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DOCKETING DIVISION  
Public Utilities Commission of Ohio

BEFORE THE  
PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of  
FirstEnergy Corp. on Behalf of Ohio  
Edison Company, The Cleveland  
Electric Illuminating Company, and  
the Toledo Edison Company for  
Approval of Their Transition Plans  
and for Authorization to Collect  
Transition Revenues

Case Nos. 99-1212-EL-ETP,  
99-1213-EL-ATA, and  
99-1214-EL-AAM

**MEMORANDUM OF UWUA INTERVENORS IN SUPPORT OF MOTION FOR  
LEAVE TO FILE REPLY AND REPLY TO FIRSTENERGY'S MEMORANDUM  
CONTRA REQUEST FOR CERTIFICATION AND APPROVAL OF  
INTERLOCUTORY APPEAL**

UWUA Intervenor should be granted leave to file a brief reply to FirstEnergy Corp.'s ("FE") April 27, 2000 Memorandum Contra Motion for Certification and Approval of Interlocutory Appeal ("April 27 Memorandum Contra") in order to address a significant change in FE's position and the impact of that change on the resolution of the matters at issue.

UWUA Intervenor seek leave to reply because FE's position as stated in its April 27 Memorandum Contra is markedly different from the position it took in its pleading leading to the April 19 Entry that is the subject of the certification request. UWUA Intervenor have not previously had an opportunity to address FE's current position or its relationship to the matters at issue. Moreover, FE's positional change is significant in that the Company is now taking a position that is in accord with the crux of the argument advanced by UWUA Intervenor.

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**BRIEF REPLY**

UWUA Intervenor has argued throughout this dispute that Section 4928.34(A)(14) of the Ohio Restructuring Code ("ORC") provides that a proposed Transition Plan cannot be approved unless the Commission makes certain findings, including those required under Section 4928.02. That Section sets forth certain State policies, including (in subsection (A)), ensuring the availability of "adequate, safe, reliable, efficient, nondiscriminatory and reasonably priced retail electric service." UWUA Intervenor seeks through discovery to develop evidence relevant to this finding.

In its April 3, 2000, Memorandum Contra to UWUA Intervenor's March 21, 2000 motion to compel, FE argued that UWUA Intervenor's reading of the statutory provisions was wrong. FE stated that

UWUA's contention that the Commission must make specific findings regarding service adequacy, reliability and safety prerequisite to approval of a transition plan is no more than an attempt to impose requirements beyond those of the statute. The specific findings required for Commission approval are set out expressly in R.C. 4928.34. The Commission has rebuffed an earlier intervenor group attempt to inject new, additional criteria into R.C. 4928.34 over the back of the transition plan processing rules. [citation and footnote omitted]. It should do so again.

April 3 Memorandum Contra at 4.

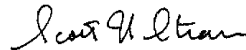
In its April 27 Memorandum Contra, FE no longer contends that the statute does not require "specific findings service adequacy, reliability and safety prerequisite to approval of a transition plan." Instead, FE now admits that this is precisely what the Ohio Restructuring Code provisions cited by UWUA Intervenor require:

It is true that Section 4928.34(A)(14) says that the Commission must find that the utility is in compliance with Sections 4928.01 to 4928.11 of the Revised Code.

April 27 Memorandum Contra at 3. Nonetheless, FE argues that its own reading of the statutory language -- which is in complete accord with UWUA Intervenor -- should be ignored because "principles of statutory interpretation notwithstanding, it would be impossible for the Commission to make such a finding." *Id.* In support of this position, FE refers to *other* parts of the Restructuring Statute (Sections 4928.01 and 4928.04), noting that it perceives difficulties in making findings under *those* provisions. FE makes no effort to show that it is "impossible for the Commission to make" findings with respect to service safety or reliability. Obviously, it is not impossible for the Commission to do so.

FE's positional turn-about demonstrates that the interlocutory appeal should be certified. There is no dispute about what the Restructuring Statute requires the Commission to do. In essence, FE argues that the certification of the interlocutory appeal should be denied because the Commission can disregard the plain language of the statute. Were the position to be adopted, it would surely constitute the type of a "new or novel" approach that should be considered immediately by the Commission. *See* OAC Rule 4901-1-15(B)(1).

Respectfully submitted,



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April 28, 2000

CERTIFICATE OF SERVICE

I hereby certify that I have on this 28th day of April, 2000, caused the foregoing document to be sent by first-class mail to all parties on the service list compiled in this proceeding.



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