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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**

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

James W. Burk (0043808)
Counsel of Record
FIRSTENERGY SERVICE COMPANY
76 South Main Street
Akron, OH 44308
Phone: (330) 384-5861
Facsimile: (330) 384-3875
E-mail: burkj@firstenergycorp.com

David A. Kutik (0006418)
Jeffrey Saks (0071571)
JONES DAY
North Point, 901 Lakeside Avenue
Cleveland, Ohio 44114-1190
Telephone: (216) 586-3939
Facsimile: (216) 579-0219
E-mail: dakutik@jonesday.com
jsaks@jonesday.com

Grant W. Garber (0079541)
JONES DAY
Mailing Address:
P.O. Box 165017
Columbus, Ohio 43216-5017
Street Address:
325 John H. McConnell Blvd., Suite 600
Columbus, Ohio 43215
Telephone: (614) 469-3939
Facsimile: (614) 461-4198
E-mail: gwgarber@jonesday.com

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

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I. INTRODUCTION

Over ten years ago, the General Assembly began the process of bringing competition to the market for retail generation service in this state. It is undisputed that, as result of that legislation, the Companies were required to separate their generation operations from the regulated portions of their business and that the Companies accordingly transferred their generation facilities. It is also undisputed that, when the Companies owned and operated generation plants, it made sense to attract off-peak load, such as electric heating customers. That load could help defray certain fixed costs, and thus put downward pressure on residential electric rates.

With the generation business separated from the distribution companies, the Commission moved in several steps towards the elimination of separate special electric heating rate schedules: from prohibiting new customers from receiving special rates beginning in 2007; to consolidating distribution and generation rates in 2009; to providing certain credits for electric heating customers in that same year. All but one of these steps was approved as a result of a stipulation of all parties to those cases, including the Office of the Consumers' Counsel ("OCC").

During the ten years since the General Assembly took its initial actions to restructure the electric utility industry, the Companies' base rates were effectively frozen, with distribution increases only beginning in 2009. Seeing their distribution rates increase for the first time in years, many electric heating customers believed that the reason for the increase was the elimination of the former special heating rate. But other residential customers' rates rose too, and most of those customers experienced steeper increases than electric heating customers. What's more, the other customers paid for the discount that the electric heating customers continued to enjoy.

The electric heating customers, spurred by someone who admitted she "didn't care that the law had changed," and who determined to spread falsehoods in an attempt to obtain lower electric bills for electric heating customers, began a publicity campaign that was designed to "put pressure" on the Companies and, more importantly, the Commission. The Companies filed an application to provide the electric heating customers a limited additional credit, in addition to the two credits they were already receiving, to mitigate the impact on these customers' rates. The Commission rejected the Companies' initial application and approved a larger discount, and also extended that discount to non-electric heating customers and at least through an additional heating season. The Commission set additional proceedings to figure out what to do with electric heating customers; specifically, to fashion a "long term" solution.

Through it all, the Companies have always and only charged the rates as authorized by the PUCO, which is all they could lawfully do. Electric heating customers who were receiving a discount for heating with electricity in 2008 continued receiving such a discount without interruption through 2009, 2010, and today, i.e., the electric heating discount was never eliminated, and the Companies have not proposed in this proceeding to eliminate a discount for electric heating customers. These facts were undisputed on the record and any statements to the contrary are simply untrue.

The parties to the case have now put forward proposals. OCC and its allies, Citizens for Keeping the All-Electric Promise ("CKAP"), Susan Steigerwald, Joan Heginbotham and Bob Schmitt Homes, Inc. ("BSH")(collectively, the "CKAP parties"), want the Commission to extend discounts to "all electric customers" on an ongoing basis. They want the discount to "remain with the home." They want all of the Companies' other customers to pay for the discount. They also want to deny the Companies recovery of deferrals and carrying costs on deferrals that the Companies incurred since the initial implementation of the Rider RGC credit over a year ago.

In contrast, the Companies and the Staff have proposed an extended phase out of Rider RGC, although these parties differ as to the length of time over which they propose that the phase out should occur. They also both propose that the two other existing credits for electric heating customers – Riders EDR and RDC – continue under their current terms. These parties also support recovering the costs incurred as a result of the operation of Rider RGC, including all deferrals and carrying charges, from only residential customers.

As demonstrated below, the arguments of OCC and the CKAP parties fall one by one. They fail to present any credible evidence that could justify continuing Rider RGC on an ongoing basis. OCC, for example, tries to argue that the discount is cost justified. There is simply no evidence, other than their expert's unsubstantiated say so, to support that argument. Indeed, the best that OCC can do is: (a) to point to decades' old cost of service studies, which their own expert admits no longer reflect the Companies' current costs; or (b) to baldly contend, without any basis, that the "true cost of service" (which apparently refers to the cost that generation suppliers incur) to serve electric heating customers was lower than the cost to serve other residential customers.

OCC also points to "gradualism" to justify no phase out of the RGC credit. While gradualism may support a transition period, it's hard to understand how gradualism can justify an ongoing discount, especially where that discount is in many cases larger than the discount that electric heating customers historically ever received. Moreover, such an approach overlooks the fact that other residential customers, who would pay for these discounts, have been paying higher rates than electric heating customers and, for the most part, experienced higher rate increases than electric heating customers did. "Gradualism" cannot serve as the rallying cry for increasing discounts for electric heating customers and then locking in that increased discount on an ongoing basis.

The CKAP parties try to argue that there were some kind of contracts that somehow require discounts to remain, perhaps forever. Notably, OCC fails to join the CKAP parties in this argument. The undisputed fact is that any alleged "contract" to keep a rate or a discount forever was never approved by the Commission. The Companies, like all public utilities in Ohio, may only charge the rates that are authorized by the Commission, and it is undisputed in this proceeding that that is precisely what the Companies have done and continue to do. Thus, under settled Ohio law, no such contracts can be effective against electric companies, like the Companies here. Further, even apart from whether any alleged contract had been filed with the Commission, the CKAP parties present nothing that could have been considered to have been a contract to provide discounts on an ongoing basis. Indeed, Staff agrees with the Companies that no party has presented any credible evidence of such a contract. The CKAP parties attempt to make much of the fact that the Companies marketed electric technologies and provided incentives to builders. But, to the extent that there were agreements to provide incentives, the Companies did everything that they said that they were going to do. And, builders were advised that the electric heating rates were subject to change.

OCC and the CKAP parties also spend much effort trying to portray the Companies' marketing efforts as improper. A close review of the evidence relied upon by these parties, however, reveals nothing of the sort. The Companies historically marketed electric heating technologies in homes, but there is nothing improper about that.

OCC and the CKAP parties appear to part company when arguing the effect of the Companies' allegedly improper marketing. The CKAP parties argue that, given the Companies' past marketing, it is somehow "unfair" to do anything other than make the discounts larger and ongoing. Yet, like OCC's "gradualism" argument, the CKAP parties never explain why their proposal is "fair" to other customers who will have to pay for their discount – forever.

OCC argues that the allegedly improper marketing practices require the Companies to forego recovery of deferrals that the Commission has previously authorized the Companies to accrue since March of last year. OCC presents no citation that gives the Commission that authority, and the Companies are likewise aware of no basis for such a determination.

Although OCC's witness proposed extending discounts to non-electric heating customers, OCC never even bothers to justify that proposal. Nor does OCC try to justify why discounts should remain with the home. While the CKAP parties mount an argument as to why discounts should remain with the home, given that these parties never address the numerous shortfalls and inconsistencies that their own witness admitted concerning his analysis, this argument is without merit and deserves little attention from the Commission.

As the Companies' initial brief showed, and as further demonstrated below, the Companies' proposal is the one that best balances the interests of all concerned. It proposes the phase-out of Rider RGC for electric heating customers over a three-year period to limit the impact upon these customers to an annual increase of a modest 12%, while proposing no changes to the two other credits also being received by electric heating customers through Riders RDC and EDR. It is the least costly proposal for those residential customers who will bear the burden of paying for continued discounts contained in Rider RGC. It provides the Companies full recovery of the costs of the credits. In short, it is fair.

II. ARGUMENT

A. There Is No Basis To Justify An Ongoing Additional Discount for Electric Heating Customers.

A key question in evaluating the parties' respective proposals is whether there is any evidence-based rationale to support them. That is particularly the case with the proposal from OCC and the CKAP parties. These parties' proposal includes: (1) an ongoing discount in the range of 35% off of the standard residential rate; (2) that would apply to certain non-heating residential customers; and (3) that would also apply to the premises and not the customer. (OCC Ex. 1, pp. 4-5.) OCC offers two justifications: cost of service and gradualism. Regarding the former, OCC argues that because it costs less to serve electric heating customers, those customers should pay a lower or discounted rate. OCC also contends that the rate-setting principle of gradualism supports a discount that lasts effectively forever.

As demonstrated below, OCC's assertion that it costs less to serve electric heating customers has absolutely no support in the record, other than its witness' say so. Further, to the extent OCC's argument had any merit, the Companies' proposal leaves unchanged Riders RDC and EDR, both credits for electric heating customers providing a discount of approximately 3.6 cents/kWh for monthly winter usage above 500 kWh. As for OCC's gradualism argument related to Rider RGC, to state it is to refute it: how can something that's ongoing be considered "gradual?" Further, OCC's proposal ignores the burden that providing ongoing discounts places on other customers who have to pay for those discounts and who, for the most part, have incurred larger rate increases than electric heating customers.

For its part, the CKAP parties argue that discounts are required because the Companies promised them. CKAP also complains that receiving all of the RGC credit on an ongoing basis is necessary because it would be unfair to do otherwise. As demonstrated below, the overwhelming evidence shows that there were no promises made, let alone any that could lawfully bind the Companies or be reasonably relied upon by any customer. Further, the record reveals that electric heating customers have enjoyed significant cost advantages over other residential customers for years and continue to do so. Thus, these customers received significant long-term value for any decisions that they made years ago.

1. Discounts for electric heating customers cannot be justified on a cost of service basis.

The undisputed record demonstrates that the Companies' cost to provide generation service is no different for electric heating customers than it is for other residential customers. Even if the costs of the Companies' generation suppliers were relevant (which is not the case), there is no evidence to show that the costs of these entities are different for electric heating customers and other residential customers.

a. The Companies' costs to provide generation service are the same for all residential customers.

OCC's own witness rebutted any argument that cost of service principles require the continuation of a discount to electric heating customers:

> 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.

(Tr. Vol. I 232:6-15.) Thus, in light of this admission, because the record shows that the costs to serve electric heating customers are no different that the costs to serve other residential customers, the Commission should not "see any reason for a discount" based upon cost of service.

There is no dispute that the Companies' cost of supplying generation service is the price that it pays wholesale generation suppliers. (*Id.* at 229:17-19.) There is also no dispute that this price is determined based on a competitive bidding process. (*Id.* at 227:17-20.) There is further no dispute that the price that the Companies pay for generation service for electric heating customers is no different than the price the Companies pay for generation service for other customers. (*Id.* at 229:20-22.) Notably, OCC doesn't argue otherwise. Thus, based on the Companies' cost of providing generation, there is "no reason" for an ongoing discount.

b. There is no evidence that it costs less to provide generation service to electric heating customers.

Faced with the irrefutable reality that the Companies' generation costs to serve electric heating customers are the same as the costs to serve other residential customers, OCC argues that focusing only on the Companies' costs is incorrect. OCC posits that the Commission should be guided by "the true cost of service." (OCC Br., p. 12-13.) By this, OCC apparently refers to the costs that wholesale generation suppliers experience in providing wholesale power to the Companies for their retail generation customers. OCC never says why this "true cost of service" is relevant. There is no dispute that the Companies' generation costs are a pass-through of what the Companies were charged for generation. There is also no dispute that the prices charged to the Companies are not based on their suppliers' cost of service through traditional regulatory rate-setting. Rather, these prices are determined by a competitive bidding process.

Notably, even assuming that the Companies' wholesale suppliers' costs are relevant, the record contains no evidence of what these costs are, much less any evidence showing that it costs suppliers less to serve electric heating customers. Mr. Yankel admitted that he had not undertaken or even reviewed any study or analysis of suppliers' costs. (Tr. Vol. I 250:24-251:25.)

Given Mr. Yankel's inability to provide any evidence to support OCC's "true cost of service" theory, OCC may only rely on three things. First, OCC could attempt to rely on Mr. Yankel's reference to the cost of service studies for the Companies that related to the Companies' cost structure over fifteen years ago. Second, OCC could try to rely on Mr. Yankel's conclusion that the relationship between rates paid by electric heating customers and the rates paid by standard residential customers is similar today to what it was at the time the cost of service studies were undertaken some fifteen or more years ago. Third, OCC points to the Commission's opinion in the Companies' first Electric Security Plan ("ESP") case, Case No. 08-935-EL-SSO, where the Commission mentioned alternative rate designs. (OCC Br., p. 13.) None of these things, however, supports OCC's view that the "true cost of service" of suppliers is different for service to different residential customers.

Regarding the decades old cost of service studies prepared by the Companies,[1] those studies reflected a time when the Companies owned generation facilities. (Tr. Vol. I 223:10-25.) The Companies have transferred those facilities. No one can dispute that the Companies' cost structure is now completely different. (*See id.* at 250:13-251:3.) At the most basic level, because the Companies no longer own generation facilities, the Companies do not have to incur costs to maintain, repair or operate them. (Company Ex. 65, p. 18.) Thus, the operational efficiencies of generating plants afforded by the electric heating customers in terms of off-peak load are no longer relevant to the rationale for ongoing electric heating discounts.

Nor is it appropriate to extrapolate the Companies' costs (and why they were incurred) in the late 1980s to mid-1990s to wholesale generation suppliers' costs now. As Mr. Ridmann

[1] In support of his recommendation, Mr. Yankel relied on unbundling studies prepared by the Companies' transition case in Case No. 99-1212-EL-ETP. (*See* OCC Ex. 1, pp. 13.)

demonstrated in his rebuttal testimony, the structure of generation suppliers' costs is different today. At the time of the cost of service studies cited by Mr. Yankel, the Companies' fixed costs, represented by demand charge revenue, represented between 66 and 71 percent of the Companies' costs. (Company Ex. 65, p. 23.) The more recent fixed costs for generators, represented by the capacity component of generation charges today, comprises, for example, 15 percent of total POLR costs for the period June 2011 through May 2014. (*Id.*, p. 23.)

The claim that the relationship between electric heating and standard residential rates from the 1990s has remained constant through today also does not support the view that generation suppliers' costs now are no different from what they were then. As Mr. Ridmann explained in his rebuttal testimony, "The relationship in the total rate paid by customers was held essentially constant only because the Companies were in a transition period between being a fully integrated utility and having rates set based upon competitive generation pricing." (*Id.*, p. 20.) During this period, the Companies "deferred what would have otherwise been a nearly half a billion dollars in rate increases." (*Id.*) Thus, any similarity in rate differentials is built on a false foundation; the Companies' rates during this time were not tracking costs. OCC would have the Commission ignore these facts.

The Commission's December 19, 2008 Order in the Companies' first ESP case, Case No. 08-935-EL-SSO, also does not help OCC. That order modified and then approved a proposed ESP for the Companies. The Companies subsequently withdrew their application. As the Commission recognized in its January 21, 2009 order in Case No. 07-551-EL-AIR, the Commission's December 19, 2008 order in the ESP case "is of no effect." (Opinion and Order, Case No. 07-551-EL-AIR, p. 10 (Jan. 21, 2009).) Further, as part of a subsequent stipulation approved by the Commission in Case No. 08-935-EL-SSO, the Companies' current rates for generation service do not reflect any alleged differences in the costs to serve different customer classes or customers with differing load profiles. (*See* Tr. Vol. I 152:2-13.)

Simply put, even if the generation suppliers' costs were relevant (and they are not), there is no evidence that the generation suppliers' costs to serve electric heating customers are any different than the costs to serve any other customer. Thus, as Mr. Yankel was forced to concede, there is no reason for a discount to continue based upon cost of service. (Tr. Vol. I 232:6-15.)

2. "Gradualism" does not support an ongoing additional discount.

All parties agree that the principle of gradualism is important. Only the proposals by the Companies and Staff, however, are consistent with that principle. The proposal supported by OCC and the CKAP parties does not do anything to transition electric heating customers, whether gradually or otherwise. OCC and the CKAP parties claim that an ongoing discount is needed to prevent "rate shock." Yet, in light of the fact that other customers, who will have to pay for the discounts given to electric heating customers, have experienced even greater increases, the claims of "rate shock" as a justification to maintain permanent additional discounts ring hollow.

a. Putting "rate shock" in perspective

OCC and the CKAP parties spend much effort discussing the "rate shock" they say was experienced by electric heating customers. But these parties' reliance on "rate shock" overlooks the fact that the Companies' rates have essentially been frozen for twenty years while the Companies' costs have not. As Mr. Ridmann's testimony demonstrates, the Companies deferred over a half a billion dollars in costs. (Company Ex. 65, p. 20.) The simple fact of the matter is that after an extended period of virtually no increases in the Companies' base rates, the rates for ***all*** residential customers have gone up, and the rates for non-electric heating customers have in many cases gone up *faster* than the rates for electric-heating customers.

Nothing better illustrates the overly narrow – and erroneous – view taken by OCC and the CKAP parties than OCC's selective use of data to demonstrate the "spike" in rates experienced by electric heating customers. Specifically, OCC points to a series of graphs attached to Mr. Ridmann's pre-filed direct testimony, Attachment WRR-3. (OCC Br., p. 7, n. 24.) Although these graphs certainly show the rate increases experienced by electric heating customers at certain usage levels (2000 kWh, 5000 kWh and 10,000 kWh per month) for each of the Companies, OCC overlooks the fact that each graph contains ***two lines***: one showing the level of electric heating rates and ***one showing the level of rates paid by other electric customers***. In each usage case for each of the Companies, the line for standard residential rates is above the line for electric heating customers, meaning that, at all times, electric heating customers have always paid less than standard residential customers. Further, in each usage case for CEI and TE, the difference between electric heating rates has continued to increase, meaning that the electric heating discounts have gotten larger and the rate increases for electric heating customers have been less than the increases for standard residential rates. And for OE electric heating customers, although their rates were (and at all times have been) below standard residential rates, from December 2008 to January 2010 they experienced increases that were somewhat higher than standard residential customers at usage levels of 1500 kWh and above. (Company Ex. 1, Attachment WRR-2.) As a result of the Commission orders in this case, however, OE electric heating customers at all usage levels are experiencing greater discounts than they have ever had. (*Id.*)

OCC and the CKAP parties also overlook the fact that, for the last twenty years, home energy costs for electric heating customers have increased dramatically less than those costs for standard residential customers. As Mr. Ridmann's pre-filed direct testimony shows, from 1990 to 2009, home energy costs for electric heating customers increased 44% for CEI and OE and 12% for TE. (*Id.* p. 27, Attachment WRR-6.) During that same period, home energy costs for comparable standard residential customers increased by 141%. (*Id.)* Over the last ten years, the home energy costs of a typical electric heating customer was less than the costs experienced by standard residential customers of all of the Companies. (*Id.*) Over the last twenty years, energy costs for these two sets of customers was roughly the same for CEI, less for OE electric heating customers (by less than 9%) and higher for TE electric heating customers (by a little over 9%). (*Id.*)[2]

Given that electric heating customers have largely enjoyed lower electric rates, lower total energy costs and lower electric rate increases for decades, pleas of "rate shock" from electric heating customers beg the question of why such large discounts for electric heating rates should remain in place at current levels on an ongoing basis. While "rate shock" may justify a debate about how long current electric heating discounts should be maintained and the level of

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[2] OCC contends that Mr. Ridmann's analysis of competitive energy costs should be ignored because he "makes the huge, untenable assumption that all customers using electric heat use an air-source-heat-pump that has a 200 percent efficiency rating . . . as well as that customers who heat with natural gas use a 90 percent efficient gas furnace." (OCC Br., p. 32, n. 101 (citations omitted).) OCC's proof that Mr. Ridmann's assumptions are "huge" and "untenable" is a citation to the public hearing testimony of eight individuals who mentioned that they had baseboard electric heating in their homes.

OCC's criticism ignores several things. First, Mr. Ridmann's analysis was designed to compare average residential customers' energy costs. (Company Ex. 1, p. 29.) Mr. Ridmann calculated electric heating costs assuming heat pumps because they are the most prevalent electric heating equipment in the Companies' territory. For example, Mr. Schmitt testified that his company was one of the largest builders of "all electric" homes in the Companies' service territory. (Tr. Vol. II 439:5-14.) His company has installed either heat pumps or geothermal systems in the "large majority" of the homes that they have built. (*Id.* 439:15-19.)

Mr. Ridmann compared energy costs of customers with heat pumps with the costs of gas customers with furnaces at 90 percent efficiency. (Company Ex. 1, Attachment WRR-6.) This was done to study comparably efficient heating systems. (*See id.*) Thus, Mr. Ridmann's study produced total energy costs for average comparable customers.

Notably, while OCC criticizes Mr. Ridmann' study, OCC provides no study of its own or any other evidence showing that Mr. Ridmann's figures don't stand as a reasonably reliable estimate of relative energy costs for electric heating and other residential customers.

the discount over that period, "rate shock" cannot be the sole justification for extending Rider RGC without end.

b. Keeping Rider RGC in place on a permanent basis does not constitute the application of the principle of gradualism.

For all its supposed concern with gradualism, OCC's proposal that Rider RGC remains a permanent discount violates that principle. OCC believes that the discounted rate charged to all-electric customers should never change. But gradualism does ***not*** mean that rates must not change or that discounts must remain permanent. In fact, it means the opposite. The whole point of gradualism is that rates ***do*** change over time in order to better reflect cost causation and that such change should avoid unreasonably sudden changes to bills. Accordingly, the Commission repeatedly has applied gradualism to moderate – not to halt – changes in rates to better reflect cost of service. *See, e.g.*, *In re Application of Ohio Edison Co., The Cleveland Elec. Illuminating Co., and The Toledo Edison Co. for Authority to Increase Rates for Distribution Service, Modify Certain Accounting Practices, and for Tariff Approvals*, Nos. 07-551-EL-AIR, *et al.*, Op. and Order dated Jan. 21, 2009, p. 29 n.3 ("[W]e also agree with FirstEnergy that [gradualism] is a useful tool in managing overall customer impacts resulting from incorporating the Companies' proposed new proposed rates and rate structure as we transfer from historic rate levels and structures.") (quotation omitted); *In re Application of The East Ohio Gas Co. d/b/a Dominion East Ohio for Authority to Increase Rates for its Gas Distribution Service, et al.*, Nos. 07-829-GA-AIR, *et al.*, Entry on Reh'g dated Dec. 19, 2008, ¶ 19 (observing that "consistent with the principle of gradualism, we noted in the order that the new levelized rate design best corrects the traditional rate design inequities, while mitigating the impact of the new rates on residential customers . . ."); *In re Application of Duke Energy Ohio, Inc. for an Increase in Rates, et al.*, Nos. 07-589-GA-AIR, *et al.*, Entry on Reh'g dated July 23, 2008, ¶ 7 (noting that "consistent with the principle of gradualism, . . . the new levelized rate design best corrects the traditional rate design inequities while mitigating the impact of the new rates on residential customers . . ."); *In re Application of The Toledo Edison Company for Authority to Amend and Increase Certain of Its Rates and Charges for Elec. Service, et al.*, Nos. 95-299-EL-AIR, *et al.*, Entry on Reh'g dated June 12, 1996, ¶ 12 ("In our opinion and order, the Commission, after reviewing the entire record, also attempted to exercise judgment, to apply principles of gradualism and rate continuity, and to move the classes closer to the cost of providing service."); *In re Application of The Cincinnati Gas & Elec. Co. for an Increase in Elec. Rates in its Service Area*, No. 91-410-EL-AIR, Op. and Order dated May 12, 1992, 1992 Ohio PUC LEXIS 316, *231 ("The Commission believes that we should be moving closer to cost-based rates, to the extent possible, bearing in mind concepts of gradualism and rate continuity.").

Just so here. Gradualism means that there should be a reasonable transition – but a transition nonetheless – to rates that better reflect cost causation. The Companies' proposed phase out of Rider RGC, while maintaining Riders EDR and RDC, reflects precisely this concept. OCC's proposal, by contrast, reflects rate stagnation, not gradualism. It should be rejected for this additional reason.

3. The Companies' marketing practices do not require an additional discount be maintained on an ongoing basis.

Notably absent from any of the initial briefs filed by the parties is any legal support for continuing the Rider RGC on an ongoing basis. The CKAP parties attempt to argue that there were contracts entered into. Not only does this ignore Ohio law, but it overlooks the fact that there simply were no contracts that required the Companies to provide discounts on an ongoing basis. The Companies' marketing was not misleading or improper in any way. The Companies statements, in each instance, were true. Further, there was nothing in how the Companies marketed electric heating that makes phasing out Rider RGC unfair or unreasonable.

a. There were no "contracts" formed requiring the Companies to provide any rate discount.

That there were no contracts that require the extension of discounts is best demonstrated by the fact that OCC's brief never bothers to argue that such contracts ever existed. In response to claims that such contracts existed, the Commission specifically asked individuals to come forward at the public hearings with any "written documentation or contracts that all-electric customers had regarding their rates." (Entry, October 14, 2010, ¶ 7.) After six public hearings and months of exhortation by Sue Steigerwald to CKAP members and others, no such contracts have been presented.

OCC's brief does not even contend that any contracts exist. Nor does OCC try to argue that electric heating rates must be maintained to enforce any contractual obligation. Rather, the best that OCC can do is to argue that the Companies' "marketing practices" warrant not allowing the Companies to collect deferrals. (OCC Br., pp. 23-33.) OCC's arguments regarding the Companies' marketing practices are wrong (*See* pp. 24-28 *infra.*), but even OCC implicitly recognizes there is no contractual basis to continue any rates.

As the Companies have demonstrated, Ohio law requires that the only permissible rate for them to charge customers is that set forth in the tariffs approved by the Commission. *See* Ohio Rev. Code § 4905.32; *Keco Indus., Inc. v. Cincinnati & Suburban Bell Tel. Co.*, 166 Ohio St. 254, 257 (1957); *Kazmaier Supermarket, Inc. v. Toledo Edison Co.*, 61 Ohio St. 3d 147, 150 (1991); *Hull v. Columbia Gas of Ohio*, 110 Ohio St. 3d 96, 106 (2006). (Companies' Br. pp. 61-62.) Any alleged verbal statements about rates that were inconsistent with applicable tariffs would have been contrary to the law and thus could not have created an enforceable contract. *Bell v. Northern Ohio Tel. Co.*, 149 Ohio St. 157, 158 (1948).

Even disregarding the law relating to utility contracts, there were no contracts under more traditional notions of contract law. Simply put, although the CKAP parties' brief uses the words "contract" or "contracts" repeatedly, their brief offers no evidence of any. For example the CKAP parties generally claim that a contract exists based upon advertising. (CKAP Br., pp. 6-7.) Yet the brief does not explain: (a) what specific advertising constituted a contract; (b) how that advertising constituted an enforceable contract; or (c) what the terms of the supposed contracts were.

The CKAP parties also mention "contracts with builders" (*id.* pp. 7-11), but the CKAP parties' brief never alleges, much less shows, that those "contracts" guaranteed any rate or discount in perpetuity. Nothing in the public hearing testimony cited by the CKAP parties regarding the Companies' dealings with builders references any contract or promise regarding the longevity of rates. Nor do these parties even allege an untrue statement was made. For example, the public hearing testimony of Mike Payne only recounted that he was informed of a then-applicable rate, which he in fact received. (*Id.*) The Companies charged the then-applicable tariff rates, as they were required to do.

Likewise, the materials cited by Chester Karchefsky in his public hearing testimony contain no promise of future rates, nor do they otherwise constitute a contract. (*Id.*, p. 10.) Mr. Karchefsky attempted to make much of the fact that a builder was required to certify that certain equipment had been installed. From that, he argued that the certification somehow proved that discounts offered were permanent. (Kirtland Public Hearing Tr. 43:1-44:3.) But there is a more obvious and more direct reason why the Companies required a builder to certify that certain equipment had been installed: because the Companies were paying the builder a rebate for each site on which the equipment was installed. Without the certification, there would be no rebate.[3]

The CKAP parties also cite to the evidentiary hearing testimony of their witnesses Michael Schmitt, CEO of Bob Schmitt Homes, and former OE employee Michael Challender on the subject of the Companies' dealings with builders. (CKAP Br., pp. 9-11.) Neither witness' testimony disputes that the Companies fulfilled any obligations under whatever marketing "contracts" the Companies entered into with builders. Both witnesses testified at length about the fact that the Companies provided builders with incentives in the form of payments, like rebates for the installation of certain electric equipment. (*E.g.,* Tr. Vol. II 339:21-342:2; 356:4-357:13 (Schmitt); Tr. Vol. III 562:19-569:1; 575:4-22 (Challender).) But neither witness testified that the Companies ever failed to provide any incentive payment promised to any builder.

Nor did either witness offer any evidence of guaranteed rates. Mr. Challender testified that he never guaranteed any rates. (Tr. Vol. III 601:16-23.) Mr. Schmitt testified that he had no proof of any promise. (Tr. Vol. II. 414:9-415:6.) Nor in the face of changing rates did Mr. Schmitt ever raise with Mr. Challender any claim that rates had been guaranteed. (*Id.* 423:17-424:25.) Further, the evidence submitted actually shows that builders like BSH were provided

[3] The CKAP parties also point to the unsworn statements submitted by Greg Spatz and Bob Briggs. (CKAP Br., pp. 8-9.) Neither of these individuals appeared at any hearing. Mr. Spatz was listed as a witness at the evidentiary hearing for the CKAP parties, but his name ultimately was withdrawn as a potential witness. Mr. Briggs' statement was simply read by Cora Neill at the Sandusky public hearing. (Sandusky Public Hearing Tr. 44:13-45:18.) Needless to say, neither statement was – or could be – subjected to cross examination. Thus, neither statement is entitled to any weight and in fact are not part of the evidentiary record and may not be relied upon by the Commission for any purpose in rendering a decision in this matter.

In any event, on their face, neither statement provides any proof of any promise regarding the longevity of rates or discounts. Neither provides any proof of any false or misleading statements by the Companies. Mr. Spatz's unsworn letter simply recounts that he was informed of then-current discounts. (CKAP Br., p. 8.) The letter from Mr. Briggs simply tells of incentives that were offered, but offers no proof of any promises or inaccurate statements. (*Id.*, pp. 8-9.)

with documents that either specifically referenced applicable tariffs or specifically advised that rates were subject to change by the Commission. (*E.g.*, CKAP Ex. 32; Company Exs. 53, 54.)

BSH's actions prior to this case further demonstrate that BSH never believed that there were any promises made by the Companies to anyone regarding the longevity of a particular rate or any discount. For example, Mr. Schmitt admitted that, when BSH moved to intervene in the RCP case, BSH never argued that the electric rates could not be modified or eliminated because of any contract or promise that the Companies had made regarding those rates. (Tr. Vol. II 424:17-25; 429:10-430:13.) Similarly, a proposed customer letter on the BSH website, which encourages customers to complain to the Commission about the effects of deregulation, never mentions any alleged promise about rates. (Company Ex. 59.)

The CKAP parties also point to documents provided by the Companies to BSH and to Mr. Schmitt's testimony regarding "agreements" wherein the Companies stated that, under the programs at issue, buyers of BSH homes would get discounted rates. (CKAP Br., p. 9.) As an initial matter, neither of the documents relied upon – specifically, CKAP Exhibits 16 and 17 – could reasonably be construed to be an agreement of any sort. CKAP Exhibit 16 was not signed by any party and contained numerous handwritten edits and marginalia. (Tr. Vol. II 416:8-417:3.) At most, this document appears to be some sort of proposal.[4] There was also no evidence that the parties agreed to the terms provided in CKAP Exhibit 17.

Further, even if those documents were evidence of contracts, which they are not, nothing in CKAP Exhibits 16 and 17 shows that the Companies failed to meet the alleged promises in

[4] Notably, CKAP Exhibit 16 sets forth certain amounts that OE would pay for certain installations: specifically, $1,000 for geothermal systems and $750 for electric heat pumps. Yet, BSH provided no evidence that OE ever paid rebates, allowances or rebates in the amounts shown in that document. In fact, the invoices and receipts provided by BSH that evidence some payments by OE show amounts different than those shown in CKAP Exhibit 16. (*See* CKAP Exs. 19, 21-30; Tr. Vol. II 363:17-21; 416:8-417:3.) This is additional evidence that the terms of CKAP Exhibit 16 were never part of any agreement that was consummated between OE and BSH.

such contracts. For example, both documents refer to the fact that BSH-built homes would qualify for discounted rates. Customers in those homes, in fact, did qualify for such rates and received them – and they still do.

Even further, as noted, BSH was well aware that the Companies' rates could change and that the discounts were not permanent. Indeed, CKAP Exhibit 16 specifically provides, "FirstEnergy's discounted all-electric rate is frozen until 2006." (CKAP Ex. 16, p. 2.) Thus, someone relying on CKAP Exhibit 17 could have had no reasonable expectation that discounts would extend beyond 2006.

CKAP also contends that the Companies had contracts with customers. Citing to various marketing materials that it claims were "contracts with customers through direct contact," the CKAP parties argue that "a contract was established and it should continue to be enforced." (CKAP Br., p. 11.) Yet there is no explanation as to what the terms of this "contract" supposedly were. There obviously was no promise for a specific rate. Consistent with the evidence of rate increases (*e.g.,* Company Ex. 1, Attachment WRR-3), various witnesses, including those sponsored by the CKAP parties, testified at that they were aware that rates increased over the years. (*E.g.,* Tr. Vol. II 462:23-463:15 (Jesse Willetts); *id.* Vol. III 421:19-25 (Michael Schmitt).)

The public hearing testimony cited by the CKAP parties hardly constitutes proof of a contract between the Companies and any customer. For example, the most public hearing witness Thomas Waltimire could say was that there was "an implication" of reduced rates "forever." (CKAP Br. p. 12.) An 'implication" does not a contract make. *Faurecia Automotive Seating, Inc. v. Toledo Tool & Die Co., Inc.*, 579 F. Supp. 2d 967, 971 (N.D. Ohio 2008) ("Under Ohio common law, contract formation requires mutual assent (generally, offer and acceptance) and consideration.") (citation omitted); *Stickler v. Keycorp.*, 2003 WL 157388, 2003-Ohio-283, ¶

30 (Cuyahoga Cty. App.) ("A party asserting an implied contract's existence carries the heavy burden of establishing each and every contract formation element, including meeting of the minds.").

Mr. Karchefsky testified that in 2007 he was told that he would be grandfathered on a discounted rate. (CKAP Br. p. 13.) But, he and every other customer were notified several times in 2006 that the discount would only last as long as it was available. (Company Ex. 1, Attachment WRR-1.) Mr. Karchefsky's remarks about a promotional document, titled "Fast Facts" – to wit: "certainly seems like a contract to me" (CKAP Br. p. 18) – does not establish, and cannot be considered, proof of a contract. Putting aside the lack of foundation for Mr. Karchefsky to opine as to the document's legal effect, the cited terms simply state certain benefits of electric heat. (*Id.*) There is nothing untrue about any statement in the document; nor is there any term regarding rates to be enforced.[5]

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[5] The CKAP parties also cite to some materials that were never part of any hearing. For example, they cite to a statement by William Taggert, a HVAC contractor, about what he was allegedly told by the Companies' employees. (CKAP Br., pp. 11-12.) Since Mr. Taggert never appeared at any hearing he didn't testify at all. The CKAP parties' representations about what he "testified" are overblown and flat wrong and entitled to no weight in this proceeding.

Similarly, the CKAP parties cite to a letter allegedly received by Dominic Mante. (*Id.*, p. 13.) These parties further purport to recite what he "testified" to, i.e., that he was supposedly told that he "would always receive a preferred electric rate." (*Id.*) Putting aside that, if Mr. Mante lived in an electrically heated home since before 2007, he has "always" received a discount of standard residential rates, Mr. Mante never appeared at any hearing. Thus, like Mr. Taggert, he never "testified" about anything. Any statement and exhibits supposedly provided by Mr. Mante were never moved, much less admitted, into evidence. Thus, those materials are entitled to no weight; they should be stricken and disregarded.

Further, the letters supposedly produced by Mr. Mante are not proof of any contract or any promise that he would "always" receive a "preferred rate." In one letter, dated March 1, 1989, to "Electric Heating Customer," CEI advises that although these customers' rates increased, the electric heating discount ***increased***. The letter further advised that the rate was part of a "three year rate plan." Nothing was said about rates beyond that three year period.

In another letter, dated march 14, 1986, CEI provides information about the costs to convert from electric heating to gas. It notes, "A recent study of over 150 homes (some with gas heat and others with electric) indicates that the annual energy costs for electrically heated homes are about the same as gas heated homes and often quite less. … In addition, our <u>new load management options</u> can save you even more." (Emphasis original.) Nothing in that letter was untrue. Nothing constituted a contract. Nothing constituted a promise that discounts or rates were "forever." The letter merely advised the customer of the customer's then-existing options.

The CKAP parties also cite to the public hearing testimony of two additional former company employees, James Ehlinger and Teryl Bishop. Mr. Bishop testified regarding his understanding of OE policy. (CKAP Br., pp. 15-16.) Not only did he lack foundation for those statements, but they are also contradicted by admitted evidence. For example, Mr. Bishop claimed that "grandfathering was a normal and customary option whenever rates were changed" and that "no rates [were] eliminated without grandfathering existing customers." (North Ridgeville Public Hearing Tr. 117:25-118:6.) Yet, as Mr. Ridmann demonstrated, this was wrong. (Company Ex. 65, pp. 10-11.) Mr. Bishop's views regarding the need to "assure" customers were also inaccurate. As other former employees of the Companies testified, the Companies' rules and regulations expressly provided that rates were always subject to change. (Tr. Vol. I 125:9-128:18 (Andreatta); Vol. III 597:25-601:23 (Challender).) Tellingly, although Mr. Bishop tried to recruit other former employees of the Companies to repeat his erroneous statements and falsehoods, none agreed to join him. (Company Ex. 3A (Steigerwald Dep.) 107:17-108:3.)

Likewise, Mr. Ehlinger's testimony was demonstrably incorrect: both about residential customers having signed contracts giving electric heating contracts forever (CKAP Br., p. 16), as Mr. Challender testified before the Commission (Tr. Vol. III 586:1-587:9), and also about documents supposedly having been ordered by Mr. Temple to be destroyed (CKAP Br., p. 16), as Mr. Ridmann explained (Company Ex. 65, p. 15.)

For all of its talk of contracts, the CKAP parties fall far short of producing any documents from customers that these parties even try to allege are written contracts.[6] The fact

[6] The CKAP parties attempt to explain the lack of documentary proof of any contract guaranteeing rates or discounts by pointing to Mr. Ehlinger's allegations about purported TE company policies regarding document destruction. (CKAP Br., p. 17.) Yet, even if Mr. Ehlinger was correct (which he is not, as Mr. Ridmann explained),

remains that there were only two documents presented by customers who claimed that they were evidence of a contract: a purported 1988 letter sent by Elio Andreatta to Thomas Logan (Strongsville Ex. 2) and the letter received by Jesse Willetts (CKAP Ex. 31). (CKAP Br., pp. 13-14.) Neither document constitutes an enforceable contract.

There are numerous questions regarding whether the Logan letter is genuine. To begin, Mr. Andreatta testified that writing letters to customers was rare. (Tr. Vol. I 113:9-19; 122:25-123:2; 130:12-13.) Yet he recalled neither writing this letter nor even discussing the issue of longevity of rates with Mr. Logan or any customer. (*Id.* 113:9-19; 121:17-122:2; 129:22-130:7.) In addition, Mr. Andreatta testified that his title as listed on the alleged letter was incorrect, and he would not have had a letter typed on a Saturday, which was the date of this alleged letter. (*Id.* 123:3-124:1.) Even if this letter is genuine, however, Mr. Andreatta testified that it would have been contrary to Company policy, of which he was aware; a policy clearly providing that sales representatives were not permitted to enter into contracts with customers that were contrary to the terms of the applicable tariff. (*Id.* 126:9-127:22; 128:8-11; Company Ex. 46.)

Neither is the letter presented by Mr. Willetts an enforceable contract, his unqualified legal opinion to the contrary notwithstanding. (CKAP Br. p. 14.) The CKAP parties simply ignore Mr. Ridmann's testimony, which explained that the purpose of the letter was to inform electric heating customers that the availability of the discount under the prior rate had been modified by a recent Commission order. Thus, as of the date of the new rate schedule, the availability of the discount provision would be based upon the customer of record, not the date

(continued…)

such a policy does not explain why ***customers*** were unable to produce any written contracts. Surely, if written contracts were entered into and were so crucial to customers' decisions to buy "all electric" homes or to install electric equipment, among the over 100,000 customers living in such homes or with such equipment for several decades, there would be at least one person who would come forward with such documents.

specific equipment first was installed in the residence. (*See* Company Ex. 65, pp. 4-5.) In addition, the quote from Mr. Willetts's direct testimony regarding his communication with CEI ignores the clarification he provided on cross-examination: CEI never promised him any electric rates "forever." Rather, he asked if the rate existed and if he "could depend" on it, and was told that he could. (Tr. Vol. II 459:21-460:9.) That statement unquestionably was true, as Mr. Willetts was able to depend upon that rate for several decades. Mr. Willetts was told the truth; but no promise was made of a rate lasting "forever."

b. The Companies' marketing practices were proper.

Given the lack of credible evidence of any "contract" that guarantees rates, OCC and the CKAP parties argue that the Companies engaged in improper marketing practices regarding electric heating. Yet the evidence to which OCC and CKAP cite does not show anything improper. The Companies touted the benefits of electric heat, including its costs, which statements were true.

i. The Companies' advertising and marketing programs were not misleading.

OCC cites to various public hearing witnesses who recounted being told about electric heating rates by builders, real estate agents or representatives of the Companies. (*E.g.* OCC Br., pp. 29-30.) Falling far short of the "hundreds" claimed by the CKAP parties (CKAP Br., p. 14), this is the same testimony examined in the Companies' initial brief (Company Br., pp. 55-56), and it does not establish any improper conduct, even with OCC's and the CKAP parties' gloss on it. Although a handful of individuals testified that they were promised rates lasting forever, the record evidence demonstrates that, even if such statements were made, they were contrary to Companies policy and, perhaps more importantly, the Companies' Commission-approved rules and regulations. (Company Exs. 46, 63). The vast majority of public hearing witnesses testified that only they were informed that they qualified for a then-existing rate. (*E.g.* OCC Br., p. 29, n. 94, 95.) These were unquestionably true statements.

The testimony of Jim Jankura, which OCC quotes at length (OCC Br. p. 31), is telling. Mr. Jankura did not allege that he was provided with any promise about how long his rate would last. In fact, none of the Companies' statements described by Mr. Jankura was inaccurate or otherwise improper. Mr. Jankura simply was told that he qualified for a rate. He also was told the Companies' then-applicable rationale for offering the rate. All of this information was true.

Notably, OCC fails to include the fact that the conversation that Mr. Jankura recounted occurred 21 years ago. The statements were true when made, and Mr. Jankura, like many of the public hearing witnesses, received the benefits of special electric heating rates for decades. The omission of the fact that these alleged conversations occurred years ago – sometimes, decades ago – is understandable because it effectively rebuts any claim that it would be unfair to phase out Rider RGC. It is not "unfair" to ask customers who have enjoyed the benefits of lower electric rates and lower energy costs since the 1970s, the 1980s, the 1990s or even the 2000s to begin to pay more of their fair share of the cost to provide them service. Customers who purchased their homes or who installed certain electric equipment years or decades ago, allegedly based on a belief that they would receive lower rates have long since realized the "payback" on their investment. For example, Mr. Schmitt testified that "the payback period was anywhere from 7 to 10 years on the installation of that geothermal heating and cooling system." (Tr. Vol. II 392:15-393:1.)

ii. The documents relied upon by interveners do not constitute evidence of any promise or commitment to provide a permanent discount.

For the same reason that the documents relied upon by the CKAP parties do not constitute a contract, they also do not evidence a promise to provide a permanent discount or any other improper marketing practices, as OCC alleges. The letter allegedly sent by Mr. Andreatta (Strongsville Ex. 2) is of questionable authenticity and, even if it was sent, was directly contrary to company policy. (Tr. Vol. I 126:9-127:22, Company Ex. 46.) OCC's treatment of the alleged letter produced by Mr. Logan overstates the case and thus gives away any argument that the letter is credible. For example, OCC contends, "The suggestion that the document was … fraudulent in the face of overwhelming evidence to the contrary (i.e., the testimony of *both* the author and the recipient), is not credible." (OCC Br., p. 27, n.85.) But the evidence relating to *both* the alleged author and the purported recipient sustain questions as to the document's authenticity. As previously discussed, Mr. Logan had an ongoing dispute with OE regarding his electric service to his business, not surprisingly over an alleged oral promise made by OE. (Company Br. p. 32; Company Ex. 4.) Thus, his testimony is worthy of question on that basis alone.

OCC misleadingly states that Mr. Andreatta "remembered dealings with Mr. Logan…." (OCC Br., p. 28.) But Mr. Andreatta specifically stated that he did not recall discussing the issue of the longevity of rates with Mr. Logan, or with any customer for that matter. (Tr. Vol. I 121:20-122:2.) Importantly, Mr. Andreatta, who wrote very few letters and thus likely would have remembered those he wrote, did not remember writing this document. (*Id.* 121:17-19.)

In its vain defense of the purported Andreatta letter, OCC is left to point to the facts that the letter appears to be on OE letterhead and that Mr. Andreatta admitted that his signature looked genuine. (OCC Br., p. 28.) But neither Mr. Andreatta nor, more importantly, OCC can explain why such basic things as Mr. Andreatta's title or the date of the letter is wrong. Further, no one can explain why Mr. Andreatta would have written a letter stating something that he admitted conflicted with OE's rules and regulations. (Company Exs. 46, 63.) This is especially troublesome for those advocating the authenticity of the alleged letter, given that Mr. Andreatta was aware of those rules and regulations (Tr. Vol. I 127:20-22; 128:8-11) and that a supervisor would have reviewed any letter that he might have sent. (*Id.* 114:9-17; 124:2-6; 128:12-18.)

The other document principally relied upon by OCC and the CKAP parties, the letter received by Mr. Willetts (CKAP Ex. 31), also provides no evidence of any promise that any discounted rates would be permanently available. As noted, the letter explained the change in how the discount would be made available, as a result of a Commission order. As of the date of the new rate schedule, the availability of the discount provision would be based upon the customer of record, not the date specific equipment first was installed in the residence. (*See* Company Ex. 65, pp. 4-5.)

The CKAP parties and OCC also cite to documents referenced by Mr. Karchefsky. One, a promotional document provided to customers, accurately explained benefits of electric heat. (CKAP Br. p. 18.) There is nothing inaccurate about the document, and it contains no promise that any rate would be permanent. Nor documents regarding the internal company letter regarding the LGS program making any commitment about rates or provide any support for the notion that the Companies' marketing practices were improper. (*Id.* pp. 19-20; OCC Br. p. 25.) This "internal marketing effort" contained nothing that was either "unfair" or "deceptive," as CKAP claims. (*Id.* p. 20.) The Company simply promoted the benefits of electric heat, making statements that all were true at the time. Indeed, BSH offered similar incentive programs to buyers of BSH homes if those persons successfully recommended BSH to someone else. (Company Ex. 57.) Mr. Schmitt testified that such incentive plans were not misleading. (Tr. Vol. II 433:23-434:13.)

As the Staff correctly concluded, "no party presented either sufficient or credible evidence to show that FirstEnergy promised an all-electric discount rate in perpetuity." (Staff Br. p. 4.)

Importantly, neither CKAP nor OCC provides any basis for why any alleged improper marketing practices should result in an ongoing discount. OCC doesn't even try. As for CKAP, after its failed "contract" theory, the best it can come up with is that it would somehow be unfair for electric heating customers to be phased out of the RGC credit.

As noted, the Companies could not lawfully commit to providing any rate or discount forever. Further, as also noted, electric heating customers who contend that they somehow relied on getting a discount did get one for years. And they are still getting one. Both Riders EDR and RDC have remained in effect without interruption.

But the fact remains that the original justification for separate special electric heating rate schedules no longer remains valid. Discounts to electric heating customers must be borne by other customers, most of whom have been paying higher electric rates and higher energy costs for years. "Fairness" requires electric heating customers to continue receiving their current discount only if one defines "fairness" solely in terms of the electric heating customers' interest. "Fairness" to all customers, however, requires that the Rider RGC discount that they have enjoyed be phased out, even if the other discounts are maintained.

4. There is no basis to provide additional discounts to non-heating residential customers.

The recent expansion of the RGC credit allows individuals to receive the electric heating credits even if they do not heat their homes with electricity. Even OCC agrees that those customers should not receive discounts, and that "continuing RGC credits . . . should be made available to all customers whose homes are electrically heated." (OCC Br., p. 20.) CKAP's brief does not take a contrary view.

As explained in the Companies' initial brief, the non-heating residential customers are receiving an unwarranted windfall, with Rider RGC merely providing another decrease on top of the decrease that these customers already had experienced. (Company Br., pp. 37-38.) There is no basis to continue providing this discount to non-electric heating residential customers.

B. The Companies' Proposal for a Phase Out of the Rider RGC Credit Should Be Adopted.

1. The Companies' proposal best balances the needs of all customers.

The Companies' proposal is the least costly for both standard residential customers and for non-residential General Service – Secondary ("GS") and General Service – Primary ("GP") customers. The Companies propose a three-year phase out of the Rider RGC credit, with corresponding deferrals of the credit itself and appropriate carrying charges. (Company Ex. 1, pp. 7-8.) In order to minimize the amount of interest to be recovered, deferrals arising in each year of the phase out will be collected within the year that deferral is created. (*Id.*, p. 46.) The Companies do not propose recovering any additional amounts from GS and GP non-residential customers, beyond what those customers already pay under Rider EDR.

The Companies' proposal is significantly less costly to other customers than OCC's proposal. Specifically, OCC proposes establishment of a credit and recovery rider in an amount sufficient to result in all-electric bills that are 65% of the standard residential bill. (OCC Ex. 1, pp. 4, 39.) Although OCC witness Anthony Yankel has not calculated the total cost of OCC's proposal (*see* Tr. Vol I 246:8-23), one thing is clear: OCC's proposal will result in a revenue shortfall of approximately $30 million, every year, for as far as the eye can see. (*See* Tr. Vol. I 218:14-16; Tr. Vol. II 510:12-511:8.) And because it perpetuates a declining block structure, OCC's proposal likely would encourage even more usage, and even greater deferrals. (Tr. Vol. I 219:23-220:4 (Yankel Cross).) Moreover, by expanding the scope of customers who will pay the deferred amount, OCC's proposal increases costs – without end – for both residential customers and GS and GP non-residential customers. Of the three proposals before the Commission, OCC's proposal places the greatest financial burden on other customers, including other residential customers.

The Companies' proposal also is less costly than Staff's proposal. Although both the Companies and Staff propose a phase out of the Rider RGC credit, Staff's proposal incorporates both an initial "freeze" in the level of all-electric discounts and a longer phase-out period, both of which result in higher costs. Specifically, Staff proposes that in year one of the phase-out period (*i.e.*, September 2011 through May 2012), the Rider RGC credit be frozen "at current levels," which the evidence shows will yield approximately $87 million in deferrals. (Company Ex. 1, p. 43; Staff Ex. 1, p. 3.) Under the Companies' proposal, by contrast, Rider RGC will be reduced to a level resulting in no more than a 12% increase during the winter period from current levels (and a correspondingly smaller deferral). The Companies' proposal is less costly than Staff's proposal.

Under the Companies' proposal, deferral of costs related to the Rider RGC credit are to be recovered only from the residential class on a non-avoidable basis. (*See* Company Ex. 1, pp. 46-47.) Staff agrees. (Staff Ex. 1, p. 4.) Recovery of Rider RGC-related costs from only residential customers is consistent with the treatment of other relevant costs in several ways. As Attorney Examiner Price pointed out at hearing, Rider RDC, through which distribution costs related to all-electric customers are recovered, is paid for only by residential customers. (Tr. Vol. I 185:6-10; Company Ex. 1, p. 44.) And it is consistent with the fact the revenue differential arising from historical all-electric rates prior to 2001 was recovered only from residential customers (notwithstanding OCC's argument that those rates benefited all customers). (Company Ex. 1, pp. 42-43.) The same should be true of the revenue shortfall arising from Rider RGC.

Notwithstanding its suggestion on brief that the Companies not be permitted to recover costs that the Commission authorized the Companies to defer, OCC in testimony, by contrast, proposes that deferrals associated with the Rider RGC credit (which according to OCC should last forever) be recovered through an "equal cents per kWh charge" from all other customers served by the Companies (*i.e.*, GS and GP customers). (OCC Ex. 1, p. 40.) OCC's proposal thus is plainly contrary to basic notions of cost causation. *See City of Columbus v. Pub. Util. Comm'n*, 62 Ohio St. 3d 430, 438 (1992) (*quoting Townships of Mahoning County v. Pub. Util. Comm'n*, 58 Ohio St. 2d 40, 44 (1979)) (noting that "the basic underlying consideration is that of cost of service rendered"). Under that principle, costs of service are to be recovered from the class of customers on whose behalf they are incurred, except for certain economic development-type agreements or as otherwise agreed by the parties, such as through stipulations. (Company Ex. 65, p. 28; *see* Tr. Vol. I 230:20-24.)

Here, costs related to the Rider RGC credit are generation costs incurred on behalf of certain residential customers. (Company Ex. 65, p. 29.) As a result, Rider RGC creates a revenue shortfall among the residential customer class. (*Id.*; Tr. Vol. II 512:11-14) (agreeing that ongoing discounts create a "revenue shortfall among the residential customer class").) And under cost causation principles, the residential customer class should fund the deferrals created to cover this shortfall. As Staff witness Fortney aptly put it: "I cannot, nor could any member of

Staff, think of any reason whatsoever that a general service customer should pay revenue shortfalls created by the residential class." (*See* Tr. Vol. II 511:10-20.)

Although OCC witness Yankel contended that all customers benefit from – and therefore should pay for – Rider RGC-related costs, there is no basis for his opinion. As noted, Mr. Yankel's reliance on historical cost-of-service studies to show a continuing justification for Rider RGC is misplaced. *See* p. 9, *supra*. Mr. Yankel has no basis to suggest that the generation prices charged to customers today are influenced by the presence of all-electric customers. He performed no independent analysis or modeling of auction results in the absence of all-electric usage. (Tr. Vol. I 211:21-15, 214:17-18.) He did not review or rely on literature discussing retail marketing strategies or conduct a bidding strategy review. (*Id.* 214:22-25, 251:16-18.) He has never worked for or talked to marketers or wholesale suppliers regarding the effects of all-electric customers on generation prices. (*Id.* 214:19-21, 251:7-15.) Nor could he quantify the impact of wholesale bidding strategies on auction prices. (*Id.* 251:22-25.) In sum, he has no support whatsoever for his suggestion that non-residential customers should bear a portion of the costs associated with the Rider RGC credit.

Nor does OCC fare any better when it argues that the Commission should spread the revenue shortfall associated with Rider RGC to all customers, including non-residential customers, consistent with its treatment of shortfalls created by reasonable or unique arrangements pursuant to Ohio Revised Code Section 4905.31 and Ohio Administrative Code Chapter 4901:1-38. (OCC Br., p. 41.) Neither of those authorities provide any basis for OCC's proposal. As OCC acknowledges, a primary justification for reasonable arrangements is as an economic development benefit, such as specifically-identifiable jobs that are created or retained as a result of the arrangement. *See* Rule 4901:1-38-03. Yet, in his direct testimony, OCC witness Yankel repeatedly stated that the Companies' special electric heating rates were not offered for economic development purposes. (*See, e.g.*, OCC Ex. 1, pp. 9, 19, 25.) Nor could Mr. Yankel allege otherwise; there is absolutely no evidence demonstrating that special electric heating rates or credits advance economic development – such as the creation or retention of jobs. Moreover, although OCC cites language indicating that costs associated with reasonable arrangements may be "spread to all customers" (*see* OCC Br., p. 41), OCC ignores that these are not reasonable arrangements and omits the critical language which states: "subject to change, alteration, or modification by the Commission." *See* Rule 4901:1-38-08(A)(4). In fashioning the appropriate remedy here, the Commission should apply principles of cost causation and order recovery of Rider RGC-related costs from residential customers only.

OCC also contends that its proposal is supported by the Commission's approval of "interruptible tariffs" that reduced large customers' rates, where the costs associated with those tariffs were borne by other customers. (OCC Br., p. 41.) This example also misses the mark. OCC fails to mention that the Commission approved the riders in that case pursuant to a series of stipulations submitted by the parties. *See, e.g.*, *In re Application of Ohio Edison Co., The Cleveland Elec. Illuminating Co., and The Toledo Edison Co. for Authority to Establish a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Elec. Security Plan* ("*In re FirstEnergy's ESP II Case*"), No. 10-388-EL-SSO, Op. and Order (Aug. 25, 2010), p. 32. OCC's citation of those stipulations here is inappropriate. *See, e.g.*, *In re Application of The Dayton Power and Light Co. for Approval of its Elec. Security Plan*, Nos. 08-1094-EL-SSO, *et al.*, Op. and Order dated June 24, 2009, p. 10 (noting that stipulation in case "strikes a reasonable balance under which all parties receive substantial benefits . . . but no party receives everything it may have sought in litigation"). Those stipulations provided that they could not be relied upon for any purpose other than enforcing their terms. This is reason alone to reject this argument.

Moreover, a review of the Commission's order in Case No. 10-388-EL-SSO shows exactly why forcing non-residential customers to pay for Rider RGC-related costs is inappropriate. In that case, the Commission cited specific record evidence showing that the presence of interruptible customers led to lower generation auction prices and thus benefited all customers. *See In re FirstEnergy's ESP II Case*, Op. and Order dated Aug. 25, 2010, p. 26. The record contained evidence of other benefits, including avoided generation capacity cost savings, avoided transmission and distribution cost savings, reliability benefits and environmental benefits. *See id.*, p. 31. Contrary to OCC's claim that those tariffs were approved merely to mitigate "rate shock," there was a great deal of evidence justifying cost recovery from all customers. Here, by stark contrast, there is no such evidence. OCC's citation of the approval of interruptible tariffs in Case No. 10-388 should be disregarded.

OCC's suggestion ignores that GS and GP customers already are – and will continue to be – responsible for recovery of costs associated with all-electric discounts. Specifically, those customers currently pay for the revenue differential arising from Rider EDR, and under the Companies' proposal, this will not change. (Company Ex. 1, pp. 43-44; Tr. Vol. I 184:21-185:5.) Notably, Rider EDR accounts for approximately 25% of the total discounts currently available to all-electric customers. (Tr. Vol. II 508:12-22.) Non-residential customers already are paying a significant portion of the credits associated with all-electric customers. (Company Ex. 1, p. 44.) There is no basis to force them to pay more.[7]

[7] CKAP on March 22, 2011 filed a document titled "Press Release: Comparison Rate Chart of FirstEnergy, the PUCO Staff, and OCC's Proposed Solutions to the All-Electric Rate Issue," which purported to offer an analysis of all-electric customers' bill amounts at various usage levels and purported calculations of the percentage changes

2. The RGC credit should not be available to customers moving to electrically heated premises after January 1, 2007.

There is no reason to provide the RGC credit to customers moving to electrically heated premises after January 1, 2007. As explained in the Companies' initial brief, permitting the discount to remain with the residence is contrary to the Companies' practice and the Commission's order in the RCP case. (Company Br., p. 67.) There is no evidence that the Companies ever promised that the rate would stay with the residence, as even Ms. Steigerwald admitted. (Company Ex. 44; Company Ex. 8; Company Br., pp. 67-68.) Neither of the briefs submitted by OCC or the CKAP parties make any argument to the contrary.

The only purported justification to extend special heating rates to these individuals is the argument that their home values will suffer without the discount. Yet there is no reliable evidence to support this argument. As the Staff's brief correctly recognizes, there is no credible evidence supporting a decline in property values of electrically heated homes. (Staff Br., pp. 32-35.)

It is telling that both the CKAP parties and OCC do not seriously argue otherwise. The CKAP parties, which sponsored Mr. Frawley's testimony, offer only tepid support of it. They simply recite Mr. Frawley's conclusion, completely ignoring both the numerous fundamental

(continued...)

in those bills under the three parties' proposals in this case. Because this filing attempts to submit "evidence" after the hearing in this matter has concluded, the filing should be stricken. Moreover, CKAP did not produce and has not produced the underlying calculations, data analysis and assumptions that produced the numbers contained in this filing. Nor was any of the information contained in the filing submitted during the hearing, through a sponsoring witness and subject to cross-examination. Thus, the filing should be stricken on these grounds. In addition, there are substantive flaws in the document. For example, the filing contains an unexplained assumption of a competitive bid price for generation that is higher than the actual prices that will have already been determined for part of the Companies' next ESP. The filing also contains an unwarranted assumption that there are equal numbers of customers at each usage level. This assumption then allowed CKAP to take a straight arithmetic average for all usage levels, giving equal weight to higher usage levels. Because the number of customers at each usage level varies, a weighted average should have been used. For all of these reasons, this belated CKAP filing should be stricken as improper and unreliable, and should not be relied upon by the Commission for any purpose.

flaws in his "study", as Mr. Frawley admitted, and the expert testimony of Charles Ritley. (*See* CKAP Br., pp. 25.) OCC distances itself from Mr. Frawley even further, offering nothing more than a brief statement in a footnote that Mr. Frawley relied upon public hearing testimony in coming to his conclusions. (OCC Br., p. 31, n. 99.)

The CKAP parties cite to public hearing testimony of a realtor (Diana Sull), a councilman (David Kos) and three home owners (Carolyn Dragics, Joan Glickson and Dale Finley) regarding property valuation. (CKAP Br., pp. 23-25.) OCC cites to the public hearing testimony of two homeowners, Messrs. Jankura and Finley. (OCC Br., p. 31.) Only two of these individuals, Ms. Glickson and Mr. Finley, offered any specifics regarding the valuation of their homes. The others merely baldly stated, without any support, their fears or theories of declining values. This testimony should be disregarded accordingly, particularly in light of the record evidence that Ms. Steigerwald repeatedly disseminated information about declining property values to CKAP members that was without any factual basis. (Company Br., pp. 25-27; Company Ex. 16; Steigerwald Dep. 190:15-20.) Even with regard to Ms. Glickson and Mr. Finley, they offered no evidence that the reason their property values were reduced was because their homes are heated with electricity as compared to another source of energy. As even Mr. Frawley admitted, all property values in Northeast Ohio have declined recently. (Tr. Vol. II 288:21-289:10.) There simply is no support for the claim that a feared decline in the value of electric heated homes requires special rates be extended. Mr. Ritley's testimony affirmatively disproves it. (Company Br., pp. 69-73.)

Notably, in the last section of its brief, Staff writes "No Credible Evidence Supporting Decline In Property Values." (Staff Br., p. 32.) A real or potential decline in property values of electrically heated homes was the only justification put forward by the CKAP parties for keeping discounts "with the home." Given that Staff recognizes that the CKAP parties' justification was not supported in the record, the Staff nevertheless appears to continue to support keeping discounts "with the home." In light of Staff's statement that the only justification for this position is unsupported, the Commission should reject the notion that discounts should be available based on the premises, rather than the customer.

3. The Companies must recover all costs associated with Rider RGC, including all accrued deferrals and carrying charges.

a. The Commission has no legal authority to deny the Companies all of their costs based upon any improper marketing practices.

OCC and the CKAP parties cite to statutes relating to the Commission's ability to adopt rules to protect customers from unreasonable, unfair or deceptive marketing practices. (OCC Br., p. 11; CKAP Br., pp. 5-6.) OCC contends that the Companies should be denied recovery on deferrals authorized by the Commission's March 10, 2010 Order because of the Companies' alleged improper marketing practices. But none of those statutes or the rules promulgated thereunder provides the Commission with any authority to deny the Companies the opportunity to recover costs reasonably incurred to provide generation service. OCC sites to three statutes that deal with the Commission's authority to regulate utility "practices"; specifically Ohio Revised Code Sections 4905.37, 4928.02(I) and 4928.10. But each of those statutes deals with the Commission acting in a forward-looking capacity. For example, under Section 4905.37, the Commission's power is to "fix and prescribe" "rules, regulations and service[s]" found to be "unjust or unreasonable," among other things. This statute does not give the Commission the power to set rates or preclude recovery of Commission-mandated costs. Similarly, neither Section 4928.02(I) nor Section 4928.10 provide the Commission with the power to set rates or deny such costs. The former statute merely delineates state policy to protect consumers against "unreasonable" sales practices; the latter gives the Commission power to prescribe rules for electric companies' service.

To the extent that OCC cites a statute that does, in fact, deal with Commission authority over rates, OCC still fails to explain how the statute applies here. Specifically, OCC cites to Section 4909.16, which gives the Commission the authority to amend, alter or suspend rates in the case of an emergency. One is left to wonder exactly what the emergency is or how that emergency leads to the conclusion that the Companies' should be denied recovery of deferrals authorized in previous Commission orders. For example, because OCC apparently seeks to preclude the Companies from ever recovering the deferrals at issue; does OCC contend that whatever emergency exists will last forever?

Although OCC never admits it, what OCC really seeks is to have the Commission penalize the Company for allegedly improper marketing practices. The penalty OCC seeks is to deprive the Companies the ability to recover the deferrals. The fact that OCC never admits this demonstrates the Commission's lack of authority to do what OCC wants. In short, OCC has utterly failed to articulate any legal basis that would allow the Commission to deny recovery of deferred costs. Thus, even if it could be proven that the Companies' marketing practices were somehow improper (which OCC and the CKAP have not even come close to showing), the Companies cannot be lawfully forced to share any burden resulting from providing the Commission-ordered Rider RCG credits to residential customers.

b. The Companies do not have to prove that the denial of complete cost recovery imposes a significant financial burden.

OCC urges the Commission to deny the Companies the ability to recover carrying charges. Yet, in doing so, OCC applies the wrong standard, and thus arrives at the wrong result. OCC claims that carrying charges are not warranted absent a showing of "significant financial harm" or a threat to the utility's "financial integrity." (OCC Br., pp. 36, 37.) Those standards are not reflected in the Commission orders that OCC cites. Further, they are contrary to the Takings Clause jurisprudence that the Companies has cited in their initial brief. (Company Br., pp. 42-44.)

OCC tries to limit the Commission's authority to award carrying costs to those cases involving significant financial harm. The cases OCC cites do not support that standard. (*See, e.g.*, OCC Br., pp. 36, nn. 113, 114.) To be sure, in OCC's cited cases, the Commission did not provide carrying charges for certain deferred costs. Those cases, however, do not discuss any standards for considering when carrying charges should be recovered. None of them adopt a "significant financial harm" standard as suggested by OCC here. In *In re CG&E Request to Modify Accounting Procedures Related to Disconnection Moratorium*, Case No. 01-3229-EL-AM, Entry (July 8, 2003), for example, the Commission merely noted that the deferred costs "shall not accrue carrying charges." *See id.* at ¶ 8. The Commission provided no discussion of why that was so. Moreover, the deferred asset there was only $3.9 million in uncollectible past-due residential revenues, a far cry from the magnitude of the deferrals at issue here (expected to exceed $90 million as of May 2011 and $87 million each year).

Likewise, in *In re Columbia Gas Request to Change Accounting Methods*, Case No. 09-371-GA-AAM, Entry (July 8, 2009), another OCC cited case, the Commission again offered no reason for denying carrying charges. Indeed, the Commission had not yet reached a decision on whether it would allow recovery of the deferred costs at issue there (certain pension obligations) *at all*.

None of the other cases that OCC cites adopt the significant financial harm standard that OCC articulates. Indeed, three of the five remaining cases, (OCC Br., p. 36 n. 14), do not use the word "significant" or "financial harm" at all. One of the other two entries, *Ohio Edison Company*, Case No. 84-188-EL-AAM Entry at 1-2 (February 2, 1988), must be miscited, as no such entry exists. While the remaining entry, *Cincinnati Gas & Electric Company*, Case No. 92-946-EL-AAM, Entry (October 1, 1992), does refer to the assets underlying the deferred charges as "significant," the Commission nowhere suggests that the magnitude of the deferred charges (or the underlying assets) is in any way related to the decision to allow carrying charges. There is likewise no reason for the Commission to impose such a standard here. Moreover, even if those cases had tacitly adopted such a standard, the deferral at issue here, some $87 million per year, certainly seems "significant" by any reasonable standard.

In any event, OCC's cases are entirely distinguishable because of the limitations imposed by the Fifth Amendment's Takings Clause. As the Companies explained in their initial brief, the Takings Clause prevents the Commission from denying the Companies full recovery of the costs that they incur in purchasing generation service for their customers. (Company Br., pp. 42-44.) Given the restructuring that has occurred in the electric industry, the Companies merely act as middlemen for generation – passing the costs that they pay for generation service through to the customers who use that generation. Given that the Companies are required to provide the generation service, requiring them to sell the service for less than they pay is no different than walking into a bank where the Companies maintain an account and removing funds, a straightforward violation of the Takings Clause.

The U.S. Supreme Court has made clear that, in the Takings context, full recovery requires compensation for the time value of money. When there is a delay between the taking and the recovery, "the owner is entitled to interest thereon sufficient to insure that he is placed in as good a position pecuniarily as he would have occupied if the payment had coincided with the appropriation." *Kirby Forest Indus. Inc. v United States*, 476 U.S. 1, 10 (1984). *See also Jacobs v. United States*, 290 U.S. 13 (1933) (reversing appellate court order that had denied recovery of interest in takings case, and noting that "[t]he concept of just compensation is comprehensive and includes all elements" such as "interest at a proper rate"). As the Court of Federal Claims stated, "Awarding interest recognizes both the time value of money and the opportunity that [a party] has lost to earn interest on its principal." *Innovair Aviation v. United States*, 83 Fed. Cl. 498 (2008).

Those same principles compel recovery of carrying charges here. Carrying charges are designed to compensate utilities for the time value of money where the recovery of incurred costs has been deferred. Such charges recognize the reality that, if a utility has been forced to carry an unrecovered cost for an extended period of time, providing recovery of only the deferred cost itself would deprive the utility of a meaningful and important aspect of its total recovery. There is no basis to impose that deprivation here, and it would violate the Constitution for the Commission to do so.[8]

c. The Companies have not waived their right to recover carrying charges.

In an argument directly contrary to recent Ohio Supreme Court precedent squarely on point, OCC separately claims that the Companies have essentially waived their right to seek recovery of carrying charges. (OCC Br., pp. 33-35.) According to OCC, the Companies failed to raise the carrying charge issue within 30 days after the March 3, 2010 Order that did not provide for recovery for such charges, rendering the Companies' subsequent attempt to raise that issue as error untimely under Ohio Revised Code Section 4903.10. OCC fails to recognize,

[8] As this is a constitutional command, it would trump the OCC's alleged state law "significant financial harm" test, even if such a test existed (which, in fact, is not the case).

however, that just three weeks ago, the Ohio Supreme Court expressly held that under R.C. 4903.10 parties "receive ***a new 30-day period*** to challenge entries on rehearing that modify earlier orders." *In re Columbus Southern Power*, Slip Opinion No. 2011-Ohio-958, ¶ 12. Here, the Commission's April 15, 2010 Second Entry on Rehearing in this case modified its previous March 3, 2010 Order. The Companies filed their application for rehearing within 30 days of that Entry on Rehearing. Thus, their application for rehearing is clearly timely, and OCC is wrong to claim otherwise.

The March 3, 2010 Order – which authorized the Companies to accrue deferrals for the difference in rates between the what the Companies would collect under the terms of the Commission's Order (i.e., the discounted all-electric rates) and the rates that would otherwise apply (i.e., the non-discounted rates) – did not specifically authorize or deny recovery for carrying charges. Notably, the March 3, 2010 Order made the discounts available only to customers who had owned their homes as of January 1, 2007. Further, the Order specifically stated that it was "not a long-term solution to this issue." (March 3, 2010 Order at 3.) Reflecting just how temporary the Order was, the Order required Staff to investigate the appropriate long-term solution and file its report "within 90 days." (*Id.* at 4.)

On March 8, 2010, OCC filed an application for rehearing challenging the March 3, 2010 Order. On April 6, 2010, the Commission granted that application for rehearing. On April 15, 2010, the Commission issued a Second Entry on Rehearing that modified the March 3, 2010 Order in two important ways. First, the Commission substantially expanded the group of customers who would receive the lower rate, by including not only those customers "who had previously been billed under the 'all-electric' rate schedules," but also "any other residential customers who is the successor account to a customer [that had received all-electric rates]."

(April 15, 2010 Second Entry on Rehearing at 2.) This extended the rate discounts to some 88,000 additional customers. (Company Ex. 1, p. 19.) Second, the Commission also extended the lower rates would extend at least through the 2011 winter heating season. (*Id.*)

Not surprisingly, the combined effect of these two changes – an increase in the number of customers receiving the lower rates, coupled with an increase in the minimum time these rates would be effect – dramatically changed the financial impact the discounted rates would have on the Companies. Accordingly, on May 14, 2010, the Companies filed an Application for Rehearing. Expressly pointing to the modifications that the Second Entry on Rehearing imposed, the Companies challenged the Commission's "failure to provide the Companies with authorization to accrue their carrying charges." (May 14, 2010 App. for Rehearing at 2.) On June 9, 2010, the Commission granted the application for rehearing (along with applications for rehearing that OCC and Industrial Energy Users-Ohio ("IEU") had filed). On November 10, 2010, the Commission acted on the application by declining to rule on carrying charges, stating that it would "address the question of carrying charges when it addresses the recovery of any deferrals authorized in this proceeding." *See* Fifth Entry on Reh'g dated Nov. 10, 2010, ¶ 11.

OCC now claims that, because the March 3, 2010 Order did not include carrying charges, and the Companies first raised that issue in the May 14, 2010 Application for Rehearing, that application is untimely. (OCC Br., p. 34.) OCC is wrong.

In fact, the Ohio Supreme Court recently ***rejected*** OCC's attempt to advance that very argument. In *Columbus Southern Power*, that utility filed, as part of its ESP application, a request seeking Commission approval to sell certain generation assets. 2011-Ohio-958, ¶ 4. The application did not include a request for increased rates to recover the costs of operating the assets. *Id.* at ¶ 5. During testimony, however, the utility witnesses stated that cost recovery may be an appropriate alternative remedy. *Id.* In its Order, the Commission denied the request to sell, but granted cost recovery. *Id.* at ¶ 6.

IEU filed an application for rehearing challenging cost recovery. *Id.* at ¶ 7. The Commission then issued an Entry on Rehearing that modified the previous Order to deny cost recovery, while leaving in place the earlier prohibition on selling the assets. *Id.*

Only then did the utility seek its own rehearing challenging the denial of authority to sell. *Id.* at ¶ 8. When the Commission denied that application, Columbus Southern Power Company ("CSP") appealed. In opposing the appeal, OCC (along with the other appellees) claimed that the Court lacked jurisdiction over the issue, asserting (just as OCC does here) that CSP had not filed its application for rehearing within 30 days of the Order denying the authority to sell the assets, and that the application was thus untimely under Section 4903.10. *Id.* at ¶ 11.

The Court made short work of that argument. The Court noted that while Section 4903.10 imposes a 30-day limit, the statute also provides that "an order made after … rehearing, abrogating or modifying the original order, shall have the same effect as an original order." In language directly on point here, the Court held that this statutory language means that ***"[p]arties … receive a new 30-day period to challenge entries on rehearing that modify earlier orders."*** *Id.* at ¶ 12. Moreover, as the case clearly illustrates, this new 30-day window applies ***even as to those aspects of the original order that were not modified*** (i.e., the new order in *Columbus Southern Power* did not modify the prohibition on selling from the earlier Order, yet that is what CSP challenged).

The decision in *Columbus Southern Power* eviscerates OCC's argument here. Admittedly, the Companies could have sought rehearing of the March 3, 2010 Order's failure to provide recovery for carrying charges. But given the interim nature of the discounts that Order provided, the Companies elected not to pursue the issue. The Commission's modifications to the March 3 Order in its April 15 Second Entry on Rehearing, however, changed that calculus dramatically. These modifications thus provided the Companies "a new 30-day period to challenge [that] entr[y]." *Id.* No one disputes that the Companies filed their application for rehearing within that new 30-day window, and thus their challenge was timely.

Not only does the language of Section 4903.10 and Ohio Supreme Court precedent compel this result, but it also makes sense. When a party elects not to seek rehearing, that indicates that the party is willing to accept the Order ***as a whole***. If the Commission later changes some of the Order's terms on rehearing, though, that may change the Order's net impact in important ways. The party may now legitimately wish to challenge some aspect of the previous Order that it was otherwise willing to accept. That is why Section 4903.10 treats a new entry on rehearing that modifies an original order as restarting the clock. If the rule were instead what OCC contends here – that a party must challenge the original order or be forever barred – parties essentially would be forced to challenge ***any*** undesirable aspect of an Order, even if they were willing to accept the Order as a whole. Such a rule would lead to an endless stream of unnecessary applications for rehearing, a result that serves no one's interest, and the Ohio Supreme Court was correct to reject it.

d. The Companies should recover carrying charges at their long term debt rate without reduction for accumulated deferred income taxes.

OCC objects that to the extent recovery of carrying charges is permitted, those carrying charges should be calculated net of accumulated deferred income tax. (OCC Br., p. 39.) To support this contention, OCC cites the Commission's December 19, 2008 Opinion and Order in Case No. 08-935-EL-SSO, in which, OCC alleges, the Commission held that calculation of carrying charges net of tax is in accord with "sound ratemaking theory." (*Id.*, p. 39.)

But OCC ignores that the Commission has since reached the ***opposite*** conclusion in another subsequent case involving the Companies. Specifically, on January 21, 2009, the Commission issued its Opinion and Order in the Companies' most recent distribution rate case, Case No. 07-551-EL-AIR. In that decision, the Commission noted that OCC was arguing that "if a particular cost is deductible for income tax purposes [sic] as incurred, then the net case investment to fund the deferred recovery of such a cost is reduced by the income tax savings associated with the tax deduction. Therefore, applicable deferred taxes should be offset against the balance on which interest is accrued." *In re Application of Ohio Edison Co., The Cleveland Elec. Illuminating Co. and The Toledo Edison Co. for Authority to Increase Rates for Distribution Service, Modify Certain Accounting Practices and for Tariff Approvals* ("*In re FirstEnergy Distribution Rate Case*"), Nos. 07-551-EL-AIR, *et al.*, Op. and Order dated Jan. 21, 2009, p. 9. Moreover, at hearing in that case, Staff agreed with OCC's argument, citing the Commission's prior decisions in Nos. 88-205-EL-AAM and 92-713-EL-AAM (which OCC also cites in its footnote 123 here) and noting that since "investments" are deductible expenses for tax purposes, the carrying charge should be reduced by the amount of that tax benefit. *Id.*

But the Commission ***rejected*** those arguments:

> [A]lthough Staff's recommendation accounts for the deductibility of the debt rate, the recommendation does not account for the fact that ***revenues collected are taxable.*** If we were to adopt Staff's recommendation, the Companies would not recover the carrying charges provided for in the RCP Stipulation, which stated that the carrying charges would be equal to the Companies' actual long term cost of debt. ***Therefore, we find that the carrying charges on the deferrals should be calculated on a gross of tax rather than a net-of-tax basis in order to ensure that the Companies recover their actual long term cost of debt.***

In re FirstEnergy Distribution Rate Case, Op. and Order dated Jan. 21, 2009, p. 10 (emphasis added). Notable here, the Commission also directly addressed the prior decision in Case No. 08-935-EL-SSO, the very case on which OCC relies here:

> The Commission notes that our decision in this proceeding is not consistent with our decision in *In re Ohio Edison Co., The Cleveland Electric Illuminating Co., Toledo Edison Co.*, Case No. 08-935-EL-SSO Opinion and Order at 58 (December 19, 2008). ***We further note that the order is of no effect, therefore, our decision in Case No. 08-935-EL-SSO need not be addressed.***

Id. at 10 (emphasis added).[9]

OCC should know better. On February 20, 2009, it applied for rehearing of the Commission's January 21, 2009 Opinion and Order. And on February 2, 2011 – just weeks ago – the Commission denied rehearing on that basis. *In re FirstEnergy Distribution Rate Case*, Entry on Reh'g dated Feb. 2, 2011, ¶ 17. OCC offers its method of calculating carrying charges as if these recent decisions do not exist, and its proposal should be rejected for that reason alone.

Moreover, the original rationale for why carrying charges were initially ordered to be calculated net of tax in Case No. 08-935-EL-SSO does not apply here. In that case, Staff argued that because the deferral itself included items that were tax deductible, such as property taxes, depreciation, interest and operation and maintenance expenses, the carrying charges should be calculated net of tax in order to avoid an over-recovery. (*See, e.g.*, *In re Application of Ohio Edison Co., The Cleveland Elec. Illuminating Co., and The Toledo Edison Co. for Authority to Establish a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Elec. Security Plan*, Nos. 08-935-EL-SSO, *et al.*, Tr. Vol. II dated Oct. 17, 2008, p. 310:1-17 (Wagner Cross).) But here, the amounts included in the deferrals are not tax deductible, and the reasoning from Case No. 08-935-EL-SSO does not apply. OCC's cited authorities fail, and it has no evidence to support its method of calculating carrying charges. This proposal should be rejected as well.

[9] On December 22, 2008, the Companies withdrew the application that resulted in the Commission's December 19, 2008 Opinion and Order in Case No. 08-935-EL-SSO.

C. OPAE's Suggested "Pilot Program" Should Be Rejected.

The Commission should reject OPAE's suggested "pilot program." (*See* OPAE Br. pp. 6-9.) Given that its "proposal" lacks even the most basic details (*see* Company Br., p. 74), it is not surprising that OPAE itself is confused about what it is seeking in this case. In its brief, OPAE characterizes its proposal as having "FirstEnergy . . . commit to purchase the brown power through a power purchase agreement and enter into a contract to purchase the SRECs . . . ." (OPAE Br., p. 8.) But at hearing, OPAE witness Stacia Harper flatly contradicted that suggestion:

> Q: In this case you are not asking the Commission to order the companies to actually enter into any purchased power agreements; isn't that right?
>
> A: That is correct.

(Tr. Vol. III 535:19-23.) OPAE has yet to articulate intelligibly what it would have the Commission do in this case. Its "proposal" should be rejected for that reason alone.

Similarly, although OPAE characterizes Ms. Harper's testimony as offering a "potential model" to solve the issues in this case (*see* OPAE Br., p. 6), even that tentative description is an overstatement. In fact, both her underlying assumptions and the supposed end result lack ***any*** record support, aside from Ms. Harper's say-so. Specifically, OPAE contends that below market price power can be procured because of the availability of, among other things, the potential sale of renewable energy credits and potential tax and economic development incentives. (OPAE Br., p. 7.) But Ms. Harper never calculated either of those figures for OPAE's "pilot program." (Tr. Vol. III 541:13-23.) Nor has she pointed to any evidence of the amount of "investment tax credits" or "accelerated depreciation" that would be available.

Moreover, although OPAE asserts on brief that the price of "brown power" would be below the price established at an auction (*see* OPAE Br., p. 8), it does not even bother to repeat

Ms. Harper's guess as to what that price would be. (*See* OPAE Ex. 1, p. 7.) And for good reason, as Ms. Harper never calculated an estimated price that the "pilot program" would yield and never saw the calculations appearing in her testimony, which purportedly were generated by an outside entity. (Tr. Vol. III 540:8-541:2.) OPAE has provided no reason for the Commission to take any action regarding its proposed "pilot program." The Commission should reject it.

III. CONCLUSION

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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Respectfully submitted,

Grant Gal

James W. Burk (0043808)
Counsel of Record
FIRSTENERGY SERVICE COMPANY
76 South Main Street
Akron, OH 44308
Phone: (330) 384-5861
Facsimile: (330) 384-3875
E-mail: burkj@firstenergycorp.com

David A. Kutik (0006418)
Jeffrey Saks (0071571)
JONES DAY
North Point, 901 Lakeside Avenue
Cleveland, Ohio 44114-1190
Telephone: (216) 586-3939
Facsimile: (216) 579-0212
E-mail: dakutik@jonesday.com
jsaks@jonesday.com

Grant W. Garber (0079541)
JONES DAY
Mailing Address:
P.O. Box 165017
Columbus, Ohio 43216-5017
Street Address:
325 John H. McConnell Blvd., Suite 600
Columbus, Ohio 43215
Telephone: (614) 469-3939
Facsimile: (614) 461-4198
E-mail: gwgarber@jonesday.com

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

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Reply 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 12th day of April, 2011:

Jeffrey L. Small
Maureen Grady
Christopher Allwein
Office of the Ohio Consumers' Counsel
10 West Broad Street, Suite 1800
Columbus, Ohio 43215
small@occ.state.oh.us
grady@occ.state.oh.us
allwein@occ.state.oh.us

Samuel C. Randazzo
Scott E. Elisar
McNees Wallace & Nurick LLC
21 East State Street, 17th Floor
Columbus, Ohio 43215
sam@mwncmh.com
selisar@mwncmh.com

William L. Wright
Sarah Parrot
John Jones
Public Utilities Section
Office of the Attorney General
180 E. Broad St., 6th Floor
Columbus, Ohio 43215
william.wright@puc.state.oh.us
sarah.parrot@puc.state.oh.us
john.jones@puc.state.oh.us

Richard L. Sites
General Counsel & Senior Director of Health Policy
Ohio Hospital Association
155 East Broad Street, 15th Floor
Columbus, Ohio 43215
ricks@ohanet.org

Thomas J. O'Brien
Bricker & Eckler LLP
100 South Third Street
Columbus, Ohio 43215
tobrien@bricker.com

Kevin Corcoran
Corcoran & Associates, Co., LPA
8501 Woodbridge Court
North Ridgeville, Ohio 44039
kevinocorcoran@yahoo.com

M. Howard Petricoff
Stephen M. Howard
Vorys, Sater, Seymour and Pease LLP
52 E. Gay Street
P.O. Box 1008
Columbus, Ohio 43216-1008
mhpetricoff@vorys.com
smhoward@vorys.com

Cynthia Fonner Brady
Senior Counsel
Constellation Energy Resources, LLC
550 West Washington Blvd, Suite 300
Chicago, Illinois 60661
cynthia.brady@constellation.com

David C. Rinebolt
Colleen L. Mooney
Ohio Partners for Affordable Energy
231 West Lima Street
Findlay, Ohio 45839-1793
cmooney2@columbus.rr.com
drinebolt@ohiopartners.org

Grant Garber

An Attorney For Applicants Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company