

**FILE**

**BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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In the Matter of the Application of Ohio Edison )  
Company, The Cleveland Electric Illuminating )  
Company, and The Toledo Edison Company for )  
Approval of a Market Rate Offer to Conduct a )  
Competitive Bidding Process for Standard Service )  
Offer Electric Generation Supply, Accounting )  
Modifications Associated with Reconciliation )  
Mechanism, and Tariffs for Generation Service. )

Case No. 08-0936-EL-SSO

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**THE OHIO HOSPITAL ASSOCIATION'S  
MEMORANDUM CONTRA  
APPLICATION FOR REHEARING OF  
OHIO EDISON COMPANY, THE CLEVELAND ELECTRIC ILLUMINATING  
COMPANY AND THE TOLEDO EDISON COMPANY**

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Pursuant to Ohio Revised Code ("R.C.") Section 4903.10 and Ohio Administrative Code ("O.A.C.") Rule 4901-1-35(B), the Ohio Hospital Association ("OHA") submits its Memorandum Contra to the Application for Rehearing of Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company (collectively "FirstEnergy") filed December 22, 2008.

The OHA urges the Commission to reject the entirety of FirstEnergy's application for rehearing. FirstEnergy's argument that the Commission's November 25, 2008 Opinion and Order is "unreasonable or unlawful," "misguided," and "evidencing a blatant disregard for both the General Assembly's will and the bounds of the Commission's own authority" is wholly

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unsupported in either law or logic<sup>1</sup> Rather than setting forth unreasonable and/or unlawful conclusions of law contrary to the General Assembly's intent, the November 25<sup>th</sup> Opinion and Order is an entirely reasonable foray by the Commission into the new ratemaking scheme established by Amended Senate Bill 221 ("SB 221").<sup>2</sup> Importantly, the November 25 Opinion and Order clearly establishes policy boundaries for market rate offers ("MRO") under SB 221 in order to "protect and balance the interests of public utilities and their ratepayers alike"<sup>3</sup> as provided by the General Assembly in this instance.

FirstEnergy ignores the fact that SB 221 provides the Commission with very broad discretion to formulate a competitive bidding process ("CPB") under the new statutory scheme. The processes set forth in SB 221 are entirely different from the more constrained traditional ratemaking formula set forth in R.C. 4909.15. FirstEnergy's application in this case is one of first impression under SB 221, and judicial guidance is correspondingly thin. However, nearly 15 years ago, the Ohio Supreme Court opined on the scope of the Commission's discretion in ratemaking matters when it labeled the ratemaking formula in R.C. 4909.15 "mandatory," and prohibited the Commission from using anything but the most constrained discretion to adjust the rates under this formula.<sup>4</sup> Using the court's logic in that proceeding, unlike R.C. 4909.15, SB 221 does not contain similar constraining ratemaking formulae to be followed by the Commission. Instead, it requires an electric distribution utility to engage in a competitive bidding process that meets certain amorphous standards (*e.g.*, open and fair, third-party

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<sup>1</sup> *Memorandum in Support of Application for Rehearing of Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company* ("FirstEnergy Application"), p. 2.

<sup>2</sup> Arguably the most widely cited administrative law decision is *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), in which the U.S. Supreme Court ruled that it would defer to an agency's interpretation of an ambiguous statute if the interpretation is reasonable.

<sup>3</sup> *Cf., Columbus Southern Power Co. v. PUCO* (1993), 67 Ohio St.3d 535, 541.

<sup>4</sup> *Id.*, at 537.

oversight, etc.), satisfies the three requirements in R.C. 4928.143(B), and complies with the Commission's yet-to-be finalized rules. Because there is no specific ratemaking formula prescribed by the General Assembly, SB 221 simply provides the Commission with guidelines to follow, thereby preserving its discretion in establishing reasonable electric rates.

In carrying out its responsibilities under Chapter 49 of the Ohio Revised Code, the Commission also cannot lose sight of its primary function of serving the public interest, including the interests of the approximately 60 hospitals served by FirstEnergy.<sup>5</sup> Section 4928.02 sets forth the important state policies underlying the regulation of electric utilities in the state of Ohio, including the following (emphasis added):

- (A) ***Ensure the availability to consumers of adequate, reliable, safe, efficient, nondiscriminatory, and reasonably priced retail electric service;***
- (B) Ensure the availability of unbundled and comparable retail electric service that provides consumers with the supplier, price, terms, conditions, and quality options they elect to meet their respective needs;  
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- (G) Recognize the continuing emergence of competitive electricity markets through the development and implementation of flexible regulatory treatment;
- (H) Ensure effective competition in the provision of retail electric service by avoiding anticompetitive subsidies flowing from a noncompetitive retail electric service to a competitive retail electric service or to a product or service other than retail electric service, and vice versa, including by prohibiting the recovery of any generation-related costs through distribution or transmission rates;
- (K) Encourage implementation of distributed generation across customer classes through regular review and updating of administrative rules governing critical issues such as, but not limited to, interconnection standards, standby charges, and net metering;
- (L) ***Protect at-risk populations,*** including, but not limited to, when considering the implementation of any new advanced energy or renewable energy resource;  
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<sup>5</sup> In fact, the Commission's own mission statement defines its primary goal as "to assure all residential and business consumers access to adequate, safe and reliable utility services **at fair prices**, while facilitating an environment that provides competitive choices." (Emphasis added.)  
<http://www.puco.ohio.gov/PUCO/about/mission.cfm>.

(N) Facilitate the state's effectiveness in the global economy.

As emphatically stated in the Commission's recent Opinion and Order in FirstEnergy's ESP case:

The Commission believes that the state policy codified by the General Assembly in Chapter 4928, Revised Code, sets forth important objectives **which the Commission must keep in mind when considering all cases filed pursuant to that chapter of the code.**<sup>6</sup>

It is in light of these policy considerations that the Commission must review FirstEnergy's application for rehearing through the lens of the overriding "public interest." The public interest cannot possibly be served by allowing FirstEnergy to dictate the outcome of this MRO proceeding, and thwart the Commission's reasonable and laudable attempt to protect FirstEnergy's customers—including hospitals vital to Ohio communities—from astronomical electric rates. As Justice Pfeiffer stated in a dissenting opinion more than 15 years ago, "[r]ate shock can be disastrous not only for the family budget, but also for Ohio's business climate." The Commission's November 25 Opinion and Order represents the Commission's noble attempt to protect Ohio from this rate shock in a manner that is consistent with the Commission's ratemaking authority under SB 221.

Beyond this, the Commission's Opinion and Order in this case is essential for the Commission to properly execute its duties to the public interest to ensure the prudence of the purchasing decisions of FirstEnergy's operating companies, which still lies squarely within the authority of the Commission, rather than the federal authorities.<sup>7</sup>

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<sup>6</sup> *Ohio Edison Company, Cleveland Electric Illuminating Company and Toledo Edison Company*, Case No. 08-935-EL-SSO (*Opinion and Order* dated December 19, 2008) (hereinafter referred to as "FirstEnergy Order"). (emphasis added.)

<sup>7</sup> *Pacific Gas & Electric Co. v. Lynch*, 216, F. Supp. 2d 1016 (N. Dist. CA 2002).

In order to protect the health and welfare of Ohio, and the hospitals that serve the needs of all Ohioans, the OHA urges the Commission to reject FirstEnergy's application for rehearing for the reasons stated herein.

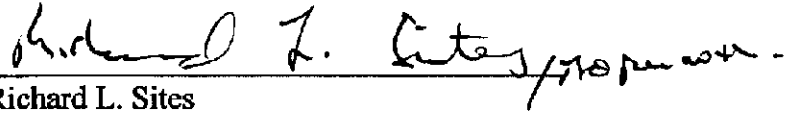
Respectfully submitted on behalf of the  
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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a copy of the foregoing Memo Contra was served  
via *electronic mail* upon the parties of record this 2<sup>nd</sup> day of January 2009.

  
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