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

INITIAL POST-HEARING BRIEF
BY
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I. INTRODUCTION

A. History of the Case

On February 12, 2010, the Application was filed in this case by the Ohio Edison Company ("OE"), the Cleveland Electric Illuminating Company ("CEI"), and the Toledo Edison Company ("TE", collectively with OE and CEI, "FirstEnergy" or the "Companies"). The Application proposed that the Public Utilities Commission of Ohio ("PUCO" or "Commission") adjust certain residential electric rates that were applicable to some of the Companies' approximately 1.9 million residential customers who were previously served according to non-standard residential rates (i.e. "all-electric" customers).

The OCC, the only state agency that represents Ohio's residential utility consumers, moved to intervene in this case on February 23, 2010. This pleading is submitted in continuation of the OCC's efforts to fully participate in this case and protect the interests of the Companies' residential customers.

On February 25, 2010, the OCC responded to FirstEnergy's Application by filing a Motion for Declaration of an Emergency and Motion to Alter Residential All-Electric Rates ("Motion Regarding Emergency"). The OCC asked the Commission to recognize that customers in all three service areas served by FirstEnergy, not just those served by OE and CEI, were affected by changes to all-electric rates.[1] The burden of rates relates to the equipment installed at the residential customer's location (e.g. electric space heating systems). On the subject of rates, the OCC requested the following:

> FirstEnergy's approach should be replaced by the restoration of the relationship between the standard residential distribution rates and each non-standard residential distribution rate that existed prior to elimination of the non-standard rates (i.e. as of January 22, 2009 for OE and TE and as of April 30, 2009 for CEI). The discounted relationship between the standard residential generation rates and each non-standard residential generation rate that existed prior to elimination of the discounted rates (i.e. as of May 31, 2009) should also be restored.[2]

The OCC also asked the Commission to recognize that FirstEnergy has removed from the roll of those eligible to receive separate rate treatment the customers located at residences where the separate rates applied but the customer account changed for some reason.[3]

The Commission issued a Finding and Order on March 3, 2010, recognizing the "substantial public concern expressed regarding certain all-electric residential customers' bills" and ordered FirstEnergy to "file tariffs for the all-electric residential subscribers

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[1] OCC Motion Regarding Emergency at 4-5 (February 25, 2010) and Application, proposed Original Sheet 123 (one each for OE and CEI) ("Rider RGC").

[2] Id. at 7 (February 25, 2010).

[3] Id. at 5 (February 25, 2010). See, e.g., id. (OE Tariff No. 11, "Applicable to any customer . . . who on January 22, 2009 took service from the Company under one of the following rates schedules"; CEI Tariff No. 13, "April 30, 2009"; TE Tariff No. 11, "January 22, 2009"). Generation credits for customers are based upon eligibility for the distribution credits. See, e.g., OE, CEI, and TE Tariff No. 11, 13, and 8, respectively, Original Sheet 116 ("Rider EDR").

that will provide bill impacts commensurate with FirstEnergy's December 31, 2008, charges for those customers."[4] The "substantial public concern" was expressed in public meetings[5] conducted in areas served by FirstEnergy, in media accounts of the controversy, and also in the many letters filed with the Commission after the initiation of the above-captioned case. The Commission also stated that until a "long-term solution to this issue" was determined, the Companies would be entitled to "defer the difference between the rates and charges to be charged to the all-electric residential customers as the result of the Commission's order . . . and the rates and charges that would otherwise be charged to those customers."[6] The PUCO Staff was ordered to file a "report with the results of its investigation in this docket within 90 days."[7]

On March 8, 2010, the OCC sought clarification of the Order from March 3, 2010, seeking (among other matters) confirmation regarding the identity of the customers who would receive the immediate rate relief.[8] The OCC also sought clarification regarding the intended scope of the PUCO Staff's investigation, and stated that it was "absolutely necessary" for the investigation to include "the issue of FirstEnergy responsibility for allegedly marketing major electricity-consuming equipment (such as for space and water heating) using promises of continued, discounted electric rates" so it could recommend

[4] Finding and Order at 3 (March 3, 2010).

[5] The public meetings were not organized or sponsored by the PUCO, and should not be confused with the later-held local public hearings conducted by the PUCO.

[6] Finding and Order at 3 (March 3, 2010). The Commission later clarified that the Companies were authorized to defer certain costs. Third Entry on Rehearing at 2 (April 28, 2010).

[7] Id. at 4, ¶13.

[8] OCC Request for Clarification at 7 (March 8, 2010).

the assignment of financial responsibility" in this case.[9]

Revised residential tariffs in response to the Commission's Entry dated March 3, 2010 were filed by FirstEnergy on March 17, 2010, which in the case of CEI provided rate relief through a Residential Generation Credit Rider for "any customer taking service under Rates Schedule RS who on April 30, 2009 took service from the Company under one of the . . . [all-electric] rate schedules."[10] The dates for "taking service" were January 22, 2009 for customers of OE and TE.[11] The Commission continued to consider the OCC's March 8 Motion for Clarification in an Entry on Rehearing dated April 6, 2010. On April 15, 2010, however, the PUCO "clarif[ied] that the Finding and Order [on March 3] applie[d] to all residential customer who had previously been billed under the 'all-electric' rate schedules . . . as well as to any other residential customer who is the successor account [holder] to a customer who had previously qualified under the 'all-electric' rate schedules . . . ."[12] The 90-day deadline for the PUCO Staff's investigation was indefinitely suspended.[13] The PUCO also stated that "the adjudication of any alleged agreements, promises, or inducements made by the Companies outside of the express terms of its tariffs . . . is best suited for a court of general jurisdiction rather than the Commission."[14]

[9] Id. at 6-7 (March 8, 2010).

[10] Rider RGC, Residential Generation Credit Rider (CEI) (March 17, 2010).

[11] Rider RGC, Residential Generation Credit Rider (OE and TE) (March 17, 2010).

[12] Second Entry on Rehearing at 2, ¶(7) (April 15, 2010).

[13] Id.

[14] Id. at 3, ¶ (9).

The OCC applied for rehearing regarding the Second Entry on Rehearing seeking a PUCO initiative to investigate FirstEnergy's marketing and sales practices,[15] which was granted in the Fourth Entry on Rehearing for purposes of providing the Commission additional time to consider the matter.[16] On June 30, 2010, the OCC moved to compel FirstEnergy responses to discovery on matters related to the Companies' marketing and sales practices. That motion was granted on November 8, 2010, stating that the "information sought through discovery [by the OCC] is plainly related to the subject matter of this proceeding . . . ."[17] A Fifth Entry on Rehearing, dated November 10, 2010, considered a recent Geauga County Court of Common Pleas decision and determined:

> The Commission agrees with the Court that claims that customers were to receive rates that are in violation of Commission-approved tariffs or which were not authorized by the Commission are issues that the Commission is empowered to decide. * * * The Commission will exercise [its] jurisdiction over FirstEnergy's rates and marketing practices, pursuant to Section 4928.02(I), Revised Code, and Rule 4901:1-10-24(D), O.A.C. . . . .[18]

The procedural schedule was not well synchronized with procedural schedule rulings in the case. A Motion to Intervene was filed on June 2, 2010 by Sue Steigerwald, Citizens for Keeping the All-Electric Promise (CKAP), Joan Heginbotham and Bob Schmitt Homes, Inc. (collectively, "CKAP Parties"). The CKAP Parties support, among other matters, discounts for all-electric customers and the continued existence of such

[15] OCC Application for Rehearing at 4-10 (May 17, 2010).

[16] Fourth Entry on Rehearing at 2, ¶9 (June 9, 2010).

[17] Entry at 4, ¶(8) (November 8, 2010).

[18] Fifth Entry on Rehearing at 5, ¶(13) (November 10, 2010).

discounts.[19] On October 8 and 14, 2010 and November 5, 2010, Entries ordered six local public hearings -- for Sandusky, Strongsville, Springfield, Maumee, North Ridgeville, and Kirtland -- that would begin on October 25, 2010 and extend into November. The CKAP Parties' Motion to Intervene was granted, but only on November 17, 2010 after the local pubic hearing had already begun.[20]

Before the OCC's Motion to Compel regarding FirstEnergy's marketing and sales practices was granted on November 8, 2010, the public was invited to testify at the local public hearings on the subject of FirstEnergy's "commitment[s] that the [all-electric] rate would remain with the home for future owners" as well as views on whether the Commission should consider comparisons with the cost of heating with natural gas and the rate shock associated with the discontinuation of discounted electric rates.[21] The final hearing for Columbus was originally scheduled for November 29, 2010.[22] Following various extensions, the hearing in Columbus commenced on February 16, 2011.

A core concern of this proceeding is the need to determine the impacts on customers, at various usage levels, of rate increases to customers. Customers have testified in public hearings that promises were made to all-electric customers by the Companies, and the marketing to customers of all-electric service and rates should be given serious attention by the Commission. Further, it is important to balance the protection of all-electric customers from excessive rate increases through the removal of

[19] CKAP Parties' Motion to Intervene at 3 (June 2, 2010) (e.g., "must continue to receive an all-electric discount").

[20] Entry at 6 (November 17, 2010).

[21] Entry at 4-5 (October 14, 2010).

[22] Id.

promised discounts against the impact such protections have on other customers. The Commission should ensure that the outcome is fair and reasonable, and provides affordable rates for every customer while also avoiding rate shock.

B. History of Proposals

On September 24, 2010, a Staff Investigation and Report ("Report") was filed. The Report provided the background behind rate changes for FirstEnergy's residential customers, and noted the "substantial public concern expressed regarding all-electric residential customers' bills" "during the 2009-2010 Winter heating season."[23] A spike in rates for electric heating customers for that heating season initiated the public concern,[24] which included public meetings organized by concerned citizens in Northern Ohio.

The Report included two attachments. Attachment 1 listed the rate credits in place by former non-standard rate schedule for each of the FirstEnergy electric distribution utilities. The credits listed were the Residential Distribution Credit ("RDC"), the Economic Development Rider ("EDR") generation credit, and the Residential Generation Credit ("RGC") that was ordered by the Commission in this case. Only the RGC is the subject of deferrals approved by the Commission (i.e. they are currently unfunded). Attachment 2 showed bills by kilowatt-hour usage levels for estimated all-electric rates in place for winter 2010/11 and estimated bills for standard residential customers for winter 2011/12 as well as three levels for estimated bills assuming RGC credit reductions for winter 2011/12 at various levels (i.e. 50, 25, and 0 percent of current

[23] Report at 2.

[24] The spike is graphically depicted in FirstEnergy Witness Ridmann's testimony regarding the bill impacts of increased rates for electric heating customers for winter 2009/10. FirstEnergy Ex. 1, Attachments WRR-3 (nine pages) (Ridmann) (three utilities at varying usage levels).

RGC levels) and three levels for bills assuming increased fixed charges for distribution service. The Report did not contain recommendations or claim to present an exhaustive list of options.[25]

PUCO Staff recommendations appeared in the testimony of Staff Witness Fortney. Mr. Fortney testified regarding a proposal to completely phase-out RGC credits over a five-year period, beginning with keeping RGC credits at existing levels for winter 2011/12 as well as a generation rate and Residential Deferred Distribution ("RDD") charges that would not be adjusted as scheduled for other customers.[26] The proposal would also remove the existing RDC credit for customers formerly served on electric water heater tariffs,[27] a change that would result in rate reductions for commercial customers.[28] Without further mention in this Initial Post-Hearing Brief, this case did not originate over concern about increases in commercial rates, and the Commission should reject Staff's recommendation to decrease commercial rates by that residential EDR credits for residential customers,.

FirstEnergy's proposal for the treatment of rates for its residential customers also includes the complete phase-out of RGC credits over a period that depends on future residential rate changes. FirstEnergy Witness Ridmann estimated that his proposal to

[25] Report at 3.

[26] Staff Ex. 1 at 3 (Fortney). The testimony refers to "customers frozen at current levels," which was explained on cross-examination as frozen RGC, generation rate, and RDD charges. Tr. Vol. II at 480-481 (Fortney) (February 17, 2011). Rates would not actually be "frozen," as explained by Mr. Fortney on the stand. Id. at 479 ("not going to be exact"). RDD charges are scheduled to expire for all residential customers before winter 2011/12. Id. at 475.

[27] Staff Ex. 1 at 4 (Fortney).

[28] Tr. Vol. II at 485 (Fortney) (February 17, 2011).

phase-out RGC credits would conclude in less than three years for each of FirstEnergy's electric distribution utilities.[29]

The OCC sponsored the testimony of Anthony Yankel who presented testimony regarding the past, and continuing, justification for reduced rates for residential customers having electrically heated residences.[30] The testimony, therefore, does not recommend the complete phase-out of lower rates for residential customers having electrically heated residences compared with those residential customers served on standard tariffs.[31]

II. APPLICABLE OHIO LAW

A. Fixation of Rates

FirstEnergy's Application on February 12, 2010 contains only a partial lessening of the burden that has been placed on certain OE and CEI residential customers by proposing additional credits that would be phased-out over eight years.[32] FirstEnergy's approach does not adequately deal with the current situation. The General Assembly has empowered the PUCO to declare an emergency, pursuant to R.C. 4909.16, under the circumstances currently applicable to all-electric customers:

> When the public utilities commission deems it necessary to prevent injury to the business or interests of the public or of any public utility of this state in case of any emergency to be judged by the commission, it may temporarily alter, amend, or, with the consent of the public utility concerned, suspend any existing rates,

[29] FirstEnergy Ex. 1 at 35 (Ridmann) ("until the Rider RGC credit is zero") and at 41 ("within three years"). Mr. Ridmann's workpapers show that FirstEnergy's proposed reductions to RGC credits would eliminate the RGC in winter 2014/15 for customers of CEI and OE, eliminate the RGC in winter 2012/13 for non-apartment residential customers of TE, and eliminate the RGC in winter 2014/15 for TE customers in apartments. OCC Ex. 5 (Ridmann Workpaper 6).

[30] OCC Ex. 1 at 37 (Yankel).

[31] Id. at 34.

[32] Application, proposed Original Sheet 123 (one each for OE and CEI) ("Rider RGC").

> schedules, or order relating to or affecting any public utility or part of any public utility in this state. Rates so made by the commission shall apply to one or more of the public utilities in this state, or to any portion thereof, as is directed by the commission, and shall take effect at such time and remain in force for such length of time as the commission prescribes.

The public health, safety, and the general welfare of the public are at question during these difficult economic times when large numbers of FirstEnergy's customers are struggling to pay for their necessary energy supplies.

Furthermore, R.C 4905.31 provides that "Chapters . . . 4909 [distribution rates] [and] 4928 [standard service offers] . . . do not prohibit a public utility from filing a schedule . . . providing for . . . [a] classification of service based upon the quantity used, the time when used, the purpose for which used, the duration of use, and any other reasonable consideration. . . . ."[33] The Companies filed an Application on February 12, 2010, and thereafter modified their proposed schedules for residential customers who use electricity as their primary source of energy.[34] "No such schedule . . . is lawful unless it is filed with and approved by the commission. . . ."[35] New rates for customers who heat with electricity were approved in the Finding and Order dated March 3, 2010. A final order should provide the "long-term solution" that was also the subject of the Commission's Finding and Order on March 3, 2010.[36]

B. The Marketing Practices of the Companies

Numerous provisions in the Ohio Revised Code are intended to protect consumers against the unreasonable sales practices of an electric distribution utility. Under R.C.

[33] R.C. 4905.31(D).

[34] Tr. Vol. I at 139 (Ridmann) (February 16, 2011).

[35] R.C. 4905.31.

[36] Finding and Order at 3, ¶10 (March 3, 2010).

4905.37, the Commission is vested with the authority to ensure that the "practices" of a public utility with respect to its public service are just and reasonable. If they are not, the commission shall fix and prescribe the practices. R.C. 4928.02(I) sets forth, as one of the policies of the state associated with the competitive offering of retail electric service, ensuring consumers protection against unreasonable sales practices.

Additionally, consistent with R.C. 4928.02(I), R.C. 4928.10 requires the Commission to adopt rules to protect consumers that include a prohibition against unfair, deceptive, and unconscionable acts in the marketing, solicitation, and sale of competitive electric retail service. Ohio Adm. Code 4901:1-10-24 (D) was promulgated as a result of these provisions of the Ohio Revised Code, and specifically prohibits an electric utility from committing an unfair or deceptive act or practice in connection with promoting or providing service. Generally, R.C. 4905.22 may be applicable as well as it requires utilities to furnish services and facilities as are "adequate and in all respects just and reasonable."

III. ARGUMENT

A. Two Regulatory Principles Should be Applied.

Two regulatory principles apply to the issue of appropriate long-term rate-setting that is important in this case. Testimony in this case supports all-electric discounts based upon the cost of service principle. Testimony also supports such discounts based upon the principle of rate gradualism.[37] Both should be considered by the Commission in setting rates for all-electric customers.

[37] The Commission specifically invited the public to comment upon "rate shock," a term used to refer to the lack of rate gradualism. Entry at 4-5 (October 14, 2010).

The principles of cost of service and rate gradualism were distinguished, for example, in the testimony of OCC Witness Yankel. Mr. Yankel stated his support for all-electric rates based upon the cost of service principle, which was a main topic of his direct testimony.[38] However, Mr. Yankel also recognized that discounts might also be based upon the principle of rate gradualism.[39] Rate gradualism as a rate-setting principle was recognized in the Commission's request for testimony at local public hearings.[40]

Some confusion regarding the proper application of cost principles is exhibited in this case, a matter that has been the subject of confusion in other cases since enactment of S.B. 221.[41] That legislative enactment, FirstEnergy would have the Commission believe, changed everything regarding cost principles that apply to retail rate-setting under Ohio law. But cost-causation principles and the fundamental economics of providing electricity service to Ohioans do not change with the passage of legislation, including enactment of S.B. 221 in 2008 that is partly the focus of FirstEnergy Witness Ridmann.[42]

FirstEnergy testimony focuses on its generation procurement situation and does not recognize important cost differences between customers having different demand profiles. FirstEnergy Witness Ridmann, for example, compares rates to "the cost of generation service."[43] Mr. Ridmann incorrectly focuses on the Companies' power acquisition process (cost of acquisition), which is by contract with successful bidders in

[38] See, e.g., OCC Ex. 1 at 35 (Yankel) (section entitled "Recommendations Going Forward"). See also Tr. Vol. I at 230-231 (February 16, 2011).

[39] Tr. Vol. I at 231 (February 16, 2011) ("Two different principles," "cost causation" and "the principle of gradualism").

[40] Entry at 4-5 (October 14, 2010) ("rate shock").

[41] See, e.g., *In re FirstEnergy's ESP I Application*, Case No. 08-935-EL-SSO, Opinion and Order at 23 (December 19, 2008).

[42] FirstEnergy Ex. 1 at 13 (Ridmann).

[43] Id.

generation supply auctions,[44] rather than the cost of serving customers having different load profiles (i.e. the true cost of service). For example, changing the contractual agreement in connection with an auction process so that it no longer makes the cost of acquisition a constant cents per kilowatt-hour would require re-stating the cost of acquisition, but would not change the enduring cost of serving customers based upon the time pattern of their usage.

After the passage of S.B. 221, the Commission continues to distinguish between the contractual cost of acquiring wholesale generation supply and the cost of service that should be considered in developing appropriate retail pricing for customers. In Case No. No. 08-935-EL-SSO, the Commission stated:

> FirstEnergy should work with Staff, and other stakeholders, to develop a means of transitioning FirstEnergy's generation rate schedules to a more appropriate rate structure which takes into consideration of time varying generation costs of serving different customers and classifications of customers with homogenous loads and/or generation cost profiles, considers customer load factor, incorporates seasonal generation cost differentials, and, where adequate metering is available, provides customers with time-differentiated and dynamic pricing options.[45]

The recognition of this distinction, and the proper manner in which to consider the costs imposed by individual customers, is implicit in such FirstEnergy activities such as its roll-out of smart grid technology in its CEI service area and FirstEnergy's study of rate designs in connection with that project.[46]

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[44] Tr. Vol. I at 148-149 (Ridmann) (February 16, 2011).

[45] *In re FirstEnergy's ESP I Application*, Case No. No. 08-935-EL-SSO, Opinion and Order at 23, (December 19, 2008).

[46] Tr. Vol. I at 165-166 (Ridmann) (February 16, 2011).

Regarding Ohio law, State of Ohio policy related to electric service provided for "reasonably priced retail electric service" under R.C. 4928.02(A) both before and after the effective date of S.B. 221.[47] Before enactment of S.B. 221 in 2008, R.C. 4928.02(D) stated Ohio policy in support for "innovation and market access for cost-effective supply and *demand-side* retail electric service."[48] That provision's support for energy efficiency was clarified in 2008 to "include[e] . . . time-differentiated pricing, and implementation of advanced metering infrastructure" over which the Commission stated its concern in Case No. 08-935-EL-SSO (as quoted above).[49] The legislative prescription has been to charge residential customers appropriate prices that recognize their load characteristics, and also promote conservation that recognizes such appropriate pricing.

B. Rates Going Forward Should Recognize the Lower Cost of Serving Customers Who Heat Using Electricity.

1. Discount levels should recognize the reduced cost of serving electrically heated residences.

Rates for the winter season of 2011/12 and thereafter should be set recognizing both cost of service and rate gradualism principles. The cost of serving one customer class relative to another customer class should be recognized to determine the end-state at which rates should be set in the long-term. Long-term, in the context of this case, is the time period required for the durable stock in heating systems and the utility infrastructure required to serve those heating systems (e.g. the extension of natural gas pipelines to subdivisions heretofore dedicated to electric heating systems) to change, as well as the

[47] FirstEnergy Witness Ridmann acknowledged the existence of this policy. Tr. Vol. I at 141 (Ridmann) (February 16, 2011).

[48] Emphasis added.

[49] S.B. 221 provided greater specificity regarding energy efficiency developments, but R.C. 4905.70 previously recognized the desirability of "programs that will promote and encourage conservation" while recognizing the lower cost of providing electricity to "residences . . . primarily heated by electricity. . . ."

change in the durable stock of residential dwellings themselves (e.g. many of which cannot be retrofitted for alternative heating systems). Rate gradualism should be recognized in the short- and intermediate-run to avoid economic dislocation and hardship in order to transition to the desirable long-term end state regarding relative rate levels between rate classes and rate sub-classes.

Mr. Yankel's pre-filed testimony most directly addressed the issue of the cost of serving all-electric customers, and supports the existence of a discount for customers who use electricity as their primary source energy source for heating irrespective of when the customer established an account with FirstEnergy. Mr. Yankel examined the past history of the Companies' all-electric rates, including past cost of service studies conducted by the Companies, and testified that it is a "long recognized fact that All-Electric customers tend to be less expensive to serve than standard service customers."[50] His recommendation regarding appropriate long-term rates for all-electric customers follows from that fact:

> I propose that there be a uniform target adopted for all three operating companies, such that the relationship between Standard service and All-Electric service be the same across all three operating companies. I propose that the relationship be set such that the total bill for All-Electric customers (at the 3,500 kWh usage level) be set at 65% of the bill for a similarly situated Standard customer. This would be in keeping with the long recognized fact that All-Electric customers tend to be less expensive to serve than Standard service customers. An annual review would be made for each of the operating companies and a determination would be made of the present relationship between the Standard rate and the All-Electric rate at a usage level of 3,500 kWh.[51]

[50] OCC Ex. 1 at 37 (Yankel). FirstEnergy Witness Ridmann acknowledged that the Companies do not collect load information that permits cost of service studies that differentiate between the all-electric and standard residential customers. Tr. Vol. I at 153-154 (February 16, 2011) (Ridmann). See also OCC Ex. 2 (the Companies "do not have the requested information").

[51] OCC Ex. 1 at 34 (Yankel).

This is the relative cost of serving all-electric customers relative to standard service residential customers that should be recognized in the end-state for long-term rates.[52]

The rate gradualism principle -- about which the Commission has stated its concern both by adjusting all-electric rates starting with the 2009/10 heating season and in its announced concern over "rate shock"[53] -- should also play a role in setting rates for all-electric residential customers. In response to the spike in all-electric rates during the 2009/10 winter heating season,[54] the Commission ordered sizable rate reductions for all-electric customers March 2010. The Commission ordered FirstEnergy to "file tariffs for the all-electric residential subscribers that will provide bill impacts commensurate with FirstEnergy's December 31, 2008, charges for those customers."[55] The discounts ordered by the Commission ran deeper than those proposed by the OCC.[56] The discounts for all-electric customers of CEI ran even deeper than appears contemplated by the

[52] If evaluated for all-electric customer based upon expected rates for September 2011, the 65 percent relationship would result in billing credits in the amount of 1.268 cents per kilowatt-hour for OE customers, 1.312 cents per kilowatt-hour for CEI customers, and 1.456 cents per kilowatt-hour for TE customers. OCC Ex. 1 at 4 (Yankel).

[53] Entry at 4-5 (October 14, 2010).

[54] The spike is graphically depicted in Mr. Ridmann's testimony regarding the bill impacts of all-electric rates that increased for winter 2009/10. FirstEnergy Ex. 1, Attachments WRR-3 (nine pages) (Ridmann) (three utilities at varying usage levels).

[55] Finding and Order at 3, ¶(10) (March 3, 2010).

[56] On rehearing, the "OCC argue[d] that the relationship between residential rate schedules and the 'all-electric' rate schedules should be restored . . . ." Second Entry on Rehearing at 2, ¶(8). The Commission denied the OCC's assignment of error, stating that "OCC's proposed changes would not return 'all-electric' residential customers to their prior rates . . . ." Id. at 3, ¶(8).

Commission's order, providing many such customers with lower rates than they had previously experienced.[57]

The adjustment of all-electric rates from their current level of discount to the rate relationship recommended by OCC Witness Yankel should be tempered in the short- and intermediate-run to prevent another period of rate shock. Although FirstEnergy proposes the total elimination of the Commission-ordered adjustments in all-electric discounts within three years,[58] the FirstEnergy-sponsored testimony provides a short-term rate adjustment procedure that should be used until the end-state all-electric discounts recommended by Mr. Yankel are achieved.

FirstEnergy Witness Ridmann proposed the adjustment of the Commission-ordered all-electric discounts (i.e. the RGC credits) based upon an annual appraisal of discounts for total bills. Mr. Ridmann explained:

> The reduction will be accomplished by comparing the total bill for the winter period from one year to the next with the credit being reduced only to the extent that the maximum increase on a total bill

[57] The "overshoot" for some kilowatt-hour usage levels is graphically depicted in Mr. Ridmann's testimony. The reduction in all-electric rates between December 2008 and April 2010 (also a winter month for tariff purposes) is especially noteworthy for CEI's all-electric customers at higher usage levels. FirstEnergy Ex. 1, Attachment WRR-3, page 2 of 9. Mr. Ridmann's testimony states that "[r]ates paid by most CEI electric heating customers . . . are *less* than they were in December 2008. Id. at 22 (emphasis added). PUCO Staff members directed FirstEnergy regarding the tariffs that they submitted following the Commission's order to reduce the all-electric rates. Tr. Vol. I at 158-159 (Ridmann) (February 16, 2011). The reductions in CEI rates was also the subject of public testimony. Tr. Sandusky at 29 (Bruton) (October 25, 2010).

[58] FirstEnergy Ex. 1 at 35 (Ridmann) ("until the Rider RGC credit is zero") and at 41 ("within three years").

> basis, assuming the same usage, for these customers is no greater than twelve percent over the prior year's winter period total bill.[59]

The annual assessment (i.e. between winter periods) portion of Mr. Ridmann's proposal is similar to the annual "band" assessment proposed by OCC Witness Yankel to evaluate the relationship between all-electric and standard residential customers on a total bill basis.[60]

The difference between the proposal stated by Mr. Ridmann and that stated by Mr. Yankel is largely the end-state for rates. Mr. Ridmann's annual assessment simply results in the full elimination of the RGC, while Mr. Yankel's annual "band" assessment results in the determination of the level of RGC that is needed. The annual assessment proposed by Mr. Ridmann should be modified such that decreases in the Commission ordered all-electric discounts are not reduced any further once the mid-point of Mr. Yankel's band (i.e. 35 percent at 3500 kilowatt-hours) is reached.

After the mid-point of Mr. Yankel's band is reached, the all-electric rates should be adjusted if the relationship between rate levels strays beyond the band described by Mr. Yankel (i.e. 35 percent, plus or minus five percent).[61] OCC Witness Yankel testified:

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[59] Id. at 34. PUCO Staff testimony also contained a proposal to adjust all-electric rate discounts gradually. Staff Ex. 1 at 3-4 (Fortney). Staff Witness Fortney proposed that residential rates be "frozen" for winter 2011/12 at the levels for winter 2010/11. Staff Ex. 1 at 3 (Fortney) ("frozen at current levels"). Cross-examination revealed that Mr. Fortney proposed a frozen RGC, not frozen rates. Tr. Vol. II at 479, lines 12-20. Although frozen RGC credits might not provide all-electric residential customers with expected residential rate reductions (Tr. Vol. II at 478), FirstEnergy Witness Ridmann's assessment was that Staff's proposal would result in higher RGC levels after taking all rate components into consideration. Tr. I at 175-176 (Ridmann). The assessment of Staff's proposal is complicated by Mr. Fortney's imprecision regarding the meaning of frozen RGC credits at "current levels." Tr. Vol. II at 474 ("right now"), contrasting testimony at Vol. II at 480-481 ("before September 1").

[60] OCC Ex. 1 at 32-33 (Yankel).

[61] Id. at 37.

> An annual review would be made for each of the operating companies and a determination would be made of the present relationship between the Standard rate and the All-Electric rate at a usage level of 3,500 kWh.[62]

Adjustments would only be made if the relationship strays beyond the band recommended by Mr. Yankel.

Rates for FirstEnergy's all-electric customers should be adjusted by taking into consideration both cost of service and rate gradualism principles. The continuation of all-electric credits relative to standard residential rates is cost justified, but movement towards appropriate end-state rates from current levels, as previously approved by the Commission, should be moderated.

2. Customers should receive clear communications regarding their rates.

Rates should be communicated to customers as clearly as possible, including the discounts that apply for FirstEnergy's service to electrically heated homes. Statutory support exists for such clear communications, including a "[m]inimum content of customer bills" that includes, "to the maximum extent practicable, separate listing of each service component to enable a customer to recalculate its bill for accuracy" and a "clear explanation on each customer bill, for two consecutive billing periods, of any changes in the rates, terms, and conditions of service."[63] The PUCO Staff's position regarding the communication of electric heating discounts (i.e. EDR and RGC generation-related credits) -- at best the "indifferen[ce]" stated by Staff Witness Fortney and at worst his

[62] Id.

[63] R.C. 4928.10(C) (2) and (5).

view that the PUCO Staff decided at some point not to completely reveal discounts on customer bills [64] -- is incompatible with Ohio law.

The existing electric heating discounts, each of which will continue in some form and for some period of time according to the testimony, are the distribution-related RDC as well as the generation-related EDR and RGC.[65] The RDC and RGC are shown on the appropriate bills for residential customers, while the EDR is not shown.[66] This gap helps to explain FirstEnergy Witness Ridmann's effort in his testimony to explain that the credits for FirstEnergy's electric heating customers were never completely removed.[67] Electric heat customers have not been able to completely observe their generation-related credits, leading to misunderstanding and mistrust on this subject. The EDR credit should be shown on customer bills to fill the current gap in information provided to residential customers, consistent with Ohio law.

3. The new rates should be charged to residential customers who heat with electricity.

The rates supported by OCC Witness Yankel are those for all customers having electrically heated homes.[68] This proceeding has permitted an examination of customer circumstances that were heretofore unexamined in detail, and many customers who receive the Commission-ordered RGC discounts do not have electricity as the major energy source for heating their homes. The continuing RGC credits, those that extend to

[64] Tr. Vol. II at 494-495 (Fortney) (February 17, 2011).

[65] FirstEnergy Ex. 1 at 14 (Ridmann).

[66] Tr. Vol. II at 493-494 (Fortney).

[67] FirstEnergy Ex. 1 at 14 (Ridmann).

[68] Mr. Yankel testified that his application of electric rates to OE's load management customers resulted from reliance upon the Commission's Second Entry on Rehearing concerning non-standard residential customers. OCC Ex. 1 at 42 (Yankel).

winter 2011/12 and beyond, should be made available to all customers whose homes are electrically heated.

FirstEnergy Witness Ridmann devised a rough, statistical test to distinguish between customers who were more and less likely to have their homes heated by electricity. The statistical test relies upon household differences between kilowatt-hour usage between a shoulder month (October) and mid-winter months (December through February).[69] The results of that indicator-test reveal both expected and unexpected results. Mr. Ridmann's statistical test, discussed in summary form in his direct testimony but revealed in more detail on cross-examination, focuses attention on the load management customers served by OE as the most likely customers receiving RGC credits whose residences are not heated electrically. This is expected since these customers did not qualify for load management rates based upon the existence of electric heating in the home.[70] Mr. Ridmann's statistical test results in approximately 159,000 customers whose homes are electrically heated out of a total of 318,000 customers who currently receive the RGC credits.[71] Mr. Ridmann states that the "great majority of the [other] 159,000 non-electric heating customers (109,400) received service under previously-existing load management rates."[72] Of approximately 144,200 customers receiving RGC credits that were previously served on OE's load management rates, Mr. Ridmann's test

[69] FirstEnergy Ex. 1 at 38 (Ridmann).

[70] FirstEnergy Witness Ridmann discusses OE Rate 11 has having been available "'where electricity is the primary source of heat. . . .'" FirstEnergy Ex. 1 at 37. OE Rate 11 was provided as part of an electric tariff, while other OE load management rates where available based on other availability clauses in OE tariffs.

[71] FirstEnergy Ex. 1 at 38 (Ridmann).

[72] FirstEnergy Ex. 1 at 39 (Ridmann).

indicates that approximately 36,700 (25.5 percent) are served at electrically heated homes.[73]

[73] OCC Ex. 4 (Ridmann Workpaper 4) (OE, Sheet No. 17).

The classification of customers suggested by FirstEnergy Witness Ridmann should be considered an indicator test and not a definitive test. The means by which the test was calibrated regarding accuracy was not presented by Mr. Ridmann, and no evidence was presented that any statistical classifications were confirmed by investigating the actual energy source in customers' homes. The use of electricity as the "primary source of heat," the result sought by Mr. Ridmann,[74] fits homes heated using add-on electric heat pumps, but many of the customers in this category (i.e. in FirstEnergy's records) were placed into the non-electric category according to the indicator test.[75] The definitiveness of the test is overstated by FirstEnergy Witness Ridmann, who states that the test "would properly reduce the customers eligible for Rider RGC [credits] . . . ."[76]

Fortunately, the procedure proposed by FirstEnergy to remove certain customers from the ranks of those who receive the RGC credits seems to recognize that a statistical review of customer account information can only provide *indications* of which residences are less likely to be primarily heated using electricity. FirstEnergy Witness Ridmann proposed that customers whose use of electricity for heating is questioned by his test would receive two communications, such as in a postcard, that notified the customer that the use of electric heat is questioned and failure to respond to both of the communications would result in loss of future RGC credits.[77]

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[74] FirstEnergy Ex. 1 at 39, line 12 (Ridmann).

[75] OCC Ex. 4 (Ridmann Workpaper 4). Mr. Ridmann's Worksheet 4 shows that only 700 of 3,700 CEI (19 percent) customers listed in the Companies records as having add-on heat-pumps were considered "heating customers," and no TE add-on heat-pump owners (0 out of 100) were considered "heating customers." Id.

[76] FirstEnergy Ex. 1 at 38 (Ridmann).

[77] FirstEnergy Ex. 1 at 39-40 (Ridmann).

FirstEnergy's proposed procedure provides some protection against arbitrary removal of customers from the ranks of all-electric customers, but caution should prevail in the administration of the procedure. The communications should be separate and not conducted by means of billing stuffers. Both the timing and content of the messages should be subject to review and comment by both the PUCO Staff and OCC personnel.[78] Some customers will undoubtedly miss or misunderstand the messages, and they should be able to reverse their removal from eligibility for RGC credits upon demonstrating the existence of an electric heating source in the home. Upon such a showing, missed credits should be credited back to the customer.[79]

C. Collections on Deferrals Should Not be Permitted Based Upon FirstEnergy's Unfair and Deceptive Marketing Practices.

The deferrals authorized for only accounting purposes in the Commission's Finding and Order dated March 3, 2010 should not be collected in rates by FirstEnergy. The Commission should base this decision upon the unfair and deceptive marketing/sales practices in which the Companies engaged to entice residential customers and developers of residential housing to commit to electric heating before the Companies abandoned their support for the favorable rate treatment.

The saga of the Companies' marketing and sales efforts in connection with gaining sales to electric heating customers is tied to its predicament by way of competition presented by other major fuel sources (primarily natural gas). The

[78] PUCO Staff Witness Fortney stated that Commission approval of a "process to accomplish the exclusion of load management customers who did not heat primarily with electricity" would include "staff and the [C]ompan[ies] and probably the Office of Consumers' counsel." Tr. Vol. II at 472 (Fortney) (February 17, 2011).

[79] Upon cross-examination, FirstEnergy Witness Ridmann stated FirstEnergy "would probably make [RGC credits] retroactive." Tr. Vol. I at 170 (Ridmann) (February 16, 2011).

Commission is fortunate that a former FirstEnergy employee, Mr. Teryl Bishop, testified in North Ridgeville regarding the business response undertaken to this predicament:

> One of the major obstacles to our success -- and I've heard it here [at the North Ridgeville hearing] tonight -- was the skepticism by dealers and customers that the special electric rates being offered with this program would be eliminated, leaving them with high bills and unhappy customers. To counter this, we assured them that if the special rate was ever eliminated or replaced by a different rate, that they could remain on that rate until they decided to change or when there was a change in account .
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> * * *
>
> I think you can tell I'm extremely distressed by this action [of increasing rates for electric heat customers] and that a lot of it would take place. It makes me and my representatives guilty of lying to these customers, abandoning the trust and confidence that they placed in us.[80]

The Companies' marketing and sales representatives knew that they would face "unhappy customers" if they promoted electric space heat based upon the false premise that special electric heating rates would continue to exist, and this predictable result burst into the public light during the winter of 2010/11.

The Companies' marketing and sales efforts were pervasive, extending beyond employees designated as marketing and sales personnel. Mr. Chester Karchefsky testified:

> The more I think about what's on with this all-electric rate situation, I can recall times when I was a sales employee with the company. Illuminating Company managing and marketing personal telling its sales force to keep on pushing all-electric building until we did not have it anymore. If someone asked the question whether the rate would ever go away, our reply would be not to commit one way or the other, just let the customer know that there are so many all-electric customers already and that we're committed to selling the all-electric lifestyle going forward. The rate is still here, as they say, and we are committed to selling the all-electric lifestyle going forward. And the quote was -- that I

[80] Tr. N. Ridgeville at 117-119 (Bishop) (November 22, 2010).

> wanted to mention is, the rate is still here and that's what we have to tell our customers. With those marching orders, we would sway the customer into what was then a false sense of security, that FirstEnergy couldn't ever abandon so many all-electric customers. But obviously, the point of the phrase, it was another version of, "don't ask, don't tell. Just keep selling it until we can't."[81]

Mr. Karchefsky described FirstEnergy's "LGS" program that encouraged all utility employees to engage in sales activities to entice the Companies' customers to use electric equipment.[82] The evasiveness with which the Companies' marketing efforts were undertaken, as described by Mr. Karchefsky, constitutes an unfair and deceptive marketing/sales practice.

Mr. Tom Waltermire was also a FirstEnergy employee who testified about his experiences dealing with residential customers and builders of residential dwellings. Mr. Waltermire testified at the Kirkland local public hearing as follows:

> As an employee of the Illuminating Company, Centerior Energy and then FirstEnergy, I dealt with both the public and with builders. All of us employees were persuaded to promote building all-electric homes with the promise of better rates with no framework for cancellation. As a customer I've lived in an all-electric home since 1972 when I built my first new home. The Illuminating Company representative, Jay Warner, joined with me in the design to build an energy efficient home using all-electric, rather than the alternative of oil or propane to supply heat energy. I was guaranteed a reduced electric rate to do so.
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> * * *
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> After retirement, I bought property in Ashtabula County in 2003 where I built a new home and currently live. My only choice for energy was propane, oil or electric. In making that energy decision, I was once again assured by the now-named FirstEnergy of the all-electric rate, which was always assumed to be a permanent rate.[83]

[81] Tr. Kirkland at 39-40 (Karchefsky) (November 23, 2010).

[82] Id. at 41.

[83] Tr. Kirkland at 127-128 (Waltermire) (November 23, 2010).

Mr. Waltermire was both a FirstEnergy representative tasked with promoting electric heat and a customer who received the promise of continued special rates for homes heated with electricity from a representative of the FirstEnergy (i.e. Jay Warner).

Another former employee testified in Maumee regarding his experience as part of FirstEnergy's marketing and sales effort. Mr. James Ehlinger testified as follows:

> [F]rom 1980 until 1993, I was an HVAC contractor in Defiance, Ohio, and at the time Toledo Edison actively promoted electric heat of all types. They had incentives. They had rebates. They did all kinds of advertising. At that particular time, Toledo Edison was looking for a winter load, because they were a summer peaking company, wanted some load in the wintertime. So they were out actively seeking and endorsing electric heat.
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> * * *
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> From 1993 to 2001, I was an employee at FirstEnergy, and specifically Toledo Edison. And in part of my tenure I was a residential account rep actively calling on the HVAC contractors, home builder's associations, anyone who would listen to us, and we were actively seeking more load for electric heat. We were promoting it. We had rebates. We had home shows. You name it, we were doing it. The same thing with electric service contracts. If you put electric heating in your home, you would get that rate, basically, indefinitely.
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> * * *
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> One of the things that did happen along the way at the particular time that I was employed there, there was a gentleman by the name of Al Temple [phonetic], who was the sales — vice president of sales and marketing, and one of the things he directed us to do was to destroy all records that were over three years old. So a lot of those records are probably gone by now.[84]

Mr. Ehlinger's testimony again reveals aggressive marketing and sales activities to promote the use of electric heat, including false and misleading communications to customers that special tariffs would continue "indefinitely." Mr. Ehlinger adds an insight

[84] Tr. Maumee at 23-25 (Ehlinger) (November 18, 2010).

into the retention of records regarding FirstEnergy's activities -- records were destroyed.[85]

Written documentation of the marketing and sales activities survived because it was deemed important and carefully guarded by its *recipient*, Mr. Thomas Logan. Mr. Logan testified in Strongsville as follows:

> I have had an all-electric home for more than 30 years, utilizing an agreement between myself and Ohio Edison, now FirstEnergy, on electric rates for my home. You have heard numerous testimonies from other homeowners to the effect that for more than 40 years FirstEnergy has . . . induced homeowners to install all-electric homes by offering a permanent and special rate for those homes.
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> * * *
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> I submit to you that FirstEnergy did, in fact, make such commitments and that their testimony to you that such commitments do not exist is false. I wish to submit herewith a written document issued by an authorized Ohio Edison employee that shows that Ohio Edison did enter into a permanent, fixed rate agreement with me as an all-electric homeowner.[86]

Mr. Logan presented a letter ("Logan Letter"), authored by Mr. Elio Andreatta dated June 18, 1988 and addressed to Mr. Logan.[87] The letter attached a copy of a residential tariff for an "Optional Heating Rate" and stated that "if Ohio Edison ever removes this rate from our files you would not be in jeopardy of forfeiting this rate. This rate will be guaranteed for you as long as you wish to utilize it."[88]

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[85] FirstEnergy Witness Ridmann stated in his rebuttal testimony that FirstEnergy's records were searched for a document authored by OCC Witness Andreatta over twenty years ago and that the document could not be found. FirstEnergy Ex. 65 at 2 (Ridmann). The suggestion that the document was therefore fraudulent, in the face of overwhelming evidence to the contrary (i.e. testimony by *both* its author and its recipient), is not credible.

[86] Tr. Strongsville at 124-125 (Logan) (October 27, 2010).

[87] Sandusky Ex. 2 (submitted October 27, 2010).

[88] Id. at 1.

The Logan Letter had the tell-tale attributes of a utility-originated document: the Logan Letter was written on stationary bearing the Ohio Edison logo, it contained a heading that identified an Ohio Edison program that promoted electric heat-pumps,[89] and it attached an actual Ohio Edison tariff sheet that was consistent with the contents of the letter as well as dated appropriately for an attachment to the letter. FirstEnergy subpoenaed the original document, questioning its authenticity.[90] Instead of a challenge at trial, however, the OCC produced Mr. Elio Andreatta by subpoena (the author of the Logan Letter). Mr. Andreatta confirmed that he was a residential representative of Ohio Edison at the time the letter was written, that the Logan Letter was written on Ohio Edison stationary, that the "Alternative Plus" heading identified an Ohio Edison program to promote the use of heat-pumps, that he signed letters "Elio" as displayed on the Logan Letter, and that he remembered dealings with Mr. Logan regarding the equipment.[91] Mr. Logan stated on cross-examination that his letters were reviewed by a residential supervisor before being transmitted, and that he was asked through his supervisor to represent that electric heating tariffs could be used by a customer (but not new customers) after it was withdrawn.[92]

The record contains much testimony by the Companies' customers who received communications from the utilities that promised continued special tariff treatment of

[89] The "Alternative Plus" program was the subject of other corroborating testimony. Tr. N. Ridgeville at 116 (Bishop) ("alternative plus program").

[90] FirstEnergy Motion for Issuance of a Subpoena at 1 (December 22, 2010). Arrangements to permit FirstEnergy's handwriting analyst to examine the document, and for its safe return to Mr. Logan, were discussed at a status conference. Tr. at 130-137 (January 7, 2011).

[91] Tr. Vol. I at 109-114 and 119 (February 16, 2011).

[92] Id. at 114-118.

customers who used electric heating.[93] As the administrators of the special residential tariffs, FirstEnergy representatives were reasonably relied upon to explain how they were applied to service provided by the Companies.[94] And persons considering housing and heating system choices responded to the Companies efforts to entice customers (directly or though homebuilders) with promises of special rates to choose electrically heated homes.[95] Many of these decisions were (and continue to be) difficult or impossible to reverse due to the durable nature of both heating systems and housing stocks, [96] as well as

[93] See, e.g., Tr. Sandusky at 80-81 (Kocis) and 86 (Lane) (October 25, 2010); Tr. Strongsville at 44 (Ansari), and at 57-58 (Carney) (October 27, 2010); Tr. N. Ridgeville at 51 and 61 (Sweeny) (November 23, 2010); Tr. Kirtland at 106 (McMeechan) and at 166 (Martony) and at 174 (Loy) and at 184 (McLaughlin) (November 23, 2010).

[94] See, e.g., Tr. Sandusky at 71 (Pitsinger) (October 25, 2010); Tr. Strongsville at 15 (Jankura) ("appease my parents' skepticism, I called the Illuminating Company" after having "been told by Bob Schmitt Homes") and at 124-125 (Logan) (October 27, 2010); Tr. N. Ridgeville at 61 (Sweeney) and at 64 (Ferry) ("[FirstEnergy's] input to both of us totally put us at ease with special rates") and at 72 (Pitsinger); Tr. Kirtland at 33-34 (Kossick) and at 106 (McMeechan) and at 110 (Arcaro) and at 166 (Martony) and at 174 (Loy) (November 23, 2010).

[95] See, e.g., Tr. Sandusky at 7 (Randall) ("the discounted electrical rate offered by FirstEnergy was a deciding factor that led to my purchase of the geothermal system. The cost of the system was $12,000 over the cost of a propane or gas system") and at 14-15 (Jankura) and at 15-16 (Groover) ("Upgrades. And if we did this, we would continue to get our all-electric discount.") (October 25, 2010); Tr. Strongsville at 7 (Randall) (October 27, 2010).

[96] See e.g., Tr. Strongsville at 7 (Randall) and at 25 (Landers) and at 45 (Ansari) ("pay for the assessed costs of running the gas line…in addition to the costs of the new furnace, the new oven, the clothes dryer, hot water heater") and at 142 (Finley) ("to see if I could convert to gas…it would take you about - - cost you about 30 to $40,000 to convert" (October 27, 2010); Tr. N. Ridgeville at 143 (Silski) ("Most of us have no other heating options without major costly utility infrastructure improvement, which are really not even economically feasible.") (November 22, 2010); Tr. Kirtland at 24 (Garvey) ("no gas lines on our street…no duct work in the homes") and at 180 (Matras) ("We invested in this brand-new furnace. We are preparing for retirement. I don't want to go out and buy a new furnace.") (November 23, 2010).

due to the unavailability of natural gas pipelines in subdivisions dedicated to electric heat.[97]

Rate-setting by the Commission should be undertaken based upon familiarity with the extensive reports by customers regarding their personal contacts with FirstEnergy personnel that are reported in the transcripts of the local public hearings and the documents docketed in this case.[98] The testimony of Mr. Jim Jankura in Strongsville, for example, illustrates the customer interactions with the Companies that resulted in wrongly-guided, and damaging, decisions:

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[97] See, e.g., Tr. N. Ridgeville at 70 (Jager) ("no access to natural gas supply systems") and at 103 (Campo) ("Total cost of converting to gas, $23,700.") (November 22, 2010); Tr. Sandusky at 25-26 (Theibert) ("void a competing energy structure with buildings that would permanently depend upon electricity for heating") and at 36 (Kasicki) ("Took the gas line out all the way to the street, taking away our option for gas.) (October 25, 2010); Tr. Strongsville at 25 (Landers) ("no gas lines in the development") and at 109 (Sass) ("No gas lines to our dwellings. No ductwork. No provisions for alternate hearing supplies.) and at 170 (Hays) ("there are not gas lines in our community") (October 27, 2010); Tr. Kirtland at 118 (DeCicca) ("have all-electric and no source for natural gas, so we're stuck with electric heat") (November 23, 2010).

[98] Chairman Schriber, presiding over some of the local public hearings, encouraged the public to comment both by means of testimony at the local public hearings and by transmitting materials for docketing and consideration by the Commission. Tr. Strongsville at 91-92 (October 27, 2010) ("if you . . . would . . . like to have a statement on the record but you don't want to hang around to wait to make that statement -- . . . then mail your testimony * * * [and] I'll make sure it gets on the docket as part of the record"). For example, the docketed letters are informative regarding contact between FirstEnergy representatives and customers. Docket 10-176-EL-ATA, Bogdanoff Memo (March 1, 2010) ("representative indicated that I would save money using this [electric] system over the lifetime of owning this home because . . . FirstEnergy would offer a discounted electric rate"), Peasley Memo (March 1, 2010) ("informed by the staff of The Illuminating Company that his rate went forward for us as long as we owned this home" and "[n]umerous purchases . . . were made with this information in mind"), Huntington Memo (March 10, 2010) ("When I bought this home 22 years ago, I was told by the Illuminating Company that the all electric discount would never go away as long as I owned this home."), Siamidis Memo (March 15, 2010) ("I contacted the Illuminating Company . . . and I was told the discount WILL CONTINUE[ ] TO BE APPPLIED AS LONG AS I LIVED IN MY HOME."), Mager Memo (April 12, 2010) ("CONTACTED THEN CEI, AND WAS TOLD I WOULD BE IN EFFECT PERMANENTLY"), Owen Memo (October 19, 2010) ("I was promised the electric discount rate as long as I live din this house. I purchased it in 1977. . . ."), Singler Letter (November 2, 2010) ("told us to not worry as that rate was locked in for good"), Dudley Letter (November 2, 2010) ("put us with Dan Hartlieb of the line dept . . . . Because of their 'great' plan we decided to take energy saving into consideration in all aspects of our home."), Gute Letter (January 9, 2011) ("I was told these discounted rates were indeed in effect and would transfer over to me"), McCoy Memo (January 30, 2011) ("I was assured over the phone that we were grandfathered in to rate system [in 2001] and I did not need to worry"), Reeder Letter (February 2, 2011) ("and that anyone who bough my house in the future would get the same great rates. [D]urin the time I was being sold on the idea . . . FirstEnergy was also lobbying to have those rates taken away").

> [M]y parents, from day one, had a very skeptical background about my wife and I building an all-electric home. Knowing that skepticism, there were a lot of question that came upon during our building process.
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> * * *
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> To appease my parents' skepticism, I called the Illuminating Company and inquired with them about the all-electric home discount rate. What I had been told by Bob Schmitt Homes was pretty much concurred by the Illuminating Company. We were told that a special rate had been established to make the all-electric homes affordable, if not more affordable than heating with gas. And heating with electricity was the way of the future. Convinced, we proceeded to build[ ] our first all-electric home.
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> * * *
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> Had I been informed of th[e] outcome[ ] [of the removal of the special all-electric rate,] I would never have considered building an all-electric home. My increase to around $800 per month in my electric bills last winter was hard for my family to absorb. Harder yet will be to absorb . . . the depreciated value in my home, and eventually my retirement, if this discount rate is not currently saved. I pay my taxes and seldom resented having to do so. However, if this special electric rate is not restored, I will be one of the first to go to the county and ask for a reduction in my property valuation in taxes, which I fully realize will only cause my schools and my city to suffer.[99]

The Commission should remove the threat to customers and to communities where electrically heated homes are concentrated.

FirstEnergy Witness Ridmann's argument that electric heating customers received lower average cost increases for heating their homes over various *historical periods* would not be reassuring to customers who fear their *future costs* while heating with electricity without special electric rates will be damaging.[100] The public record supports

[99] Tr. Strongsville at 15-18 (Jankura) (October 27, 2010). The effect of electric heating rates on property values, and ultimately upon the local governments that depend upon property taxes, was the subject of both expert and local public testimony. CKAP Parties Ex. 1 at 4 (Frawley), referring to the testimony of Dale Finley regarding the "reduced tax evaluation" on his home. Tr. Strongsville at 143 (Finley) (October 27, 2010). The link between the testimony of Messrs Frawley and Finley was established at hearting. Tr. II at 269-270 (February 17, 2011).

[100] FirstEnergy Ex. 1 at 28-29 (Ridmann).

the fact that FirstEnergy's special electric rates made electric heating attractive in the past. Mr. Ridmann's back of the envelop calculations were based upon selected information on only OE customers using hypothetical heating systems instead of the stocks of actual heating systems used by customers.[101] The OE customer information used by Mr. Ridmann, according to his own testimony, is corrupted by the presence of accounts for non-electrically heated residences in his pool of accounts for electrically heated residences.[102] Mr. Ridmann's calculations did not even provide comparative heating costs based upon differing price assumptions for electricity (i.e. the subject of this proceeding). Mr. Ridmann's comparison's between electrically heated and gas heated residences provides no assistance to the Commission in making its decision in this case.

Ohio Adm. Code 4901:1-10-24(D) prohibits an electric utility from committing an unfair or deceptive act or practice in connection with promoting or providing service. The evidence shows that the Companies increased their sales of electricity by promoting the use of electric heating, and that such promotion was conducted in an unfair and

[101] Tr. Vol. 1 at 160-162 (Ridmann) (February 16, 2011). Mr. Ridmann makes the huge, untenable assumption that all customers using electric heat use an air-source heat-pump that has a 200 percent efficiency rating (id. at 162-163 and OCC Ex. 3 (Ridmann Workpaper 5)) as well as that customers who heat with natural gas use a 90 percent efficient natural gas furnace. FirstEnergy Ex. 1, WRR-6 ("90% Gas Efficiency"). Even on the matter of electric heating systems, Mr. Ridmann did not use information regarding actual system ownership in areas served by FirstEnergy. Tr. Vol. I at 163 (Ridmann) (February 16, 2011).

Public testimony revealed that many baseboard and other non-heat pump systems were installed in response to FirstEnergy's marketing and sales efforts. See, e.g., Sandusky Tr. at 19 (Kinney) and at 23 (McCartney) and at 47 (Neill) (October 25, 2010); Strongsville Tr. at 40 (Nussle) (October 27, 2010); N. Ridgeville Tr. at 99 (Campo) (November 22, 2010); Kirkland Tr. at 24 (Garvey) (November 23, 2010); Tr. Maumee at 43 (Beavers), (November 18, 2010). FirstEnergy representatives discussed the installation of such heating with customers. See, e.g., Sandusky Tr. at 18 (Kinney) (October 25, 2010).

[102] FirstEnergy Ex. 1 at 38-39. Mr. Ridmann used OE customers who were on the schedule for electric heat. Tr. Vol. I at 160 (Ridmann) (February 16, 2011). The problem of corrupted data is not remedied by the exclusion of load management customers, as is evident from OCC Ex. 4 (Ridmann Workpaper 4).

deception fashion. As a result, the Commission should reject all collections of deferrals in rates.

D. Carrying Charges Should Not be Approved.

1. The PUCO properly denied FirstEnergy the right to accrue carrying charges resulting from reinstatement and extension of all-electric credits.

On March 3, 2010, the PUCO issued a Finding and Order in this proceeding that authorized FirstEnergy, under R.C. 4905.13, to modify its accounting procedures. According to the clarification stated in the Fourth Entry on Rehearing on April 28, 2010, the Commission allowed FirstEnergy to defer the incurred purchased power costs equal to the difference in rates collected under its Finding and Order and the rates and charges that would otherwise apply to service provided to all-electric customers.[103] Conspicuously absent from the Commission's March 3, 2010 Finding and Order, however, was any authorization for FirstEnergy to accrue carrying charges on the deferrals.

On April 2, 2010, FirstEnergy filed an application for rehearing regarding the Finding and Order on March 2, 2010 that sought rehearing on two issues that did *not* include the Commission's failure to permit carrying charges on the authorized deferrals. No party to the case opposed the Companies' Application for Rehearing, and the PUCO issued a Second Entry on Rehearing on April 28, 2010 that granted the Companies' Application for Rehearing.[104] In response to the Commission's Second Entry on Rehearing, FirstEnergy sought rehearing on May 14, 2010 regarding the absence of

[103] *In re FirstEnergy's Request for Approval of a New Rider and Revision of an Existing Rider*, Case No. 10-176-EL-ATA, Second Entry on Rehearing (April 15, 2010) and Third Entry on Rehearing (April 28, 2010).

[104] Second Entry on Rehearing (April 28, 2010).

carrying charges on the costs related to providing the authorized all-electric discounts.[105] FirstEnergy argued under the guise of complaining about the Commission expanding the scope of the discounts, even though the Companies claimed they were not challenging the scope of the discounts.[106]

The OCC filed a Memorandum Contra FirstEnergy's application for rehearing noting that, among other things, FirstEnergy failed to comply with the law governing rehearing of Commission decisions, R.C. 4903.10. Under R.C. 4903.10, an application for rehearing must be "filed within thirty days after the entry of the order" that is the subject of the pleading. This statute is mandatory and jurisdictional. The PUCO has no jurisdiction to entertain an application for rehearing filed out of time.[107] The Companies' Application for Rehearing that argued the carrying charge issue was filed seventy-two days after the Second Entry on Rehearing that authorized the deferrals without carrying charges. The Companies' Application for Rehearing was untimely, and the Commission had no jurisdiction to hear FirstEnergy's arguments regarding the lack of carrying charges.

The PUCO issued a Fourth Entry on Rehearing on June 9, 2010 where it granted rehearing on matters specified in the applications for rehearing filed by, among others, FirstEnergy. The rehearing was issued on the grounds that further consideration needed

[105] FirstEnergy's Application for Rehearing, Memorandum in Support at 1 (May 14, 2010).

[106] FirstEnergy Application for Rehearing at 7-13 (May 14, 2010). Despite claiming they are not challenging these issues, the Companies argued that the PUCO failed to explain the reason for doing so, and claimed that the expansion was contrary to prior PUCO orders such as the Rate Certainty Plan Order, the Distribution Rate Case Order, and the Electric Security Plan Order. FirstEnergy's testimony echoes this theme in a further attempt to divert the PUCO's attention from the fact that the Companies failed to seek rehearing regarding carrying charges. FirstEnergy Ex. 1 at 44-45 (Ridmann).

[107] *City of Dover v. Pub. Util. Comm.* (1933), 126 Ohio St. 438, 185 N.E. 833; *Greer v. Pub. Util. Comm.* (1961), 172 Ohio St. 361, 16 O.O.2d 214, 176 N.E.2d 416; *Pollitz v. Pub. Util. Comm.* (1918), 98 Ohio St. 445, 16 OLR 10, 121 N.E. 902.

to be given on the matters specified in various parties' applications for rehearing. In its Fifth Entry on Rehearing, issued on November 10, 2010, the PUCO correctly denied FirstEnergy's assignment of error related to carrying charges.[108] The PUCO was correct in denying carrying charges on deferrals pertaining to the continuation and extension of the all-electric discounts.

2. The Commission should deny carrying costs on the deferrals because FirstEnergy failed to show that significant financial harm will result if it is denied carrying charges.

Even if the PUCO determines to entertain further argument on carrying charges -- a decision that circumvents its earlier decision and Ohio law -- it would have to consider the unique facts in this case to determine whether to allow FirstEnergy to collect carrying charges. The PUCO's decision will be important because carrying charges are not merely about accounting. The addition of carrying charges would affect the ultimate rates that FirstEnergy would charge to its Ohio customers. Indeed, Mr. Ridmann testified that the carrying costs should be calculated as of February 28, 2010 and without reduction for accumulated deferred income tax.[109]

Because the decision to allow carrying charges (i.e. when permitted by Ohio law) is a case-by-case determination, there can be no controlling precedent that presumes one particular outcome. For instance, Mr. Ridmann testified that the Commission authorized

[108] Although the Commission noted that it would address the question of carrying charges when it addresses the recovery of any deferrals, the Commission's language must be interpreted to relate to any future deferrals as opposed to deferrals already created under its earlier orders (i.e. reinstating and extending the initial discounts). The OCC's arguments in the instant pleading apply equally to future deferrals.

[109] FirstEnergy proposed that carrying charges be calculated using February 28, 2010 as a starting date, consistent with the methodology used to derive the 6.54 percent composite debt rate for the Companies used in Case No. 07-551-EL-AIR. FirstEnergy Ex. 1 at 46 (Ridmann).

carrying charges for distribution deferrals in FirstEnergy's ESP case.[110] Carrying charges were permitted in that case on certain deferrals -- distribution, line extensions, and transition taxes.[111] Those expenses are not at issue here. Mr. Ridmann also points to several other PUCO cases where carrying charges were permitted on deferrals and claims these cases are "not distinguishable."[112] He fails to explain, however, the rationale for allowing carrying charges in those cases, and does not explain how those cases are necessarily controlling on a factual basis. Furthermore, precedent exists for not permitting carrying charges on deferrals.[113]

The PUCO has stated general principles in its review of requests for deferral accounting and carrying charges. Where the Commission has approved deferred accounting and carrying charges in the past, it has generally done so to avoid the possibility of *significant* financial harm to the utility.[114] Similarly, the Commission has found that deferrals and carrying charges should be denied where they are not necessary

[110] FirstEnergy Ex. 1 at 45-46.

[111] FirstEnergy Application for Rehearing at 11-12 (May 14, 2010) (arguing that the Companies are entitled to carrying charges because they received recovery of such charges in their ESP proceeding).

[112] See FirstEnergy Ex. 1 at 45-46.

[113] See, e.g., *In re CG&E Request to Modify Accounting Procedures Related to the Disconnection Moratorium*, Case No. 01-3229-EL-AAM, Entry (July 8, 2003) (where the PUCO allowed no carrying charges on deferrals of incremental electric residential past due accounts); *In re Columbia Gas Request to Change Accounting Methods*, Case No. 09-371-GA-AAM, Entry (July 8, 2009)(where no carrying costs were permitted on deferrals of pension costs and post retirement benefits).

[114] See, e.g., *In re Investigation into the Financial Impact of FASB Statement No. 106, "Employers Accounting for Postretirement Benefits Other Than Pensions,"* Case No. 92-1751-AU-COI, Finding and Order at 19 (February 25, 1993); *Cincinnati Gas & Electric Company*, Case No. 92-946-EL-AAM, Entry at 1-2 (October 1, 1992); *Ohio Edison Company*, Case No. 84-188-EL-AAM, Entry at 1-2 (February 2, 1988); *Cleveland Electric Illuminating Company*, Case No. 87-109-EL-AAM et al, Entry at 2 (February 2, 1988); *Ohio Edison Company*,. Case No. 87-985-EL-AAM et al, Entry at 2 (October 20, 1987).

to maintain a utility's financial integrity.[115] Recently, the Commission denied deferrals where the deferrals would cause the rates customers pay to substantially increase.[116]

In the instant case, FirstEnergy alleges merely that the recovery of carrying charges is necessary to "make the Companies whole."[117] Mr. Ridmann testified that the Companies have been deprived of the use of these revenues during the recovery period and there is a "real cost to being deprived the use of those funds."[118] These claims merit several responses. First, this claim fails to recognize that "making the company whole" has no basis in law. Traditional regulation, before enactment of S.B. 221, afforded utilities the opportunity to earn a fair and reasonable rate of return. There was no guarantee or promise of making whole. Regulation under S.B. 221 does not include a "make whole" guarantee either.[119]

Second, the Companies make no showing that denial of carrying charges will impose a significant financial burden upon them.[120] Nor do they claim that the carrying charges are necessary to maintain their financial integrity. Thus, arguments for carrying charges (if entertained) should fail in accordance with the principles the PUCO has stated in past cases that involved carrying charges.

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[115] *In re Cincinnati Gas & Electric Co.*, Case No. 90-2017-EL-AAM, Entry (March 14, 1991).

[116] See, e.g., *In re FirstEnergy's Request for Authority to Modify Certain Accounting Practices and for Tariff Approvals,* Case No. 07-1003-EL-ATA, Finding and Order at 7-8 (January 9, 2008).

[117] FirstEnergy Ex. 1 at 44.

[118] Id.

[119] The electric security plan standard, set forth in R.C. 4928.143(C)(1) states that the Commission shall approve or modify and approve an electric security plan so long as the plan including any deferrals and any future recovery of deferrals and all other terms and conditions is more favorable in the aggregate as compared to the results of a market rate offer.

[120] If a carrying cost is permitted, in order to minimize the costs that will likely be sought to be recovered from customers, it should be comprised of the following: Debt only, with no cost of equity, and no compounding of the carrying charge rate, on a net of tax basis. See FASB (Financial Accounting Standard Board) 92, which prohibits capitalization of the return on equity other than during construction or as part of a qualified phase-in plan.

3. Carrying charges, if permitted, should be calculated net of tax.

Although FirstEnergy's testimony stated that carrying costs should be calculated without reduction for accumulated deferred income tax,[121] doing so would be unreasonable. During the deferral period, the balance on which the carrying charges are accrued should be reduced by the applicable deferred taxes. The deferred expenses create a deferred tax obligation that reduces the Companies' current tax expense. The Companies will only need to rely on short-term debt borrowed from the capital market to support the net of tax balance of deferred expense until the expense is recovered from customers. If the Companies are permitted to accrue carrying charges on the gross balance, it will be over-collecting the actual carrying costs of these expense balances.

Restricting the carrying charges to a net of tax basis is consistent with the Commission's ruling on this very issue in a FirstEnergy's standard service offer case.[122] The Commission accepted arguments by the OCC and the PUCO Staff, finding that the calculation of carrying charges on a net of tax basis is in accordance with "sound ratemaking theory" as well as Commission precedent.[123] In the event that carrying charges are permitted, the Commission should stand by its earlier decision and again rule that carrying charges should be calculated on a net of tax basis.

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[121] FirstEnergy Ex. 1 at 46.

[122] *In re FirstEnergy ESP Case*, Case No. 08-935-EL-SSO. FirstEnergy Witness Ridmann stated that the "deferrals arising from this proceeding are not distinguishable from the deferrals discussed above [including those arising from Case No. 08-935-EL-SSO.]" FirstEnergy Ex. 1 at 45-46.

[123] Id., Order at 58 (December 19, 2008) (citing to *Cleveland Electric Illuminating Co.*, Case No. 88-205-EL-AAM, Entry (February 17, 1988), ordering carrying charges for Perry nuclear power plant to be net of taxes) and *In re Cleveland Electric Illuminating Co.*, Case No. 92-713-EL-AAM, Entry (December 17, 1992) (ordering carrying charges on deferred program costs to be on a net of tax basis).

E. All Customer Classes Should Contribute to Support the New Rates for Electrically Heated Residences, Consistent with the PUCO's Rule Regarding Reasonable Arrangements.

OCC Witness Yankel recommended the end of deferrals upon long-term rate-setting for all-electric customers, and also the collection of revenues from customers in all customer classes to support the newly established rates for these all-electric customers. Mr. Yankel stated:

> I recommend that a recovery rider be established on an on-going basis following the Commission's Order for each operating company . . . . I further recommend that that recovery rider contain its own funding mechanism, such that it sets on an annual basis the level of RGC credits to be given, and the amount of revenue to be collected for each of the customers on other rate schedules in order to fund the credits. Any over- or under-recovery in one year should be carried over to the next year. Eventually, after the next ESP expires in 2014 and in the next distribution rate case, the Commission could consider folding the differential into permanent rates and retain the rider for the purpose of any adjustments needed to stay within the bandwidth.[124]

On the subject of which "other rate schedules" would be affected, OCC Witness Yankel testified as follows:

> I recommend that these riders be funded by an equal cents per kWh charge from all other customers in each of the FE operating companies. Given the fact that the Company is obtaining a single average price per kWh from its generation/energy suppliers, and given the fact that All-Electric customers should generally benefit the system with high usage during times of low hourly energy costs, it is only appropriate that all customers that are benefiting from the usage patterns of the All-Electric customers should equally pay for the credit given to these customers.[125]

[124] OCC Ex. 1 at 39 (Yankel).

[125] OCC Ex. 1 at 39-40 (Yankel).

Regarding benefits obtained from the load profile that all-electric customers contribute to the overall load shape of the Companies, FirstEnergy Witness Ridmann testified that the previously existing all-electric rates were "designed to lower rates for all customers."[126]

Reasonable arrangements, including economic development arrangements and unique arrangements, normally provide rate reductions to large customers.[127] By Commission rule, recovery for the reduced revenue resulting from reasonable arrangements is "spread to all customers in proportion to the current revenue distribution between and among classes . . . ."[128] The Commission should modify and approve the schedule proposed by the Companies, consistent with the contents of this Initial Post-Hearing Brief, and spread the reduced revenue resulting from continuing RGC credits across all customers.

The testimony of OCC Witness Yankel differs from that of FirstEnergy Witness Ridmann and Staff Witness Fortney regarding the customers who would pay for the RGC (or equivalent). Charging a broad range of customers for class rate reductions is not unusual in Commission practice, including Commission approval of rates for FirstEnergy's customers. For example, the rates approved in the most recent electric security plan case include interruptible tariffs that reduce rates for large customers -- based on arguments that large customers might experience "rate shock" -- and the load changes are part of FirstEnergy's claimed peak demand reductions for purposes of

[126] FirstEnergy Ex. 1 at 8 (Ridmann).

[127] R.C. 4905.31 ("special contract law") permits "a public utility . . . [to] fil[e] a schedule . . . providing for . . . [a] classification of service based upon the quantity used, the time when used, the purpose for which used, the duration of use, and any other reasonable consideration. . . . ." R.C. 4905.31(D).

[128] Ohio Adm. Code 4901:1-38-08(A)(4).

meeting requirements stated in S.B. 221.[129] Residential customers were assigned a portion of the responsibility to pay for these reductions despite a number of other Commission decisions that follow the regulatory principle that DSM program costs should be collected from the customer class the program targets.[130]

The Commission should spread the reduced revenue resulting from the RGC credits across all customer classes, consistent with the PUCO's rule regarding reasonable arrangements.

IV. CONCLUSION

The discounts previously available in residential non-standard rates should be restored and remain in place, consistent with the requirements stated in this pleading. The Commission should order rates for residential customers that are fair and reasonable, and that balances the interests of electric customers in FirstEnergy's service area.

The Commission should continue its efforts on behalf of residential customers in the wake of the marketing representations by FirstEnergy regarding the treatment of all-electric rates. The Commission should remedy the losses imposed by the marketing and sales actions of the Companies by requiring the Companies to absorb the existing deferrals. The funds needed to provide discounts for residential customers who heat with electricity should be allocated to all customer classes.

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[129] *In re FirstEnergy's ESP II Case*, Case No. 10-388-EL-SSO, Opinion and Order at 30-31 (August 25, 2010).

[130] *In re Duke ESP Case*, Case No. 08-920-EL-SSO, *In re DP&L ESP Case*, Case No. 08-1094-EL-SSO, and *In re AEP DSM Portfolio Case*, Case No. 09-1089-EL-POR.

Respectfully submitted,

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SELECTED CASE EXHIBITS

CERTIFICATE OF SERVICE

I hereby certify that a copy of the Office of the Ohio Consumers' Counsel's Motion was served electronically upon the persons listed below this 28th day of March 2011.

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Summary: Brief Initial Post-Hearing Brief by the Office of the Ohio Consumers' Counsel electronically filed by Ms. Deb J. Bingham on behalf of Small, Jeffrey L. Mr.