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October 28, 2010

VIA FEDEX MAIL

Lester A. Heltzer
Executive Secretary
National Labor Relations Board
1099 14th Street, N.W.
Washington, D.C. 20570

Re: Case No. 6-CA-36631
FirstEnergy Generation Corp. and
International Brotherhood of Electrical
Workers, Local Union No. 272, AFL-CIO

Dear Mr. Heltzer:

Enclosed are an original and eight copies of Respondent's Answering Brief in Response to Charging Party's Limited Exceptions to the Decision of the Administrative Law Judge. The General Counsel and Union were served this date via U.S. Regular Mail.

Thank you for your assistance in this matter.

Very truly yours,

JACKSON LEWIS LLP

James A. Prozzi

JAP/kmw
Enclosures

cc: Janice A. Sauchin, Esq. (via U.S. Regular Mail) (w/encl.)
Marianne Oliver, Esq. (via U.S. Regular Mail) (w/encl.)

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

FIRSTENERGY GENERATION CORP.	)	
	)	
	)	
and	)	Case No. 6-CA-36631
	)	
	)	
INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION NO. 272, AFL-CIO	)	

RESPONDENT'S ANSWERING BRIEF IN RESPONSE TO CHARGING PARTY'S LIMITED EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

James A. Prozzi, Esq.
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One PPG Place, 28th Floor
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Dated: October 28, 2010

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

FIRSTENERGY GENERATION CORP.	)	
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I. INTRODUCTION

The Charging Party, International Brotherhood of Electrical Workers, Local Union No. 272, AFL-CIO ("the Union") has filed an exception to the Decision of Administrative Law Judge David I. Goldman. The judge's Decision, inter alia, required that Respondent, FirstEnergy Generation Corp. ("the Company") "upon demand by [the Union], bargain in good faith with [the Union] regarding a cap on the employer subsidy to retiree health care, as it applies to current employees and to former employees who retired on or after July 1, 2009." (ALJD at 18).

The Union states the question raised by its exception as whether "in the face of an unremedied unilateral change in future retiree health care employer subsidies, and the execution of a labor agreement covering the subject at issue," the Union must demand bargaining or "risk a waiver of the right to bargain." Limited Exceptions at 1. In support of its position, which is that "no bargaining need now occur because the matter is covered by the contract," the Union relies upon a 1966 Board decision, C&S Industries, Inc., 158 NLRB 454 (1966). The

Union states in support of its exception that since the Company "had its opportunity to raise the issue in bargaining for the 2009 contract, and its failure to do so and execution of a contract embodying future medical terms forecloses [the Company] from now proposing future retiree insurance caps anew and requiring the Union to request bargaining regarding same." Limited Exceptions at 5.

The Company answers the Union's exception as follows: The Administrative Law Judge applied the standard Board remedy for unilaterally implemented changes in benefits and nothing in the 1966 case relied upon by Union states otherwise. Moreover, by raising the argument about a contract which now embodies "future medical terms," the Union has implicitly conceded the Company's point in its own exceptions filed with the Board, which is that the announced changes have not altered the existing terms and conditions of active unit employees.

II. ARGUMENT

A. THE ADMINISTRATIVE LAW JUDGE APPLIED THE STANDARD BOARD REMEDY.

The Board stated in Larry Geweke Ford, 344 NLRB 628 (2005), that: "The standard remedy for unilaterally implemented changes in health insurance is to order restoration of the status quo." While the Company disagrees with the judge's conclusion that an unlawful unilateral change was made in the instant matter, the judge's remedy was the standard one for such violations. Indeed in Midwest Power Systems, Inc., 323 NLRB 404, 408 (1997), which was relied upon by the judge in his Decision in this matter, the Board's remedy was for the

employer "on request," to "bargain with the Union ... and if an understanding was reached, embody the understanding in a signed agreement."[1]

In its exception, the Union seems to believe that the Board's decision in C & S Industries, supra, requires a different result. The Union has misread what occurred in that case.

In C&S Industries, the employer made a unilateral change in a wage incentive system during the term of an existing contract. Because the employer was foreclosed under Section 8(d) of the Act "from modifying contract terms over the Union's objection" the Board modified the remedy. 158 NLRB at 460. Instead of requiring the employer to cease and desist from making unilateral changes "without first consulting with the Union," the Board ordered that the employer cease and desist from making changes "during the effective term of the collective bargaining agreement ... without first reaching agreement with the Union concerning such changes." 158 NLRB at 460-461.

The Company submits that C&S Industries has no application to the instant matter, in which the Company was found to have violated the Act by implementing a change in retiree benefits during a hiatus period between contracts, rather than during the term of a contract. The judge stated in his Decision that the General Counsel's contention is that the Company "unlawfully implemented a unilateral change in a mandatory subject of bargaining, in violation of its duty to bargain, when it implemented the three-year cap on subsidization of retiree health care costs." (ALJD at 10). As such, the standard remedy for a unilateral change should apply.

[1] The Board ordered the same remedy for another retiree benefits bargaining violation in Mississippi Power Co., 332 NLRB 530, 533 (2000).

Finally, the Company notes it is quite obvious from its argument that the Union wants it both ways. It wants the Board to rescind the Company's unilateral change, and it also wants the Board to shield the Union from the risk that good-faith bargaining over a possible cap on employer contributions for future retirees will result in an impasse which would allow the Company to lawfully implement its proposal. The Board is being asked to remedy a violation which occurred, if at all, during a contractual hiatus period in June 2009, and is not affected by the subsequent execution of a contract which is "effective by its terms from December 5, 2009 to February 15, 2013." (ALJD at 2).[2] Since bargaining before implementation of a proposed change in what the Company was found to have failed to do, it follows that bargaining is what is now required and "if an understanding is reached, [to] embody such understanding in a signed agreement." (ALJD at 19).

B. THE UNION'S EXCEPTION TO THE ADMINISTRATIVE LAW JUDGE'S REMEDY IS EVIDENCE THAT THE COMPANY HAS NOT CHANGED TERMS AND CONDITIONS FOR ACTIVE UNIT EMPLOYEES.

The Union's limited exception states that "a labor contract is now in place setting forth future retiree benefits...." Limited Exceptions at 2. The Union also states that "no bargaining need occur now because the matter is covered by the contract." Limited Exceptions at 4. The Union makes these statements despite the Administrative Law Judge finding that:

> "[E]mployees retiring on or after February 16, 2008, through the term of the 2009 Agreement (set to expire February 15, 2013), will be entitled, for the life of the 2009 Agreement, to health care coverage from [the Company] in accordance with the terms and conditions of the plan in effect for active unit employees." (ALJD at 3).

[2] In Caterpillar, Inc., 355 NLRB No. 91 (August 17, 2010), also relied upon by the judge in the instant matter, the Board recently ordered an employer, in the middle of a current contract term, to notify and upon request, bargain with the Union before implementing changes. Section 8(d) was not mentioned. See Slip. op. at 4.

It is clear from the judge's finding that despite what the Union argues in support of its exception, the 2009 Agreement neither sets forth future retiree benefits nor covers that matter at all, except to the extent noted above. The whole point of the judge's Decision is that the Company was found to have violated the Act because it failed to bargain before it "implemented the three-year cap on subsidization of retiree health care costs." (ALJD at 10). Since the Union obviously believes, as it now argues to the Board, that the 2009 Agreement embodies "future retiree medical terms," then the conclusion which must be drawn is that the 2009 Agreement fails to address the change involved in the instant matter, which is the three-year subsidy cap, since that change is not embodied in the 2009 Agreement. In this sense, the Union's argument lends support to the position the Company raised in its exceptions to the judge's Decision, which is that the announced change affected only current retirees, and that the terms and conditions of active unit employees have not been altered by the Company's June 2009 announcement of the subsidy cap. See Brief in Support of Exceptions at 9-12.

Respectfully submitted,

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By: _____

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Dated: October 28, 2010

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing *Respondent's Answering Brief in Response to Charging Party's Limited Exceptions to the Decision of the Administrative Law Judge* was served upon the following this 28th day of October, 2010, by the United States Postal Service, first class, postage prepaid:

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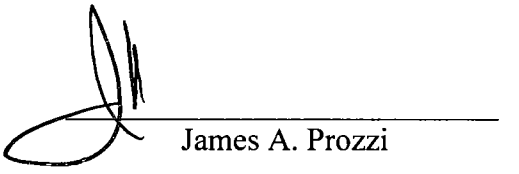

James A. Prozzi