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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**

POSTHEARING BRIEF OF OHIO EDISON COMPANY, THE CLEVELAND ELECTRIC ILLUMINATING COMPANY AND THE TOLEDO EDISON COMPANY

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I. INTRODUCTION

Electric heating customers have historically and without interruption paid less for their electric service than standard residential customers. The rate structure and the mechanisms through which the discount is provided have evolved over time, as has the amounts of those discounts enjoyed by customers. They were borne of an era when Ohio Edison Company ("OE"), The Cleveland Electric Illuminating Company ("CEI") and The Toledo Edison Company ("TE") (collectively, the "Companies") owned and operated generation facilities that served a summer peaking load. Electric heating load benefitted all residential customers by spreading over more kilowatt hours the Companies' fixed costs and the revenue responsibility attributable to the residential class. With deregulation, the unbundling of electric service, the transfer of the Companies' generation facilities, and statutory requirements for energy efficiency, the original justification for special electric heating rates no longer exists; however, the Companies have at all times maintained discounts for the customers who heat their home primarily with electricity. This is undisputed.

The mitigation of rate impacts on electric heating customers through the provision of credits for those customers has, before this case, been generally uncontroversial. Starting with the Companies' Rate Certainty Plan in 2006, continuing through the Companies' distribution rate case in 2007 and the Companies' Electric Security Plan adopted in 2009, the consolidation of residential distribution rates into a single rate and generation rates into a single rider for each Company, creation of certain distribution and generation credits for electric heating customers as well as the elimination of special rates for new electric heating customers, were introduced largely through Orders approving Stipulations agreed to by a broad coalition of interests, including the Office of the Consumers' Counsel ("OCC").

Even with the best intentions and plans and with the maintenance of credits for electric heating customers, however, some electric heating customers complained how much their rates increased. These complaints ignored the facts that, given that the Companies' rates had been frozen for many years, almost all of the Companies' residential customers saw rate increases and that the increases experienced by electric heating customers were usually less than those experienced by standard residential customers. Nonetheless, in this proceeding, the Companies proposed the establishment of another modest credit, in addition to the previously existing credits, to mitigate electric heating customers' rate impacts.

The Commission expanded the Companies' proposed credit by increasing both the amount of the credit and the number of customers that were eligible to receive it. The Commission then established a proceeding to determine how best to deal with electric heating customers and the rates to be paid by those customers on a going forward basis. In response, three parties submitted proposals: the Companies, OCC and the Staff. As demonstrated below, the Companies' proposal should be accepted because it best balances the interests of all parties. It maintains certain credits available to electric heat customers. It provides the Companies full recovery of deferred costs that result from the imposition of the additional discount, including the recovery of carrying costs. It is also the least costly to other residential customers, who will have to pay for the discounts.

In response to media and other publicity in which customers claimed that they were provided some type of promises or guarantees by the Companies, the Commission requested evidence on this issue – and on the issue of the Companies' marketing practices generally. Contrary to claims made in media campaigns and public hearings, there is ***no credible evidence*** that the Companies made promises to customers that the electric heating rates would last forever

or engaged in any other improper marketing practices. The evidence further shows that this process has been manipulated by Susan Steigerwald and the "CKAP parties", and that claims of home valuation loss have no basis. Likewise, the evidence indisputably shows that owners of electrically heated homes continuously have received a discount compared to standard residential rate customers.

II. FACTS OF RECORD

A. The History of Electric Heating Rates

1. The rates were first adopted in response to concerns about a natural gas shortage.

The evidence presented at the hearing regarding the history of electric heating rates and the justification for them is uncontroverted. During the energy crisis of the 1970s, concerns arose that there may be a shortage of natural gas. In light of those concerns, CEI requested permission from the Commission to offer, and the Commission approved, special electric rates for customers who used electricity as their main source of energy for space heating or for water heating. TE and OE later applied for and were granted permission to offer similar rates for electric heating customers. "These rate structures were declining block structures such that the customer's rate declined with greater electricity usage." (Commission Finding and Order in Case No. 10-176-EL-ATA, March 3, 2010 (hereinafter "March 3, 2010 Order"), ¶ 2.)

2. The electric heating rates initially offered benefits to both utilities and consumers.

Concerns about natural gas availability were not the only impetus for the rates. Until relatively recently, all three of the Companies were fully integrated utilities (as were virtually all electric utility companies in Ohio). (Direct Testimony of William R. Ridmann (Company Ex. 1) p. 8.) Given the growing popularity of air-conditioning in the late 1960s and 1970s, summer peak electricity usage was increasing at a much faster rate than winter peak usage. (Company Ex.

1, p. 9.) That caused issues for the utilities; they had to build sufficient generating capacity to meet their peak summer load, but that capacity went underutilized during the winter months.

The electric heating rates helped address this problem in two ways. First, they increased the total number of kWhs that the utilities sold during the year, thereby allowing the utilities to spread their fixed costs over a greater number of kWhs. That, in turn, reduced the price per kWh that a residential customer would otherwise pay for electricity. (Company Ex. 1, p. 8.) Second, the increase in generation plant operations during the winter months decreased the need for the Companies to cycle their generating plants (*i.e.*, to start and shut down generators). This decrease in cycling reduced the Companies' operation and maintenance expenses. Again, these savings ultimately benefitted customers in the form of lower rates. (*Id.*)

The Companies explained these rationales in the filings in which they sought the electric heating rates. For example, in its application to establish an electric heating rate, in Case No. 83-1455-EL-ATA, OE described the following benefits to all of its customers:

> i. This increase in energy sales will increase revenue over the additional cost to service this load, and this excess revenue recovery will be credited to all customers in the form of lower rates.
>
> ii. all customers can benefit from reduced operating expenses that this optional service will afford. Examples are reduced generating unit cycling expenses during low load periods (through increased low load period sales) and more economical operation of Company facilities. (Company Ex. 1, p. 9)

CEI and TE described these benefits in similar ways when they introduced electric heating rates in Case No. 36060 and Case No. 36411, respectively. In Case No. 36060, CEI introduced its Residential Space Heating Schedule. In its filing, CEI noted that its summer peak usage was growing more quickly than its winter peak usage. (Company Ex. 1, p. 9.) CEI explained that continuation of this trend would have resulted in a "lowering of plant utilization

which, in the long run, will be disadvantageous to all customers." Consequently, CEI proposed the Residential Space Heating Schedule to "stimulate winter load." (*Id.*)

In Case No. 36411, TE expressed a similar rationale for electric heating rates for its customers – to encourage more usage during the winter so that annual utilization of TE facilities would be maximized. (Company Ex. 1, p. 9.) TE noted that this increase in overall utilization would help offset the higher costs associated with building the generating capacity to meet peak summer usage. (*Id.*)

Indeed, no one disputes that the electric heating rates were originally cost-justified. Even Anthony Yankel, a witness called on behalf of OCC, testified that the special rates for electric heating customers were cost-based. (Hearing Transcript ("Tr.") Vol. I 224:6-25.)

The introduction of special electric heating rates caused the standard residential rates to be lower than they otherwise would have been. (Company Ex. 1, p. 10.) In particular, the special heating rates were designed to allow the utilities to recover an amount in excess of the incremental variable cost of service to electric heating customers. As noted, that recovery helped offset the Companies' fixed costs, thereby spreading fixed cost recovery over more kWh sales. Thus, the implementation of electric heating rates put downward pressure on rates for the Companies' customers, but the adoption of these rates did not increase the Companies' overall profits over the long term. (*Id.*)

3. With the establishment of a competitive generation market in Ohio, the rationale for continuing to offer special electric heating rates has changed.

In 1999, the General Assembly enacted S.B. 3, which restructured the electric industry in Ohio. S.B. 3 required electric distribution utilities to unbundle electric services and sought to create a fully competitive market for retail electric generation services. Thus, S.B. 3 provided that pricing, marketing and production of electric generation would be separate from the other

rate components of electric service. (Company Ex. 1, pp. 10-11.) Retail generation service thus became a competitive service, which customers could purchase either through an electric utility or through a competitive supplier.

S.B. 3 also provided that an electric distribution utility could not provide both a competitive retail electric service and a noncompetitive retail electric service, except pursuant to a Commission-approved corporate separation plan. (*Id.*; March 3, 2010 Order ¶ 3.) As a result of S.B. 3, the Companies transferred their generating plants to a corporate affiliate as contemplated by their approved transition plan. The Companies no longer own generation plants. (Company Ex. 1, p. 11.)

Because of this restructuring, the Companies' generation costs now are the same for all customers, subject only to differences due to system line losses. This is a significant change from when the electric heating rates first were established. (*Id.*, p. 11.) Because the Companies no longer own generation facilities, they no longer have fixed generation costs. Thus, the Companies need not make investments or incur expenses relating to the operation, maintenance, installation or expansion of such facilities. Now, the Companies' rates for generation service are designed simply to collect the direct costs that the Companies incur from generation suppliers as a result of providing "Provider of Last Resort" ("POLR") service to customers that chose to remain as generation service customers of the Companies. Even OCC witness Yankel recognized that the Companies' generation costs now are market based. (Tr. Vol. I 227:17-20.) The Companies merely pass through the charges for generation service to retail customers; the Companies do not profit from the charges that they collect for that service. (Company Ex. 1, pp. 11-12.)

Because the Companies' cost structure has changed, the increased winter usage that electric heating customers provide (and the incremental revenues that accompany that usage) no longer benefit the Companies' other customers by putting downward pressure on rates. (*Id.*, p. 12.) Because the Companies have no fixed costs for generation service, the electric heating revenues do not help to defray such costs. Nor does the additional winter usage decrease the Companies' generation expense by allowing the Companies to operate generation facilities more economically; the Companies do not have generation facilities and thus cannot achieve savings from the economical operation of such facilities. For customers that chose to receive generation service through the Companies, OE, CEI and TE merely pass through all generation charges from their wholesale suppliers. (*Id.*)

4. In S.B. 221, Ohio established a state policy of energy efficiency and conservation; special electric heating rates or discounts, if maintained, must be balanced with that policy.

The enactment of S.B. 221 in 2008 further caused the Companies and other stakeholders to rethink the appropriate balance between discounts for electric heat customers and the rates paid by other customers. S.B. 221 established a state policy of encouraging conservation and energy efficiency. Ohio Rev. Code § 4928.02. (Company Ex. 1, p. 13.) The bill imposed certain energy efficiency and peak demand reduction requirements. Ohio Rev. Code § 4928.66. The special electric heating rates or discounts based upon declining block structure, if maintained, must be balanced with this newly-enacted state policy. In particular, under the declining block rates, the greater a customer's electric usage, the greater the discount that customer would receive. (Company Ex. 1, p. 13.) Thus, the special electric heating rates encourage consumption, not conservation.

B. Although The Commission Phased Out The Separate Electric Heating Rate Schedules, Electric Heating Customers Have Continued To Receive A Discount.

The Commission has begun to change the special electric heating rates. The Commission has implemented those changes, however, in a way that is designed to ease the impact to those customers. In particular, while the Commission has discontinued the separate special rate schedules, it has implemented riders that have preserved discounts for electric heating customers. (*See, e.g.* March 3, 2010 Order, ¶¶ 4-8.) Thus, while some have claimed that recent increases in their electric bills resulted from a loss of the discounted rate, in fact, the record is to the contrary – an electric heating customer discount was not eliminated, but has remained in effect without interruption. (*See* Company Ex. 1, Attachment WRR-3.)

1. Electric heating customers have received without interruption, and continue to receive, a discount relative to standard residential customers.

The evidence shows that, for all three Companies, electric heating customers continued to receive a discount relative to the standard rate, even during the December 2009 through March 2010 time period. (*See* Company Ex. 1, Attachments WRR-2 and WRR-3.) Mr. Ridmann analyzed the Companies' electric rates during three time periods: (1) December 2008; (2) the winter period of 2009-2010; and (3) the current rates, after the implementation of Rider RGC. (Company Ex. 1, p. 20.) That analysis showed that the rate discount that electric heating customers receive compared to standard customers is greater ***now*** for CEI and OE customers (and also for higher use TE customers) than it was in December 2008. (*Id.*, p. 21.) Mr. Ridmann provided the following relevant comparisons:

Current difference in rates for 2000 and 5000 kWh/month customer (electric heat - standard)

CEI		OE		TE	
¢/kWh Rate	Usage level	¢/kWh Rate	Usage level	¢/kWh Rate	Usage level
-6.9	2000 kWH average	-4.2	2000 kWH average	-2.7	2000 kWH average
-7.4	5000 kWH average	-6.2	5000 kWH average	-4.4	5000 kWH average

December 2008 difference in rates for 2000 and 5000 kWh/month customer (electric heat - standard)

CEI		OE		TE	
¢/kWh Rate	Usage level	¢/kWh Rate	Usage level	¢/kWh Rate	Usage level
-1.7	2000 kWH average	-3.9	2000 kWH average	-2.7	2000 kWH average
-1.6	5000 kWH average	-5.9	5000 kWH average	-3.5	5000 kWH average

(*Id.*) That is not to say that electric heating customers did not experience an increase in their bills in December 2009, but so did the Companies' other customers. (*Id.*, p. 23.) Simply put, those increases were ***not*** the result of the loss of electric heating discounts.

2. The Commission's Order in the Rate Certainty Plan ("RCP") case ended the availability of special electric heating rates for new customers who commenced service on and after January 1, 2007, but grandfathered those rates for existing customers.

Over recent years, the Commission has acted to begin implementing changes to the special electric heating rates in a series of steps. The first of the notable recent changes to the rate structure for residential customers occurred when the Commission approved the Rate Certainty Plan ("RCP") in Case No. 05-1125-EL-ATA. (March 3, 2010 Order, ¶ 4.) As a result of the RCP, customers who were then receiving service under the special electric heating rates were notified that they would be permitted to remain on those rates as long as the rate was offered and the customer continued to qualify for the rate, but new customers purchasing homes on and after January 1, 2007 would not be eligible to receive the special discounted rate. (Company Ex. 1, p. 15.) OCC and virtually every other party in the RCP case signed a Stipulation and Supplemental Stipulation supporting the grandfathering of these rates. (*Id.*)

Customers were made aware of the RCP and of the fact that the special discounted rates for electric heating would no longer be available to new customers as of January 1, 2007. The

Companies provided various notices to customers that explained the RCP and its effect on the customers' bills. (Company Ex. 1, Attachment WRR-1.) Those notices also explained what customers needed to do to remain eligible for the rates. For example, the rates would continue only so long as the customer continued to live at the same service address and the rate remained in effect. In some cases, to remain eligible for the electric heating rate, electric heating customers were not permitted to shop with a competitive supplier. (*Id.*, pp. 15-16.) But, while existing customers could continue to qualify for the electric heating rate, the RCP – and notices provided by the Companies explaining the RCP – made clear that customers purchasing homes on and after January 1, 2007 were not entitled to take service under that rate. (*Id.*, pp. 15-16 & Attachment WRR-1.)

Notably, no one sought to challenge any part of the RCP – and especially the provisions dealing with the elimination of special rates for electric heating for new customers – on the grounds of any alleged "promise" by the Companies that electric heating rates would be available "forever" or for any period, for that matter. For example, Bob Schmitt Homes ("BSH"), one of the intervening parties here, also moved to intervene in the RCP case. BSH sought to challenge the RCP's provisions that discontinued electric heating rates for customers who took new service after April 1, 2006, as the Commission originally ruled.[1] In seeking to keep these rates available, however, neither BSH, nor any of the other intervening parties, ever suggested that the Companies had promised that the electric heating rates would last "forever" or for any other period. In fact, Michael Schmitt, BSH's CEO, admitted that in the RCP case BSH had not claimed that the Companies "ever made a promise that these rates were going to remain in

[1] The Commission subsequently changed the date to January 1, 2007 in a later Entry.

effect." (Tr. Vol. II 430:8-13.) And, in the RCP case, the Commission itself noted no rate lasts forever. (Entry on Rehearing, Case No. 05-1125-EL-ATA, March 1, 2006, ¶ 13.)

3. The Companies' 2007 Distribution Rate Case consolidated residential distribution rates into a single rate and created a credit for electric heat customers.

The Companies' most recent distribution case, Case No. 07-551-EL-AIR (the "2007 Distribution Rate Case"), resulted in additional changes to the distribution component of the electric heating rate. (Company Ex. 1, p. 16.) In the 2007 Distribution Rate Case, the Companies proposed and the Commission approved a simplified residential distribution rate structure. Previously, CEI had seven residential tariff schedules, OE had seven, and TE had ten. The 2007 Distribution Rate Case consolidated those various tariff schedules into a single cost-of-service-based residential distribution tariff for each company. The approved tariff included a flat charge per kWh for all residential customers, rather than the declining block charge that some residential customers, such as electric heating customers, had previously received. This flat per kWh charge was then combined with a number of riders, providing charges and credits, to determine the total customer distribution charge per kWh. (*Id.*) This consolidation into a single rate meant the end of the special electric heating rates for those customers who had been grandfathered under the RCP.

One of the riders, however, ameliorated the impact of the rate consolidation for electric heating customers. In particular, Rider RDC provided a credit of approximately 1.7 cents/kWh for electric heating customers of all three Companies for usage during winter months[2] in excess of 500 kWh. (As was the case for new electric customers under the RCPs electric heating rates, the credit provided under Rider RDC was not available to those customers who purchased a

[2] The winter months are September through May. (*See, e.g.*, March 3, 2010 Order, ¶ 8.)

home after January 1, 2007. (*Id.*)) This rider was expressly designed to help ease the impact on customers who had previously received the grandfathered electric heating rates. (March 3, 2010 Order, ¶ 5; *see also* Opinion and Order, Case No. 07-551-EL-AIR, January 21, 2009, p. 24.)

The Commission Order in the 2007 Distribution Case provided that the new distribution rate schedule would go into effect in January 2009 for OE and TE and in May 2009 for CEI. (*Id.*, pp. 16-17.)

4. The Stipulation and Order approving the Companies' Electric Security Plan eliminated the generation component of the special electric heating rates but created another discount for electric heating customers.

The third change that impacted residential rates (and thus impacted the special electric heating rates) resulted from the currently effective Electric Security Plan ("ESP") in Case No. 08-935-EL-SSO. Like the 2007 Distribution Rate Case Order did for the Companies' distribution rates, the ESP eliminated the historical residential rate schedules for generation and in their place implemented a consolidated rate schedule structure and at the same time created a new credit for electric heat customers. The new generation rate structure was based on the structure approved in the distribution case. (Company Ex. 1, p. 17; March 3, 2010 Order, ¶ 5.)

More specifically, under the ESP, the Companies were to procure all of their generation through a competitive bidding process. This competitive bidding process would not differentiate procurement among different residential customer classes (*e.g.*, electric heating customers and non-electric heating customers). Moreover, under the ESP, not only would the Companies not differentiate among residential customers in procuring generation, but all residential customers would be charged the same generation rate. (Company Ex. 1, p. 17.)

OCC and virtually every other party to the ESP signed the Stipulation/Supplemental Stipulation, which the Commission then approved. (*See* Second Opinion and Order, Case No.

08-935-EL-SO, March 25, 2009, p. 22.) The ESP tariffs became effective on June 1, 2009. (*See* Finding and Order, Case No. 08-935-EL-SSO, May 27, 2009, p. 2.)

As in the distribution case, concurrent with the adoption of a single generation rider, the ESP established other riders that provided discounts to the generation charge for certain customers. Of note here, the ESP included a Residential Non-Standard Credit in Rider EDR. This credit provided a discount of 1.9 cents/kWh to electric heating customers for usage during the winter months above 500 kWh. (Consistent with Rider RDC and the RCP, a customer taking new service after January 1, 2007 did not receive the credit under Rider EDR. (Company Ex. 1, p. 17.)) As with Rider RDC, the Commission explained that it approved this residential credit to mitigate the impact that consolidation of the generation rate schedules would otherwise have on certain residential customers. (March 3, 2010 Order, ¶¶ 5-6.)

5. Rider RDD is established to accelerate the recovery of residential deferrals, and results in increases in winter electric rates.

In Case 09-641-EL-ATA, the Commission adopted another rider that impacted residential winter electric bills. The purpose of the rider was to permit the Companies to accelerate the recovery of certain distribution deferrals they had accrued. Over the long haul, accelerating the recovery will save residential customers significant carrying costs. (Company Ex. 1, pp. 17-18.) In the short run, however, the rider increased per kWh electricity costs during the winter months. (*Id.*)

In the RCP case, the Commission had authorized the Companies to accrue deferrals of certain distribution costs. In the ESP case, the Commission authorized the Companies to begin collecting those accrued deferrals. The ESP provided that the deferred costs would be recovered over a 25-year period. (*Id.*, p. 18; March 3, 2010 Order, ¶ 8.)

In Case 09-641-EL-ATA, the Commission adopted a Residential Deferred Distribution Cost Recovery Rider ("Rider RDD"). This rider accelerated the recovery period for approximately $156 million in accrued distribution deferrals. (Company Ex. 1, p. 18.) By accelerating recovery of these deferred amounts, residential customers are projected to save $178 million in carrying charges. (*Id.*) The parties to the case agreed that the accelerated recovery should occur during the winter months from September 2009 to May 31, 2011. After May 2011, Rider RDD will terminate except for any necessary reconciliation. (*Id.*)

As was the case for the RCP and the ESP discussed above, OCC was among the parties that supported the Application in Case 09-641-EL-ATA, including the adoption of Rider RDD. (*Id.*) Based on that agreement, the Commission approved the rider in the RDD case in August 2009. (*Id.*)

6. In 2010, the Commission adopted yet another rider, Rider RGC, that significantly increased the credit that electric heating customers receive.

Beginning in the winter period of 2009-2010, customers experienced the changes from the cumulative effect of the 2007 Distribution Case, the ESP case and Rider RDD. As noted, most of the Companies' customers received a base rate increase for the first time since at least the mid 1990s. Electric heating customers, without interruption, continued to receive a discount compared to other residential customers. Nevertheless, the combined impact of the changes made in the RCP and ESP cases and Rider RDD resulted in vocal customer complaints, particularly from the electric heating customers.

On February 12, 2010, in an effort to address customers' concerns, the Companies filed an application in this case seeking to establish a new credit to ease the impact for electric heating customers even more than had been previously approved by the Commission through the

establishment of Riders RDC and EDR. If approved, these new tariffs would have limited the amount of bill-increases for the vast majority of electric heating customers.

The Commission rejected the Companies' proposal. Instead, on March 3, 2010, the Commission directed the Companies to file tariffs for non-standard residential rate customers that would provide "bill impacts" commensurate with rate levels that existed on December 31, 2008. On March 17, 2010, the Companies filed these new tariffs. The Companies achieved the desired bill impacts by establishing a third credit for electric space heating customers, Rider RGC. This rider significantly increased the generation credit that electric heating customers received.

In its April 15, 2010 Second Entry on Rehearing, the Commission significantly expanded the number of customers eligible to receive the Rider RGC credit by more than 88,000 customers. (Second Entry on Rehearing, ¶ 7.) This expansion of the RGC credit allowed individuals to receive the electric heating credits if they purchased homes from customers receiving electric heating rates or credits, even if they purchased these homes after January 1, 2007, when the rates no longer were available to new customers. In this Entry, the Commission also extended the time the new Rider RGC credit would be in place to at least through May 2011. (*Id.*)

As a result of Rider RGC, most electric heating customers are now receiving a greater discount and paying less for electricity now than they were in 2008. As Mr. Ridmann's testimony demonstrates, most CEI electric heating customers currently pay less than they did in December 2008. (Company Ex. 1, p. 22 & Attachment WRR-2.) In fact, even before Rider RGC, CEI electric heating customers who used more than 1000 kWh per month had experienced less of a rate increase from December 2008 than did standard residential customers over that same time. (*Id.*) As for OE, all OE residential customers (including both electric heating and

standard) currently pay lower rates than they paid in December 2008. (*Id.*) And over that period, electric heating customers actually have received larger decreases than did standard residential customers. (*Id.*) In the case of TE customers, with Rider RGC in place, almost all electric heating customers currently pay lower rates than in December 2008. Moreover, all TE residential customers who used between 500 and 1500 kWh had already been experiencing lower rates than in December 2008 even before the implementation of Rider RGC, with electric heating customers enjoying larger discounts in January 2010 than in December 2008. (*Id.*) Indeed, for many electric heating customers, the total amount of the credits that they currently receive is greater than the cost of the generation they receive. (*Id.*, p. 21.)[3]

The deferrals that the Companies are accruing as a result of Rider RGC amount to approximately $87.3 million annually. That is more than half of the estimated total of the annual heating credits provided through Riders RGC, RDC and EDR (which is $164.3 million). (Company Ex. 1, p. 19.)

C. The Commission Expands The Scope Of This Case

In response to the Commission's March 3, 2010 Order requiring the Companies to file new tariffs, OCC filed a request for clarification and, in the alternative, application for rehearing. In the Commission's April 6, 2010 Entry on Rehearing, the Commission granted OCC the right to intervene. (Entry on Rehearing, April 6, 2010, p. 2.)

In its Second Entry on Rehearing, the Commission clarified that its March 3, 2010 Order applied to all residential customers who had been billed under special electric heating schedules, other than electric water heating schedules. As noted, the Commission also expanded the scope of its initial Order and now required Rider RGC to apply also to customers who had purchased

[3] This impact is being noticed even among members of intervener CKAP. As Ms. Steigerwald admitted, CKAP members reported "record low" bills. (Company Ex. 7.)

homes after January 1, 2007 from customers who had been billed under "all-electric" rate schedules (*i.e.*, customers who had not been receiving special rates previously). (Second Entry on Rehearing, April 15, 2010, ¶ 7.)

The Commission further directed the Staff to continue its investigation "and to develop a process, which ensures that interested parties and stakeholders have a meaningful opportunity to participate in the resolution of the issues raised in this proceeding." (Second Entry on Rehearing, April 15, 2010, ¶ 7.) The Commission rejected the OCC's argument that the Commission should conduct an investigation into the "alleged promises and inducements made by the Companies to 'all-electric' residential customers." (*Id.*, ¶ 9.)

OCC, the Companies and the Industrial Energy Users-Ohio ("IEU") each filed an application for rehearing of the April 15 Second Entry on Rehearing. The Commission granted all three applications for rehearing in its Fourth Entry on Rehearing on June 9, 2010. The Companies argued that the April 15 Entry wrongly failed to provide the Companies with authorization to accrue carrying charges on deferred costs. The Companies also argued that the April 15 Entry required the Companies to extend all-electric credits to customers who purchased their homes after January 1, 2007 and thus did not qualify under the stipulations adopted in prior cases. The Commission denied this assignment of error, stating that it "will address the question of carrying charges when it addresses the recovery of any deferrals authorized in this proceeding." (Fifth Entry on Rehearing, November 10, 2010, ¶ 11.)

Both the Companies and OCC argued that the April 15 Entry wrongly held that the Commission lacked jurisdiction over allegations of false promises allegedly made by the Companies related to electric rates. In response, the Commission "agree[d] . . . 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." (Fifth Entry on Rehearing, ¶ 13.) The Commission further held that it would "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., and the parties are not precluded from conducting discovery regarding these issues nor from presenting evidence during the hearing provided that such evidence is otherwise properly admissible in Commission proceedings." (*Id.*)

The Commission also issued an Entry setting six public hearings "to provide customers of FirstEnergy a reasonable opportunity to provide public testimony regarding potential rates to be charged all-electric customers." (Entry, October 8, 2010, ¶ 7.) The Commission later issued an Entry that changed some of the public hearing dates, and stated that "the Commission is particularly interested in receiving more information at the public hearings" about three topics: (1) written documentation or contracts that all-electric customers had regarding their rates, and whether there was "a commitment that the rate would remain with the home for future owners"; (2) whether all-electric customers through the Commission should take into account in setting rates the difference in cost between heating a home with natural gas or electricity; and (3) recognizing that policy changes "make it necessary to alter the discount" that may be provided to all-electric homeowners, what is a "fair way to move or phase in all-electric home bills to accommodate these changes without causing rate shock and without burdening other customers." (Entry, October 14, 2010, ¶ 7.)

D. The "Pressure" Campaign By CKAP And OCC

As the Commission was preparing to conduct public hearings, a process already was underway to manipulate the proceedings and generate testimony that was favorable to a certain outcome. Susan Steigerwald created an organization, called Citizens for Keeping the All-electric Promise ("CKAP") and joined with OCC to plot a strategy to put pressure on the Commission in

this proceeding to lower rates for "all electric" customers regardless of the lack of any justification. As the evidence demonstrates, Ms. Steigerwald and CKAP believe the ends justify any means, and have attempted to engineer what they consider to be a favorable outcome for themselves.

1. The creation of CKAP

Although she formed and leads an organization supposedly dedicated to make sure that the Companies' alleged "promises" are "kept," Susan Steigerwald admitted that no promises were ever made by the Companies to her. She owns an all-electric home. (Company Ex. 3A Revised, 3B Revised & 3C (Excerpts of deposition of Sue Steigerwald, hereinafter "Steigerwald Dep.") 6:13-25.) She admitted that she did not purchase that home because of any promise or marketing practices from any of the Companies. (Steigerwald Dep. 7:4-8.) She admitted that CEI never promised her anything. Before purchasing their home, neither she nor her husband had any dealings with CEI regarding their rates, they never received any written guarantees about rates, and Ms. Steigerwald could not say if she ever received any sort of verbal promise about rates. (*Id.* 19:14-24.) Upon moving into her home in 1988, neither Ms. Steigerwald nor her husband received anything from the seller indicating that they have received any promises from CEI. (*Id.* 7:18-25.)

In December 2010 or January 2011, Ms. Steigerwald became upset at how much her electric bill had increased. (*Id.* 19:25-20:9.) She contacted CEI for an explanation. She was told that the electric heating rate no longer was available and that CEI had frozen its rates for a number of years. (*Id.* 20:13-21:19.) She subsequently contacted OCC. An OCC representative told her that CEI's rates had changed because Ohio law had changed and that, as a result, it was unlikely the special rates could be reinstated. (*Id.* 25:16-25.) Tellingly, Ms. Steigerwald told the OCC representative that she didn't care if the law had changed. (*Id.* 26:1-8.)

Ms. Steigerwald then set out to find some way to get the increases reversed, regardless of the facts or applicable law. She decided that she would mount a campaign to publicize the increases and their effect. She contacted John Funk, a reporter at *The Plain Dealer* in Cleveland, and asked him to write a story. (*Id.* 155:11-24; Company Ex. 25; Company Ex. 13.)

Ms. Steigerwald also met with some like-minded customers and State Senator Timothy Grendell. (Steigerwald Dep. at 325:14-24; Company Ex. 25.) Ms. Steigerwald wanted Senator Grendell to find ways to "put pressure" on the Commission. (Steigerwald Dep. 32:20-22.) At the meeting with Senator Grendell, the notion was raised that customers should contend that the Companies had made oral promises of some kind that required the reinstatement of the special electric heating rates. (*Id.* 333:7-334:10; Company Ex. 28.) Senator Grendell, who is also licensed to practice law in Ohio, also agreed to file a class action lawsuit against the Companies in Geauga County Common Pleas Court. (Steigerwald Dep. at 32:23-33:18; Company Ex. 11, p. 005373.)

In Ms. Steigerwald's view, the primary purpose of the lawsuit was not to pursue a legitimate grievance in court. In fact, Ms. Steigerwald understood that the Commission – and not a court – was the proper venue to establish the proper level of electric heating customers' rates.[4] Rather, as Ms. Steigerwald admitted, the purpose of the lawsuit was to "put pressure" on

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[4] After the Geauga County Common Pleas Court dismissed the lawsuit for lack of jurisdiction, Ms. Steigerwald wrote:

> The thing is, the PUCO is most definitely the right venue to hear rate cases, the problem is **they are trying to weasel their way out of investigating any past marketing practices of FE...**
>
> Remember, once the PUCO got involved in the case, we always knew and agreed that the best place for the all electric issue to be handled was with the PUCO.

(Company Ex. 11 at 005373 (emphasis in original).)

the Commission by keeping the issue of the alleged elimination of the discounts in the media. (Steigerwald Dep. 33:4-7; 33:12-15.)

Because of her background and computer skills,[5] Ms. Steigerwald "offered to help coordinate communic[ations] for him [Mr. Grendell] since he can't use his Senate office." (Company Ex. 25; Steigerwald Dep. 12:6-12.) Senator Grendell suggested that Ms. Steigerwald develop a name of her organizing efforts and further suggested that the name have something to do with the theory that there had been promises made by the Companies. (Steigerwald Dep. 333:7-334:10; Company Ex. 28, p. CN1032.)

2. The CKAP publicity campaign

CKAP embarked on a multi-front assault. Ms. Steigerwald continued to communicate with her contact at *The Plain Dealer*, John Funk, to whom she expressed concern that "the significance of the elimination of the all-electric discount hasn't been thoroughly publicized." (Company Ex. 13.) Mr. Funk became her "ally" and was "very cooperative" to ensure that she "got whatever message [she] needed to send out."[6] (Steigerwald Dep. 157:13-19.) Mr. Funk also offered his advice regarding how best for CKAP to make its case, including suggestions regarding accumulating bill data and how best to present it. (Company Ex. 27, at CN001029-30.)

Ms. Steigerwald also made contact with other members of the media, including reporters at two local Cleveland television stations. (Steigerwald Dep. 158:18-159:11.) She appeared on "Feagler & Friends," a show on Cleveland's Public Broadcasting System television station. (*Id.* 159:12-160:9.) She also regularly sent emails with story ideas to her numerous media contacts. (*E.g.*, Company Ex. 29 at CN001297-98; Company Ex. 28 at CN001031; Company Ex. 30 at

[5] Ms. Steigerwald has a degree in Information Systems Management. (*Id.* 12:10-12.) She worked for twelve years at Ohio Savings Bank where all her work was "IT related." (*Id.* 14:11-14; 15:7-9.)

[6] As an example, in preparing to write one story, Mr. Funk included an offer that if Ms. Steigerwald "want[ed] to say anything else, please tell me and I will make room in the story." (*Id.* 157:7-12.)

CN001300-01; Company Ex. 43 at CN001142.) Indeed, some members of the media became members of CKAP. (Steigerwald Dep. 52:10-53:9.)

In further efforts to publicize her cause, Ms. Steigerwald developed and maintained a website for CKAP. (Steigerwald Dep. 63:9-23; Company Ex. 32, p. CN001243.) She also provided CKAP members with regular updates about her campaign, and instructed them on how they could aid the cause. Ms. Steigerwald testified that she believed it was important to have as many letters of protest as possible filed with the Commission, and she worked diligently to accomplish that goal. (*Id.* 115:24-116:4.) As early as February 19, 2010, she sent an e-mail to all CKAP members titled, "HOW TO COMPLAIN ABOUT YOUR HIGH ELECTRIC BILL!!!" (Company Ex. 31, p. CN001060.) In that e-mail, she stated, "We need to keep the complaints coming about the elimination of the all-electric discount and the ridiculous 106% increase for all customers in the distribution charges." (*Id.*) Ms. Steigerwald also instructed CKAP members to send a complaint to eight listed e-mail addresses, including the Commission, as well as to local politicians, concluding: "Cut and paste baby, cut and paste!" (*Id.* p. CN001061.)

In another email in which Ms. Steigerwald urged members to "cut and paste what I have below," she provided the substance of an email to be submitted to the Commission. (Company Ex. 38 p. CN001082.) As a result, the Commission docket in this matter includes numerous emails that are merely verbatim copies of text from Ms. Steigerwald's email to CKAP members. (Company Ex. 39.) Ms. Steigerwald, who was keeping a count of the complaints sent to the Commission's docket, repeated these email campaigns numerous times, at one point instructing: "Start writing/emailing your requests for our permanent solution to be implemented!! I'll remind you every two weeks to do it again!" (Company Ex. 32, p. CN001242 (March 18, 2010); *see also* Company Ex. 31, p. CN001056 (March 9, 2010); Company Ex. 33, p. CN1108 (March 31,

2010, "Two weeks has passed and it is time to file our complaints with the PUCO, OCC and Governor again! . . . [P]lease send in your complaints again, even if you send exactly the same wording, because it is the sheer number of complaints that will also get the attention of these organizations."); Company Ex. 34 (April 8, 2010).)

Ms. Steigerwald sent a newsletter proclaiming, "Friday is Pester the PUCO Day! It is time to wake up the PUCO Docket with a new influx of letters regarding the all-electric issue." (Company Ex. 35, p. CN001232.) On another occasion, she ordered: "I'd like to see a fresh, but very large influx of comments into the PUCO Docket about the AE Issue." (Company Ex. 36, p. CN001224.) After suggesting what members should include in the email, Ms. Steigerwald added: "it is the right time now to see a few hundred more entries logged into the docket specifically asking for the PUCO Staff and Commission to rule in favor of permanently reinstating the AE Discount." (*Id.*) Ms. Steigerwald went so far as to use fellow CKAP members as her secret surrogates, asking them to "help me out by writing in your complaints since I've been instructed to keep a low profile in the media and PUCO docket for now." (Company Ex. 37, p. CN001246.)

In light of the evidence of the orchestration of this publicity campaign, intervenors cannot argue that the emails or letters submitted to the Commission amount to anything. Consequently, to the extent that they are considered at all, the Commission should give these filings no weight.

3. CKAP intervenes in this proceeding

Ms. Steigerwald was not content with engineering a media campaign and instructing CKAP members to flood the Commission docket with letters and email. Ms. Steigerwald also moved to intervene as a party in this proceeding for the sole reason that she "wanted a seat at the table." (Steigerwald Dep. 152:22.) Consistent with her "ends justify the means" approach, Ms. Steigerwald took liberties with the truth in order to advance her cause. The motion to intervene

was filed by Ms. Steigerwald, CKAP, BSH and Joan Heginbotham on June 2, 2010.[7] The motion argued that the OCC would not adequately represent the interests of individuals living in homes that exclusively or primarily had electric heating. (Motion to Intervene and Memorandum in Support of Sue Steigerwald; Citizens for Keeping the All-Electric Promise (CKAP); Joan Heginbotham; and Bob Schmitt Homes, Inc.; Reply to FirstEnergy's Memorandum Contra Motion to Intervene of Sue Steigerwald; Citizens for Keeping the All-Electric Promise (CKAP); Joan Heginbotham; and Bob Schmitt Homes, Inc.) Yet, months before filing the motion to intervene, Ms. Steigerwald had come to the opposite conclusion, informing CKAP members in a February 26, 2010 email that "OCC seems to have really stepped up to the plate for us and appears to be one of our best allies now in getting this problem solved." (Company Ex. 29, p. CN001296.)

In another February 2010 email, Ms. Steigerwald wrote:

> "I spoke at length with Amy Gomberg today from the OCC, and she seems like she will be a great ally for us and a 'direct line' if you will into getting our opinion voiced at the OCC and ultimately the PUCO."

(Company Ex. 30, p. CN001300.) Notwithstanding this belief, Ms. Steigerwald successfully argued to the Commission that she needed to intervene because OCC would not adequately represent her interests.

Contrary to any notion that their interests were in any way adverse, Ms. Steigerwald and her counsel worked closely with the OCC throughout this proceeding. As Ms. Steigerwald informed CKAP members in a December 12, 2010 email:

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[7] The lawyer who represented all of these parties, Kevin Corcoran, was Vice President and General Counsel for BSH. (Tr. Vol. II 413:10-414:8) As BSH CEO Michael Schmitt admitted, BSH agreed to fund the representation of these parties. (*Id.*) Of course, BSH had ample motivation to fund the legal representation of this alleged "grass roots" organization given that Mr. Schmitt believed that the elimination of "all-electric discounts" amounted to an "attack" on BSH's "business model." (*Id.* 412:10-413:3; 420:6-421:7.)

> Although both the OCC and the PUCO initially let the AE customer down by passing the original case that took away the AE discount, I feel the OCC has more than made up for their initial error. We now consider them our close allies, and Kevin and I speak with them very frequently. We are basically planning the case together against FE. Just wanted you all to know that the OCC is our friend in all of this.

(Company Ex. 42 at CN001154-55.)

Ms. Steigerwald and her counsel had discussions with OCC's witness Yankel prior to the time that he began to draft his testimony. (Steigerwald Dep. 146:14-18.) She reviewed drafts of his testimony before it was filed, and provided input in discussions that included Mr. Yankel and lawyers for OCC. (*Id.* 146:23-147:12.)

4. CKAP influences the public hearings

Ms. Steigerwald's manipulation of these proceedings was not limited to questionable representations made in the motion to intervene. The Commission scheduled six public hearings in this matter designed to allow public input from concerned individuals. Of course, parties to this action, such as Ms. Steigerwald and CKAP, already have "a seat at the table" and can be heard. Consequently, Ms. Steigerwald knew that "CKAP, represented by our attorney Kevin Corcoran, are official parties to the case. Since my name is specified in the motion to intervene and Kevin is the attorney, neither one of us is permitted to testify at the local public hearings." (Company Ex. 16).

Ignoring the prohibition on a party from offering sworn testimony and evidence at the public hearings, Ms. Steigerwald encouraged CKAP members to attend the public hearings. (Steigerwald Dep. 192:9-15; Company Ex. 16; Company Ex. 17; Company Ex. 19.) Ms. Steigerwald told CKAP members that "it is of utmost importance for you to attend ONE of these public hearings. Even if you do not testify, please show up as a body of support!!!" (Company Ex. 16.) Ultimately, at least 45 CKAP members testified at the six public hearings, including 11

individuals that Ms. Steigerwald admitted were leaders of CKAP. Among the leaders who testified was Richard Jordan, whom Ms. Steigerwald credited as assisting her in founding CKAP. (Steigerwald Dep. 214:22-215:5 (Jordan). S*ee generally id.* 193:12-209:24 (identifying public hearing witnesses who were CKAP members).)

In addition to encouraging CKAP members to attend the hearings, Ms. Steigerwald also told the CKAP members what they should say if they testified. OCC provided Ms. Steigerwald with "a list of 'talking points' for us to use," which she told CKAP members that she "will pass those along when they are ready." (Company Ex. 44, p. CN001133. S*ee also* Steigerwald Dep. 145:20-146:7.) Ms. Steigerwald then provided detailed instructions to CKAP members. (Company Ex. 16.) The instructions included logistics – "plan to arrive by 5:30ish . . . because you will need to put your name on a sign up sheet," (*id.*) – and tips for testifying – "to make your testimony as effective as possible, we recommend that you write out your testimony and read directly from your statement. If you write it out ahead of time, you won't forget something you want to say and you also won't wander off target." (*Id.*) As she did with her "cut and paste" email campaigns for submitting complaints to the Commission, Ms. Steigerwald also instructed CKAP members on precisely what they should testify:

> As far as what to include in your testimony, don't worry if you do not have any written documents promising the discount permanently. This is a chance to TELL YOUR VERSION OF THE STORY. In other words, in your testimony, tell whatever you were told or lead to believe, even if you do not have it in writing. In place of the phrase "written contract," you can simply use the term contract. We all either built our homes to a specific set of requirements and/or later installed specific all-electric equipment in our homes in exchange for a discounted electric rate. Therefore, this is a contract between us and FE[8]

(*Id.* (emphasis in original).)

[8] Notably, Ms. Steigerwald admitted that, although she used the word "we," she did not, in fact, build her home to a "specific set of requirements" or install "specific all-electric equipment ... in exchange for a discounted rate." (Steigerwald Dep. 182:22-183:7.)

Ms. Steigerwald also provided a dozen items for CKAP members to include in their testimony. (*Id.*) Among her items, she instructed that CKAP members should:

> Mention how the loss of the AE discount will decimate your property value by at least 30%, thus ruining the value of most individual's nest egg investment – your home. . . Mention how if the AE discount is not reinstated permanently, it will make it impossible to sell your home (*Id.*)[9]

Her suggestions regarding the decrease in home values were largely her own invention. There is no evidence to support the 30% figure, and even Larry Frawley's flawed analysis does not reach that conclusion.[10] Ms. Steigerwald also testified that she did not remember anyone actually telling her that it was impossible to sell their home. (Steigerwald Dep. 190:15-20.)

The result of Ms. Steigerwald's artifice became clear at the hearings. CKAP members testified at the public hearings that their homes had declined in value by precisely 30 percent, and that they feared they would not be able to sell their homes. (*E.g.*, Strongsville Public Hearing Tr. 86:3-15 (Gary Damert); 174:10-14 (Caroline Dragics).) Yet almost all of these witnesses presented no evidence to support their valuation testimony other than their say so – *i.e.*, that they had not tried to sell their home or had done anything to research the value of their home. Indeed, no witness could testify that the value of their home had decreased due to anything other than the general decrease in values experienced by homes across Ohio and the country. Simply put, notwithstanding Ms. Steigerwald's efforts, no witness could show that the values of their homes had been affected by anything to do with the fact that they were heated by electricity.

5. Ms. Steigerwald spreads inaccurate information

During her campaign, Ms. Steigerwald disseminated statements that she knew were not accurate. These statements frequently made their way into emails or public testimony.

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[9] As discussed further below, this instruction came long after Ms. Steigerwald admitted knowing that the electric heating discount in fact had not been eliminated or lost. (Steigerwald Dep. 86:21-87:1, Company Ex. 25.)

[10] *See* pp. 70-73, *infra.*

For example, in exhorting CKAP members to testify, she said that CKAP should demand the "reinstatement" of the "AE discount" (Company Ex. 16), implying that the "discount" had been eliminated. Yet she knew that electric heating customers who had been receiving discounts as of January 1, 2007, continued at all times to receive a discount. (Steigerwald Dep. 86:21-87:1.) Indeed, Ms. Steigerwald was aware of that fact as early as February 2010. (Company Ex. 25.) Numerous witnesses allied with Ms. Steigerwald proceeded to repeat her falsehood that the discount had been eliminated, including CKAP witnesses Schmitt and Frawley. (Tr. Vol. II 284:5-15, 284:23-285:7 (Frawley); 420:9-421:9 (Schmitt).)

Ms. Steigerwald also claimed that the Companies were being less than truthful when their representatives pointed out that the discounts enjoyed by electric heating customers were being subsidized by other customers. (Company Ex. 5 ("Where is the proof that the gas/electric customers have ever subsidized the discounted rates offered to all-electric customers?"); Company Ex. 30, p. CN 001302 ("First Energy has done a fine job of trying to pit the gas/electric customer against the all-electric customer by saying that they were subsidizing us all along."); Company Ex. 40, p. CN001088 ("there is no proof that we have ever been subsidized by the gas users.").) Yet, in her deposition, she admitted that she knew that some customers were paying for some of the credits that electric heating customers were receiving. (Steigerwald Dep. 306:13-307:6.) She also specifically advised another CKAP member, "[I]f we get the discount, someone has to make up that amount." (Company Ex. 22, p. 000115.)[11]

[11] Ms. Steigerwald's dissembling was not limited to statements made to CKAP members, the media or the public. She has not been forthcoming to the Commission regarding her statements relating to some procedural issues. As noted, although she claimed that OCC could not represent her interests adequately , she had come to exactly the opposite conclusion well before attempting to intervene. (Company Ex. 29, 30.) Moreover, in attempting to avoid having to provide the Companies with the names and addresses of CKAP members, Ms. Steigerwald's counsel represented that CKAP did not have that information. (Transcript of January 7, 2011 Hearing 141:9-142:17.) Documents provided in discovery, however, revealed that Ms. Steigerwald had maintained an electronic petition of CKAP member and others, which included names and addresses. (Company Ex. 18; Steigerwald Dep. 293:12-294:25.) Further, although she told the Commission that it would be "burdensome" to

E. The Evidence Presented at the Hearings Regarding the Companies' Marketing Practices and Electric Heating Rates

The evidence submitted at the hearings also failed to support Ms. Steigerwald's contention that the Companies made promises to homeowners that electric heating rates would be permanent. The evidence consisted largely of a few documents and statements of four former employees of the Companies.

1. The few documents presented at the hearings did not support any promise or guarantee.

Much of the evidence regarding the Companies' marketing practices was neither controversial nor surprising: the Companies have advertised the benefits of all-electric homes over the years. In some instances, the Companies partnered with builders, such as BSH, to market all-electric homes and provide rebates or advertising assistance. (Strongsville Public Hearing Ex. 1; CKAP Exs. 14, 15.)

Some individuals pointed to advertisements that did not mention that rates are subject to change, although some marketing materials were presented that did expressly state that rates were subject to change (Kirtland Public Hearing Exs. 16, 17; Company Ex. 53), and others specifically referenced tariff schedules that contained that information. (Sandusky Public Hearing Ex. A; Company Ex. 54; CKAP Ex. 32.)

As Companies' witness Ridmann testified, however, a reasonable interpretation of any mention of rates in the Companies' marketing would have included an inference that any utilities' rates were subject to change. For example, during the 1980s, when many of the documents at issue were written and published, in one nine year period, OE and TE each had

(continued...)

prepare written testimony for the evidentiary hearing (Company Ex. 15; Steigerwald Dep. 171:1-21), she specifically advised CKAP members to do so for the public hearings. (Company Ex. 16.)

nine rate increases, while CEI had eight. (Company Ex. 65, pp. 8-9.) As shown on Attachments WRR-3, WRR-5 and WRR-6 of Mr. Ridmann's direct testimony, the rates of the Companies and the relevant natural gas utilities changed often. (Company Ex. 1, Attachments WRR-3, WRR-5 & WRR-6.)

Individuals also provided documents which they considered to be "contracts" and which did not contain language warning that the rate schedule could change. (*See* Sandusky Public Hearing Ex. A.) But such documents expressly referred to specific rate schedules, *e.g.*, "Rate 11A, 11B". Thus, any "contract" established by such documents would include all of the terms and conditions of the schedules referred to in the document. (Company Ex. 65, pp. 7-8.) For example, the special electric heating rate for OE specifically incorporated the Company's Electric Service Rules and Regulations. (*E.g.*, Strongsville Ex. 2.) Those Rules unequivocally provided that the Company's rate schedules "may be terminated, amended, supplemented or otherwise changed from time to time only in accordance with law and the rules promulgated thereunder by The Public Utilities Commission of Ohio." (Company Ex. 46.) Thus, none of these documents establishes a contract for an indefinite rate or discount.

Two documents presented at the public hearings received particular attention. One was a letter that CEI sent to electric heating customers in 1980. The letter advised customers that the "discount provisions" of CEI's rates will continue to be available to the customer so long as the customer continues to reside at the premises. (Kirtland Hearing Ex. 7.) Yet, as Mr. Ridmann testified, this letter was only advising customers that although rates had changed (including the provisions relating to the availability of the discount), customers then currently enjoying the discount provisions would continue to receive the benefits of those provisions and would not lose that discount as a result of that particular rate proceeding. (Company Ex. 65, pp. 4-6.) Thus, the

letter could not be construed to guarantee any rate or discount forever. Indeed, even the customer who presented the letter, Mr. Jesse Willetts, admitted that, subsequent to receiving his letter, his rates increased. (Tr. Vol. II 463:4-9.) Although he offered that he believed that the letter guaranteed a discount "proportional to the residential all-normal customer" (*id.* 463:8-9), that simply was not the case, and the text of the letter itself does not support this conjecture in any way. As Mr. Ridmann demonstrated, the percentage discount for electric heating customers actually decreased as a result of the rates that were being put into effect at the time of the letter. (Company Ex. 65, pp. 6-7.)

The second featured public hearing document was a letter allegedly written by an Ohio Edison employee in 1988, in which he "guaranteed" a particular rate would be made available to a customer because the rate in question was "experimental." (Strongsville Hearing Ex. 2.) The document is questionable proof of anything. OCC witness Elio Andreatta, the purported author of the document, however, could not recall writing the document or ever discussing the subject of the longevity of rates with the alleged letter's recipient, Thomas Logan, or any other customer for that matter. (Tr. Vol. I 121:20-122:2.) Further, Mr. Andreatta admitted to basic errors contained in the document, including the fact that the title of his job position shown under his name was incorrect. (*Id.* 123:21-124:1.) The letter also shows a date, June 18, 1988, which was a Saturday. This indicated another likely error since, as Mr. Andreatta admitted, it would have been unlikely that he or any secretarial staff would have prepared a letter on a weekend. (*Id.* 123:3-16.)

More fundamentally, as Mr. Ridmann observed, the content of the letter – and specifically, the discussion of the meaning of the word "experimental" when relating to a rate – made no sense. Although the letter purported to define "experimental rate" to mean "if Ohio

Edison ever removes this rate from our files you would not be in jeopardy of forfeiting this rate." (Strongsville Public Hearing Ex. 2), that term actually means just the opposite – that the Company would be offering the rate, potentially on a temporary basis. (Company Ex. 65, pp. 2-3.) As noted, the Companies could not have told anyone that a customer would "not be in jeopardy of forfeiting" a rate because the Companies' Rules and Regulations expressly recognized that all rates were subject to change by the Commission, a fact that Mr. Andreatta recognized and admitted that he knew at the time. (*Id.*) As discussed further, *infra*[12], Mr. Andreatta further testified that he would not have advised customers of information that was inconsistent with the Company's Rules and Regulations. (Tr. Vol. I 128:12-18.)

The letter is further suspect given that the purported addressee had an ongoing dispute with OE regarding the electric service to his business. In an email, Mr. Logan claimed that he had received a "verbal promise" to change the rate schedule under which his business, a stamping plant, was to receive service. Mr. Logan contended that OE had gone back on that alleged verbal agreement. Further, Mr. Logan alleged that when he talked to an OE customer service representative, she told him, "Get a lawyer." He concluded, "OE/FE will do whatever it wants with rates...." (Company Ex. 4.) Clearly, Mr. Logan had an animus against OE that went beyond issues related to electric heating discounts

2. None of the testimony of the Companies' former employees established any promise or guarantee.

Four former employees of the Companies testified: James Ehlinger, Chester Karchefsky, Teryl Bishop and Michael Challender. Mr. Bishop worked for OE and its affiliate FirstEnergy Solutions Corp. ("FES") for 16 years as a sales representative. He testified that he realized that rates could change and were not permanent. He stated that he told customers that it was "normal

[12] *See*, pp. 60-61, *infra*.

and customary" for Ohio Edison to "grandfather" customers if rates changed. He did not testify that he was directed to so instruct customers, but that "[t]o my knowledge, historically at least while I was there, there were no rates eliminate[d] without grandfathering existing customers." (11/22/10 North Ridgeville Public Hearing, 117:25-118:3-6.)

As Mr. Ridmann demonstrated, however, Mr. Bishop's statements were obviously wrong:

> It was not OE's policy to grandfather rates whenever rates were changed. If that was the case, then every time there was a rate increase, OE could not have collected any additional revenue until a customer moved from their home. [Company Ex. 65, p. 10.]

Mr. Ehlinger worked for Toledo Edison and FES from 1993 to 2001. He testified that residential customers signed "electric service contracts" which provided that "you would get that rate, basically, indefinitely." (11/18/10 Maumee Public Hearing, 25:4-21.)

Mr. Ridmann again demonstrated that this witness's testimony was wrong. TE did not sign separate "electric service contracts" with residential customers stating how long the rates would remain in effect. Further, TE could not have offered any rate an indefinitely because that would have been contrary to TE's PUCO-approved rules and regulations. (Company Ex. 65, p. 15.)

Mr. Karchefsky worked for CEI and FES from 1994 to 2002 in several capacities, including as a sales representative. He testified that he did not commit to customers that rates would be permanent, but did tell customers that the company was "committed to selling the all-electric lifestyle going forward." (11/23/10 Kirtland Public Hearing, 39:22-40:7.)

However, nothing that Mr. Karchefsky supposedly said to customers was untrue or constituted a promise. At all times prior to 1999, the Companies were vertically integrated companies. As noted, it was in the interests of the Companies and some of their customers to build non-peak load to defray fixed costs and reduce maintenance expenses. Once Ohio law

changed and required electric utilities to unbundle their generation, that rationale for special electric heating rates no longer applied.

Mr. Challender's testimony similarly did not demonstrate any promise that rates would be in effect indefinitely. Mr. Challender admitted that OE's rules and regulations provided that the Company's rates were subject to changes. (Tr. Vol. III 597:25-601:15.) He also admitted that he never promised any customer that a specific rate was guaranteed or that a discount was guaranteed. (*Id.* 601:16-23.)

The most that Mr. Challender could say was the following:

> . . . I informed them that, you know, rates, as fuel costs go up, the rates would, therefore, have to go up. Fuel costs and other costs associated with delivering the electricity, and if those went up, they would go up.
>
> But the fact is that Ohio Edison was a summer-peaking company. The valleys would always be in place in the winter, and it was assumed that the – of the top tier rate went up 4 percent, the bottom tier rate would go up 4 percent.

(*Id.* 559:3-12.) But, as with Mr. Karchefsky's alleged statement to customers, nothing in what Mr. Challender said was untrue or a promise of any sort.

3. There was no proof whatsoever that the Companies promised that special rates or discounts would stay with the home.

Of the few documents produced by intervenors – such as the letter provided by Mr. Willetts and the alleged letter produced by Mr. Logan – none established any promise that a rate or discount would remain with the home. In fact, Ms. Steigerwald believed that the letter produced by Mr. Willetts was "damaging" because it expressly stated that the discount provisions would not be available to customers after July 1985 and to subsequent homeowners. (Company Ex. 10.)

Tellingly, Mr. Bishop advised Ms. Steigerwald that there was no such promise ever made. In an email exchange, Ms. Steigerwald asked Mr. Bishop whether he believed "the

intention was to tie the AE program to the house or the owner." (Company Ex. 8.) He replied that he could not recall ever saying that the program was tied to the house. (*Id.*)

III. ARGUMENT

A. The RGC Should Be Phased Out Gradually While Other Discounts Are Maintained And The Companies Should Be Authorized To Recover The RGC Deferrals With Carrying Charges.

The Companies put forth a three-part proposal for Rider RGC. The Commission should adopt that proposal because it balances the interests of all parties and, consistent with the principle of gradualism, takes into account the impact of rate changes on customers. Consistent with the state policy regarding energy efficiency and conservation, as well as the Commission Orders consolidating the Companies' rate structure, the Companies' proposal mitigates rate impacts for electric heating customers. Further, the Companies' proposal does so by eliminating Rider RGC over an extended period of time with no currently proposed changes to Riders RDC or EDR, thereby mitigating the impact to electric heat customers.

1. The Companies' proposal provides for the gradual elimination of Rider RGC to electric heating customers while maintaining other credits for those customers.

The Companies' proposal related to the Rider RGC Credit consists of three parts. ***First***, the Rider RGC Credit should apply only to those residential customers who use electricity as the primary or sole source of heat.

Second, the Companies propose that, starting with the 2011-2012 winter heating season, Rider RGC be reduced. The reduction will be implemented in such a manner that a given electric heating customer will experience ***no more than a 12% increase*** in their bills as compared to that customer's bill for the 2010-2011 winter heating season at the same usage

level.[13] A similar reduction in the RGC credit would occur during each subsequent winter heating season (*i.e.*, Rider RGC will be reduced, but there will be a 12% cap on the year-over-year increase that a given customer would face at the same usage level) until the credit under Rider RGC eventually falls to zero.

Third, consistent with the Commission's prior orders concerning Rider RGC, the Companies would be allowed to accrue deferred costs equal to the difference between what customers would have otherwise been billed and what they were actually billed as a result of this proceeding, hereafter referred to as the RGC Credit. This would include all deferrals and carrying charges from the time that Rider RGC was first initiated until such time as all deferred amounts with carrying charges are fully recovered. The Companies also would receive carrying charges associated with these deferrals at a debt rate as of February 28, 2010 and without reduction for accumulated deferred income tax. (Company Ex. 1, pp. 34-35.)

The Companies also propose no changes to Rider RDC or Rider EDR. Therefore, under the Companies' proposal, customers would continue to receive the credits pursuant to the terms of those riders. Similarly, the Companies propose to retain the seasonal rate design for generation charges. These rate features benefit electric heating customers by lowering their overall per kWh cost, due to their higher than average winter period usage, as compared to standard residential customers. (Company Ex. 1, p. 34.)

2. Discounts to electric heating customers, if maintained, cannot be based upon historic cost justification.

The reason that the Companies propose eliminating Rider RGC is that the undisputed evidence shows that the rationales to maintain special electric heating rates or discounts have

[13] The "no more than 12% increase" assumes that the customer will have the same usage as during the 2010-2011 winter period. If the customer's usage is different than the previous winter period, then the customer's year-to-year increase may be greater than 12%.

changed. First, the passage of S.B. 3 in 1999 created a fully competitive market for generation services. As a result, the Companies no longer own their own generation facilities, which undercuts the economic and operational rationales for providing discounted rates for increased winter electricity usage. (*See, e.g.*, Company Ex. 1, p. 11.) Second, with the enactment of S.B. 221 in 2008, the state adopted a policy of promoting energy efficiency and conservation. Discounted rates for electric heating, particularly with declining block rates that make electricity cheaper at higher levels of use, must be balanced with that policy. Thus, an electric heating rate, if maintained, would need to be considered within the parameters of state policy. (*Id.*, p. 13.)

3. Discounts should not be available to non-electric heating residential customers.

The first part of the Companies' proposal reflects that there are two types of customers currently receiving the Rider RGC Credit that should not receive that credit ***at all*** : (1) customers whose winter usage pattern indicates that the customer does not use electricity as the primary source to heat their residence; and (2) customers who were receiving Rider RGC not as a result of using electric heat, but rather because they had received now-discontinued load management rates. (Company Ex. 1, pp. 35-36.)[14] For both types of customers, Rider RGC is nothing more than an unwarranted windfall.

Customers who use electricity for space heating experience higher electricity usage during the winter months compared to other residential customers. Rider RGC provides price

[14] The Companies would determine if a customer heats with electricity by comparing the difference between usage in October compared to the maximum billing period usage during the heating months of December, January and February. If the difference in monthly usage for a customer is greater than 2,000 kWh, or if the ratio of maximum billing period usage of the three winter months is greater than or equal to twice the October usage, that customer would be considered to be heating with electricity. (Company Ex. 1, p. 38.) The Companies would notify the customer that they believed that the customer no longer was eligible for credits under Rider RGC, and advise the customer that if the customer was, in fact, using electricity as the primary or sole source of heat, the customer could contact the Company to either remain or be placed back on Rider RGC, subject to future confirmation by the Company. (*Id.*, p. 39.)

reductions in the form of credits to those customers for winter periods. (*Id.*, p. 36.) Customers who do not rely upon electricity for winter heating should not receive the Rider RGC Credit.

Despite that, the record evidence shows that, based on usage patterns, nearly half of the 318,000 customers currently receiving a credit under the Rider are not using electricity as their primary source of heat.

These approximately 159,000 non-electric heating customers receive a credit of approximately $13.9 million on an annual basis, but do not have electric heating. That is unwarranted. Most of these customers were "load management customers," who had received discounts as a result of a since-discontinued load management rate that gave them a credit for using less electricity during on peak times and more electricity during off peak times. As Mr. Ridmann explained (*id.*, pp. 20-23), almost 88% of the load management customers actually experienced ***decreases*** in their electric bills from the winter of 2008-2009 to winter 2009-2010, ***even before Rider RGC was implemented.*** For these customers, Rider RGC merely added yet another decrease on top of the decrease that these customers already had experienced. That was not the intent of Rider RGC. (*Id.*, pp. 38-39.)[15]

The Commission previously has stated that only customers that rely on electricity for winter heating should receive the Rider RGC Credit. (*See* Fifth Entry on Rehearing, Nov. 10, 2010, p. 6.) The Companies' proposal is consistent with this rationale. The Companies' proposal also is consistent with provisions in the historical electric heating rates (known as "availability clauses") that required the customers to have electric heating as their primary source of heat in order to take service under the rate. (Company Ex. 1, pp. 37-38.)

[15] Even these non-electric heating customers would continue to receive credits under Rider RDC and EDR under the Companies' proposal, even if they no longer received the Rider RGC Credit. (Company Ex. 1, p. 36.)

4. Rider RGC should be gradually phased out over time.

The second part of the Companies' proposal is to undertake the associated rate changes gradually to minimize bill impacts, limiting to 12% the bill increases that customers will face from one winter heating season to the next. The Companies would implement this proposal by calculating the effective bill amount that electric heating customers received in May of the prior winter period, for usage levels ranging between 250 kWh and 12,000 kWh. (Company Ex. 1, p. 40.) The Companies would perform a similar calculation for the upcoming September of the next winter period at the same levels of kWh usage, incorporating all known rate changes. Based on those two calculations, the Companies will determine the percentage change that electric heating customers would experience at each level of usage absent Rider RGC. The Rider RGC Credit will then be set at a level so that, after application of the credit, the customers will not experience greater than a 12% increase in their winter electricity bills, assuming that their usage level does not change from the previous winter. (*Id.*)[16] Once a new level of RGC credit is established, it will not subsequently be increased.

Consistent with gradually mitigating the rate impact for electric heating customers, the Companies would continue to reduce the Rider RGC Credit each year, using the same methodology, until the credit is zero. Based on current calculations, that would occur within approximately three years of implementing this phase out process. (*Id.*, p. 41.) By extending the phase-out over this three-year period, the Companies' proposal ensures that the impact to customers is mitigated through the gradual elimination of Rider RGC credits.

[16] Changes in an individual customer's usage obviously may have an effect on percent increases or decreases between years. Rider RGC will not be adjusted for any percent increases or decreases that occur due to quarterly updates or other rate changes that occur during the period between the adjustments described above; Rider RGC only will be adjusted each year on September 1 with known rate changes incorporated at that time. (Company Ex. 1, p. 40-41.)

5. The Companies must be allowed to recover all costs associated with the deferral of costs associated with Rider RGC, including carrying charges.

Since the time that Rider RGC was first initiated, through the time that it is finally eliminated, the credits provided under Rider RGC will impose costs on the Companies. When the customers receive a credit under Rider RGC, the Companies are incurring purchased power costs for which they are not contemporaneously receiving payment from customers. (Company Ex. 1, p. 41.) The Companies have been authorized by the Commission through its previous Orders and Entries in this proceeding to accrue these deferred costs for later recovery.

The purpose of Rider RGC is to mitigate rate impacts for electric heating customers. When the Commission ordered the Companies to implement Rider RGC in its current form, the Companies were authorized to defer for future recovery purchased power costs that represented the differential between the amounts paid by customers receiving the credit and the amounts that otherwise would have been paid by those customers, but for the Commission's orders and entries in this proceeding. (*Id.*, pp. 41-42.)

The Companies should be authorized to recover these deferred costs and the associated carrying costs in this proceeding as proposed by the Companies. The amount of the deferral represents actual incurred expenditures made by the Companies to wholesale suppliers for power resulting from the Commission-approved competitive bid process that occurred in May 2009. The generation purchased by the Companies is sold to all generation customers, not just electric heating customers. (*Id.*, p. 42.)[17] The Companies had not historically been forced to absorb any of the price differential between the electric heating rates and the standard rates, nor did the Companies have to defer any costs for future recovery. Rather, other residential customers paid

[17] In addition, the special legacy electric heating rates provided benefits to other residential customers by reducing their rates, and the Companies only charged rates authorized by the Commission.

whatever costs were allocated to the residential class that were not otherwise paid by the electric heating customers. (*Id.*, pp. 42-43.)

At current credit levels, the estimated annual costs being deferred as authorized in this case amounts to $87 million (assuming shopping levels that existed as of July 2010 for those customers that commenced receiving the Rider RGC Credit in March and May 2010). (Company Ex. 1, p. 43.)

In addition to the deferred costs, in order to be made whole, the Companies must also recover carrying charges on the deferrals. Without the carrying charges, the Companies would recover an amount only equal to the deferred purchased power costs themselves. But, during the time from when the costs are incurred, until the time at which they are recovered, the Companies have been deprived the use of those funds. Money has a time value, and delaying recovery of previously-incurred costs imposes a real cost on the Companies. (Company Ex. 1, p. 44.)[18]

The Commission typically allows utilities to recover carrying costs on deferred amounts. For example, the Companies were authorized to recover carrying charges in the current ESP proceeding on deferred amounts associated with (1) post date-certain distribution deferrals authorized in the Companies' RCP, (2) line extension deferrals and (3) transition tax deferrals as well as generation and fuel deferrals. (*Id.* p. 45.) Staff witness Fortney agreed that it would be appropriate for the Companies to recover carrying costs arising from the deferrals authorized as part of this proceeding. (Tr. Vol. II 505:8-19.) There is no reason to deny recovery of the similar carrying charges here.

In fact, an order precluding the Companies from recovering all their generation costs, including all deferrals and related carrying costs, would constitute a constitutionally

[18] The Commission never explained the reason for dramatically increasing the scope of the credits (by approximately 88,000 customers) in its Second Entry on Rehearing, nor did the Commission authorize the Companies to establish and accrue carrying charges on the additional deferrals. (*Id.* pp. 44-45.)

impermissible deprivation of property. At present, no customers are paying higher charges to compensate the Companies for the shortfall created by the credits ordered to be implemented by the Commission in this proceeding. The Fifth Amendment to the United States Constitution (made applicable to the States through the Fourteenth Amendment), as well as Sections 1 and 19, Article I of the Ohio Constitution, provide that private property shall not be taken for public use without just compensation.[19] Failure to provide the Companies the ability to recover all of their generation-related costs would violate each of these constitutional prohibitions.

It is well settled that the protections of the Takings Clause apply to personal property as well as real property. *See, e.g., Andrus v. Allard*, 444 U.S. 51, 65 (1979); *Maritrans, Inc. v. United States*, 342 F.3d 1344, 1351 (Fed. Cir. 2004). The Fifth Amendment prevents not only direct physical takings of personal property without compensation, but also regulatory takings, which occur when regulations interfere with ownership interests. Regulatory takings are divided into two types: categorical takings and non-categorical takings. A categorical taking occurs when all economically viable use, or all economic value, has been taken by the regulatory imposition. *See Palm Beach Isles Assoc. v. United States*, 231 F.3d 1354, 1357 (Fed. Cir. 2000); *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 538 (2005). A non-categorical taking, by contrast, is one in which the regulation prohibits or restricts some, but not all, of the uses that would be available to the property owner, and thus the owner is left with substantial viable economic use. *Palm Beach Isles*, 231 F.3d at 1357.

To determine whether a non-categorical taking has occurred, the United States Supreme Court in *Lingle* recently clarified that courts are to utilize the analysis set forth in *Penn Central*

[19] The Ohio Constitution contains greater protection for private property rights than the United States Constitution. *Norwood v. Horney*, 110 Ohio St. 3d 353, 355-56, 2006-Ohio-3799 ¶5-9.

Transp. Co. v. City of New York, 438 U.S. 104 (1978). *See Lingle*, 544 U.S. at 538-38.[20] In *Penn Central*, the United States Supreme Court instructed courts to examine: (1) the economic impact of the regulation on the property owner; (2) the extent to which the regulation interferes with the owner's distinct investment-backed expectations; and (3) the character of the government action. *Id.* at 124.[21]

Denying the Companies recovery of generation costs would constitute a taking under either definition of a regulatory taking. As explained *supra,* a categorical taking occurs when all economically viable use, or all economic value, has been taken by the regulatory imposition. *See Palm Beach Isles Assoc. v. United States,* 231 F.3d 1354, 1357 (Fed. Cir. 2000); *Lingle v. Chevron U.S.A., Inc.,* 544 U.S. 528, 538 (2005). Here, the failure to provide the Companies recovery of their generation costs, including all of the deferrals of those costs and associated carrying costs, would constitute a categorical taking because the Companies would be deprived of all economically beneficial or viable uses of the generation that they have purchased. The Companies simply purchase generation for POLR service and then provide that generation to non-shopping customers. The generation costs are passed through to customers and the Companies do not make a profit on this service. If the Companies do not recover the costs in full, there is no economically beneficial use to them in providing generation service because the Companies have provided that service at a loss.

Even if an order depriving the Companies full recovery of their generation-related costs did not constitute a categorical taking, such an order would constitute a non-categorical taking

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[20] To the extent it were to be argued that a different standard has been articulated in cases such as *Monongahela Power Co. v. Schriber*, 322 F. Supp. 2d 902, 919 (S.D. Ohio 2004), or *Duquesne Light Co. v. Barasch*, 488 U.S. 299, 307-08 (1989), those cases predate *Lingle* and thus no longer apply.

[21] Ohio courts have followed *Penn Central* when addressing regulatory takings cases. *State ex rel. Gilmore Realty, Inc. v. Mayfield Hts.*, 122 Ohio St. 3d 260, 263, 2009-Ohio-2871, ¶ 16; *State ex rel. Duncan v. Middlefield,* 120 Ohio St. 3d 313, 316, 2008-Ohio-6200 ¶ 17.

under the three-factor *Penn Central* test. The character of the government action supports that such a less than full recovery order is a taking. This is not a situation involving government action, such as zoning or other regulations, that might indirectly affect the value of the Companies' property. (*See, e.g., Penn Central*, 438 U.S. at 131; *United States v. Central Eureka Mining Co.*, 357 U.S. 155, 168 (1958).) Rather, this case involves government action directly approving the process that determines the price for which the Companies can recover generation costs. If that price is less than the Companies' cost of acquiring generation, the state regulation would directly impose a loss.

The economic impact factor similarly supports the idea that less-than-full recovery is a taking. The estimated cost annual of the current level of Rider RGC is $87 million. (Company Ex. 1, p. 43.) The deferrals accrued as a result of Rider RGC thus far (*i.e.*, through May 2011) amount to $96 million. (Tr. Vol. I 178:10-179:4.) Carrying costs on those deferrals amounts to $6 million. (*Id.* 179:5-7.)

Denying the Companies complete recovery of generation costs would interfere with their reasonable expectations. The Companies have an expectation that they will not be compelled to operate at a loss in providing this required service. Notably, the Companies are not in the generation business; they simply purchase generation on the open market and pass through the costs from the generation supplier to the customer. This is not a matter of the Companies receiving less profit; they earn no profit on generation costs. Moreover, the Companies are required to provide generation service, and cannot simply chose to exit this market and not incur any loss. If the Companies are denied full recovery of their generation costs, it would be no less of a taking than if the government took money directly out of the Companies' bank accounts.

To the extent it is argued that the Companies' generation costs should not be considered in isolation but in conjunction with their distribution costs and the overall recovery of the Companies' proposal, such a mixing of generation and distribution is contrary to Ohio law. Revised Code Section 4928.02(G) expressly provides that it is the policy of the state to "[e]nsure effective competition in the provision of retail electric service by avoiding anticompetitive subsidies flowing from a non-competitive retail electric service to a competitive retail electric service or to a product or service other than retail electric service, and vice versa." As the Ohio Supreme Court has repeatedly explained, when the Legislature passed S.B. 3, it "altered the traditional rate-based regulation of electric utilities by requiring the three components of electric service – generation, transmission, and distribution – to be separated." *Indus. Energy Users-Ohio v. Public Utilities Comm'n of Ohio*, 117 Ohio St. 3d 486, 487 (2008). "In the context of S.B. 3 electric-utility deregulation, each service component must stand on its own." *Id. See also Migden-Ostrander v. Public Utilities Comm'n of Ohio*, 102 Ohio St. 3d 451, 452-53 (2004); *Elyria Foundry Co. v. Public Utilities Comm'n of Ohio*, 114 Ohio St. 3d 305, 315 (2007).

The Supreme Court has rejected attempts to have one service component subsidize the costs of another because it would violate Section 4928.02(G). *Elyria Foundry*, 114 Ohio St. 3d at 317. If the Companies were to suffer a loss on generation sales, the revenues from distribution costs necessarily would be subsidizing the generation service, in direct violation of Section 4928.02(G). Consequently, the generation costs must be viewed alone, and the Companies must be permitted to recover them in full.

The Companies propose that the deferred costs and carrying charges be recovered from residential customers only. (Company Ex. 1, pp. 43-44.) That is because residential customers historically have received the benefits of electric heating rates. Non-residential customers

already are paying a significant portion of deferrals arising from the non-standard residential generation credit in Rider EDR. (*Id.*, *see also* Tr. Vol. I 184:14-185:5.)

CEI and OE propose accruing Rider RGC deferrals through May 31, 2011, together with interest, and then collecting those deferrals with interest over a three-year period from June 1, 2011 through May 31, 2014. TE proposes that it collect the Rider RGC deferral balance as of May 31, 2011, together with interest, over a one-year period with interest from June 1, 2011 through May 31, 2012 from residential customers. TE proposes the shorter period because current calculations show that the accrued deferrals for TE are expected to be significantly less than for CEI and OE. (Company Ex. 1, p. 46.) Starting on September 1, 2011, deferrals arising on and after September 1, 2011 would be collected from residential customers within the 12-month period after the deferral is created, thereby minimizing the amount of interest that customers would pay on the deferrals. (*Id.*)

In sum, the Companies' proposal (1) ensures that the credit under Rider RGC is directed to the correct customers and maintains discounts for those customers through Riders EDR and RDC, (2) provides the electric heating customers a more gradual impact to their rates, and (3) allows the Companies to recover the costs that they incur in providing these discounts to customers. In so doing, the Companies' proposal balances the interests among the various stakeholders. Accordingly, the Companies respectfully urge the Commission to adopt their proposal.

B. The OCC Plan Should Be Rejected.

OCC has offered a proposal by rate consultant Anthony Yankel. (OCC Ex. 1.) Mr. Yankel proposed that a discount of roughly 35 percent off of standard residential rates be

maintained for "all-electric customers" (*i.e.*, electric space heating and load management customers) indefinitely.[22]

As an initial matter, Mr. Yankel's proposal is improper because it is sponsored by the OCC, yet it is contrary to stipulations to which the OCC was a party in the ESP and RCP cases. In the RCP case, it was stipulated and agreed that electric heating rates would not apply to customers who purchased the residence after January 1, 2007. Similarly, in the ESP case, it was stipulated and agreed that discounted rates that would be available as a result of the ESP case would be available under the same eligibility rules established in the RCP case. Further, those stipulations expressly required the signatory parties to support their terms. Contrary to those stipulations, however, OCC has proffered Mr. Yankel's proposal that electric heating customers receive discounts and credits even if they purchased residences after January 1, 2007. Basic principles of *res judicata* prevent the OCC from reneging on stipulations to which it previously has agreed. *See, e.g., Scott v. City of East Cleveland*, 16 Ohio App. 3d 429 (Cuyahoga Cty. 1984); *Horner v. Whitta*, 1994 WL 114881 (Seneca Cty. App. Mar. 16, 1994); *Shanklin v. Lowman*, 2011 WL 290643, 2011-Ohio-255 (Logan Cty. App. Jan. 24, 2011).

The Commission should reject Mr. Yankel's proposal for four additional reasons. First, it ignores the fact that the Companies' cost structure has changed and encourages consumption rather than conservation. Second, even putting these failings aside, Mr. Yankel's proposal relies upon flawed calculations and assumptions. Third, OCC has offered no justification for providing additional discounts ***to non-electric heating customers.*** Fourth, although OCC points to purported "promises," it cannot provide any convincing evidence that such promises were ever

[22] In fact, Mr. Yankel proposed that "all-electric" customers pay basically about two thirds of what standard residential customers pay. For example, he agreed that, under his proposal, all-electric customers would pay "two-thirds of ***any rider***." (Tr. Vol. I 217:9-25 (emphasis added).)

made, and in any event, such promises would provide no basis for extending electric heating discounts indefinitely. Nor can OCC point to any deceptive marketing by the Companies.

1. There is no cost justification for continuing Rider RGC indefinitely.

Mr. Yankel proposed "that a relationship be established" between the standard residential rates and the credits for electric heating customers "that returns the all-electric customers rates back to a similar proportional credit to which they received in the past." (OCC Ex. 1, p. 3.) Mr. Yankel proposed that this "relationship" will "generally result in all-electric bills that are 65% of the standard residential bill". (*Id.*, p. 4.) But there is no cost justification for what Mr. Yankel proposes. Further, the first year impact of Mr. Yankel's proposal would cause rate increases for CEI electric heating customers in excess of 35%.

The undisputed record evidence shows that the Companies' cost structure has changed. In the past, electric heating rates were warranted in that they provided benefits not only to electric heating customers, but to other residential customers as well, through the increased use of electricity during off-peak times. Under the Companies' present cost structure, however, that broader benefit no longer exists.

Mr. Yankel admitted that when the electric heating rates were introduced they were cost based. (Tr. Vol. I 224:18-25.) Mr. Yankel acknowledged that the Companies' generation costs are now market based, but admitted he did not know how generation rates are currently set. (*Id.* 227:18-229:10.) Nonetheless, the record evidence is clear: the rates of the wholesale suppliers from whom the Companies purchase electricity currently are not subject to regulated ratemaking; they are the result of a competitive bidding process. (*Id.* 248:25-250:6.)

Mr. Yankel based his proposal on claims that it is "less costly" to service an electric heating customer than a standard residential customer. But he based this belief principally on the notion that, with the load from electric heating customers the Companies can spread fixed

distribution costs over more units of consumption. (OCC Ex. 1, p. 11.) Indeed, all of the specific examples of costs cited by Mr. Yankel are distribution costs. (*Id.*, pp. 11-12; Tr. Vol. I 226:3-227:3.) Yet he had no idea what percentage of an electric heating customer's bill or a standard residential customer's bill represents distribution-related costs. (Tr. Vol. I 227:4-16.) Regardless, the recovery of distribution costs here is irrelevant. Rider RGC relates to credits for only generation rates.

Mr. Yankel admitted that his only information on the relative costs to serve different customer classes was a rate unbundling study from Case No. 99-1212-EL-RTP. (*Id.* 223:10-18.) He further admitted that that case was not "a traditional ratemaking case," but rather "the intent [of that case] was to keep basically rates where they were." (*Id.* 245:5-246:7.) Thus, he cannot draw any relationship between rates of return displayed in the study by rate schedule.

Further, the specific costs considered in that study were from a time when the Companies owned generation facilities. (*Id.* 223:10-25.) Thus, Mr. Yankel was forced to admit that he must infer that the Companies' generation costs to serve electric heating customers are now lower because wholesale suppliers set their auction prices after taking into account that electric heating customers are cheaper to serve. (*Id.* 250:13-251:3) But he has never worked for a wholesale supplier, nor conducted a study of wholesale supplier bidding strategies, nor has he even discussed this issue with a wholesale supplier. (*Id.* 251:7-18.) He admitted that he could not quantify the impact that electric heating customers have on bidding strategies of wholesale suppliers in the competitive bidding process for generation supply. (*Id.* 251:22-25.)

Even if wholesale supplier costs (and not the prices they charge the Companies) were relevant, the fixed cost component of suppliers' costs has decreased dramatically. As Mr. Ridmann demonstrated, when the Companies were vertically integrated, the demand component

of their respective revenue requirements ranged from 66% to 71%. (Company Ex. 65, pp. 22-23.) In contrast, in today's markets, wholesale capacity costs are less than 15% of total POLR generation costs. (*Id.*) Given that the fixed cost component of generation service is now a relatively small part of the total cost of that service, the notion that electric heating customers are less costly to serve is out-dated.

Mr. Yankel's proposal is also based upon the erroneous premise that "the all electric customers should generally benefit the system with high usage during times of low energy costs." (OCC Ex. 1, p. 40, Tr. Vol. I 211:5-10.) Here again, though, Mr. Yankel admitted that he based this opinion simply on "other efficiencies" that Mr. Ridmann mentioned; Mr. Yankel conducted no independent analysis to determine whether the benefits and off-peak usage that he relies upon actually exist. (Tr. Vol. I 211:21-25.) Likewise, Mr. Yankel based his opinion about off-peak energy costs on his general knowledge of energy markets (*id.* 214:25-215:7), but he had not conducted any study to determine if customers can shop for their generation and receive a benefit from having the load profile of an electric heating customer. (*Id.* 214:1-21.)

Even aside from his unproven assumptions, Mr. Yankel's proposal did not take into account Ohio's public policy regarding energy efficiency and conservation. Mr. Yankel admitted that his proposal is a declining block rate, and that customers will thus pay at a lower per kilowatt hour the more that they use. (Tr. Vol. I 218:17-219:14.) He further admitted that declining block rates tend to increase usage. (*Id.* 219:15-220:4.) Not surprisingly, Mr. Yankel conceded that he does not know if his proposal is consistent with statutory mandates. (*Id.* 220:5-223:2.)

Despite the fact that Mr. Yankel is a strong proponent of "cost causation," his proposal also runs contrary to cost-causation principles. Mr. Yankel testified that it is a "requirement in

setting rates that customers that are cheaper to serve should pay lower rates." (*Id.* 230:13-16.) He also acknowledged that "cost should be recovered from those segments of the companies' customers that cause those costs." (*Id.* 230:20-24.) Mr. Yankel was forced to admit that if, as the record shows, it does not cost less to serve electric heating customers, the discount should be eliminated:

> Q: Sure, let me try again. If it could be shown that the cost to companies is the same to serve electric heating customers as it does other customers, including standard residential customers, you would not be in favor of eliminating the discounts for electric heating customers, correct?
>
> A: It depends on whether or not I agree with the analysis, but, yes, if I agree with the analysis I – I think again back to principles of cost of service, I would not see any reason for a discount.

(*Id.* 232:6-15.)

2. Mr. Yankel's calculated discount is based on an alleged historical relationship between electric heating rates and is wrong.

Mr. Yankel proposes discounts based upon the discounts that he believes customers have historically enjoyed, not based upon any analysis of the Companies' costs to serve standard customers compared to electric heating customers. (Tr. Vol. I 233:8-22.) Yet, his historical "analysis" was thin at best. He considered exactly one electric heating rate and one residential rate for each of the three companies. (*Id.* 233:23-234:21.) To come up with his historical relationship, he did not derive an average of the relationship of the two sets of rates over time. (*Id.* 234:3-235:6.) Rather, he compared the relationship of recent rates to the relationship of the rates at one other point in time – 1996 for CEI and TE, and 1992 for OE. (*Id.* 235:7-18.) He used these years because those represented the "earliest most accessible tariffs [he] could find." (*Id.* 235:3-237:5.) In his "study," he did not consider the magnitude of the rate differential

between electric heating customers and standard residential customers before 1992 for OE or before 1996 for CEI and TE. (*Id.* 237:6-16.)

Mr. Yankel's unwillingness to perform a serious study extended beyond his failure to collect the necessary data. Mr. Yankel proposed a discount based upon a usage level of 3,500 kWh per month. (OCC. Ex. 1, pp. 34-38.) He admitted, however, that he has no idea how many customers have that usage level, or whether it even represents the majority of customers, or can be deemed a typical level of usage. (Tr. Vol. I 239:15-240:13.) The failure to develop reliable information regarding typical levels of usage renders his "study" essentially useless. Mr. Yankel admitted that if he had used a lower usage level, he would have recommended a lower discount. (*Id.* 240:14-243:17.) Mr. Yankel also had no apparent basis for beginning discounts at the 1,000 kWh/month level. He simply "was assuming" it represented a "base load." (*Id.* 244:1-16.)

As Mr. Ridmann demonstrated, average winter monthly usage among electric heating customers was 2333 kWh. (Company Ex. 65, pp. 25-26.) Using an average of the historical relationship between electric heating rates and standard residential rates and calculating monthly usage level of 2000 kWh (*see* Company Ex. 1, Attachment WRR-3), the discount enjoyed by electric heating customers was 15.5% for CEI, 31.3% for OE and 19% for TE. (*Id.* p. 26.) Adopting such a discount going forward (and recognizing that the credits provided by Riders RDC and EDR are not proposed to be eliminated or reduced by this proceeding) would mean that Rider RGC would be ***reduced*** to 2.11 cents/kWh for OE and that Rider RGC would be ***immediately eliminated*** for Rider RGC for CEI and TE. Indeed, using historical discounts for CEI and TE would mean that Rider EDR would also need to be reduced for customers of those Companies to .622 cents/kWh for CEI and 1.198 cents/kWh for TE from the current 1.9

cent/kWh level. (*Id.* p. 27.) This would, of course, be less advantageous for electric heating customers than the Companies' proposal.

3. OCC provides no justification for providing additional discounts to non-electric heating customers.

Putting aside the numerous flaws in Mr. Yankel's proposal as it relates to electric heating customers, it is doubly flawed as it relates to non-electric heating customers. Yet he nevertheless proposed providing additional discounts to non-electric heating customers.

Mr. Yankel admitted that his proposal includes non-standard, non-electric heating customers. (Tr. Vol. I 218:1-8.) Yet his proposal repeatedly claims that it is based upon his erroneous belief that ***electric heating customers*** provide cost savings and other benefits that justify their receiving discounted rates. (*E.g.*, OCC Ex. 1, p. 11.) He admitted that he did not make any analysis of whether the costs to serve non-standard, non-electric heating customers are similar to the costs of serving electric heating customers. (Tr. Vol. I 233:8-16.) He did not look at the relationship between standard residential rates and non-standard non-electric heating rates. (*Id.* 239:8-14.) He did not know whether his 3500 kWh usage figure for calculating the discount represented a typical usage level of such customers. (*Id.* 243:18-25.) In short, he provided no basis, nor has OCC offered one, for providing non-electric heating customers with additional discounts other than Riders EDR and RDC.

4. OCC has not provided any other justification for continuing Rider RGC indefinitely.

The oft-repeated argument – made at the public hearings, in customer complaints filed with the Commission and in various filings made by the OCC and others – is that special electric heating rates should continue indefinitely because the Companies made "promises" to customers that these rates would be permanent. (*See, e.g.*, OCC's Motion to Compel Responses to Discovery, filed June 30, 2010, at p. 13 (arguing that OCC should be permitted to investigate

whether the Companies made agreements, promises or inducements to customers that were outside of the terms of the tariff).) The Commission's October 14, 2010 Entry setting the six public hearings in this matter specifically requested individuals to come forward with any evidence of commitments: "If you are in an all-electric home, what contracts or written documentation do you have regarding your electric rates now and in the future? Was there a commitment that the rate would remain with the home for future owners?" (October 14, 2010 Entry ¶ 7.)

Yet despite the fact that such "promises" were central to OCC's claims, and despite having every opportunity to collect evidence regarding them, OCC and its allies in this case have failed to present convincing evidence to support the assertion that the Companies' customers received any such commitments. To the contrary, the record evidence contains numerous Company documents that expressly stated that rates could change at any time, other Company documents cited to specific tariff schedules that contained that information and specific testimony from the Companies' representatives expressly denying that they made any such promise or guarantee. Further, the evidence demonstrates that the statements made by the Companies' representatives and in marketing materials were true at the time that they were made or published. That circumstances changed subsequently does not now make those statements untrue, deceptive or even misleading.

(a) The Companies did not promise that any specific rate, rate schedule or discount would be available forever.

The lack of any credible evidence supporting a claim of a promise is best demonstrated by the fact that it is difficult to determine from the evidence offered by OCC and the intervenors exactly what promise or promises the Companies are alleged to have made. The "evidence" of

oral or written promises falls short of demonstrating either that the promises were made or that, even if made, they were or could be binding on the Companies.

(i) The "evidence" of oral promises

Of all of the witnesses who testified at the public hearings, only 37 testified in any way about any oral promises or statements. Of these, six recounted alleged "promises" or "assurances" that they had ***received from their builders***. (Sandusky Public Hearing Tr. 15:19-16:1 (Virginia Groover); Strongsville Public Hearing Tr. 15:2-17 (Jim Jankura), 39:8-12, (Carol Nussle); North Ridgeville Public Hearing Tr. 46:16-23 (Jane Pfaff), 125:8-126:17 (Shirley Yunkers), 146:16-23 (Tom Paluscsczk).)[23] Certainly, the Companies cannot be held responsible for what others allegedly said.

One witness claimed that the Companies made "verbal promises" but this witness did not say what allegedly was promised. (Sandusky Public Hearing, Tr. 20:13-21:1 (Roger Kenney).) Five others contended that they had been promised a specific rate that would be permanent. (Strongsville Public Hearing Tr. 37:6-8 (Bill Vassel), 143:21-25 (Dale Finley); North Ridgeville Public Hearing Tr. 51:15-22 (Thomas Sweeney); Kirtland Public Hearing Tr. 166:4-167:6 (Steve Martony); 184:4-12 (William McLaughlin).) But, there can be no dispute that the Companies did not guarantee a specific rate would last forever. The uncontroverted evidence is that the electric heating rates had changed over time during virtually the entire time that they were in place. Since 1973 through the first half of 2009, TE's rates to electric heating customers changed 26 times. (Company Ex. 1, Att. WRR-5.) Since 1970 through the first half of 2009, CEI's electric heating rates changed 33 times. (*Id.*) Since 1987 through the first half of 2009, OE's electric heating rates changed 11 times. (*Id.*) Even Michael Schmitt and Jesse Willetts,

[23] One witness reported what the builder had told her neighbor. (Sandusky Public Hearing Tr. 46:15-25 (Cora Neill).) Another witness testified about what his realtor supposedly said. (North Ridgeville Public Hearing Tr. 78:16-79:8 (Edward Bueche).)

witnesses for the CKAP parties, testified that they were aware that rates have changed. (Tr. Vol. II 421:19-25 (testimony of Michael Schmitt); 462:23-463:15 (testimony of Jesse Willetts).)

Two homeowners testified what they were purportedly told about the potential longevity of special electric heating rates. One witness said that in 1976, he was told that there "would always be" special rates for homes built by BSH. (Strongsville Public Hearing Tr. 51:20-25 (Gerald Grissom).) Another witness said that he was told all-electric pricing would "go on forever." (*Id.* 22:6-15 (Robert Stefanik).)

Other public witnesses reported that they were told their home qualified for a discounted rate. (Sandusky Public Hearing Tr. 36:5-13 (Raymond Kisicki), 72:22-73:11; 74:14-76:14 (Richard Pitsinger), 80:6-17; 80:24-81:13 (Andrew Kocis), 86:11-23 (Louis Lane), 88:25-89:7 (Rosemary Reidy), 98:14-99:6 (Edward Cullen); Strongsville Public Hearing Tr. 44:4-10 (Riaz Ansari), 119:16-120:8 (Donald Blankenship), 172:1-6 (Caroline Dragics); North Ridgeville Public Hearing Tr. 38:25-39:15 (Linda Jankura), 63:20-64:19 (Hazel Ferry), 141:8-12 (Carl Silski); Kirtland Public Hearing Tr. 33:23-34:24 (Kim Kossick); 106:13-20 (James McMeechan); 110:20-111:12 (Candace Arcaro); 128:5-22 (Thomas Waltermire), 130:16-131:7 (Richard Gift), 161:17-21 (Sue Hurd), 169:5-9 (Patricia Rickettson), 173:24-174:13 (Derrick Loy), 180:6-181:8 (Felica Matras).)

But none of these witnesses claimed – nor could they – that there was a specific cents per kWh or percentage discount promised. As demonstrated by Mr. Ridmann, the amount of the discount changed, nominally and as a percentage, as often as the rates did. (Company Ex. 1, Attachment WRR-3.) Ironically, to the extent that any electric heating customer could contend that they were simply promised "a discount," that promised has been honored. There is no

dispute that electric heating customers, who were receiving discounts as of January 1, 2007, have at all times enjoyed a discount off of standard residential rates.

A closer look at most of these witnesses' testimony, however, reveals simply that the Companies merely advised individuals regarding their eligibility for a discounted rate. Those statements were true when they were made. The fact that the rate later become unavailable to them because they were discontinued with Commission approval does not mean that those statements were untrue or deceptive.

But the fact of the matter is that there simply is no credible evidence that there were any "oral promises" made to customers about rates. Michael Challender, a former employee of OE who also was called as a witness by the CKAP parties, testified that he "never promised any customer that a specific rate was guaranteed" or "that there was a discount that was guaranteed." (Tr. Vol. III 601:16-23.) Even BSH CEO Schmitt testified that he had no proof that CEI or Ohio Edison made any promise that a special electric heating rate would last forever. (Tr. Vol. II 414:9-415:6.)

None of the testimony provided by the Companies' former employees provided any support for the idea that there were any oral promises or guarantees. For example, statements that Messrs. Karchefsky and Challender claim to have made to customers – that, given the Companies' cost structure, the Companies were likely to continue to offer or support special rates – were true. They also do not amount to any type of promise. When the Companies owned generation facilities, it made sense for the Companies to try to build non-peak load. This put downward pressure on the other customers' rates by defraying fixed costs. It also reduced expenses by reducing cycling costs. But when Ohio law changed and required unbundling of

generation, the original separate special rates were discontinued, but new credits went into effect under the principle of gradualism. Notably, this fact is undisputed.

Nor are the statements made by Messrs. Bishop or Ehlinger credible proof of any promise. As Mr. Ridmann testified, Mr. Bishop did not work in OE's rate department and thus lacked any in-depth experience or expertise in how rates were developed, how they worked or what rate policy was. (Company Ex. 65, p. 11.) Mr. Bishop's statement that OE "always" grandfathered rates is demonstrably wrong. (*Id.*, p. 10-11.) Similarly, Mr. Ehlinger's statements that the rate would be available "as long as the electric heating system remained functional" was also plainly contrary to TE's Commission-approved rules and regulations. (*Id.*, p. 15.)

(ii) The "evidence" of written promises

For all of the publicity, for the millions of customer communications that the Companies distributed or published over the decades at issue in this case, OCC and its allied interveners could produce exactly ***two*** documents which could, in any way, be considered a promise relating to special electric heating rates. (Steigerwald Dep. 264: 8-16.) One is a purported letter, dated June 18, 1988, that was supposedly sent by former Ohio Edison employee Elio Andreatta to a single residential customer. (Strongsville Ex. 2.) The letter purports to inform this particular residential customer that an "experimental rate" means that the rate "will be guaranteed for as long as you wish to utilize it". (*Id.*)

There are several problems with this document. To begin with, it is questionable whether this letter is even authentic. Mr. Andreatta, the purported author, testified that he wrote very few letters to customers during the four years he worked for OE: "[T]here might have been one or two. Like I said, not a common practice." (Tr. Vol. I. 113:9-19; *see also id.* 129:22-130:17.) Notwithstanding that writing this letter would thus have been an uncommon experience for Mr. Andreatta, he testified that he had no recollection of having written it. (*Id.* 121:17-19.) Nor did

he recall ever talking to this customer – or any other customer – about the longevity of rates. (*Id.* 121:20-122:2.) The letter also lists Mr. Andreatta's title as "senior residential representative," but he testified that he did not hold that title. (*Id.* 123:21-124:1.) Mr. Andreatta further testified that letters would have been typed by a secretary, and that the office staff did not work on Saturdays. (*Id.* 123:3-16.) However, the date of the letter, June 18, 1988, was a Saturday.

Moreover, a copy of this letter was not found in OE's records, nor were any similar letters or form letters. (Company Ex. 65, p. 2.) And, in reviewing the letter, the statement in question is internally inconsistent. One would typically think of an "experimental" rate as one that is being offered potentially on a temporary basis to customers (*i.e.*, as an experiment), which is the opposite of being "guaranteed for as long as you wish to utilize it." (*Id.*, p. 3.)

Putting aside questions of the document's authenticity, its content is unquestionably wrong. Mr. Andreatta testified that he was aware of rules and regulations that were in effect at the time of the letter, which specified that OE's rates could not be modified by employees, and also aware that no promise was binding unless it was incorporated into the service agreement. (Tr. Vol. I 126:9-127:22; 128:8-11; Company Ex. 46.) He further testified that neither he nor his supervisor would have done something, such as the statement in the letter, that violated these rules. (*Id.* 128:12-18.)[24]

The second document was a letter presented by Mr. Willetts (CKAP Ex. 31), who contended that the statement "there will be no change in the discount provisions until there is a change in customer" establishes some sort of contract. (Tr. Vol. II 455:22-456:7.) This interpretation is incorrect. As Mr. Ridmann explained, the purpose of this letter was to inform electric heating customers that the availability of the discount under the prior rate had been

[24] Even if Mr. Andreatta wrote and sent the June 18, 1988 letter there is no evidence that the statements contained in this letter were made to any other customers of the Companies. Thus, the record shows that the statement in that letter was made, at most, to one customer.

modified by a recent Commission order. (Company Ex. 65, p. 4.) What changed on July 14, 1980 (the date the new rate schedule was issued, and the date set forth in CKAP Ex. 31) was that the availability of the discount provision from that point on was to be based on the specific customer of record who was taking service as of that date. (*Id.*, pp. 4-5.) The availability of the discount was no longer to be based upon what date specific equipment was first installed at a residence. (*Id.*) Thus, the customer was being advised that, as a result of this change, if the existing customer moved out of the residence, the discount provision would not be available to the next customer that moved into the residence. (*Id.*) As Mr. Ridmann further pointed out, the sentence in question begins "under the new rate schedule," and does not state that there may not be future new rate schedules. (*Id.*)

(iii) No oral or written promise could be binding on or enforceable against the Companies.

The Companies could not have made any promise guaranteeing the availability of any rate. The Companies have long made their employees aware that rates are subject to approval and change by the Commission. A former employee called as a witness by OCC, Elio Andreatta, testified as to certain rules that he was "sure at one point in our employment we did go over," including the following:

> The Company's Schedule of Rates and the Standard Rules and Regulations as herein contained may be terminated, amended, supplemented or otherwise changed from time to time only in accordance with the law and the rules promulgated thereunder by The Public Utilities Commission of Ohio.

(Tr. Vol. I 126:22-127:22; Company Ex. 46.) Likewise, the Companies' rules advised employees that they did not have "any right to modify or alter any provision of the Company's Schedule or Rates or the Standard Rules and Regulations." (*Id.*) The rules also provided:

> The service contract shall constitute the entire agreement between the customer and the Company, and no promise, agreement, or

> representation of any agent, representative or employee of the Company shall be binding upon it unless the same shall be incorporated in the service contract.

(*Id. See also* Company Ex. 65, p. 3.) Mr. Challender also testified to his familiarity with these regulations, and that he would not have said anything to a customer that was contrary to them. (Tr. Vol. III 599:15-601:15.)

As indicated by the plain language of the rules and regulations, no oral promise could have been made or could be enforceable against the Companies if it was made. Ohio law is no different.

Pursuant to Ohio law, no utility "shall charge . . . a different rate . . . for any service rendered . . . than that applicable to such service as specified in its schedule filed with the public utilities commission which is in effect at the time." Ohio Rev. Code § 4905.32. "Under [R.C. 4905.32] a utility has no option but to collect the rates set by the commission." *Keco Industries, Inc. v. Cincinnati & Suburban Bell Telephone Co.*, 166 Ohio St. 254, 257 (1957); *see also Kazmaier Supermarket, Inc. v. Toledo Edison Co.*, 61 Ohio St. 3d 147, 150 (1991); *Suburban Power Co. v. Public Utilities Comm'n of Ohio*, 123 Ohio St. 275, 281-82 (1931).

Ohio courts have rejected claims by customers who have sought to obtain utility service on terms other than as provided in the utility's tariffs or Commission-approve contracts. In *Hull v. Columbia Gas of Ohio*, 110 Ohio St. 3d 96, 103 (2006), the Ohio Supreme Court rejected claims that utility should have charged lower rate, holding:

> Columbia did nothing wrong. Columbia is a public utility, . . . As such, Columbia was and is subject to the regulatory jurisdiction of the PUCO. That regulation required Columbia to file PUCO-approve tariffs containing rate schedules, obtain approval of its Customer Choice program, and abide by the terms and conditions of its tariffs and the Customer Choice Program, all of which it did. It could not legally have provided service to Hull or charged for that service other than it did.

Similarly, in *Keco Industries*, addressing a customer's claim for the difference between the original rate and the increased rate charged by the utility in accordance with the Commission's order, the court held that rates:

> were established by the proper designated authority after a hearing and consideration in full compliance with the law, and, until such time as they were set aside by the Supreme Court, they were, in the absence of a stay, the lawful rates and the only ones which could be collected by the utility. 166 Ohio St. at 257-58.

Even if there was evidence in this proceeding supporting the claims by OCC and the CKAP parties that the Companies had entered into "contracts" to provide the special electric heating rates "forever," which there is not, those contracts would have been contrary to Ohio statute and the Commission's rules, and thus void as a matter of public policy. "It is elementary that no valid contract may be made contrary to statute, and that valid, applicable statutory provisions are parts of every contract." *Bell v. Northern Ohio Telephone Co.,* 149 Ohio St. 157, 158 (1948). "Public utility service in this state is regulated by statute and no contract for service may be made by a public utility except as provided by statute." *Id.*

There is no basis to claim an enforceable contract based upon an alleged written or oral modification by the Companies of an applicable Commission tariff schedule. As explained previously, any allegedly promised rate that was different than the tariff rate approved by the Commission would have been contrary to Ohio law. Thus, it would constitute an unenforceable contract. Moreover, the change in Ohio law in the form of S.B. 221, which mandates a reduction in consumption of electricity, would prevent enforcement of any alleged promise for special electric heating rates to the extent such rates were found to be contrary to S.B. 221.

In fact, the advent of S.B. 3 would preclude any prior promise or representation regarding rates or discounts from being binding on the Companies. The rule in Ohio is clear:

> When, after a contract is made, a party's performance is made impracticable without his fault by the occurrence of an event, the non-occurrence of which was a basic assumption on which the contract was made, his duty to render that performance is discharged, unless circumstances indicate to the contrary.

Restatement (Second) of Contracts §261 (1981). *See also* 18 Ohio Jur. 3d Contracts §227; *Assoc. of Cleveland Fire Fighters v. Cleveland,* 2010 WL 4684736 (8th Dist. Nov. 18, 2010).

By requiring the unbundling of electric service and the divestiture of the Companies' generation facilities, the fundamental premise of the Companies' special electric heating rates changed. As the undisputed record shows, the Companies no longer needed to build non-peak load to help defray fixed costs or reduce plant maintenance expenses (*e.g.*, through the reduction of cycling). Because the Companies no longer own or operate generation facilities, these benefits no longer accrue to the Companies or to any customer. This is especially true because the Companies' generation costs do not differentiate among different types of residential customers. Given the unanticipated change in law that was fundamental to the reason for offering and marketing special electric heating rates, any alleged promise relating to the longevity or effective dates of those rates is no longer enforceable.

(b) The Companies' marketing materials were not deceptive.

Some witnesses contended that the Companies' marketing practices relating to electric heating rates of "all electric" homes were deceptive. The basic reason underlying these statements was simply that the Companies did not include such a statement in all marketing materials that the special rates might be subject to change. This fact does not make the Companies' marketing deceptive or misleading in any way.

To be sure, the record shows that the Companies did give rebates and other incentives, such as assistance with advertising costs, to home builders. (*E.g.*, Tr. Vol. II 377:20-382:15, CKAP Exs. 21 through 28.) BSH CEO Michael Schmitt testified that there was nothing

inappropriate, however, about a program that provided incentives to customers to purchase a product or services. (Tr. Vol. II 378:22-25.) And, while the marketing materials that the Companies used to promote these incentives may not have always contained a specific disclaimer about the longevity of rates, the materials certainly did not promise that rates were permanent, nor would the failure to provide such a disclaimer constitute a "deceptive practice." (Company Ex. 65, pp. 7-9.) Given the frequency of rate increase for both gas and electric utilities (*id.*), no reasonable customer could have read any advertising or marketing material that was silent about the term of the rate to guarantee any rate or discount forever.

Moreover, the record evidence also shows that the materials that the Companies provided to builders and others often did in fact specifically disclaim that rates were permanent. Some documents, such as one provided to BSH, for example, advised that "operating costs provided are not guaranteed but are submitted as an estimate which is based on rate schedules currently in effect," and further that "rate schedules are subject to change at any time as new rates are fixed by the various regulatory authorities under which the company operates." (Company Ex. 53.) Mr. Schmitt acknowledged that BSH was aware of this information. (Tr. Vol. II 427:2-4.)

Even those documents lacking a specific disclaimer often referenced specific tariff schedules, which did specifically state that rates were subject to change. (Company Ex. 54.) If a customer or developer such as BSH wanted to see what a rate was, Mr. Challender testified that he would have provided the rate, or the builder could obtain it directly from the Commission. (Tr. Vol. III 595:17-597:6.)[25]

[25] Further demonstrating that a builder such as BSH had no basis for believing that any of the Companies' rates were "guaranteed," despite moving to intervene in the earlier case that eliminated electric heating rates for new customers after January 1, 2007, BSH never argued that the Companies had promised certain rates. (Tr. Vol. II 424:17-25; 429:10-430:13.) Nor did Mr. Schmitt ever raise this issue with Mr. Challender. (*Id.*) Further, on its website, as of January 2010, BSH provided a sample letter for all-electric customers to complain to the Commission, among others, about the effects of deregulation. This letter fails to register any complaint about any promise or guarantee by the Companies. (Company Ex. 59.)

There is no question that years ago the Companies touted the benefits of electric heat, including its comfort, safety, reliability, and that its costs compared favorably to other heating sources. (*See* Kirtland Public Hearing Ex. 17.) Those statements were not deceptive, however, because they all were true, as even two CKAP witnesses testified. (Tr. Vol. II 430:24-431:13 (Schmitt), Tr. Vol. III 555:22-556:18 (Challender).) Moreover, statements in marketing materials about the ***benefits*** of electric heat do not constitute a contract or a promise about future ***costs*** of such heat.

In sum, OCC has failed to provide any valid reasons for the Commission to adopt its proposal.

C. The Staff's Proposal Should Not Be Adopted.

The Commission Staff's proposal is similar to the Companies' proposal, but varies in two key respects: (1) it adopts a longer phase-out period for Rider RGC; and (2) the Staff proposes that the rates remain with a house, even if the people living in the house change. The first of these makes the plan too costly to standard residential customers. There is simply no justification for the second.

1. The Staff's proposal is the most costly to standard residential customers.

The Staff agrees with many of the Companies' goals. As Mr. Fortney explained, the Staff proposal, like the Companies' proposal, seeks to reduce the current discounts gradually over an extended period of time, while also seeking to minimize the deferred costs during that period that will need to be recovered from other customers in the future. (Staff Ex. 1, p. 3.) The Staff proposal also seeks: (1) to provide a better signal to customers regarding the actual costs that the Companies experience in providing electricity; (2) to promote conservation; (3) to provide for competition by increasing the opportunities for alternative electric suppliers; and (4)

to maintain a portion of the current discounts currently being given to eligible electric heating customers. (*Id.*)

Based on these objectives, the Staff, like the Companies, recommends that Riders RDC and EDR remain in place under their current terms for electric heating customers. (*Id.*) Also like the Companies, the Staff proposes a phase out of the Rider RGC Credit over time.

Unlike the Companies, however, the Staff proposes that the phase out occur over the next five years, ending May 31, 2015, with a cap at monthly usage levels in excess of 7,500 kWh. (*Id.*) In addition, like the Companies, the Staff proposes that the Companies be allowed to accrue and recover deferrals (including any new deferrals that result from a rate freeze under its proposal). (*Id.*, p. 4; Tr. Vol. II 504:17-505:19.)

While the Companies support many aspects of the Staff's proposal, the Companies believe that their proposal achieves the shared goals at a lower cost. In particular, the Staff's proposal imposes higher costs on other residential customers because of the longer phase-out period. As Mr. Fortney testified, the Staff's proposal "essentially keeps the RGC the same for Year 1 and then phases out over the next four years and so it's basically a five-year phase-out." (Tr. Vol. II 509:14-25.) By contrast, as Mr. Fortney acknowledged, the Companies' proposal "is a more of a three-year phase-out." (*Id.*) The extra two years for the phase out period will result in larger accrued deferred costs and larger carrying costs. Because the Companies' shorter phase-out period lessens the costs that will be imposed on future customers, the Companies' proposal better achieves the goals that the Staff articulated in advancing its proposal.

2. There is no justification to have the rate stay with the residence.

In its proposal, the Staff also recommends that the electric heating rates "stay with the property." (*See* Staff Ex. 1, p. 4; Tr. Vol. II 471:5-11.) The Staff's proposal offers no rationale for this recommendation. The record evidence, however, provides three reasons to reject it.

(a) Staff's recommendation is contrary to the Companies' practice and the Commission's Order in the RCP case.

First, the practice would be contrary to the Companies' past practices and the Commission's previous Orders regarding electric heating rates. Specifically, the Staff's proposal also is contrary to the Commission's Order adopting the stipulation regarding the Rate Certainty Plan, Case No. 05-1125-EL-ATA. In that Order, the Commission provided the electric heating rate would not be available to customers who purchased homes primarily or exclusively with electric heat on or after January 1, 2007. In that case, the Commission observed that the decision to eliminate discounts had been agreed to by a diverse group of parties and was consistent with state policy promoting conservation. As the Commission recognized:

> [T]here is no guarantee that a rate currently in the utility's tariffs will remain there forever. Schedules are always subject to review and modification in future proceedings. In this case, we believe that the elimination of the rate schedules in question, with the grandfather provisions and with the modification set forth below, provides a reasonable balance of promoting conservation while not unduly affecting home builders and customers who are currently served by one of the grandfathered rate schedules.

(Entry on Rehearing, March 1, 2006, ¶ 13.)

There has been no credible justification for changing the Commission's policies with respect to the future availability of discounted rates to new owners or occupants of electrically heated premises. As demonstrated below, the only justification put forward by any party – the alleged adverse impact on property values – cannot survive serious scrutiny.

(b) The Companies never promised that the rate would stay with the residence.

Second, Staff fails to offer any justification for the electric heating discounts staying with the home. The record contains no evidence that the Companies ever promised that discounts would stay with the home. Even the materials that OCC and the CKAP parties cite as evidence

of a "promise" do not contain any promise, or even a suggestion, that the discount would stay with the home. In fact, the evidence is directly to the contrary. The 1980 letter that Mr. Willetts provided expressly states that the rate does ***not*** stay with the residence: "If there is a change in our customer of record at any residence served under these discount provisions after July 14, 1980, electric service will be provided on the Residential Schedule without the discount provision." (CKAP Ex. 31; emphasis in original.) Even Ms. Steigerwald understood what this letter said, terming it "damaging" because it expressly did not apply "discount provisions" to anyone beyond the current occupant of the home. (Company Ex. 10.)

Ms. Steigerwald wanted evidence to support her view that electric heating rates be "tie[d] to the property structure itself instead of the owner," as "[t]his is absolutely necessary to maintain the salability of the all electric home going forward." (Company Ex. 8.) But, she was unable to provide any such evidence. She even tried to get former OE employee Teryl Bishop to say so. But he could not. Teryl Bishop told Ms. Steigerwald that he did "not recall promoting" the electric heating rates "in that fashion." (*Id.*) Ultimately, even Ms. Steigerwald came to realize that there was no basis to make the rate apply to individuals who purchased homes after January 2007:

> It is obvious that the all-electric home no longer benefits FE, so they must put an end to it. So I suppose it makes sense that they will use their original date (2007) as the cutoff date since this is the date they published and originally told builders about. FE has plenty of documentation to backup the fact that they warned everyone that any new home built after 2007 would not get the discount. ***I hate to say this, but my gut instinct is that fighting this aspect anymore is a lost cause***. (Company Ex. 44, p. CN001131; emphasis supplied.)

(c) There is no evidence that electric-heated homes will suffer loss in value absent special rates.

Lacking any evidence that the Companies ever represented that the rates would stay with the home, the only justification that any party offered for extending the discounts in that manner is that the lack of discounts possibly could adversely affect the value and marketability of electrically heated homes. The actual record evidence demonstrates otherwise.

Charles Ritley, an expert on real estate valuation, testified regarding a study that he conducted to determine whether the heating source impacted home valuation. (*See* Company Ex. 64.) Mr. Ritley testified that he conducted studies in four submarkets in which the Companies provide electric service. He compared sale prices for homes sold between 2003 and 2010 that were heated by electricity and natural gas, and that otherwise had comparable characteristics. For the period studied, there was no statistically significant difference in the price or marketability of otherwise comparable homes heated by electricity as opposed to natural gas. (*Id.*, p. 3.)

Mr. Ritley also analyzed sales data between 2007 and 2010, to account for the fact that as of January 2007, new homebuyers were not eligible to receive the same discounted rates available to owners of electric-heated residences prior to that date. This time period is a useful proxy for the market reaction to the absence of special electric heating rates or discounts. As of January 1, 2007, buyers of electrically heated homes knew or should have known that they would not be receiving special or discounted rates upon the purchase of the house. Nonetheless, the home sales data for this period showed that there was virtually no difference in the valuation of gas and electric-heated residences. (*Id.*, p. 13.) Mr. Ritley's testimony thus directly contradicts the notion that electric-heated homes will lose value and marketability absent special rates.

The testimony of Larry Frawley on behalf of CKAP does not require a different conclusion. His admissions on cross examination revealed multiple fatal problems with the "study" upon which he bases his opinion. For example, he admitted that he relied on data that he knew to be wrong. (Tr. Vol. II 302:23-303:10; 304:16-22; 305:9-11.) Frawley only analyzed average price per square foot of homes in Strongsville between 2008 and 2010. (Tr. Vol. II 291:9-19.) He obtained his data from Comparative Market Analysis ("CMA") Reports. (CKAP Ex. 1, p. 3.) Mr. Frawley never checked that the square footage reported on the CMA Reports was accurate, even though in some instances, homes were listed as having zero square feet. (Tr. Vol. II 301:21-302:12.) Mr. Frawley knew the zeros in his data pool were not accurate, but he did nothing to correct for the zeros, to either find out the accurate square footage or to remove the listing from his calculation:

Q: Okay. So you do have some zeros in your data pool, right?

A: That's correct.

Q: And you know they are not accurate, right?

A: That's correct.

Q: Didn't you remove the zeros?

A: I can't go in and change any of that information.

Q: Well, you could have removed it from your table for purposes of your calculation.

A: I would have had to remove the whole listing.

(*Id.* 302:23-303:10.)

Mr. Frawley's analysis also suffered from additional serious flaws. First, there is a question of bias. He is a CKAP member who lives in an all-electric home. (*Id.* 278:20-279:13.) He also believed that electrically heated home values had suffered before he ever began his study

(*id.* 280:14-281:3), suggesting that he was predetermined to reach his conclusions. Further, Mr. Frawley has used this study to speak at events in Strongsville as a springboard to a campaign for a seat on city council. (*Id.* 281:4-10.)[26]

There are also significant questions as to his qualifications. He neither graduated from college nor has had any training in statistical analysis. Mr. Frawley first took four courses and received his realtor's license in 2003, after a nearly 30-year career as a truck driver. He is not certified as a real estate appraiser, and he has not completed either of the educational requirements that certification entails. (*Id.* 282:15-19; 283:2-19.)

Notably, in light of his lack of qualifications, Mr. Frawley did not discern and was incapable of discerning whether his data could provide any meaningful information under standard statistical analyses. Mr. Frawley admitted that he would not expect sales data to be identical in all three years that he studied, but rather would expect some differences among the years. (*Id.* 290:7-15.) He agreed that it is important when analyzing these differences to be able to discern if the differences are meaningful, but with no background in statistical analysis, Mr. Frawley admitted he cannot tell whether the numbers in his study are "statistically significantly different." (*Id.* 290:16-291:8.) Mr. Frawley further admitted that the real estate market in Northeast Ohio has suffered serious declines in values for all types of homes. This is the first real estate market downturn that Frawley has experienced. (*Id.* 288:21-289:10.) Thus, Mr. Frawley could not understand or analyze how much of the downturn that he believed existed in home values was attributable to general market conditions or how the home was heated.

Mr. Frawley's analysis is also flawed because it relied upon all homes in Strongsville, with no effort to limit the study to homes that were comparable. (Company Ex. 64, p. 19.)

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[26] Mr. Frawley's campaign is being managed by one of the leaders of CKAP. (Steigerwald Dep. 211:13-212:12.)

Indeed, Mr. Ritley showed that, once these shortcomings are corrected, Mr. Frawley's data is consistent with that in Mr. Ritley's study. (*Id.*, pp. 21-23.) For example, for the three years included in Mr. Frawley's study, the average prices per square foot for both type of homes (electrically heated and gas heated) were relatively flat. The average price per square foot was marginally better for electrically heated homes in 2008 and 2009, but was better for gas heated homes in 2010. (*Id.*, pp. 22-23.) Yet average prices and median prices for electrically heated homes were greater for all three years. (*Id.*, p. 24.) Thus, if anything, Mr. Frawley's data, when used properly, actually shows that the valuation and marketability of electric-heated residences and gas-heated residences are comparable.

Mr. Frawley's analysis also ignored other indicia of value and marketability. He admitted that data regarding how many days a home is on the market ("DOM") and a comparison of its sales price to the list price ("%LP") both are indicators of marketability. (Tr. Vol. II 291:9-292:11; 293:13-294:2). Yet, although this data was available, he did not consider it. Mr. Frawley also admitted that, when shown the DOM and %LP data for the years in his study, the data was actually favorable for electric-heated homes, or at least comparable to non-electric homes. Comparing DOM for electrically heated and gas heated homes, DOM for electrically heated homes went down in 2010 versus 2009 and, indeed, was less than the average DOM for gas heated homes in both years. Similarly, %LP rose for electrically heated homes in 2010 over 2009 and was within tenths of a point of %LP for gas heated homes in 2010. (*Id.* 292:12-293:12; 294:3-22; Company Ex. 64, pp. 23-25.)

Apart from his data, Mr. Frawley contended there is a negative stigma effecting electric-heated residences. Mr. Frawley also testified that stigma is a function of publicity, and the greater the publicity the more likely to create a stigma. (Tr. Vol. II 281:11-282:6.) In this case,

if a stigma exists, it is due in large part to CKAP's own significant and concerted efforts to publicize as much as possible the issue about the discount "going away". (*Id.* 282:7-10.) As Mr. Ritley explained, any stigma, if one in fact exists, would be expected to fade soon after this proceeding is resolved. (Company Ex. 64, p. 25.) Indeed, given that the market has already experienced a period when new home buyers were not getting discounts (*i.e.*, 2007-2009), it is reasonable to expect that the market will return to the behavior seen then. Specifically, the fact that a home is heated with electricity does not adversely affect the value or marketability of the home. (Company Ex. 64, p. 3.) Concerns about such "stigma" thus provide no basis for extending the electric heating rates to new purchasers.

Aside from Mr. Frawley, the only "evidence" in the record regarding diminution in home values was that provided at the public hearings. But as to that "evidence," there is no support for it other than Ms. Steigerwald's email directing CKAP members to so testify. (Company Ex. 16.) Ms. Steigerwald admitted that she could not identify anyone who told her it was impossible to sell their home. (Steigerwald Dep. 190:15-20.) And she further admitted that she choreographed the repeated appearance of CKAP members to testify at public hearings to this supposed "fact." (Company Ex. 16.) The repetition of this baseless "fact" does not lend it any validity; and there is nothing else in the record that supports it.

D. The Commission Should Not Adopt The Proposal Offered By Ohio Partners For Affordable Energy.

In her pre-filed testimony, Ohio Partners for Affordable Energy ("OPAE") witness Stacia Harper proposed the construction of a "new power plant" that, according to her, could utilize solar and wind technologies to produce power at a below market cost for the benefit of all-electric customers. (OPAE Ex. 1, p. 6.) This proposal should be rejected for two reasons.

First, OPAE's proposal does not remotely qualify as an actionable recommendation that the Commission can adopt in this proceeding – in fact, it hardly can be called a "proposal" at all. Specifically, Ms. Harper recommended construction of a power plant but did not suggest where it should be built (Tr. Vol. III 536:22-24), how large it should be (*id.* 537:8-13), who should build it (*id.* 537:14-16), who should pay for its construction (*id.* 537:17-19), who should own it (*id.* 537:20-22) or who should operate it after it opens (*id.* 537:23-25). Lacking even these basic details, Ms. Harper's proposal fails as a serious response to the issues in this case. In fact, at hearing Ms. Harper acknowledged these deficiencies, admitting that she is not actually asking the Commission to order the Companies to build a power plant or enter into contracts for power. (*Id.* 535:19-536:2.) Given these admissions, it is hard even to know what OPAE is asking the Commission to do, much less know how to implement OPAE's recommendation. OPAE's purported "proposal" should be rejected for that reason alone.

Second, even if its "proposal" is construed as a mere "concept," OPAE has failed to offer even minimal evidence to show that the proposal warrants further consideration, either in a formal collaborative process or otherwise. For example, according to Ms. Harper, OPAE's hypothetical power plant could yield reduced-price electricity because of: (i) the potential for revenue from the sale of renewable energy credits; and (ii) the potential availability of federal and state economic development funding. (*See* OPAE Ex. 1, p. 7.) But to support these claims, Ms. Harper offered only her own say-so. In fact, she never calculated the amount of revenue that would be produced by the sale of renewable energy credits in connection with this case. (Tr. Vol. III 541:13-18.) She did not even look into the amount of federal or state incentive funding that would be available for OPAE's hypothetical project.[27] (*Id.* 541:19-23.) And although she

[27] Notably, Ms. Harper admitted that she has never participated in an application process for funding from Ohio's Advanced Energy Fund or its Third Frontier Program. (Tr. Vol. III 542:7-15.)

suggested in her pre-filed testimony that such (uncalculated) "excess revenue" could be used to fund weatherization of homes for all-electric customers on the Percentage of Income Payment Plan, she was forced to concede that she has "no idea" how much that excess revenue would be. (*Id.* 543:6-12.) In fact, Ms. Harper is not aware of ***any*** project like the one she "proposes" in her testimony – either in Ohio, or anywhere else in the country. (*Id.* 539:3-11; *see id.* 546:6-8 (confirming on redirect that with respect to "the actual project we have put forth," "there is no such project in the state of Ohio").) OPAE has failed to offer any evidence to justify a Commission-ordered review of its proposal.

Ms. Harper's claims regarding the potential price of electricity also fail. Specifically, she contends that a hypothetical renewable energy-based plant could produce power at a cost of $40 to $50 per megawatt hour. (*See* OPAE Ex. 1, p. 7.) According to her pre-filed testimony, "her calculations" yielded these figures. (*Id.*) But at hearing, she admitted that she did not perform those final calculations. (Tr. Vol. III 540:8-11.) Rather, those figures were calculated by an outside entity that did not produce a witness to sponsor them at hearing. (*Id.* 540:12-15.) For her part, Ms. Harper admitted that she had never even seen those calculations, much less know the assumptions on which they were based. (*Id.* 540:16-541:2.) The Commission should give no weight to Ms. Harper's unsupported testimony regarding a hypothetical price of power from a hypothetical power plant.

OPAE has provided no justification for the Commission to order a further review of its "proposal," much less a basis to order its implementation. OPAE's proposal should not be adopted.

IV. CONCLUSION

Electric heat customers have continued to enjoy lower electric rates than their standard residential customer brethren, and under the Company's proposal would continue to do so. This

should be accomplished in a way that balances the interests of all customers, including those who will receive the credit and those customers who will pay for it. There is no credible evidence of any "promises" made by the Companies to continue any particular rate in perpetuity, and any such claims should be denied by the Commission.

For the foregoing reasons, the Commission should approve the Companies' proposal relating to the eventual phase out of Rider RGC, while recognizing the continuation of the discounts provided to electric heating customers through Riders EDR and RDC, and the recovery of the deferrals and associated carrying charges arising due to credit amounts authorized in this proceeding.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Posthearing Brief of Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company was delivered to the following persons via electronic mail this 28th day of March, 2011:

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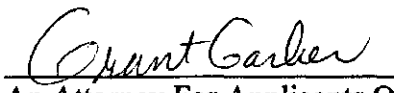

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