BEFORE THE
PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company For Approval of Their Energy Efficiency and Peak Demand Reduction Program Portfolio Plans for 2010 through 2012 and Associated Cost Recovery Mechanisms.	)	Case Nos. 09-1947-EL-POR 09-1948-EL-POR 09-1949-EL-POR
In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company For Approval of Their Initial Benchmark Reports.	)	Case Nos. 09-1942-EL-EEC 09-1943-EL-EEC 09-1944-EL-EEC
In the Matter of the Energy Efficiency and Peak Demand Reduction Program Portfolio of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company	)	Case Nos. 09-580-EL-EEC 09-581-EL-EEC 09-582-EL-EEC

REPLY BRIEF OF OHIO EDISON COMPANY, THE CLEVELAND ELECTRIC ILLUMINATING COMPANY, AND THE TOLEDO EDISON COMPANY IN SUPPORT OF THEIR ENERGY EFFICIENCY AND PEAK DEMAND REDUCTION PROGRAM PORTFOLIO PLANS FOR 2010 THROUGH 2012 AND INITIAL BENCHMARK REPORTS

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INTRODUCTION

Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company (collectively, "Companies") submit their reply brief in support of their Energy Efficiency and Peak Demand Reduction Portfolio Plans for the Years 2010 through 2012 (the "Plans"), which responds to issues raised by The Environmental Law and Policy Center ("ELPC"), Material Sciences Corporation ("MSC"), Nucor Steel Marion, Inc. ("Nucor"), The Ohio Environmental Council ("OEC"), The Ohio Energy Group ("OEG"), the Ohio Manufacturer's and Ohio Hospital Associations ("OMA/OHA"), the Commission Staff ("Staff"), Citizens' Coalition ("Citizens")[1] and the Ohio Consumer and Environmental Advocates ("OCEA").[2] As is more fully discussed below, while various parties complain about aspects of the Plans submitted by the Companies, not one party submitted alternatives that are supported by the evidence. For example, while some parties suggested additions or changes to the EE&PDR programs included in the Plans, no one performed a total resource cost ("TRC") test on either their suggestions or on the resultant revised portfolio of programs as required by the Commission's Rules set forth in Section 4901:1-39-01 *et seq.* ("Rules"). Similarly, while several parties complain about the TRC results for the commercial and industrial ("C/I") lighting program, again, not one provided its own calculation, instead relying on general statements without any details or analyses. Others simply complain, with no basis in fact or law, that the Companies' compliance strategy relies too heavily on what is expressly allowed by statute. In other words, while many are quick to complain about certain aspects of the Plans, none are ready with solutions.

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[1] This group is comprised of The Neighborhood Environmental Coalition, The Empowerment Center of Greater Cleveland, Cleveland Housing Network and The Consumers for Fair Utility Rates.
[2] This group is comprised of The Office of the Ohio Consumers' Counsel, Citizen Power, Natural Resources Defense Council and the Citizens Coalition.

When evaluating the Plans, the Commission should recognize that the requirements set forth in R.C. 4928.66 created an entirely new area of law – an area in which very few have any experience specific to Ohio consumers; an area with many uncertainties that were either resolved late in 2009 or were still pending at the time the Plans were filed.[3] Therefore, while the Companies' Plans may not be perfect or include each and every recommendation on each and every intervener's wish list, the Plans, as already explained in the Companies' Post-Hearing Brief, do indeed meet the requirements of both the laws of Ohio and the Rules of the Commission and should therefore be approved. Attempting to achieve and accommodate every parties' opinion of perfection will delay the launch of the many programs included in the Plans, thus delaying not only the benefits these programs will afford customers, but also the vision of the General Assembly when enacting Am. Sub. S.B. 221 ("Senate Bill 221"). As Citizens indicated in their initial brief (at page 3): "There is a time for litigation. There is a time for cooperation." The Companies submit that there is also a time to get started and to launch the programs included in the Plans, and that time is now. Many of the so-called program deficiencies alleged by various parties will be addressed during the implementation phase of the Plans – a phase in which a professional facilitator will be retained to assist with both the successful launch and operation of the various programs. And, as discussed below, none of the challenges to the Plans warrant rejection of the Plans. Accordingly, the Companies respectfully

[3] *See, e.g., In the Matter of the Adoption of Rules for Alternative and Renewable Energy Technology, Resources, and Climate Regulations, and Review of Chapters 4901:5-1, 4901:5-3, 4901:5-5, and 4901:5-7 of the Ohio Administrative Code, Pursuant to Amended Substitute Senate Bill No. 221*, Case No. 08-888-EL-ORD (Commission Rules became effective on December 10, 2009); *In the Matter of Protocols for the Measurement and Verification of Energy Efficiency and Peak Demand Reduction Measures*, Case No. 09-512-GE-UNC (Entry, March 17, 2010) (Commission selects statewide EM&V evaluator); *Id.* (Entry, Feb. 25, 2010) (Attorney Examiner orders a workshop be held on March 16, 2010, to gather input for technical reference manual). *See generally, In the Matter of the Adoption of a Portfolio Plan Template for Electric Utility Energy Efficiency and Peak Demand Reduction Programs*, Case No. 09-714-EL-UNC (Template is not yet final).

ask that the Plans be approved as currently proposed[4] so that the Companies may immediately begin their implementation.

ARGUMENT

I. The Plans Should Be Approved As Currently Proposed.

While there are several issues specific to individual parties or customer classes, which are addressed *infra* in Section II, the vast majority of the issues raised by the various intervening parties involve: (i) the Plans' compliance with the Commission's Rules; (ii) the Companies' collaborative process; (iii) the lost revenue and shared savings component of the cost recovery mechanism included in the Plans; and (iv) the costs incurred for the previously approved residential CFL program. None of these complaints establishes valid grounds for not approving the Plans, or any part thereof, and each is addressed below.

A. The Plans Comply with Ohio Law and Commission Rules.

In 2008, Ohio's legislature enacted Senate Bill 221, including R.C. 4928.66, which sets forth certain statutory energy efficiency and peak demand reduction benchmarks that all Ohio electric utilities must meet through at least 2025 and 2018, respectively. Consistent with the Commission's Rules, the Companies developed plans that set forth their strategy for achieving these benchmarks during the period January 1, 2010 through December 31, 2012 ("Plan Period").[5] As already explained in the Companies' Post-Hearing Brief, the Plans are designed to achieve the statutory benchmarks during the Plan Period;[6] are cost effective on a total portfolio basis;[7] and include all components required by the Commission's Rules.[8]

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[4] As indicated in their Post-Hearing Brief (at page 2, fn. 2), the Companies agreed to modify the rebate levels that will be offered in the proposed appliance recycling program. This is the only change in the Plans from that which was originally filed.
[5] *See* Rule 4901:1-39-04.
[6] Companies' Post-Hearing Brief ("Co. Br."), pp. 6 -12.
[7] *Id.* at 13-14.
[8] *Id.* at 15-16.

Both ELPC and OEC claim that the Plans are not designed to meet the statutory benchmarks during the Plan Period and complain that the Companies' compliance strategy relies too heavily on historic mercantile customer projects.[9] Staff argues that the Plans do not specify how the Companies will meet their peak demand reduction targets after May 31, 2011. OEC also claims that the Market Potential Study submitted by the Companies "is not justifiable,"[10] while others argue that the Companies' TRC calculation for the C/I lighting program is improper and should be re-done under different assumptions or, alternatively, rejected in its entirety.[11] As explained below, none of these arguments are valid or justify the rejection of the Plans.

1. The Plans are designed to meet the statutory benchmarks during the Plan Period.

The Commission has indicated that energy savings must be prorated based on the date on which an energy efficiency program is launched.[12] The Rules also require the Companies to file a three-year compliance plan, based on a procedural schedule that makes it unlikely that any programs will be launched prior to mid-2010.[13] The Companies have no way to determine exactly when the Commission will issue an order in this proceeding. Therefore, when designing the Plans, the Companies assumed that a majority of the programs would launch mid-2010.[14] This assumption, when coupled with the pro-rated savings policy established by the Commission, forced the Companies to design Plans under several different scenarios. First, each

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[9] ELPC Br., pp 11-13; OEC Br., pp. 6-9.
[10] OEC Br., p. 13.
[11] *See, e.g.*, OCEA Br., p. 41; Staff Br., pp. 2-4.
[12] *In the Matter of the Adoption of Rules for Alternative and Renewable Energy Technology, Resources, and Climate Regulations, and Review of Chapters 4901:5-1, 4901:5-3, 4901:5-5, and 4901:5-7 of the Ohio Administrative Code, Pursuant to Amended Substitute Senate Bill No. 221*, Case No. 08-888-EL-ORD, Entry on Rehearing at p. 9 (June 17, 2009).
[13] *See* Rule 4901:1-39-04(A), (D), (E), adopted effective December 10, 2009, which requires the filing of a proposed plan prior to January 1, 2010, and then provides for a 60-day comment period, and then provides that the Commission conduct an evidentiary hearing on the Plans. Remarkably, this rule provides that the next plan for the 2013-15 period shall be filed by April 15, 2013, which, if followed, essentially would eliminate the opportunity for Commission approval before most of the first year of the next plan had expired.
[14] Company Exhibit 4, Direct Testimony of George L. Fitzpatrick ("Fitzpatrick Testimony"), p. 10. Inasmuch as reply briefs are being filed in mid-April, such an assumption does not appear to be unreasonable.

of the Plans could be approved in their entirety through an accelerated procedural schedule; second, the Commission could adopt a two-tiered approval process in which four specific programs, referred to in the Plans as "Fast Track Programs",[15] would be launched no later than April 1, 2010; and third, there could be a change in the Commission's policy on pro-rated savings so as to allow a full year of savings to be counted in the year in which a program is launched. If this occurred, then neither of the two other options would be necessary.[16]

OEC and ELPC argue that the Plans are not designed to meet the EE&PDR benchmarks during the Plan Period because the Plans include the alternative assumptions set forth above.[17] However, OEC and ELPC both fail to recognize that plans like those filed in this proceeding always require that certain assumptions be made. Neither OEC nor ELPC has demonstrated that any of the assumptions underlying the design of the Plans are unreasonable. On the contrary, the Fast Track Programs were either thoroughly vetted through the collaborative process ("Collaborative") set up by the Companies (*e.g.*, the proposed residential CFL program) or were standard programs proven effective in other jurisdictions. No party objected to the early launch of these programs. Indeed, twenty-three parties to this proceeding either requested or agreed not to oppose a request for the approval of the Fast Track Programs as described in a joint motion filed with the Commission in this docket on February 23, 2010.[18] Every party to this proceeding, including ELPC and OEC, agreed to allow the Fast Track Programs to be launched consistent with the conditions set forth in the Joint Motion.

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[15] The Fast Track Programs included (i) the Appliance Turn-In Program; (ii) the CFL (and CFL Low Income) Program; (iii) the C/I Equipment Program (Lighting component); and (iv) C/I Equipment Program (Industrial Motors). *See* Fitzpatrick Testimony, p. 9.

[16] Hearing Transcript, Vol. I ("Tr. Vol. __"), p. 144.

[17] ELPC Br., pp 9-11; OEC Br., p. 6.

[18] *See* Joint Motion For Approval Of Fast Track Programs And An Expedited Ruling filed Feb. 23, 2010 in Case Nos. 09-1947-EL-EEC *et al.* ("Joint Motion"); Memorandum In Response To Joint Motion For Approval Of Fast Track Programs By The Office Of The Ohio Consumers' Counsel And Citizens Coalition filed Feb. 24, 2010 in Case Nos. 09-1947-EL-EEC *et al.*

Similarly, as to proration of energy savings, it is not unreasonable to assume that a policy might be reconsidered after it had been pointed out that using annualized savings is a reasonable approach to accounting for long-term savings and that pro-rating savings will cost Ohio customers in the Companies' service areas approximately $51 million more during the Plan Period than the alternative.[19] Indeed, Mr. Fitzpatrick testified that the Companies' Pennsylvania affiliates are subject to annualized savings, and that the annualized approach "is a cost-effective way to look at the long-term savings."[20] Thus, he recommended that the Commission "reconsider their decision requiring pro-rated savings for partial year participation and recognize the extent to which 'persistence' of the Energy Efficiency ethic will be initiated and fostered by the Companies' programs and portfolios."[21]

In sum, although OEC and ELPC may not like the design, the Plans, *when filed*, were designed to meet the statutory benchmark requirements during the Plan Period. If the Commission fails to approve the Plans following the necessary timeline or fails to adopt the proposed two-tiered approval process, this does not change the fact that the Plans satisfy all statutory requirements. Ironically, OEC's and ELPC's favored course of action – outright rejection of the Plans and extensive redesign followed by the initiation of a new review proceeding – would guarantee that the Companies fail to implement any new programs until sometime in 2011, thereby putting not only 2010 but 2011 benchmarks at risk.[22] OEC's and

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[19] Tr. Vol. II, pp. 258-59; Fitzpatrick Testimony, pp. 11-12.
[20] Tr. Vol. II, pp. 258-59. *See also In the Matter of the Application of Columbus Southern Power Company for Approval of Its Program Portfolio Plan and Request for Expedited Consideration,* Case No. 09-1089-EI-POR, Direct Testimony of Jon F. Williams, p. 14 (Nov. 12, 2009) (Twenty-two States use annualized reporting of savings.)
[21] Fitzpatrick Testimony, p. 24.
[22] Without the ability to launch new programs during this additional review period, the Companies, in an effort to comply with annual benchmark requirements, would be forced to rely more heavily on Transmission and Distribution ("T&D") projects and historic mercantile customer self directed projects – the only types of projects expressly identified in R.C. 4928.66 as being able to be counted towards statutory benchmark requirements. All others require Commission approval.

ELPC's idealistic position unfortunately is typical of those who neither have to implement nor pay for EE&PDR programs.

Although the Companies do not agree with the prorated savings approach, they designed the Plans with this requirement in mind while also trying not to overspend on 2010 programs. OEC's and ELPC's apparent position is that the Companies should have eschewed any attempt at efficiency and, instead, proposed Plans that included substantially more spending on programs in 2010 so that the 2010 benchmarks could be satisfied with the pro-rata savings of a half-year or less of programs. The Companies submit that assuming the worst, most-conservative outcome may advance OEC's and ELPC's policy objectives but does not benefit customers who end up overpaying when that outcome does not occur. Indeed, it would be unjust and unreasonable to penalize the Companies for submitting Plans that are properly designed but that fail to achieve the 2010 benchmarks using pro-rated savings simply because Commission approval, and thus program implementation, is delayed well into 2010. It also is unjust and unreasonable to issue rules effective December 10, 2009, that create a procedural schedule that, in essence, precludes the counting of savings for half of 2010.

ELPC argues that the Companies "knew no later than May 1, 2008 that [they] would need energy efficiency programs to meet the statutory benchmarks."[23] The Companies also are fully aware, however, that Commission approval of the Plans and their cost-recovery mechanism is a precondition for recovery of EE&PDR program costs.[24] The Companies requested Commission approval of their Plans two weeks earlier than required by the Rules, and ELPC has not shown that the Companies' Application was unreasonably delayed. The Companies did not learn of the Commission's policy position on prorated savings until mid-June, 2009, and that position

[23] ELPC Br., p. 9.
[24] *See* Rule 4901:1-39-07(A).

remains tenuous given that, while a part of the Commission's Entry on Rehearing, this policy has never been incorporated into the Rules (which still are subject to pending applications for rehearing).[25] At the time this policy was announced, the Companies and most parties to this proceeding were diligently working through the process for development of EE&PDR plans as set out in the ESP Stipulation.[26] That process, which is unique to the Companies and not shared by other Ohio electric distribution utilities ("EDUs"), was not approved until March 25, 2009.[27] An essential element of that process was the preparation of a market study by September 1, 2009, which would then be reviewed by the Collaborative prior to the Companies' submission of proposed programs to the Commission for its review and approval.[28] The Companies delivered Black & Veatch's market study to Collaborative members on or about September 1, 2009, as scheduled, and the next three months were consumed by program design, including the extensive and time-consuming CFL Program re-design. During this design period, the Commission's filing requirements for EE&PDR portfolio plans mostly were finalized, although the filing template remains under review even today.[29] Any criticism that the Companies' December 15, 2009 Application should have been filed earlier than it was simply ignores reality.

The Plans were based on reasonable assumptions at the time of filing and are designed to afford the Companies the opportunity to meet their respective EE&PDR benchmarks during the Plan Period. OEC's and ELPC's criticisms are unreasonable, impractical and ignore both reality

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[25] *See* Case No. 08-888-EL-ORD Entry Nunc Pro Tunc (June 24, 2009), Entry on Rehearing (October 15, 2009), Entry (October 28, 2009), Entry on Rehearing (Dec. 9, 2009) (granting applications for rehearing).
[26] The ESP Stipulation was agreed to by many parties and approved by the Commission in Case No. 08-935-EL-SSO, becoming effective in March, 2009. It created the Companies' first Electric Security Plan which included among other things specific provisions related to energy efficiency and peak demand reduction.
[27] *See* Second Opinion and Order issued March 25, 2009, in Case No. 08-935-EL-SSO *et al.*
[28] ESP Stipulation, Sections E.6.b. to E.6.f.
[29] *See* October 15, 2009 Entry on Rehearing and October 28, 2009 Entry in Case No. 08-888-EL-ORD; August 28, 2009 Entry in *In the Matter of the Adoption of a Portfolio Plan Template for Electric Utility Energy Efficiency and Peak-Demand Reduction Programs*, Case No. 09-714-EL-UNC.

and good economic sense. As such, the Commission should reject their criticisms and quickly act to approve the Plans as currently proposed.

2. The Companies' Market Potential Study is valid.

OEC also challenges the results of the Companies' Market Potential Study ("MPS"), arguing that the study indicates that the Companies "will fall woefully short" of achieving the 2025 energy efficiency benchmark.[30] Yet this case involves the Companies' plans for compliance during 2010 through 2012, which renders OEC's criticism purely speculative and wholly irrelevant. Further, it is outrageous for OEC to think that the estimates included for events fifteen years into the future will not change, which is exactly why the report makes clear that the estimates included in the report are exactly that – *estimates*. Had OEC taken the time to read the remainder of the MPS executive summary, it would have discovered that these estimates were "intentionally designed to be conservative," may change as programs are implemented and do not include any savings arising from Transmission and Distribution ("T&D") projects that the Companies may implement in the interim.[31] The difference between Black & Veatch's conservative projections and the ACEEE Study's "maximum technical potential" is readily apparent from the text of the MPS itself, and there is no direct contradiction as claimed by OEC.[32]

Indeed, OEC's comparison either is designed to mislead the Commission or demonstrates its lack of understanding of the MPS and the ACEEE report. OEC refers to a "Maximum Technical Potential of 33%" included in the ACEEE Ohio report, apparently comparing it to the Achievable Potential Savings reported in the Companies' MPS which, based on a simple

[30] OEC Br., p. 13-14.
[31] Plans, Appendix D – Assessment of Potential, pp. 2-3.
[32] *See* OEC Br., p. 13.

arithmetical average of the three Companies, is approximately 12%.[33] Unlike the Achievable Potential Savings used by the Companies in the MPS, the Maximum Technical Potential fails to factor in measure economics and customer's willingness to participate. The ACEEE Ohio Report uses an achievable potential of approximately 22%, stating that its "suite of innovative energy efficiency policies will contribute savings of ... 10% of Ohio's electricity needs by 2025. This will leave only 12% ... of the EEERS target to be met by proven programs."[34] Thus, the ACEEE Ohio Report agrees with the Companies' MPS that 12% of the energy efficiency contribution will come from utility programs.

OEC's argument regarding the MPS vis-à-vis the proposed shared savings mechanism is simply ridiculous, given that the MPS indicates the potential market, while the shared savings mechanism acts as an incentive to exceed the statutory benchmarks. Obviously if the market does not exist to exceed statutory benchmarks, then no amount of incentive will allow the Companies to do so. Similarly, if such a market does indeed exist, then the shared savings mechanism could affect the level to which the Companies elect to comply. There is no inconsistency between the two as OEC claims.[35]

3. The Companies' compliance strategy is lawful.

OEC and ELPC claim that the Companies' Plans "over rely" on historic mercantile customer self-directed EE&PDR programs[36] and that such reliance casts doubt on the Companies' compliance strategy.[37] OEC and ELPC fail to provide any lawful justification or

[33] MPS, p. 1.
[34] "Shaping Ohio's Energy Future: Energy Efficiency Works." American council for an Energy Efficient Economy. ACEEE Report No. E092, (March, 2009), p. iii.
[35] OEC Br., p. 14.
[36] OEC Br., p. 8; ELPC Br., p. 11.
[37] ELPC Br., p. 13; OEC Br., pp. 11-12.

evidence to support their arguments.[38] Again, OEC and ELPC have adopted an idealistic position that is directly contrary to the language of Senate Bill 221 and, if adopted, would impose much higher compliance costs on customers.

Senate Bill 221 mandates that the Companies' compliance with the statutory benchmarks must be measured by including all mercantile self-directed programs:

> Compliance with [the statutory EE&PDR benchmarks] shall be measured by including the effects of *all* demand response programs for mercantile customers of the subject electric distribution utility and *all* such mercantile customer-sited [EE&PDR] programs. ... Any mechanism designed to recover the cost of [EE&PDR] programs ... may exempt mercantile customers that commit their demand response or other customer-sited capabilities, *whether existing or new, for integration into the electric distribution utility's demand-response, energy efficiency, or peak demand reduction programs*, if the commission determines that that exemption reasonably encourages such customers to commit those capabilities to those programs.

R.C. 4928.66(A)(2)(c) (emphasis added). Nowhere in this statute is there a cap on the amount of energy savings or peak demand reduction arising from mercantile customer self-directed projects ("Mercantile Projects") permitted to be included in the Companies' compliance strategy. Indeed, ELPC acknowledges that such reliance is "legally permissible"[39] as does Staff Witness Scheck.[40] OEC implicitly admits that the Companies' approach is lawful by claiming, without any justification or reasoned analysis, that the "intent" of the statute is something other than what it actually says.[41] Given the extreme cost-effectiveness of these programs, the Companies' reliance on Mercantile Projects is more than reasonable.[42]

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[38] Equally without merit is OEC's argument that the cost of the Companies' Mercantile Projects is excessive and unjustifiable. OEC Br., p. 9. This issue has already been addressed in Case No. 09-553-EL-EEC (Entry on Rehearing, Feb. 11, 2010). OEC's improper attempt at a second bite at this apple must be summarily rejected.
[39] ELPC Br., p. 12.
[40] Tr. Vol. II, pp. 380-82.
[41] OEC Br., pp. 8-9. Remarkably, OEC's argument ignores the first sentence of R.C. 4928.66(A)(2)(c) as cited in the text above.
[42] *See* Plans, PUCO Table 1 (showing extremely high TRC for Mercantile Projects).

Moreover, while the Companies intend to rely on Mercantile Projects for a significant portion of their compliance in 2010 (partially due to the Commission's requirement to pro rate savings in the year in which a program is launched), OEC and ELPC have not elected to tell the whole story. The record is clear that, once the other programs included in the Plans are launched and operational, reliance on Mercantile Projects is expected to significantly diminish in 2011 and 2012, with such projects expected generally to comprise less than ten percent of the Companies' EE&PDR results in those years.[43] The Plans are not unlawful simply because *legally permissible projects* are included at levels beyond those desired by ELPC and OEC.

Because there are numerous Mercantile Project applications currently pending before the Commission, OEC and ELPC argue that this casts doubt on the Companies' ability to meet its benchmarks. Yet of the forty-five Mercantile Project applications filed in 2009, the Commission has approved six,[44] denied none, and only one pending application has been challenged (by OEC) as deficient.[45] All of these applications were filed in good faith, with the firm belief that each qualifies as a valid Mercantile Project.[46] There is absolutely no evidence to suggest anything to the contrary. The sole pending application that has been challenged also involves a *valid* Mercantile Project as demonstrated in Ohio Edison's Memorandum Contra OEC's Motion to Dismiss, which was filed in Case No. 09-1226-EL-EEC on March 31, 2010. The Commission has yet to rule on this motion and OEC's reliance on its presumption of success is improper.[47]

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[43] Tr. Vol. I, pp. 121-21 and OEC Exh. 1 (showing percentage of overall energy savings expected to come from Mercantile Programs in 2011 ranges from 8.9% to 12.4% and in 2012 ranges from 6.0% to 7.3%).

[44] *See* Feb. 11, 2010 Finding and Orders issued in Case Nos. 09-0595-EL-EEC, 09-1100-EL-EEC, 09-1101-EL-EEC, 09-1102-EL-EEC; 09-1200-EL-EEC, 09-1201-EL-EEC. OEC and OCC have sought rehearing of four of these Findings and Orders, with those in Case Nos. 09-1101-EL-EEC and 09-1102-EL-EEC now final and unappealable.

[45] *See* Case No. 09-1226-EL-EEC.

[46] Tr. Vol. I, pp. 122-123.

[47] OEC's request for a third party administrator of the Companies' Mercantile Project program is equally without merit, especially since OEC bases such a request on an invalid and unsupported assertion that the Companies are not able to administer this program. OEC Br., p. 21.

In sum, there is no basis in law or fact to warrant rejection of the Plans based on the Companies' reliance on cost effective Mercantile Projects as part of their compliance strategy. Nowhere in R.C. 4928.66 (or for that matter, anywhere else in the law) is there a limit on the number of Mercantile Projects that can be included in the Companies' compliance plan and, of the project applications currently pending before the Commission, or those that will be filed in the future, there is absolutely no evidence to support a finding that any of them will fail to qualify as Mercantile Projects permitted under R.C. 4928.66(A)(2)(c).

4. The Plans include as much detail on peak demand reduction compliance as is reasonably possible.

Staff argues that "there is considerable uncertainty as to how the Companies are going to meet their annual peak demand reduction targets after May 31, 2011" and that the Companies "should be required to provide greater clarity" on this issue.[48] As this Commission is aware, the Companies, in Case No. 09-906-EL-SSO, have proposed obtaining interruptible load from C/I customers through an RFP process beginning in 2011.[49] In the alternative, they have proposed in Case No. 10-388-EL-SSO that the current C/I Electric Load Response ("ELR") Rider be extended (with slight modifications) through May 31, 2014.[50] The Plans expressly state that there will be an Interruptible Demand Reduction ("IDR") Program, which through May, 2011, will be the program set forth in Rider ELR currently in effect. No additional clarity is required in this proceeding, as the details of the IDR Program for years 2011 and 2012 will be as approved in either Case No. 09-906-EL-SSO or Case No. 10-388-EL-SSO. One way or the

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[48] Staff Br., p. 4.

[49] *See* Direct Testimony of John E. Paganie, pp. 6-7 and Attachment JEP-1 thereto filed Oct. 20, 2009 in *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. 09-906-EL-SSO.

[50] *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. 10-388-EL-SSO.

other, the Companies will obtain necessary demand resources. The Companies will update the status of the program in future reports to the Commission as more details become known.[51]

5. The Companies' TRC calculation for C/I lighting is reasonable.

ELPC, OCEA and the Commission Staff claim that the Companies' TRC calculation for the C/I lighting program is incorrect because it results in a TRC of less than one.[52] OCEA further argues that the program should not proceed without a TRC score of at least 1.0.[53] The Companies believe that the TRC calculation included in the Plans for the C/I lighting program is appropriate and, even though it results in a TRC of less than 1.0, the program should be approved.

OCEA argues that the Companies used "overly-conservative assumptions in modeling the proposed program" noting that "the modeling of labor costs for fluorescent lighting retrofits did not take into account the fact that the new system would be replacing a system that had already exhausted a portion of its useful life; thus some labor costs would have been expended anyway when the inefficient system failed."[54] OCEA presented no independent TRC analysis, instead electing to rely on the testimony of a witness who admitted not knowing the details involved in retrofitting T-12s with T-8s; admitted not knowing the amount of labor necessary to make such a retrofit; admitted not knowing the voltage of the fixtures that would have to be replaced; admitted not knowing whether an electrician would be required to perform the retrofit; and if necessary, also admitted not knowing the average cost of an electrician in Ohio.[55] While the

[51] Each of the Companies' Plans, Section 3.1.3(3).
[52] Staff Br., p. 2; OCEA Br., p. 41; ELPC Br., pp. 27-28. ELPC mirrors arguments made by the other two parties. *See generally, id.* Therefore, the Companies' response to the arguments raised by OCEA and Staff equally apply to those made by ELPC.
[53] OCEA Br., p. 41.
[54] OCEA Br., p. 41.
[55] Tr. Vol. II, pp. 292-293.

witness claimed that such knowledge was unnecessary when performing the cost-benefit test,[56] it is hard to fathom how the cost of a lighting retrofit could be determined without knowing such details. ELPC's witness Crandall agreed.[57]

Staff, too, challenges the C/I lighting TRC calculation, relying on Staff witness Scheck's observations that the Companies' calculation is not consistent with other utilities' calculations, and that some of the Companies' assumptions were not reasonable.[58] However, Staff too, failed to provide an independent TRC calculation, and it did not provide any details surrounding the assumptions incorporated into the utilities' calculations to which the Companies' were compared. Like OCEA, Staff also argues that the Companies failed to factor in the remaining useful life of the system being replaced.[59] This, however, is irrelevant for purposes of the proposed C/I lighting program since the Companies have specifically designed these program to be "retrofit programs." As Mr. Fitzpatrick explained, if T-12 fixtures were being replaced with more efficient T-12 fixtures, then some of the labor costs could be excluded because the replacement of some of the bulbs could be performed by existing maintenance staff as bulbs burn out.[60] In such a situation the remaining useful life might factor into the calculation. However, the Companies' C/I lighting program does not involve the replacement of bulbs with more energy efficient bulbs. Rather, this program assumes a complete retrofit, which would require the replacement of mechanical ballasts with significantly more efficient electronic ballasts. This retrofit would require the complete removal of the old ballasts, bulbs and fixtures and the installation of totally different equipment. Not only does such a project generally require more than one person, but due to safety issues, it generally requires an electrician with expertise in

[56] *Id.*
[57] Tr. Vol. III, pp. 487-488.
[58] Staff Br., pp. 2-3.
[59] *Id.*, p. 3.
[60] Tr. Vol. II, p. 230.

handling such equipment. Such experience does not normally reside with maintenance personnel.[61]

In sum, both OCEA and Staff make general statements criticizing the Companies' C/I lighting TRC calculation without any specifics or evidence to support their conclusions.[62] Accordingly, their challenge to the TRC calculation should be rejected on this basis alone. Nevertheless, as Mr. Fitzpatrick explained, there are alternative ways of performing the TRC analysis, some of which would increase the TRC results.[63]

Regardless of the methodology used, the TRC for the C/I lighting program, as well as any other program with a TRC of less than 1.0, becomes irrelevant when the "non-energy benefits" are factored into the analysis. As set forth in Sections 9 and 3.2.2 of the Companies' Plans, there are significant "non-energy" benefits associated with all of the programs, including the C/I lighting program. For example, because the bulbs require replacement less often and emit less heat, maintenance costs are reduced.[64] This program also improves the quality of the building stock, improves property values, increases employee satisfaction, and allows businesses to qualify for "green" status – all of which translates into an improved bottom line for businesses, which, in turn, maintains Ohio jobs, generates tax revenue for the State, and is an overall benefit to Ohio's economy. It also will increase general awareness of energy efficiency and conservation and could create or maintain "green" related jobs.[65] On a broader scale, energy

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[61] *Id.*, pp. 231-232.
[62] Staff also tries to discredit the Companies' TRC calculation for the occupancy sensor programs for large and small enterprise customer segments based on customer participation rates. Staff Br., p. 3. Again, Staff fails to provide any substantive evidence, instead relying on its *belief* that "there would [not] be this amount of disparity in participation between the smaller and larger customer classes." The Companies, on the other hand, established their participation rates based on empirical data developed through the market research described in the Companies' MPS (Plans, Apdx. D.) Staff's "gut feeling" is not sufficient evidence to supersede results obtained through statistically valid market research data.
[63] Tr. Vol II, p. 262.
[64] Company Plans at Section 3.2.2, Project 11 "Non-energy benefits".
[65] *Id.*, Section 9.1.5.

efficient projects should reduce emissions, thus improving the environment.[66] No party challenged any of these "non-energy" benefits.

In light of these significant non-energy benefits, even if it is assumed that the TRC for the C/I lighting program is less than 1.0 (as well as any other program with a similar result), the program should be approved for inclusion in the Plans consistent with the provisions set forth in Rule 4901:1-39-04(B).[67] Moreover, because this Rule allows programs with a TRC of less than 1.0 to be included in the portfolio of programs, provided that the TRC result for the entire portfolio is greater than 1.0 (which it is for each of the Companies)[68], there is no need to require a recalculation of the TRC (as suggested by Staff) or the rejection of the program (as suggested by OCEA), especially when no party who offered an opinion on this issue suggested that the program not go forward.[69]

6. Summary

In sum, the Plans, as designed, will afford the Companies the opportunity to meet their statutory EE&PDR benchmarks. The MPS, which was included as Appendix D to the Plans, is valid, the Companies' compliance strategy is lawful and the Companies' C/I lighting program can be approved consistent with the Commission's Rules. Therefore, none of the challenges to the general design of the Plans warrants rejection of the Plans.

B. The Companies' Collaborative Process is Effective and, Regardless, Does Not Present Any Basis for Rejection of the Plans.

OCEA claims that the Companies' Collaborative was "inadequate and unreasonable" because the Companies (i) complied with provisions set forth in the ESP Stipulation by only

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[66] Similar non-energy benefits exist for all C/I programs. *Id.*
[67] Rule 4901:1-39-04(B) (The portfolio as a whole must have a TRC of at least 1.0, but programs with TRC results of less than 1.0 are permitted if significant non-energy benefits can be demonstrated.)
[68] *See* Plans, PUCO Table 1.
[69] Tr. Vol. III, p. 494 (Crandall: "As for the [C/I] lighting program, I'm suggesting they[sic] go forward."). *See generally*, NRDC Exh. 1 (Sullivan); Staff Exh. 1 (Scheck).

allowing signatory parties thereto to participate in the Collaborative,[70] (ii) did not provide the Collaborative with all details of the Plans prior to filing;[71] and (iii) allegedly failed to provide the Collaborative with all details surrounding the costs incurred for the residential CFL programs.[72] As a result, OCEA asks the Commission to place the management of the Collaborative in the hands of a third party administrator.[73] As a preliminary matter, even if it is assumed for the sake of argument that everything OCEA claims is true (which it is not), its requested remedy of placing a third party administrator in charge of the Collaborative cannot be granted, unless and until the Companies are relieved of their potential penalties should they fail to achieve the statutory EE&PDR benchmarks. It would be unjust and unreasonable to hold the Companies accountable, without also empowering them to manage their own destiny. Although this should be dispositive of the matter, as is discussed below, OCEA's claims either ignore facts inconvenient to its argument or exaggerate the situation. While perhaps not perfect, the Collaborative process worked.

1. The Companies' exclusion of ELPC from the Collaborative is not unreasonable or unlawful.

Both OCEA and ELPC complain because ELPC was denied access to the Collaborative.[74] However, neither provide any legal authority that supports OCEA's claim of inadequacy or unreasonableness. Indeed, as indicated in the ESP Stipulation, the Companies agreed to "commence a collaborative process *with Signatory Parties and third party administrator(s)* to consider the energy efficiency and peak demand reduction opportunities identified in the [MPS] ...."[75] ELPC is neither a signatory party to the ESP Stipulation nor a

[70] OCEA Br., pp. 7-9, 14-16. ELPC also challenges the Collaborative process on this basis. ELPC Br., pp. 13-15.
[71] OCEA Br., pp. 9-14.
[72] *Id.*, pp. 16-20.
[73] *Id.*, pp. 7, 11.
[74] OCEA Br., pp. 7-9, 14-16; ELPC Br., pp. 13-15.
[75] ESP Stipulation, Section E.6.c. (emphasis added).

third party administrator and, accordingly, the Companies were required to deny ELPC access to the Collaborative.[76] Moreover, notwithstanding OCEA's claims to the contrary and its observation that the ESP Stipulation addresses the initial composition of the collaborative,[77] the terms of the ESP Stipulation are in effect "for the next couple of years" and therefore compliance with its terms does indeed "make practical sense."

Both ELPC and OCEA argue that the Companies did not follow the ESP Stipulation because Summa Health Systems and Summit County are permitted to participate, even though they allegedly are non-signatory parties to the ESP Stipulation.[78] Both parties, however, are members of a trade group that was a signatory party to the ESP Stipulation.[79] ELPC is not. Moreover, OCC, OEC, Citizens, the Natural Resources Defense Council and the Sierra Club are all signatory parties to the ESP Stipulation and are therefore eligible for participation (and do indeed participate) in the Collaborative.[80] Many of these same parties represent the environmentalists' point of view, some of whom regularly participate as members of OCEA – the Ohio Consumers and *Environmental Advocates.* While OCEA and ELPC may not agree with the Companies' decision to exclude ELPC from the Collaborative, there is nothing "inadequate or unreasonable" about a policy that complies with stipulated provisions approved by the Commission.

2. The Companies provided details of the Plans as they became available.

OCEA complains that the Companies provided Collaborative members with little or no time to review information, claiming that the Companies obstructed "any stakeholders' ability to

[76] OCEA seems to also imply something nefarious on the part of the Companies because they did not discuss ELPC's request with the Collaborative. OCEA Br., p. 15. In light of the plain language included in the ESP Stipulation there was no need for such a discussion.
[77] *See* OCEA Br., p. 15
[78] OCEA Br., p. 15; ELPC Br., p. 15.
[79] Tr. Vol. I, p. 139.
[80] *See* Case No. 08-935-EL-SSO (Second Opinion and Order, March 25, 2009), p. 7.

review specific details of the Portfolios prior to filing."[81] It claims that Collaborative members were not permitted to discuss the "core substance" of the Plans, including a shared savings mechanism and the two-tiered Fast Track approval process, until December 10, 2009.[82] While the Collaborative process was perhaps not perfect, OCEA grossly exaggerates the situation.

The Collaborative or its various subcommittees met no less than sixteen times between May and December 2009, and Collaborative input was used extensively in designing the Plans.[83] The Companies worked with the Collaborative to redesign the residential CFL program included in the Plans.[84] There were at least three meetings with the residential subcommittee of the Collaborative during the month of November to resolve issues surrounding this program.[85] There were also a number of presentations on the programs that the Companies had planned to include in the Plans prior to the December 10, 2009 meeting.[86] For example, the MPS was presented to the collaborative shortly after completion in September, 2009.[87] Other documents were sent to the Collaborative participants when they became available.[88] Based on these prior discussions, the Companies incorporated suggestions from Collaborative members into the final programs, including residential new construction, C/I new construction, and the Technical Assessment Umbrella program.[89]

OCEA also ignores the conditions under which the Plans had to be developed. As discussed above, the Companies were obligated by the ESP Stipulation to follow a design

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[81] OCEA Br., p. 9.
[82] *Id.*, pp. 10-14.
[83] Plans, § 3.1.5; Tr. Vol. I, pp. 34-45, 89-96; Fitzpatrick Testimony, pp. 6-7, 13, 15; Company Exh. 1, Direct Testimony of John E. Paganie ("Paganie Testimony"), p. 8.
[84] Tr. Vol. I, pp. 34-35, 40, 43-45. *See also* Paganie Testimony, p. 8.
[85] Plans, § 3.1.5.
[86] Tr. Vol. I, pp. 89, 95.
[87] *Id.*, p. 33.
[88] *Id.*, p. 96.
[89] *Id.*, pp. 83, 95-96. *See also* OCC Exh. 16 (Nov. 23, 2009 Collaborative Meeting Minutes, Meeting Notes (2)(c)) ("The Collaborative process is improving as members have been active and engaged. ***Several good ideas were suggested and incorporated into the Program Portfolio Plan.***" (emphasis added)).

process that lasted most of 2009 and limited significant program design and review until after the Market Potential Study was provided to Collaborative participants on September 1, 2009.[90] The most significant effort to obtain Commission approval of a program prior the completion of this process – the CFL Program – was met with belated but vehement opposition from OCEA.[91] Several additional factors further complicated the process: (i) the Commission's Rules underwent several revisions, only becoming final five days before the Plans were filed; (ii) the Commission's policy decision to prorate savings was not known until June 17, 2009; and (iii) as of the filing of this brief, there is no final technical resource manual or final order on the template to be used when submitting plans under Rule 4901:1-39-04. Moreover, in order to include the residential CFL program in the Plans, the filing date on which the Plans had to be submitted was accelerated by two weeks.[92]

There was no conspiracy to withhold information from OCEA or any other Collaborative member. The simple fact is that certain information was not available until close to the filing date of the Application, which, as Mr. Paganie explained, is why the Companies' Application specifically provided for additional review *after* the filing.[93] As of December 10, 2009, modeling

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[90] ESP Stipulation, Section E.6.b. through E.6.d.

[91] Based on R.C. 4928.66, the Companies, in the interim between the approval of the ESP Stipulation and the completion of the MPS, focused on historic Mercantile Projects and T&D projects. *See, e.g., In the Matter of the Energy Efficiency and Peak Demand Reduction Program Portfolio of [the Companies (T&D)]*, Case No. 09-384-EL-EEC, *et al.*; *In the Matter of the Application of Progressive Casualty Insurance Company and The Cleveland Electric Illuminating Company For Approval of a Special Arrangement Agreement With A Mercantile Customer*, Case No. 09-595-EL-EEC; *In the Matter of the Application of The Lubrizol Corporation and The Cleveland Electric Illuminating Company For Approval of a Special Arrangement Agreement With A Mercantile Customer*, Case No. 09-1100-EL-EEC; *In the Matter of the Application of Ohio Edison Company and PCC Airfoils LLC For Approval of a Special Arrangement Agreement With A Mercantile Customer*, Case No. 09-1200-EL-EEC; *In the Matter of the Application of Ohio Edison Company and Heinz Frozen Food Company For Approval of a Special Arrangement Agreement With A Mercantile Customer*, Case No. 09-1201-EL-EEC.

[92] *In the Matter of the Energy Efficiency and Peak Demand Reduction Program Portfolio of [the Companies}*, Case No. 09-580-EL-EEC, *et al.* (Entry, Nov. 30, 2009).

[93] Paganie Testimony, p. 8. Based on this additional review, the Companies modified the rebate levels for the Appliance Recycling Program.

had not been completed[94] and it was only after the Companies saw the preliminary results of the modeling on a pro rata basis that the Fast Track concept became part of the Plans.[95] Therefore, the Collaborative was informed of the latest changes to the Plans almost immediately upon the Companies' determination that such a concept was necessary in order for the Plans to be designed to meet or exceed the statutory EE&PDR benchmarks during the Plan Period generally, and 2010 specifically. The Companies provided details surrounding the Plans as decisions were finalized.[96] There is absolutely no evidence to the contrary. Nor was OCEA prejudiced by the timing of the release of such information, as evidenced by the objections and testimony it submitted after having sixty days in which to review the Plans.[97] Its objections and testimony did not focus on the design of the programs included in the Plans, or on the Companies' benchmark reports, or on virtually any of the other details set forth in the Plans but, instead, on the same issues raised in its brief – issues unlikely to be resolved regardless of the amount of time OCEA had to review the Plans prior to their filing.

3. The Companies did not withhold cost data related to the initial residential CFL program.

OCEA accuses the Companies of withholding documents pertaining to the costs incurred for the CFL Program that was approved by the Commission but never launched at the request of the Commission ("Approved CFL Program.").[98] OCEA claims that it repeatedly requested all supporting documentation to support certain costs related to the Approved CFL Program.[99] Yet, not once, either during the discovery period, or even at the hearing, did counsel for any member

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[94] Tr. Vol. I, p. 90.
[95] *Id.* at 99.
[96] *Id.* at 96.
[97] *See* Rule 4901:1-39-04(D).
[98] OCEA Br., pp. 16-20; *In the Matter of the Energy Efficiency and Peak Demand Reduction Program Portfolio of [the Companies]*, Case No. 09-580-EL-EEC, *et al.* (Finding and Order, Sept. 23, 2009); *Statement from PUCO Chairman on FirstEnergy's compact fluorescent light bulb program* (Oct. 7, 2009) ("Until the PUCO has specific details regarding the program costs, FirstEnergy should not deploy its compact fluorescent light bulb program.").
[99] OCEA Br., p. 18.

of OCEA move to compel discovery. Nor did they demonstrate at hearing that any documents were being withheld. While the record may be somewhat confused, at least one thing is clear – Company witness Toth, who was responsible for accumulating the CFL cost information provided to the parties during the program redesign,[100] provided all information in his possession to the Collaborative on numerous occasions.[101]

In its accusations, OCEA appears to be confusing three separate and distinct events: the discovery process, the settlement process and the rebuttal phase of a case. The Companies are not required to generate additional documentation in response to discovery requests.[102] Mr. Toth made it clear that through discovery he provided to OCEA and others all CFL cost information that was requested and in his possession.[103] He then created several summary sheets for purposes of settlement discussions that were held in February, 2010.[104] Once developed, Mr. Toth also shared this information. There was also information gathered specifically to rebut claims by OCEA that specific line item CFL costs were unsupported.[105]

What OCEA fails to grasp is that, throughout the process, the Companies were negotiating with all vendors involved in either the Approved or revised CFL Program, with the goal of reducing costs to the level proposed for the Approved CFL Program. This required exhaustive efforts, given that the budgeted amount would include the costs of *both* the Approved CFL Program *and* the CFL program included in the Plans ("Proposed CFL Program").[106] As a

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[100] Tr. Vol. IV, p. 549.
[101] *See, e.g.*, Tr. Vol. IV, p. 541 (I [Mr. Toth] gave the Collaborative all information that we had, bringing it to many collaborative meetings.); *id.* at 542 (I pulled additional information together for settlement discussions which was also provided to all parties.); *id.* at 543 (I shared as much information as I had. If I had it I gave it to everybody.); *id.* at 560 (I knew there were cost issues, but I had no additional information to share.); *id.* at 560 (The residential CFL program was constantly being redesigned and evaluated. I brought all costs to collaborative on multiple occasions.).
[102] *See* Rule 4901-1-20(A)(2).
[103] Tr. Vol. IV, p. 541.
[104] *Id.*, p. 543.
[105] *Id.*, pp. 590-591.
[106] *See* Company Exh. 12, Rebuttal Testimony of Gregory M. Toth ("Toth Rebuttal"), pp. 4-5.

result, cost components were constantly changing, and the November, 2009 cost estimates OCEA has fixated upon – and mistakenly and confusingly refers to in its Brief as "invoices"[107] – necessarily also changed. As evidenced by the various OCEA exhibits included in the record, a significant amount of CFL cost information was provided to all parties in a timely manner.[108]

4. Summary

In light of the foregoing, none of OCEA or ELPC's complaints warrant the introduction of a third party administrator into the Collaborative process, a finding that the process is inadequate and unreasonable, or the rejection of the Plans.

C. The Companies' Rider DSE is reasonable and should be approved.

The Commission approved the Companies' Rider DSE in Case No. 08-935-EL-SSO. The Companies included within the Plans an amended Rider DSE, making certain modifications, including the addition of a shared savings component.[109] This, along with lost revenues, were the only aspects of the cost recovery mechanism that were challenged in this proceeding. Both are without merit, and the Commission should approve Rider DSE, as well as the amount included in the Plans for recovery.

OCEA, OEC, OMA/OHA and Nucor each oppose the inclusion of the shared savings mechanism as designed by the Companies.[110] As currently proposed, Rider DSE will include a provision for recovery of shared savings to the extent earned in future years, as permitted by Rule 4901:1-39-07(A). Shared savings are earned on a Company-specific basis (results are not aggregated across the Companies) when a Company achieves more reductions than are mandated by R.C. § 4928.66 in any given year.[111] The amount of shared savings is determined by

[107] OCEA Br., p. 22.
[108] *See, e.g.*, OCC Exhs. 13-15, 17.
[109] Company Exh. 3, Direct Testimony of Steven E. Ouellette ("Ouellette Testimony"), p. 4.
[110] OCEA Br., pp. 32-39; OEC Br., pp 15-20; OMA/OHA Br., pp. 1-3; Nucor Br., pp. 34-37.
[111] Ouellette Testimony, p. 10. *See* Tr. Vol. I, p. 169.

calculating the net benefits gained using the Utility Cost Test, net of taxes, for generating savings in excess of a Company's benchmarks.[112]

Notwithstanding OEC's confusion,[113] no shared savings is earned on results generated from Mercantile Projects.[114] All energy savings are taken into account when determining whether the Companies exceeded their statutory benchmarks, which is consistent with R.C. 4928.66.[115] However, if a Company exceeds a benchmark, Mr. Ouellette clearly affirmed that the shared savings calculation excludes Mercantile Projects.[116] Similarly, the Companies have no intention of double counting "banked savings" as alleged by OCEA.[117]

Finally, contrary to all of the aforementioned parties' assertions, the Companies' proposed 15% shared savings component is supported by the evidentiary record.[118] As Mr. Ouellette explained, the Companies reviewed proposed shared savings mechanisms of AEP and Duke Energy.[119] Inquiries as to the reasonableness of the proposed shared savings mechanism were also made of the Companies' consultant, Black & Veatch.[120] And regardless of whether an analysis was presented, the Companies determined based on internal discussions that a 15% shared savings component was the level that was believed to be necessary to incent the Companies to exceed that which is required by law.[121] Therefore, while a lesser shared savings percentage could be awarded the Companies, there is no proof that it would be sufficient to incent the Companies to expend the resources on such endeavors, rather than other activities, or incur costs for which a lesser return on its investments will be obtained. As Staff witness Scheck

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[112] Ouellette Testimony, p. 10.
[113] *See* OEC Br., p. 15.
[114] Tr. Vol. I, pp. 173-74.
[115] *See* Companies' Post-Hearing Brief, pp. 23-24.
[116] Tr. Vol. I, pp. 173-74.
[117] OCEA Br., p. 39.
[118] *See* OCEA Br., p. 33; Nucor Br., p. 35; OMA/OHA Br., p. 2; OEC Br., p. 15.
[119] Tr. Vol. I, p. 161.
[120] Tr. Vol. I, p. 162.
[121] Tr. Vol. I, pp. 162, 176, 184.

explained, the analysis must be done at the shareholder level, regardless of whether the EDU's own generation. Therefore, the Companies have the same decisions as those of Duke or AEP, and those decisions are based on the returns earned on energy efficiency investments vis-à-vis other potential investments.[122]

OCEA also challenges the recovery of lost revenues, arguing (incorrectly) that the Application seeks lost revenues from programs implemented in 2012, and suggesting that lost revenue recovery be replaced with revenue decoupling starting in that year.[123] As OCEA acknowledges, the ESP Stipulation "allow[s] the Companies to collect lost revenues from programs *implemented* in 2009, 2010, and 2011 for six years from the effective date of the Stipulation."[124] As the "Summary Three-year Time Line" (Figure 2) included in each of the Companies' Plans indicates, all programs being proposed in the Plans are *implemented* prior to 2012. Therefore, the Companies are eligible to recover their lost revenues for all programs included in the Plans during the six year period.

In addition, OCEA's argument is not yet ripe. Rider DSE provides for annual reconciliations and includes a true-up mechanism. Unless and until the Companies seek recovery through Rider DSE of costs incurred for energy efficiency or peak demand reduction programs implemented *after* 2011, the Companies are in compliance with the provisions set forth in the ESP Stipulation. No modification to the recovery formula included in Rider DSE is necessary at this time.

Moreover, the issue of revenue decoupling involves significant policy issues that have statewide effects with substantial, complex and direct effects on the rate plans of all of the EDUs in the State. Therefore this proceeding – a proceeding to evaluate the Companies' EE&PDR

[122] Tr. Vol. III, pp. 396-399.
[123] OCEA Br., p. 42-43.
[124] *Id.*, p. 42 (emphasis added.).

programs – is not the appropriate forum in which to address revenue decoupling. OCEA's arguments should be rejected.

D. The CFL Program Costs already incurred by the Companies are both just and reasonable and should be approved for recovery.

OCEA devoted a significant amount of its energy on its challenge of the Companies' request to recover through Rider DSE costs already incurred for the Approved CFL Program and the costs projected to be incurred for the Proposed CFL Program.[125] These costs are included in Appendix B-1 in each of the Companies' respective Plans and total, in the aggregate, $13,163,448.[126] OCEA argues that the Companies failed to justify cost recovery of five items: (i) $285,000 of the more than $4 million spent to purchase CFL bulbs;[127] (ii) $225,000 for management services;[128] (iii) $630,000 spent on personnel;[129] (iv) $279,000 of advertising costs;[130] and (v) an unidentified amount of "additional storage costs" for warehousing the CFL bulbs.[131] As explained below, not only are the aggregate costs just and reasonable, but so too are each of the components being challenged by OCEA. Accordingly, the Commission should approve for recovery all residential CFL program costs as proposed in the Plans.

1. The aggregate costs incurred to date for the Approved and Proposed CFL Programs are just and reasonable.

On September 23, 2009, the Commission approved the Approved CFL Program.[132] The Companies projected that this program would cost $13.1 million.[133] Since program inception,

[125] There is no clear line of demarcation between the two programs. Many of the costs already incurred for the Approved CFL Program were for goods and services that will be utilized in the Proposed CFL Program. Tr. Vol. IV, p. 611.
[126] Tr. Vol. II, p. 219.
[127] OCEA Br., pp. 21-23.
[128] *Id.*, p. 23.
[129] *Id.*, p. 24.
[130] *Id.*, p. 27-28.
[131] *Id.*, p. 30.
[132] Finding and Order, Case No. 09-580-EL-EEC, *et al.* (Sept. 23, 2009).
[133] Toth Rebuttal, p. 4.

$9,113,856 has been spent on the Approved CFL Program.[134] On October 7, 2009, the Companies were asked to postpone deployment of the Approved CFL Program, and on November 4, 2009, the Commission directed the Companies to redesign it.[135] It is this redesigned program that is included in the Plans. No party has complained that the total program cost included in the Plans is unreasonable, which, given the circumstances, is not surprising.

The total CFL costs included in the Plans is $13,163,448 – essentially the same as the anticipated cost of the Approved CFL Program.[136] Through negotiations with virtually all major vendors involved in the Approved CFL Program, the Companies negotiated a total cost for *both* the Approved *and* the Proposed CFL Program at the amount originally budgeted for only the Approved CFL Program. The Commission already has found that the Companies' request to recover the costs for the Approved CFL Program was not unreasonable.[137] Because the total costs of *both* the Approved *and* Proposed CFL Programs are essentially the same as that already approved for the Approved CFL Program alone, the costs included in the Plans must also be reasonable. Accordingly all CFL Program costs included in the Plans for recovery through Rider DSE should be approved.

2. The Companies demonstrated the reasonableness of each CFL Program cost category challenged by OCEA.

Rather than recognize the situation described above, OCEA challenges specific cost items included in the aggregate amount for which the Companies seek recovery. In each instance OCEA claims that the Companies failed to justify these cost components. As demonstrated below, OCEA is wrong.

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[134] *Id.*
[135] *Id.*, pp. 3-4.
[136] Toth Rebuttal, p. 5; Plans, Appendix E, pp. 4-5. Total costs for each Company of the CFL Program are found in Tables 6A and 6B - $6,551,656 for Ohio Edison, $4,645,308 for CEI, and $1,966,484 for Toledo Edison.
[137] Finding and Order at ¶ 6, Case No. 09-580-EL-EEC, *et al.* (Sept. 23, 2009).

CFL Bulb Costs: OCEA asks the Commission to reject $285,000 of costs incurred for 3.75 million CFL bulbs because of a mathematical error on an invoice. As a preliminary matter, OCEA never challenged the cost of the light bulbs in its objections or testimony, instead only objecting to management costs, advertising costs and certain warehousing costs.[138] Therefore, the Companies submitted rebuttal testimony regarding these three cost categories and sponsored a rebuttal witness with the expectation to be cross-examined on the same.[139] By choosing to stay silent regarding bulb costs until the cross-examination of Mr. Toth, OCEA managed to generate much confusion but little evidence. Regardless, OCEA's claim is without merit. *All* of the CFL bulb costs are reasonable and are therefore recoverable.

The Companies acknowledge that the Power Direct invoice to which OCEA refers and which is included as Exhibit GMT-1 of Mr. Toth's rebuttal testimony includes a per unit cost of $3.00 per two-pack of bulbs. This invoice, however, was prepared on September 17, 2009 – before the bulbs were purchased – and does not (and could not) reflect the average price of the total number of bulbs actually purchased by the Companies.[140] After the Commission approved the program on September 23, 2009, the Companies purchased the CFL inventory from a 15-state region as well as from overseas, with the cost of some two-packs of bulbs coming in above $3.00 and some coming in under $3.00.[141] The actual average cost of a two-pack of bulbs was $3.15 which, when substituted in the Power Direct invoice for the $3.00 unit cost results in a mathematically correct invoice.[142]

OCEA has made no demonstration that this unit cost, and thus the total cost for all 3.75 million bulbs, is unreasonable. Indeed, because this cost was incurred as a result of the

[138] OCEA Objections, p. 11 (Feb. 17, 2010); OCC Exh. 12 (Sawmiller), pp. 13-16.
[139] *See* Toth Rebuttal.
[140] Tr. Vol. IV, p. 615.
[141] Tr. Vol. IV, pp. 616, 619.
[142] Tr. Vol. IV, p. 615; Toth Rebuttal, GMT-1..

Commission approving the Approved CFL Program, it is deemed to be reasonable and recoverable.

Management Service Costs: OCEA next asks the Commission to reject $225,000 of management service costs, again claiming that the Companies did not support the reasonableness of the costs. In response to such claims, and during the development of the rebuttal phase of its case, the Companies further discussed the matter with the vendor. The evidentiary record demonstrates that these costs represent the services of fifteen CFL vendor management employees – ten supervisors, three managers and two operations managers – for an extensive array of services provided: i) rescheduling the distribution formula on five separate occasions as the actual delivery days were compressed prior to the decision to store all of the bulbs ($40,750); (ii) supervising the warehousing and reorganization and safe storage of light bulbs that had been lined up in boxes and bags in two warehouses ($31,250); and (iii) developing and implementing the operational planning of all logistics related to procurement, storage, and delivery ($153,000).[143] In addition to the above, and while not expressly included as part of the above costs, the CFL leadership team and other senior staff were much more involved than originally anticipated, having to spend more time on communication between the Companies and the vendor staff, as well as coordination of services, redeployment of staff and other logistics.[144] Further because it was originally anticipated that call volumes would be relatively low, additional efforts were needed in the call center where staff had to answer thousands, rather than

[143] Toth Rebuttal, p. 8; Tr. Vol. IV, pp. 591-592.
[144] Toth Rebuttal, p. 9.

the hundreds of calls regarding the program that were originally anticipated.[145] There is absolutely no evidence to refute the above.

Instead, OCEA dwells on the fact that the Companies did not seek additional details from the vendor prior to the rebuttal phase of the case and did not present detailed invoices.[146] As already discussed *supra* in Section I(B)(3), the Companies were neither obligated to obtain additional information not within its possession nor generate exhibits in response to discovery questions. OCEA received all discoverable information through discovery responses. As demonstrated above, the Companies, through the rebuttal phase of the case, more than met their burden and demonstrated the reasonableness of the management service costs and, accordingly, these too are recoverable.

Personnel Service Costs: OCEA also argues that the Companies failed to substantiate the costs incurred for "personnel services." Again, a review of the record demonstrates that OCEA is in error. These costs were incurred as a result of the CFL Vendor hiring approximately 100 workers to support the CFL program. The work done by these individuals included three phases: (i) ramp up; (ii) suspension and (iii) de-staging. During the ramp up phase, which occurred prior to the planned launch date of October 10, 2009, these workers unloaded shipments of some of the 3.75 million light bulbs being received from a fifteen state region, pre-packaged the bulbs in boxes and bags for delivery to homes and sorted them for scheduled deliveries based on delivery routes. Some also participated in community outreach, notifying public officials of anticipated delivery dates, while others tested the GPS delivery tracking system, or developed quality

[145] Not only did the volume stress the staffing levels, but because of the nature of most of these calls, senior management was called in to respond. Additional training costs were incurred for additional staff who could answer the phones and the scope of work for the telephone vendor was expanded. Toth Rebuttal, pp. 9-10.
[146] OCEA Br., p. 24.

control measures or trained personnel.[147] The suspension phase, which occurred between October 10 and October 18, 2009, involved workers reworking the pre-staged materials. Each day the program was suspended, reconfiguration of the delivery routes was necessary so that more bulbs could be delivered in a shorter period of time. This reconfiguration required pre-sorted neighborhood combinations as well as delivery truck loads to be adjusted. All suspension phase work was in addition to work needed to be done when receiving additional light bulbs, which also occurred during this phase.[148] Finally, the un-staging phase, which commenced on October 18, 2009, required workers to take bulbs that were ready to be delivered and prepare them for storage. This required re-packaging the materials from that to be delivered to individual customer homes to one for delivery to retail outlets and community agencies. This required a complete inventory as well as a reconfiguration of the bulbs to make them suitable for pallet storage, which, in turn reduced warehousing costs.[149]

All of the work performed during all three phases amounted to $.16 per bulb. Again, OCEA made no attempt to refute the above evidence, instead incorrectly claiming that "no further explanation of the [$630,000] cost" was provided.[150] The evidentiary record proves otherwise.

<u>*Advertising Costs:*</u> OCEA asks the Commission to disallow recovery of $279,000 of advertising costs on the one hand, while on the other complains because the Companies only spent $427,000 – actually $405,140 – of a $1.9 million budget for a program that never launched.[151] It also criticizes the Companies for reducing through negotiations invoices totaling

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[147] Toth Rebuttal, p. 10.
[148] *Id.*, p. 11.
[149] *Id.*
[150] OCEA Br., p. 25.
[151] OCEA Br., p. 26; Tr. Vol. II, p. 359. *See* Toth Rebuttal, p. 7.

almost $800,000 to approximately $280,000.[152] This in and of itself demonstrates the absurdity of OCEA's position on this issue.

OCEA's witness acknowledges that the $405,140 was spent to market the Approved CFL Program and that none of the advertising received pursuant to this cost can be used for the Revised CFL Program.[153] Because such costs were incurred in reliance upon the Commission's approval of the Approved CFL Program, it would be unjust and unreasonable to disallow recovery of any of these costs, including the $279,000 suggested by OCEA, regardless of whether the Companies could produce an invoice.[154]

Warehousing Costs: Equally ridiculous is OCEA's position on certain warehousing costs. OCEA asks this Commission to reject warehousing costs incurred during the period December 2009 through March 2010, which totals approximately $120,000, because the Revised CFL Program already "had the potential to start in December 2009" had the Companies not decided to incorporate the Revised CFL Program into the Plans, rather than obtain Commission approval and launch it separately.[155] OCEA's argument is flawed in at least two material respects. First, while it believes that the Revised CFL Program "had the potential" to start in December 2009, there is no evidence to indicate that the Commission would have approved the program in that time frame. Indeed, the evidence contradicts OCEA's assertion given that the Commission has failed to rule on a Joint Motion unopposed by twenty-three parties that would have allowed the Proposed CFL Program to launch early. Moreover, while the Companies may have requested permission to incorporate the Proposed CFL Program into the Plans, it was the

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[152] OCEA Br., p. 27.
[153] Tr. Vol. II, pp. 358-359.
[154] OCEA Br., p. 27. Notably, the Companies produced invoices supporting the $279,115 paid and detailing the radio spots and newspaper ad placements purchased, but OCEA is upset because these invoices total much more than $279,115. *See* Toth Rebuttal, Exhibit GMT-1.
[155] OCEA Br., p. 28.

Commission that authorized such an action. Any disagreement with the Commission's decision should have been addressed through proper procedure in the docket in which the decision was made. There is no basis for disallowing recovery of any warehousing costs incurred by the Companies, and the Commission should rule accordingly.

In sum, the Companies have demonstrated the reasonableness of the costs budgeted for the Proposed CFL Program, including those already incurred, and they have also highlighted the fallacies of OCEA's arguments on each of the specific cost categories for which OCEA seeks disallowance of recovery. Accordingly, the Companies urge the Commission to authorize recovery of all residential CFL-related program costs included in the Plans, which are at a level virtually identical to that found not to be unreasonable for the Approved CFL Program.

II. The Intervenors Have Failed to Present Grounds for Rejecting the Plans.

A. The Comments of Industrial Customers Do Not Justify Amendments to the Plans.

Nucor strongly supports counting interruptible capability obtained through the C/I Interruptible Demand Reduction Program ("IDR Program") toward meeting the Companies' PDR benchmarks, and argues that the IDR Program should not be subject to the TRC test.[156] The Companies agree that application of a TRC test to the IDR Program is unnecessary given that the Commission already has approved this program in Case No. 08-935-EL-SSO.

To the extent the TRC test is applied, the Companies reject Nucor's misstatement that the Company relied upon short-run rather than long-run avoided capacity costs.[157] Dr. Goins admitted that the market-clearing price for capacity used by the Companies is not short-term at all, but is tied to the reserve margins required to produce once-in-ten-year system reliability.[158]

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[156] Nucor Brief at 5, 9-14.
[157] *See* Nucor Brief at 5, 14-17.
[158] Tr. Vol. III, p. 414.

In contrast, although Dr. Goins' favors using the much higher Cost of New Entry ("CONE") value set by PJM, he is unable to explain how CONE is used in the PJM auction process.[159] Indeed, although CONE only has relevance when there is a shortage in the PJM capacity market,[160] he produced no evidence that a shortage exists. The avoided cost of capacity used in calculating the TRC for interruptible load is best determined by using actual data resulting from capacity auctions in which thousands of megawatts of interruptible load are bid into the auctions.[161] The Companies maintain that they in fact developed the TRC using the proper long run cost of capacity.

Nucor also argues that the amount of interruptible capability counted toward the Companies' PDR benchmarks should be calculated using the definition of Curtailable Load included in Rider ELR to calculate credits payable to interruptible customers.[162] The Companies propose using the valuation method they currently use to register their interruptible capability as a capacity resource with the Midwest Independent Transmission System Operator, LLC ("MISO").[163] The Companies believe this methodology is consistent with Rule 4901:1-39-05(E)(2)(a) and best represents the operational demand reduction capability addressed in that rule.[164] The difference between the two positions is simple. The Companies propose using the amount of load capable of being reduced when an event is called.[165] Nucor proposes using the

[159] Tr. Vol. III, pp. 414-15.
[160] Tr. Vol. III, p. 415.
[161] *See* Tr. Vol. III, p. 413.
[162] Nucor Brief at 5-6, 18-21.
[163] Company Exh. 2, Direct Testimony of Katherine M. Kettlewell ("Kettlewell Rebuttal"), p. 3.
[164] Kettlewell Rebuttal, pp. 3-5.
[165] Kettlewell Rebuttal, p. 4 (Companies' multi-factor calculation determines the "realistic operational capability associated with interruptible resources"). Nucor criticizes the Companies' multi-factor calculation as not supported by any study or analysis, Nucor Brief, p. 23, but the record does not support this claim. To the contrary, Ms. Kettlewell testified that the Companies use several data points – maximum performance, average on-peak performance, average performance at system monthly peaks including the hour before and the hour after the peak, and average performance during the hours of 3 p.m. and 6 p.m., Monday through Friday, June through August – to determine operational interruptible capability. Kettlewell Rebuttal, pp. 3-4. The Companies' expertise is then used to weight these various data points. Tr. Vol. IV, p. 519.

aggregate amount of maximum load interruptible customers have pledged will be available for interruption, regardless of whether that load is capable of interruption when an event is called.[166] While the Companies maintain that operational capability is the true measure of DR, the Companies are not opposed to counting all Curtailable Load, as defined in Rider ELR, toward their PDR benchmarks should the Commission order it.[167]

Nucor asks the Commission to order the Companies to maintain the IDR Program even if the IDR Program is not needed by the Companies in future years to satisfy their PDR benchmarks.[168] Such an order is outside the scope of this proceeding, which is limited to a determination of what programs may cost-effectively achieve the statutory benchmarks. Additionally, such an order would not affect the Plans, which include an IDR Program for the entire Plan Period. Thus, Nucor's request is premature and can be revisited, if necessary, in an appropriate proceeding in the future.

Nucor also objects to the method used by the Companies to allocate Mercantile Utility – Large Enterprise sector costs to the appropriate GP, GSU or GT rate schedule.[169] OEG similarly complains that these costs should be directly assigned to the GP, GSU and GT rate schedules.[170] Because the Mercantile Utility – Large Enterprise sector includes these three customer classes, EE&PDR program costs initially are allocated using forecasted energy usage. There is no way *initially* to allocate costs as is proposed for Rates RS and GS because there is not a one-to-one correspondence between the applicable sector and rate schedule. However, these costs are then reconciled for every non-residential customer based on per-customer tracking of incentives and

[166] Dr. Goins admitted that all customers will not have their maximum demand available for interruption when an event is called. Tr. Vol. III, p. 416 ("the probability is certainly not 1"). He performed no analysis showing how often maximum demand would be available, and had no information related to Nucor's maximum demand. *Id.*, pp. 416-17.
[167] Kettlewell Rebuttal, p. 5.
[168] Nucor Brief, pp. 6, 26-28.
[169] Nucor Brief, pp. 6-7, 28-33.
[170] OEG Brief, p. 1-3.

energy savings.[171] As a result of the reconciliation, each class will pay its appropriate share. Indeed, Nucor recognizes that the reconciliation, which is necessary because there are no programs specific to the GP, GSU or GT rate schedules, significantly mitigates the possibility of cross-subsidization between rate schedules.[172]

Thus, Nucor complains that allocating costs based on energy (kWh) and not capacity (kW) could result in inequities among customers within the GT class itself.[173] Because Nucor considers itself to be a higher-than-average load factor customer, it is concerned that it will be overly burdened by EE&PDR costs as compared to lower-than-average load factor customers in the GT class. As a result, Dr. Goins has proposed solutions for eliminating the intra-class subsidization that could result if the GT class were to include customers with significant variability in their load profiles.[174] Yet Nucor and Dr. Goins skipped a necessary step. Before proposing solutions, one should first confirm from readily-available data that a problem actually exists. Significant intra-class subsidization is possible only if the load factors of GT class customers are widely dispersed around the mean. Dr. Goins testified, however, that he performed no analysis to determine whether there is significant variation in the load factors of GT class customers.[175] He was not aware that most customers in the GT class are clustered around the mean.[176] He also testified that he has no evidence that this problem exists.[177] Remarkably, he suggested splitting energy efficiency costs on a demand-energy basis, but openly admitted that he had "not made a specific determination of the appropriate demand-energy split

[171] Ouellette Testimony, pp. 8, 10-11.
[172] Nucor Brief, p. 29.
[173] Nucor Brief, pp. 30-32.
[174] Goins Testimony, pp. 27-28.
[175] Tr. Vol. III, p. 427.
[176] Tr. Vol. III, p. 427.
[177] Tr. Vol. III, p. 429.

for EE costs in this case."[178] Thus, Nucor has produced no credible basis for forcing the Companies to alter, for this one customer class, their assignment of energy efficiency costs on an energy basis.[179]

Nucor suggests that the impact of energy efficiency program costs on higher-than-average GT class customers of Ohio Edison – because Nucor is an Ohio Edison customer – should be mitigated by using a cap on DSE2 charges to shift these costs to other customers in the GT class.[180] Dr. Goins was unable to explain during cross-examination how Ohio Edison would go about tracking this cap, and he made no recommendation concerning what would happen if the cap were exceeded.[181] His only point, apparently, was that Nucor should pay less than other customers. This, however, is not a reasoned basis upon which to shift costs among customers.

B. The Commission Should Reject the Additional Recommendations Made by OCEA and ELPC.

OCEA wants the Companies to pursue a joint home performance program with Dominion East Ohio Gas Company,[182] while ELPC asks the Commission to require the Companies to incorporate a laundry list of suggestions into the Plans.[183] Both of these parties have lost sight of the purpose of this proceeding, which is to determine whether the Plans, as currently proposed, meet the requirements of R.C. 4928.66 and the Commission's Rules related thereto. As has already been demonstrated both in the Companies' Post-Hearing Brief as well as in this reply, the Plans do, indeed, meet these requirements. The Plans include a variety of programs, offering at least one to each customer segment. The portfolio of programs as a whole passes the TRC test

[178] Goins Testimony, p. 27.
[179] Energy efficiency cost are incurred, of course, to reduce kWh usage, as a less expensive way to supply kWhs than building a power plant. Higher consuming users such as those in the GT class benefit most.
[180] Nucor Brief, pp. 33-34. Tr. Vol. III, pp. 418-19 (agreeing that testimony focused on Ohio Edison because Nucor is a customer of that operating company).
[181] Tr. Vol. III, pp. 419-22.
[182] OCEA Br., p. 40.
[183] See generally ELPC Br., pp. 29-30.

and, for the programs challenged by the parties that do not have a TRC of greater than 1.0, the Companies have demonstrated significant "non-energy" benefits to justify inclusion in the Plans. The Plans also include all of the other details suggested in the template proposed by the Commission. No party has challenged any of these facts.

OCEA asks the Commission to dictate to the Companies the topics for discussion in Collaborative meetings.[184] With all due respect to the Commission, it is not its place to set the agenda for collaborative meetings. Moreover, the program that OCEA demands that the Companies address does not exist anywhere in the country.[185] Once the Plans are approved, the Companies anticipate a Collaborative focus on operational issues to ensure that the programs that are included in the Plans are operating properly and are meeting the Companies' and the Collaborative's expectations. While the Companies are perhaps willing to consider pursuing a program such as that proposed by OCEA, such a decision cannot be made until the programs are launched and it is decided where best to focus the Collaborative's efforts.

With the consent of its participants, the Collaborative may also address some of ELPC's suggestions or other future recommendations. ELPC's recommendations fit into one of several categories. The first includes recommendations already addressed in this Reply Brief and, therefore, will not be revisited. The second includes a recommendation to include an additional program – a solid-state lighting program – in the portfolio of programs included in the Plans.[186] This recommendation is vague, with no specific details as to which program should be included. And, regardless of the program to which ELPC may be referring, there is insufficient evidence for inclusion in the Plans. ELPC failed to perform a TRC test on either this individual program

[184] OCEA Br., p. 40 (The Commission should *require* the Companies to pursue the joint home performance program in the Collaborative).
[185] Tr. Vol. II, p.295.
[186] ELPC Br., p. 30.

or on the resultant revised program portfolio should it be added. Further, of the several examples of solid state lighting programs described by ELPC's witness Crandall, at least one program was relatively new, with no historic results, one was run by the State of Wisconsin, and several were pilots.[187] Mr. Fitzpatrick also clearly stated that the solid-state lighting programs contemplated by Mr. Crandall for inclusion in the Plans were not appropriate and would result in higher costs.[188] Indeed, the only portfolio of programs before the Commission that is supported by the evidence and passes the TRC test is that being proposed by the Companies.

The third, includes recommendations to "tweak" the programs that are included in the Plans.[189] While the Companies are not opposed to considering these types of suggestions, again, there is no evidence to support a finding that modifications to the programs as designed in the Plans are necessary. ELPC again failed to present any evidence of the costs of its proposed modifications. And without such information, there is no way to know how the TRC results of the individual program or the portfolio as a whole would be affected. Notwithstanding, as ELPC notes, Company witness Paganie, the Companies' Vice President of Customer Service and Energy Efficiency, indicated that some of ELPC's suggestions should be further investigated, which, as indicated above, is expected to occur in future collaborative meetings.[190]

The final category includes recommendations without any indication of a problem needing a solution. For example, ELPC recommends additional customer educational materials even though ELPC Witness Crandall never reviewed the marketing materials developed by the Companies.[191] ELPC also recommends that the Companies abide by the Commission's

[187] Tr. Vol. III, pp. 465-469.
[188] Tr. Vol. II, pp. 245-47.
[189] ELPC recommends revisions to the appliance recycling program, some of which were adopted by the Companies (*see* fn. 2 in the Companies' Post-Hearing Brief), including steps in the program for customer follow up and disposal of hazardous materials. ELPC Br., p. 30.
[190] ELPC Br., pp. 14-15.
[191] Tr. Vol. III, pp. 455-456.

accounting procedures and develop a database of Ohio specific cost data, even though ELPC's witness agreed that these were prospective issues.[192] It also recommends that the Companies ensure that the EM&V contractor is independent, even though there is no evidence to indicate that the EM&V contractor will be anything less.[193] In sum, when it isn't broke, there is no need to fix it.

As demonstrated above, none of the recommendations of either ELPC or OCEA should be included as modification to the Plans. They are either beyond the scope of the Commission's authority or are unsupported by the evidentiary record. The Companies' however, are open to revisiting many of these issues if deemed appropriate or deemed necessary under the circumstances *after the Plans are approved and the programs are launched.*

C. The Commission Should Grant the Companies' Request for a Waiver of Certain Rules.

OCEA recommends that the Commission deny the Companies' request for a waiver of certain rules. Its rationale is perhaps the best demonstration of it "complaining simply to complain." In their Application, the Companies requested a waiver to the extent the customer sectors utilized in the Plans conflict with the Commission's forthcoming order approving a portfolio plan template in Case No. 09-714-EL-UNC (the "Template Docket"). This was done for several reasons. First, the proposed template was not final at the time the Application was filed and, in fact, is still not final. While the Companies attempted to comply with the requirements set forth in the Template Docket, they could not be certain that the Plans filed prior to the template becoming final would comply with the final template. Therefore, to the extent that the Plans deviate from the final template, the Companies, in an abundance of caution,

[192] Tr. Vol. III, pp. 473-474, 489.
[193] Tr. Vol. III, p. 477.

requested a waiver.[194] They also requested the waiver, because as explained in their comments in the Template Docket: (i) the sectors have no rational relationship to the Companies' commission-approved rate schedules; (ii) the Companies' customer data does not track with the proposed segments, thus making it virtually impossible to accurately assign customers to the proposed segments; (iii) the Companies' customer accounting systems do not track customer data consistent with the proposed sectors, and would have to be reconfigured; and (iv) such a reclassification of customers would significantly reduce the accuracy of the MPS results which were just recently completed.[195]

OCEA argues that the Companies' "blanket request for a waiver of compliance with some of the reporting requirements in the Commission's forthcoming order approving the portfolio template ... should be denied because the Companies' [sic] failed to specify the information they cannot provide."[196] In essence, OCEA argues that the waiver request should be denied because the Companies did not indicate the information they don't know will be required to be provided in a template that has yet to indicate what information is required to be provided. The Companies are at a loss as to how they should even respond to such an argument.

OCEA also argues that the request should be rejected because there is no evidence in the record to explain why the Companies cannot comply.[197] OCEA misses the point. The Commission has yet to issue a final order in the Template Docket. Therefore, the Company is not required to comply with the proposed template requirements. Moreover, because the Commission had not issued an order in the Template Docket prior to the Plans being filed, the

[194] The Companies' request for a waiver should not be construed as its waiver of any rights to argue against the application of rules that become effective after the Plans are filed.
[195] *In re the Adoption of a Portfolio Template*, Case No. 09-714-EL-UNC, Comments of the Companies (Sept. 11, 2009).
[196] OCEA Br., p. 44.
[197] *Id.*, p. 45.

requirements eventually mandated in the Template Docket order could not be applied retroactively. The Commission can only apply rules, if any, in effect at the time the application was filed. *See Pack v. Osborn* (2008), 117 Ohio St. 3d 14 (rules in effect at the time of the application must be applied to the applicant.)[198] Therefore, while the Companies attempted to meet the requirements in the proposed template, because no final order has been issued, they were not required to do so, and were certainly not required to comply with each and every requirement set forth therein.

III. Conclusion

The Companies have demonstrated that the Plans as currently proposed comply with both Ohio law and the Commission's Rules. Accordingly, the Companies respectfully request the Commission to approve the Plans.

Respectfully submitted,

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[198] *See also Van Fossen v. Babcock & Wilcox Co.* (1988), 36 Ohio St. 3d 100 (rules cannot be applied retroactively, except in limited circumstances).

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CERTIFICATE OF SERVICE

I hereby certify that this **Post-Hearing Brief** was filed electronically this 12th day of April, 2010, with the Public Utilities Commission of Ohio Docketing Information System. Notice of this filing will be sent via e-mail to the attached list.

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