BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Filing by Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company of a Grid Modernization Business Plan	)	Case No. 16-481-EL-UNC
In the Matter of the Filing by Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company Application for Approval of a Distribution Platform Modernization Plan	)	Case No. 17-2436-EL-UNC
In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company to Implement Matters Relating to the Tax Cuts and Jobs Act of 2017	)	Case No. 18-1604-EL-UNC
In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Approval of a Tariff Change	)	Case No. 18-1656-EL-ATA

REPLY BRIEF OF THE OHIO MANUFACTURERS' ASSOCIATION ENERGY GROUP

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I. INTRODUCTION

The Settlement before the Commission is a rushed attempt to address multiple, unrelated issues in one fell swoop. The Toledo Edison Company, Ohio Edison Company, and Cleveland Electric Illuminating Company's (collectively, the Companies) attempt to combine four cases, from three years, regarding two subjects into one single proceeding is unjust and unreasonable. The Companies were directed to return tax savings to customers, but instead of doing so directly, the Companies used this proceeding to extract over half-a-billion dollars of above market charges from customers. As the Ohio Manufacturers Association Energy Group (OMAEG) and others noted in initial briefs, this settlement would unjustly and unreasonably allow the Companies to collect above-market charges from customers without a resulting customer benefit, collect those charges without protections in place to ensure customers will be refunded if the Companies collect unjust, unreasonable, or unlawful charges, and refund customers for the Companies' overcollection of its federal income tax obligation in a manner that disadvantages non-residential customers.[1]

OMAEG and others raised these issues in their briefs, arguing that the unjust and unreasonable results of the Stipulation[2] and Supplemental Stipulation[3] (collectively, the Settlement) should lead the Commission to determine that the Settlement does not satisfy the Commission's criteria for approval of settlements and, accordingly, reject or modify the Settlement.[4] Many of the arguments raised by OMAEG and others, specifically those related to rate design and refund/reconciliation language were not addressed in briefs submitted by the

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1 See Initial Brief of the Ohio Manufacturers' Association Energy Group (March 1, 2019) (OMAEG Brief).

2 See Companies Ex. 1.

3 See Companies Ex. 3.

4 See OMAEG Brief at 4-5, 7-24.

Companies and other parties to the Settlement. OMAEG's objections to the collection of grid modernization costs from customers were discussed, but not adequately justified, in briefing in support of the Settlement. As detailed below, the Companies and supporting parties have not met the Commission's criteria for approval of the Settlement.

Pursuant to the Attorney Examiners' direction at the close of hearing,[5] OMAEG hereby submits this reply brief urging the Commission to reject or, alternatively, modify the settlement for the reasons specified herein.

II. STANDARD OF REVIEW

As explained in OMAEG's initial brief,[6] a stipulation is only a recommendation that is not binding on the Commission.[7] The Commission "may take the stipulation into consideration, but must determine what is just and reasonable from the evidence presented at the hearing."[8] The Commission has established and used the following criteria in evaluating whether a settlement is reasonable and merits adoption:

1. Is the settlement a product of serious bargaining among capable, knowledgeable parties?

2. Does the settlement, as a package, benefit ratepayers and the public interest?

3. Does the settlement package violate any important regulatory principle or practice?[9]

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5 Tr. Vol. II at 321.

6 OMAEG Brief at 4-5.

7 *Duff v. Pub. Util. Comm*., 56 Ohio St.2d 367, 379 (1978); *see also* Ohio Adm. Code 4901-1-30(E) ("No stipulation shall be considered binding upon the commission").

8 Id.

9 See, e.g., *In the Matter of the Application Seeking Approval of Ohio Power Company's Proposal to Enter into an Affiliate Power Purchase Agreement for Inclusion in the Power Purchase Agreement Rider*, Case No. 14-1693-EL-RDR, Opinion and Order at 48-49 (March 31, 2016).

Below, OMAEG responds to the arguments of the Companies and other parties asserting that the Settlement does satisfy the Commission's standard for review of stipulations.

III. ARGUMENT

A. The Settlement Is Not the Product of Serious Bargaining Among Capable, Knowledgeable Parties.

The first factor in the Commission's analysis of whether a settlement should be adopted is whether the settlement is the product of serious bargaining among capable, knowledgeable parties. As OMAEG explained in its initial brief, this Settlement does not meet that standard.[10] Despite the Companies and supporting parties attempts to portray the negotiations that led to the Settlement as comprehensive efforts that included all interested parties, the fact is that most of the negotiations that led to the Settlement took place without the involvement of the vast majority of parties.[11] The Supreme Court of Ohio has determined that such exclusive settlement negotiations are not acceptable,[12] and pro forma meetings between parties after an agreement between Staff and the Companies was reached do not change the analysis that the process that led to the Settlement was unjust, unreasonable, and unlawful. By citing the *Time Warner* footnote, OMAEG is not contending that there were never settlement negotiations that included all parties. Rather, OMAEG and others contend that settlement negotiations that only included all parties after an agreement had been essentially reached and is set to be filed have effectively excluded those parties that were not a part of the process that led to the agreement presented at the settlement negotiations and rendered the *Time Warner* footnote meaningless.

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[10] OMAEG Brief at 7-9.

[11] See Tr. Vol. I at 34-35; OMAEG Brief at 7-8.

[12] See *Time Warner AxS v. Pub. Util. Comm.*, 75 Ohio St.3d 229, 233, fn.2, 1996-Ohio-224, 661 N.E.2d. 1097 (1996).

In their brief, the Companies present the process leading to the Settlement as a comprehensive one that involved all parties.[13] Notably, however, the Companies make admissions that undermine this contention. The Companies admit that they began meeting with Staff in June 2018 and did not involve any other stakeholders in this process until October 31, 2018.[14] They also admit that the initial Stipulation was reached on November 9, 2018, barely one week after that initial meeting with parties other than Staff.[15]

The Companies also attempt to use the longer process that had been followed in the grid modernization proceedings prior to their combination with the TCJA application as evidence that the bargaining was serious.[16] Contrary to that assertion, however, the process in those cases actually shows that the bargaining for this Settlement was insufficient. The Companies state that they provided extensive discovery and information on the grid modernization issues over the past three years.[17] However, no settlement discussions with all of the parties occurred during that three-year period. The evidence that the Companies cite is in no way a credit to the bargaining process used to arrive at the Settlement. It is actually the exact opposite. Contrary to the Companies' claims, its own evidence indicates that the Companies took two cases that were complex on their own (but had not involved previous settlement negotiations), combined it with another, unrelated proceeding, and then filed the initial Stipulation only nine days later.

Allowing the process used in this case to meet the Commission's requirement of serious bargaining would set a dangerous precedent. Utilities should not be permitted to present

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13 See Post-Hearing Brief of Ohio Edison Company, the Cleveland Electric Illuminating Company, and the Toledo Edison Company at 5-9 (March 1, 2019) (Companies Brief).

14 Id. at 6-7.

15 Id. at 7.

16 See Companies Brief at 5-6.

17 Id.

essentially finalized settlements to intervening parties in a case at the eleventh hour, put those parties under pressure to join those settlements in a matter of days, and then claim that because all parties were brought in at the last minute, the requirement is satisfied. This would render the *Time Warner* footnote powerless as parties would be able to avoid its central purpose by holding exclusionary settlement meetings and then inviting the excluded parties at the last minute, after an agreement has been essentially reached, and claim that the bargaining was serious. The bargaining that leads to settlement of proceedings before the Commission—especially proceedings that present issues as complex and multi-faceted as the ones before the Commission here—should constitute genuine and serious bargaining, not just be a facade.[18]

Moreover, it is telling that one party to the Settlement, the Office of the Ohio Consumers' Counsel (OCC), cited the three-prong test for reviewing stipulations that is discussed above, offered arguments related to the other two prongs of that standard, but declined to offer a single word in support of the conclusion that the Settlement was the result of serious bargaining among capable, knowledgeable parties.[19] Despite its support of the ultimate result of the Settlement, and clear knowledge of the Commission's standard, OCC explicitly chose not to endorse the bargaining process that led to the Settlement. The Commission should consider that the inability of a signatory party to argue in good faith that the bargaining process used for the Settlement met the Commission's standard for ensuring adequate settlement negotiations as evidence that the negotiation process used by the Companies in this case was deeply flawed.

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[18] See also Initial Brief of the Environmental Law & Policy Center, Natural Resources Defense Council, and Ohio Environmental Council at 20-21 (March 1, 2019) (Environmental Brief); Initial Post-Hearing Brief of the Kroger Co. at 9-12 (Kroger Brief).

[19] See Brief in Support of the Supplemental Settlement by the Office of the Ohio Consumers' Counsel (March 1, 2019) (OCC Brief).

As OMAEG and others articulated in the initial briefs, the negotiation process for the Settlement was insufficient to account for the depth and complexity of the issues being resolved.[20] Accordingly, the Commission should find that this Settlement is not the result of serious bargaining so as to not set the precedent that superficial negotiations can be replicated in the future.

B. <u>The Settlement Does Not Benefit Ratepayers or the Public Interest.</u>

The rushed Settlement that stemmed from the process described above resulted in an agreement that includes unjust and unreasonable charges, deploys an inadequate rate design, and does not sufficiently protect customers against charges deemed to be unjust, unreasonable, or unlawful. The Commission should modify the Settlement to ensure that just and reasonable charges are established, that a fair rate design is utilized, and that appropriate tariff language is adopted to fully protect customers if a rate is deemed to be unjust, unreasonable, or unlawful by requiring refunds. Until those revisions are made, the Settlement fails to satisfy the requirement that it benefits ratepayers and is in the public interest.

i. <u>The Commission Should Modify the Settlement to Ensure that the Refund Language Adequately and Fully Protects Customers.</u>

Despite the fact that OMAEG raised the issue of the inadequate refund and reconciliation language included in the tariff for the Advanced Metering Infrastructure/Modern Grid Rider (Rider AMI) on cross-examination of Companies Witness Fanelli,[21] neither the Companies nor any party supporting the Settlement addressed such language on brief. No signatory party has attempted to defend the language included in Rider AMI that limits the situations under which

[20] OMAEG Brief at 8-9; Kroger Brief at 9-12, Environmental Brief at 11-15.

[21] See Tr. Vol. I at 123-32.

refunds or reconciliation can occur. The refund and reconciliation language contained in Rider AMI is:

> This Rider is subject to reconciliation including, but not limited to, increases or refunds. Such reconciliation shall be based solely upon the results of audits ordered by the Commission in accordance with the July 18, 2012 Opinion and Order in Case No. 12-1230-ELSSO, and the March 31, 2016 Opinion and Order in Case No. 14- 1297-EL-SSO and upon the Commission's orders in Case Nos. 18- 47-AU-COI, 16- 481-EL-UNC, 17-2436-EL-UNC, 18-1604-EL-UNC and 18-1656-EL-ATA.[22]

As OMAEG and others explained at length in the initial briefs,[23] this language does not sufficiently protect customers for two reasons. First, the language fails to contemplate refunds as the result of audits in proceedings that are not explicitly listed in the reconciliation and refund language. Second, the reconciliation and refund language fails to consider the possibility that the Supreme Court of Ohio could determine that charges collected from customers under Rider AMI were unjust, unreasonable, or unlawful. OMAEG provided evidence that tariffs for other utilities are able to address these issues more appropriately.[24] Therefore, it would be unjust and unreasonable for the Commission to approve this language, which would limit the protection of customers from unjust, unreasonable, or unlawful charges.

ii. <u>The Companies Fail to Justify the Excessive and Possibly Duplicative Charges for Grid Modernization.</u>

In violation of R.C. 4905.22, the Companies have not demonstrated that $516 million in additional grid modernization charges imposed on customers would be just and reasonable. The Companies have not developed a record sufficient to sustain their burden of proof that the charges, and the level of the charges, for grid modernization included in the Settlement are just

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22 Supplemental Stipulation at 3-4.

23 OMAEG Brief at 10-15; Kroger Brief at 22-24.

24 Id.

and reasonable. The Companies have the burden of demonstrating that the proposed charges would be just and reasonable.[25] Moreover, the Commission has determined that ". . . in requests for grid modernization investment, it only makes sense that an EDU include a cost/benefit analysis with the application. This way, the Commission and stakeholders can transparently evaluate whether a grid modernization investment should be made in the first place."[26] The Commission further clarified that the utility should demonstrate that benefits generated by the project will exceed costs on a net present value basis.[27] The Companies have also not met their burden of demonstrating that customers will in fact receive benefits from those charges.

As an initial matter, not all parties to the Settlement support the grid modernization provisions. Specifically OCC and the Northeast Ohio Public Energy Council (NOPEC) took no position on whether the grid modernization portions of the Settlement provided positive benefits to customers and only agreed not to oppose the grid modernization provisions under the Settlement.[28] With that non-opposition noted, OCC did not attempt to support or justify the grid modernization costs that the Settlement imposes on customers in their briefs.[29] NOPEC did not file an initial brief.

As they did at hearing, the Companies attempt to justify grid modernization costs using promises of improved customer savings and eventual cost savings resulting from the grid modernization investments that will be made.[30] The Companies' arguments, however, appear to be mostly speculative and general. Those arguments are also not supported by tangible record

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[25] See *In the Matter of the Application of Duke Energy Ohio for a Charge Pursuant to Section 4909.18, Revised Code, et al.*, Case No. 12-2400-EL-UNC, et al., Opinion and Order at 49 (February 13, 2014).

[26] See *PowerForward: A Roadmap to Ohio's Electricity Future* at 27; ELPC Ex. 32 at 4-5 (Volkmann Direct).

[27] *PowerForward: A Roadmap to Ohio's Electricity Future* at 27

[28] Supplemental Stipulation at 8.

[29] See OCC Brief;

[30] Companies Brief at 12-15.

evidence. It is telling that the Companies' support for most of the benefits they contend stem from the grid modernization portions are not supported by witness testimony or substantive exhibits entered at hearing, but rather by portions of the two stipulations entered into between some of the parties.[31] Stipulations, drafted largely by lawyers, do not provide concrete evidence that these benefits will actually result. Rather, the Stipulation and Supplemental Stipulation cursory state the purported benefits of the Settlement. It was the Companies' obligation to substantiate those benefits at hearing with record evidence from knowledgeable witnesses, studies, and other sources that could verify that the Settlement's purported benefits will result in actuality. As evidenced by the lack of citation to such evidence on brief, the Companies failed to meet that obligation.

Additionally, as explained by the Environmental Law & Policy Center (ELPC), the Natural Resources Defense Council (NRDC), and the Ohio Environmental Council (OEC) (collectively, Environmental Intervenors), the assumptions used to arrive at the determination that these benefits would result were invalid, and a proper analysis reveals that the grid modernization proposal is not cost effective on a net-present value basis.[32] The Environmental Intervenors further explained how these unreliably forecasted benefits are especially dangerous given the reality that there are no enforcement mechanisms requiring the Companies to achieve those benefits.[33]

Moreover, as noted in OMAEG's initial brief, this proceeding is not the first time that the Companies have offered these speculative grid modernization benefits to customers in exchange

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31 See Companies' Brief at 12-15.

32 See Environmental Brief at 20-21.

33 Id. at 22-23.

for hundreds of millions of dollars in grid modernization charges.[34] Under the Distribution Modernization Rider (Rider DMR) approved in the Companies' fourth electric security plan, the Companies are already collecting significant amounts of grid modernization charges from customers.[35] In its brief, the Kroger Co. (Kroger) pointed out that the Settlement would allow the Companies to collect costs from customers for this version of grid modernization without allowing for any offset for the costs those same customers had previously paid purportedly for the very same purpose.[36] The repetitive nature of these claims of customer benefits in concert with the fact that the Companies have not provided specific evidence that would allow the Commission to ascertain that the benefits will actually occur this time around should lead the Commission to reject the Settlement's grid modernization provisions as unjustly and unreasonably collecting grid modernization costs from customers.[37]

iii. <u>The Rate Design Used to Return Tax Benefits to Customers Is Unjust and Unreasonable.</u>

The settlement negotiation process should not be used to disadvantage one customer class to the benefit of another for the sole purpose of adding additional parties to the ultimate agreement. As previously discussed, the Commission has stated that it disfavors cost shifting

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[34] OMAEG Brief at 16-17.

[35] See *In the Matter of the Application of Ohio Edison Company, the Cleveland Electric Illuminating Company, and the Toledo Edison Company for Authority to Provide for a Standard Service Offer Pursuant to R.C. 4928.143 in the Form of an Electric Security Plan*, Case No. 14-1297-EL-SSO, Fifth Entry on Rehearing at ¶¶ 118-19 (October 12, 2016) (ESP IV Fifth Entry on Rehearing) ("Rider DMR will not only further grid modernization technologies throughout the state of Ohio, it will also bolster the several policies set forth in R.C. 4928.02, specifically by improving reliability by reducing the number and length of outages, provide new options to customers, and allow new suppliers to enter the market"); see also Tr. Vol I at 155-63.

[36] See Kroger Brief at 13-14.

[37] See Kroger Brief at 17-18.

among customer classes for the purpose of arriving at a settlement.[38] OMAEG and Kroger argued against the disproportionate allocation of tax benefits used to add additional parties to the Settlement in their briefs,[39] and then OCC—the beneficiary of the cost shifting at issue here—confirmed that such a shift between customer classes had indeed occurred in its own brief.[40]

As OMAEG and Kroger noted, the rate design that was used in the initial Stipulation had been used in prior proceedings and contained reasonable provisions to fairly allocate the tax savings dispersed as a result of the Settlement.[41] However, the Supplemental Stipulation modified the rate design such that $125.1 million (representing 15.58% of the total rate reduction) of the tax savings were reallocated from commercial to residential customers.[42] In its brief, OCC plainly agrees that such a shift in benefit allocation has occurred, saying that the Supplemental Stipulation "provides additional tax related benefits" to residential customers and that this increased benefit to one customer class demonstrates that the Settlement as a whole is in the public interest.[43]

Importantly, OCC does not once aver that the reallocation of tax savings away from one customer class and to another is just or reasonable under ratemaking principles, Commission precedent, or any other standard. OCC's argument appears to be that more benefits for residential customers are inherently in the public interest, regardless of how those additional benefits impact other customers of the Companies. While the cost shifting used to build this

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38 *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Authority to Recover Costs Associated with the Ultimate Construction and Operation of an Integrated Gasification Combined Cycle Electric Generation Facility*, Case No. 05-376-EL-UNC, Order on Remand at 12 (February 11, 2015).

39 OMAEG Brief at 17-19; Kroger Brief at 20-22.

40 OCC Brief at 4-5.

41 See See Supplemental Stipulation at 2, Supplemental Attachment E; OMAEG Brief at 17-19.

42 OCC Ex. 1 at 5 (Willis Direct).

43 See OCC Brief at 4

Settlement is indeed beneficial to OCC's interest, that is not the same as being beneficial to all customers or the public interest. Electricity cost increases to manufactures results in increases in the cost of producing their products, which will negatively affect the public. The Commission should look to the entire public, not just one subset of customers in determining whether a rate design is just and reasonable and in the public interest. In doing so, it should rely on rate designs that have been previously determined to fairly spread out costs and benefits rather than a contrived formula only used to have a subset of customers join a settlement agreement.

iv. The Companies Have Failed to Demonstrate that the Settlement's Purported Benefits Are Anything More than Mandatory Legal Obligations of the Companies.

In determining whether the Settlement benefits the public interest, the Commission should disregard legal obligations of the Companies. Mandatory legal obligations do not constitute settlement benefits. The first benefit that the Companies cite to in the Settlement is that customers will realize tax-related savings resulting from the TCJA.[44] Despite the Companies' assertions, this is not a benefit to customers of the Settlement, but rather a result to which customers were legally entitled before the negotiations that led to this Settlement ever began. On October 24, 2018, the Commission stated that "we once again find it necessary to note that we intend all benefits resulting from the TCJA will be returned to customers."[45] Therefore, the Commission had already determined that the TCJA benefits cited by the Companies in their brief are actually a legal obligation of the Companies.

The Companies' claim that customers will receive TCJA-related benefits through the Settlement is disingenuous. The Commission already decided that customers would receive

[44] See Companies Brief at 10.

[45] See *In the Matter of the Commission's Investigation of the Financial Impact of the Tax Cuts and Jobs Act of 2017 on Regulated Ohio Utility Companies*, Case No. 18-47-AU-COI at ¶ 27 (October 24, 2018).

those benefits. Therefore, the Commission should not allow the Companies to weigh those benefits against new above-market charges being imposed on customers. Allowing benefits that were required to occur, even without the Settlement, to be considered a benefit of the Settlement would set a precarious precedent whereby utilities could delay providing cost savings to which Ohioans are legally entitled until their customers provide additional benefits in exchange. The TCJA never should have been considered to be a bargaining chip for utilities to extract above-market charges from customers. The Commission should reject the Companies' attempt to use it as such here and only consider the benefits that customers would not be entitled to absent the Settlement in its analysis of whether the Settlement benefits the public interest.

C. The Settlement Violates Important Regulatory Practices and Principles.

OMAEG and others identified several important regulatory practices and principles that the Settlement violates in its initial brief.[46] OMAEG reiterates and incorporates by reference these violations as if fully written herein, as the Companies have not offered any evidence to the contrary. The Signatory Parties have not produced evidence that contradicts the facts or overcomes the failures of the Settlement. In contrast, the evidence demonstrates the following: the Settlement fails to ensure reasonably priced electric service by imposing above-market, duplicative charges; the Settlement fails to ensure cost-effective access to information; the Settlement fails to facilitate Ohio's effectiveness in the global economy; and the Settlement fails to protect all customers. Given these violations of regulatory practices and principles, the Commission should find that the Settlement does not satisfy the Commission's third prong for evaluation of agreements resolving proceedings before the Commission.

[46] OMAEG Brief at 20-24; Kroger Brief at 24-28; Environmental Brief at 36.

IV. CONCLUSION

Through their initial briefs, OMAEG and others articulated the flaws in this Settlement that preclude it from satisfying the Commission's standards for Settlement approval. The signatory parties' briefs did nothing to cure the deficiencies. The facts remain. The rushed attempt to resolve unrelated cases and allow the Companies to use tax relief as a bargaining tool to collect more than half-a-billion dollars from customers should be rejected by the Commission. The Companies should be forced to address tax relief in a unique case rather than through a comprehensive settlement of unrelated issues. Approving the Settlement would set the precedent that rates can be designed based on convenience instead of fairness, result in unjust and unreasonable rates in violation of Ohio law, and leave customers vulnerable to being charged unjustly and unreasonably by the Companies and then be left without recourse when such unjust and unreasonable charges are identified. Accordingly, the Commission should reject or modify the Settlement as a whole, as it was not a product of serious bargaining among all knowledgeable parties, does not benefit ratepayers and the public interest, and violates important regulatory principles and practices as set forth herein, and require the Companies to implement the tax relief resulting from the TCJA and ordered by the Commission.

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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing was served upon all parties of record via electronic mail March 12, 2019.

/s/ Brian W. Dressel_____
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Summary: Brief Reply Brief Of The Ohio Manufacturers' Association Energy Group electronically filed by Mrs. Kimberly W. Bojko on behalf of OMA Energy Group