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January 17, 2006

Public Utilities Commission of Ohio
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Columbus, Ohio 43215

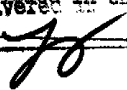
Greetings:

On behalf of Elyria Foundry, I enclose for filing its Memorandum Contra to the Motion for Clarification in Case Nos. 05-704 EL-ATA, 05-1125-EL-ATA, 05-1126-EL-AAM, and 05-1127-EL-UNC, involving the FirstEnergy operating companies.

Regards



Craig I. Smith
Attorney For Elyria Foundry

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**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Joint Application of Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company of a Generation Charge Adjustment Rider.

Case No. 05-704-EL-ATA

In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company for Authority to Modify Certain Accounting Practices and for Tariff Approvals.

Case No. 05-1125-EL-ATA

Case No. 05-1126-EL-AAM

Case No. 05-1127-EL-UNC

**MEMORANDUM CONTRA BY ELYRIA FOUNDRY
TO MOTION FOR CLARIFICATION DATED JANUARY 10, 2006
BY OHIO EDISON, THE CLEVELAND ELECTRIC ILLUMINATING
COMPANY, AND THE TOLEDO EDISON COMPANY**

The FirstEnergy companies move to clarify the Commission's Opinion and Order approving a Rate Certainty Plan embodied in the revised stipulation. *[See Motion For Clarification, dated January 10, 2006, and Request For Expedited Ruling, dated January 11, 2006]*

The motion requests the booking of monthly fuel and distribution deferrals prior to the Staff's annual review under the Opinion and Order. *[Motion For Clarification, at pg. 2-3, Subpart A., and fn. 3]* It seeks assurances that the types of costs enumerated by "Attachment 2" meet the criteria for deferrals under the Opinion and Order. *[Motion For Clarification, at pg. 4, Subpart B.]* The motion seeks approval of a methodology to deduct from deferred costs those costs already being recovered in rates as required by the Opinion and Order. *[Motion For Clarification, at pg. 4-5, Subpart C.]* Finally, it seeks approval to defer costs for both accelerated and non-accelerated distribution projects under the Opinion and Order. *[Motion For Clarification, at pg. 6-7, Subpart D.]*

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Common law provides the Commission with inherent authority to correct errors through orders *nunc pro tunc* to subsequently record actions previously taken “*** so that the record speaks the truth***.” *State ex rel. Fogle v. Steiner* (1995), 74 Ohio St. 3d. 158, 163-164, citing *In re. Estate of Cook* (1969), 19 Ohio St. 2d. 121, 127

The motion for clarification exceeds the Commission’s inherent authority to correct the record *nunc pro tunc* by seeking changes to the Opinion and Order based on the FirstEnergy companies belief as to what the Commission should have decided, or intended to decide, when rendering its decisions. See *State ex rel. Fogle v. Steiner, supra*, 164, citing *Webb v. W. Res. Bond & Shore Co.* (1926), 115 Ohio St. 247, 256

The motion exceeds the proper use of *nunc pro tunc* orders by asking the Commission to change its Opinion and Order to allow the booking of deferrals before annual reviews, provide assurances that certain costs meet the criteria for deferrals, approve a methodology to determine net deferred costs, and approve the deferral of costs for accelerated and non-accelerated projects.

Further, RC 4903.10 nullifies as a legal fiction the FirstEnergy companies moving for clarification as an interim step to substitute for, or avoid, rehearing as provided for by the Ohio statutory scheme.

Ohio law requires FirstEnergy companies to timely filing an application for rehearing specifically setting forth grounds for the unreasonableness and unlawfulness of

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the Opinion and Order upon which to request reversal or modification by the Commission, subject to court review.

The matters raised by the motion for clarification are not properly before the Commission until the FirstEnergy companies file for rehearing under RC 4903.10.

In closing, the motion for clarification exceeds the Commission's inherent powers to correct the record *nunc pro tunc*, and becomes a nullity when used as an interim step to substitute for a rehearing application under RC 4903.10.

The motion for clarification requires denial by the Commission.

Respectfully submitted



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Certificate of Service

I hereby certify that a true copy of the foregoing Memorandum Contra by Elyria Foundry was served on January 17, 2006 upon the persons listed below by first class mail, postage prepaid.



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