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**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 ) Case No. 04-1931-EL-AAM  
Edison Company for Authority to Modify )  
their Accounting Procedures. )

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**APPLICATION FOR REHEARING AND  
MEMORANDUM IN SUPPORT  
BY THE  
OFFICE OF THE OHIO CONSUMERS' COUNSEL**

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Janine L. Migden-Ostrander  
Consumers' Counsel

Colleen L. Mooney, Trial Attorney  
Kimberly W. Bojko  
Assistant Consumers' Counsel

**The Office Of The Ohio Consumers' Counsel**  
10 West Broad Street, Suite 1800  
Columbus, Ohio 43215-3485  
(614) 466-1291 – Telephone  
(614) 466-9475 – Facsimile

June 16, 2005

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The Office of the Ohio Consumers' Counsel ("OCC") hereby files at the Public Utilities Commission of Ohio ("Commission") this Application for Rehearing in the above-captioned docket containing the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company (collectively "Companies"). The Companies are the three Ohio public utility operating companies of FirstEnergy Corp. ("FirstEnergy"). OCC herein alleges, pursuant to R.C. 4903.10, the following grounds upon which the Commission's May 18, 2005 Finding and Order in this docket is unreasonable and unlawful.

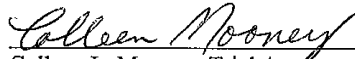
- 1) The Commission violated R.C. 4928.34(A)(6) and Commission precedent in allowing deferrals of costs incurred during the market development period ("MDP") for recovery after the MDP.
- 2) The Commission violated the Commission's Opinion and Order approving the Companies' Electric Transition Plan, Case No. 99-1212-EL-ETP, and the Stipulation and Recommendation in that case.
- 3) The Commission acted unlawfully in failing to grant OCC's Motion to Dismiss the application on the grounds that the Application violates Ohio law and Commission precedent.

- 4) The Commission acted unlawfully in failing to grant OCC's Motion to Intervene. OCC met the criteria set forth at R.C. 4903.221 and Ohio Adm. Code 4901-1-11(A)(2) and 4901-1-11(B) for intervention in this matter; therefore, OCC's Motion to Intervene should have been granted.

The grounds upon which the Commission's Finding and Order is unlawful and unreasonable are more fully explained in the attached Memorandum in Support of the Application for Rehearing.

Respectfully submitted,

Janine L. Migden-Ostrander  
Consumers' Counsel



Colleen L. Mooney, Trial Attorney  
Kimberly W. Bojko  
Assistant Consumers' Counsel

**The Office Of The Ohio Consumers' Counsel**  
10 West Broad Street, Suite 1800  
Columbus, Ohio 43215-3485  
(614) 466-1291 – Telephone  
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---

**I. INTRODUCTION**

Pursuant to R.C. 4903.10, the Office of the Ohio Consumers' Counsel ("OCC") hereby submits this memorandum in support of OCC's Application for Rehearing in the above-captioned docket. The Commission approved the Companies' Application to defer transmission- and ancillary-service related costs incurred from December 30, 2004 through December 31, 2005 for recovery commencing January 1, 2006.

OCC is the statutory representative of Ohio's residential utility consumers. OCC is filing this Application for Rehearing on behalf of 1.8 million residential consumers who will pay higher electricity rates under the PUCO's Order. These consumers are served by Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company.

**II. THE COMMISSION VIOLATED R.C. 4928.34(A)(6) AND COMMISSION PRECEDENT IN ALLOWING DEFERRALS OF COSTS INCURRED DURING THE MARKET DEVELOPMENT PERIOD (“MDP”) FOR RECOVERY AFTER THE MDP.**

The Companies proposed to defer transmission costs incurred during the market development period (“MDP”) of Ohio’s electric restructuring legislation, Am. Sub. S.B. 3 (“SB 3”) and to recover these costs from ratepayers through a rider commencing after the MDP. The deferral of costs incurred during the MDP for recovery after the MDP violates the mandated rate cap of SB 3.

R.C. 4928.34(A)(6) states that the total of all unbundled components in the electric transition plan’s (“ETP”) rate unbundling plan is capped and shall equal during the MDP the total of all rates and charges in effect on the day before the effective date of the statute. With the exception of items not relevant herein, the total of all unbundled components is capped through the MDP, which ends on December 31, 2005.

The Application violates the rate cap provision of R.C. 4928.34(A)(6). The Companies would use the artifice of deferrals to circumvent the rate caps that the General Assembly imposed during the MDP. The proposed deferral of costs incurred by the Companies during the MDP (with carrying charges to compensate the Companies for their inability to recover such costs during the MDP) and subsequent recovery after the MDP renders the customer protections of R.C. 4928.34(A)(6) meaningless.

The Commission has already found that such deferrals violate R.C. 4928.34(A)(6). The Commission recently rejected in two separate cases the use of deferrals to circumvent the rate caps under R.C. 4928.34(A)(6). *Application of Cincinnati Gas & Electric Company*, Case No. 03-93-EL-ATA, et al., Opinion and Order at 34 (September 29, 2004) (hereinafter “CG&E”) and *Application of Columbus*

*Southern Power Company and Ohio Power Company*, Case No. 04-169-EL-UNC, Opinion and Order at 27 (January 26, 2005) (hereinafter “*AEP*”). In *CG&E*, the Commission stated as follows:

The Commission finds that, while deferrals are not rate increases, the amounts that would be deferred under the stipulation are representative of amounts that ultimately may be charged to customers. Those costs, if and when ultimately recovered, would be based on accruals during the MDP, and the deferrals would therefore violate the rate cap under SB 3.

*CG&E*, Case No. 03-93-EL-ATA, et al., Opinion and Order at 34 (September 29, 2004).

The Companies filed their Application after the Commission’s Order in *CG&E*. Thus, the Application disregards not only R.C. 4928.34(A)(6) but also the principle of *stare decisis* as embodied in *CG&E*. In finding that the deferrals would violate the rate cap under SB 3, the Commission recognized that the consumer protection provided by R.C. 4928.34(A)(6) would be rendered meaningless if utilities were able to circumvent the rate cap provisions of Ohio law by simply deferring costs during the MDP for recovery after the MDP. The Commission’s decision in *CG&E* gave effect to the General Assembly’s MDP rate cap and required dismissal of FirstEnergy’s Application with prejudice.

The Commission incorrectly states that its decision to deny authority to create deferrals in *CG&E* and *AEP* was based upon specific facts and circumstances in the record in those other cases. Finding and Order at 5. The Commission stated falsely that its decision in those cases was not based on a matter of law. *Id.* Contrary to the Commission’s statement, the decision in *CG&E* and *AEP* was based solely on the conclusion of law that such deferrals violate R.C. 4928.34(A)(6); the decision was not

based on any specific facts in those cases. The *CG&E* decision is quoted above. In *AEP*, the PUCO stated:

Recovery of the deferred RTO administrative charges would be based upon accruals during AEP's MDP. As a result, we will not approve the proposed deferral of 2004 and 2005 RTO administrative charges.

*Columbus Southern Power Company* and *Ohio Power Company*, Case No. 04-169-EL-UNC, Opinion and Order at 27 (January 26, 2005). Obviously, the decisions in *CG&E* and *AEP* were not based on the specific facts of those cases, but were based, as a matter of law, solely on the illegality of deferrals during the MDP, i.e., the decisions were based solely on R.C. 4928.34(A)(6).

The Commission also acted unlawfully when it granted deferrals of transmission costs based upon R.C. 4928.35(A), which authorizes the Commission to approve adjustments to rate schedules during the MDP as "authorized by federal law." Finding and Order at 6. R.C. 4928.35(A) states that the Companies' rates shall be in effect for the duration of the MDP and shall be subject to the rate cap of R.C. 4928.34(A)(6) and shall not be adjusted during the MDP except as authorized by federal law.

The Commission's reference to R.C. 4928.35(A) is misplaced. It is misplaced because SB 3 did not leave the electric utilities without remedy for increased transmission costs. During the MDP rate cap, if there are any unrecovered transmission costs pursuant to FERC-approved transmission rates, a mechanism exists for their recovery. If the Companies wished to recover these transmission costs pursuant to Ohio law, they had only to apply to increase the transmission component of their capped rates and correspondingly to decrease the distribution component.



Other electric utilities in Ohio conform to this mechanism, which the Commission has endorsed. For example, on March 27, 2002, the Commission issued a Finding and Order in a transmission cost case filed by The Cincinnati Gas & Electric Company ("CG&E"). In approving the application, the Commission stated "any increase in the transmission rate must be offset by a decrease in the distribution rate." *Application of CG&E*, Case No. 02-416-EL-ATA, Finding and Order at 1 (March 27, 2002). CG&E filed another application not to increase rates in Case No. 04-883-EL-ATA. In this tariff filing, CG&E requested again to increase its transmission rates consistent with the Midwest Independent System Operator's revenue requirement and to decrease its distribution rates by like amounts. The Commission again allowed an increase in the transmission rate with a corresponding decrease in the distribution rate. *Application of CG&E*, Case No. 04-883-EL-ATA, Finding and Order at 1 (July 28, 2004). The Commission stated again that during the MDP "any increase in the transmission rate must be offset by a decrease in the distribution rate." *Application of CG&E*, Case No. 04-883-EL-ATA, Finding and Order at 1 (July 28, 2004). Thus, it is well-established Commission precedent that during the MDP, pursuant to R.C. 4928.34(A)(6), transmission rates may be increased with a corresponding reduction in the distribution rate.

Thus, the Companies are not without remedy for increased transmission costs under Ohio law. The Companies may file to increase the transmission components of their Ohio rates. During the MDP, pursuant to R.C. 4928.34(A)(6), a request to increase the transmission components must be accompanied by an equivalent request to decrease the distribution components.

The Commission should grant rehearing and reaffirm its earlier precedent that the deferral of costs incurred during the MDP for recovery after the MDP violates R.C. 4928.34(A)(6), which requires that rates be capped during the MDP. The deferral of costs during the rate cap period for recovery after the rate cap period completely frustrates the General Assembly's statutory framework for the MDP, which includes a rate cap.

The Supreme Court has found on numerous occasions that the PUCO, as a creature of statute, may exercise only that jurisdiction conferred upon it by statute. *Columbus S. Power Co. v. Pub. Util. Comm.* (1993), 67 Ohio St.3d 535, 537. Even if the PUCO believes it is furthering some policy, it may not do so beyond the scope of its statutory authority. The General Assembly, not the PUCO, has the authority to make modifications to the statutory regulatory framework to permit the furtherance of regulatory policies. If the current statutory framework does not permit the PUCO to effect some regulatory policy, the PUCO is not permitted to do so. *Canton Storage & Transfer Co. v. Pub. Util. Comm.* (1995), 72 Ohio St.3d 1, 4, 16-17.

The PUCO is constrained to apply the existing regulatory framework; it may not bypass the General Assembly and create, by administrative fiat, a different regulatory climate. *Id.* at 17. The General Assembly provided for rate caps in the MDP; the Commission's decision in this case frustrates the General Assembly's framework for the MDP. Therefore, the Commission's decision is unlawful and should be reversed.

**III. THE COMMISSION VIOLATED ITS OWN OPINION AND ORDER APPROVING THE COMPANIES' ELECTRIC TRANSITION PLAN, CASE NO. 99-1212-EL-ETP, AND THE STIPULATION AND RECOMMENDATION IN THAT CASE.**

Approval of the Application also violated the Commission's order in the Companies' electric transition plan ("ETP") case. The Commission's Opinion and Order provided for a cap on the unbundled components of the Companies' rates, as required by R.C. 4928.34(A)(6). *Application of FirstEnergy Corp.*, Case No. 99-1212-EL-ETP, et al., Opinion and Order at 46, 69 (July 19, 2000). The deferrals in the instant case are merely a means to circumvent R.C. 4928.34(A)(6) and the Commission's approval of the Companies' ETP, which conformed to the rate cap provisions of Ohio law.

In addition, the Companies' participation in a federally-approved regional transmission organization ("RTO") was anticipated in the Commission's Opinion and Order approving the ETPs. *FirstEnergy Corp.*, Case No. 99-1212-EL-ETP, Opinion and Order at 60. In fact, Ohio law requires that the Companies participate in an RTO. R.C. 4928.12.

The Companies recognized in the Stipulation and Recommendation that they signed and docketed on April 17, 2000 in Case No. 99-1212-EL-ETP ("ETP Stipulation") that they would participate in a federally-approved RTO. ETP Stipulation at 10. The Companies also knew, when they signed the ETP Stipulation, that there would be costs associated with such participation. Neither the ETP Stipulation nor the Commission's Opinion and Order approving the ETP Stipulation provided for the Companies' deferral during the MDP of any incremental costs associated with the Companies' participation in the FERC-approved RTO.

Thus, the Application should also have been dismissed because it did not comport with the ETP Stipulation and the Commission's Opinion and Order that approved the ETP Stipulation and the ETP. OCC is also a signatory party to the ETP Stipulation, which the Commission approved with no relevant modifications in its Opinion and Order dated July 19, 2000, in the Companies' ETP proceedings.

The ETP Stipulation was a bargained for agreement that cannot be modified unilaterally. OCC does not consent to the Companies' proposed change in the settlement. A unilateral modification of a settlement is unacceptable in the context of a negotiated agreement. Under Ohio law, a settlement agreement voluntarily entered into cannot be repudiated by a party and should be summarily enforced by the court. *Spercel v. Sterling Industries* (1972), 31 Ohio St. 2d 36; *Cummins Diesel Michigan, Inc., v. The Falcon* (1962), 305 F.2d 721, 723.

The Commission should require the Companies to keep the bargain that they made in the ETP Stipulation, which the Commission approved in its Opinion and Order. The Commission should dismiss the Application as a proposal by the Companies to repudiate unilaterally the Commission-approved ETP Stipulation.

#### **IV. THE COMMISSION ACTED UNLAWFULLY IN FAILING TO GRANT OCC'S MOTION TO DISMISS THE APPLICATION ON THE GROUNDS THAT THE APPLICATION VIOLATES OHIO LAW.**

The Commission, as a creature of statute, lacks the authority to amend or ignore the requirements imposed upon it by the General Assembly. *Time Warner AxS v. Pub. Util. Comm.* (1996), 75 Ohio St.3d. 229, 234, 661 N.E.2d 1097; *Canton Storage & Transfer Co. v. Pub. Util. Comm.* (1995), 72 Ohio St. 3d 1, 4, 647 N.E.2d 136. The

Commission has no statutory authority to violate Ohio law. Neither can the Commission act in a manner that negates the statutes enacted by the Ohio General Assembly. Because the General Assembly could not have intended that the rate cap provision be rendered meaningless by Commission action granting deferrals, the Commission had no authority to grant such deferrals.

The deferral of expenses incurred during the MDP for recovery after the MDP violates the mandated rate cap of SB 3. R.C. 4928.34(A)(6). Therefore, the Application violates the rate cap provision of R.C. 4928.34(A)(6). The General Assembly has mandated rate caps and the purpose of the deferrals is merely to frustrate the mandated rate caps. Approval of the Application creates the unreasonable result that the rate cap provision brought about a new set of deferrals leading to rate increases at the end of the MDP. The General Assembly could not have intended this result from the R.C. 4928.34(A)(6) rate cap provision. R.C. 1.47. The rate cap during the MDP should not result in the creation of deferrals during the MDP for recovery after the MDP.

The Commission's decision granting the Application is unlawful because the Application violates the provision at R.C. 4928.34(A)(6) for rate caps during the MDP. Because the Application is unlawful, the Commission should have dismissed it. Therefore, the Commission should grant rehearing and grant OCC's Motion to Dismiss.

The Application also should have been dismissed because it did not comport with the ETP Stipulation and the Commission's Opinion and Order that approved the ETP Stipulation and the ETPs. The Commission should require the Companies to keep the bargain that they made in the ETP Stipulation, which the Commission approved in its Opinion and Order. The Commission should grant rehearing and grant OCC's Motion to

Dismiss because the Application is a proposal by the Companies to repudiate unilaterally the Commission-approved ETP Stipulation.

**V. THE COMMISSION ACTED UNLAWFULLY IN FAILING TO GRANT OCC'S MOTION TO INTERVENE. OCC MET THE CRITERIA SET FORTH AT R.C. 4903.221 AND OHIO ADM. CODE 4901-1-11(A)(2) AND 4901-1-11(B) FOR INTERVENTION IN THIS MATTER; THEREFORE, OCC'S MOTION TO INTERVENE SHOULD HAVE BEEN GRANTED.**

The Commission acted unlawfully in failing to grant OCC's Motion to Intervene.

The Commission claimed incorrectly that it was not necessary to grant OCC's intervention in order to consider OCC's pleading in its determination of the Application. Finding and Order at 4. The Commission also found that a hearing was not necessary for conducting its evaluation of the Application. *Id.* at 5.

This Application has adverse consequences for ratepayers, meaning that the test for intervention under R.C. 4903.221 was met. The Companies proposed to defer costs incurred during the MDP for collection from ratepayers after the MDP. Given the Companies' application in Case No. 04-1932-EL-ATA for riders to recover the deferral amounts from ratepayers, there is no credibility to any contention that only accounting is involved here. It cannot credibly be claimed that the Application requires no hearing and affects only accounting when, on the same day the Application was filed, the Companies also filed another application for riders to collect the deferrals from ratepayers. Therefore, OCC has a real and substantial interest in this matter because it directly concerns charges that the Companies seek to impose upon OCC's clients, the Companies' residential ratepayers.

In addition to OCC's real and substantial interest in the application due to its proposed adverse impact on ratepayers from the collection of the deferral amounts through the riders, there is also OCC's interest in preventing unlawful charges to the Companies' residential ratepayers. The deferral of expenses incurred during the MDP for recovery after the MDP is unlawful pursuant to R.C. 4928.34(A)(6). Ratepayers are adversely affected when the Commission requires that they pay unlawful charges.

Pursuant to the intervention standard in R.C. 4903.221, the interests of residential electric customers in areas served by the Companies are "adversely affected" by the unlawful Application. OCC met the Commission's required showing for a party that has a "real and substantial interest" according to Ohio Adm. Code 4901-1-11(A)(2) and should therefore have been permitted to intervene in this case.

OCC also met the criteria for intervention set forth at Ohio Adm. Code 4901-1-11(B) and in R.C. 4903.221(B) for the Commission's consideration in deciding whether to grant a request for intervention. Ohio Adm. Code 4901-1-11(B) states that the Commission may consider (1) the "nature of the person's interest," (2) the "extent to which the person's interest is represented," (3) whether the intervention "would unduly delay the proceeding," and (4) the person's "contribution to a just and expeditious resolution of the issues." These factors are also stated, in principal part, in the criteria set forth in R.C. 4903.221(B) for the Commission's consideration in deciding whether to grant a request for intervention:

- (1) The nature and extent of the prospective intervenor's interest;
- (2) The legal position advanced by the prospective intervenor;
- (3) Whether the intervention by the prospective intervenor will unduly prolong or delay the proceeding; and

- (4) Whether the prospective intervenor will significantly contribute to the full development and equitable resolution of the factual issues.

The nature and extent of OCC's interest lies in preventing unlawful and unreasonable charges for residential electric service and in the provision of services that will adequately, effectively and efficiently serve the energy needs of residential customers. OCC takes the position that the Application should have been dismissed as unlawful, in opposition to the position of the Companies. OCC's intervention will not unduly prolong or delay the proceedings, but should provide insights that will facilitate the Commission's adjudication of the Companies' Application. OCC will significantly contribute to the full development and equitable resolution of the issues herein, based on its expertise in such matters. OCC brings its statewide, consumer perspective to this case that is different than that of the Companies or any intervenor. OCC's interest in this case is consistent with its statutory role as the representative of residential consumers of public utility service.

Therefore, OCC's Motion to Intervene should have been granted. In addition, if OCC's Motion to Dismiss were not granted, the Commission should have set this matter for hearing.

## **VI. CONCLUSION**

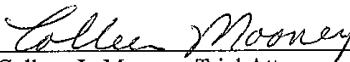
OCC respectfully requests that the Commission grant OCC's Application for Rehearing. The Commission also should have dismissed the Companies' Application with prejudice. Ohio law and Commission precedent prohibit the deferrals proposed here by the Companies. R.C. 4928.34(A)(6). During the period of statutory rate caps in the MDP, distribution rates must be decreased if transmission rates are increased. If OCC's



Motion to Dismiss is not granted, the Commission should set this matter for hearing and grant OCC's Motion to Intervene.

Respectfully submitted,

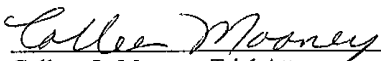
Janine L. Migden-Ostrander  
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**Office of the Ohio Consumers' Counsel**  
10 West Broad Street, Suite 1800  
Columbus, Ohio 43215-3485  
614-466-8574 (Telephone)  
614-466-9475 (Facsimile)  
[mooney@occ.state.oh.us](mailto:mooney@occ.state.oh.us)

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the OCC's Application for Rehearing was served on the persons stated below via first class U.S. Mail, postage prepaid, this 16<sup>th</sup> day of June 2005.

  
Colleen L. Mooney, Trial Attorney  
Assistant Consumers' Counsel

**SERVICE LIST**

**Helen L. Liebman, Esq.**

Jones Day  
P.O. Box 165017  
Columbus, Ohio 43216-5017

**Duane Luckey, Esq.**

Attorney General's Office  
Public Utilities Section  
180 East Broad Street, 9<sup>th</sup> Floor  
Columbus, Ohio 43215

**Judith B. Sanders**

Bell, Royer and Sanders  
33 South Grant Avenue  
Columbus, Ohio 43215

**Kathy J. Kolich, Esq.**

FirstEnergy Service Company  
76 South Main Street  
Akron, Ohio 44308

**David C. Rinebolt**

Ohio Partners for Affordable Energy  
231 West Lima Street  
P.O. Box 1793  
Findlay, Ohio 45839-1793

**Samuel C. Randazzo**

**Lisa G. McAlister**

**Daniel J. Neilsen**

McNees Wallace & Nurick LLC  
21 East State Street, 17<sup>th</sup> Floor  
Columbus, Ohio 43215