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**BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of Ohio )  
Edison Company, The Cleveland Electric )  
Illuminating Company, and The Toledo )  
Edison Company for Approval of a )  
New Rider and Revision of an Existing )  
Rider. )

Case No. 10-0176-EL-ATA

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**POST HEARING BRIEF  
OF  
INDUSTRIAL ENERGY USERS-OHIO**

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March 28, 2011

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## TABLE OF CONTENTS

I.	INTRODUCTION .....	1
II.	PROCEDURAL HISTORY AND BACKGROUND.....	2
III.	IEU-OHIO SUPPORTS THE COMMISSION STAFF'S AND FE'S RECOMMENDATIONS REGARDING THE RESPONSIBILITY FOR ANY REVENUE SHORTFALL PRODUCED BY THE COMMISSION'S DECISIONS IN THIS PROCEEDING .....	9
IV.	THE TESTIMONY SPONSORED BY OCC'S WITNESS ANTHONY YANKEL WAS IMPROPERLY ADMITTED INTO EVIDENCE .....	11
	A.    OCC is Bound by Settlement Agreements.....	13
	B.    Even if Not Stricken, the Recommendations of OCC's Witness Yankel Are Without Merit .....	14
V.	CONCLUSION .....	18

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**I. INTRODUCTION**

The evidentiary hearing in this proceeding was completed on February 24, 2011 and was preceded by numerous local public hearings. The subject matter of this hearing has received much attention from elected officials<sup>1</sup> and the media with claims and accusations that have shown to be inaccurate and misleading. As discussed below, the relief proposed by some of the participants in this proceeding conflicts with the positions they have taken in prior cases on this same subject and, more importantly, conflicts with settlement agreements to which they are bound and which they previously agreed to support.

The Industrial Energy Users-Ohio ("IEU-Ohio") intervened in this proceeding on February 18, 2010, more than one year ago. Since then, it has worked to address the

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<sup>1</sup> The Cleveland Plain Dealer, "Legislators whip up crowd of angry all-electric homeowners.", February 22, 2010, news article accessible via the internet at: [http://www.cleveland.com/business/index.ssf/2010/02/strongsville\\_hosts\\_all-electri.html](http://www.cleveland.com/business/index.ssf/2010/02/strongsville_hosts_all-electri.html) (last visited March 28, 2011).

fallout associated with the Public Utilities Commission of Ohio's ("Commission") disregard for its own decisions and the flip flopping by stakeholders who have narrowly defined the public interest by reference to some residential customers who have benefited from what has come to be known as the "all-electric rates." More specifically, IEU-Ohio has focused its protests and advocacy in this proceeding on proposals that would require non-residential customers to absorb greater responsibility for the costs incurred by the Ohio Edison Company ("OE"), The Cleveland Electric Illuminating Company ("CEI"), and The Toledo Edison Company ("TE") (collectively "FE") pursuant to final and binding Commission orders to serve customers that were previously receiving electric service pursuant to FE's all-electric rate schedules. In this context, IEU-Ohio submits its Post Hearing Brief for the Commission's consideration.

## **II. PROCEDURAL HISTORY AND BACKGROUND**

While some parties to this proceeding and various elected officials have claimed otherwise, the issues raised in this proceeding are not new. They have been addressed repeatedly by the Commission.

Indeed, on January 4, 2006, the Commission issued an Opinion and Order regarding the rate certainty plan ("RCP") for OE, CEI and TE and adopting a settlement agreement that included a provision that certain all-electric residential rate schedules would no longer be available to new customers or new premises beginning January 1, 2007. *In the Matter of the Joint Application of Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company for Authority to Modify Certain Accounting Practices and for Tariff Approvals*, PUCO Case Nos. 05-1125-EL-ATA, *et al.*, Opinion and Order (January 4, 2006).

On January 21, 2009, the Commission issued its Opinion and Order in FE's distribution rate case. *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Authority to Increase Rates for Distribution Service, Modify Certain Accounting Practices, and for Tariff Approvals*, PUCO Case Nos. 07-551-EL-AIR, *et al.*, Opinion and Order (January 21, 2009). To simplify FE's rates relative to the mandates contained in Chapter 4928, Revised Code, the Commission approved FE's proposed consolidation of 32 different residential distribution rate schedules into a single residential distribution rate schedule for each electric distribution utility ("EDU"). To mitigate the effects of this consolidation upon residential customers, the Commission approved a distribution credit for certain residential customers,<sup>2</sup> many of which had taken service under all-electric residential rate schedules. Such customers had received a substantial discount on their winter period electric rates prior to the rate schedule consolidation and they received a discount after the consolidation based upon the principle of gradualism.<sup>3</sup>

After extensive settlement discussions, on February 19, 2009, OE, CEI and TE filed an Amended Application initiating an electric security plan ("ESP") case<sup>4</sup> and a Stipulation and Recommendation ("ESP Stipulation") signed by many of the intervening parties. On February 26, 2009, a Supplemental Stipulation was filed. The Supplemental Stipulation contained refinements to the ESP Stipulation (concerning

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<sup>2</sup> *Id.* at 23-24.

<sup>3</sup> *Id.* at 29.

<sup>4</sup> *In the Matter of the Application of the Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Authority to Establish a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan*, PUCO Case Nos. 08-935-EL-SSO, *et al.*, Application (July 31, 2008) (hereinafter "*FE ESP Proceeding*").

things like governmental aggregation and the creation of a \$25 million fund that was not permitted to be used to fund reasonable arrangements or "special contracts") and committed additional signatory parties, including the Office of the Ohio Consumers' Counsel ("OCC"), the statutory representative of residential customers, to support the ESP Stipulation as modified by the Supplemental Stipulation. At page 10 of the Supplemental Stipulation, the signatory parties stated:

The undersigned Parties respectfully request the Commission to issue its Opinion and Order approving and adopting the Stipulated ESP as set forth in this Stipulation and this Supplemental Stipulation.

*FE ESP Proceeding*, Supplemental Stipulation at 10 (January 26, 2009). The ESP Stipulation, as supplemented, was not opposed by any non-signatory parties.

On March 4, 2009, the Commission approved the portion of the ESP Stipulation regarding the limited term ESP.<sup>5</sup> On March 25, 2009, the Commission approved the remaining provisions of the ESP Stipulation regarding FE's standard service offer ("SSO") generation price for the June 1, 2009 through May 31, 2011 period.<sup>6</sup> Under the approved ESP Stipulation, retail generation rates for June 1, 2009 through May 31, 2011 have been determined by a descending-clock format competitive bidding process ("CBP") that produced the cost incurred by OE, CEI and TE to provide default generation supply service as required by Section 4928.141, Revised Code.<sup>7</sup> By letter dated March 30, 2009, FE notified the Commission that it accepted the results of the Commission's March 25, 2009 Opinion and Order saying:

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<sup>5</sup> *FE ESP Proceeding*, Second Finding and Order (March 4, 2009).

<sup>6</sup> *FE ESP Proceeding*, Second Opinion and Order (March 25, 2009).

<sup>7</sup> Contrary to the assertions contained in testimony of OCC's witness Anthony J. Yankel (OCC Exhibit 1), the cost of this default generation supply is not determined based on the cost of service studies that were used historically to identify the jurisdictional costs associated with the provision of service to retail customers and to divide or allocate such costs between the various customer classes and rate schedules.

While no formal acceptance of the Commission's Second Opinion and Order is required because the Commission approved and adopted the totality of the Stipulated ESP without modification, in order to avoid unnecessary uncertainty regarding the implementation of the Stipulated ESP, the Companies hereby provide notice that they accept the Commission's Second Finding and Order issued on March 4, 2009 and the Second Opinion and Order issued on March 25, 2009 as their ESP through May 31, 2011, with such acceptance remaining dependent upon the terms and conditions of the Stipulated ESP being specifically implemented in the manner and timeframe contemplated thereby, particularly regarding the terms and conduct of the competitive bid process and the implementation of the results arising therefrom.

As indicated above, the ESP Stipulation and the Supplemental Stipulation provided that, for the period between June 1, 2009, and May 31, 2011, default generation supply prices must be determined by a CBP. Further, in order to create a generation rate structure consistent with the distribution rate structure approved in FE's distribution rate case (described above), the Commission approved a rate consolidation that resulted in a single residential generation rate schedule for each EDU. *FE ESP Proceeding*, Second Opinion and Order at 9-10 (March 25, 2009). The Commission also approved a residential generation credit for customers who were impacted by the generation rate schedule consolidation in order to mitigate the impact of the consolidation. *Id.* Again, the benefited customers included a number of customers taking service under the discounted all-electric residential rate schedules.<sup>8</sup>

As has been explained in the testimony of William R. Ridmann (FE Exhibit 1 at 43-44) and Robert B. Fortney (Staff Exhibit 1 at 4), the *FE ESP Proceeding* settlements approved by the Commission included, as part of a larger package, provisions to allocate the responsibility for funding the cost of the benefits that were extended to

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<sup>8</sup> The distribution and generation credits provided to customers affected by the rate schedule consolidation in both proceedings represent total rate discounts of 3.6 cents per kWh. *Finding and Order* at 2 (March 3, 2010).

residential customers receiving rate concessions to mitigate the effects of the above-described rate schedule consolidations and rate design changes. Non-residential customers served under GS and GP rate schedules ended up with responsibility for a significant portion of this funding responsibility (FE Exhibit 1 at 43-44) as a result of the *FE ESP Proceeding* settlements adopted by the Commission.

On March 30, 2009, the Commission issued an Entry *nunc pro tunc* amending its Second Opinion and Order dated March 25, 2009.

This proceeding was initiated by FE's February 12, 2010 application seeking authority to modify rates so as to reduce rates for certain all-electric customers and increase rates for other customers. In a Finding and Order issued on March 3, 2010, the Commission indicated that substantial public concern had been expressed regarding certain all-electric residential customers' bills notwithstanding the discounts provided to these customers and the settlements signed and supported by representatives of residential customers. In the same Finding and Order, the Commission, among other things:

- (1) Found that "...until such time as the Commission determines the best long-term solution to this issue, rate relief should be provided for all-electric residential customers";
- (2) Directed FE to file tariffs that would mimic December 31, 2008 bill impacts for these customers;
- (3) Stated that in light of the prior settlement agreements regarding the use of a CBP to procure generation and the recovery of generation supply costs through retail rates, further proceedings would be needed to address the revenue shortfall created by the direction;
- (4) Authorized FE to modify its accounting procedures to defer the revenue shortfall created by the direction;
- (5) Acknowledged that the direction did not create a long-term solution; and,



- (6) Directed the Staff to conduct an investigation and file a report regarding the appropriate long-term solution.

Finding and Order at 1, 3-4 (March 3, 2010).

On March 8, 2010, OCC filed an Application for Rehearing. On April 6, 2010, the Commission granted rehearing for the purpose of further consideration of the matters specified in OCC's Application for Rehearing. Subsequently, on April 15, 2010, the Commission denied OCC's Application for Rehearing in its Second Entry on Rehearing in this proceeding.<sup>9</sup>

While the April 15 Entry denied OCC's Application for Rehearing, it nonetheless "clarified" the March 3, 2010 Finding and Order so that the bill reductions directed by the Commission were provided both to customers previously billed under the all-electric rate schedules plus any residential customer with a successor account to a customer that previously qualified for the all-electric rate schedules "...notwithstanding the provisions of the stipulation in *In re FirstEnergy*, Case No. 05-1125-EL-ATA, et al." April 15 Entry at 2.

On April 2, 2010, FE filed an Application for Rehearing regarding the Commission's March 3, 2010 Finding and Order. The Commission granted rehearing on April 28, 2010.

On May 14, 2010, FE filed an Application for Rehearing regarding the April 15 Entry alleging that the April 15 Entry was unreasonable and unlawful. Among other things, FE protested the "clarification" that extended bill discounts to customers who have never received a discount thereby significantly increasing the shortfall created by the Commission's actions. Further, on May 17, 2010, IEU-Ohio and OCC filed

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<sup>9</sup> Second Entry on Rehearing at 2 (April 15, 2010) (hereinafter "April 15 Entry").

Applications for Rehearing regarding the April 15 Entry. In IEU-Ohio's Application for Rehearing, it generally contested the Commission's authority to undo the effect of prior settlements and orders establishing rates and IEU-Ohio also contested the Commission's large expansion of the revenue shortfall.

On June 9, 2010, the Commission granted the Applications for Rehearing filed by FE, OCC and IEU-Ohio in May, 2010 for the purpose of further consideration.

On October 8, 2010, an Entry establishing a procedural schedule was issued. The procedural schedule that is now complete included numerous local public hearings, as well as an evidentiary hearing.

On November 10, 2010, the Commission issued its Fifth Entry on Rehearing *granting or denying all or parts of the Applications for Rehearing filed by FE, OCC and IEU-Ohio on May 14, 2010 and May 17, 2010, respectively.* In rejecting IEU-Ohio's Application for Rehearing, the Commission stated (at page 7 of the Fifth Entry on Rehearing) that this proceeding is being conducted under Section 4909.18, Revised Code, and the Commission's authority to address applications not for an increase in rates.

The evidence that is now before the Commission shows that the claims that have been advanced by persons representing the beneficiaries of prior all-electric discounts are without merit. The same evidence also shows, perhaps with the benefit of hindsight, that the Commission's directions that FE provide discounts to customers who previously received as well as customers who never received all-electric discounts were not warranted. Right or wrong, the Commission's directions have produced a revenue shortfall.

Without making concessions regarding its prior legal arguments on the Commission's jurisdiction to do what the Commission has so far done in this proceeding, the remainder of IEU-Ohio's Brief is focused on the revenue shortfall created by the directions the Commission has already issued in this proceeding as well as any shortfall that may arise from the Commission's future directions.

**III. IEU-OHIO SUPPORTS THE COMMISSION STAFF'S AND FE'S RECOMMENDATIONS REGARDING THE RESPONSIBILITY FOR ANY REVENUE SHORTFALL PRODUCED BY THE COMMISSION'S DECISIONS IN THIS PROCEEDING**

IEU-Ohio supports the Commission Staff's ("Staff") and FE's recommendation of continuing to phase-out the credits available to the non-standard rate residential customers and their proposals to confine the responsibility for the incremental revenue shortfall and any further shortfall that may be created by actions yet to be taken by the Commission in this proceeding to the residential customer class. Stated differently, the efforts by OCC and other parties to shift responsibility for this shortfall to non-residential customers are unlawful and unreasonable.

The Staff and FE have demonstrated that the responsibility for this shortfall must rightly reside with residential customers and that any share of any such responsibility for non-residential customers has already been determined in accordance with the settlements and decisions in the *FE ESP Proceeding*.

In Mr. Robert B. Fortney's prefiled testimony, he recommended that the above-described revenue shortfall be absorbed by residential customers.<sup>10</sup> Mr. Fortney also recommended that the Economic Development Rider ("EDR") discount currently paid by

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<sup>10</sup> Staff Exhibit 1 at 3 (January 24, 2011).

GS secondary and GS primary customers continue to be provided to all-electric customers.<sup>11</sup>

In his testimony at the evidentiary hearing on this matter, Mr. Fortney stated that pursuant to the determinations made by the Commission in the *FE ESP Proceeding*, the EDR and Residential Distribution Credit ("RDC") Rider discounts that are paid by non-residential customers provide roughly 25% of the annual reduction or benefit made available to all-electric residential customers.<sup>12</sup> Mr. Fortney also testified that it was Staff's recommendation that the residential class of electric customers pay the revenue shortfalls created by the all-electric residential deferral<sup>13</sup>--the rationale being that the residential class benefited from the all-electric rate deferrals and thus should pay the cost associated with this benefit.<sup>14</sup>

In his prefiled testimony, Mr. William R. Ridmann stated that all residential customers should be allocated the cost associated with future all-electric residential rate deferrals.<sup>15</sup> As indicated above, Mr. Ridmann's prefiled testimony also explains that non-residential customers are already and will continue to be responsible for the recovery of the portion of the shortfall that is recovered through the EDR Rider.<sup>16</sup>

In his testimony at the evidentiary hearing, Mr. Ridmann stated that the discounted non-standard residential rates benefited the residential class of customers and therefore the residential rate class should be responsible for making up the revenue

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<sup>11</sup> *Id.* at 4.

<sup>12</sup> Tr. Vol. II at 508.

<sup>13</sup> *Id.* at 511.

<sup>14</sup> *Id.*

<sup>15</sup> FE Exhibit 1 at 46 (January 10, 2011).

<sup>16</sup> *Id.* at 43, 44.

shortfall produced by such discounts.<sup>17</sup> Mr. Ridmann also noted that non-residential customers were currently funding the EDR credits that accrue to the residential electric heating customers.<sup>18</sup>

#### IV. THE TESTIMONY SPONSORED BY OCC'S WITNESS ANTHONY YANKEL WAS IMPROPERLY ADMITTED INTO EVIDENCE

Section 4901-1-15(F), Ohio Administrative Code, states:

Any party that is adversely affected by a ruling issued under rule 4901-1-14 of the Administrative Code or any oral ruling issued during a public hearing or prehearing conference and that (1) elects not to take an interlocutory appeal from the ruling or (2) files an interlocutory appeal that is not certified by the attorney examiner **may still raise the propriety of that ruling as an issue for the commission's consideration by discussing the matter as a distinct issue in its initial brief** or in any other appropriate filing prior to the issuance of the commission's opinion and order or finding and order in the case. (emphasis added).

During the evidentiary hearing, IEU-Ohio moved to strike the prefiled testimony of OCC's witness Anthony J. Yankel because, by sponsoring such testimony, OCC breached its duty to support and be bound by the settlements adopted by the Commission in the *FE ESP Proceeding*.<sup>19</sup> The motion to strike was denied.<sup>20</sup> It is IEU-Ohio's position that the ruling on IEU-Ohio's motion to strike was improper and that the Commission must reverse this ruling as part of its decision in this proceeding.

The facts recited by IEU-Ohio in its motion are not in dispute. OCC signed a Supplemental Stipulation agreeing to be bound by the terms of that agreement if adopted by the Commission. Among other things and as a matter of law, that

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<sup>17</sup> Tr. Vol. I at 184, 185.

<sup>18</sup> *Id.*

<sup>19</sup> Tr. Vol. I at 203, 207, 208.

<sup>20</sup> *Id.* at 210.

Supplemental Stipulation obligated OCC, as a signatory party, to support the rate design and revenue responsibility outcomes dictated by such Supplemental Stipulation. As explained above, the Supplemental Stipulation was adopted by the Commission without further protests from any party in the *FE ESP Proceeding*. Throughout this proceeding OCC has sought to undo the results which, by its own efforts, it obtained through settlements which the Commission approved in accordance with Ohio law.

The legal significance of OCC's support for the Supplemental Stipulation as it relates to IEU-Ohio's motion to strike is also beyond dispute.

The Ohio Supreme Court has held that a party is bound to honor the obligations created by an agreement by the force of the doctrines of collateral estoppel and *res judicata* and to bring finality to decisions rendered.<sup>21</sup> In its ruling, the Court established that the legal doctrine of collateral estoppel is applicable to administrative hearings where parties have had an adequate opportunity to litigate the issues involved in the proceeding.<sup>22</sup> Furthermore, the Court has specifically held that OCC is barred from relitigating a point of law or fact that was at issue in a former action between the same parties and was appropriately ruled upon by an appropriate judicial body.<sup>23</sup>

In previous orders, the Commission has also found that an agreement supported by parties, and entered into freely by the parties, should not later be subject to a challenge by the parties to the agreement.<sup>24</sup> In the Dayton Power and Light Company's

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<sup>21</sup> *Superior Brand Meats vs. Lindley*, 62 Ohio St.2d 133 (1980).

<sup>22</sup> *Id.*

<sup>23</sup> *Office of Consumers' Counsel v. Public Utilities Commission of Ohio*, 16 Ohio St. 3d at 9 (1985)

<sup>24</sup> *In the Matter of the Application of Dayton Power and Light Company for Approval of Tariff Changes Associated with a Request to Implement a Storm Cost Recovery Rider*, PUCO Case No. 05-1090-EL-ATA, Finding and Order (July 12, 2006); *In the Matter of the Application of Duke Energy Ohio, Inc. to Establish and Adjust the Initial Level of its Distribution Reliability Rider*, Case No. 09-1946-EL-RDR, Entry on Rehearing (March 9, 2011).

storm cost recovery ruling of 2006,<sup>25</sup> the Commission held that the OCC could not come back to the Commission (after agreeing to a settlement that resolved issues regarding the charges that a utility could impose to recover costs associated with storm damage) and attempt to contest its previously agreed-to position.<sup>26</sup> Additionally, in denying an OCC request for rehearing, the Commission has recently ruled that it was disingenuous for the OCC to agree to a creation of a rider for storm cost recovery and then turn around and attempt to challenge its own freely entered into stipulation and agreement.<sup>27</sup>

#### **A. OCC is Bound by Settlement Agreements**

As IEU-Ohio explained during the evidentiary hearing (through a motion to strike portions of OCC witness Anthony Yankel's testimony),<sup>28</sup> issues associated with the level and design of the residential rates which are the focus of this proceeding were addressed in settlement agreements in the *FE ESP Proceeding*. The Commission adopted the settlement agreements in early 2009 in Case No. 08-935-EL-SSO. OCC signed and agreed to the terms of the settlements.

Here, OCC is attempting to challenge outcomes produced by such settlement agreements through its sponsorship of the testimony of Mr. Yankel. In his testimony on behalf of OCC, Mr. Yankel makes recommendations contrary to and in conflict with the outcomes which the OCC agreed to support as part of such settlement agreements.

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<sup>25</sup> *In the Matter of the Application of Dayton Power and Light Company for Approval of Tariff Changes Associated with a Request to Implement a Storm Cost Recovery Rider*, PUCO Case No. 05-1090-EL-ATA, Finding and Order (July 12, 2006).

<sup>26</sup> *Id.*

<sup>27</sup> *In the Matter of the Application of Duke Energy Ohio, Inc. to Establish and Adjust the Initial Level of its Distribution Reliability Rider*, Case No. 09-1946-EL-RDR, Entry on Rehearing (March 9, 2011).

<sup>28</sup> Tr. Vol. 1 at 199-210.

OCC has a duty, enforceable by the Commission, to respect the terms of the Supplemental Stipulation. Here, life is imitating art; as has been said on the motion picture screen, "a promise is a promise."<sup>29</sup> IEU-Ohio was also a party to the settlement agreements adopted by the Commission in the *FE ESP Proceeding* and OCC's disrespect for its settlement agreement duties abridges IEU-Ohio's rights secured by the same agreements.

By the terms of its binding agreements, OCC is precluded from contesting the rate design and revenue distribution results contained in the settlements approved by the Commission. Neither on its own, nor through the sponsorship of witness testimony, can OCC breach its settlement obligations.

The OCC must now be held accountable for these improper actions in accordance with the rule of law and the method for resolving issues through formal adversarial proceedings. It is IEU-Ohio's position that OCC cannot, under those rules, walk away from its settlement commitments.

IEU-Ohio urges the Commission to find that IEU-Ohio's motion to strike was proper and that the motion must be sustained thereby excluding the testimony of OCC's witness from the record in this proceeding.

**B. Even if Not Stricken, the Recommendations of OCC's Witness Yankel Are Without Merit**

In his testimony, Mr. Anthony Yankel asserted that a non-bypassable rider should be imposed on all customers to fund the revenue shortfall associated with the

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<sup>29</sup> *Forrest Gump* (Paramount Pictures, 1994).



residential rate design and rate level recommendations of OCC.<sup>30</sup> Mr. Yankel's stated, but erroneous, rationale for this proposal is that all customers benefit from the usage patterns of the poorly-defined population of residential customers who would receive discounts if his recommendation was adopted.<sup>31</sup> In addition to Mr. Yankel's testimony being in direct contradiction to OCC's signatory position in the Supplemental Stipulation,<sup>32</sup> Mr. Yankel's recommendation is void of any serious rate analysis and in direct conflict with the Commission-approved use of a CBP and reliance upon market-based pricing for generation supply service available from OE, CEI and TE.

In order for expert testimony to be admissible, the testimony must be relevant and reliable and the expert witness must show by a preponderance of evidence that the principle being advanced is based on reliable facts that were properly applied to the case at hand.<sup>33</sup> The casual reasoning Mr. Yankel offered for his conclusions shows that his conclusions cannot be relied upon to fairly and lawfully resolve issues in this proceeding. Mr. Yankel's testimony also shows that his conclusions were assembled without regard to the relevant facts and circumstances.

After all that has happened on the subject of this proceeding, the record evidence shows that reliance upon Mr. Yankel's investigative techniques might, likely as not, result in another round of protests by OCC should the Commission actually adopt OCC's recommendations.

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<sup>30</sup> OCC Exhibit 1 at 40 (January 10, 2011).

<sup>31</sup> *Id.*

<sup>32</sup> *FE ESP Proceeding, Second Finding and Order* (March 4, 2009).

<sup>33</sup> *Fed. R. Evid. 702; Kumo Tire v. Carmichael*, 119 S. Ct. 1167 (1999).

As was pointed out during the evidentiary hearing, the prices for the generation portion of FE's service are established in accordance with a market-based approach.<sup>34</sup> In this market-based approach, a CBP is used to determine the costs incurred by OE, CEI and TE to provide default generation supply to all customers and to set the prices, subject to the Commission's approval, that will permit these utilities to recover the costs incurred to provide this generation supply service. The "cost causation" and "cost-of-service" references made by Mr. Yankel are disconnected from the current reality.

Mr. Yankel's prefiled testimony asserts that all customers benefit from the usage by all-electric customers, yet he identified no support for this claim. Mr. Yankel did not conduct any independent analysis to see what the CBP costs and resulting prices would have been absent the load and usage characteristics of customers he recommended be the recipients of residential rate discounts.<sup>35</sup> Mr. Yankel did not run any models on the impact of the all-electric rate on non-all-electric customers.<sup>36</sup> Mr. Yankel did not talk to retail marketers to test his casually assembled theories.<sup>37</sup>

Mr. Yankel testified that he did not use or rely on any studies regarding retail marketers or pricing strategies,<sup>38</sup> and did not consult technical literature to obtain insight into market-based electric rates.<sup>39</sup> Mr. Yankel also said that could not testify as to what

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<sup>34</sup> Tr. Vol. I at 227.

<sup>35</sup> *Id.* at 211.

<sup>36</sup> *Id.* at 214.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

the costs associated with distribution service were for residential customers served by FE<sup>40</sup> or how the currently effective generation supply price was set for FE.<sup>41</sup>

Finally, Mr. Yankel could not defend his hypothesis that wholesale suppliers take into account the impact of all-electric customers in setting their offer prices entered into the declining-clock-auction CBP that has been used, pursuant to the Commission's direction and supervision, to determine the costs incurred by OE, CEI and TE to provide default generation supply service.<sup>42</sup>

Mr. Yankel admitted that he had neither so much as talked to a wholesale electric supplier, nor researched any information regarding bidding strategies for wholesale electric suppliers.<sup>43</sup>

In order to reach his broad conclusions in favor of discounts for a poorly-defined population of residential customers, Mr. Yankel testified that he simply reviewed the testimony of Mr. Ridmann<sup>44</sup> and reviewed FE's tariff filings from 1992 and 1996 (a period of time that predates the implementation of Ohio's electric restructuring law contained in Chapter 4928, Revised Code).<sup>45</sup> In addition to Mr. Yankel's testimony being contrary to OCC's stipulated agreement, it also fails to provide any data or information that could reasonably be relied upon by the Commission to rationally and lawfully resolve the contested issues in this proceeding.

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<sup>40</sup> *Id.* at 227.

<sup>41</sup> *Id.* at 228.

<sup>42</sup> *Id.* at 250.

<sup>43</sup> *Id.* at 251.

<sup>44</sup> *Id.* at 211.

<sup>45</sup> *Id.* at 235.

**V. CONCLUSION**

For the reasons explained above, IEU-Ohio urges the Commission to preclude OCC and other parties from violating their obligations under binding settlement agreements. And, IEU-Ohio urges the Commission to reject proposals that would require non-residential customers to pick up responsibility for whatever revenue shortfall has been or will be created by the Commission's determinations in this proceeding.

Respectfully submitted,



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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing *Post Hearing Brief of Industrial Energy Users-Ohio* was served upon the following parties of record this 28<sup>th</sup> day of March 2011, via electronic transmission, hand-delivery or first class mail, postage prepaid.

  
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