BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, the The Toledo Edison Company for Approval of a New Rider and Revision of an Existing Rider.	)))))	Case No. 10-176-EL-ATA

OPINION AND ORDER

The Commission, considering the above-entitled application, hereby issues its opinion and order in this matter.

APPEARANCES:

James W. Burk, FirstEnergy Service Company, 76 South Main Street, Akron, Ohio 44308, and Jones Day, by David A. Kutik and Jeffrey Saks, North Point, 901 Lakeside Avenue, Cleveland, Ohio 44114-1190, and Grant A. Garber, 325 John H. McConnell Blvd., Suite 600, Columbus, Ohio 43215, on behalf of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company.

Mike DeWine, Ohio Attorney General, by John H. Jones, Assistant Section Chief, and Thomas G. Lindgren, Assistant Attorney General, 180 East Broad Street, Columbus, Ohio 43215, on behalf of the staff of the Public Utilities Commission of Ohio.

Janine L. Migden-Ostrander, Ohio Consumers' Counsel, by Jeffrey L. Small, Maureen M. Grady and Christopher J. Allwein, Assistant Consumers' Counsel, 10 West Broad Street, Columbus, Ohio 43215-3485, on behalf of the residential utility consumers of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company.

McNees, Wallace & Nurick, LLC, by Samuel C. Randazzo and Scott Elisar, 21 East State Street, 17th Floor, Columbus, Ohio 43215-4228, on behalf of Industrial Energy Users-Ohio.

Bricker & Eckler, LLP, by Thomas J. O'Brien, 100 South Third Street, Columbus, Ohio 43215, on behalf of the Ohio Manufacturers' Association.

Bricker & Eckler, LLP, by Thomas J. O'Brien, 100 South Third Street, Columbus, Ohio 43215, and Richard L. Sites, General Counsel and Senior Director of Health Policy, 155 East Broad Street, 15th Floor, Columbus, Ohio 43215-3620, on behalf of the Ohio Hospital Association.

Corcoran & Associates Co., LPA, by Kevin Corcoran, 8501 Woodbridge Court, North Ridgeville, Ohio 44039 on behalf of Sue Steigerwald, Citizens for Keeping the All-Electric Promise, Joan Heginbotham and Bob Schmitt Homes, Inc.

David C. Rinebolt and Colleen L. Mooney, 231 West Lima Street, P.O. Box 1793, Findlay, Ohio 45839-1793, on behalf of Ohio Partners for Affordable Energy.

Vorys, Sater, Seymour & Pease, LLP, by M. Howard Petricoff, Stephen M. Howard, and Matthew J. Settineri, 52 East Gay Street, Columbus, Ohio 43216-1008, and Cynthia Fonner Brady, Constellation Energy Group, Inc., 550 West Washington Street, Suite 3000, Chicago, Illinois 60661, on behalf of Constellation NewEnergy, Inc., and Constellation Energy Commodities Group, Inc.

OPINION:

I. HISTORY OF THE PROCEEDING

Ohio Edison Company (OE), The Cleveland Electric Illuminating Company (CEI), and The Toledo Edison Company (TE) (collectively, FirstEnergy or the Companies) are public utilities as defined in Section 4905.02, Revised Code, and, as such, are subject to the jurisdiction of this Commission. Beginning in January 1974, the three electric utilities, which were not affiliated at the time, implemented various residential all-electric rates, which were subsequently revised over the years in each Company's service territory. These bundled rates used declining block rate structures such that the customer's rate declined with greater energy usage.

However, on July 6, 1999, Am. Sub. Senate Bill 3 (SB 3) was enacted, effective October 5, 1999. SB 3 deregulated generation service in this state, unbundled generation, transmission, and distribution rates, froze distribution rates at their existing levels through the end of a five-year market development period, and mandated electric utilities to divest their generation assets.

Subsequently, on January 4, 2006, the Commission approved FirstEnergy's rate certainty plan, which included a provision that certain all-electric residential rate schedules for FirstEnergy would no longer be available to new customers or new premises beginning January 1, 2007. In response to an application for rehearing filed by Bob Schmitt Homes, Inc., the Commission noted that the purpose of eliminating the all-electric rate schedules was to promote energy conservation by eliminating discounts to customers who used large amounts of electricity. The Commission further noted that there is no guarantee that a rate currently in a utility's tariffs will remain there forever and that rate schedules are always subject to review and modification. The Commission determined that the elimination of the all-electric rate schedules, with grandfather provisions for existing customers as of January 1, 2007, instead of April 1, 2006, provided a reasonable balance of promoting conservation while not unduly affecting homebuilders and customers served by a grandfathered rate. *In re FirstEnergy*, Case Nos. 05-1125-EL-ATA et al., Entry on Rehearing (March 1, 2006) (*FirstEnergy RCP Case*) at 8-9.

Further, on January 21, 2009, the Commission issued its Opinion and Order in the most recent FirstEnergy distribution rate case. *In re FirstEnergy*, Case No. 07-551-EL-AIR, et al., Opinion and Order (January 21, 2009). Among other issues, in order to simplify FirstEnergy's existing rate structure, the Commission approved the consolidation of 32 different residential distribution rate schedules into a single residential distribution rate schedule for each electric utility. However, in order to mitigate the impact upon residential customers who would be adversely affected by the consolidation of the rate schedules, the Commission approved a residential distribution credit (Rider RDC) for certain residential customers. *FirstEnergy*, Case No. 07-551-EL-AIR, at 23-24. These adversely impacted customers included a number of customers taking service under the all-electric residential rate schedule, who had received more substantial discounts on their winter rates prior to the rate schedule consolidation.

In addition, the Commission issued its Second Opinion and Order in FirstEnergy's electric security plan proceeding on March 25, 2009, approving the stipulations filed by various parties. *In re FirstEnergy*, Case No. 08-935-EL-SSO, et al., Second Opinion and Order (March 25, 2009) (*FirstEnergy 2009 ESP Case*). Among other terms, the stipulations provided that, for the period between June 1, 2009, and May 31, 2011, retail generation rates would be determined by a competitive bid process (CBP). Further, in order to facilitate the transition to a standard service offer (SSO) sourced through a CBP and to create a generation rate structure which was consistent with the distribution rate structure approved in the distribution rate case, the Commission approved the consolidation of the various residential generation rate schedules into a single residential generation rate schedule for each electric utility. The Commission also approved a residential generation credit (Rider EDR) to customers who were adversely impacted by the generation rate schedule consolidation in order to mitigate the impact of the consolidation. *FirstEnergy 2009 ESP Case*, at 9-10. Again, the adversely impacted customers included a number of customers taking service under all-electric residential rate schedules. Further, the Commission extended Rider EDR until May 31, 2014, in FirstEnergy's second electric security plan proceeding. *In re FirstEnergy*, Case No. 10-388-EL-SSO, Opinion and Order (August 25, 2010) (*FirstEnergy

2010 ESP Case). The distribution and generation credits provided to customers adversely affected by the rate schedule consolidation in both proceedings represent a total rate discount of approximately 3.6 cents per kWh (Staff Ex. 1A, Attachment 1).

However, there was substantial public concern regarding the magnitude of the rate increases upon certain all-electric residential customers, notwithstanding the discounts provided to these customers. In order to provide rate relief to those residential customers who were adversely impacted by the rate schedule consolidation, on February 12, 2010, FirstEnergy filed an application in this proceeding to revise its current tariffs.

Intervention in this proceeding was granted to the Ohio Consumers' Counsel (OCC); Industrial Energy Users-Ohio (IEU-Ohio); the Ohio Manufacturers' Association (OMA); the Ohio Hospital Association (OHA); Ohio Partners for Affordable Energy (OPAE), Constellation NewEnergy, Inc., and Constellation Energy Commodities Group, Inc.; and Sue Steigerwald, Citizens for Keeping the All-Electric Promise, Joan Heginbotham, and Bob Schmitt Homes, Inc. (collectively, the CKAP Parties).

On March 3, 2010, the Commission issued its Finding and Order in this proceeding, approving FirstEnergy's application as modified by the Commission and providing interim rate relief for all-electric residential customers. On March 8, 2010, OCC filed an application for rehearing. On April 6, 2010, the Commission granted rehearing for the purpose of further consideration of the matters specified in the application for rehearing. Subsequently, on April 15, 2010, the Commission denied rehearing in our Second Entry on Rehearing (April 15 Entry) in this proceeding. On April 2, 2010, FirstEnergy also filed an application for rehearing regarding the Commission's March 3, 2010, Finding and Order. The Commission granted rehearing on April 28, 2010, in the Third Entry on Rehearing in this proceeding.

On May 14, 2010, FirstEnergy filed an application for rehearing regarding the April 15 Entry. Further, on May 17, 2010, IEU-Ohio and OCC each filed applications for rehearing regarding the April 15 Entry, arguing that it is unreasonable and unlawful on two separate grounds. On June 9, 2010, the Commission, in our Fourth Entry on Rehearing, granted rehearing for the purpose of further consideration of the matters specified in these applications for rehearing. Subsequently, on November 10, 2010, in the Fifth Entry on Rehearing in this proceeding, the Commission granted, in part, and denied, in part, the applications for rehearing filed by OCC and FirstEnergy, and denied the application for rehearing filed by IEU-Ohio.

In the Finding and Order issued on March 3, 2010, the Commission directed Staff to file a report regarding the appropriate long-term rates that should be provided to all-electric residential customers of FirstEnergy. The Commission further directed that

Staff provide a range of options regarding proposed rates and discounts for all-electric residential customers and that each option be supported by a thorough statistical analysis, including the bill impact upon all-electric customers at various levels of consumption and the number of all-electric residential customers at each consumption level. On September 24, 2010, the Staff filed its report as directed by the Commission. In the Staff Report, the Staff provided six different options for the reduction or elimination of the discounts provided to all-electric customers as well as the bill impacts for each option.

On September 8, 2010, OCC filed a motion requesting that the Commission establish a procedural schedule in this proceeding. FirstEnergy filed a memorandum contra OCC's motion on September 23, 2010. In addition, in the Staff Report, Staff recommended that, in light of the recent decision by the Geauga County Court of Common Pleas to dismiss the class action lawsuit brought against FirstEnergy by all-electric customers, further review and hearings be conducted regarding the recovery of any revenue shortfall resulting from the discounts provided to all-electric customers.

Accordingly, on October 8, 2010, the attorney examiner issued an entry setting a procedural schedule for this proceeding and ordering the Companies to publish notice of the local public hearings. However, due to unforeseen scheduling conflicts, on October 14, 2010, the attorney examiner revised the procedural schedule and scheduled local public hearings in Sandusky, Maumee, Strongsville, Springfield, North Ridgeville, and Kirtland, Ohio. Due to weather conditions, the public hearing in Maumee was rescheduled to November 18, 2010.

On November 8, 2010, the attorney examiner granted a motion to compel discovery filed by OCC. On January 7, 2011, a prehearing conference was held in order to resolve several outstanding discovery disputes. At the prehearing conference, the attorney examiners granted a motion to compel filed by OCC and motions to compel filed by FirstEnergy. A second prehearing conference was held on January 8, 2011, in order to conduct an *in camera* review of documents subject to the motion to compel. On January 27, 2011, the Commission denied an interlocutory appeal of the attorney examiner's decision to grant the motions to compel filed by FirstEnergy.

The evidentiary hearing commenced on November 29, 2010, and was continued to February 16, 2011. The hearing concluded on February 21, 2011. Two witnesses testified on behalf of FirstEnergy, one witness testified on behalf of Staff, and one witness testified on behalf of OPAE. OCC called two witnesses, and the CKAP Parties called four witnesses. Post hearing briefs were filed by the Companies, OPAE, OCC, Staff, IEU-Ohio, OMA and OHA, and the CKAP Parties. Reply briefs were filed by the Companies, OPAE, OCC, Staff, IEU-Ohio, and the CKAP Parties.

II. APPLICABLE LAW

The Companies are electric light companies as defined by Section 4905.03(A)(3), Revised Code, and public utilities pursuant to Section 4905.02, Revised Code. The Companies are, therefore, subject to the jurisdiction of the Commission pursuant to Sections 4905.04 and 4905.05, Revised Code.

Section 4905.30, Revised Code, in pertinent part, provides that "every public utility shall print and file with the public utilities commission schedules showing all rates, joint rates, rentals, tolls, classifications, and charges for service of every kind furnished by it, and all rules and regulations affecting them." Pursuant to Section 4909.18, Revised Code, in pertinent part, "any public utility desiring to establish any rate, joint rate, toll, classification, charge, or rental, to modify, amend, change, increase, or reduce any existing rate, joint rate, toll, classification, charge, or rental, or to modify, amend, change, increase, or reduce, any existing rate, joint rate, toll, classification, charge, or rental, or any regulation or practice affecting the same, shall file a written application with the public utilities commission." In accordance with Section 4905.22, Revised Code, all charges for service shall be just and reasonable and not more than allowed by law or by order of the Commission.

III. DISCUSSION AND CONCLUSIONS

A. Procedural Issues

Initially, we note that IEU-Ohio renews its objection to the attorney examiner's denial of its motion to strike testimony of OCC's witness, Mr. Yankel. During the evidentiary hearing, the Companies moved to strike certain prefiled testimony of Mr. Yankel on the basis that, by sponsoring his testimony, OCC allegedly breached its duty to be bound to the stipulation adopted by the Commission in the *FirstEnergy 2009 ESP Case,* and IEU-Ohio joined the Companies' motion (Tr. I at 203). Specifically, IEU-Ohio argues that, in his testimony on behalf of OCC, Mr. Yankel made recommendations contrary to the rate design and revenue distribution results that OCC agreed to support as part of the stipulation. The attorney examiner denied IEU-Ohio's motion to strike (Tr. I at 210). IEU-Ohio renews its assertion that the attorney examiner's ruling was improper and argues that the Commission should reverse this ruling pursuant to Rule 4901-1-15(F), Ohio Administrative Code (O.A.C.).

OCC responds that the Commission should uphold the attorney examiner's ruling on the basis that the objection at the hearing was poorly articulated and unsupported and that IEU-Ohio's brief does not further explain or support its objection. Further, OCC points out that the stipulation that is the subject of IEU-Ohio's objection was part of the case that determined the Companies' standard service offer rates for the period ending May 31, 2011, and that Mr. Yankel's testimony was a proposal for prospective rates that explicitly recognized the Commission had made determinations regarding Rider RGC levels through the end of May 2011 (OCC Ex. 1 at 3).

The Commission agrees with OCC that the attorney examiner was correct in overruling IEU-Ohio's objection. The Commission notes that Mr. Yankel's testimony addressed a proposal for rates commencing after May 2011, at which time the rates at issue in the *FirstEnergy 2009 ESP Case* will no longer be in effect (OCC Ex. 1 at 3; *FirstEnergy 2009 ESP Case*, at 8). Consequently, the stipulation at issue in *FirstEnergy 2009 ESP Case* is not an appropriate basis to strike Mr. Yankel's testimony.

B. Issues in the proceeding

The substantive issues before the Commission may be summarized into the following key questions: (1) which customers should receive a discount; (2) what is the amount of the discount that should be provided to customers; (3) is there any basis to deny the Companies recovery of the cost of the discount provided to customers; (4) how should the cost of the discount be recovered from customers; and (5) should an alternate proposal, such as that proposed by OPAE, be adopted.

(1) Which customers should receive a discount?

In the Finding and Order issued on March 3, 2010, in this proceeding, the Commission provided interim rate relief for all-electric residential customers of FirstEnergy. Therefore, the first question before the Commission is which customers should receive a discount as part of a long-term resolution of the issues raised in this proceeding.

The Companies propose that the Rider RGC credit should apply only to those residential customers who use electricity as the primary or sole source of heat (electric heating customers). The Companies contend that the evidence in the record demonstrates that nearly half of the 318,000 customers receiving interim rate relief are not using electricity as their primary source of heat (Company Ex. 1 at 38-39). Staff also recommends that, beginning September 1, 2011, only customers who heat with electricity should be eligible for the discount provided by Rider RGC (Staff Ex. 1 at 4).

OCC notes that this proceeding has revealed that many customers receiving the interim rate relief ordered by the Commission do not have electricity as the major energy source for heating their homes. OCC recommends that the new rates resulting from this proceeding should be charged to residential customers who heat with electricity. OCC further notes that the process proposed by FirstEnergy's witness, Mr. Ridmann, recognizes that a statistical review of customer accounts only provides indications of which residences are less likely to be primarily heated using electricity and that FirstEnergy's proposed procedure provides protections against the arbitrary removal of customers from the group of electric heating customers. OCC recommends that any communications from FirstEnergy regarding the potential removal of customers from the group of electric heating customers be subject to review by Staff and OCC.

The Commission agrees with the recommendations of the Companies, OCC, and Staff on this issue. We find that any discounts provided over the long term should be limited to residential electric heating customers rather than residential all-electric customers generally. Limiting future discounts to electric heating customers will provide rate relief to the customers most in need while serving to mitigate the cost of providing discounts (Company Ex. 1 at 38-39). Further, the Commission finds that the proposed process outlined at the hearing is an appropriate method for determining which customers are electric space heating customers (Company Ex. 1 at 38-40).

Consistent with our determination to extend discounts to electric heating customers, while mitigating the cost of such discounts to other customers, the Commission will focus the discounts in those months when electric heating is used most heavily. In doing so, the Commission notes that evidence indicates that the discount has been applied during months reflecting air conditioning usage (Tr. V at 857-859). As this case concerns discounts for electric heating, the Commission finds it is appropriate to limit the RGC discount to billing periods beginning on October 31 and ending on March 31. The RGC discount will not apply during the generally milder autumn and spring shoulder periods. This refinement better accomplishes the objectives of avoiding significant rate shock for electric heating customers while mitigating the impact of the discounts on other customers.

(2) <u>What is the amount of the discount that should be provided to electric heating customers?</u>

The next issue before the Commission is determination of the appropriate amount of discount that should be provided to electric heating customers. The proposals provided by the parties include (a) an approximate three-year phase out of Rider RGC characterized by a 12 percent cap on increases above the prior year's bill at the same usage, as proposed by the Companies; (b) a five-year phase out of Rider RGC characterized by frozen rates for the first year and a 25 percent decrease in the RGC discount for each subsequent year until its elimination in year five, as proposed by Staff; and (c) an annual band assessment whereby the RGC rider and electric heating discount would be continued indefinitely to maintain a range of 30 to 40 percent discount for electric heating customers relative to standard customers, as proposed by OCC.

a. The Companies' Proposal

The Companies begin their discussion by explaining that special rates for electric heating customers were first adopted in response to concerns about a natural gas shortage and that the rates initially offered benefits to both utilities and consumers (Company Ex. 1 at 8). The Companies continue that, with the establishment of a competitive generation market by SB 3 in 1999, the rationale for continuing to offer special electric hearing rates changed. Specifically, the Companies explain that, as a result of SB 3, the Companies no longer own generation plants and, consequently, the Companies' generation costs are currently the same for all customers (Company Ex. 65 at 18-19). Further, the Companies point out that the passage of Senate Bill 221 (SB 221) established a state policy encouraging energy efficiency and conservation. The Companies contend that discounted electric heating rates, which provide a higher level of discount for customers utilizing more electricity, run counter to the energy efficiency and conservation goals of SB 221. In light of this legislation, the Companies conclude that discounts to electric heating customers cannot be based upon historic cost justification, as undisputed evidence shows that the rationales for special electric heating rates or discounts have been eliminated (Company Ex. 1 at 12-13).

The Companies propose that the Commission phase out Rider RGC gradually while Riders RDC and EDR are maintained. Specifically, the Companies propose that, beginning with the 2011-2012 winter heating season, Rider RGC be reduced so that electric heating customers will experience no more than a 12 percent increase in their bills as compared to their 2010-2011 winter heating season bills at the same usage, and that a similar reduction of Rider RGC occur each subsequent year (with the same 12 percent cap on the prior year's bill at the same usage) until Rider RGC falls to zero. The Companies also note that, although the Commission phased out the separate electric heating rate schedules, electric heating customers have continued to receive a discount relative to standard residential customers. Further, the Companies claim that their proposal is the least costly for the residential customers who bear the burden of paying the costs of Rider RGC.

Staff states that it supports the portion of the Companies' proposal suggesting a gradual phase out of Rider RGC; however, Staff contends that a three-year phase out period is not long enough to appropriately mitigate the rate impact for the residential electric heating customers. Without commenting on the specific time frame for the phase out, IEU-Ohio also expresses its support for the Companies' recommendation to phase out the special rates available to electric heating customers.

OPAE disputes the Companies' proposal, contending that Rider RGC must be maintained for as long as possible in order to minimize the rate shock that would result if rates for electric heating customers were to reflect the rates for standard electric customers. OPAE reasons that, even if the RGC discount is not sustainable at its current levels due to its impact on other customers, its permanent continuation in some amount is essential to the economic health of residential communities. OPAE states that, if Rider RGC must be phased out entirely, it should be phased out over a minimum eight-year period.

OCC opposes the Companies' proposal, arguing that the Companies erroneously focus only on the Companies' cost of acquiring generation and fail to recognize the overall cost differences to serve customers with different demand profiles. OCC admits that, after the passage of SB 221, the Companies acquire generation by contract with successful bidders in generation supply auctions; however, OCC avers that the Commission has continued to distinguish between the contractual cost of acquiring wholesale generation supply and the cost of service that should be considered in developing appropriate retail pricing for customers, citing *FirstEnergy 2009 ESP Case*, Opinion and Order (December 19, 2008) at 23. Additionally, OCC submits that the Companies' witness, William Ridmann, acknowledged that, to his knowledge, the Companies do not collect load information that permits cost of service studies to differentiate between electric heating and standard residential customers (Tr. I at 153-154).

b. OCC's Proposal

In its brief, OCC requests restoration of the discounted relationship between the standard residential distribution and generation rates and the discounted electric heating residential distribution and generation rate that existed prior to elimination of the discounted rates. OCC proposes that this be accomplished by an annual band assessment. In support of its position, OCC advocates the application of two regulatory principles, cost of service and gradualism. Additionally, OCC contends that the passage of legislation, including SB 221, has not modified these principles. Regarding cost of service principles, OCC argues that rates going forward should recognize the reduced cost of serving electric-heated residences. In support of this proposition, OCC cites Mr. Yankel's testimony that it is a "long recognized fact that All-Electric customers tend to be less expensive to serve than Standard service customers" (OCC Ex. 1 at 35). Mr. Yankel supported his statement by opining that cost-of-service studies conducted by the Companies in 1989 and 1995 reflect that the cost of serving electric heating customers is less than that for its standard residential customers, and that deregulation of the generation function has no effect on the costs of serving specific load patterns (Tr. I at 223; OCC Ex. 1 at 13-15, 20-21, 26-27).

Mr. Yankel testified that the specific costs of service are presently unknown because the Companies have not conducted a cost of service study during the last fifteen to twenty years (OCC Ex. 1 at 33). However, Mr. Yankel testified that, because rates were developed in order to meet a utility's revenue requirement and in order to reflect the differences in cost causation between rate schedules, use of a band that reflects the traditional rate relationship between standard and electric heating customers will establish a discount that is sensitive to overall costs of providing service (OCC Ex. 1 at 33). Consequently, Mr. Yankel surveyed the relative relationships between standard bills and electric heating bills for OE, CEI, and TE in the mid 1990s and in December 2008, and averaged the percentages for all three companies (OCC Ex. 1 at 34-35). Based on the average relationship, Mr. Yankel proposes that setting electric heating rates at 65 percent of the standard rate would be consistent with the traditional relationship between electric heating and standard customers (OCC Ex. 1 at 34-35). Finally, regarding the gradualism principle, OCC argues that the adjustment of electric heating rates from their current level of discount to the relationship recommended by Mr. Yankel be gradual to prevent a period of rate shock.

Consequently, OCC proposes that, in accordance with Mr. Yankel's recommendation, the total bill for electric heating customers at a 3,500 kWh usage level be set at 65 percent of the bill for a similarly situated standard customer, with an annual review to determine the present relationship between the standard rate and the rate for electric heating customers at the 3,500 kWh usage level (OCC Ex. 1 at 34-35, 37-38). That relationship would then determine the amount of Rider RGC that is necessary. After the mid-point of the annual band assessment is reached, OCC proposes that the electric heating rates should be examined on an annual basis and adjusted if the relationship between the rate levels strays beyond the band (the 35 percent discount, plus or minus five percent). Further, OCC argues that the rates proposed by Mr. Yankel should be available for all electric-heated homes, despite changes in ownership.

The Companies assert that OCC's proposal should be rejected. The Companies argue that the discount calculated by Mr. Yankel, OCC's witness, is flawed because it is based on outdated cost-of-service studies and no other evidence was presented to support OCC's cost-of-service justification. To the contrary, the Companies argue that, per the testimony of the Companies' witness, Mr. Ridmann, it is undisputed that the Companies pay the same price for generation service for electric heating customers as standard residential customers (Tr. I at 152-153; Company Ex. 65 at 18-19).

Finally, the Companies argue that OCC has provided no justification for continuing Rider RGC indefinitely. In support of its argument, the Companies contend that "gradualism" supports a transition period, not an ongoing discount, and that no credible evidence demonstrated that the Companies promised that a specific rate, rate schedule, or discount would be available forever. More specifically, as to oral promises, the Companies point out that some of the oral promises testified to at the public hearings involved assurances the witnesses received from their homebuilders, and not from the Companies, or involved statements whereby the Companies merely advised individuals regarding their eligibility for a discounted rate, but made no promises about the duration or amount of the rate (Sandusky Tr. 15-16, 36, 72-76, 80-81, 86, 88-89, 98-99; Strongsville Tr. 15, 39, 44, 119-120, 172; North Ridgeville Tr. 38-39, 46, 63-64, 125-126, 141, 146; Kirtland Tr. 33-34, 106, 110-111, 128, 130-131, 161, 169, 173-174, 180-181).

Additionally, as to written promises, the Companies question the authenticity of a letter allegedly authored by a former representative of the Companies (Andreatta letter) and assert that the content of the letter was unquestionably wrong. The Companies assert that another such letter (Willitts letter) was merely informational and did not form a contract (Strongsville Ex. 2; CKAP Ex. 31). Further, the Companies contend that, even if an oral or written promise was made, it would not be binding or enforceable against the Companies. The Companies also argue that, contrary to the testimony of OCC's witnesses, the Companies' marketing materials were not deceptive because the materials did not promise that the rates were permanent and, further, that no reasonable consumer would have interpreted such materials that were silent about the term of the rate as a guarantee of the rate or discount forever.

Staff also recommends that OCC's proposal not be adopted. Staff argues that OCC's witness, Mr. Yankel, admitted that he was not aware of whether OCC's proposal was inconsistent with any statutory mandates requiring that the Companies reduce usage in order to meet energy efficiency benchmarks, and that Mr. Yankel's justification for the discount was based on outdated cost-of-service studies from the Companies (Tr. I at 220-224). Staff further points out that Mr. Yankel did not know whether the Companies' rates were currently cost-based or what percentage of an electric heating customers' bill and an average residential customers' bill represented distribution costs (Tr. I at 224-227). Additionally, Staff points out that Mr. Yankel proposed the discount should begin at 1000 kWh per month, but admitted that he did not know if this represented the typical base load for an electric heating customer (Tr. I at 244).

c. Staff's Proposal

Staff initially notes that, even after the deregulation of generation, electric heating customers have continually received a discounted rate in comparison to standard service customers. Staff further points out that the bills of electric heating customers are expected to decrease in terms of percentage and dollar amount per kWh when Rider RDD terminates in May 2011. Additionally, Staff avers that changes in the Companies' rate design that eliminated the special electric heating rates were necessary due to changes in law that restructured the electric industry and established a policy encouraging conservation. Consequently, Staff concludes that a discounted rate is no longer an option as it cannot be justified on the grounds upon which it was established.

Further, Staff asserts that the lengthy duration of the discounted rates alone is not a sufficient reason to continue the rates permanently.

Staff proposes adoption of a long-term strategy of moving in the direction of cost causation and avoidance of practices that result in cross-subsidies from other customers. Further, Staff emphasizes the rate-making principle of gradualism and correspondingly recommends that prices be increased gradually to give electric heating customers time to adjust and respond to the ultimate target price change. The specific tenets of Staff's proposal include (a) that the RDC and EDR credits remain in place for electric heating customers; (b) a gradual phase out of Rider RGC over a five-year period; (c) elimination of the "water heating only" EDR discount beginning in the 2012-2013 winter heating season; (d) that whichever electric heating credits are applicable to the grandfathered electric heating accounts should stay with the property regardless of change of ownership; and (e) that customers who are former load management customers that do not heat with electricity should be eligible for the RDC and EDR discount, but should not be eligible for the RGC discount beginning September 1, 2011.

Regarding the gradual phase out of the RGC discount, Staff specifically recommends that, in the first year (2011-2012 winter heating season), electric heating customers' rates remain frozen at current levels. In the second year (2012-2013 winter heating season), Staff recommends that electric heating customers receive 75 percent of the RGC discount, for usage up to 7500 kWh. In the third year (2013-2014 winter heating season), Staff recommends that electric heating customers receive 50 percent of the RGC discount, up to a usage of 7500 kWh. In the fourth year (2014-2015 winter heating season), Staff proposes that electric heating customers receive 25 percent of the RGC discount up to 7500 kWh. Finally, in the fifth year (2015-2016 heating season) and beyond, Staff recommends that electric heating customers receive no RGC discount. Staff notes, however, that even with elimination of Rider RGC, electric heating customers will continue to enjoy a 25 percent discount in comparison to other standard service offer customers under Staff's proposal.

IEU-Ohio states that it supports Staff's recommendation to the extent it proposes the special rates available to electric heating customers be phased out. The Companies, however, assert that Staff's proposal should be rejected. Specifically, the Companies contend that Staff's proposal is the most costly to standard residential customers and that the Companies' proposal can accomplish many of the same goals at a lower cost. Specifically, the Companies point out that Staff's proposal utilizes a five-year phase out period, which consequently imposes higher costs on residential consumers than the approximate three-year phase out period included in the Companies' proposal. Additionally, the Companies contend that Staff offers no justification to permit the discounted rate to stay with the residence despite change of ownership. The

Companies assert that, in contrast, allowing the rate to stay with the residence would be contrary to the Companies' practice and the Commission's order in *In re FirstEnergy*, Case No. 05-1125-EL-ATA, Entry on Rehearing (March 1, 2006) at 8-9, which provided that the electric heating rate would not be available to customers who purchased homes primarily or exclusively with electric heat after January 1, 2007. Additionally, the Companies point out that the record contains no credible evidence that the Companies ever promised the discounts would remain with the residence and no evidence that electric-heated homes will suffer loss in value absent special rates. The Companies support this assertion by challenging the accuracy of the calculations and analysis of the CKAP Parties' witness, Mr. Frawley.

Staff replies to the Companies' criticism of Staff's proposal by opining that a five-year phase out period will better accomplish the goal of mitigating rate impact for electric heating customers than a three-year phase out period. Additionally, Staff states that, contrary to the Companies' contention, its proposal that the rate stay with the residence is based upon a prior Commission order in this case, citing the Second Entry on Rehearing (April 15, 2010) at 2.

OPAE initially challenges Staff's proposition of a straight fixed variable (SFV) design as an alternative to use of Rider RGC. OPAE opposes the SFV rate design on the basis that it believes this rate design is harmful to low-use, low-income customers because it frustrates the efforts of customers to reduce their bills through energy efficiency and conservation. Additionally, as with its argument against the Companies' proposal, OPAE proposes that, if Rider RGC is phased out entirely, the phase out period should be eight years at a minimum.

d. CKAP Parties' claims

The CKAP Parties argue that the Companies' marketing practices operated to form contracts. First, the CKAP Parties contend that the Companies undertook an advertising campaign to tout the benefits of electric-heated residences and to entice customers to convert to electric heating by offering a discounted rate and setting eligibility requirements (See, e.g., Kirtland Tr. at 95-100). Additionally, CKAP asserts that the Companies and their customers mutually benefitted from the electric heating relationship for over fifty years. Consequently, the CKAP Parties request that the Commission order reinstatement of the previously available electric heating discount.

Initially, the CKAP Parties argue that the Companies entered into contracts with homebuilders by enticing them to build electric-heated residences with incentives such as advertising dollars and equipment rebates (Strongsville Tr. at 56-57; Kirtland Tr. at 84-86; Sandusky Tr. at 44-45). The CKAP Parties specifically point to the testimony of their witness, Michael Schmitt, concerning agreements entered into between his company, Bob Schmitt Homes, and FirstEnergy that specifically provided for a discounted electric rate to his homebuyers and referred to the discounted electric heating rate (Tr. II at 348-349). Additionally, the CKAP Parties argue that, because of the exclusive nature of the electric heating program and the fact that many of these homes were built without gas lines, a permanent captive audience was created (See Tr. III at 577). Correspondingly, the CKAP Parties contend that the electric heating discount should have the same permanency.

Additionally, the CKAP Parties contend that the Companies created contracts with customers through direct contact, communicating their offer of discounted rates to customers in exchange for customers' use of electricity to heat their homes. In support, the CKAP Parties cite to a public comment filed by an HVAC contractor who stated that employees of the Companies told heating contractors to tell their customers the discounted rate would be available through 2005, but that there would always be a special rate for electric homes (Public Comment (November 4, 2010) at 1). The CKAP Parties also point to the Andreatta letter, which informed a customer of OE that the discounted rate would be guaranteed for as long as the customer intended to use it (Strongsville Ex. 2). The CKAP Parties further cited to testimony by various customers at the public hearings that a promise was made that they would be "grandfathered" into the electric heating discount and that there was no communication that suggested the discount could ever be terminated (Strongsville Tr. at 72-75, 87-90, 125-126; Kirtland Tr. at 37-38, 77-78; Tr. II at 455-457).

The CKAP Parties also aver that employees of the Companies enticed customers to switch to electric heating by offering a discounted electric rate. In support, the CKAP Parties cite the testimony of several former employees of the Companies offered at the public hearings that they were encouraged by the Companies to inform customers that the Companies were committed to selling the electric heating lifestyle going forward and that "the rate is still here" (North Ridgeville Tr. at 116-118; Maumee Tr. at 23-25; Kirtland Tr. at 38-40, 44-45; Tr. III at 558, 569). Further, the CKAP Parties state that the former employees testified to demonstrate that the Companies also encouraged its employees to push the sale of electric homes by offering incentives (Kirtland Tr. at 41-42).

Next, the CKAP Parties address the potential consequences of removal of the discounted rate. The CKAP Parties contend that testimony at the public hearings demonstrated that customers experienced large bill increases or "rate shock" during the 2009-2010 winter heating season after the discount was removed (Kirtland Tr. at 130-131, 144; Strongsville Tr. at 18, 24, 32-33, 36, 39-40, 53, 71, 78, 110, 120, 142, 167-168, 183-184; North Ridgeville Tr. at 101-103, 147-148). Additionally, the CKAP Parties argue that testimony at the public hearing demonstrated that many electric heating homeowners did not have the ability to convert to another energy system due to lack of the necessary infrastructure in the neighborhood or in their homes, or had obtained estimates showing a high cost to convert their homes from electric heating to mixed-utility (Kirtland Tr. at 128-129, 146-147; Strongsville Tr. at 142-143). The CKAP Parties continue that homeowners and realtors testified at the public hearings that the stigma of high heating bills had made electric-heated homes unmarketable (Strongsville Tr. at 115-118, 142-143, 173-174; North Ridgeville Tr. at 20; Kirtland Ex. 94). Additionally, the CKAP parties' witness, Larry Frawley, testified that owners of electric-heated homes were receiving less for the sale of their homes than owners of mixed-utility homes (CKAP Ex. 1 at 4.)

Based upon the preceding, the CKAP Parties recommend that the Commission order restoration of the previously available electric heating discounted rates and, additionally, that the Commission should take measures to remedy the losses imposed by the actions of the Companies.

The Companies initially address the CKAP Parties' argument by contending that the CKAP Parties orchestrated a campaign to manipulate the proceedings and generate testimony favorable to a certain outcome (See Company Ex. 3A at 33; Company Exs. 31-39). In particular, the Companies argue that the CKAP Parties improperly influenced the public hearings (See Company Ex. 3A at 192; Company Exs. 16, 17, 19). Consequently, the Companies argue that, in light of evidence of the campaign, the Commission should give no weight to the emails and letters submitted by customers to the Commission urging restoration of the discount.

Next, the Companies contend that no evidence was presented to support the CKAP Parties' contention that the Companies made promises to homeowners that the special rates would be permanent. Specifically, the Companies argue that the few documents presented at the hearing did not support any promise or guarantee. In contrast, the Companies point out that some of the marketing materials presented specifically disclaimed that rates were subject to change or referenced tariff schedules that contained that information (Kirtland Exs. 16, 17; Sandusky Ex. A; Company Exs. 53, 54; CKAP Ex. 32). The Companies argue that even the marketing materials presented that did not contain such a disclaimer still gave rise to a reasonable inference that any utilities' rates were subject to change.

Staff recommends that no weight be assessed to the CKAP Parties' real estate witness, Mr. Frawley, on the basis that he was not competent to perform an analysis of real estate value comparisons and that his testimony demonstrated that he relied on reports in his analysis that he knew contained inaccurate information (See Tr. II at 290, 303-306). Additionally, as to CKAP's assertion that homeowners and realtors testified at the public hearings that the stigma of high heating bills had made electric-heated homes unmarketable and caused them to lose significant value, Staff asserts that it is not possible to determine what portion of decline in value, if any, was attributable to the heating method of the home.

Similar to the Companies' proposition, Staff also argues that no credible evidence was heard to demonstrate that the Companies promised a permanent discounted rate to electric heating customers. Staff posits that the two letters produced at the hearing allegedly containing a promise were able to be explained in their proper context or shown to be in conflict with the Companies' rules and regulations (Strongsville Ex. 2; CKAP Ex. 31). Additionally, Staff points out that the CKAP Parties' witness, Michael Schmitt, testified that Bob Schmitt Homes had received documents from CEI and OE advising that the rates were subject to change (Tr. II at 425). Staff concludes that, considering the two letters in the context of the other evidence presented as to the Companies' tariffs, standard rules and regulations, and the total number of electric heating customers being served, there is insufficient credible evidence that the Companies promised a discounted rate to electric heating customers forever.

Staff additionally points to the testimony of the CKAP Parties' witness, Michael Challender, a former marketing representative of the Companies, that he never made misleading statements during his employment with the Companies (Tr. III at 592), that there could have been no contract or promise for certain electric service rates between the Companies and Bob Schmitt Homes because customers take service under the terms of a tariff approved by the Commission (Tr. III at 586-587), that an analysis form provided to prospective homebuyers by the Companies contained a disclaimer that rates were subject to change (Tr. III at 593-594; Company Ex. 53), and that he never promised any customer that a specific rate was guaranteed (Tr. III at 601).

OMA and OHA urge the Commission, in considering the CKAP Parties' argument, to recognize that a significant number of the 1,220 letters (and many form letters) filed in the docket urging continuation of the discount came from members of CKAP. OMA and OHA further assert that the CKAP Parties' advocacy in this case was funded by Bob Schmitt Homes, one of Ohio's largest builders of electric-heated homes (Tr. II at 413, 439).

OMA and OHA further argue that the record is devoid of any apples-to-apples comparison of energy costs demonstrating that electric heating customers' electric rates would be unreasonable absent a discount. OMA and OHA argue that mixed utility residential heating customers have endured the volatility of the global energy markets for decades, and question whether customers who have enjoyed the electric heating discounts would be willing to subsidize their neighbors' natural gas costs should those prices spike. OMA and OHA further note that the record contains no credible analysis comparing the overall energy costs of mixed utility residential customers to electric heating residential customers to demonstrate any disparity that might justify a cross-class subsidy.

e. Commission Decision

Initially, the Commission wishes to emphasize that a solution to the issues presented in this case requires a balancing of many different important factors, including cost causation, the avoidance of rate shock, the principle of gradualism, and the structural and policy changes that occurred with the passage of SB 3 and SB 221.

The Commission further notes that the parties have proposed discounts for electric heating customers ranging from approximately 23 percent to 40 percent of the standard residential bill. This includes the Companies' proposal of retaining Riders RDC and EDR, which result in an approximate 25 percent discount for electric heating customers, along with the approximate three-year phase out of the Rider RGC using a 12 percent cap on increases above the prior year's bill at the same usage (Company Ex. 1 at 6-7, 41); Staff's proposal of retaining Riders RDC and EDR, along with a five-year phase out of Rider RGC with frozen rates for the first year and a 25 percent decrease in the RGC discount for each subsequent year until its elimination in year five (Staff Ex. 1 at 3); and OCC's proposal of retaining Riders RDC and EDR and creation of an annual band assessment whereby Rider RGC and would be continued indefinitely and adjusted to maintain an approximate 30 to 40 percent overall discount for electric heating customers relative to standard customers (OCC Ex. 1 at 4-5).

To more thoroughly illustrate the effect of the parties' proposed discounts, the Commission notes the following bill comparison information for CEI under several different scenarios at the 2000 kWh usage level. If Riders RDC and EDR are retained and Rider RGC is reduced to 50 percent of its current level, an electric heating customer's bill will be $135.98 or 59 percent of a standard residential bill of $231.98. If Riders RDC and EDR are retained and Rider RGC is reduced to 25 percent of its current level, an electric heating customer's bill will be $156.98 or 68 percent of a standard residential bill of $231.98. Finally, if Riders RDC and EDR are retained and Rider RGC is eliminated, an electric heating customer's bill will be $177.98 or 77 percent of a standard residential bill of $231.98 (Staff Ex. 1A, Attachment 2(a)). On the other hand, under OCC's proposal, an electric heating customer's bill may vary between 60 and 70 percent of a standard residential bill, or $139.19 to $162.39.

The Commission believes that the proposal by the OCC is flawed because it abandons any pretense of gradualism and runs the risk of rate shock in the first year. OCC's proposal would significantly increase rates for electric heating customers this year. For example, according to the testimony of OCC's witness, Mr. Yankel, OCC's proposal would result in a winter bill of $261.48 for a CEI electric heating customer using 3500 kWh per month (OCC Ex. 1 at 36), an increase of 44 percent above the 2010/2011 winter bill of $181.91 for the same usage (Staff Ex. 1A, Attachment 2(a)). Further, this abrupt increase, which OCC proposed to take effect on September 1, 2011, would leave electric heating customers little time to prepare for higher bills or to take steps to help conserve electricity.

At the same time, OCC's proposal fails to take any steps to gradually reduce the discount over time. OCC's proposal fails to acknowledge the significant restructuring of the electric industry by the General Assembly in SB 3 and SB 221. In SB 3, generation, distribution, and transmission rates were unbundled (Company Ex. 1 at 10-11). SB 3 also directed electric utilities to divest their generation assets (Company Ex. 1 at 11). Consequently, as a result of the stipulations approved by the Commission in the *FirstEnergy 2009 ESP Case* and the *First Energy 2010 ESP Case*, the Companies' generation costs are the same for all customers (Company Ex. 65 at 18-19). Further, the Commission agrees with the Companies that generation rates which charge the customer less than the cost of obtaining generation are antithetical to the energy efficiency policy goals embodied in SB 221.

The Commission notes that the proposals by Staff and FirstEnergy do provide for the phase out of the discounts, consistent with the principle of cost causation and with the legislative changes embodied in SB 3 and SB 221 (Staff Ex. 1 at 3; Company Ex. 1 at 6-7, 41). However, the Commission finds that the three-year and five-year phase outs of Rider RGC proposed by FirstEnergy and Staff also fail to provide electric heating customers with sufficient time to adjust to the gradual elimination of the discount.

With respect to the arguments regarding the existence of contracts raised by the CKAP Parties, the Commission initially finds that the CKAP Parties have not demonstrated that such claims are subject to our jurisdiction. As the Commission noted in our Second Entry on Rehearing in this proceeding, the Commission has no power to determine legal rights and liabilities involving contract rights even though a public utility is involved. *Marketing Research Service, Inc., v. Pub. Util. Comm.* (1987), 34 Ohio St.3d 52, 56. Second Entry on Rehearing (April 15, 2010) at 3. In addition, in the Fifth Entry on Rehearing, the Commission reiterated that, although we would exercise our jurisdiction over FirstEnergy's rates and marketing practices in this proceeding, we lack jurisdiction to hear "pure contract" claims, including claims based upon reliance or promissory estoppel. Fifth Entry on Rehearing (November 10, 2010) at 5. Further, even if the CKAP Parties had demonstrated our jurisdiction over these claims, the Commission finds that the evidence in the record does not demonstrate that a contract exists, or has ever existed, between electric heating customers and the Companies. Although the CKAP Parties summarily claim that contracts exist, the CKAP Parties have never produced a written contract between the Companies and any customer, and the CKAP Parties did not even attempt to establish that any alleged statements by the

Companies met the requirements for an oral contract under Ohio law. Further, the CKAP Parties do not address the fact that electric heating customers have continuously received discounts from standard service offer rates in the form of Riders RDC and EDR (Staff Ex. 1A, Attachment 1).

The Commission notes that Section 4928.144, Revised Code, authorizes the just and reasonable phase in of any rate established under Section 4928.143, Revised Code, as the Commission considers necessary to ensure rate stability for consumers. Therefore, the Commission finds that, in light of the regulatory changes resulting from SB 3 and SB 221, and after balancing the need to avoid rate shock with the principles of gradualism and cost causation, the appropriate solution is to extend the current freeze on customer rates for two years, consistent with Staff's recommendation, through May 31, 2013. This will allow electric heating customers time to prepare for increased rates and to take steps to mitigate their usage. During this time, FirstEnergy should annually adjust Rider RGC to maintain the rate freeze. Moreover, the Commission agrees with OPAE that an eight-year phase out is optimal. Therefore, following this two-year freeze, the Commission directs FirstEnergy to phase out Rider RGC from its March 31, 2013, level by implementing six equal annual reductions, effective October 31 of each year. However, nothing in this Opinion and Order should be construed as reducing the existing discounts provided by Riders EDR and RDC. Finally, the Commission directs that any educational materials produced by the Companies should be reviewed by staff prior to distribution to the public and that the Companies and Staff explore an online tool to assist electric heating customers to calculate their bills.

In conjunction with the principles of gradualism, the Commission additionally finds that options should be created for electric heating customers to offset the decline of the discount in a substantive way. The Commission finds that this goal could be accomplished through collaborative efforts with the purpose of increasing energy efficiency for electric heating customers. Therefore, the Commission directs the Companies to discuss potential programs for electric heating customers with its energy efficiency collaborative and to include any resulting programs in its next three-year program portfolio plan.

Further, the Commission notes that we have initiated a docket to investigate the potential for better aligning electric utility rate designs with state policy regarding energy efficiency and peak demand reduction. *In the Matter of Aligning Electric Distribution Utility Rate Structure With Ohio's Public Policies to Promote Competition, Energy Efficiency, and Distributed Generation,* Case No. 10-3126-EL-UNC, Entry (December 29, 2010). The Commission believes that potential changes in rate design resulting from this investigation may also better reflect cost causation principles and serve to mitigate the phase out of the discounts provided to electric heating customers.

Finally, although the Commission was not persuaded by the testimony that home values are directly related to the level of the discounts provided to electric space heating customers, the Commission wishes to minimize any risk of our action today in impeding the recovery of the housing market in the Companies' service territories. Therefore, the Commission finds that homebuyers who purchase a home that uses electricity as the sole or primary source of space heating will be entitled to receive the same discount described herein as long as the homeowner otherwise qualifies for such discounts, maintains electricity as the sole or primary source of heating, and the discounts remain in effect. However, nothing in this Opinion and Order should be construed to extend the electric heating discount to homes constructed after January 1, 2007, as previously ordered by the Commission. *FirstEnergy RCP Case* at 8-9.

(3) Is there any basis to deny the Companies recovery of the costs of the discount provided to electric heating customers?

The Companies propose that they should be authorized to recover the deferrals resulting from Rider RGC with carrying charges. Additionally, the Companies argue that they should be permitted to accrue deferred costs equal to the difference between what customers would have otherwise been billed and what they were actually billed.

OCC maintains that the Companies engaged in unfair and deceptive marketing practices and that, consequently, collections on deferrals should not be permitted. Specifically, OCC argues that the Companies unfairly and deceptively enticed residential customers and housing developers to commit to electric heating before the Companies eliminated the discounted rates. As examples, OCC cites to customers' testimony at the public hearings that they relied on the Companies' representations when building or converting their homes to electric heat, as well as the Andreatta letter allegedly authored by a former representative of the Companies which made representations regarding the discounted rate for electric heating customers (Sandusky Tr. at 71-77, 80-81, 86-87; Strongsville Tr. at 7, 14-16, 24, 44-45, 57-58, 124-125, 142; North Ridgeville Tr. at 51, 64, 71, 140-143; Kirtland Tr. at 24, 33-34, 106, 110-111, 166-167 174, 180, 184; Strongsville Ex. 2).

Additionally, OCC contends that the Companies should not be permitted to accrue carrying charges resulting from reinstatement and extension of electric heating rates or collect on the deferrals because the Companies have failed to demonstrate that significant harm will result if the Companies are denied the carrying charges. Alternatively, OCC argues that, even if carrying charges are permitted, they should be calculated net of tax, instead of the Companies' position that carrying charges should be calculated without reduction for accumulated deferred income tax.

The Companies reply to OCC's assertion by arguing that there is no requirement that the Companies demonstrate significant harm in order to recover carrying charges. Additionally, the Companies allege that OCC has cited no authority that justifies it forgo deferrals previously authorized by the Commission due to alleged unfair and deceptive marketing practices.

The Commission notes that the deferrals in this case reflect the difference between the Companies' prudently incurred generation costs and the rates paid by customers after the interim rate relief provided by Rider RGC. OCC seeks an extraordinary remedy on this issue. OCC has not cited to a single Commission precedent in which the Commission denied recovery of prudently incurred costs based upon alleged deceptive marketing practices by a public utility in this state. OCC has not cited to a single precedent from another state in which a public utility was denied recovery of costs based upon alleged deceptive practices. Further, despite the unprecedented nature of OCC's arguments, OCC did not present a single expert witness in support of its position. Instead of presenting the testimony of an expert witness demonstrating that FirstEnergy's alleged conduct was so egregious that recovery of prudently incurred generation costs should be denied, OCC relies solely on the testimony of witnesses at the public hearings. Although the Commission understands and is sympathetic to the concerns raised by consumers at the public hearings, the Commission finds that such testimony is insufficient to support the denial of recovery of FirstEnergy's generation costs.

Moreover, OCC summarily claims in its brief that FirstEnergy has violated 4901:1-10-24(D), O.A.C., which provides that no electric utility shall commit an unfair or deceptive act or practice in connection with the promotion or provision of service, including an omission of material information. However, OCC does not differentiate between testimony describing FirstEnergy's alleged actions which occurred prior to the effective date of the Rule from testimony regarding alleged actions which occurred after the Rule was effective. Obviously, testimony regarding alleged conduct prior to the effective date of a Commission rule cannot be used to support a finding that a utility violated that rule.

With respect to alleged conduct prior to the effective date of 4901:1-10-24(D), O.A.C., OCC presented no expert testimony in this proceeding demonstrating that FirstEnergy violated a customary industry practice or standard of care. This failure to present expert testimony regarding customary industry practices or the applicable standard of care is fatal to OCC's claim. OCC has offered no evidence that FirstEnergy's conduct was any different from other utilities that engage in marketing or from other electric utilities that offered special tariff rates to electric heating customers. The Commission cannot deny FirstEnergy recovery of prudently-incurred generation costs in the absence of evidence demonstrating a violation of a Commission rule or a violation of a customary industry practice or standard of care.

With respect to conduct after the effective date of Rule 4901:1-10-24(D), O.A.C., the specific claims made by OCC are not supported by the evidence in the record in this case. OCC claims that the Companies unfairly and deceptively enticed residential customers and housing developers to commit to electric heating before the Companies abandoned support for favorable rate treatment; however, the evidence demonstrates that discounts for electric heating customers have never been eliminated and that electric hearing customers have always received a minimum of two discounts, Rider RDC and Rider EDR (Staff Ex. 1A, Attachment 1; OCC Ex. 1 at 29-30). OCC does not demonstrate how electric heating customers have been misled by FirstEnergy when these customers have always received a significant discount on the rates paid by standard service offer customers.

In support of its claim of pervasive unfair and deceptive marketing practices, OCC relies upon a letter to Thomas Logan from an OE sales representative, Elio Andreatta, in which Mr. Andreatta represents to Mr. Logan that "if Ohio Edison ever removes this rate from our files you would not be in jeopardy of forfeiting this rate. This rate will be guaranteed for you as long as you wish to utilize it" (Strongsville Ex. 2). The Commission notes that, at a minimum, the letter communicated inaccurate information to the consumer, including the position of the author within OE (Tr. I at 123-124), the nature of "experimental" tariffs (Company Ex. 65 at 3), and statements in conflict with the terms of OE's tariffs (Tr. I at 126-128; Company Ex. 46). At most, the letter represents a commitment for a given rate to a single customer, Mr. Logan. However, the testimony in the record clearly demonstrates that such letters were not a common practice of either Mr. Andreatta or OE (Tr. I at 113, 122-123, 130). As such, the letter does not support OCC's claim of pervasive unfair and deceptive marketing practices. Further, OCC failed to demonstrate any nexus between the letter and the marketing practices of CEI or TE, which were not affiliated with OE at the time the letter was allegedly sent.

Further, the Commission finds that the expert testimony of OCC's witness, Mr. Yankel, undermines its arguments on this issue. Although OCC claims in its brief that the Companies increased their sales of electricity by promoting the use of electric heating through unfair and deceptive practices, the testimony presented by Mr. Yankel indicates that the electric space heating rates were not developed for purposes of load retention. Mr. Yankel testified that the electric space heating rate of each utility was not "promotional," which Mr. Yankel defined as a rate below cost causation and being offered for the purpose of retaining load in the face of competitive alternatives (OCC Ex. 1 at 9, 19, 25). Instead, Mr. Yankel testified that the electric space heating rates were independently developed by three unaffiliated utilities on the basis of cost causation

(OCC Ex. 1 at 2, 6). Further, according to Mr. Yankel, "even with the additional differential provided to the summer rates, the rate of return for the All-Electric rate (Res H) was above cost of service" (OCC Ex. 1 at 20, 28). This testimony, from OCC's own expert witness, undercuts OCC's claim that FirstEnergy promoted use of electric heating rates in a manner that was unsustainable at those rates in order to increase its sales of electricity.

Moreover, OCC's arguments regarding the recovery of the costs of any generation discount are at odds with the testimony of its own expert witness. At the hearing, Mr. Yankel testified that the Companies should be permitted to recover the costs of any discount provided to electric space heating customers from other FirstEnergy customers (OCC Ex. 1 at 39-40). Mr. Yankel bases his conclusion that other customers should pay for the discount provided to electric space heating customers on two key facts: the Companies obtain a single average price per kWh from their generation suppliers, and electric space heating customers benefit the system with high usage during times of low hourly energy costs (OCC Ex. 1 at 40). Nowhere does Mr. Yankel claim that the Companies benefit from the discount provided to electric space heating customers.

Therefore, the Commission finds that the evidence in this proceeding does not support OCC's claim that FirstEnergy should be precluded from recovering its prudently incurred costs of generation. Likewise, the evidence in this proceeding provides no basis for the denial of carrying costs related to the deferrals accrued by the Companies as the result of providing discounts to all-electric customers, as ordered by the Commission in this proceeding. Therefore, the Commission finds that, pursuant to Section 4928.144, Revised Code, FirstEnergy should accrue carrying charges, equal to its weighted average cost of debt and without reduction for accumulated deferred income taxes, for all deferrals accrued since the Commission's Finding and Order issued on March 3, 2010.

(4) <u>How should the cost of the discount be recovered from customers?</u>

The Companies propose accruing Rider RGC deferrals for CEI and OE through May 31, 2011, with carrying charges, and then collecting those deferrals from residential customers over the three-year period spanning from June 1, 2011, through May 31, 2014. For TE, the Companies propose collection of the Rider RGC deferral as of May 31, 2011, with carrying charges, over a one-year period from June 1, 2011, through May 31, 2012, from residential customers, as the accrued deferrals from TE are expected to be significantly less than those of CEI and OE.

Staff addresses allocation of shortfall in revenue recovery by recommending that residential customers, and not other customer classes, should be responsible for Rider RGC and associated deferrals and carrying costs. Staff supports its position by claiming that there is no justification for requiring general service customers to pay for revenue shortfalls created by members of the residential class.

OCC argues that the discounted rate for electric-heated homes is analogous to a reasonable arrangement and should be borne by all customer classes, consistent with the Commission's rules regarding reasonable arrangements, which provide that recovery for the reduced revenue is "spread to all customers in proportion to the current revenue distribution between and among classes." Rule 4901:1-38-08(A)(4), O.A.C. OCC argues that the electric heating discount is similar and that charging a broad range of customers for class rate reductions is not unusual.

The Companies dispute OCC's position on this issue by arguing that there is no justification for analogizing the electric heating discount with a reasonable arrangement. In contrast, the Companies point out that OCC's witness, Mr. Yankel, stated that the electric heating discount was not for economic development purposes (OCC Ex. 1 at 9, 19, 25).

IEU-Ohio expresses its support for Staff's proposal to confine the responsibility for the incremental revenue shortfall to the residential customer class. In support of its position, IEU-Ohio points to testimony at the evidentiary hearing by Mr. Fortney, Staff's witness, recommending that the residential class pay the revenue shortfalls created by the electric heating discount deferral on the rationale that the residential class benefited from the electric heating rate deferrals and should therefore pay the costs associated with the benefit (Tr. II at 511).

OMA and OHA argue that financial repercussions associated with the voluntary decision to purchase a residential, electric-heated home should not be borne by commercial or industrial consumers. OMA and OHA aver that the electric heating discount program was not created as a social welfare program, and that, like all consumers of energy, electric heating customers have always faced the prospect that costs could change. OMA and OHA further argue that Rider EDR, which is funded by the Companies' commercial and industrial customers, provides a significant portion of the electric heating discounts. OMA and OHA contend that, based on the thin record in this case, the Commission should not reopen FirstEnergy's ESP stipulations and add to the burden already shouldered by the Companies' commercial and industrial customers. OMA and OHA further assert that the only reliable testimony presented at the hearing was that of Mr. Ridmann and Mr. Fortney, who both recommended that no rate classes other than the residential rate classes should shoulder any portion of the electric heating subsidy beyond that provided by the terms of the *FirstEnergy 2010 ESP*

Case (Tr. I at 184-185; Tr. II at 511). OMA and OHA also argue that Mr. Yankel's opinion that all customer classes should fund Rider RGC is baseless in light of the evidence in the record that the Companies' generation procurement process is reflective of the cost to serve the residential class as a whole (Company Ex. 65 at 18).

OPAE recommends that the recovery of deferrals resulting from Rider RGC should be from all customer classes because, OPAE contends, all classes have benefitted from the winter usage of electric heating customers.

The Commission finds that revenue shortfalls resulting from Rider RGC should be recovered solely from the residential class. As Staff argues, there has been no legitimate reason set forth to justify recovery from all customer classes (Staff Ex. 1 at 4). Despite OCC's assertion that the discounted rate is analogous to a reasonable arrangement, which is typically spread among all customer classes, as the Companies point out, OCC's own witness stated that the discounted rate was not for economic development purposes (OCC Ex. 1 at 9, 19, 25). No other reason for analogizing is apparent. Further, as OMA and OHA point out, nonresidential customers already fund Rider EDR which provides a significant portion of the discount for electric space heating customers.

The Commission further notes that nonresidential customers' obligation to fund Rider EDR was established pursuant to stipulations approved by the Commission in the *FirstEnergy 2009 ESP Case* and the *FirstEnergy 2010 ESP Case*. There is no evidence in the record of new facts or changed circumstances since the adoption of these stipulations. Therefore, there is no basis in the record of this proceeding to modify our orders approving these stipulations or to adjust the nonresidential customers' obligation to fund discounts provided to electric heating customers.

(5) <u>Should OPAE's proposal be adopted?</u>

OPAE recommends that the Commission should order the Companies to implement the long-term pilot program using solar energy incentives as proposed by Ms. Harper. OPAE supports its recommendation by stating that solar resources would allow the Companies to secure generation at a price below that set by auction, which could then be dedicated to electric heating customers in the percentage of income payment plan (PIPP) program in order to ameliorate costs and weatherize their homes (OPAE Ex. 1).

The Companies assert that OPAE's proposal should be rejected. Specifically, the Companies argue that OPAE's proposal is not an actionable recommendation that the Commission can adopt in this proceeding. The Companies point out that OPAE's witness, Ms. Harper, proposed construction of a power plant but lacked basic details such as where the plant should be built, who would be responsible for the plant's construction and cost, and who would own and/or operate the plant (Tr. III at 536-537). The Companies conclude that, because OPAE's plan is merely conceptual, it would be difficult for the Commission to implement OPAE's recommendation. Further, the Companies assert that, even if its proposal were more than a concept, OPAE failed to offer even minimal evidence to demonstrate that the proposal warrants further consideration, either in a formal collaborative process or otherwise. Specifically, the Companies point out that Ms. Harper admitted that, in formulating the proposal, she never calculated the amount of revenue that would be produced by the sale of renewable energy credits in connection with the proposed plan, that she did not research the amount of federal or state incentive funding that would be available for the proposed plan, that, although she suggested excess revenue could fund the weatherization of homes for electric heating PIPP customers, she had no estimate of how much that excess revenue would be, and that she did not calculate the probable price of power from the proposed power plant, but that those figures were calculated by an outside entity (Tr. III at 539-543).

OPAE argues that the Companies' criticism as to the proposal's lack of detail is unfair, as OPAE could not more thoroughly develop the proposal without the Companies' assistance. OPAE contends that the purpose of Ms. Harper's testimony was to cause the Companies to consider an innovative solution by obtaining power at a cost lower than the auction price.

The Commission finds that OPAE's proposal should not be adopted. As the Companies point out, OPAE's proposal lacks such basic details as location of the proposed power plant, payment for the plant's construction, and ownership of the plant (Tr. III at 536-537). Additionally, the OPAE witness who formulated the proposal admitted that she had no estimate as to how much revenue and excess revenue would be produced in connection with the proposed plan, that she did not know what amount of federal or state incentive funding would be available, and that she did not calculate the probable price of power from the proposed plant (Tr. III at 539-543). As OPAE's proposal appears at this time to be no more than a loosely developed concept, the Commission finds that the proposal cannot be adopted as a solution to the issues presented in this case.

C. <u>Commission's Conclusions</u>

On March 3, 2010, the Commission approved FirstEnergy's application filed on February 12, 2010, as modified by the Commission, in order to provide interim relief to all-electric customers. In this Opinion and Order, the Commission makes further modifications to FirstEnergy's application in order to provide a long-term solution to the issues raised in this proceeding.

Accordingly, the Commission finds that, as modified by this Opinion and Order, FirstEnergy's application is not unjust or unreasonable and should be approved. Further, FirstEnergy should file proposed tariffs, consistent with this Opinion and Order, within 30 days.

FINDINGS OF FACT AND CONCLUSIONS OF LAW:

(1) The Companies are electric light companies as defined by Section 4905.03(A)(3), Revised Code, and public utilities pursuant to Section 4905.02, Revised Code; therefore, the Companies are subject to the jurisdiction of the Commission pursuant to Sections 4905.04 and 4905.05, Revised Code.

(2) On February 12, 2010, FirstEnergy filed an application in this proceeding to revise its current tariffs in order to provide rate relief to certain all-electric customers.

(3) Intervention in this proceeding was granted to OCC, IEU-Ohio, OMA, OHA, OPAE, Constellation and the CKAP Parties.

(4) On March 3, 2010, the Commission issued its Finding and Order in this proceeding, providing interim rate relief for all-electric residential customers.

(5) On September 24, 2010, the Staff filed its report as directed by the Commission.

(6) Local public hearings were held pursuant to published notice in Sandusky, Maumee, Strongsville, Springfield, North Ridgeville, and Kirtland, Ohio.

(7) The evidentiary hearing commenced on November 29, 2011, and was continued to February 16, 2011. The hearing concluded on February 21, 2011.

(8) As modified by this Opinion and Order, FirstEnergy's application is not unjust or unreasonable and should be approved.

ORDER:

It is, therefore,

ORDERED, That the application filed by FirstEnergy be approved, as modified herein. It is, further,

ORDERED, That FirstEnergy file proposed revised tariffs, consistent with this Opinion and Order, within 30 days of the date of this Opinion and Order. It is, further,

ORDERED, That a copy of this Opinion and Order be served upon all parties of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO

Todd A. Snitchler, Chairman

Paul A. Centolella

Steven D. Lesser

Andre T. Porter

Cheryl L. Roberto

MLW/GAP/sc

Entered in the Journal
MAY 25 2011

Betty McCauley

Betty McCauley
Secretary

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, the The Toledo Edison Company for Approval of a New Rider and Revision of an Existing Rider.	)))))	Case No. 10-176-EL-ATA

<u>CONCURRING AND DISSENTING OPINION OF COMMISSIONER CHERYL L. ROBERTO</u>

With the exception of the following two matters, I concur in the majority opinion.

Transferability of Discount

The Commission's sole reasoning for the continuation of a discount for all-electric homes is the principle of gradualism and the mitigation of rate shock. The majority finds that homebuyers who purchase a home that uses electricity as the sole or primary source of space heating will be entitled to receive the same discount as the existing homeowner. See Opinion and Order at pp. 21-22. A new customer has never been the beneficiary of the discount and thus, could not be experiencing rate shock as the result of losing a discount.

The majority expresses the wish today to minimize any risk the action taken today impedes the recovery of the housing market in the Companies' service territories. Id. at p.21. I cannot agree that this Commission should take into account the relative utility burden of all-electric homes and multi-fuel homes in establishing rates or those impacts on real estate. For these reasons, I dissent from the portion of the Opinion and Order that extends the discount to new customers.

Unfair and Deceptive Marketing Practices

The majority finds that the evidence in this proceeding does not support claims that FirstEnergy should be precluded from recovering its prudently incurred costs of generation. See Opinion and Order at p. 25. I concur in this finding.

I do not agree, however, with the reasoning in the Opinion and Order at p. 23 that seems to indicate that expert testimony is required to establish an unfair or deceptive practice. An unfair deceptive act or practice may be established upon the testimony of any witness, expert or otherwise. I cannot find on the record in this case, however, that FirstEnergy engaged in unfair or deceptive marketing practices. If the Commission had concluded that unfair or deceptive marketing practices occurred, it would then be a separate question as to what remedies are available to the Commission. Because the Commission did not find that FirstEnergy engaged in unfair or deceptive marketing practices, there is no need to reach the question of whether this Commission could consider denying recovery of prudently incurred costs or could order a utility to incur additional expenses, resulting from a discounted rate design, without the means to recover those costs.

Cheryl L. Roberto

Cheryl L. Roberto
Commissioner

Entered in the Journal
MAY 25 2011

Betty McCauley

Betty McCauley
Secretary