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 Authority to Increase Rates for Distribution Service, Modify Certain Accounting Practices and for Tariff Approvals. | ) | Case No. 07-551-EL-AIR<br>Case No. 07-552-EL-ATA<br>Case No. 07-553-EL-AAM<br>Case No. 07-554-EL-UNC |



# APPLICATION FOR REHEARING BY THE OFFICE OF THE OHIO CONSUMERS' COUNSEL

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February 20, 2009

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**APPLICATION FOR REHEARING**
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The Office of the Ohio Consumers' Counsel ("OCC"), pursuant to R.C. 4903.10 and Ohio Adm. Code 4901-1-35(A), applies for rehearing of the Finding and Order ("Order") issued by the Public Utilities Commission of Ohio ("PUCO" or "Commission") on January 21, 2009 in the above-captioned cases. The Order addressed an application ("Application") filed by Ohio Edison Company ("OE"), the Cleveland Electric Illuminating Company ("CEI"), and the Toledo Edison Company ("TE") (collectively, "FirstEnergy" or "Companies") on June 7, 2007 for the approval of new distribution rates. The Order affects the rates and terms of service for the approximately 1.9 million residential electric customers represented by the OCC.

The approval of the increased rates in the Rider Order was unjust, unreasonable, and unlawful, and this Commission erred in the following particulars:

A. The Commission Erred in its Determination of Revenue Requirements in Connection with the Treatment of Rate Certainty Plan ("RCP") Distribution Operation and Maintenance Deferrals and Pension and Other Postretirement Employment Benefits.

1. The Commission Erred in its Rate Recovery Treatment of the Rate Certainty Plan ("RCP") Distribution O&M Deferrals

2. The Commission Erred in its Rate Treatment of Pension and Other Postretirement Employment Benefits

3. The Commission Erred in its Determination that the Calculation of Carrying Charges for Deferrals be Calculated on a Gross-of-Tax Basis.

B. The Commission Erred in Granting FirstEnergy's Request for Accounting Authority to Defer Storm Costs.

C. The PUCO Erred in its Determination of Measures that Must be Taken for Improvement of The Cleveland Electric Illuminating Company's Reliability and the Consequences for that Company's Failure to Provide its Customers Reliable Electric Distribution Service.

The reasons for granting this Application for Rehearing are set forth in the attached Memorandum in Support.

Respectfully submitted,

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## MEMORANDUM IN SUPPORT

## I. INTRODUCTION AND HISTORY OF THE CASE

On May 8, 2007, the FirstEnergy Companies initiated the above-captioned proceedings. Pursuant to R.C. Chapter 4911, the OCC moved to intervene under its legislative authority to represent the interests of the 1.9 million residential distribution customers of FirstEnergy.

On December 4, 2007, the PUCO Staff filed three Reports of Investigation ("Staff Reports") regarding the FirstEnergy Companies' requests to increase distribution rates and requests to make other changes to the FirstEnergy Companies' distribution tariffs.[1] The OCC submitted objections to the Staff Reports on January 3, 2008, and filed supporting pre-filed testimony on January 10, 2008. The OCC's objections pointed to matters in the Staff Reports that recommended against, or actively supported, rates or service terms that contravene what is reasonable and lawful for the residential consumers of the FirstEnergy Companies.

[1] To the extent required for clarity, the individual reports are referred to as the "OE Staff Report," "CEI Staff Report," and the "TE Staff Report." Because these three reports contain many identical recommendations, OCC statements regarding the "Staff Reports" should be understood to refer to all three Staff Reports.

The hearing convened on January 29, 2008. During the course of the hearing, a partial stipulation was submitted ("2008 Stipulation") and made part of the record that resolved disputes between most parties to these proceedings regarding the allocation of revenue requirements over customer classes. Also during the course of the hearing, the PUCO Staff adopted some, but not all, of the OCC's recommendations.

Public hearings commenced on March 5, 2008 in the Akron area, and continued the week of March 10, 2008 in the Toledo and Cleveland areas. Public hearings were also conducted during the weeks of March 17 and March 24, 2008 in Sandusky, Springfield, and Mansfield. Briefs were submitted in these cases on or before March 28, 2008, and reply briefs were filed on or before April 18, 2008. The Order was issued on January 21, 2009.

## II. ARGUMENT

### A. The Commission Erred in its Determination of Revenue Requirements in Connection with the Treatment of Rate Certainty Plan ("RCP") Distribution Operation and Maintenance Deferrals and Pension and Other Postretirement Employment Benefits.

#### 1. The Commission Erred in Its Rate Recovery Treatment of the Rate Certainty Plan ("RCP") Distribution O&M Deferrals.

##### a. Commission Action Authorizing RCP Distribution O&M Deferrals Must be Properly Understood.

In Case No. 05-1125-EL-ATA, et al. ("*FirstEnergy RCP Case*"), a number of parties entered into a stipulation that requested Commission approval of specialized (i.e. deferred, creating the "RCP distribution deferrals") regulatory treatment for certain expenditures for the distribution costs. The distribution costs eligible for the specialized treatment in the request were listed in the first portion of the stipulation ("2005

Stipulation").[2] The qualifying costs are described more particularly in the second portion of the 2005 Stipulation (i.e. the "Supplemental Stipulation").[3] The Order in that case stated:

> [W]e find that *exigent circumstances exist* to deviate in a controlled way from the above stated public utility regulatory principles. * * * We are mindful that such deferrals must be scrutinized to assure that the costs to be deferred are reasonable, appropriately incurred, clearly and directly related to specifically necessary infrastructure improvements and reliability needs of the Companies, and in excess of expense amounts already included in the rate structures of each of the Companies. We will approve the deferral concept in this case premised upon the understanding that the expenses related to infrastructure improvement and the increased expenses for maintenance of infrastructure and reliability will yield necessary improvements that otherwise would have been realized, for company financial reasons, over a much longer period of time.[4]

The Commission recognized the soundness of remaining true to standard utility ratemaking policies, but made an explicit exception under "exigent circumstances."[5]

In its Entry on Rehearing in the *FirstEnergy RCP Case*, the Commission established a two-part test for the amounts that would be eligible to be included in the distribution deferrals. The first part of the two-part test was "if FirstEnergy spends more than the total amount of its distribution O&M expenses embedded in current rates."[6] The

[2] OCC Ex. 11, Attached Stipulation, ¶8.

[3] OCC Ex. 12, Attachment 2.

[4] *FirstEnergy RCP Case*, Case Nos. 05-1125-EL-ATA, et al., Order at 9 (January 4, 2006).

[5] Id. at 8.

[6] *FirstEnergy RCP Case*, Case Nos. 05-1125-EL-ATA, et al., Entry on Rehearing at 4, ¶(8) (January 25, 2006).

second part of the two-part test stated: "FirstEnergy may defer up to $150 million or the excess amount determined in [the first part of the test] . . ., whichever is lower."[7]

The Commission did not specify the method to be used to determine the distribution O&M expenses embedded in current rates, and did not approve the method of calculation proposed by the FirstEnergy Companies[8] that would "modify the methodology by which we will assure that the expenses deferred in the distribution deferral are in excess of the amount in current rates."[9] Rather, the Commission stated:

> FirstEnergy must provide documentation to substantiate that they have spent more than the distribution O&M expense embedded in current rates and that amount should be verified by staff. *FirstEnergy bears the burden of establishing and supporting those embedded amounts.*[10]

This is the fundamental framework that guided the OCC's positions on the issue of the RCP distribution deferrals in the above-captioned cases.

The Commission's two-part test is based on the well established ratemaking principle that regulated public utilities should not recover the same costs twice. That is, if authorized rates are adequate to recover given costs, those same costs should not be deferred for future recovery. To avoid such a double recovery, the Commission required FirstEnergy to prove that the eligible costs incurred exceeded the amounts of such costs being recovered in rates.

All costs deferred pursuant to the RCP must meet the definition of eligible costs in Attachment 2 to the Supplemental Stipulation, and must also pass the two-part test

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[7] Id.

[8] OCC Ex. 1 at 13 (Effron).

[9] *FirstEnergy RCP Case*, Case Nos. 05-1125-EL-ATA, et al., Entry on Rehearing at 3 (January 25, 2006).

[10] Id. at 4 (emphasis added).

established by the Commission in its Entry on Rehearing in the *FirstEnergy RCP Case.* Based on the record of these cases, however, it is clear that the FirstEnergy Companies have failed to establish that the amounts of eligible costs incurred by the Companies exceeded the amounts being recovered in rates. The expenditures on distribution operation and maintenance in total for all three FirstEnergy Companies were less in 2006 than they were in 2000 when distribution rates were capped as the result of electric restructuring legislation.[11] In fact, the distribution-related operation and maintenance expenditures for the three FirstEnergy Companies decreased by $8.6 million (5.6 percent) from 2000 to 2006.[12]

The available evidence shows that only the expenditures incurred in 2006 exceeded the amounts of expenses embedded in rates - and then only by modest amounts which certainly not be indicative of any response to "exigent circumstances."[13]

**b. Balances of RCP Distribution O&M Deferrals in Rate Base Should be Appropriately Measured for Each Company.**

Staff and the Companies' used the same basic method for the computation of RCP distribution deferrals, but the PUCO Staff modified that approach to recognize the balances as of the date certain in these cases. Neither the Staff nor the Companies' method complies with the conditions stated in the Commission's *FirstEnergy RCP Case* decision. Staff's approach is inappropriate in two respects. First, Staff's approach relies on an improper

[11] OCC Ex. 1 at 24 (Effron).

[12] Id.

[13] Id.

definition of distribution O&M expenses. Second, Staff's approach improperly measured the distribution O&M expenses embedded in current rates.

### i. Proper Measurement Begins With the Definition of Distribution O&M Expenses.

Testimony presented by the OCC stated a method to determine the distribution O&M expenses embedded in current rates, but the OCC has *not* challenged (as stated above) any of the costs identified by FirstEnergy as failing to meet the eligibility criteria established in Attachment 2 to the Supplemental Stipulation. As pointed out by the FirstEnergy Companies in the *FirstEnergy RCP Case*, the test for the distribution O&M deferrals is not straightforward and the Commission recognized the "difficulty in determining the amounts of distribution O&M expense embedded in current rates that relate to the specific expense categories listed in Attachment 2 of Joint Ex.2 [in the 2005 Stipulation]."[14]

As stated by OCC Witness Effron, the ideal test would compare "the actual expenses defined in Attachment 2 to the level of such expenses embedded in current rates."[15] The OCC asked the FirstEnergy Companies to provide the FERC accounts to which the Attachment 2 expenditures were charged, but the FirstEnergy Companies were unable to do so.[16] Therefore, *both* the OCC and the FirstEnergy/Staff comparisons must utilize a less than ideal definition in order to apply the Commission's test. The best definition matches the expenses used in the test to the expenditures defined in Attachment

[14] *FirstEnergy RCP Deferral Case*, Case Nos. 05-1125-EL-ATA, et al., Entry on Rehearing at 4 (January 25, 2006).

[15] OCC Ex. 1 at 15 (Effron).

[16] Id. at 19, referring to response to OCC interrogatory in Attachment DJE-4.

2 to the Supplemental Stipulation, and Mr. Effron testified that the great majority of expenditures identified in Attachment 2 would be charged to FERC accounts 580-598.[17]

Staff Witness Castle was mistaken when he stated that the OCC's computations began with a definition of O&M expenses that "inclu[ded] costs allocated to the transmission function."[18] The evidence shows that it is only the FirstEnergy/Staff definition that suffers such a deficiency. The FirstEnergy/Staff approach performs computations using a definition for O&M expenses that is "top down." That is, the approach began with total O&M expenses as shown in the FERC Form 1 and deducted certain limited expense items from the total O&M.[19] FERC accounts 580-598, utilized by OCC Witness Effron,[20] and are included in the total O&M that served as the beginning point for the FirstEnergy/Staff calculations.[21] With enough deductions, the FirstEnergy/Staff method would produce the same definition for O&M expenses as used by OCC Witness Effron.

The problem with the FirstEnergy/Staff approach, as revealed in the cross-examination of Staff Witness Castle, is that too few deductions were made from total O&M expenses. As stated above, the total O&M include all of the distribution expense accounts -

[17] OCC Ex. 1 at 15-16 (Effron). Mr. Effron never testified that "the RCP distribution deferrals must be limited to amounts in FERC Accounts 580-598." FirstEnergy Ex. 3-C at 9 (Wagner).

[18] Staff Ex. 16 at 6 (Castle).

[19] Tr. Vol. VII at 15-20 (February 15, 2008) (Castle). The testimony, on cross-examination, refers extensively to the calculations shown on Staff Ex. 16, Exhibit MAC-1, page 9 of 19. That page shows the calculations for OE, but the calculations for CEI and TE are similar. Tr. Vol. VII at 16.

[20] OCC Ex. 1 at 14-15 (Effron).

[21] Totals for FERC accounts 580-598 are shown on line 156 of the 2006 OE example used during cross examination. OCC Ex. 8., line 156 (2006 FERC Form 1 for OE, page 322). The aggregate T&D amounts for O&M used by Staff Witness Castle include those amounts. OCC Ex. 14, line 198 (2006 FERC Form 1 for OE, page 323) ("Total 80, 112, 131, *156*, 164, 171, 178, 197," emphasis added).

- FERC accounts 580-598 -- that were used by OCC Witness Effron.[22] None of the expenses in accounts 580-598 were deducted by Staff from the total amounts (which was proper since they are distribution expense accounts). Neither the FirstEnergy/Staff approach *nor the OCC approach* suffers from using transmission numbers from the inclusion of accounts 580-598. However, the FirstEnergy/Staff approach failed to deduct transmission expense accounts from the aggregate O&M amounts. The Commission's Order fails to recognize that the FirstEnergy/Staff approach uses *transmission costs* in its calculations.

Referring to OCC Ex. 25, Staff Witness Castle confirmed that his method did not deduct amounts for transmission accounts such as for transmission "Scheduling, System Control and Dispatch Services."[23] Mr. Castle stated on re-direct that he accepted "the company's calculation regarding assignments to the distribution function,"[24] but he admitted that the cost study for these cases submitted by the FirstEnergy Companies shows that amounts for "Scheduling, System Control and Dispatch Services" are not distribution related.[25] Therefore, the FirstEnergy/Staff calculations (not the OCC figures) are *infected*

[22] This calculation is confirmed by the absence of a deduction for accounts 580-598 in Staff Witness Castle's tables. See, e.g., Staff Ex. 16, Exhibit MAC-1, page 9 of 19.

[23] Tr. Vol. VII at 20 (February 15, 2008) (Castle).

[24] Id. at 52.

[25] OCC Ex. 26, Standard Filing Requirement Schedule C-2.1, page 4 of 8, line 2. The title of the transmission account seems self explanatory (i.e. not related to the distribution function).

*by the use of transmission expense figures.*[26] This is the very situation that Staff Witness Castle referred to as "totally unacceptable."[27]

The Commission acknowledged that Staff's approach erred regarding the inclusion of transmission amounts, stating that "Staff acknowledged one error in its calculations."[28] The OCC's presentation revealed a problem with Staff's *approach* (as well as discrediting Staff's criticism that the OCC included transmission expenses in its calculations), and neither Staff nor the Companies corrected even the error in their calculations that the OCC revealed in cross-examination.

OCC Witness Effron laid out his "bottom up" approach that performs calculations based upon values located in accounts 580-598 in FERC's Uniform System of Accounts Form 1 information (i.e. under the heading "Distribution Expenses"):

> If it is not possible to determine the amounts of distribution O&M expense embedded in current rates that relate to the specific expense categories listed in Attachment 2, then the test should use a definition of distribution O&M expense that stays as close to those expenses as possible. The definition of distribution O&M adopted by Staff does not accomplish this result, but limiting distribution O&M to the costs actually charged to FERC accounts 580 – 598 does.[29]

Mr. Effron further commented that the FirstEnergy/Staff method used the accounts for "the comparison of actual costs in 2006 to the amounts of such cost embedded in rates [which] is totally inappropriate for the purpose of applying the test established by the

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[26] As observed by OCC Witness Effron, the definition used by the Companies and Staff also included "customer accounts expenses, customer information and service expenses, sales expenses, and administrative and general expense allocated to distribution operations." OCC Ex. 1 at 16 (Effron).

[27] Staff Ex. 16 at 6 (Castle).

[28] Order at 11.

[29] OCC Ex. 1 at 16 (Effron).

Commission."[30] This testimony was unrefuted. The "bottom up" approach used by OCC Witness Effron should be adopted by the Commission for the purpose of calculating the distribution O&M deferrals.

### ii. Distribution O&M Expenses Embedded in Rates Must be Reviewed for the Proper Calculation of Deferred Distribution O&M.

The Commission's Order states that "the RCP Stipulation does not provide for adjustments to the amounts of distribution expenses currently embedded in base rates."[31] This commentary, apparently directed at OCC Witness Effron's testimony, does not correctly reflect the nature of the OCC's testimony. The calculation of distribution O&M expenses embedded in existing rates should recognize the *growth in sales* by the FirstEnergy Companies over the time elapsed since their last rate cases. Staff, on the other hand, accepted the use of the O&M expenses functionalized to distribution service from the electric transition plan case, Case No. 99-1212-EL-ETP, as the measure of the distribution O&M embedded in current rates. Staff did not use the "distribution O&M expenses established in the FirstEnergy electric transition plan proceeding. Case No. 99-1212-EL-ETP as the baseline for the distribution O&M expenses currently in base rates" as stated by the Commission.[32] The amounts used by Staff included transmission expenses, customer accounting expenses, and administrative and general expenses in the baseline, none of which are "distribution O&M." The Commission does not address the question of the proper definition of distribution O&M.

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[30] Id.

[31] Order at 11.

[32] Id.

OCC Witness Effron testified:

> While it might reasonably be argued that the unbundling studies identified the distribution O&M expenses being recovered in OE rates in 1989 and in the CEI and TE rates in 1995, there is no plausible argument that expenses on Schedule UNB 4.1 represent the distribution O&M expenses being recovered in rates in 2006.[33]

OCC Witness Effron provided an example designed to illustrate that a growth in sales at constant rates results in recovery of increased distribution O&M expenses. A change in billing determinants causes revenues to increase as the result of approved rates, and that revenue is available to support increased expenditures on distribution O&M. As sales grew for the FirstEnergy Companies, embedded *rates* supported increased O&M expenditures without the need for deferrals to provide recovery of those expenditures.

Mr. Castle's testimony was not responsive to the important insight provided by OCC Witness Effron. As stated by Mr. Effron:

> The first test established by the Commission in its Entry on Rehearing in Case No. 05-1125-EL-ATA et al. was "if FirstEnergy spends more than the total amount of its distribution O&M expenses embedded in current *rates*," not if FirstEnergy spends more than the total O&M expense in its distribution *revenue requirement*."[34]

The calculations by the FirstEnergy Companies and by Staff incorrectly determine expenses included in the determination of *distribution revenue requirements* from old rate cases rather than, as required by the Commission in the *FirstEnergy RCP Case*, the amounts presently being recovered in current *rates*. The method proposed by the

[33] OCC Ex. 1 at 17 (Effron), referring to *In re FirstEnergy ETP Case*, Case No. 99-1212-EL-ETP, et al.

[34] OCC Ex. 1 at 14-15 (Effron), quoting from *FirstEnergy RCP Case*, Entry on Rehearing at 4, ¶(8) (January 25, 2006) (emphasis added).

FirstEnergy Companies, and adopted by Staff, does not meet "FirstEnergy['s] . . . burden of establishing and supporting th[e] embedded amounts."[35]

The calculations performed by OCC Witness Effron determined the amounts of distribution revenues embedded in current *rates*.[36] These calculations first determined the proportion of distribution revenues that covered distribution O&M expenses and applied that proportion to the FirstEnergy Companies' current revenues. This method properly captured the increases in distribution expense being covered in rates as sales grow. Notably, no witness cited any problem with the method used by Mr. Effron to calculate the distribution O&M embedded in current rates. The FirstEnergy Companies did not offer rebuttal testimony on this subject.

The Commission stated in its Order:

> Staff used the distribution O&M expenses established in the FirstEnergy electric transition plan proceeding. Case No. 99-1212-EL-ETP as the baseline for the distribution O&M expenses currently in base rates. * * * Because the RCP Stipulation does not provide for adjustments to the amounts of distribution expenses currently embedded in base rates, the Commission does not believe that the adjustments to the baseline proposed by OCC are appropriate to determine the amount of expenses currently in base rates.[37]

First, Staff did not use the "distribution O&M expenses established in the FirstEnergy electric transition plan proceeding, Case No. 99-1212-EL-ETP, as the baseline for the distribution O&M expenses currently in base rates." The amounts used by Staff included transmission expenses, customer accounting expenses, and

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[35] *FirstEnergy RCP Case*, Case Nos. 05-1125-EL-ATA, et al., Entry on Rehearing at 4 (January 25, 2006).

[36] The calculations are shown on Schedule DJE-B, page 3, for each of the FirstEnergy Companies. OCC Ex. 1 at 18 (Effron).

[37] Order at 11.

administrative and general expenses in the baseline, none of which are "distribution O&M." The Commission Order does not address the question of the proper definition of distribution O&M.

Secondly, the RCP Stipulation does not provide for adjustments to the amounts of distribution expenses currently embedded in base rates because the RCP Stipulation does not address this matter. The limitation on recovery was established by the Commission. In addition, what OCC proposed cannot correctly be characterized as "adjustments to the baseline." Rather it is a method of determining the amounts embedded in base rates. It should be self-evident that the amount "embedded" in rates is the proportion of the rates that goes to cover a given cost, not the fixed dollar amount that was incurred many years ago.

OCC Witness Effron compared the distribution O&M expenses being recovered in rates to the actual distribution O&M expenses being incurred. Based on the cost of service studies in the FirstEnergy Companies' last rate cases, Mr. Effron calculated that distribution O&M expenses accounted for 11.00 percent of revenue for CEI, 16.92 percent of revenue for OE, and 14.35 percent of revenue for TE.[38] When these percentages were applied to actual 2006 revenues and compared to actual O&M expenses for each company, the difference was $6,122,000 for CEI, negative $10,985,000 for OE, and $2,979,000 for TE.[39] A negative deferral is not permitted, so the value for OE was set to zero. These are the calculated maximum deferrals for distribution O&M expenses for the three FirstEnergy Companies, before carrying charges, in 2006.

[38] OCC Ex. 1 at 18 and Schedule DJE-B, page 3 (each company) (Effron).

[39] Id.

Finally, for the calculation of distribution O&M expenses in 2007, OCC Witness Effron dealt with the lack of 2007 data by assuming that spending on distribution O&M expenses took place to the date certain at the same rate in 2007 as occurred in 2006.[40]

### c. Plant-Related Deferred Costs Should be Adjusted Downward.

Certain calculations related to plant additions that were included by Staff in its calculation of the RCP distribution deferrals should be adjusted downward or eliminated. The first of these items is the calculation of post-in-service interest. Such interest, according to sound ratemaking theory, should only accrue on *net* plant. OCC Witness Effron explained that Staff's calculations in this regard were incomplete:

> Staff offset the growth in plant by the incremental depreciation on the plant additions. However, Staff did not recognize that as the plant additions take place, the depreciation reserve on embedded plant will also be growing as depreciation expense on that embedded plant is recorded. The depreciation expense on the embedded plant represents the cost of that plant that is being recovered through rates. To the extent that plant additions can be financed through depreciation expense recovered in rates, the plant that must be financed by investor supplied funds is reduced accordingly. Therefore, the applicable growth of the depreciation reserve on embedded plant should be offset against the balance on which interest is accrued.[41]

OCC Witness Effron's calculations -- which applied the "ratio of eligible plant additions to total distribution plant additions to the annual depreciation on distribution plant"[42] -- should be followed to reduce the RCP distribution deferrals.

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[40] Id. at 19 (Effron).

[41] OCC Ex. 1 at 20-21 (Effron).

[42] Id.

The testimony shows that the adjustment of post-in-service interest charges was not adopted by the Staff.[43] Staff Witness Castle appears to believe that Mr. Effron's reduction in post-in-service interest charges is somehow already captured when "depreciation reserve on embedded plant is used to reduce rate base."[44] The calculation of depreciation on utility plant and the proper calculation of interest charges on undepreciated utility plant are two separate and non-duplicative ratemaking treatments. For example, Staff's calculations in these cases involve both the calculation of depreciation as an expense item and the calculation of a return on undepreciated plant without any concern that these calculations are duplicative of one another. On cross-examination, Staff Witness Castle recognized this distinction.[45] OCC Witness Effron's adjustment to post-in-service interest charges should be adopted.

The second item of the costs related to plant additions that should be adjusted is property taxes. No evidence exists that Staff conducted any study to support calculations based upon an increase in property taxes as the result of plant additions in 2006.[46] Staff's calculations recognize that the "True Value Percentage" is a factor in the calculation of property taxes. This factor decreases as the vintage of the property increases. However,

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[43] Staff Ex. 16 at 7 (Castle). Mr. Castle agreed to the ratemaking concept that carrying charges should be on net, not gross, utility plant. Tr. Vol. VII at 31 (February 15, 2008) (Castle).

[44] Id.

[45] Tr. Vol. VII at 30 (February 15, 1008) (Castle) (depreciation and carrying charges entirely different calculations, "Yes").

[46] The Staff response to the associated OCC objection does not seem responsive to the Effron testimony. Staff Witness Castle stated that "Staff believes the more-than-in-base-rates test applies only to O&M." That response seems to fly in the face of sound ratemaking theory that if an expense is presently being recovered in rates, the utility should not be able to defer that expense for future recovery. Any other position would allow recovery of the same expense twice.

the effect of changes on the "True Value Percentage" was not properly considered by Staff. OCC Witness Effron explained:

> Staff used the 98% True Value Percentage to calculate the property tax expense on the 2006 plant additions. However, Staff failed to recognize that as the property taxes increase because of the plant additions in 2006, there will be an offsetting decrease to property taxes as a result of lower True Value Percentages being applied to plant vintages prior to 2006. In other words, it has not been established that the property taxes paid by the Companies in 2007 will actually increase as a result of the 2006 plant additions.

The inclusion of property taxes should be eliminated from the RCP distribution deferrals. Mr. Effron's adjustments, shown on Schedule DJE-B to his testimony, should be adopted on rehearing.[47]

### 2. The Commission Erred in its Rate Treatment of Pension and Other Postretirement Employment Benefits.

The Commission's Order states:

> Although either approach to accounting for pension and OPEB expenses may be acceptable from an accounting perspective, the Commission agrees with Staff that including the full accrual of pension and OPEB expenses in the test year without creating a rate base item and calculating a return would be improper.[48]

The approach proposed by FE and accepted by Staff is *not* "acceptable from an accounting perspective." No utility (or any other company, for that matter) recognizes the service component of pension and OPEB costs as expenses on its books of account. The only acceptable method "from an accounting perspective" is the accrual method, which recognizes the expenses pursuant to SFAS 87 and SFAS 106.

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[47] OCC Ex. 1, Schedule DJE-B at 3 for each of the FirstEnergy Companies.

[48] Order at 16.

The Commission's Order goes on to state that "there is insufficient information in the record to create the rate base item and calculate a return on that [pension and OPEB] item."[49] The precedent cited by the OCC regarding use of an accrual basis for the proper treatment of this topic is unchallenged in these cases. The Companies bear the burden of proof. R.C. 4909.19 governs the procedures that must be followed in these rate cases that involve applications by the FirstEnergy Companies for increases in their rates. The statute provides, among other matters, that "[a]t any hearing involving rates or charges sought to be increased, the burden of proof to show that the increased rates or charges are just and reasonable shall be on the public utility." The FirstEnergy Companies' inability to meet that burden when they departed from clear regulatory practice in Ohio should not result in higher rates for customers.

The FirstEnergy Companies incorrectly used the estimated service cost component of the pensions and other post-retirement employment benefits ("OPEB") as the *pro forma* pension and OPEB expenses for inclusion in the revenue requirement for each of the Companies and the Staff Reports failed to correct that component of the revenue requirement (Staff Reports, Schedule 3.6 for each). As explained by OCC Witness Effron, the service cost "is the estimated value of future benefits earned by employees during . . . [a reporting] period,"[50] and is only one component of the total pension and OPEB expenses. The pension accruals (pursuant to FAS 87) and the OPEB

[49] Id..

[50] Id.

accruals (pursuant to FAS 106) -- i.e. the full amounts of those expenses -- should have been used as the bases for the pension and OPEB expenses in the revenue requirements.[51]

The treatment of pensions and OPEB by the FirstEnergy Companies and also (surprisingly) by Staff for regulatory rate-setting purposes advocates changes in these cases to the Commission's core regulatory practices without justification and also without warning to parties that regularly appear before the Commission as well as to the public. PUCO practice regarding the treatment of OPEB for rate-setting was set in a generic proceeding expressly for that purpose:

> Having reviewed the comments and reply comments we believe that subject to the provisions stated below, the Staff proposal to adopt SFAS 106 accrual of OPEB costs for ratemaking and regulatory accounting purposes is the most reasonable approach. We are, therefore, stating our intention to recognize in rates OPEB costs calculated on an accrual basis generally consistent with the requirements of SFAS 106. * * * While the Commission sees no reason not to generally comply with the requirements of the EITF consensus, we want to make it perfectly clear that we are not surrendering any of our ratemaking authority to FASB.[52]

The Commission made a policy pronouncement in Case No. 92-1751-AU-COI that the OPEB expense for ratemaking purposes should be consistent with the OPEB expense recorded for financial reporting purposes.

The Commission has set its regulatory policy regarding the method of determining the treatment of pension expense for rate-making purposes through its consistent treatment in a series of cases rather than by means of a separate generic

[51] See OCC Objections at 9.

[52] *In re Commission Investigation Into the Financial Impact of FASB Statement No. 106, "Employers Accounting for Postretirement Benefits Other Than Pensions,"* Case No. 92-1751-AU-COI, Order at 6,¶(15) (February 25, 1993).

proceeding. As acknowledged by FirstEnergy Witness Kalata on cross-examination, the Commission has applied a consistent policy of basing the pension expenses included in revenue requirements on FAS 87 since that accounting standard went into effect in 1987.[53]

Based upon the Commission's policy and sound regulatory policy, OCC Witness Effron testified that the full amounts of the pension accruals and the OPEB accruals, rather than isolated elements of those accruals, should be used for purposes of calculating revenue requirements for the FirstEnergy Companies.[54] The downward adjustments to revenue requirements are "$5,980,000 for CEI, $21,552,000 for OE and $1,908,000 for TE from the expenses reflected in the Staff Reports (Schedule DJE-C-1.2)."[55]

The testimony of OCC Witness Effron reflects the Commission policy regarding the treatment of pension and OPEB expenses based upon accruals rather than the service cost components.

> FAS 87 and FAS 106 contain self-correcting mechanisms so that the effects of the differences between the assumptions and the actual experience will balance out over time in a manner that *does not favor either shareholders or ratepayers*. This self-correcting feature of FAS 87 and FAS 106 is lost if the cost of service for ratemaking purposes reflects only the service cost components of the expenses rather the full accruals.[56]

[53] Tr. Vol. IX at 109-110, 114-116 (February 25, 2008) (Kalata).

[54] OCC Ex. 1 at 33-36 (Effron).

[55] Id. at 36.

[56] OCC Ex. 1 at 35 (Effron) (emphasis added).

OCC Witness Effron further explained that the FirstEnergy Companies maintain their books on an accrual basis,[57] which was confirmed by FirstEnergy Witness Kalata.[58] The balance shown in Commission precedent is lost if FirstEnergy's failure to follow accepted regulatory practice -- i.e. failure to carry their burden of proof -- is excused in the instant cases.

The use of estimated service cost components for the pension and OPEB costs by the FirstEnergy Companies -- thereby disregarding the funded status of the plans -- reflects their penchant for choosing non-standard ratemaking methods that favor the shareholder and would unreasonably raise rates for customers. The treatment proposed by the FirstEnergy Companies is new since FirstEnergy Witness Kalata began his employment with the FirstEnergy Companies,[59] although he was aware that the proposed treatment was not used by CEI and TE in their last rate cases in 1995.[60] Mr. Kalata acknowledged that accounting standards required treatment of pensions and OPEB costs on an accrual basis.[61] He contended that accounting standards do not dictate regulatory accounting for purposes of ratemaking,[62] but he also testified that PUCO practice has treated pension and OPEB for ratemaking purposes based upon net periodic costs and not as proposed by the FirstEnergy

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[57] Id. at 36.

[58] Tr. Vol. I at 32 (January 29, 2008) (Kalata).

[59] Id. at 30.

[60] Id. at 31. Mr. Kalata also acknowledged that OE did not propose his method of dealing with pensions and OPEB in its last rate case. Id. at 36. That case was submitted before the Order was issued in Case No. 92-1751-AU-COI.

[61] Id. at 32.

[62] Id.

Companies.[63] Mr. Kalata, however, did not conform to the consistently applied policy of the Commission (as reflected in earlier filings by the FirstEnergy Companies).[64]

The support by the Staff for the treatment sought by the FirstEnergy Companies is perplexing. Asked if she was familiar with the Commission's pronouncements in Case No. 92-1751-AU-COI, Staff Witness Smith stated that the order was issued "prior to [her] employment here with the Commission."[65] The PUCO's regulatory policies should not depend upon the date of employment by witnesses on a subject. Customers should Not be overcharged, considering the collapse of the FirstEnergy/Staff case on cross-examination. Ms. Smith's prefiled testimony appears to rely upon perceived changes in accounting standards rather than on the Commission's ratemaking pronouncements.[66] The new accounting standard cited by Ms. Smith is relevant only to the manner in which pension and OPEB balances are reflected in financial reports, and is of no consequence to ratemaking. Ms. Smith stated that "FASB 158 [as an amendment to FASB 106] was not in effect at the time of this [92-1751-AU-COI] order so it's sort of irrelevant."[67] Ms. Smith later acknowledged that the FASB 158 amendment did nothing more than bring footnoted material into the main textual material in financial statements.[68] Her claim that the effect

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[63] Tr. Vol. IX at 109-110 (January 25, 2008) (Kalata).

[64] Tr. Vol. I at 28-29 (January 29, 2008) (Kalata).

[65] Tr. Vol. VII at 79 (February 15, 2008) (Smith).

[66] See, e.g., Staff Ex. 17 at 6 (Smith) ("FAS 158 requires").

[67] Id. at 80.

[68] Id. at 85. FAS 87 and FAS 106 always required that the cumulative differences between pension and OPEB accruals and funding be shown on the balance sheet. FAS 158 only modified the calculation of the amounts reflected on the balance sheet to include what had previously been unrecognized actuarial gains or losses.

of the accounting standard change would increase the rate base in these cases[69] flies in the face of the Commission's statement, again in Case No. 92-1751-AU-COI quoted above, that accounting for ratemaking purposes in Ohio is determined by the Commission and not by the issuance of financial accounting standards. Sound regulatory policy of the PUCO is not controlled by the treatment of footnoted material in financial statements, and should be *applied consistently in rate cases* unless and until reconsidered in a generic proceeding that does not suggest bias towards increasing the rates that customers pay.

Staff's conjectures should not be the basis of ratemaking treatment of pension and OPEB expenses. Staff Witness Smith testified that "if test year pension and OPEB expenses were to reflect the full accrual, or net periodic cost, for each, then a corresponding asset must be reflected on the balance sheet to be included in rate base and therefore earn a return on."[70] There is no requirement -- no statute, no rule, and certainly no regulatory policy statement or case law -- that would require such rate base recognition related to changes in accounting standards. Even so, Ms. Smith had no basis in fact to believe that such a situation would occur in these cases since she did not determine the funded status of the plan applicable to the operating companies.[71] The funded status of the plans was not a difficult matter to establish, whether by Staff investigation in these cases or from publicly available documents.

All available evidence of record indicates that any rate base adjustments such as those suggested in Ms. Smith's testimony would be deductions, not additions. As revealed

[69] Id. at 86.

[70] Staff Ex. 17 at 6-7 (Smith).

[71] Id.

in cross-examination, the funded status of the pension plan for the FirstEnergy Companies, as of December 31, 2006, is a liability (i.e. an under-funding) of $43 million.[72] The funded status of the OPEB (shown on the OCC's exhibits as "Other Benefits") plan for the FirstEnergy Companies, as of December 31, 2006, shows a liability (or an under-funding) of $594 million.[73]

OCC Exhibits 22, 23, and 24 also show that OE, CEI, and TE each have net balance sheet liabilities with regard to their pension and OPEB plans when these items are taken together.[74] That means that the actual cash disbursements related to pensions and OPEB have been less cumulatively than the accruals for those expenses. Thus, Ms. Smith's concern about increasing rate base for an over-funded pension and OPEB plans scenario can be disregarded. If any rate base adjustments took place related to these plans, the adjustments would have to be deductions to rate base to recognize the fact that the actual cash disbursements have been less, on a cumulative basis, than the expenses recorded.

The use of the service cost components in the Staff Reports is inconsistent with Commission precedent on the pension and OPEB expense to be included in utilities' revenue requirements, inconsistent with accrual accounting and inconsistent with sound rate-making practice for setting just and reasonable rates that customers must pay. The Commission has included the "full accrual of pension and OPEB expenses in the test year" without creating a rate base item in numerous cases over the years. No reason is

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[72] OCC Ex. 21 at 58 (FirstEnergy Annual Report) ("Funded Status" in first table on page 58). The amounts for the three operating companies are shown on OCC Ex. 22 at 123.21 (OE), Ex. 23 at 123.19 (CEI), and Ex. 24 at 123.21 (TE) (FERC Form 1 information, "Funded status"). Staff Witness Smith confirmed the OCC interpretation of the documents. Tr. Vol. VII at 72-78 (February 15, 2008).

[73] Id. After initially stating that the numbers represented assets, Ms. Smith confirmed that the negative values in the exhibits represent liabilities. Id. at 76-77.

[74] Tr. Vol. VII at 72-78 (February 15, 2008) (Smith).

offered for departing from that well established practice here. The only information in the record with regard to any necessary "rate base item" is that the Companies' balance sheets reflect liabilities, implying that any rate base item would be a deduction, which would further reduce the Companies' revenue requirements. The Commission should adopt the position advanced by the OCC as stated in the testimony of OCC Witness Effron.

### 3. The Commission Erred in its Determination that the Calculation of Carrying Charges for Deferrals be Calculated on a Gross-of-Tax Basis.

The Commission rejected the PUCO Staff's recommendation that "the tax deductibility of the debt rate be reflected in the carrying charge on a net-of-tax basis" stating that:

> [t]he recommendation does not account for the fact that the revenues collected are taxable." If we were to adopt Staff's recommendation, the Companies would not recover the carrying charges provided for in the RCP Stipulation, which stated that the carrying charges would be equal to the Companies' actual long-term cost of debt. [75]

The Commission's finding is in error and states the issue incorrectly. The issue is not whether the return on the deferred balances should be the pre-tax or after-tax rate. The issue is whether the return should be calculated on the gross deferral balance or on the balance net of taxes. The balance net of taxes represents the Companies' actual investment in the deferrals and should be the balance on which the return is calculated. In fact, this is the very method used by all parties to calculate the return requirement prospectively. There is no reason why the return that accrues during the deferral period should be calculated any differently. If Staff's recommendation were adopted, the

[75] Order at 10.

Companies do recover the carrying charges provided for in the RCP Stipulation and will do so in a manner consistent with the calculation of the prospective revenue requirement in this case.

### B. The Commission Erred in Granting FirstEnergy's Request for Accounting Authority to Defer Storm Costs.

The Companies have made no demonstration that special accounting authority for the deferral of storm damage expenses is prudent or necessary in its current distribution rate case. The Commission previously established that "standard application" of rate making and accounting policies require that expenses incurred by a public utility must be recovered through annual revenues.[76] The Commission also noted that the approval of deferral authority that "both exigent circumstances and good reason" must be demonstrated before such authority would be granted. The Commission further noted that the requested deferral authority was approved in the prior case because of "specifically necessary infrastructure improvements and reliability needs * * * in excess of expense amounts already included in the rate structures of the Companies.[77]"

None of the preconditions previously set forth by the Companies have been met by FirstEnergy. The Companies have neither demonstrated that exigent circumstances exist nor has FirstEnergy demonstrated that there is good reason for the accounting authority. There is no discussion in the Order of the timeframe covered by the deferral authority nor is there any record support for the timeframe covered.

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[76] *FirstEnergy RCP Case*, Case Nos. 05-1125-EL-ATA, et al., Order at 8 (January 4, 2006).

[77] Id at 8-9.

In contrast to FirstEnergy's request for ongoing special accounting treatment for *potential* storm damage costs, OCC's recommendation that CEI's rate of return be reduced, due to its ongoing reliability problems, was deemed "premature" by the Commission.[78] OCC's recommendation followed years of failures by CEI to meet its service restoration benchmarks.

FirstEnergy made absolutely no demonstration that it should be granted deferral authority for storm damage costs. The Commission should amend the Order and reject the Companies' request and in any event, ensure that storm-related costs related to Hurricane Ike cannot be recovered by the Companies.[79]

### C. The PUCO Erred in its Determination of Measures that Must be Taken for Improvement of The Cleveland Electric Illuminating Company's Reliability and the Consequences for that Company's Failure to Provide its Customers Reliable Electric Distribution Service.

The Commission states that it is "premature" to impose consequences upon CEI after that company failed to meet its "CAIDI target for seven years" and "CEI [failed] to meet its SAIFI target for four consecutive years."[80] The consequences the PUCO did not impose included forfeitures for CEI to pay and reducing CEI's rate of return that

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[78] Order at 36.

[79] *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company for Authority to Establish a Standard Service Offer Pursuant to R.C. § 4928.143 in the Form of an Electric Security Plan* Case No. 08-935-EL-SSO et al., Stipulation and Recommendation (February 19, 2009) at 17. "The Companies will not be authorized to recover the incremental costs related to Hurricane Ike damage." As of the filing of this Application for Rehearing, the Commission has yet to issue an Order approving the Stipulation and Recommendation.

[80] Order at 36.

customers pay. [81] This decision was in error and disserves utility customers who need the PUCO to protect them from a lack of adequate reliability of their electric service.

As OCC has previously noted regarding CEI's distribution O&M expenditures the Commission's efforts to provide CEI with additional financial resources in order to improve upon this shameful record on reliability have not worked for consumers.[82] A more direct effort by the Commission is needed. Based upon the record, the Commission's reliance on CEI's adoption of recommendations in the report issued by the UMS Group, Inc. ("UMS," author of the "UMS Report")[83] is misplaced. While the UMS Report did note that CEI's expenditures on "distribution gross plant additions" were well below industry standards[84], sterner measures than those proposed by UMS are needed to deal with the situation, including financial consequences.

A substantial portion of this proceeding was devoted to examining the recommendations from the UMS Report,[85] which provides a useful starting point for evaluating CEI's service reliability problems. UMS was hired to conduct a "focused assessment" of CEI's reliability as a result of the EDU's repeated failure to meet its Service Average Interruption Frequency Index ("SAIFI") and Customer Average Interruption Duration Index ("CAIDI") outage-based reliability targets.[86] However, this

[81] Order at 36.

[82] OCC Initial Brief at 51.

[83] Id.

[84] Id.

[85] OCC Ex. 20. 2007 Focused Assessment of the Cleveland Electric Illuminating Company. ("UMS Report").

[86] Staff Ex. 1 at 76 (CEI Staff Report).

"focused assessment" only provided a useful starting point for evaluating CEI's (and, to some extent, FirstEnergy Companies') service reliability.

The Commission's Order appears to rely upon CEI's intention to adopt most of the UMS recommendations to improve service quality, stating that "CEI has implemented or will implement 22 of the recommendations adopted by Staff (Tr. III at 72)."[87] The FirstEnergy Companies' position in their Brief is quite different. The CEI Staff Report adopted 25 of the recommendations contained in the UMS Report,[88] and FirstEnergy Witness Lettrich testified that CEI supports 22 of the 25 recommendations.[89] However, the FirstEnergy Companies stated in their Brief that they are willing to accept the eight short-term and five long-term UMS recommendations adopted by Staff.[90] Regarding the twelve "additional UMS recommendations" (i.e. in addition to the short- and long-term recommendations), the FirstEnergy Companies are unwilling to provide *any* detailed justification for declining to implement three of the recommendations.[91] Furthermore, the FirstEnergy Companies now profess only an agreement "to seriously *consider* implementing nine of the twelve 'additional UMS recommendations' and provide Staff

[87] Order at 34.

[88] Staff Ex. 1 at 77-79 (CEI Staff Report).

[89] Tr. Vol. VIII at 72 (February 22, 2008) (Lettrich). The three recommendations that FirstEnergy does not support are characterized by FirstEnergy Witness Lettrich as "Tier 2" recommendations. Tr. Vol. IV at 74 (February 11, 2008) (Lettrich). The recommendations not supported by FirstEnergy according to Ms. Lettrich are numbers 1, 2, and 5 at the bottom of page 78 of the CEI Staff Report.

[90] Staff Ex. 1 at 77-78.

[91] FirstEnergy Brief at 106 ("pertaining to additional tree-trimming, additional lighting protection and additional repair on 4kV exit cable").

with an implementation schedule or a detailed justification for any of the nine that CEI does not plan to implement."[92]

The Order's emphasis on "a schedule to implement the three remaining UMS recommendations or provide a detailed justification for why CEI does not plan to implement these recommendations"[93] misses the point that CEI has disavowed Witness Lettrich's support for other measures. CEI's "flip-flop" regarding moving forward on the UMS recommendations should, on remand, be explicitly addressed such that CEI has an enforceable obligation to carry out the 22 measures that were supported by FirstEnergy Witness Lettrich.

CEI has failed to meet its obligations under the Commission's ESSS, and the Commission's Order permits the Company to again avoid any substantial consequences for the failures. Ohio Adm. Code 4901:1-10-10(B)(2) requires electric utilities to submit certain reliability performance targets to the Staff, which may be revised annually. The electric distribution utilities ("EDUs") are also required by Ohio Adm. Code 4901:1-10-10(C) to submit an annual report that states the EDU's performance during the prior year. The EDU must then file an "action plan" if it fails to meet its performance targets that specifies what steps the company will take to meet or exceed its performance targets for the upcoming year.[94]

CEI's performance is measured according to SAIFI and CAIDI. These indices measure, respectively, the frequency and duration of outages experienced by customers

[92] Id. at 102-103 (emphasis added).

[93] Order at 35.

[94] Ohio Adm. Code 4901:1-10-10(C)(2)(b).

of CEI. During 2005, Staff and the FirstEnergy Companies agreed to set "interim" (i.e. more lenient) targets for CEI for years 2006-2007. CEI missed its interim targets in 2006, and as a result a consultant was hired to develop a proposal regarding actions that CEI should take. According to the testimony of Staff Witness Baker:

> Q. And the company failed to meet those more lenient targets; is that correct?
>
> A. Yes, that is correct.
>
> Q. And that's part of the reason that the UMS consultant was hired?
>
> A. Yes. As a part -- part of the action plan was a commitment that if they did miss the interim targets, that they would hire a consultant.
>
> Q. So with the interim data that we have regarding the performance on the 2007 CAIDI and SAIDI targets for CEI, CEI has failed to meet its CAIDI targets for seven years; is that correct?
>
> A. That would be the seven years referenced in the chart on page 76 [of the CEI Staff Report]. It would be eight years if you want to include the preliminary data that we discussed earlier.[95]

As OCC Witness Cleaver stated, the measurements afforded by the reliability measures "are an extremely important source of information for determining if the distribution system is performing adequately, if the system is being operated and maintained properly, and if the system is experiencing problems which require remedial action."[96]

CEI has failed to meet its CAIDI reliability targets for 8 years -- since the ESSS were originally implemented in 1999-2000. These failures are all the more remarkable because the FirstEnergy Companies and the PUCO Staff are both permitted to have a review conducted by the Commission if an action plan for improvement cannot be

[95] Tr. Vol. VI at 113 (February 13, 2008) (Baker).

[96] OCC Ex. 4 at 28 (Cleaver).

agreed upon. This result leads to one conclusion -- the SAIFI and CAIDI targets for CEI are viewed as reasonable by the CEI and the PUCO Staff.

The repeated failure of CEI to meet its outage-related reliability targets warrants further Commission action to protect customers in northern Ohio. The Commission should have imposed appropriate forfeitures for CEI to pay.[97] Also, the Commission's Order should have adjusted downward the rate of return for CEI as stated in the OCC's Brief and set CEI's rate of return at the lower bound of 7.55 percent as proposed by OCC Witness Adams.[98] Financial consequences should follow from CEI's poor performance, and this matter should be corrected on rehearing to protect customers in northern Ohio.

## III. CONCLUSION

The FirstEnergy Companies' Applications will greatly affect residential customers through the distribution rates they pay, the terms under which that service is provided, and the quality of that service. For the reasons stated above that rest upon sound regulatory principles and practices under Ohio law, the PUCO should issue its entry on rehearing adopting the changes sought by the OCC in these cases.

[97] The General Assembly gave the PUCO the statutory means to penalize companies whose actions would harm customers, to give incentives to those companies towards future compliance with regulations, and to remedy service deficiencies. These statutes provide for findings and opinions of: inadequate service pursuant to R.C. 4905.22, treble damages under R.C. 4905.61; prohibitions on the issuance of dividends under R.C. 4905.46(A); and forfeitures of up to $10,000 per violation under R.C. 4905.54, among other statutes.

[98] OCC Initial Brief at 42.

Respectfully submitted,

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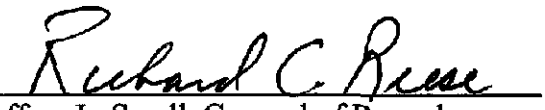

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## CERTIFICATE OF SERVICE

It is hereby certified that a true copy of the foregoing *Application for Rehearing by the Office of the Ohio Consumers' Counsel* was served by regular U.S. Mail to the attorney listed below as well as electronically to the persons listed on the electronic service list, stated below, this 20th day of February, 2009.

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