BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Revised Tariff PUCO No. 13 for Update of Rider DSE of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company	**)** **)** **)** **)** **)**	**Case No. 14-1947-EL-RDR**

OHIO EDISON COMPANY, THE CLEVELAND ELECTRIC ILLUMINATING COMPANY, AND THE TOLEDO EDISON COMPANY'S MEMORANDUM CONTRA THE MOTION TO COMPEL OF THE OHIO MANUFACTURERS' ASSOCIATION ENERGY GROUP

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On behalf of Ohio Edison Company,
The Cleveland Electric Illuminating Company,
and The Toledo Edison Company

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I. INTRODUCTION

The Ohio Manufacturers' Association Energy Group ("OMAEG") has moved to compel Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company ("Companies") to respond to over fifty discovery requests in *In the Matter of the Revised Tariff PUCO No. 13 for Update of Rider DSE of Ohio Edison Company, The Cleveland Electric Illuminating and The Toledo Edison Company,* Case No. 14-1947-EL-RDR.[1] As discussed below, OMAEG has not demonstrated why this Commission should deviate from its current process as it relates to the Companies' update and audit of Rider DSE through various public filings. Moreover, the information that OMAEG seeks has already been publicly filed for 2013 and 2014. As is the current Commission-ordered process, the 2015 information will be publicly filed and available to all parties and Staff in March 2016 (when the Companies file their annual Rider DSE audit report) or no later than May 2016[2] (when the Companies file their energy efficiency and peak demand reduction ("EE/PDR") portfolio plan annual reports). Further, under strong Commission precedent, OMAEG's discovery requests are premature and it is not entitled to discovery in this docket at this time. Even if OMAEG were entitled to discovery, several of OMAEG's requests are not relevant, unduly burdensome and seek confidential and proprietary information. Finally, OMAEG's assertion that the Companies invited OMAEG to serve discovery in this docket is incorrect and not relevant whatsoever. For all of those reasons, the Commission should deny OMAEG's Motion to Compel ("Motion").

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[1] OMAEG incorrectly captions this docket as "In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company to Update Rider DSE." However, the Companies have not filed any such application. Rather, as will be discussed *infra*, the Companies have merely filed tariff updates in accordance with Commission orders.

[2] Rule 4901:1-39-05(C), Ohio Administrative Code currently requires the Companies to file their portfolio plan status reports by March 15 each year. Historically, the Companies have received a waiver of this rule to file their portfolio plan annual reports in May.

II. RELEVANT FACTS

A. History of Rider DSE

On March 25, 2009, the Commission approved the Stipulation and Recommendation in Case No. 08-935-EL-SSO, the Companies' first Electric Security Plan ("ESP").[3] The Stipulation and Recommendation included provisions that established the Companies' Demand Side Management and Energy Efficiency Rider ("Rider DSE") and included the following language that defined costs to be included in the rider:

> The Demand Side Management and Energy Efficiency rider (as proposed in the Companies' ESP excluding smart grid) will recover costs reasonably incurred by the Companies associated with energy efficiency, peak load reduction and demand side management programs, including program administration costs and recovery of lost distribution revenues as permitted by the Commission rules, resulting from implementation of such programs and any unrecovered DSM program costs from the Rate Certainty Plan.[4]

The Stipulation also stated that "to the extent such a rider is necessary to recover energy efficiency and peak load reduction program costs, Rider DSE will continue."[5]

In accordance with the Second Order and Opinion in Case No. 08-935-EL-SSO, the Companies originally filed Rider DSE on March 27, 2009. Thereafter, Rider DSE was affirmatively approved for continuation in both the Companies' ESP II (Case No 10-388-EL-SSO) and ESP III (Case No. 12-1230-EL-SS0).[6] Since then, as discussed below, the Companies

[3] *In re the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company for Authority to Establish a Standard Service Offer Pursuant to O.R.C. 4928.143 in the Form of an Electric Security Plan*, Case No. 08-935-EL-SSO, Second Opinion and Order at ¶27 (March 25, 2009).
[4] *Id.* at Stipulation at 21 (February 19, 2009).
[5] *Id.*
[6] *In re the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company for Authority to Establish a Standard Service Offer Pursuant to O.R.C. 4928.143 in the Form of an Electric Security Plan*, Case No. 10-388-EL-SSO, Opinion and Order (March 25, 2010); *In re the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company for Authority to Establish a Standard Service Offer Pursuant to O.R.C. 4928.143 in the Form of an Electric Security Plan*, Case No. 12-1230-EL-SSO, Opinion and Order (July 18, 2012)

have updated Rider DSE semiannually and filed those updates with the Commission.[7] The rates set forth in the semi-annual update filings have been approved and go into effect in accordance with the provisions of the approved tariff and associated approved electric security plan.

Most recently in Case No. 12-1230-EL-SSO, the Commission stated:

> The Commission notes that the Stipulation provides that the riders listed on Attachment B of the Stipulation shall be subject to ongoing Staff review and audit. According to the terms of the Combined Stipulation and past practice, separate dockets have been opened for the review of Riders DCR, AMI, and AER. The Commission clarifies that the Companies annually should file applications in separate dockets for the review and audit of Riders DCR, AMI, AER, NMB, and DSE. In addition, the Companies annually should file an application for the combined review of Riders PUR, DUN, NDU, EDR, GCR, and GEN. The Commission directs the Companies and Staff to develop a schedule for the filing of the annual reviews and audits.[8]

The Companies then worked with Staff and agreed that the audit report and workpapers for Rider DSE would be filed in March of every year for the Staff to conduct its audit. The Companies have filed this audit report and workpapers since 2012.[9]

As discussed above, the Rider DSE1 and Rider DSE2 are updated semi-annually. No later than December 1st and June 1st of each year, the Companies file with the Commission the Rider DSE updates which, unless otherwise ordered by the Commission, become effective on a service rendered basis on January 1st and July 1st each year. On December 1, 2014, the Companies opened this docket to file its updated Rider DSE for rates that became effective on January 1, 2015. On March 26, 2015, OMAEG moved to intervene in this docket. The

[7] *See* Case Nos. 08-935-EL-SSO; 12-2978-EL-RDR; 13-2173-EL-RDR and this docket.
[8] Case No. 12-1230-EL-SSO, Opinion and Order at 44 (July 18, 2012).
[9] Case No. 13-0722-EL-RDER (2012 Rider DSE audit); Case No. 12-2978-EL-RDR (2013 Rider DSE Update and Audit); Case No. 13-2173-EL-RDR (2014 Rider DSE Update and Audit).

Commission has not ruled on that motion.[10] On June 1, 2015, the Companies again filed an updated Rider DSE for rates effective on July 1, 2015.

B. OMAEG's Discovery Requests

On August 11, 2015, OMAEG served over fifty discovery requests on the Companies. On August 31, 2015, the Companies timely submitted responses and properly objected to the requests. As demonstrated by OMAEG's Motion and the discovery requests themselves, the majority of the categories of information sought by OMAEG are: 1) already provided in public dockets; 2) will shortly be provided to all interested parties and Staff in public dockets; 3) unavailable; or 4) not relevant, unduly burdensome or seek confidential and proprietary information. Moreover, OMAEG discovery requests are premature and it does not have discovery rights in this docket at this time. Consequently, the Companies served their responses to OMAEG objecting to each discovery response.

As indicated in OMAEG's Motion, the Companies and OMAEG exchanged correspondence relating to its discovery requests. As the correspondence indicates, the Companies advised OMAEG that its discovery responses were overbroad and sought 2013 and 2014 Rider DSE information that was not relevant to this docket.[11] Nevertheless, the Companies specifically advised OMAEG of where it could find the information it seeks or when the information would be forthcoming in accordance with the Commission's established procedure.[12] Not satisfied with the Companies' response or this Commission's established

[10] Citing to Rule 4901-1-16(H), Ohio Administrative Code ("O.A.C."), OMAEG asserts that it is "deemed a 'party' to this proceeding."[10] However, Rule 4901-1-16(H), O.A.C., merely states that "for purposes of rules 4901-1-16 to 4901-1-24 of the Administrative Code, the term 'party' includes any person who has filed a motion to intervene which is pending at the time a discovery request or motion is to be served or filed." OMAEG is not a party to this docket.

[11] E-mail from Carrie M. Dunn to Rebecca L. Hussey dated September 9, 2015; E-mail from Carrie M. Dunn to Ryan O'Rourke dated October 20, 2015.

[12] *Id.*

procedure, OMAEG has filed its Motion presumably only seeking responses related to the 2015 information.[13]

III. LAW AND ARGUMENT

A. Relevant Law

The Commission routinely denies motions to compel when a party has already responded to the movant's request (as is the case here with publicly filed information), when the movant seeks the production of irrelevant information, or when the discovery requested is vague, overly broad or otherwise objectionable.[14]

B. OMAEG has not demonstrated why the Commission should deviate from its current process as it relates to the Rider DSE updates and audit process.

The Commission, in its discretion, has outlined the manner in which it wants to conduct updates to the Companies' Rider DSE and the audit of Rider DSE. As discussed above, since the Companies' ESP I, they have updated Rider DSE semiannually and filed those updates with the Commission.[15] And, the Commission in ESP III ordered the Companies to annually file

[13] As OMAEG indicated in its Motion, during discussions with the Companies, it limited its scope of discovery to 2015 information. The Companies assume that OMAEG's Motion is focused only on the 2015 information. However, the Companies response will discuss all of the requests.

[14] *See, e.g., In the Matter of the Complaint of Brenda Fitzgerald v. Duke Energy Ohio*, Case No. 10-791-EL-CSS, 2011 Ohio PUC LEXIS 415 at *5-13 (April 4, 2011) (denying in part motion to compel where respondent had already provided responses to several discovery requests at issue and the requests otherwise sought irrelevant information); *In the Matter of the Application of Buckeye Wind LLC for a Certificate to Construct Wind-powered Electric Generation Facilities in Champaign County, Ohio*, Case No. 08-666-EL-BGN, 2009 Ohio PUC LEXIS 931 at *8-12 (Oct. 30, 2009) (denying in part motion to compel because several discovery requests were irrelevant, vague and overly broad); *In the matter of the Application of Middletown Coke Co.*, Case No. 08-281-EL-BGN, 2008 Ohio PUC LEXIS 821 at *3-4 (Nov. 4, 2008) (denying motion to compel and holding that irrelevant material was not subject to discovery); *In the Matter of the Continuation of the Rate Freeze and Extension of the Market Development Period for The Dayton Power and Light Company*, Case No. 02-2779-EL-ATA, 2003 Ohio PUC LEXIS 392 at *34-35 (Sept. 2, 2003) (acknowledging the general rule that discovery is limited to materials "relevant to the subject matter of the proceeding" and denying motion to compel because "the information sought would not be relevant to the determination of [the present] matter"); *In the Matter of the Complaint of Ruth L. Wellman v. Ameritech Ohio*, Case No. 99-768-TP-CSS, 2002 Ohio PUC LEXIS 554 at *2-19 (June 21, 2002) (denying motion to compel where discovery requested was vague, "not imperative to a final in a final determination of [the] matter," overly broad, and because the respondent had already responded to several of the discovery requests at issue) *In the Matter of Bauman v. The Western Reserve Telephone Co.*, Case No. 90-1095-TP-PEX, 1991 Ohio PUC LEXIS 325 at *7-9 (denying a motion to compel discovery because requested information was irrelevant to the proceeding).

[15] *See* Case Nos. 08-935-EL-SSO; 12-2978-EL-RDR; 13-2173-EL-RDR and this docket.

applications in separate dockets for the review and audit of Rider DSE and to work with Staff to develop a schedule for those applications.[16] Since then, the Companies have annually filed the audit reports in the docket.[17] At that point, the information is publicly available for all interested parties and Staff. This is the process that the Commission and Staff have developed and it is more than adequate in providing transparency of the costs included in Rider DSE.[18]

OMAEG asserts that it needs to review workpapers and documents not available to any other party or even Staff at this point to "ensure" the Companies stay accountable to ratepayers who ultimately bear the costs of Rider DSE."[19] However, the Commission, in the Companies' ESP III, vested this responsibility with the Staff – not with OMAEG or other entities. OMAEG has failed to demonstrate that Staff lacks the ability to review the Companies' Rider DSE or somehow would not adequately perform the audit that the Commission has ordered.

Towards the end of its Motion, OMAEG finally acknowledges that the information it seeks is publicly filed and that the "information sought here is the same type of information that will be contained in the Companies' report due to be filed in March of 2016 for the 2015 program."[20] OMAEG also acknowledges that the Companies have informed them that the majority of information will be available in March of 2016 or May of 2016 when all parties, including Staff, obtain the information. OMAEG has failed to explain why it requires this information before Staff or any other interested party. OMAEG also has failed to demonstrate why it cannot wait until March of 2016 – a mere four months – for the Rider DSE audit information that will not only include the information it seeks but will also include full 2015

[16] Case No. 12-1230-EL-SSO, Opinion and Order at 44 (July 18, 2012).
[17] Case No. 13-0722-EL-RDER (2012 Rider DSE audit); Case No. 12-2978-EL-RDR (2013 Rider DSE Update and Audit); Case No. 13-2173-EL-RDR (2014 Rider DSE Update and Audit).
[18] OMAEG asserts that Duke and AEP provide this information through their rider filings – but completely ignores the fact that so do the Companies. (OMAEG Motion at 9.)
[19] OMAEG Motion at 2.
[20] *Id.* at 11.

information not just the partial year information OMAEG seeks. In addition, if OMAEG would wait until no later than May 2016 for the Companies' EE/PDR portfolio plan annual reports, it will receive actual, verified results for the Companies' EE/PDR portfolio plans. OMAEG fails to demonstrate why it cannot wait for the actual, verified results to be released to all interested parties and Staff. Last, OMAEG has failed to demonstrate why the Commission's approved Rider DSE update and audit process is not adequate. For all of those reasons, the Commission should deny OMAEG's Motion to Compel.

C. The majority of the information that OMAEG seeks is already currently available or will become publicly available.

As discussed above, the majority of the information that OMAEG seeks has already been publicly filed or will become publicly available in March 2016 or no later than May 2016. Specifically:

- INT 1-1 through 1-18, subparts (a) and (b) and RPD 1-1 through 1-18 (a) and (b) related to 2013 information is available in Case No. 12-2978-EL-RDR Report dated March 31, 2014 and Case No. 14-0859-EL-EEC, *et al.*

- INT 1-1 through 1-18 (c) and (d) and RPD 1-1 through 1-18 (c) and (d) related to 2014 information is available in Case No. 13-2173-EL-RDR Report dated March 24, 2015 and Case No. 15-0900-EL-EEC, *et al.*

- INT 1-1 through 1-18 (e) and RPD 1-1 through 1-18 (e) related to January 1, 2015 to June 31, 2015 information will be available in March 2016 in this docket as well as no later than May 2016 for the EE/PDR portfolio plan annual reports.

- INT 1-19 through 1-24 (a) and (b) and RPD 1-19 through 1-24 (a) and (b) related to 2013 information is available by customer class in Case No. 14-0859-EL-EEC, *et al.*

- INT 1-19 through 1-24 (c) and (d) and RPD 1-19 through 1-24(c) and (d) related to 2014 information is available by customer class in Case No. 15-0900-EL-EEC, *et al.*

- INT 1-19 through 1-24 (e) and RPD 1-19 through 1-24(e) related to 2015 will be available by customer class no later than May 2016 in the Companies' EE/PDR portfolio plan annual reports.

- INT 1-25 through 1-26 (a) and RPD 1-25 through 1-26 (a) related to 2013 information is available in Case No. 14-0859-EL-EEC, *et al.*

- INT 1-25 through 1-26 (b) and RPD 1-25 through 1-26 (b) related to 2014 information is available in Case No. 15-0900-EL-EEC, *et al*

- INT 1-25 through 1-26 (c) and RPD 1-25 through 1-26 (c) estimates related to 2015 information is available in the Companies' September 24, 2014 Application in Case No. 12-2190, *et al*.

As the above list demonstrates, the majority of the information that OMAEG seeks is already publicly available or will become publicly available shortly to all interested parties and Staff. For those reasons, the Commission should deny OMAEG's Motion to Compel.

D. OMAEG's discovery requests are premature and OMAEG is not entitled to discovery in this docket at this time.

OMAEG's discovery requests are premature and OMAEG is not entitled to discovery in this docket at this time. OMAEG asserts that the Companies' objection regarding the impropriety of discovery at this stage of the proceeding is "mystifying" and "incomprehensible."[21] However, the Commission has addressed this very issue in *In re Chapters 4901-1, 4901-3, and 4901-9 of the Ohio Administrative Code*, Case No. 06-685-AU-ORD. In that case, the Commission addressed comments related to the Commission's procedural rules contained in Chapter 4901-1. The Office of Ohio Consumers' Counsel ("OCC") requested that the Commission add the definition of "proceeding" to the rules and define it as "any filing, hearing, investigation, inquiry or rulemaking which the Commission is required or permitted to make, hold or rule upon."[22] OCC argued, similar to OMAEG here (although OMAEG believes these rights currently exist) that:

[21] *Id.* at 2; 12.
[22] *In re Matter of the Review of Chapter 4901-1, 4901-3, and 4901-9 of the Ohio Administrative Code*, Case No. 06-685-AU-ORD, Finding and Order at ¶7 (December 6, 2006)

> By defining a "proceeding" the Commission would ensure that all parties will be permitted to participate fully in all matters before the Commission. Full participation would include, at a minimum, the rights to intervene, to conduct discovery, to examine and challenge evidence that is made a part of the record, and to submit evidence into the record. OCC contends that as currently written, the Commission's rules fail to extend these procedural due process rights to proceedings other than those in which a hearing is held.[23]

The Commission specifically rejected OCC's recommendation and found that the proposed definition was "overly broad and unnecessary." The Commission stated:

> If OCC's proposal were adopted, any interested person would have the right to intervene, conduct discovery and present evidence in any Commission case. The Commission does not believe that such rights exist. In addition, OCC's proposed definition would eliminate the Commission's discretion to conduct its proceedings in a manner it deems appropriate and would unduly delay the outcome of many cases. The request is denied.[24]

Clearly, the Commission does not believe that discovery rights exist in every single Commission case. The Companies' filing, pursuant to Commission order, of updated tariffs does not make a docket a "proceeding" for purposes of intervention, discovery and evidence. In this docket, no such rights exist at this time and OMAEG's Motion must be denied.

OMAEG asserts that O.R.C. §4903.082 and Rule 4901-1-16(B), Ohio Administrative Code ("O.A.C.") entitle it to discovery in this docket.[25] O.R.C. §4903.082 states "all parties and intervenors shall be granted ample rights of discovery…." In a similar case regarding the automatic approval of rider updates, the Commission, on rehearing where OCC argued that the Commission improperly failed to allow discovery, found that a denial of a motion to compel from OCC was proper. In denying the motion to compel, the Commission held that O.R.C.

[23] *Id.*
[24] *Id.* at ¶ 9 (emphasis added).
[25] OMAEG Motion at 2.

§4903.082 "did not require the Commission to allow for discovery."[26] The Commission found that approval of the application and denial of OCC's motion to intervene justified denial of the motion to compel. The Commission noted that, although OCC filed a motion to intervene, it was not granted, making O.R.C. §4903.082 inapplicable. As noted by the Commission, O.R.C. § 4903.082 applies to parties and intervenors. OMAEG is neither a party nor an intervenor to this docket.[27] For those reasons, O.R.C. §4903.082 does not require the Commission to permit OMAEG's discovery in this docket.

Likewise, Rule 4901-1-16(B), O.A.C. is inapplicable. OMAEG forgets one glaring fact - there is no such proceeding where any discovery would be admissible or not. Also, OMAEG's assertion that discovery will enable it "to adequately prepare" for this proceeding is incorrect because no such process or proceeding has been developed.[28] Moreover, although Rule 4901-1-16(H), O.A.C. does permit an entity to conduct discovery even though a motion to intervene has not been granted, because the Commission has not yet determined whether a hearing will be held, the Commission may still deny the motion to compel.[29] Finally, the Commission has further held that:

> the Commission's procedural rules and its governing statutes convey significant discretion and flexibility on the governance of its own proceedings. This is particularly so for proceedings where no hearing is required by law. There is no

[26] *In re the Matter of the Application of The East Ohio Gas Company dba Dominion Eats Ohio and Columbia Gas of Ohio Inc. for Adjustment of Their Interim Emergency and Temporary Percentage of Income Payment Plan Riders*, Case No. 05-1421-GA-PIP, Entry on Rehearing at ¶8 (March 7, 2006). *See also* Case No. 05-732-EL-MER; Case No. 05-733-EL-AAM; Case No. 05-974-GA-AAM, Entry on Rehearing at ¶ 11 (February 6, 2006).
[27] The Commission likewise, should not permit intervention. The Ohio Supreme Court has clearly stated that, under Section 4903.221, there is no right to intervene in a proceeding that does not include a hearing. *Ohio Domestic Violence Network v. PUCO*, 70 Ohio St. 3d 311, 314 (1994). This is not a docket is not a docket whereby a hearing is required or necessary.
[28] OMAEG Motion at 9.
[29] *See Case No. 05-732- et al*, Entry on Rehearing at ¶¶13-14 (December 7, 2005) (noting Rule 4901-1-16(H), O.A.C. but finding that because the Commission has "not yet determined whether a hearing will be held…it is not appropriate to lift the stay on discovery.")

> right to an evidentiary hearing in this proceeding or to the full discovery process normally reserved for cases where a hearing is required."[30]

OMAEG's assertion that the Companies' filing of updated tariffs in a new docket is a proceeding for purposes of Rule 4901-1-16(B) and requires the Commission to permit discovery is not correct.

E. OMAEG's discovery requests are also not relevant, unduly burdensome and seek information that is confidential and proprietary.

As the Companies indicated in their objections, OMAEG's discovery requests are also not relevant, unduly burdensome and seek information that is confidential and proprietary. OMAEG vaguely asserts that it needs to "make informed decisions and recommendations to the Commission about the proposed rider rates,"[31] but given the tariffs filed in this docket are already in effect – it is unclear how and what such recommendations would or could be made to the Commission. Indeed, on December 1, 2015, while this Motion is pending, the Companies will update their Rider DSE (for rates effective January 1, 2016) in a new docket making the information that OMAEG seeks irrelevant. OMAEG also asserts that "in the spirt of cooperation, after corresponding with the Companies, OMAEG later narrowed the temporal scope of its requests to 2015."[32] However, OMAEG had no choice but to narrow the temporal scope of its requests to 2015, because the Companies pointed out that information related to 2013 and 2014 were not relevant to this docket and otherwise already available.[33]

OMAEG conflates the Commission's "expectation that the next rider adjustment will reflect lower costs to customers resulting from the implementation of the Amended Portfolio" to

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[30] *In re Triennial Review Regarding Local Circuit Switching*, Case No. 03-2040-TP-COI, Entry on Rehearing at ¶ 8 (October 28, 2003) (denying OCC and CLEC's application for rehearing claiming that it has full discovery rights in a proceeding).
[31] OMAEG Motion at 12.
[32] *Id.* at 1.
[33] *See* Email from Carrie M. Dunn to Rebecca L. Hussey dated September 9, 2015, attached to OMAEG's Motion.

assert that the information it seeks is relevant. OMAEG also surmises, without any support, that the Companies are not meeting this expectation.[34] OMAEG mistakenly believes that lower program costs will immediately and almost always equal a lower rider. However, lower programs costs, do not necessarily translate into lower rates for customers because the rate is affected by various factors, including but not limited to, the true up of what customers have previously paid versus prior costs, and MWh forecasts influenced by the number of opt-outs permitted under SB 310 or authorized through Mercantile exemptions.

Likewise, OMAEG fails to demonstrate why it is necessary to have estimated EE/PDR savings and benchmarks to review the Companies' DSE Rider. This docket was opened to update Rider DSE for rates effective January 1, 2015 and July 1, 2015. The shared savings included in those those rates include only the shared savings amounts for 2014 and that information is available in the Companies' EE/PDR portfolio plan annual report filed in Case No. 15-0900-EL-EEC. *et al.* Moreover, EE/PDR savings and benchmarks for 2015, to the extent they even exist, would be estimated and preliminary, unverified results. Benchmarks for 2015 cannot be known until the end of the year when a full accounting of the impacts of opt out customer can be incorporated into the Companies' sales data. Finally, for some of the programs contained in the Companies' amended EE/PDR portfolio plans, savings information is not available. Hence, OMAEG should wait to receive the actual, verified savings amounts for the entire 2015 year included in the Companies' May 2016 EE/PDR portfolio plan annual reports.

OMAEG's request is also unduly burdensome in that it seeks information that is not readily available. OMAEG asserts that because the Companies publicly file most of the information, it should not be burdened to produce the information OMAEG seeks.[35] OMAEG is

[34] OMAEG Motion at 8 citing Case No. 12-2190-EL-POR, *et al.*, Finding and Order at 12 (November 20, 2014).
[35] OMAEG Motion at 10-11.

correct in that the Companies will file their annual audit report in March 2016 as well as the actual, verified EE/PDR savings no later than May 2016. Requiring the Companies to produce unverified and preliminary information prior to those public filings is unduly burdensome. Moreover, OMAEG requests information and workpapers for programs that either do not exist or are not readily available in the requested form and are beyond what the Commission requires, for example, EE/PDR savings by rate schedule.[36] Requiring the Companies to produce information and workpapers that do not exist is inappropriate and the Companies should not be compelled to do so.

Last, as discussed above, some of the 2015 information is unverified and preliminary. The Companies do not provide this information as it is nonpublic company information. To that extent, the Companies consider the unverified, preliminary EE/PDR savings to be confidential and proprietary and the Companies should not be compelled to produce it especially in light of the fact that the verified information will be publicly filed and available to all parties as part of the Companies' 2015 EE/PDR annual portfolio plan reports filed in 2016. For all of those reasons, the Commission should deny the Motion to Compel.

F. <u>The Companies did not invite OMAEG to serve discovery in this docket.</u>

OMAEG claims that the Companies invited it to serve discovery in this docket. According to meeting minutes from the December 14, 2014 and June 23, 2015 collaborative meetings, minutes on which every party is entitled to comment before they become final, the Companies did not advise OMAEG to serve discovery in a formal proceeding. On July 16, 2015 and September 23, 2015, the Environmental Law and Policy Center ("ELPC") filed a motion requesting that the Commission determine that materials provided as part of the collaborative

[36] *See* INT 1-19 through 1-24 and RPD 1-19 through 1-24.

process are not confidential.[37] In light of that Motion and ELPC's continuous declaration that it believes materials provided in the collaborative are not confidential, counsel for the undersigned advised OMAEG's representative that the Companies would not provide confidential information outside of a formal Commission process that contains discovery protections for the Companies. OMAEG was not advised that "if OMAEG wanted to obtain such information, it should go through a formal Commission process."[38] Nevertheless, even if the Companies had invited OMAEG to serve discovery in this docket, OMAEG's Motion must be denied for all of the reasons discussed above.

IV. CONCLUSION

As discussed above, there is a Commission-ordered process for the public filing of the Companies' Rider DSE tariff updates and audit. OMAEG has not demonstrated that deviation from this process is necessary. Moreover, much of the information OMAEG seeks is publicly available or will become publicly available. Last, OMAEG is not entitled to discovery in this docket. For all of those reasons, the Commission should deny OMAEG's Motion.

Respectfully submitted,

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[37] *See* Case No. 12-2190-EL-POR, *et al.*
[38] OMAEG Motion at 3-4.

CERTIFICATE OF SERVICE

I certify that this Memorandum Contra was filed electronically through the Docketing Information System of the Public Utilities Commission of Ohio on this 25th day of November 2015. The PUCO's e-filing system will electronically serve notice of the filing of this document on all parties of record. Courtesy email copies have also been sent to:

OMAEG (bojko@carpenterlipps.com; o'rourke@carpenterlipps.com)

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Summary: Memorandum Contra Motion to Compel electronically filed by Ms. Carrie M Dunn on behalf of The Cleveland Electric Illuminating Company and The Toledo Edison Company and Ohio Edison Company