an ESP. The statutory authority for each provision of O.A.C. 4901:-38 is R.C. Sections 4905.04, 4905.06, 4905.31 and 4905.02. The ESP statute creates different and independent authority for the Commission to approve economic development programs. R.C. 4928.143 (B)(2)(i) provides that an ESP may "*implement economic development, job retention, and energy efficiency programs, which provisions may allocate program costs across all classes of customers of the utility and those of electric distribution utilities in the same holding company system.*" Therefore, the review procedures under the reasonable arrangement regulation do not apply to economic development programs contained in an ESP.

The only direct testimony on the merits of the automaker incentive rate was provided by Staff witness Mr. Fortney, and he supports it.[9] Chrysler, Ford and General Motors are major economic drivers in Northern Ohio. Mr. Fortney described them as a "*core industry*".[10] The State of Ohio is the second largest state in the U.S. in the production of light motor vehicles.[11] Ohio is the largest state in manufacturing motor vehicle parts.[12] The Ohio motor vehicle industry directly employs 130,000 men and women, plus another 30,000 in ancillary services.[13] These are high paying, high benefit, family supporting jobs. The plants in Northern Ohio compete with other auto plants both nationally and internationally. Even within the same corporate family the Ohio plants compete for capital investment and new vehicle lines. Providing a small incentive for these companies to increase production at their

[8] OCC Exhibit 1 at p. 5.
[9] Staff Ex. 3 at pp. 4-5.
[10] Staff Ex. 3 at p. 5.
[11] TE Vol. III at p. 731.
[12] Id.
[13] TE Vol. III at pp. 731-732.

Ohio facilities is a sound economic development program that serves to retain and grow jobs here. The program crafted in the ESP only pays for results. If production and electric usage does not increase, then there will be no incentive payment. This is a reasonable program which should be approved.

2. **<u>The Recommendation Of the PJM Curtailment Service Providers That The Existing OLR and ELR Interruptible Rate Program Be Terminated Should Be Rejected</u>**

Mr. Schisler filed testimony on behalf of Enernoc Inc., a PJM Curtailment Service Provider (CSP). According to Mr. Schisler, "*Enernoc is a competitor of FirstEnergy*."[14] Mr. Schisler requests that "*the Commission should simply allow the Tariff Riders ELR and OLR to expire on their own terms*."[15] In the alternative, Mr. Schisler proposes that "*[i]f the Commission is not prepared to simply allow the Tariff Riders to expire on their own terms, the Commission should strip Riders ELR and OLR from the stipulation, and allow all of the parties to conduct discovery and challenge the proposed Riders.*"[16] On behalf of a coalition of PJM CSPs, Mr. Campbell supports the recommendations of Mr. Schisler.[17]

Terminating the ELR and OLR interruptible rate programs would have severe negative consequences for many major industries in Northern Ohio. Terminating Riders ELR and OLR would also jeopardize this Stipulation to the detriment of all ratepayers and the Companies. The recommendations of the PJM CSPs should be firmly rejected.

The logic behind Mr. Schisler's proposal is strained. As best we can understand, this is his line of reasoning: When FirstEnergy and the Auction Manager were establishing the rules for the American Transmission Systems, Inc (ATSI) March 15, 2010 Integration Auction, FirstEnergy made representations on the Auction Website and elsewhere that the ELR and OLR rates would terminate on

[14] Enernoc Ex. 1 at p. 2.
[15] Enernoc Ex. 1 at p. 19.
[16] <u>Id.</u>
[17] Demand Response Coalition Ex. 1 at p. 14.

May 31, 2011 and would not be extended.[18] Mr. Schisler conceded that these representations were true when made,[19] but later became misleading. They became misleading because this March 23, 2010 Stipulation contains a provision which would (if approved by the Commission) extend those Riders during the term of the ESP. Mr. Schisler believes that FirstEnergy had an affirmative legal duty to inform Auction bidders about the terms of the potential Stipulation and they did not.[20] Mr. Schisler discussed his concerns with an attorney for the PJM Market Monitor, but took no formal action.[21] Mr. Schisler asks this Commission to effectively rule that FirstEnergy engaged in fraudulent behavior during the PJM supervised ATSI Integration auction, and as punishment he would have this Commission radically modify the Stipulation by removing a key provision that OEG, IEU, Material Sciences and Nucor all relied upon.

The flaws in Mr. Schisler's reasoning are many. First, none of the ESP Applicants (Ohio Edison, Toledo Edison and CEI) or any other FirstEnergy entity makes a penny off of Riders ELR and OLR. The interruptible credits paid and received under Riders ELR and OLR are all pass through costs for the Companies. Terminating these Riders will only punish the retail ratepayers whose energy intensive manufacturing processes rely those Riders, not the alleged perpetrators of the fraud. That is why the customers pushed for continuation of Riders ELR and OLR, not the Companies. Second, this Commission has no jurisdiction to rule on the conduct of the ATSI Integration Auction. That is the job of the PJM Market Monitor, PJM and FERC. His complaints should be taken there. Perhaps Mr. Schisler does not like his chances of success in those appropriate forums given the provision in the Auction rules whereby bidders are explicitly warned that they cannot and should not rely on information

[18] Enernoc Ex. 1 at p. 8; TE Vol. II at pp. 299-300.
[19] TE Vol. II at p. 302
[20] TE Vol. II at pp. 307, 309.
[21] TE Vol. II at pp. 329-330.

provided in the Auction or on the Auction Website.[22] Third, the ATSI Auction was held on March 15, 2010 which was before the Stipulation was signed and filed on April 23, 2010. During the ATSI Integration Auction FirstEnergy did not know if there would even be a Stipulation. And as of this date none of the Parties know whether the Commission will approve it. Therefore, there was nothing that could have been or should have been disclosed. Finally, Mr. Schisler confuses the regulated with the regulator. He mistakenly believes that the Companies have unilateral authority to dictate the terms of this Stipulation and which Riders become effective.[23] Last we checked, that is the Commission's job.

The PJM Demand Response Coalition witness Mr. Campbell supports the recommendation of Mr. Schisler that Riders ELR and OLR should be terminated. Mr. Campbell solely relies on Mr. Schisler's reasoning. Since Mr. Schisler is wrong, so is Mr. Campbell.

The rest of Mr. Campbell's recommendations are all based on the erroneous assumption that "*the requirements for demand response in the FE Companies' ELR and OLR programs are virtually identical to the requirements of PJM's Reliability Pricing Model ('RPM')*"; and "*The PJM programs and the OLR and ELR provisions are essentially the same.*"[24] Because it is not true that OLR/ELR is the same as the products which the PJM CSP providers sell, the balance of Mr. Campbell's recommendations should be rejected.

The PJM programs and Riders OLR and ELR are different in these significant ways. The capacity credit in the PJM program is fixed for one year, and for OLR/ELR it is three years.[25] The OLR/ELR has an economic development component, and the PJM program does not.[26] Rider ELR

[22] Company Ex. 6.
[23] TE Vol. II at pp. 297, 302.
[24] Demand Response Coalition Ex. 1 at p. 9 and 10.
[25] TE Vol. III at p. 660.
[26] TE Vol. III at p. 661.

subjects the customer to 876 hours of economic interruption, and PJM does not.[27] A customer on OLR or ELR must purchase its generation supply from the Companies standard service offer obtained through a slice-of-system descending clock auction, whereas a customer on a PJM demand response program is free to shop for competitive generation on an individual basis.[28]

When you get right down to it, the PJM CSPs want to get rid of Riders OLR and ELR because they want more potential customers to sell to. "*Q. Well, let me rephrase it. What you really want is you want to take these ELR customers and see if you can sell them demand response, right? A. Yes.*"[29] "*Q. Is part of the reason you would like the Commission to terminate the ELR and OLR tariffs, is part of the reason that would give you a larger customer base to sell to? A. That's part of the reason, yes.*"[30] But this Commission should do what is best for the economy of Ohio, not what is best for the PJM CSPs.

WHEREFORE, OEG respectfully requests that the Commission approve the Stipulation without modification.

Respectfully submitted,

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April 29, 2010

[27] TE Vol. III at p. 662.
[28] TE Vol. III at pp. 662-665.
[29] TE Vol. II at p. 356.
[30] TE Vol. III at p. 667.