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BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO 2010 APR 29 PM 4:30

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In the Matter of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Authority to Establish a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan	**Case No. 10-388-EL-SSO**

OHIO EDISON COMPANY, THE CLEVELAND ELECTRIC ILLUMINATING COMPANY AND THE TOLEDO EDISON COMPANY MEMORANDUM CONTRA APPLICATION FOR REHEARING BY THE OFFICE OF THE OHIO CONSUMERS' COUNSEL, ET AL. ("OHIO CONSUMER AND ENVIRONMENTAL ADVOCATES")

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I. INTRODUCTION

For seven days beginning on December 15, 2009, Ohio Edison Company, The Cleveland Electric Illuminating Company, The Toledo Edison Company (collectively, "Companies"), Commission Staff and at least twenty-two other parties litigated at hearing the Companies' proposed market rate offer in Case No. 09-906-EL-SSO ("MRO Case"). (*See* MRO Case Trs. Vols I-VII.) During that hearing, the Commission heard from sixteen witnesses. (*See id.*) It received over thirty-five exhibits. (*See id.*) And after the hearing concluded, the parties filed seventeen post-hearing briefs and seventeen post-hearing replies. (*See* MRO Case Docket (post-hearing briefs dated Jan. 7 and 8, 2010, post-hearing replies dated Jan. 14 and 15, 2010).)

Now, a mere four months later, the Ohio Consumer and Environmental Advocates ("OCEA") demand a "do-over" of the pertinent information propounded during the MRO Case.[1] In its Application for Rehearing of the Commission's April 6, 2010 Entry ("April 6 Entry"), OCEA argues that the Commission erred by taking administrative notice of the record in the MRO Case, re-admitting MRO Case testimony and documents in this proceeding, and granting certain waivers of filing requirements pertaining to electric security plan ("ESP") applications. (*See* Application for Rehearing dated Apr. 19, 2010 ("Reh'g App.").) According to OCEA, the Companies should be forced to re-introduce in this proceeding identical testimony and documents from the MRO Case. With the ESP proceeding well underway, and with seventeen parties having signed onto the ESP Stipulation, OCEA asks the Commission to start over so that it can formally re-receive the testimony and exhibits it already admitted in the MRO Case.

[1] The OCEA parties are the Office of the Ohio Consumers' Counsel ("OCC"), Citizen Power, Citizens Coalition, Environmental Law & Policy Center, Natural Resources Defense Council ("NRDC"), Northeast Ohio Public Energy Council ("NOPEC"), Northwest Ohio Aggregation Council ("NOAC") and Ohio Environmental Council ("OEC").

To justify this enormous and duplicative expenditure of time and resources, OCEA cites no infirmity in the MRO Case record, no gaps in the ESP evidentiary record and not a single specific instance of prejudice. Instead, OCEA offers only unsupported assertions and a flawed rendering of the caselaw.

OCEA's proposed "do-over" should be rejected. As demonstrated below, the Commission properly took administrative notice of the MRO Case record. In evaluating a party's challenge to administrative notice, the Supreme Court and the Commission must consider two factors: (i) whether the challenging party had notice of and an opportunity to explain and rebut the subject of the notice; (ii) and whether that party suffered prejudice. *See Allen v. Pub. Util. Comm.* (1988), 40 Ohio St. 3d 184, 185. Apparently failing to muster even a passable argument, OCEA fails to even mention this test or discuss its first factor. Understandably so. Not only did the OCEA parties have an opportunity to explain and rebut the MRO Case record, all but one of those parties ***helped create that record*** by participating in the MRO proceedings.

Moreover, OCEA utterly fails to show any prejudice. Instead, they stake their case on the notion that by taking administrative notice of the MRO Case record, the Commission eliminated a portion of the Companies' burden of proof in this proceeding. (*See* Reh'g App., pp. 7-8.) Although it repeats this allegation several times, OCEA fails to support it. Nor could it. In fact, as shown below, the Companies' burden of proof in this proceeding is the same as it was before the April 6 Entry: to show, among other things, that its proposed ESP is "more favorable in the aggregate as compared to the expected results" of its MRO and is "just and reasonable." *See* R.C. 4928.143(C)(1), Rule 4901:1-35-06(A), Ohio Administrative Code ("O.A.C."). The Commission's April 6 Entry did not find any facts, determine any issues, or otherwise modify or

reduce this burden. Rather, the April 6 Entry means only that the Companies need not re-introduce evidence from the MRO Case to meet it.

OCEA's arguments regarding the Commission's approval of the Companies' waiver requests fare no better. Because the Commission properly re-admitted the MRO Case record in this proceeding, the Company may rely on that record rather than resubmit information in order to answer the Commission's ESP filing requirements. The Commission correctly found "good cause" for the Companies' requested waivers.

II. ARGUMENT

An application for rehearing may be granted only where the applicant demonstrates that a Commission order is "unreasonable or unlawful." R.C. 4903.10; *see* Rule 4901-1-35(A), O.A.C. As discussed below, neither the Commission's administrative notice of the MRO Case record nor its approval of the Companies' waiver requests was "unreasonable or unlawful." OCEA has failed to meet its burden, and its Application for Rehearing should be denied.

A. The Commission Properly Took Administrative Notice Of The Record In The MRO Case.

The Commission's decision to admit in this proceeding the MRO Case testimony and exhibits was neither unreasonable nor unlawful. In deciding whether administrative notice of a Commission record is appropriate, the Commission and the Supreme Court consider two factors:

> The factors we deem significant include [i] whether the complaining party had prior knowledge of, and had an adequate opportunity to explain and rebut, the facts administratively notice. Moreover, [ii] prejudice must be shown before we will reverse an order of the Commission.

Allen v. Pub. Util. Comm. (1988), 40 Ohio St. 3d 184, 185, 186 (noting that propriety of administrative notice is determined "based on the particular facts presented"); *see Canton Storage and Transfer Co. v. Pub. Util. Comm.* (1995), 72 Ohio St. 3d 1, 8 (same).

In challenging administrative notice of the MRO Case record, OCEA fails to mention this test, barely discusses the second factor and completely ignores the first. These are telling (and fatal) omissions. As demonstrated below, the OCEA parties not only had "prior knowledge" of the MRO Case record—they helped create it. And armed only with bare allegations, OCEA has shown no prejudice from the Commission's April 6 Entry.

1. The OCEA parties undeniably had prior notice of the MRO Case record and the opportunity to explain and rebut it.

A "significant" factor in evaluating administrative notice is whether the complaining party had an opportunity to "explain and rebut" the subject of that notice. *See Canton Storage* at 8; *Allen* at 186. But in its Application, OCEA failed to mention this, much less explain how that "significant factor" applies here. Rather than discuss binding authority that would not support its argument, OCEA ignored it. This alone requires denial of the Application.

Even were OCEA to address this factor, there is little it could have said. The OCEA parties did not merely have the opportunity to "explain and rebut" the MRO Case record. In fact, all but one of them moved to intervene in the MRO Case. (*See* MRO Case Mots. to Intervene dated Oct. 22, 2009 (OCC), Oct. 27, 2009 (NOPEC), Nov. 9, 2009 (OEC), Nov. 16, 2009 (NOAC), Nov. 27, 2009 (Citizen Power), Dec. 4, 2009 (NRDC), Dec. 9, 2009 (Citizens Coalition).) Counsel for five of the eight OCEA parties participated in the MRO Case hearing and were, among other things, allowed to cross-examine the Companies' witnesses. (*See* MRO Case Tr. Vol. VII, 829:11-831:9 (noting appearances of counsel).) Six of the eight OCEA parties submitted post-hearing briefs. (*See* MRO Case Post-Hearing Brs. dated Jan. 8, 2010 (NOPEC, NOAC, OCC, Citizen Power, Citizens Coalition, NRDC).) Moreover, the only OCEA party that did not intervene in the MRO Case—the Environmental Law & Policy Center ("Center")—is a frequent, sophisticated intervenor in recent Commission proceedings involving

electric utilities and undoubtedly had notice of the content of the MRO Case and the opportunity to participate if it so chose. Indeed, OCEA does not even attempt to argue otherwise. (*See, e.g.*, *In re Application of FirstEnergy Solutions for Certification as an Eligible Ohio Renewable Energy Resource Facility*, Center's Mot. to Intervene dated Dec. 21, 2009, No. 09-1940-EL-REN; *In re Application of Ohio Edison Co., The Cleveland Electric Illuminating Co., and The Toledo Edison Co. to Amend Their Energy Efficiency Benchmarks*, Center's Mot. to Intervene dated Nov. 17, 2009, Nos. 09-1004-EL-EEC, *et al.*; *In re Application of Columbus So. Power Co. for Amendment of the 2009 Solar Energy Resource Benchmark, Pursuant to O.R.C. Section 4928.64(C)(4)*, Center's Mot. to Intervene dated Nov. 9, 2009, Nos. 09-987-EL-EEC, *et al.*)

All of the OCEA parties had ample notice of the MRO Case and an opportunity to explain and rebut it. In fact, all but one of them actively participated in ***creating*** that record. OCEA cannot argue otherwise, and it does not even try. This factor weighs in favor of administrative notice of the MRO Case record. *See Allen*, 40 Ohio St. 3d at 186 (affirming administrative notice of prior proceedings, to which appellants also were party); *County Commissioners' Assoc. of Ohio v. Pub. Util. Comm.* (1980), 63 Ohio St. 2d 243, 247 (affirming administrative notice of separate investigative proceeding, where challenging parties were party to that proceeding).

2. OCEA has suffered no prejudice from administrative notice of the MRO Case record.

OCEA also fails to show any prejudice from the re-admission of the MRO Case testimony and documents. In its Application for Rehearing, the OCEA parties failed to identify a single fact established in the MRO Case they were not allowed to contest, a single witness they were unable to cross-examine, a single document they could not examine and challenge, or a single aspect of the ESP for which they did not have notice. Nor could they, since nearly all

OCEA parties litigated the Companies' most recent proposed MRO, which involved many nearly-identical issues. (*See* Companies' Memo. Contra Application for Interlocutory Appeal dated Apr. 5, 2010, pp. 2-4 (listing issues).) OCEA was not unfairly disadvantaged by the admission of the MRO case record, especially where nearly all OCEA parties helped create it.

Instead of pointing to specific prejudice, OCEA alleges: (i) the Companies rely solely on the MRO Record—rather than on their filings in this case—to support their proposal for the supply and pricing of generation service under the ESP; and (ii) a portion of the Companies' burden of proof in this proceeding thus has been impermissibly eliminated. (*See* Rehearing App., p. 7.) Neither of these propositions are true.

First, OCEA ignores the plain substance of the ESP Application. Contrary to OCEA's assertion, the Companies detail the competitive bid process for SSO generation service in their ESP filings, which reflect:

- a description of the auction process, bidding rules and a proposed bidding schedule [Stip. dated Mar. 23, 2010, pp. 5-8; Attachment A to Stip.];
- a description of the load to be procured [*id.* at 6];
- the requirement that winning bidders execute an SSO Supply Agreement [*id.* at 7];
- the Commission's right to reject auction results within 48 hours of the auction [*id.*];
- details regarding supply of generation service to PIPP customers [*id.* at 7-8];
- that there is no minimum stay for residential and small commercial non-aggregation customers [*id.* at 8];
- that there are no standby charges and no rate stabilization charges [*id.* at 8-9]; and
- a description of the Generation Service Uncollectible Rider [*id.* at 11].

In his pre-filed testimony, the Companies' witness William Ridmann also elaborated on these provisions and described the negotiation process that led to them. (*See* Company Ex. 4 (Riddman Dir.), pp. 3-9.) In rushing to assert that the Application and related materials do not

reflect a proposed plan for generation service, OCEA fails to account for the actual contents of the Companies' filings in this case.

Moreover, OCEA utterly fails to explain how the Companies' burden of proof was eliminated or reduced. In this proceeding, the Companies must prove that the proposed ESP is "more favorable in the aggregate as compared to the expected results" of its MRO, is "just and reasonable" and is consistent with state policy. *See* R.C. 4929.02(A)-(N), 4928.143(C)(1), O.A.C. 4901:1-35-06(A).

The Companies still must meet this burden. In the April 6 Entry, the Commission did not find that any fact from the MRO Case is conclusive for this proceeding, much less one that would reduce the Companies' burden. The April 6 Entry did not decide that the proposed ESP is more favorable in the aggregate, is just and reasonable, or is consistent with state policy. Indeed, by taking administrative notice of the MRO Case record, the Commission did not decide ***anything substantive at all***. Rather, by re-admitting that record, the Commission merely allowed the Companies to meet their unmodified burden of proof using testimony and documents from the MRO Case. *See* Apr. 6, 2010 Entry, ¶ 6. Whether that evidence (along with that presented in the current proceeding) is sufficient to meet the burden remains for the Commission to decide.

The cases cited by OCEA do not support its position. In *Canton Storage and Transfer Co. v. Pub. Util. Comm.* (1995), 72 Ohio St. 3d 1, twenty-two shipping carriers applied for certificates of public convenience and necessity, with most carriers either filing testimony from one supporting witness or not filing testimony at all. *Id.* at 6. The Commission, allowing the carriers to rely on testimony filed by other carriers, granted the certificates. *Id.* at 6. On appeal, the Court reversed, noting its long-standing rule that a carrier seeking a certificate of public convenience and necessity must file testimony from at least two witnesses claiming a need for

the carrier's services. *Id.* at 6, 7. By permitting carriers to bootstrap their claims onto the testimony presented by other parties in other proceedings, the Commission eliminated a portion of each carrier's burden of proof. *Id.* at 8-9.

Canton has no bearing here. There, the applicants' burdens of proof were plainly reduced: instead of having to prove the direct support of at least two witnesses, some carriers were allowed to proceed with one or no supporting witnesses. *Id.* Moreover, the Commission never expressly took administrative notice of the supporting testimony, apparently denying other parties the chance to challenge it. *Id.* at 8. And even then, there were serious questions about the credibility of that testimony as applied to other carriers; several of the supporting witnesses testified that they did not support other carriers' applications. *Id.* at 9 ("[T]he shipper witnesses did not intend to support a class action type of application."). By taking administrative notice of the other carriers' testimony, the Commission allowed the carriers to manufacture a record of support that did not otherwise exist.

The instant case could not be more different. Here, the Companies rely on portions of testimony and documents that they presented and offered into the record of the MRO Case just four months ago. The OCEA parties had the opportunity to participate in the MRO Case and challenge that evidence, whose credibility is not questioned by OCEA. (*See* pp. 4-5, *supra.*) And even with re-admission of the MRO Case record, the Companies' burden of proof is unchanged.

OCEA's citation of *Motor Serv. Co., Inc. v. Pub. Util. Comm.* (1974), 39 Ohio St. 2d 5, also fails. There, Transit Homes sought a certificate to expand its authority to transport mobile homes. *Id.* at 9. In a prior proceeding involving another carrier, a challenging party was prevented from cross-examining witnesses regarding Transit Homes' application. *Id.* at 12. But

when the Commission subsequently adopted the prior testimony into the Transit Homes proceeding, it impermissibly allowed Transit Homes to rely on another party's record and left the challenging party without a means to question it. *Id.* at 12. Here, however, the only record the Companies rely on is the one they created, and OCEA had notice and an opportunity to explain and rebut it.[2]

Where parties challenging administrative notice had an opportunity to explain and rebut the evidence or fact in question, or where those parties are not prejudiced, administrative notice is proper. *See, e.g., Ohio Edison Co. v. Pub. Util. Comm.* (1992), 63 Ohio St. 3d 555, 560 (affirming administrative notice of utility's stock price, where no showing of prejudice); *Allen*, 40 Ohio St. 3d at 186 (affirming administrative notice of prior proceedings, where appellants were parties to that proceeding); *Cincinnati Bell Tel. Co. v. Pub. Util. Comm.* (1984), 12 Ohio St. 3d 280, 285 (affirming administrative notice of industry standard reflected in Federal Communications Commission order pertaining to utility's test year, where no prejudice to utility); *County Commissioners' Assoc.*, 63 Ohio St. 2d at 247 (affirming administrative notice of separate investigative proceeding, where challenging parties also were party to that proceeding); *see also City of Canton v. Pub. Util. Comm.* (1980), 63 Ohio St. 2d 76, 80 n. 1 (affirming

[2] In a footnote, OCEA also cites *Everhart v. McIntosh* (2007), 115 Ohio St. 3d 195, for the proposition that trial courts cannot take judicial notice of their own proceedings in other cases. (Mot., p. 6 n. 20.) But the Court did not even apply that proposition in *Everhart*. In fact, the Court itself took judicial notice of a lower court's order in a separate case. *Id.* at 197. Moreover, the concern with judicial notice arises because prior court proceedings and related authorities generally are not moved and admitted into evidence in the subsequent case. *See Schulte v. Johnson* (1922), 106 Ohio St. 359, syll. 3 ("Courts of general jurisdiction do not take judicial notice of municipal ordinances, and the litigant relying upon such ordinance must plead it, and offer it in evidence as other evidential matters."); *D&B Immobilization v. Dues*, 122 Ohio App. 3d 50, 52 (8th Dist. Ct. App. 1997) (reversing *sua sponte* judicial notice of prior case that was never admitted into record); *In re: Young*, No. 1-79-50, 1980 Ohio App. LEXIS 11244, *10 (3d Dist. Ct. App. Feb. 5, 1980) (holding that lower court may have considered evidence from earlier hearing had it been admitted into evidence in later hearing, but could not take judicial notice of it). But here, the Commission did not merely take administrative notice of the MRO Case record. Rather, it formally re-admitted the testimony and documents from that proceeding into the instant case, allowing all parties the opportunity to examine and challenge them. Apr. 6, 2010 Entry, ¶ 6 ("All testimony and exhibits which were admitted into evidence in Case No. 09-906-EL-SSO shall be admitted into the evidentiary record of this proceeding."). The reason for the Court's concern in *Everhart* does not exist here.

administrative notice, where contracts from prior litigation were admitted into evidence of subsequent proceeding).

The OCEA parties had the opportunity to challenge evidence presented in the MRO Case. Further, they have had the opportunity to rebut any testimony from that case by their participation in the instant proceeding. Simply put, they are not prejudiced by the re-admission of the MRO Case record here. Consequently, their application should be denied.

B. The Commission Properly Granted The Companies' Motion For Waivers.

1. The Commission properly waived certain filing requirements in light of its administrative notice of the MRO Case record.

OCEA also challenges the Commission's approval of waivers of filing requirements in Rules 4901:1-35-03(C)(6), (C)(7), (C)(8) and (G). *See* Apr. 6 Entry, pp. 4-5. But because it attacks this decision based on the Commission's administrative notice of the MRO Case record, and because that notice was proper, OCEA's second challenge fails as well. (*See* pp. 3-10, *supra.*)

OCEA also launches a blanket assault on those waivers because, in its view, R.C. 4928.143 requires a "full review of information" over a 275-day time period. (Reh'g App., p. 10.) This is nonsensical. Nothing in R.C. 4938.143 requires a "review of information" lasting 275 days, and OCEA unsurprisingly cites no authority for this proposition. Nor does the statute prescribe an amount of time parties must have to conduct discovery or otherwise "review information" prior to a hearing. Rather, R.C. 4928.143 requires only that the Commission issue a dispositive order within 275 days of the filing of an ESP application. R.C. 4928.143(C)(1). Here, because the instant proceeding involves many of the issues litigated just four months ago in the MRO Case, the procedural schedule is appropriate. (*See* Companies' Memo. Contra Joint Interlocutory Appeal dated Apr. 5, 2010, No. 10-388-EL-SSO, pp. 2-4.) And in fact, to the

extent this proceeding incorporates evidence presented during the MRO Case, OCEA had 118 days between the end of the MRO Case hearings and the commencement of the ESP hearings to review it. The Commission properly granted the waivers at issue.[3]

2. There was "good cause" for the Commission to approve the waiver requests.

OCEA also argues that there was no "good cause" supporting the individual waiver requests at issue. (*See* Reh'g App., pp. 11-13.) Once again, OCEA's argument is long on conclusory allegation and short on substance. It identifies no specific instance in which it lacked data necessary to review the Companies' ESP Application, no prejudice resulting from the waivers, and no reason why it could not obtain the information it sought from the Companies in discovery. Moreover, as discussed below, there is "good cause" for those waivers. As the Commission found—and as the OCEA parties well know—the information contemplated by the filing requirements at issue already was provided in the MRO Case filings. *See* Apr. 6 Entry, ¶ 10 (granting waivers "in light of the [prior MRO] process and information provided in other proceedings and the fact that the Commission has taken administrative notice of the extensive record in the MRO proceeding"). There is no reason why that information must be recited for a second time, and the Commission properly granted waivers of Rule 4901:1-35-03(C)(6), (C)(7),

[3] OCEA also alleges that in granting the waivers, the Commission failed to consider whether the data at issue was "necessary for an effective and efficient investigation," which according to OCEA is the proper "standard of review" for such requests. (Reh'g App., pp. 9-10.) This challenge also fails for at least three reasons. First, OCEA's purported "standard of review" appears nowhere in the Commission's rules, which instead provide that waiver requests be granted for "good cause shown." Rule 4901:1-35-02(B). Second, it is clear from the face of the April 6 Entry that the Commission ***did*** consider whether the data at issue was needed for an "effective and efficient review." The Commission, after explicitly noting the "effective and efficient" language, reasonably determined that given the similarities between the MRO Case and the instant proceeding, the data was not necessary for a complete review. *See* Apr. 6 Entry, ¶¶ 9-12. Third, even in the *In re Aqua* entry cited by OCEA, the Commission granted certain waivers in part because the parties were free to issue data requests seeking the information at issue. *See In re Application of Aqua Ohio, Inc. for Authority to Increase its Rates and Charges in its Masury Division*, No. 09-560-WW-AIR, Entry dated July 29, 2009, ¶¶ 6-7. Here, the OCEA parties had the same opportunity.

(C)(8) and (G). *See* Rule 4901:1-35-02(B) (permitting waiver of SSO filing requirements for "good cause").

(a) Waiver of Rule 4901:1-35-03(C)(6) and (C)(7)

Rule 4901:1-35-03(C)(6) requires that a utility describe how its proposed ESP implements governmental aggregation programs and the requirements of R.C. 4928.20(I), (J) and (K). *See* R.C. 4928.20(I) (governmental aggregation customers responsible only for portion of surcharge proportionate to benefits), (J) (allowing governmental aggregator to opt out of stand-by service), (K) (requiring consideration of non-bypassable generation charges on large-scale governmental aggregation). Rule 4901:1-35-03(C)(7), which more specifically addresses R.C. 4928.20(K), requires a "description of the effect on large-scale governmental aggregation of any unavoidable generation charge."

This information appears throughout the Companies' MRO Case materials. Specifically, in its MRO Case Application, the Companies explained that "[b]ecause the proposed MRO contains no phase-in or stand-by charge, R.C. 4928.20(I) and (J) do not apply." (MRO Case App., p. 37.) Company MRO witness Kevin Warvell testified that "the MRO will assist governmental aggregation by establishing a fixed price generation tariff in advance of delivery, which should give governmental aggregation groups a better opportunity to lock in lower pricing for longer periods of time for their representative groups." (Company Ex. 1 (Warvell Dir.), p. 26.) And this continues to be true in the ESP proceeding because, under the proposed ESP, "there are no minimum stay provisions, minimum default service charges, standby charges, or shopping credit caps. As a result, governmental aggregation and shopping will continue to be supported." (Company Ex. 4 (Ridmann Dir.), p. 13.) In light of this record, there was simply nothing to add. OCEA identified no additional information it required, and the Commission properly waived Rule 4901:1-35-03(C)(6).

The same is true for Rule 4901:1-35-03(C)(7). Specifically, OCEA argues that the Companies failed to describe the effect of the non-bypassability of the proposed Generation Cost Reconciliation Rider ("Rider GCR"). (*See* Reh'g App., pp. 12-13.) Under the proposed ESP, Rider GCR is typically ***bypassable*** for customers taking retail electric generation service from a Competitive Retail Electric Service ("CRES") provider, except under certain specified circumstances. (Stip., p. 11.) And to the extent Rider GCR may become non-bypassable for certain customers, the MRO Case record shows why. For example, the Companies are obligated to provide SSO service to all customers as the provider of last resort, and because both shopping and non-shopping customers benefit from having this default service, all of those customers should pay for it. (MRO Case Tr. Vol. IV, pp. 554:16-555:5 (Fanelli Cross).) Moreover, shopping customers benefit from the competitive bid process (and the collection of costs associated with that process through Rider GCR) because it sets a competitively procured price-to-compare, and not surprisingly, shopping has increased while the Rider has been in effect. (*Id.*; MRO Case Tr. Vol. III, p. 420:1-24 (Frye Cross).) The non-bypassability of Rider GCR also ensures that the Companies remain revenue neutral in the provision of SSO service. (MRO Tr. Vol. III, p. 449:16-20 (Strom Cross); Tr. Vol. IV, pp. 473:21-474:13 (Baron Cross).) Because the MRO Case record supplies the information required in Rule 4901:1-35-03(C)(7), the Commission properly waived that requirement.

(b) Waiver of Rule 4901:1-35-03(C)(8)

Rule 4901:1-35-03(C)(8) requires utilities to show how a proposed ESP is consistent with the state policies outlined in R.C. 4928.02. Although the Companies requested a waiver of this provision, much of this information already is contained in the ESP filings. For example, the ESP Application describes in detail the proposed competitive bid process, which will ensure the "availability to consumers of adequate, reliable, safe, efficient, nondiscriminatory, and

reasonably priced retail electric service." *See* R.C. 4928.02(A). It also describes the Companies' $3 million contribution to fund economic development and job retention activities in their service territory and to provide support for automakers. *See* R.C. 4928.02(N) (policy to "[f]acilitate the state's competitiveness in the global economy"). This information is supplemented by the MRO Case record, which further demonstrates how the Companies' proposal meets the state policies enumerated in R.C. 4928.02. (*See* MRO Case App., pp. 38-40 (describing how proposal advances state policies); Companies' Post-Hearing Br., pp. 37-38 (same).) There was good cause for waiver of this requirement.

(c) Waiver of Rule 4901:1-35-03(G)

Rule 4901:1-35-03(G) requires a utility to provide workpapers supporting its ESP application and related materials. Here, OCEA complains that the Companies withheld workpapers as part of a "strategy of avoiding scrutiny," in which the Commission, OCEA implies, is complicit. (Reh'g App., p. 13.) This is nonsense. The Companies submitted over 130 pages of supporting schedules and workpapers with its ESP Application. (*See* ESP App. (Attachments A, B, C, proposed tariff sheets and supporting schedules).) Moreover, the OCEA parties were free to request whatever workpapers they deemed necessary for their review, and OCEA fails to identify a single such document they were not provided. Because the Commission properly waived the substantive requirements discussed above, its waiver of the need to provide workpapers for those items also was proper.

III. CONCLUSION

For the above reasons, the Companies respectfully request that the Commission deny OCEA's Application for Rehearing.

DATED: April 29, 2010

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Memorandum Contra Application for Rehearing by the Office of the Ohio Consumers' Counsel, et al. ("Ohio Consumer and Environmental Advocates") was delivered to the following persons by e-mail this 29th day of April, 2010:

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