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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 a New Rider and Revision of an Existing Rider.	)	**Case No. 10-176-EL-ATA**

APPLICATION FOR REHEARING OF OHIO EDISON COMPANY, THE CLEVELAND ELECTRIC ILLUMINATING COMPANY, AND THE TOLEDO EDISON COMPANY

Pursuant to R.C. 4903.10 and Ohio Administrative Code Rule 4901-1-35, Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company (collectively, the "Companies") hereby file their Application for Rehearing of the Second Entry on Rehearing issued in the above-captioned case on April 15, 2010 (the "April 15 Entry"). As demonstrated in the attached Memorandum in Support, the Entry on Rehearing is unreasonable and unlawful for the following reasons:

1. The April 15 Entry is unreasonable and unlawful because it requires the Companies, without adequate explanation, to extend all-electric credits[1] to tens of thousands of new customers who would not have qualified for the credit under the Stipulations adopted in prior cases, and to extend those credits both to the new and existing customers indefinitely. This results in approximately $80 million in discounts to all-electric customers every year that the Companies are not

[1] "All-electric" credits are those credits listed in the Companies' Application in this proceeding.

collecting. Although the Entry authorized the Companies to defer incurred costs equivalent in amount to these discounts, it imposes substantial harm on the Companies by denying them carrying charges on those deferred amounts. In so doing, the April 15 Entry dramatically changes the recovery contemplated by the Stipulations that the Commission approved in Case Nos. 05-1125-EL-ATA (the Rate Certainty Plan "RCP" Case), 07-551-EL-AIR (the Companies' Distribution Rate Case) and 08-935-EL-SSO (the Companies' Electric Security Plan ("ESP") Case). While the Companies with this filing are not challenging the expansion of the credit to new customers, nor even its indefinite extension to allow further investigation of an appropriate long-term solution, the failure to provide the Companies with authorization to accrue their carrying charges during this time is both contrary to Commission precedent and fundamentally unfair.

2. The April 15 Entry is also unreasonable and unlawful because it misstates the scope of the Commission's jurisdiction in a way that is inconsistent with its exclusive jurisdiction over matters pertaining to a utility's rates and marketing practices. The April 15 Entry held that the Commission lacked jurisdiction to review allegations by the Office of the Ohio Consumers' Counsel ("OCC") that the Companies made false promises and inducements to customers regarding how long certain all-electric discounts would continue. Apr. 15 Entry, ¶ 9. Because the alleged promises and inducements relate directly and unequivocally to the rates that the Companies charge, OCC's allegations fall within the Commission's exclusive jurisdiction over rates. Moreover, the Commission also has express statutory and administrative authority to investigate alleged deceptive trade

practices. OCC's allegations, and the all-electric disputes underlying them, fall within the scope of the Commission's jurisdiction. The Commission was correct to deny OCC's attempt, by virtue of its motion to clarify, to expand the scope of this case, focused as it is on forward-looking rate setting. But the Commission denied OCC's motion for the wrong reason.

For these reasons, the Commission should grant this Application for Rehearing and modify the April 15 Entry as set forth in the Companies' Application for Rehearing.

Respectfully submitted,

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MEMORANDUM IN SUPPORT OF
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OHIO EDISON COMPANY, THE CLEVELAND ELECTRIC ILLUMINATING COMPANY, AND THE TOLEDO EDISON COMPANY

I. INTRODUCTION

The Commission's Second Entry on Rehearing dated April 15, 2010 ("April 15 Entry") in this matter is unreasonable and unlawful in two ways, both of which harm the Companies. First, under the guise of temporarily "***return[ing]*** 'all-electric' residential customers to their prior rates," *see* Apr. 15 Entry, ¶ 8, the April 15 Entry instead both (1) ***extends*** these discounts to approximately 80,000 new customers who had never received those rates in the first place, and (2) requires that the discounts be made available indefinitely. The combined effect of these changes is approximately $80 million in reduced revenue annually for the Companies. The Commission authorized the Companies to defer costs associated with this $80 million revenue reduction, but, in its April 15 Entry, the Commission denied the Companies their carrying charges on this deferred amount, thereby permanently depriving the Companies of recovery on that aspect of the cost related to providing the credits. While the Companies with this filing are not challenging the Commission's expansion of the scope or the term of the all-electric credits, the Companies do object to the lack of carrying charges.

Second, the April 15 Entry incorrectly states the scope of the Commission's jurisdiction in a way that is inconsistent with the Commission's authority over rate-related matters. The Office of the Ohio Consumers' Counsel ("OCC") has alleged that the Companies made false promises to customers regarding the duration of the "all-electric" rate discounts. Although these alleged promises relate directly to the rates that the Companies charge their customers, in the April 15 Entry, the Commission found that such promises fall "outside of the express terms of [the Companies'] tariffs," thus rendering OCC's allegations "best suited for a court of general jurisdiction." Apr. 15 Entry, ¶ 9. Moreover, the Commission reaches that result despite the fact that statutes and administrative rules expressly provide the Commission with jurisdiction over allegations, such as those OCC advances here, of "unreasonable sales practices," R.C. 4928.02(I), and "unfair and deceptive acts or practices," OAC 4901:1-10-24(D). While the Commission was correct ultimately in determining not to hear OCC's complaints in this case, the Commission's decision was based on an erroneous rationale that may adversely affect the Commission's jurisdiction in other matters.

On both of these fronts, the Commission's April 15 Entry is unreasonable and unlawful. The Companies urge the Commission to grant this Application for Rehearing and correct its previously-entered April 15 Entry.

II. STATEMENT OF FACTS

The all-electric rates at issue in this proceeding have a long history before the Commission. The Commission first approved an "all-electric rate" tariff for The Cleveland Electric Illuminating Company ("CEI") in November 1973, and CEI began offering it to customers the following year. (*See* "Residential Schedule, Original Sheet No. 18," eff. Jan. 22, 1974, attached as Ex. A.) In subsequent years, the Commission approved other similar discounted rates, including an "optional space heating rate" and an "optional load management

rate."[2] (*See* "Residential Schedule, 4th Revised Sheet No. 18," eff. Dec. 8, 1977, Ex. B; "Residential Schedule, 3rd Revised Sheet No. 86 & Original Sheet No. 86.1," eff. Mar. 12, 1985, Ex. C.) The Commission also approved similar discounted rates for Ohio Edison Company ("Ohio Edison") beginning in January 1984. (*See* "Residential Service Optional Controlled Service Riders Original Sheet No. 14," eff. Jan. 24, 1984, Ex. D.) Although additional rates were approved, and although the amounts and terms of the rates changed over time, the Companies continued to offer them to eligible customers throughout the 1970s, 1980s, 1990s and early 2000s.

This changed in 2006. In the Companies' Rate Certainty Plan ("RCP") proceeding (Case No. 05-1125-EL-ATA), the Companies and other parties (including OCC) agreed to support a Stipulation in which they recommended, among other things, that the all-electric rates "be grandfathered such that no new customers or premises will be permitted [to] take electric service pursuant to such rates after approval of the RCP by the PUCO." (Stip. dated Sept. 7, 2005, ¶ 13 (attached as Ex. 1 to Application dated Sept. 9, 2005; Supplemental Stip. dated Nov. 4, 2005.).) The proposed date was later changed to April 1, 2006. (Supplemental Stip. dated Nov. 4, 2005, ¶ 4.) Ultimately, the Commission approved the RCP, including the parties' agreement that the all-electric rates no longer be available to customers who moved into an all-electric home or otherwise became eligible for all-electric rates after a certain date ("successor customers"), and it subsequently established January 1, 2007 as that cut-off date. *See* Entry on Reh'g dated Mar. 1, 2006, ¶ 13; Op. and Order dated Jan. 4, 2006; *see also* Finding and Order dated Mar. 3, 2010, No. 10-176-EL-ATA, ¶ 4. Customers receiving all-electric rates as of January 1, 2007 (the

[2] The rate schedules at issue in this proceeding are listed in the Companies' Residential Generation Credit Riders, which have been filed in the docket. For ease of reference in this Application for Rehearing, the Companies refer collectively to those rates as "all-electric rates."

"grandfathered" customers), however, continued to receive them after that date so long as the rate remained in effect and the customer continued to reside in the home and comply with the eligibility requirements under the terms of the all-electric tariffs.

The amount of the all-electric discount changed in early 2009. On January 21, 2009, in the Companies' distribution rate case (No. 07-551-EL-AIR), the Commission approved the consolidation of the Companies' 32 different residential distribution rate schedules into a single schedule for each of the Companies. *See* Op. and Order dated Jan. 21, 2009, pp. 23-24. In doing so, the Commission approved the elimination of the Companies' all-electric distribution rates, which were replaced by a residential distribution credit. *See* Finding and Order dated Mar. 3, 2010, ¶ 5. On March 25, 2009, in the Companies' electric security plan ("ESP") proceeding (No. 08-935-EL-SSO), the Commission approved a corresponding consolidation of the Companies' residential generation rate schedules, which resulted in the elimination of their all-electric generation rates, which were replaced with a credit for all-electric customers as a component of the Companies' Economic Development Riders ("Riders EDR"). *See* Second Op. and Order dated Mar. 25, 2009; Finding and Order dated Mar. 3, 2010, ¶ 6. Notably, OCC was a party to the Stipulation that recommended this change. (*See* Supplemental Stip. dated Feb. 26, 2009, No. 08-935-EL-SSO.) As a result of the Commission's orders in these two proceedings, the Companies' all-electric rates were discontinued for distribution service in January 2009 and for generation service in May 2009, and the new credits were established that remain in effect today.

The instant proceeding arose on February 12, 2010. The Companies, acting in response to public concerns about the impact of the reduction to the all-electric discount, filed an

application to establish a new rider to provide an additional credit for all-electric customers. The application proposed a gradual phase out of the new all-electric credit.

In its Finding and Order dated March 3, 2010, the Commission partially agreed, authorizing the Companies to implement a new all-electric rider that would provide bill impacts for all-electric customers commensurate with those that such customers would have received as of December 31, 2008. *See* Finding and Order dated Mar. 3, 2010, ¶ 10. The Commission also authorized the Companies to defer "incurred purchased power costs" associated with the amount of the new credit. *See id.* at ¶ 11; Third Entry on Reh'g dated Apr. 28, 2010, ¶ 7 (clarifying original order). The Commission specified that this was "not a long-term solution," but rather an interim solution to restore the status quo and provide the Staff with 90 days to investigate more permanent options. Finding and Order dated Mar. 3, 2010, ¶ 12; *see* Apr. 15 Entry, ¶ 8 (denying rehearing where OCC's proposed change "would not return 'all-electric' residential customers to their prior rates").

Just one month later, the Commission—under the guise of "clarifying" the interim plan approved in its original March 3 Finding and Order—indefinitely extended the duration of the new credit and fundamentally enlarged its scope. Specifically, in its April 15 Entry, the Commission: (i) eliminated the 90-day timetable for Staff review, noting for the first time that the expanded rates would apply "at a minimum . . . through the next winter hearing season"; and (ii) ordered that the all-electric credit apply not only to the original "grandfathered" customers, who received those rates as of December 31, 2008, but also to "any other residential customer who is the successor" to such customer—that is, customers who would ***not*** otherwise be entitled to those rates according to the parties' Stipulation or the Commission's Opinion and Order in Case No. 05-1125-EL-ATA. *See* Apr. 15 Entry, ¶ 7. Thus, in one "clarification" paragraph, and

with no evident rationale or analysis of the implications, the Commission expanded the all-electric credits to an additional 80,000 customers (resulting in an additional annual reduction in cash flow of approximately $25 million to the Companies), and extended indefinitely the period during which the both the grandfathered customers and the new customers would receive these credits. The net result is a reduction of approximately $80 million in revenues for the Companies every year. Although the Companies are authorized to defer the "incurred purchased power costs" associated with both the "grandfathered" and the additional "successor" customers, *see* Third Entry on Reh'g dated Apr. 28, 2010, ¶ 7, the Commission failed in its April 15 Entry to authorize any carrying charges for these deferrals, permanently depriving the Companies of an important aspect of their cost recovery.

On a separate issue, the April 15 Entry also misstated the scope of the Commission's jurisdiction. In connection with the all-electric rate issues, OCC had requested the Commission to investigate allegations that the Companies made certain "promises and commitments" to certain customers regarding the nature and terms of those rates. (*See* Mot. for Declaration of an Emergency dated Feb. 25, 2010, pp. 10-15; Request for Clarification and, in the Alternative, App. for Reh'g dated Mar. 8, 2010, pp. 6-9.) The Companies opposed OCC's motion and argued that, although the Commission had jurisdiction to hear the complaints attempted to be raised by OCC, the Commission should decline to hear those complaints in this case, given the forward-looking focus of the proceeding. (*See* Companies' Memo. Contra App. for Reh'g dated Mar. 18, 2010, pp. 3-4.) In the April 15, 2010 Entry, the Commission agreed not to hear OCC's complaints but did so by holding that it lacks jurisdiction to hear disputes regarding alleged "promises" or "inducements" made by the Companies over the past forty years regarding the all-electric rates. Apr. 15 Entry, ¶ 9.

As set forth below, both in denying the Companies any carrying charges for the deferrals, and in expressly holding that it did not have jurisdiction over claims related to alleged promises to all-electric customers about the rates they pay, the April 15 Entry is both unreasonable and unlawful. *See* R.C. 4903.10(B) (application for rehearing is to be granted where order is "unreasonable or unlawful"). The Companies' Application for Rehearing should be granted.

III. ARGUMENT

A. The Commission's Failure To Authorize The Companies To Accrue Carrying Charges On The Deferrals Of Costs Associated With The All-Electric Discounts Is Unreasonable And Unlawful.

The April 15 Entry dramatically changes both the scope and the duration of the all-electric credits that the Companies are required to provide to certain customers. Although the Commission grants deferrals equivalent to the amount of the discounts these changes impose, it denies the Companies carrying charges on these deferrals. The failure to provide carrying charges is unlawful and unreasonable because: (i) the Commission failed to explain the reason for dramatically expanding the scope of the credits (and thus the magnitude of harm caused by denying carrying charges), an expansion that is directly contrary to prior Commission Orders regarding the all-electric rates, and (ii) the Commission's approach here is unreasonably inconsistent with the Commission's decisions authorizing carrying charges for the Companies in their ESP and previous cases.

1. The Commission failed to explain its reasons for failing to authorize carrying charges, which unreasonably exposes the Companies to financial harm.

The Ohio Supreme Court has unequivocally held that the Commission may not deviate from the terms of its own previously-entered orders unless the Commission provides reasons explaining that deviation:

> When the commission has made a lawful order, it is bound by certain institutional constraints to justify that change before such order may be changed or modified. We have previously articulated this concern in *Cleveland Elec. Illuminating Co., supra*, at 431[42 Ohio St. 2d 403 (1975)], as follows:
>
> Although the Commission should be willing to change its position when the need therefore is clear and it is shown that prior decisions are in error, it should also respect its own precedents in its decisions to assure the predictability which is essential in all areas of the law, including administrative law.

Office of Consumers' Counsel v. Pub. Util. Comm. (1984), 10 Ohio St. 3d 49, 50-51 (citations omitted).

The April 15 Entry does not "respect [the Commission's] own precedents" and instead undermines "the predictability which is essential in all areas of the law, including administrative law." As part of the Companies' RCP proceeding, the Commission approved the parties' stipulated agreement that no new customers would be offered all-electric rates, even if they subsequently purchased an all-electric home, after a date certain. *See* Entry on Reh'g dated Mar. 1, 2006, ¶ 13; Op. and Order dated Jan. 4, 2006. Specifically, only customers receiving all-electric rates as of January 1, 2007 ("grandfathered customers") would be offered those rates after that date, and only as long as the rate remained in effect and the grandfathered customers continued to live in their all-electric homes and retained eligibility for those rates. "Successor customers" who otherwise formally would have been eligible for those rates after January 1, 2007, by moving into an all-electric home, would not be offered the rate. Thus, the Commission established that there would be a limited and ever-diminishing (as all-electric home owners sold their homes) pool of customers entitled to the all-electric discounts. That determination, and the January 2007 cut-off, has been the settled Commission position for over three years.

Two years later, as part of the Companies' most recent distribution rate case and ESP proceeding, the Commission provided that all-electric rates would be discontinued to ***all***

customers—*i.e.*, including the remaining grandfathered customers—in 2009, and replaced by new all-electric credits at reduced discount levels. *See* Second Op. and Order dated Mar. 25, 2009, No. 08-935-EL-SSO; Finding and Order dated Mar. 3, 2010, No. 08-935-EL-SSO, ¶ 6; Opinion and Order dated Jan. 21, 2009, No. 07-551-EL-AIR, pp. 23-24. Pursuant to these orders, all-electric rates were completely phased out by May 2009, having been replaced by such new all-electric credits.

After former all-electric customers began complaining, the Companies initiated this proceeding to address them. (*See* App. dated Feb. 12, 2010, No. 10-176-EL-ATA.) The original purpose of this proceeding was to partially restore all-electric bill impacts for those customers who previously received them and then gradually phase out those new credits. To that end, the Commission ordered the Companies to file tariffs that would provide bill impacts commensurate with rate levels of December 31, 2008. *See* Finding and Order dated Mar. 3, 2010, ¶ 10; *see also* Apr. 15 Entry, ¶ 8 (rejecting OCC proposal because it "would not return 'all-electric' residential customers to their prior rates and, thus, would undermine the rate relief provided to 'all-electric' residential customers by the Finding and Order").

Its April 15 Entry, however, the Commission dramatically expanded the scope of those who would receive the all-electric discount, in two ways. First, by suggesting, for the first time, that the discount will extend "at a minimum" through the next winter heating season, the Commission has indefinitely extended the duration of those discounts, without explaining why that extension is reasonable or necessary. Apr. 15 Entry, ¶ 7; *see* Finding and Order dated Mar. 3, 2010, ¶ 12 (initially indicating that restoration of credits was "not a long-term solution"), ¶ 13 (ordering Staff to file report within 90 days). Second, although the Commission originally ordered that the Companies provide bill impacts to all-electric customers commensurate with

what they were on December 31, 2008, in its April 15 Entry, the Commission holds (without explanation) that those rates be available to "successor customers"—*i.e.*, customers who ***did not even receive the rates in December 2008.*** *Id.* The Commission failed, however, to authorize carrying charges either for (i) the total deferrals associated with the (now indefinitely available) discounts; or (ii) for deferrals associated with the new customers that the Entry makes eligible for the all-electric discounts.

The impact on the Companies of these expansions—and the Commission's failure to authorize carrying charges—is significant. Total deferrals associated with the all-electric discount will total approximately $80 million annually, and now those costs will be incurred indefinitely. Moreover, approximately $25 million of this total is attributable to the nearly 80,000 new "successor" customers who now qualify for the discount. Because carrying charges represent the cost imposed on the utility by the delay between when costs are incurred and when those costs are recovered, the Commission's failure to authorize carrying charges here harms the Companies by (i) extending the time period over which the Companies will endure these delays (and costs); and (ii) inflating the size of the costs by adding 80,000 new customers (and $25 million annually) to the original deferrals.

The Commission offers no reason for expanding the scope of those who will receive all-electric discount, much less for why it did not authorize carrying charges to account for those expansions. Its failure to provide any explanation is particularly surprising in that the Commission routinely authorizes recovery of carrying charges associated with deferred amounts. *See, e.g.*, *In re Fuel Adjustment Clauses for Columbus So. Power Co. and Ohio Power Co.*, Nos. 09-872-EL-FAC, *et al.*, Entry on Reh'g dated Mar. 24, 2010, ¶¶ 21-22 (authorizing recovery of carrying charges); *In re Application of Columbus So. Power Co. and Ohio Power Co. to Adjust*

Their Economic Development Cost Recovery Rider Pursuant To Rule 4901:1-38-08(A)(5), No. 10-154-EL-RDR, Finding and Order dated Mar. 24, 2010, ¶¶ 13-15 (same); *In re Application of Columbus So. Power Co. for Approval of an Electric Security Plan*, Nos. 08-917-EL-SSO, *et al.*, Entry on Reh'g dated July 23, 2009, ¶¶ 26, 32-38 (same); *In re Application of Duke Energy Ohio for Authority to Change Accounting Methods*, Nos. 08-709-EL-AAM, *et al.*, Finding and Order dated Jan. 14, 2009, ¶¶ 6-8 (same). Given the magnitude of the deferrals at issue here—approximately $80 million per year—as well as their now indefinite duration, the Commission's failure to offer any explanation for these fundamental changes to the availability of all-electric discounts renders the April 15 Entry unreasonable and unlawful.

2. The Companies sought and received recovery of carrying charges in their ESP and other cases.

The Companies are also entitled to carrying charges here because they received recovery of such charges in their ESP proceeding. Specifically, the Commission authorized carrying charges for deferrals associated with post date-certain distribution deferrals authorized in the Companies' RCP, line extension deferrals and transition tax deferrals. *See* Opinion and Order dated Mar. 25, 2009, No. 08-935-EL-SSO; *see also* Finding and Order dated Aug. 19, 2009, Nos. 09-641-EL-ATA, *et al.*, ¶¶ 2-4, 10; Opinion and Order dated Jan. 4, 2006 (approving Stipulation dated Sept. 9, 2005, Case No. 05-1125-EL-ATA et al., pp. 8-11). If the indefinite, expanded all-electric discounts that were ordered here had been included in that case, rather than arising shortly thereafter as a result of the public response to that case, the Companies certainly would have sought and presumably received carrying charges for the deferred costs associated with them. That relief should be granted now.

The Companies do not ask the Commission to unring the bell. They do not ask the Commission to limit the all-electric discounts to those who were grandfathered as of January 1,

2007 or to limit the duration of those discounts beyond what was specified in the April 15 Entry. They do, however, ask the Commission, based on the Commission's own precedent, and as a matter of fundamental fairness, to clarify the April 15 Entry to authorize the Companies to accrue carrying charges on the $80 million in deferred costs associated with the (now indefinite) all-electric discounts.

B. The April 15 Entry Is Unreasonable And Unlawful Because It Misstates The Scope Of The Commission's Jurisdiction In A Way That Threatens To Undermine The Commission's Exclusive Jurisdiction.

In two filings, OCC requested that the Commission investigate "promises and commitments" allegedly made by the Companies to all-electric customers, purportedly in the context of "promotional practices" directed at those customers. (*See* Mot. for Declaration of an Emergency dated Feb. 25, 2010, pp. 10-15; Request for Clarification and, in the Alternative, App. for Reh'g dated Mar. 8, 2010, pp. 6-9.) In its April 15 Entry, the Commission denied this request, finding that it lacks jurisdiction over the underlying disputes by all-electric customers regarding such alleged "agreements, promises, or inducements" and effectively holding that such disputes belong in Ohio state court. *See* Apr. 15 Entry, ¶ 9.

Although the Commission properly denied OCC's request, it did so for the wrong reason. Specifically, the Commission's determination that it lacks jurisdiction is unreasonable and unlawful for three reasons. First, the Commission adopted an unlawfully narrow view of its own jurisdiction (*i.e.*, that it lacks jurisdiction over matters "outside of the express terms of [a utility's] tariffs"). *See id.* As shown below, the Commission has exclusive jurisdiction over a wide array of utility-related matters that go beyond the express terms of a tariff, including rates and rate-related disputes and a utility's marketing and advertising activities. Second, the Commission wrongly determined that complaints by all-electric customers would "solely involv[e] contract rights" over which it has no jurisdiction. *See id.* In fact, those disputes relate

to the Companies' rates, the terms under which those rates are available, and the Companies' marketing practices related to those rates, all of which fall squarely within the Commission's jurisdiction. And third, the Commission ignores the two-factor test adopted by the Supreme Court in *Allstate Ins. Co. v. Cleveland Elec. Illuminating Co.*, under which Commission has exclusive jurisdiction over the underlying disputes by all-electric customers.[3]

1. The Commission adopted an unlawfully narrow view of its own jurisdiction, which instead encompasses a wide array of rate-related disputes and a utility's marketing activities.

In its April 15 Entry, the Commission held that it lacked authority to hear disputes that involve alleged "promises or inducements" that are "outside of the express terms" of the Companies' all-electric tariffs. Apr. 15 Entry, ¶ 9. This statement—which purports to limit the Commission's jurisdiction to only those disputes involving the "express terms" of a tariff—is unduly narrow and legally wrong.

Rather, Ohio law is clear: the Commission's jurisdiction extends to a broad array of rate and service-related matters. In the Supreme Court's words, the Commission "has exclusive jurisdiction over ***various matters*** involving public utilities, ***such as rates and charges, classifications, and service . . . .***" *State ex rel. Cleveland Elec. Illuminating Co. v. Cuyahoga Cty. Court of Common Pleas* (2002), 97 Ohio St. 3d 69, 72 (granting writ of prohibition to prevent common pleas court from exercising jurisdiction over customer's claims alleging "material misrepresentations" and "deceptive practices" regarding responsibility to pay electric bill) (per curiam) (emphasis added); *see also* R.C. 4905.26 (granting Commission broad authority to hear complaint that "any rate, fare, charge [or] toll . . . is in any respect unjust,

[3] Although the Commission erred in holding that it lacks jurisdiction over all-electric complaints, it correctly declined to initiate the investigation sought by OCC. Given the need to focus the parties' (and Staff and the Commission's) energies on a long-term solution to this matter, the Commission should exercise comprehensive jurisdiction over any complaints filed by all-electric customers but should not divert precious time and resources to the duplicative, unnecessary investigation proposed by OCC.

unreasonable, unjustly discriminatory, unjustly preferential, or in violation of law . . ."); *Kazmaier Supermarket, Inc. v. Toledo Edison Co.* (1991), 61 Ohio St. 3d 147, 150-51 (noting General Assembly, by statute, established the "public policy of the state that the broad and complete control of public utilities shall be within the administrative agency, the Public Utilities Commission").

The Commission's exclusive jurisdiction is particularly broad when a dispute touches upon the rates charged by utilities. *State ex rel. Cleveland Elec. Illuminating Co. v. Cuyahoga Cty. Court of Common Pleas* (2000), 88 Ohio St. 3d 447, 450 ("There is perhaps no field of business subject to greater scrutiny and government control than that of the public utility. This is particularly true of the rates of a public utility.") (citations omitted); *Kazmaier* at 151; *see Hull v. Columbia Gas of Ohio* (2006), 110 Ohio St. 3d 96, 102 ("[T]he PUCO has always had exclusive jurisdiction to adjudicate rate disputes involving public utilities . . . ."); *State ex rel. Northern Ohio Telephone Co. v. Winter* (1970), 23 Ohio St. 2d 6, 10 ("The General Assembly has provided a comprehensive plan by which subscribers may contest the reasonableness of rates . . ., which plan does not include proceedings in the Court of Common Pleas.").

Moreover, in addition to the jurisdiction to hear complaints relating to rates, service and practices under Revised Code Section 4905.26, the General Assembly has specifically authorized the Commission's complaint jurisdiction to include contract disputes involving competitive and noncompetitive retail electric service. *See* R.C. 4928.16. This statute expressly authorizes the Commission to rescind contracts and provide restitution.

The Commission's broad jurisdiction in this area also extends to a utility's marketing and advertising activities. Specifically, both statutory law and the Commission's own rules authorize the Commission to regulate a utility's marketing activities and to punish unfair or deceptive sales

practices. Revised Code Section 4928.02(I) allows the Commission to "ensure retail electric service consumers protection against unreasonable sales practices . . . ." Similarly, Rule 4901:1-10-24(D), O.A.C., provides:

> Unfair and deceptive acts or practices. No electric utility shall commit an unfair or deceptive act or practice in connection with the promotion or provision of service, including an omission of material information.[4]

The Rule also authorizes Staff to "review and/or request modification of" such promotional materials. Rule 4901:1-10-24(C). A utility that fails to comply with Commission rules and orders is subject to civil fines, orders for corrective action, and payment of restitution or damages to affected customers. Rule 4901:1-10-30.

In asserting that its jurisdiction is somehow limited only to cases involving the "express terms" of a tariff, the Commission has adopted an unlawfully narrow view of its own jurisdiction. Rather, the Commission's jurisdiction extends to all manner of disputes regarding the Companies' rates and alleged actions in promoting their electric service, including (as demonstrated below) complaints brought by all-electric customers.

2. The Commission unreasonably and unlawfully determined that disputes by all-electric customers would "solely involve[] contract rights"; rather, those disputes pertain to rates.

Because the all-electric disputes described by OCC involve "alleged agreements, promises, or inducements" made by the Companies, the Commission found that those disputes "solely involv[e] contract rights" over which it has no jurisdiction. *See* Apr. 15 Entry, ¶ 9. But the characterization of those disputes as involving "contract rights," and the jurisdictional conclusion that follows from it, are incorrect. In fact, the essence of the disputes turns on the

[4] Because Rule 4901:1-10-24 was promulgated pursuant to R.C. 4928.06 and R.C. 4928.11, disputes that implicate the Rule fall within the Commission's jurisdiction. *See* R.C. 4928.16(A)(2) (authorizing Commission jurisdiction over complaints for violations of, among other things, R.C. 4928.06 and R.C. 4928.11).

proper ***rates*** that the Companies should charge, the term over which those ***rates*** were to be available, and Commission approval of both the ***rate*** and the term of that ***rate***. As such, these disputes fall squarely within the Commission's jurisdiction.

A principal error that the Commission made in its analysis was to rely on OCC's characterization of the issues. Under Ohio law, the Commission cannot rely on mere labels—*i.e.*, assertions that a case involves "contract rights" rather than a "rate dispute"—to assess its jurisdiction over disputes by all-electric customers. Rather, the determination of whether the Commission has jurisdiction turns on the ***substance*** of those disputes. Where the "basic claim is one that the Commission has the exclusive jurisdiction to resolve," then the Commission must hear the case, regardless whether the plaintiff has endeavored to label its claim a "contract claim." *Corrigan v. The Illuminating Co.* (2009), 122 Ohio St. 3d 265, 267 (citations omitted); *see State ex rel. Columbus So. Power Co. v. Fais* (2008), 117 Ohio St. 3d 340, 345 ("It is readily apparent that *the General Assembly has provided for Commission oversight of filed tariffs*, including the right to adjudicate complaints involving customer rates and service.") (original emphasis); *Illum. Co.*, 97 Ohio St. 69; *State ex rel. Ohio Edison Co. v. Shaker* (1994), 68 Ohio St. 3d 209, 211; *Kazmaier* at 153-54 (finding Commission jurisdiction of a case involving purported "contract" claims, where "contract involved [was] the utility rate schedule"). And in describing the characteristics of a "pure" contract case, the Supreme Court has specified that "[a] pure contract case is one having nothing to do with the utility's service or rates . . . ." *Hull v. Columbia Gas of Ohio* (2004), 110 Ohio St. 3d 96, 102.

Here, the substance of all-electric disputes put them squarely within the Commission's exclusive jurisdiction. As OCC's own papers before the Commission show, OCC seeks to challenge the ***rates*** all-electric customers were being charged during the winter of 2009-2010,

after the Commission discontinued all-electric rates. (*See* OCC Mot. for Declaration of an Emergency, dated Feb. 25, 2010, Attachment Set 1, p. 1 (noting customers' complaints of "increases in their kilowatt hour rates and overall electric bills"), p. 2 (noting customers' complaints of "increases in power bills for . . . all-electric homes").) OCC seeks (and all-electric customers already have been granted) restoration of the former all-electric ***rates***. *See* Finding and Order dated Mar. 3, 2010, ¶ 10. And although the Commission claims that these disputes arise from outside "agreements" made by the Companies, the Commission failed to consider that the subject of those alleged agreements was the ***rates*** that would be charged to those customers.[5]

This is not a contract case. In *Hull v. Columbia Gas of Ohio* (2004), 110 Ohio St. 3d 96, a customer brought a claim for breach of contract against Columbia Gas of Ohio, Inc. ("Columbia") when the utility discontinued the customer's gas marketer participation in Columbia's "Customer Choice Program" and required the customer to take gas service under Columbia's tariff rates. In response to the plaintiff's argument that a court of common pleas and not the Commission had jurisdiction over "pure contract" claims, the Court agreed but held that the Commission should nevertheless hear the claim because "[a] pure contract case is one having nothing to do with the utility's service or rates . . ." *Id.* at 102. Given that the essence of the complaint was that Columbia was charging the wrong rate—a rate authorized by the Commission—the Commission had jurisdiction to hear the case.

This case is no different. The essence of OCC's complaint is that the Companies should not have been charging the rate that they charged, even though that rate was authorized by the Commission. Unlike "a pure contract case," as defined by the *Hull* court, this case has

[5] That the Companies' rates are the central focus of all-electric disputes is confirmed by the formal all-electric complaint already pending at the Commission. *See Milenkovich v. CEI*, No. 10-195-EL-CSS, Compl., pp. 1-2 (alleging increases in bills resulting from increase in rates).

everything to do with the Companies' rates. OCC alleges that, for many years, the Companies promised that all-electric rates would be available for an indefinite period of time. (*See* OCC Mot. for Declaration of an Emergency dated Feb. 25, 2010, Attachment Set 1, p. 3 (state legislator alleging that "FirstEnergy for 40 years made promises about all-electric heating programs"), Attachment Set 3 (containing documents purportedly reflecting representations by the Companies regarding all-electric rates, dating to January 1984, October 1985, October 1999 and March 2000).)

Moreover, OCC repeatedly alleges that all-electric disputes arise from the Companies' "promotional practices" regarding all-electric rates. (*See* OCC Mot. for Declaration of an Emergency dated Feb. 25, 2010, pp. 10-11 (alleging Companies "promoted all-electric service using promises of guaranteed, separate . . . treatment" and discussing alleged "promotional practices directed at customers" and "individuals involved in developing residential housing"); OCC Request for Clarification and, in the Alternative, App. for Reh'g dated Mar. 8, 2010, p. 6 (alleging Companies' "responsibility for allegedly marketing major electricity-consuming equipment . . . using promises of continued, discounted electric rates").) The Commission has the ***express*** authority to adjudicate precisely these types of allegations. *See* R.C. 4928.02(I), Rule 4901:1-10-24(C), (D) (discussed at p. 14, *supra.*). Because the Companies' rates and marketing practices are put in issue by OCC, the Commission has jurisdiction over those disputes.

By contrast, the sole case cited by the Commission, *Marketing Research Service, Inc. v. Pub. Util. Comm.* (1987), 34 Ohio St. 3d 52, had nothing to do with a utility's rates or rate-related marketing practices. Rather, the case involved a utility's contract to install thirty-two foreign exchange lines outside of Ohio. When the utility failed to install those lines as promised,

Complainant sued at the Commission for breach of contract. *See id.* at 53. In a mere three sentences, the Court affirmed that the Commission did not have jurisdiction over cases involving "contract rights or property rights." *Id.* at 56. But unlike in the instant case, the contract in *Marketing Research* did not involve the contents of (or representations about) a tariff. *See Kazmaier* at 153-54 (finding Commission jurisdiction of a case involving purported "contract" claims, where "contract involved [was] the utility rate schedule"). Unlike OCC here, the *Marketing Research* Complainant was not complaining about new rates, demanding restoration of an old one, or even taking service from an Ohio utility.[6]

3. The Commission has jurisdiction over all-electric disputes under the *Allstate* test.

The Supreme Court recently adopted a two-part test to determine whether the Commission has exclusive jurisdiction in disputes involving utilities:

> First, is PUCO's administrative expertise required to resolve the issue in dispute? Second, does the act normally complained of constitute a practice normally authorized by the utility?
>
> If the answer to either question is in the negative, the claim is not within PUCO's exclusive jurisdiction.

Allstate Ins. Co. v. Cleveland Elec. Illuminating Co. (2008), 119 Ohio St. 3d 301, 303, quoting *Pacific Indemn. Ins. Co. v. Illumin. Co.*, 2003-Ohio-3954 (Cuyahoga Cty. Ct. App.); *see also Corrigan v. Illuminating Co.* (2009), 122 Ohio St. 3d 265, 267; *In re Pro Se Commercial Properties v. The Cleveland Elec. Illuminating Co.*, No. 07-1306-EL-CSS, Entry on Reh'g dated Nov. 5, 2008, ¶ 5 (applying *Allstate* test in upholding jurisdiction in case involving alleged

[6] Moreover, the contractual issue was not even the primary basis of the Court's decision in *Marketing Research*. Rather, the main reason the Commission did not have jurisdiction was because Complainant's claims were preempted by the Federal Communications Act of 1934 and thus properly belonged before the Federal Communications Communication. *Id.* at 53-56 (18-paragraph analysis of preemption issue). *Marketing Research* does not support the Commission's decision in the April 15 Entry.

electrical surge). Here, the answer to both of these questions is yes, and the Commission thus has exclusive jurisdiction over the OCC's alleged all-electric disputes.

(a) The Commission's expertise is necessary to resolve this case.

The Commission's administrative expertise is necessary to resolve all-electric disputes, which as demonstrated above turn squarely on the Companies' rates and marketing practices.

The Commission's expertise in these areas is beyond question. It has the authority to fix, amend, alter or suspend rates charged by utilities, whether those rates are approved as part of a rate case or entered into through "special contracts" with individual customers. *See* R.C. 4905.31(E), 4909.15, 4909.16. The General Assembly has entrusted the Commission, in setting rates, to balance the interests of residential and non-residential customers, interest groups, the utility and its shareholders and to consider many competing factors, including the utility's rate-of-return, the cost-of-service to various customer groups, reliability of service, energy efficiency and economic competitiveness. *See* R.C. 4905.15, 4909.151, 4928.02. This balancing of competing factors, interests and policies occurs on a daily basis at the Commission. In fact, the Commission already has begun the task of balancing such competing interests ***in this proceeding***. *See* Finding and Order dated Mar. 3, 2010, ¶ 4 (ordering Staff to formulate "a range of options . . . regarding proposed rates and discounts . . . [and] the recovery of the revenue shortfall as a result of the discounts provided to all-electric residential customers, including from which customer classes and rate schedules FirstEnergy should recover the revenue shortfall . . .").

The Commission also has authority to regulate a utility's promotional and marketing materials, to inspect and modify its marketing practices, and to penalize a utility where its marketing materials are deceptive. *See* R.C. 4928.02(I); Rule 4901:1-10-24(C), (D); Rule 4901:1-10-30. This is especially so where, as here, the issues relate to alleged representations about rates and to the propriety of those alleged representations in light of the Companies' tariffs,

the Commission's rules and Ohio law. The Commission's expertise would be required to adjudicate complaints related to the Companies' all-electric rates and alleged marketing practices related to those rates..

(b) OCC complains of acts that are normal utility practice.

OCC seeks to challenge the Commission-approved rate charged during the winter of 2009-2010 and the Commission-approved elimination of all-electric rates and the reduction in the all-electric discount. The charging of tariff rates to customers (and refraining from charging rates that are not authorized by the Commission) are certainly "practices normally authorized by the utility"—in fact, they are required by law. *See* R.C. 4905.22 ("All charges made or demanded for any service rendered, or to be rendered, shall be just, reasonable, and not more than the charges allowed by law or by order of the [Commission] . . . .").

Further, OCC evidently complains about the Companies' representations regarding the terms of the all-electric discounts. Although those communications must be proven at hearing, efforts to attract more business or communications with customers about their rates are indisputably a "practice normally authorized by the utility." *See* Rule 4901:1-10-24(C),(D) (providing for regulation of such communications).

Because the conduct at issue here meets both prongs of the *Allstate* test, the Commission has exclusive jurisdiction over any all-electric disputes.

IV. CONCLUSION

The April 15 Entry is unreasonable and unlawful in two ways. The Commission dramatically expands the pool of customers who receive "all-electric" credits and indefinitely extends the length of time these credits will last. As a result, the Companies will suffer approximately $80 million annually in reduced cash flow. While allowing the Companies to defer this amount, the Commission failed to authorize carrying charges, thereby permanently

depriving the Companies of one aspect of its reasonable cost recovery. Second, although the Commission properly denied OCC's request to expand these proceedings to deal with 40-year old allegations, the April 15 Entry misstates the scope of the Commission's jurisdiction, threatening confusion that will almost certainly undermine the Commission's exclusive jurisdiction over matters pertaining to the Companies' rates and marketing practices. For both of these reasons, the Companies respectfully urge the Commission to grant rehearing of its April 15 Entry (1) to provide the Companies carrying charges on the deferrals resulting from extension of all-electric rates to new customers; and (2) to hold that it has exclusive jurisdiction over disputes by all-electric customers, but to maintain its rejection of OCC's request to hear claims on behalf of all-electric customers as beyond the scope of this proceeding.

May 14, 2010

Respectfully submitted,

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ATTORNEYS FOR APPLICANTS OHIO EDISON COMPANY, THE CLEVELAND ELECTRIC ILLUMINATING COMPANY, AND THE TOLEDO EDISON COMPANY

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Application for Rehearing was delivered to the following persons by first class mail, postage prepaid, and e-mail this 14th day of May, 2010:

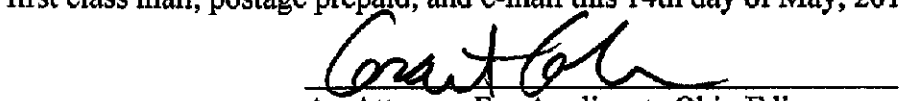

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Exhibit A

1-22-74 to 6-15-75

The Cleveland Electric Illuminating Company
Cleveland, Ohio

Original Sheet No. 18

P.U.C.O. NO. 11
ELECTRIC SERVICE

RESIDENTIAL SCHEDULE

Applicable to residential installations in a single family house, a single suite in a multiple family house, or a single suite in a multiple apartment, a mobile housing unit or any other residential unit, and not more than four such installations on the same Premises when combined as provided herein.

MONTHLY RATES:

1. KILOWATTHOUR CHARGE

		SUMMER	WINTER
		Cents per kWh	
For the first	300 kWh	3.8	3.8
For the next	700 kWh	3.2	2.8
For all excess		2.2	1.8

The Winter Rates specified above shall be applicable in seven consecutive monthly billing periods beginning with the November bills each year. The Summer Rates shall apply in all other billing periods.

2. SPACE HEATING/WATER HEATING DISCOUNT

THIS PROVISION IS AVAILABLE ONLY FOR INSTALLATIONS EXISTING ON NOVEMBER 28, 1973, AND FOR THOSE POTENTIAL INSTALLATIONS FOR WHICH, IN THE OPINION OF THE COMPANY, THE CONSUMER HAD COMMITTED HIMSELF PRIOR TO NOVEMBER 28, 1973 TO THE PURCHASE OF ELECTRIC SPACE HEATING EQUIPMENT.

The Summer and Winter Rates specified above shall be reduced by one (but not both) of the following provisions if applicable:

a. Where electricity is the sole source of energy for space heating (except for incidental requirements), the Rates specified above shall be reduced by 1.0¢ per kWh for usage between 300 kWh and 600 kWh per month and by 0.5¢ per kWh for all usage in excess of 600 kWh per month, or

b. Where electricity is the sole source of energy for water heating and the electric water heating installation is approved by the Company and is in service and in regular use, the Rates specified above shall be reduced by 1.0¢ per kWh for usage between 300 kWh and 600 kWh per month and by 0.5¢ per kWh for usage between 600 kWh and 2000 kWh per month.

3. APPLICABLE RIDERS

The Rates specified above shall be modified in accordance with the provisions of the following applicable Rider:

FUEL ADJUSTMENT — Rider No. 1

MINIMUM CHARGE:

$1.90 per month or fraction of a month.

Filed under authority of Order No. 71-634-Y of
The Public Utilities Commission of Ohio, dated November 28, 1973

Issued January 21, 1974 by Karl H. Rudolph, President
Effective for bills rendered on and after January 22, 1974

Exhibit B

RESIDENTIAL SCHEDULE

Applicable to residential installations in a single family house, a single suite in a multiple family house, or a single suite in a multiple apartment, a mobile housing unit or any other residential unit, and not more than four such installations on the same Premises when combined as provided herein.

MONTHLY RATES:

1. KILOWATTHOUR CHARGE

		SUMMER	WINTER
		Cents per kWh	
For the first	50 kWh	4.30	4.30
For the next	250 kWh	4.10	4.10
For the next	700 kWh	3.70	3.30
For all excess		2.35	1.85

The Winter Rates specified above shall be applicable in seven consecutive monthly billing periods beginning with the November bills each year. The Summer Rates shall apply in all other billing period.

2. SPACE HEATING/WATER HEATING DISCOUNT

THESE PROVISIONS ARE AVAILABLE ONLY FOR WATER HEATING INSTALLATIONS EXISTING ON NOVEMBER 28, 1973 AND SPACE HEATING INSTALLATIONS EXISTING ON DECEMBER 1, 1977.

The Rates specified in Section 1 above shall be reduced by one of the following provisions if applicable:

a. Where electricity is the sole source of energy for space heating (except for incidental requirements), the Winter Rates specified above shall be reduced by 1.0¢ per kWh for usage between 300 kWh and 600 kWh per month and by 0.6¢ per kWh for all usage in excess of 600 kWh per month, or

b. Where electricity is the sole source of energy for water heating and the electric water heating installation is approved by the Company and is in service and in regular use, the Rates specified above shall be reduced by 1.0¢ per kWh for usage between 300 kWh and 600 kWh per month and by 0.6¢ per kWh for usage between 600 kWh and 2000 kWh per month.

3. OPTIONAL SPACE HEATING RATE

Where electricity is the primary source of energy for space heating and where the consumer pays for and has a load meter installed the rates specified in Section 1 above shall be modified as follows:

a. In winter billing periods all kWh used per month in excess of 150 kWh per kW of billing load shall be billed at the rate of 1.0 cent per kWh.

Filed under authority of Order No. 77-1307-EL-ORD of
The Public Utilities Commission of Ohio, dated December 7, 1977

Issued December 8, 1977 by Karl H. Rudolph, Chairman
Effective December 8, 1977

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RESIDENTIAL SCHEDULE (Cont'd)

b. The billing load shall be determined monthly and shall be the highest 30-minute load registered in the month as indicated by a thermal demand meter but not less than 10 kW.

c. The charge to the consumer for installation of a load meter shall be $50.00.

4. APPLICABLE RIDERS

The cost of fuel chargeable to customers billed under this rate shall be calculated in accordance with the provisions of Rule No. 26 of the Public Utilities Commission of Ohio (PUCO) as set forth on Sheet Nos. 67-72.

FOSSIL FUEL COST ADJUSTMENT Rider No. 6

MINIMUM CHARGE:

$1.80 per month or fraction of a month.

SPECIAL RULES:

1. MULTIPLE INSTALLATIONS ON ONE METER

Four or less residential installations on the same Premises may be combined on one meter and billed under this schedule with the number of kWh in the first three blocks of the Rate and Minimum Charge each multiplied by the number of residential installations.

2. UNAVAILABLE TO CERTAIN INSTALLATIONS

This schedule shall not be applicable to the following installations which shall be billed under other schedules of the Company:

a. Any combination on one meter of more than four residential installations on the same Premises.

b. Any combination on one meter of residential and commercial installations on the same Premises.

c. Pumps, elevators, X-ray machines, welding machines and other equipment where the use of electricity is intermittent or the load is of fluctuating character and where a special service connection is required.

d. Any service which constitutes an additional service installation.

Exhibit C

P.U.C.O. NO. 12
ELECTRIC SERVICE

RESIDENTIAL SCHEDULE (Cont'd)

MONTHLY RATES: (Cont'd)

3. APPROVAL OF WATER HEATING/SPACE HEATING INSTALLATIONS

a. WATER HEATING INSTALLATIONS

To be approved by the Company, an electric water heater installed after October 1, 1983 shall have a minimum insulation of R-10, or a thermal insulation jacket that, in combination with the water heater's insulation, meets or exceeds such minimum insulation of R-10.

b. SPACE HEATING INSTALLATIONS

After January 1, 1985, a new space heating installation, to be approved by the Company, must be in an individually-metered residential dwelling unit in either a single family house, a single suite in a multiple family house, a single suite in a multiple apartment, a manufactured housing unit or any other residential unit, and must meet or exceed special insulation and other energy conservation standards specified by the Company in this Schedule.

4. OPTIONAL LOAD MANAGEMENT RATE

Where a residential customer elects to control his load manually, or through the use of a load control device, or requests a load meter, the rates specified in Section 1, 2 or 3 above shall be modified as follows:

a. A Time-of-Day option is available under which the load will be metered by a Time-of-Day load meter and the billing load shall be determined monthly and shall be the larger of the 30-minute on-peak registered load or one-fourth of the 30-minute off-peak registered load as indicated by a kilowatt demand meter but not less than 5.0 kW. On-peak time shall be 8:00 a.m. to 8:00 p.m. weekdays with the exception of New Year's

Filed under authority of Order No. 84-188-EL-AIR of
The Public Utilities Commission of Ohio, dated March 7, 1985

Issued March 12, 1985 by Robert M. Ginn, Chairman of the Board
Effective for service rendered on or after March 12, 1985

P.U.C.O. NO. 12
ELECTRIC SERVICE

RESIDENTIAL SCHEDULE (Cont'd) MAR 12 1985

MONTHLY RATES: (Cont'd)

4. OPTIONAL LOAD MANAGEMENT RATE (Cont'd)

Day, Good Friday, Memorial Day, Independence Day, Labor Day, Thanksgiving Day, Christmas Day, and other days and time periods at the option of the Company, which shall be off-peak. All other time periods shall be off-peak.

b. A Non-Time-of-Day option is also available under which all load will be measured by a Non-Time-of-Day load meter, irrespective of the time at which the highest billing load occurs. The billing load shall be determined monthly and shall be the highest 30-minute load registered in the month as indicated by a kilowatt demand meter but not less than 5.0 kW.

c. For the purposes of both options a and b above, the initial 125 kWh per kW of billing load will be billed at Residential Schedule Rates, including any applicable discount provisions as set forth in Sections 1, 2 and 3 above. All use in excess of 125 kWh per kW of billing load will be billed at $.014 per kWh.

d. A $9.00 monthly metering charge will apply to the Time-of-Day option under this Schedule while a $2.65 monthly metering charge will apply to the Non-Time-of-Day option.

e. Upon receiving service under this optional rate, a customer shall be ineligible to receive service under any other schedule provision for a continuous twelve-month period. After discontinuation of service under this optional rate, the customer shall be ineligible to receive service under this optional rate for a twelve-month period from the time service was discontinued.

Filed under authority of Order No. 84-188-EL-AIR of
The Public Utilities Commission of Ohio, dated March 7, 1985

Issued March 12, 1985 by Robert M. Ginn, Chairman of the Board
Effective for service rendered on or after March 12, 1985

Exhibit D

RESIDENTIAL SERVICE
OPTIONAL CONTROLLED SERVICE RIDERS

Availability:

Available to any residential customer taking service under the Company's residential rate schedule (Rate 10), where a load meter is installed and the customer agrees to install the necessary wiring and devices that will permit the Company to control the operation of the specified equipment during peak load hours.

Rider Options:

RIDER A - Controlled Water Heating

Customer must have a minimum of 80 gallons of tank capacity and will receive a reduction of 3 KW *in their measured monthly load.*

The customer charge in the residential rate shall be increased to $5.00.

RIDER B - Controlled Add-On Electric Heat Pump or Resistance Heating

The add-on electric heat pump or resistance heating must be installed in conjunction with a central heating system utilizing fossil fuel. Customers with such dual-fuel systems will receive one of the following reductions in their measured monthly loads during the heating season (seven consecutive billing months, November through May):

(a) Heat Pump.....	3 KW
(b) Resistance Heating (Minimum 12.5 KW Capacity)	10 KW

The customer charge in the residential rate shall be increased to $5.00.

Provisions:

(a) If a customer qualifies for both Riders A and B, the load reductions thereunder shall be additive and the customer charge shall be $5.00.

(b) Riders A or B are not available to residential customers that have load controllers installed.

(c) *Each installation shall be approved after verifying compliance with the Company's* requirements. Periodic checks of the installed facilities will be made by Company representatives to verify continuing compliance with the Company's requirements.

(d) The total time for all interruptions shall not exceed eight hours in any twenty-four hour period.

Filed under the authority of Order No. 83-1455-EL-ATA, Issued by The Public Utilities Commission of Ohio