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BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of a Commission Investigation )  
Into the Reliability of the Electric )  
Distribution Service Provided by Ohio's )  
Investor-Owned Electric Companies. )

Case No. 08-1299-EL-UNC

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MEMORANDUM CONTRA THE CLEVELAND ELECTRIC ILLUMINATING  
COMPANY AND THE TOLEDO EDISON COMPANY  
MOTION TO DISMISS THE REQUEST FOR INVESTIGATION  
BY  
CONSUMERS FOR RELIABLE ELECTRICITY IN OHIO

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I. INTRODUCTION

On December 15, 2008, the Office of the Ohio Consumers' Counsel ("OCC"), AARP Ohio, Pro Seniors, Inc., the Edgemont Neighborhood Coalition, Appalachian People's Action Coalition, the May Dugan Center, the Ohio Farm Bureau Federation, the Ohio Farmers Union, the Northwest Ohio Aggregation Coalition, and the Citizens Coalition -- comprised of Citizens for Fair Utility Rates, the Neighborhood Environmental Coalition, the Cleveland Housing Network, and the Empowerment Center for Greater Cleveland (collectively "Consumers for Reliable Electricity in Ohio" or "CREO"), on behalf of the 4.5 million residential households of Ohio's Electric Distribution Utilities ("EDUs"), filed a Request for Investigation with the Public Utilities Commission of Ohio ("Commission" or "PUCO"). CREO did ask the Commission to order an investigation and conduct hearings regarding the reliability of the distribution service

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provided to customers by all of Ohio's electric utilities.<sup>1</sup> CREO did not ask the Commission to rewrite any pending rules on reliability.

On January 8, 2009, the Cleveland Electric Illuminating Company and The Toledo Edison Company (collectively "FE" or "the Companies") filed a Motion to Dismiss CREO's Request for Investigation. CREO hereby submits this Memorandum Contra the Motion to Dismiss.<sup>2</sup>

## **II. FE'S MEMORANDUM CONTRA DOES NOT ADDRESS THE MERITS OF CREO'S REQUEST FOR INVESTIGATION.**

### **A. The Magnitude Of The Outages Requires More Than A Business-As-Usual Response.**

The scope and duration of the outages experienced by customers (as CREO noted in its Request for Investigation) was excessive by any measure.<sup>3</sup> Approximately 500,000 of FE's customers lost service as a result of the storm, and service was not restored for all customers for up to a week. Despite the magnitude of the outages and problems arising from the storms, FE has responded with a business-as-usual approach that would sweep the problem under the rug, rather than embracing an overall review of the service quality and reliability offered to its customers.

FE's Motion to Dismiss is an attempt to obfuscate the service reliability issue rather than deal with it. This pattern of obfuscation is exemplified by its argument

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<sup>1</sup> Request for an Investigation at 1.

<sup>2</sup> For purposes of this Memorandum Contra, CREO consists of the Office of the Ohio Consumers' Counsel ("OCC"), AARP Ohio, Pro Seniors, Inc., the Edgemont Neighborhood Coalition, Appalachian People's Action Coalition, the May Dugan Center, the Ohio Farm Bureau Federation, the Northwest Ohio Aggregation Coalition, and the Citizens Coalition -- comprised of Citizens for Fair Utility Rates, the Neighborhood Environmental Coalition, the Cleveland Housing Network, and the Empowerment Center for Greater Cleveland.

<sup>3</sup> Request for Investigation at 1.

entitled "CREO is Attempting to Usurp the Authority of the Commission," at pages 3-5 of the FE Motion to Dismiss. CREO does not deny that the Commission has an important active oversight role in ensuring the service quality and reliability of electric utilities. However, whereas FE hides behind that role in an attempt to keep the issue in the background and out of the transparency of a Commission Investigation, CREO is requesting an overall and public review of FE's service reliability in order to ensure that reliability for consumers does not take a back seat to profits for utilities.

This magnitude of this problem is significant and justifies the call for some formal review of FE's reliability and the reasons underlying the problems experienced by customers. It because of this very result that an investigation of FE's overall service reliability is not only appropriate, but necessary. FE's customers have the right to know whether they are receiving the reliable service they pay for and are entitled to.

FE's Motion to Dismiss does not address the need CREO documented for an investigation of its distribution system reliability in Ohio. While CREO's Request for Investigation cited the wind storm of September 14, 2008 as a triggering event for the need for an investigation of electric reliability in Ohio, CREO emphasized that an investigation was overdue.<sup>4</sup> As clearly pointed out in CREO's Request for Investigation,<sup>5</sup> Ohio law requires that the Commission "shall review" electric distribution utilities' annual Electric Service and Safety Standards ("ESSS") compliance reports in a "proceeding initiated under division (B) of section 4928.16 of the Revised Code."<sup>6</sup> The annual reports referenced above are currently filed pursuant to Ohio Adm. Code 4901:1-

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<sup>4</sup> Request for an Investigation at 2.

<sup>5</sup> *Id.* at 7.

<sup>6</sup> R.C. 4928.11(B).

10-26(A). FE and Ohio's other electric distribution utilities have not been subject to such a proceeding -- and such a proceeding is long overdue to ensure the protection of consumers.

Finally, the Ohio General Assembly charged the PUCO with the responsibility to ensure that electric utilities provide "necessary and adequate" service to Ohio consumers and businesses.<sup>7</sup> An investigation into the reliability of the electric distribution service of AEP Ohio will assist in determining for the public whether the Company is providing such adequate service.

**B. The Request for An Investigation Does Not Usurp the PUCO's Authority.**

FE's Motion to Dismiss claims that CREO's Request for an Investigation is an attempt to usurp the PUCO's authority.<sup>8</sup> FE could not be more wrong. The CREO Request for an Investigation does not attempt to usurp any PUCO authority. Rather, it asks the PUCO to use its authority to conduct a lawful and necessary investigation. A request for the PUCO to use its authority cannot by definition be any type of attempt to usurp the very authority that CREO wants the PUCO to use. However, an argument can be made that the FE Motion to Dismiss is the attempt to usurp the PUCO's authority because it asks the Commission to ignore the plight of residential customers and instead, to not use the authority that the legislature bestowed upon the PUCO.

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<sup>7</sup> R.C. 4905.22.

<sup>8</sup> FE Motion to Dismiss at 3.

### **III. THE REQUEST FOR AN INVESTIGATION IS NOT A COLLATERAL ATTACK.**

FE's protestation aside, the CREO Request for an Investigation is not a collateral attack on Administrative Rules, for a number of reasons. First of all, the rules are a more generic approach to the issue of service reliability for all of the electric utilities in Ohio, and address all aspects of service reliability. CREO's Request for an Investigation is more focused on the specific reliability issues and problems identified by the wind storms and what steps -- if any -- could have and should have been taken to mitigate the impact of the storms on service reliability in the service territories of FE and other EDU's.

Secondly, CREO's Request for an Investigation does not specifically challenge the rules that resulted from the pending rulemaking in PUCO Case No. 06-653-EL-ORD. Rather, the Request for Investigation questions how the utilities are performing under the ESSS and whether some rules should be amended pending the outcome of a Commission investigation. FE alleges that the Request for an Investigation is a collateral attack on those rules. But that is not the case inasmuch as the rulemaking is still pending and no final rules have been issued or implemented.<sup>9</sup>

In addressing collateral attacks, the Ohio Supreme Court has stated that "In our jurisprudence, there is a firm and longstanding principle that final judgments are meant to be just that--final."<sup>10</sup> In this instance the Commission granted Rehearing for the purpose of giving itself more time for further consideration.<sup>11</sup> Thus, the rules have not been

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<sup>9</sup> *In the Matter of the Commission's Review of Chapters 4901:1-9, 4901:1-10, 4901:1-21, 4901:1-22, 4901:1-23, 4901:1-24, 4901:1-25 of the Ohio Administrative Code*, Case No. 06-653-EL-ORD, Entry on Rehearing (December 17, 2008).

<sup>10</sup> *Ohio Pyro v. Ohio Dept. of Commerce* (2007), 115 Ohio St. 3d 375, 380-381.

<sup>11</sup> Case No. 06-653-EL-ORD, Entry on Rehearing at 1.

finalized by the PUCO. Accordingly, the rules have not yet undergone review by the Joint Committee on Agency Rule Review (“JCARR”), which is necessary before the rules can become final.<sup>12</sup> Even if the rules were final, it is not unusual for the PUCO to entertain what might be considered collateral issues regarding its orders and rules. For example, in a recent case the PUCO allowed AT&T (and others) to contest the limitations on disconnection of customers’ bundled telephone services for nonpayment of those services, which resulted in the PUCO changing its rule in favor of the utilities.<sup>13</sup>

Third, the Request for an Investigation is not a collateral attack because it addresses the specific question of whether the damages caused by the wind storm were sufficiently mitigated by proper maintenance or whether FE improperly cut back on necessary maintenance including vegetation management in order to maximize shareholders profits. The Request for an Investigation seeks only that the PUCO consider amending certain of the rules pending the outcome of its investigation. The Request for an Investigation presents the Commission with an opportunity to address certain issues based on real world examples and implications rather than simple hypotheticals.

Moreover, to the extent that FE alleges that CREO is collaterally attacking the existing PUCO rules,<sup>14</sup> FE is mischaracterizing the Request for an Investigation. For example on page 6 of the Request for an Investigation, CREO asked the PUCO to ensure that FE has complied with the rules and not to review or rewrite them. On page 26 of the Request for an Investigation, CREO asked the PUCO to ensure that FE was in

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<sup>12</sup> Joint Committee on Agency Rules Review Procedures Manual (Revised January 8, 2008) at 17.

<sup>13</sup> In re the Commission’s Review of the Minimum Telephone Service Standards as Set Forth in Chapter 4901:1-5 of the Ohio Administrative Code, Case No. 00-1265-TP-ORD et al., Finding and Order (November 5, 2008) at 2.

<sup>14</sup> FE Motion to Dismiss at 4.

compliance with the rules and that the rules were effective in being able to address the type of damages and fallout actually experienced from the wind storm.

Fourth, FE seems to ignore the distinction between a Commission-Ordered Investigation and a Complaint pursuant to R.C. 4905.26.<sup>15</sup> The CREO Request for an Investigation is not a Complaint under R.C. 4905.26, although CREO does retain the right to file such a Complaint in the future if one is deemed to be appropriate. Moreover the Request for an Investigation is not asking the Commission to rewrite its rules. CREO is requesting the Commission to investigate the actions taken -- or perhaps more appropriately -- the actions not taken by FE to ensure service quality and reliability for customers as required by R.C. 4928.02(A).<sup>16</sup>

Finally, FE incorporates by reference the arguments that the AEP Companies made in their Memorandum Contra the CREO Request for an Investigation on January 6, 2009.<sup>17</sup> Accordingly and rather than repeat CREO's response to those arguments, CREO correspondingly incorporates in this pleading the CREO Reply to the AEP Companies' Memorandum Contra filed on January 20, 2009.

#### **IV. CONCLUSION**

On behalf of residential customers in Ohio, CREO respectfully requests that the Commission reject the arguments put forth in the Company's Motion to Dismiss. The Commission should ensure that the residential customers in 4.5 million Ohio households are receiving the reliable electric service they pay for and are entitled to, by granting CREO's Request for an Investigation.

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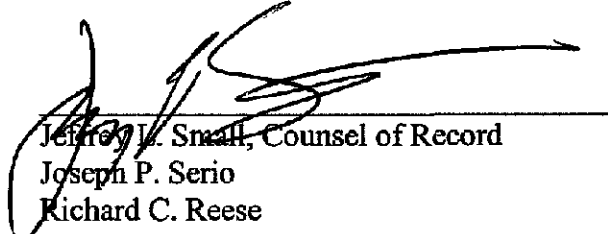
<sup>15</sup> FE Motion to Dismiss at 2-3.

<sup>16</sup> Request for an Investigation at 5.

<sup>17</sup> FE Motion to Dismiss at 4.

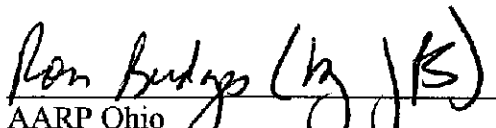
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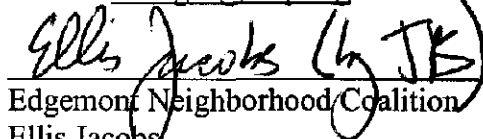


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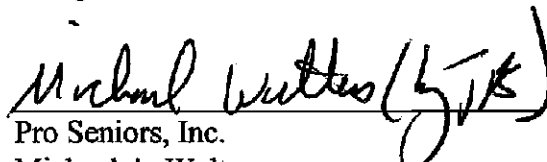
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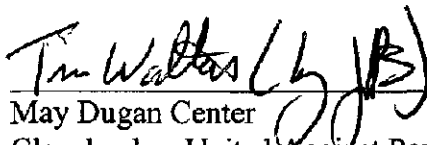


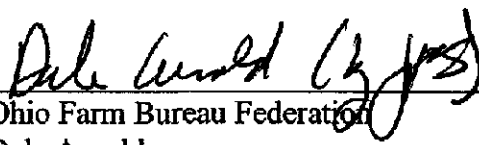
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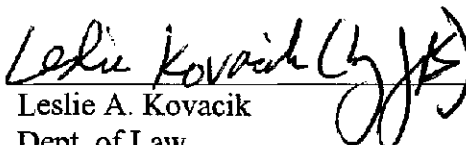


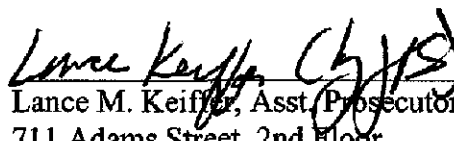
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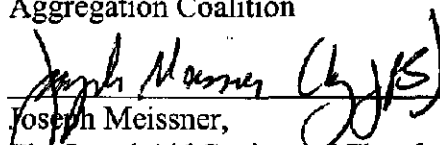
  
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## **CERTIFICATE OF SERVICE**

I hereby certify that a copy of this *Memorandum Contra* was served on the persons stated below via regular U.S. Mail Service, postage prepaid, this 26th day of January, 2009.

  
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