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BEFORE THE
PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Staff Proposal for An Economic Development Tariff Template.	)))	**Case No. 11-4304-EL-UNC**

COMMENTS OF OHIO EDISON COMPANY, THE CLEVELAND ELECTRIC ILLUMINATING COMPANY AND THE TOLEDO EDISON COMPANY

Come now Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company ("Companies"), by counsel, and respectfully submit the following comments as provided for in the Public Utilities Commission of Ohio ("Commission") Entry dated July 15, 2011.

I. INTRODUCTION

The Companies recognize and understand the interest of the Commission to encourage and promote economic development within the State of Ohio and to improve Ohio's effectiveness in the global economy. The Companies have for many years engaged in economic development efforts and continue on an on-going basis to support and work toward bringing new customers, jobs, and investment into the state. The development and implementation of a standard economic development tariff is an approach that builds on similar programs for special contracts that were in place prior to restructuring that met with success under the industry structure in place at the time. Now, as then, the benefits and costs of providing electricity rate discounts to customers must be carefully considered and analyzed to be assured that the results of economic development efforts are in fact a net benefit for the State of Ohio and its citizens and do not result in a competitive disadvantage for existing customers. This is particularly true against the backdrop of the restructured electric utility industry that is in place today.

The Companies appreciate the Commission's recognition in the Entry that electric utilities that do not own generation facilities, and thereby do not derive profits from selling generation to customers, are differently situated in their ability to absorb delta revenues arising from economic development contracts imposed upon the Companies by operation of the proposed economic development tariff (the "Proposed Tariff"). As discussed more fully below, while the Companies work hard to support economic development, they are not in a position to provide discounts on any component of their service, especially those that are simply pass-through expense items for the Companies. The Companies recommend that electric utilities that do not own or profit from the sale of generation not be required to absorb delta revenues, or otherwise be denied the opportunity to earn a fair and reasonable return on distribution-related investments, or be required to forego recovery of prudently-incurred operation and maintenance expenses arising from implementation of the Proposed Tariff.

The Companies recommend a modification to the Proposed Tariff that would be better aligned with state policy, and also be a better way to lower the delta revenues to be absorbed by other customers. Specifically, and as discussed further below, a competitive bidding process for generation supply should be folded into the Proposed Tariff. Under this approach, if the competitive market is able to produce a price lower than the utility's standard tariff, then that lower competitive price will be used to calculate delta revenues. The qualifying customer would still pay the rate resulting from the Proposed Tariff. However, the delta revenue would be calculated as the difference between the rate resulting from the Proposed Tariff and the rate reflecting the result of the competitive bid (and not as the difference between the rate resulting from the Proposed Tariff and the utility's standard tariff). Recognizing that utilities may wish to serve the load, the utility would be given the opportunity to serve the load at the price resulting from the competitive bid process. The competitive bidding process would simply be used to lower delta revenues that would otherwise be paid by customers.

In addition to incorporating a competitive bid process and leveraging the benefits of the competitive market to lower delta revenues, the Companies further believe the language contained in the Proposed Tariff and the approach taken thereby need to be closely examined to be assured there is consistent implementation and interpretation of the Proposed Tariff and that the electric rate discounts proposed are needed to attract development, appropriately sized relative to the benefit realized, do not competitively penalize existing customers, and that the benefit is maintained over the life of the economic development contract.

Responses to the questions posed by the Commission in the Entry are set forth in Appendix A, attached hereto.

The Companies look forward to working with the Commission Staff and interested stakeholders to develop a workable and beneficial economic development tariff.

II. THE COMMISSION SHOULD UTILIZE COMPETITIVE BIDDING TO REDUCE DELTA REVENUE AMOUNTS ARISING FROM THE PROPOSED ECONOMIC DEVELOPMENT TARIFF

The Proposed Tariff should require that qualifying customers bid out their load to competitive suppliers, with a proviso that the winning bid price at the time of the auction may not exceed the electric utility's otherwise applicable generation price. To the extent the winning bid price is lower, delta revenues collected under the Proposed Tariff would be calculated as the difference between the rate resulting from the Proposed Tariff being paid by the customer and the rate reflecting the lower winning bid price. This will reduce the burden on customers who will be paying the delta revenue.[1] Under this approach, the competitive market would bear the

[1] As discussed further below, the Companies do not believe it is appropriate or allowable for the Companies to absorb any portion of the delta revenue.

cost, at least in part, of the delta revenues otherwise paid by customers because the competitive market would set the benchmark against which delta revenues are measured.

As discussed below, in service territories where the electric distribution utility does not own generation, the utility cannot absorb twenty percent of the delta revenue because it is simply passing through to its customers the generation costs of others. The utility also lacks the generation resources to serve this load. Thus, even if the Commission does not require competitive bidding statewide, it should direct that competitive bidding be used in service territories where the electric distribution utility does not own generation to establish the ceiling price for generation which is then used to calculate delta revenues. All customers will benefit, with more benefit obtained the closer the competitive bid price moves to the Proposed Tariff pricing. Indeed, if competitive bidding results in pricing that matches the Proposed Tariff pricing, the delta revenue burden essentially would be eliminated (with only administrative costs spread across all customers).

Should a utility determine that it wants to serve the load, it could still do so. Specifically, following the competitive bid process, the utility would have the right to serve the customer at the competitive bid price.[2] In this scenario, the qualifying customer would still pay the rate determined by the Proposed Tariff, but the delta revenues would still be calculated as the difference between the rate determined by the Proposed Tariff and the rate reflecting the result of the competitive bid (not the difference between the rate resulting from the Proposed Tariff and the utility's standard tariff).

The Companies recognize that this proposed competitive bid process is described herein at a high level. The Companies stand ready to work with the Commission, Staff, and

[2] For utilities that do not own generation, such as the Companies, this right to serve at the competitive bid price would fall to the generation affiliate of the utility.

stakeholders to develop the details of how such a process would be conducted if the Commission is interested in exploring this option further.

III. ELECTRIC UTILITIES THAT DO NOT OWN GENERATION FACILITIES OR PROFIT FROM GENERATION SALES TO CUSTOMERS SHOULD NOT BE REQUIRED TO ABSORB DELTA REVENUES

The Companies do not own generation and do not profit from the sale of generation service. They provide retail generation service by procuring generation through a Commission-approved competitive bidding process from third-party wholesale generation suppliers and pass through those costs to non-shopping retail customers, subject to reconciliation. The Proposed Tariff requires that twenty percent of the delta revenues resulting from the Proposed Tariff be allocated to the electric utility. For the Companies, who earn no profit on generation, such a provision denies the Companies the ability to recover prudently-incurred generation costs that the Companies must pay to the wholesale generation suppliers. The Commission cannot deny 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. *Opinion and Order*, Case No. 10-176-EL-ATA, May 25, 2011, pp. 22-23.

Moreover, because the Proposed Tariff proposes a discount off the total monthly bill or a discounted total rate, the intent appears to be to discount all charges, including FERC-approved transmission charges. These charges represent a FERC-approved rate that the utilities simply pass along to customers. Similar to the way the generation supply costs are passed through to customers, the Companies simply pass through transmission charges[3] as assessed by regional transmission organizations without earning or retaining any margin on those costs. Discounting

[3] In addition to not owning generation assets, the FirstEnergy Ohio utilities do not own transmission assets. The transmission system is owned by American Transmission System, Inc. ("ATSI").

these transmission charges would inappropriately constitute denying the utility recovery of FERC-approved charges and would be unlawful.

Similarly, the Proposed Tariff appears to discount all other charges, including rider charges that are designed to pass through costs incurred by the utility to customers without profit. Historically, special contracts did not discount riders that directly passed through to customers the costs incurred by the utility to provide service to customers, *e.g.*, the previously existing Percentage of Income Payment Plan (PIPP) Rider or the Electric Fuel Component (EFC) Rider. In similar fashion today, the Companies' rates are comprised of many charges that simply pass through costs incurred by the Companies to customers, including costs incurred to meet alternative energy and energy efficiency benchmarks, and the universal service fund rider.

There is no basis to force the Companies to absorb these prudently-incurred costs, and such a requirement will have an immediate, substantial and detrimental impact on the Companies. Such an approach would cause the Companies to provide retail generation service at below their incremental cost of service, resulting in a loss on the sale of every kWh of retail generation and transmission service sold to customers taking service under the Proposed Tariff. If a utility is prevented from recovering delta revenues, thereby causing the utility to lose money on the sale of electricity to those customers, such a requirement would serve as a powerful disincentive to engage in economic development activity with existing (expanding) or prospective customers.[4]

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[4] The Companies question the underlying assumption of this docket, which is that the Commission can require electric utilities to implement involuntarily an economic development tariff. The Proposed Tariff does not in any way involve necessary and adequate service or the provision of just, reasonable and non-discriminatory rates. To the contrary, the Proposed Tariff involves little more than a transfer tax, administered by the electric utilities, to subsidize large industrial customers. For purposes of its comments herein, the Companies are proceeding in good faith to suggest improvements to the Proposed Tariff that could result in the Companies' voluntary implementation thereof; however, the Companies do not waive any arguments they may have should it later be suggested that the Proposed Tariff could be imposed on an involuntary basis. Some of these issues are addressed below.

Forcing a distribution utility to subsidize generation service out of its distribution revenues also would violate Ohio law and policy. *See* R.C. § 4928.02(H); *Elyria Foundry Co. v. Pub. Util. Comm.*, 114 Ohio St.3d 305, 871 N.E.2d 1176, 2007-Ohio-4164, ¶ 50. Ohio law specifically prohibits the recovery of any generation-related costs through distribution rates. "In the context of S.B. 3 electric-utility deregulation, each service component must stand on its own." *Indus. Energy Users-Ohio v. Pub. Util. Comm.*, 117 Ohio St.3d 486, 885 N.E.2d 195, 2008-Ohio-990, ¶ 6. Thus, the Companies cannot be required to subsidize a competitive generation service through its distribution revenues. And, as discussed above, because the Companies retain no generation revenues, the delta revenue cannot be subsidized through generation revenues.

While the Companies do earn a return on distribution plant, twenty percent of the projected delta revenues under the Proposed Tariff would potentially exceed not only the equity return on the associated distribution plant but the *entirety* of the distribution charge from the Companies to customers taking service under the Proposed Tariff. The distribution revenues collected from transmission level customers (the Companies' Rate GT) are minimal since these customers are typically served at transmission voltage levels and do not benefit from the distribution system. Given the load requirements of the Proposed Tariff, customers taking service under the Proposed Tariff generally would be expected to be transmission service level customers and therefore will pay very little in distribution charges. Of course, then the equity return is only a fraction of those revenues.

In the Companies' situation, there are simply not dollars available to absorb delta revenue after allowing the Companies to recover their prudently-incurred operation and maintenance expenses and the opportunity to earn a reasonable return on their distribution plant, which as discussed in detail below, is required as a constitutional matter. Consistent with the above policy concerns, the language in the last sentence of the Terms and Conditions section requiring an electric utility to absorb 20% of delta revenue should be limited so as not to apply to electric utilities that do not provide retail generation service to their customers from generating plants they own. The Companies should be permitted to recover 100% of the delta revenues arising from implementation of the Proposed Tariff so that they can pay 100% of their previously-approved generation, distribution and transmission expenses and earn a reasonable return on their distribution related investment.

IV. CONSTITUTIONAL CONCERNS

A. Requiring a utility to absorb 20 percent of delta revenue created by the Proposed Tariff violates the U.S. Constitution's Due Process Clause.

The Proposed Tariff states that "Delta Revenue resulting from this rider shall be allocated 20 percent to the electric utility and 80 percent to the electric utility's customers." In other words, a utility can recoup only 80 percent of the loss in revenue attributable to the Proposed Tariff's discounts from that utility's customers on a proportional basis. The utility must absorb the remaining 20 percent. Requiring a utility to absorb this 20 percent of delta revenue amounts to a deprivation of property and therefore violates the Due Process Clause of the U.S. Constitution.

The Fifth Amendment to the U.S. Constitution, which applies to the federal government, says that no person shall "be deprived of life, liberty, or property, without due process of law[.]" The Fourteenth Amendment, which applies to state governments, also contains a "due process" clause ("No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law").[5]

According to the U.S. Supreme Court, regulatory price controls that prevent a utility provider from realizing a reasonable rate of return are confiscatory and therefore violate the U.S. Constitution's Due Process Clause. *Covington & Lexington Turnpike Railroad Co. v. Sandford*, 164 U.S. 578, 597 (1896) (prescribed rate is confiscatory if it "practically deprives the owner of property without due process of law"); *Federal Power Commission v. Hope Natural Gas Co.*, 320 U.S. 591 (1944) (establishing an "end-result" standard for reviewing constitutionality of regulated utility rates); *Bluefield Water Works & Improvement Co. v. Public Service Commission of West Virginia*, 262 U.S. 679 (1923) (reversing administrative order prescribing utility rates where rate calculation undervalued utility's capital investments); *Federal Power Commission v. Natural Gas Pipeline Co.*, 315 U.S. 575, 585 (1942) ("By long-standing usage in the field of rate regulation, the 'lowest reasonable rate' is one which is not confiscatory in the constitutional sense").

The U.S. Supreme Court has evolved a test to determine whether a prescribed utility rate is so low as to be a deprivation of the utility's property in violation of the Due Process Clause. The "end result" of the rate on the utility must be "just and reasonable." *Hope Natural Gas*, 320 U.S. at 603. The Court provided further guidance in *Hope Natural Gas*:

> From the investor or company point of view it is important there be enough revenue not only for operating expenses but also for the capital costs of the business. These include service on the debt and dividends on the stock. By that standard the return to the equity owner should be commensurate with returns on investments in other enterprises having corresponding risks. That return,

[5] The Ohio Constitution contains a guarantee of due process at Article I, section 16 ("All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law").

> moreover, should be sufficient to assure confidence in the financial integrity of the enterprise, so as to maintain its credit and to attract capital.

See also Bluefield Water Works, 262 U.S. at 692-693 ("A public utility is entitled to such rates as will permit it to earn a return . . . equal to that generally being made at the same time and in the same general part of the country on investments in other business undertakings which are attended by corresponding risks and uncertainties").

The Ohio Supreme Court has acknowledged many of these key decisions when addressing the constitutionality of fixed utility rates in Ohio. *See, e.g., Dayton Power & Light Co. v. Public Utilities Commission of Ohio*, 4 Ohio St.3d 91, 97-98, 447 N.E.2d 733 (1983) (finding no due process violation but noting that prescribed utility rate is confiscatory if, when viewed in its entirety, the rate falls outside a zone of "reasonableness"), citing *In re: Permian Basin Area Rate Cases*, 390 U.S. 747, 770 (1968). *See also Ohio Edison Co. v. Public Utilities Commission of Ohio*, 63 Ohio St.3d 555, 589 N.E.2d 1292 (1992) (no due process violation even though Commission allegedly failed to consider effects of rate order on utility's "financial integrity").

The Companies' loss of 20 percent of delta revenue is not a "just and reasonable" result of the Proposed Tariff. Such a loss will have a serious negative financial impact on the Companies. Rate discounts under both the Economic Development Incentive and Energy Intensive High Load Factor Provision will remain in effect for at least five years and possibly up to ten years, and there is no limit on the number of customers or amount of delta revenue. Under the Economic Development Incentive alone, the cumulative effect of five years of discounts of up to twenty percent per customer, per total monthly bill, will substantially affect the Companies' financial integrity. The Companies' ability to pay capital costs, service their debt, and pay reasonable dividends to investors (all factors identified in *Hope Natural Gas*) will be in question.

Forcing the Companies to absorb 20 percent of the delta revenue created by the Proposed Tariff is unreasonable and "confiscatory." The Proposed Tariff thus violates the Due Process Clause.

B. Requiring a utility to absorb 20 percent of delta revenue created by the Proposed Tariff violates the Takings Clause of the U.S. and Ohio Constitutions.

Besides being a due-process violation, forcing a utility to absorb 20 percent of delta revenue created by the Proposed Tariff constitutes a "taking" of property under both the U.S. and Ohio Constitutions.[6]

The U.S. Constitution's Fifth Amendment says (in part): "nor shall private property be taken for public use, without just compensation." While the Fifth Amendment applies only to the federal government, the U.S. Supreme Court has held that the U.S. Constitution's Fourteenth Amendment, which applies to state governments, incorporates the Fifth Amendment's provisions. *See Chicago, B. & Q. Railroad v. Chicago*, 166 U.S. 226 (1897) (Fifth Amendment's Takings Clause is incorporated into Fourteenth Amendment). Ohio's Takings Clause appears at Article I, section 19 of the Ohio Constitution ("where private property shall be taken for public use, a compensation therefor shall first be made in money").

The Takings Clause is usually implicated in cases involving the appropriation of physical property, but the U.S. Supreme Court has held that government regulation can constitute a "taking" where the regulation "goes too far." *See Pennsylvania Coal v. Mahon*, 260 U.S. 393,

[6] The Due Process Clause and Takings Clause analyses are closely related. See Railroad Commission Cases, 116 U.S. 307, 331 (1886) ("Under pretence of regulating fares and freights, the State cannot . . . do that which in law amounts to a taking of private property for public use without just compensation, or without due process of law").

415 (1922) (regulatory statute restricting exercise of coal mining rights had "nearly the same effect for constitutional purposes as appropriating or destroying" the property right at issue).

To prove a claim under the Takings Clause, a party must establish that it has a constitutionally protected property interest. *State ex rel. Gilbert v. Cincinnati*, 125 Ohio St.3d 385, 389, 928 N.E.2d 706 (2010) (citations omitted). The U.S. Supreme Court has recognized that a utility provider's revenue constitutes a property interest. *See Duquesne Light Co. v. Barasch*, 488 U.S. 299, 308 (1989) (if utility rates do not "afford sufficient compensation, the State has taken the use of utility property without paying just compensation and so violated the Fifth and Fourteenth Amendments"). Under the Proposed Tariff, there is no benefit that compensates the Companies for the loss of 20 percent of delta revenue. The Proposed Tariff thus violates the Takings Clause of the U.S. and Ohio Constitutions.

V. THE ENERGY INTENSIVE HIGH LOAD FACTOR PRICING SHOULD BE GIVEN FURTHER CONSIDERATION

The Companies question whether the fixed pricing to be provided to energy-intensive high load factor customers is justified or appropriate. It is possible that the pricing is too aggressive and could result in unforeseen consequences. In particular, because each electric utility in the state has different rates for this class (or sub-class) of customers, the fixed pricing proposed could be appropriate in some regions of the state but not in others. The Companies are willing to discuss these questions further with Commission Staff should the Commission decide to move forward with this initiative.

VI. THE PROPOSED TARIFF INITIALLY SHOULD BE FOCUSED ON CUSTOMERS THAT CAN PROVIDE THE MOST ECONOMIC BENEFIT.

The Proposed Tariff is available to any mercantile customer as defined in R.C. § 4928.01(A)(1) that satisfies the conditions in Section A or B.[7] The Companies recommend that the Commission first focus on larger mercantile customers that are more likely to create long-term economic growth and jobs and more likely to be facing competing offers of energy pricing from outside the state. In particular, Section B of the Proposed Tariff sets a minimum demand level of 5 MW to qualify for fixed pricing, and the Companies recommend raising this minimum demand level to 10 MW, and applying it to both Section A and Section B so that these discounted prices are available only to larger customers. This initial focus will provide the Commission with an understanding of the scope and potential impact of the Proposed Tariff (including the amount of delta revenue that will be created by it to be borne by others). By including all mercantile customers in the Proposed Tariff, the Commission risks burdening customers with a level of delta revenues that will generate negative reaction.

VII. THE PROPOSED TARIFF IS CONTRARY TO THE COMPANIES' ESP AND DISTRIBUTION CASE ORDERS

The provision of the Proposed Tariff that forces the Companies to absorb twenty percent of delta revenue conflicts with the express terms of their Commission-approved ESP currently in force (such as the Companies' Rider DRR), and would limit the flexibility provided to the Commission and the utilities in future ESPs. As part of its currently existing ESP, the Commission-approved Rider DRR expressly permits the recovery of all delta revenues from customers. The ESP Stipulation also prohibits any adjustments to base distribution charges prior

[7] "Mercantile customer" means a commercial or industrial customer if the electricity consumed is for nonresidential use and the customer consumes more than seven hundred thousand kilowatt hours per year or is part of a national account involving multiple facilities in one or more states.

to June 1, 2014, except in case of an emergency.[8] The Proposed Tariff directly conflicts with these Commission-approved provisions, thereby changing the Stipulation in that proceeding and undermining the settlement process.

Further, the risk that would be imposed upon the Companies if the Proposed Tariff were to go into effect as written was not taken into account in the Companies' most recent base distribution case, Case No. 07-551-EL-AIR. The Commission-approved revenue requirements in that case included recovery of test year operating and maintenance expenses, as well as a fair and reasonable return on distribution-related investment at the time. All else equal, any portion of the delta revenue created under the Proposed Tariff related to base distribution revenues that is not recovered by the Companies would contradict the approved level of revenue requirements, thereby harming the Companies' ability to earn the fair and reasonable return on their assets previously authorized by the Commission.

VIII. NEEDED ADDITIONS TO THE PROPOSED TARIFF

The Companies have identified a number of concepts that would be beneficial additions to the Proposed Tariff. Such additions include additional protections for electric utilities and their customers, balancing the impact of delta revenues across the state and providing for a specific recovery mechanism, clarifying customer qualifications, appropriately defining the scope of customers to which economic development support may apply, and better defining the minimum level of incentive the customer must receive from governmental or economic development agencies in order to qualify under the Proposed Tariff.

[8] ESP II Stipulation at p. 13, filed March 23, 2010, in Case No. 10-388-EL-SSO. Under the Stipulation, the Companies may implement changes in rate design that are designed to be revenue neutral or a new distribution service offering. Id. The Proposed Tariff, as currently drafted, would not be revenue neutral and is not a new service offering as contemplated in the Stipulation.

A. The Companies recommend adding protections or limitations that would limit the impact on the utilities and other customers, including by way of example:

1. Requiring utility consent to any customer taking service under the Proposed Tariff;

2. Limiting the number of customers that could take service under this Proposed Tariff;

3. Limiting the amount of load that could be served under this Proposed Tariff;

4. Further limiting the size or class (i.e. to industrial or manufacturing type customers) of customer that could be eligible under the Proposed Tariff, since as currently drafted, any mercantile customer (even aggregating multiple locations of a single customer) could be eligible;[9] and,

5. Limiting the amount of delta revenue that will be absorbed by the customers. Delta revenue could be limited in the aggregate or to a particular reasonable arrangement customer and should be subject to minimum billing requirements elsewhere in a utility's tariff.

B. The Proposed Tariff contemplates that it will be implemented on a company-by-company basis. Such an approach runs counter to a statewide economic development initiative that would seek to bring the benefits of economic development to the entire State of Ohio, and which also would appropriately spread the investment in that economic development initiative across the entire state. The Companies recommend that a better approach would be for delta revenues to be collected from customers and be spread over all of the electric utilities in the state to put the State of Ohio in the best position of bringing in new customers, jobs, and investment.[10]

C. The Proposed Tariff may inadvertently create an incentive for customers to move from the service territory of one Ohio electric utility to another within the state in

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[9] See also discussion under Section VI above.

[10] The Companies recognize that such an approach may require legislative authorization to be implemented.

order to obtain incentives tied to "new" employees and "new" investment. Our understanding is that this is not the intent of the Proposed Tariff and that a customer may not take service under the Proposed Tariff by moving an existing business from the territory of one Ohio utility to the service territory of another Ohio utility. The Proposed Tariff as drafted could create significant costs to the State of Ohio by subsidizing intrastate moves with no net increase in jobs or payroll for the State of Ohio on an aggregate basis. We propose the following language be included as an additional provision in the Terms and Conditions section: "This tariff is not available to a customer that relocates its business or operation from an existing site within the State of Ohio except to the extent new Payroll Created or Increased and new Capital Investment meet the thresholds set forth in Section A of this Tariff." In other words, if a customer relocates its business within Ohio, only the new jobs or payroll created and new investment above the value of its current facility could be considered in determining the discount that a reasonable arrangement customer could achieve under the Proposed Tariff.

D. The Proposed Tariff provides discounts for new customers and new payroll/capital investment for existing customers, but does not allow for any discounts solely to retain existing customers, which may be appropriate to retain businesses and jobs in the state. Often times saving existing jobs is less costly and provides known levels of benefits to the state. This should be an option for the Companies, the Commission, and the Department of Development to consider and utilize as part of their economic development efforts.

E. Regarding the first paragraph in Section A, the Proposed Tariff states that the customer must receive other funding, but provides no minimum for the funding level. We recommend a minimum funding level be included in the Proposed Tariff in order to give this provision meaning. The Proposed Tariff should also require the customer to provide information to the Commission to confirm compliance with this provision.

F. The first sentence in Section A should be revised to read as follows: "This provision is available to any economic development mercantile customer that: (1) creates or increases minimum annual payroll by $5 million or more and adds at least 75 permanent, new employees based in Ohio, and~~/or~~ (2) makes a capital investment in Ohio of at least $50 million along with a job retention commitment of base employees through the duration of the tariff." As proposed, customers would have been eligible for an economic development discount if they created jobs *or* invested at least $50 million in capital and retained jobs. The concern is that job/payroll creation without capital investment could lead to discounts for transitory or temporary businesses and not support the development of long-term, sustainable jobs. In addition, without an "and" condition, the risk exists that smaller commercial customers with many locations may qualify under this Proposed Tariff. The Companies do not believe it was the intention of the Commission to extend the benefits of this Proposed Tariff (and therefore significantly increase the amount of delta revenue to be recovered from all customers) to small customers who would likely open and/or relocate without any economic development incentive. These less than desirable outcomes can be rectified by changing it to an "and" condition.

G. Regarding Section B, the Companies recommend that at least the minimum capital investment level required in Section A of the Proposed Tariff be carried over and included in Section B. As the Proposed Tariff is currently written, there is no capital investment requirement whatsoever in Section B. Because customers taking service under the Proposed Tariff under Section B will benefit from being "billed the lower of the total bill that results from applying the incentives" in Section A or Section B, the customer should have to at least meet the requirements of Section A related to capital investment. The concern is that job/payroll creation without capital investment could lead to discounts for transitory or temporary businesses and not support the development of long-term, sustainable jobs. This less than desirable outcome can be rectified by having both Section A and Section B customers meet the capital investment criteria set forth in Section A.

H. If it is determined that a customer failed to meet the necessary criteria to merit a discount and the desire is to have the customer forfeit any portion of the discount already received, the Proposed Tariff should provide for that forfeiture.

IX. Definition of Terms and Confirmation of Benefits

A. The Companies would expect that audits and reviews will take place to assure both initially and on an ongoing basis that the applicable levels of Payroll Created or Increased, Capital Investment, monthly demand, load factor, and energy intensity are met so that the State of Ohio realizes the benefit of the bargain. The Proposed Tariff language should be expanded to provide specific authority for such audits and reviews and provide for recovery of costs associated with those activities.

B. Regarding Section A, there are several open-ended items that deserve some clarification, e.g., how will the "Payroll Created" be calculated? Will it simply be a projected amount for new projects and an annual increase amount over a baseline level for existing facilities? How will "Payroll Created" be defined, i.e., does it include only base payroll or payroll, bonuses and benefits? Is there to be any minimum average annual payroll level for the jobs that are being created? A definition for "Payroll Created" should be developed and included in the Proposed Tariff to address these ambiguities.

The intended meaning of "Capital Investment" is also unclear as to whether it is limited to true capital expenditures, or if it could also include O&M expenses associated with the Capital Investment. The definition of Capital Investment references "investment" in equipment necessary for increases in productivity, efficiency and quality, and what qualifies as "investment" should be clarified.

C. Similarly in Section B, how will "at least 4% of its total operating and maintenance costs" be calculated? If it is a new facility or new operation and there is no history of operating costs, will the 4% simply be an estimate? What will serve as the basis for the estimate? Will the percentage be confirmed after the fact and the discount associated with it trued-up and reconciled later? What if the actual operation's electric cost is less than 4% of its operating cost? When and how would the 4% level be confirmed and by whom?

Similarly, how will the minimum monthly demand be determined for a new facility? Will it be on a forecasted basis based on expected installation of equipment and other electrical facilities? How will compliance with the monthly demand minimum be determined on a going-forward basis? What happens if it is not achieved during the contract period? How often will the load level be audited by the Commission?

Similar questions pertain to maintaining an "annual average load factor of at least 60%" as required in the Proposed Tariff. How will this be calculated and who will do the calculation? Will load factor be tested only once per year? The Proposed Tariff will need to provide that the customer consents to providing sufficient information to the Commission and the electric utility to allow these determinations to be made both initially and on an ongoing basis. If any of these conditions are not met, does the contract terminate and would discounts already received have to be refunded by the customer?

These types of questions need to be answered and the answers included in the tariff language so that consistent interpretation and application of the Proposed Tariff is achieved across the different electric utilities.

X. Drafting Concerns and Questions and Recommended Clarifications

A. The annual report required by the Proposed Tariff includes information that would likely be confidential and proprietary information of the customer, and should not be included in publicly filed reports (*i.e.*, "funding customer received from other sources"). The Proposed Tariff should provide for filing such information under seal and provide for recovery of costs incurred.

B. At the end of the first paragraph in Section A, the Proposed Tariff states "shall receive one or both of the following incentives". This phrase is unclear. The phrase should state "shall receive one or both of the following percentage discounts off the otherwise applicable rates."

C. The Proposed Tariff is also generally unclear as to whether the discounts are applicable to the customer's full load or to incremental load that results from the customer's development efforts. The Companies suggest that it would be most appropriate to apply the discounts to the incremental load on a proportionate basis relative to the customer's current operations in the state. Under this structure, the Commission could ensure that the Proposed Tariff maximizes the incentive for economic development in the state and protects against windfall discounts for only modest additional investments.

D. In Section A, the Commission should clarify the meaning of the phrase "subject to all riders including the economic development rider (EDR) for new and existing mercantile customers." Are riders subject to the discount or are they not, *i.e.*, do the riders get discounted under the Proposed Tariff, or are they charged to the customers taking service under the Proposed Tariff at the authorized amount set forth in the rider since they are generally collecting amounts on a pass-through basis? Further, the reference to "EDR" is confusing as the Companies, and perhaps other electric utilities, already have an existing Rider EDR.

E. Regarding the first paragraph of Section B, the Proposed Tariff states that a customer qualifying under Section B will be "billed the lower of the total bill that results from applying the incentives in Section A of this tariff or Section B." The

Companies interpret this provision as a one-time determination at the commencement of the contract under the Proposed Tariff. If the intention is to calculate two billing amounts every month and bill the customer the lower of the two, this will significantly increase the Companies' administrative costs associated with these contracts and will undermine the ability of the Commission and the Companies to prepare a meaningful calculation of delta revenues expected to arise under the contracts. The Companies recommend that the determination of billing under Section A or Section B be done on a one-time basis.

F. Regarding the first paragraph of Section B, at what point in the agreement could the Commission suspend the discount? On what basis could the discount be suspended? Could the discount be reinstated after it has been suspended? If so, on what basis? Can the customer terminate the agreement at any point or must the contract continue for 10 years no matter what, unless suspended by the Commission?

XI. CONCLUSION

The Companies appreciate the opportunity to comment upon the Proposed Tariff and believe that inclusion of the foregoing comments in the Proposed Tariff will better reflect the current structure of the electric utility industry in Ohio, provide incentives for economic development in the state where needed, and will do so in a clear and unambiguous manner to better assure consistency in application across the state.

Respectfully submitted,

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APPENDIX A

Question 1

What is the proper amount of delta revenue which electric utilities should be permitted to recover under the proposed economic development tariff template?

Response: The Companies should be permitted to recover 100% of the delta revenue arising due to implementation of the proposed economic development tariff template. The Proposed Tariff is being imposed upon the electric utilities for the benefit of the entire State of Ohio. It is unjust, unreasonable and unconstitutional to undermine the financial integrity of the Companies by compelling them to provide a discount to customers for the purpose of generally benefitting the state.

Question 2

Should there be a differential in the amount of delta revenue recovered by electric utilities, based upon whether they own generation assets or provide generation service through a competitive bid process?

Response: As stated in the Companies' comments above, electric utilities that neither own generation facilities nor profit from the sale of generation service should not be required to absorb any delta revenues arising from implementation of the Proposed Tariff or otherwise. To do so would be contrary to Commission precedent and unconstitutional.

Question 3

Would the absence of such a differential (referencing Question 2) create a disincentive to electric utilities to procure generation through a competitive bid process and stifle the further development of competitive markets in this state?

Response: As stated in the Companies' comments above, the Proposed Tariff cannot create a situation in which the Companies are unable to recover any resulting delta revenue and if absorbing delta revenue is required, it would likely stifle economic development efforts. Moreover, not incorporating a competitive bid process as outlined in the Companies' comments above would stifle the further development of competitive markets.

Question 4

Should the Commission explore eliminating differences in delta revenue recovery mechanisms so that delta revenue is recovered using a consistent rate design for all electric utilities in the state?

Response: So long as the recovery mechanism permits the Companies' recovery of all delta revenues arising from the Proposed Tariff plus any incremental expenses to implement and administer the program, then detailed variances between electric utility tariffs should be permitted for consistency with previous rate determinations and ESP orders or for administrative efficiency. As discussed above in Section VIII.B., an alternative that might require legislative action would be for delta revenues to be collected from customers and be spread over all of the electric utilities in the state.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *Comments* was served this 5th day of August, 2011, via e-mail, upon the parties below.

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