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 THEIR ENERGY EFFICIENCY AND PEAK DEMAND REDUCTION PROGRAM PORTFOLIO PLANS FOR 2017 THROUGH 2019	)	**Case No. 16-0743-EL-POR**

THE COMPANIES' OPPOSITION TO
THE OHIO HOSPITAL ASSOCIATION'S MOTION TO COMPEL
AND REQUEST FOR IMMEDIATE PRE-HEARING CONFERENCE

I. INTRODUCTION

The Ohio Hospital Association's ("OHA") Motion to Compel and Request for Immediate Pre-Hearing Conference ("Motion") must be denied because the requests at issue go beyond the permissible scope of discovery in this proceeding. As OHA itself admits, "this entire discovery dispute arises from" a single question: "***why*** did FirstEnergy terminate OHA as a contract administrator?" (Mot. at 1 (emphasis added).) The answer to that question is irrelevant to the sole issue before the Commission—whether the December 8, 2016 Stipulation and Recommendation ("Stipulation") signed by most parties in this case satisfies the Commission's three-prong test. Simply put, documents and information related to the ***reasons*** for the termination of OHA's administrator agreement have no bearing on that determination.

In contending otherwise, OHA conflates two distinct issues. On the one hand, there is the ***fact*** of OHA's termination as a plan administrator. The Companies do not—and have not—resisted discovery on that issue. The Companies have already identified for OHA which entities

will actually serve as plan administrators under their Revised EE/PDR Portfolio Plans and how hospitals will be informed about those Plans. (*See* Mot. at Attachment B, Response to INT No. 6 (identifying entities that will serve as plan administrators); *id.* at Response to INT No. 23 (explaining how the Companies will educate and market programs to hospitals under their Revised EE/PDR Portfolio Plans).). As such, and contrary to OHA's assertion, OHA has what it needs to argue that it is no longer a plan administrator and, as a result, that it believes (without basis) hospitals will be negatively impacted in the Companies' service territory.

On the other hand, any ***reasons*** why OHA was terminated as a plan administrator have nothing to do with whether the Stipulation is the product of serious bargaining among capable parties, whether the Stipulation benefits ratepayers and the public interest, or whether the Stipulation violates any important regulatory principle or practice. OHA does not explain how the reasons for the termination would (or could) shed any light on those issues, other than reiterating its need to know who will actually serve as administrators and how certain customer segments—namely hospitals—will be addressed under the Companies' Revised EE/PDR Portfolio Plans. But, as set forth above, the Companies have already provided that very information, and, regardless, any reasons for the termination would be wholly unrelated to which entities will actually serve as administrators and how specific customer segments will be served.

In reality, OHA's disputed discovery requests appear calculated to build a breach of contract action against the Companies, even though the Commission-approved administrator agreement permits the Companies to terminate OHA without cause. While the Commission does not have jurisdiction to hear such a claim, Ohio courts routinely enforce contracts that permit termination upon written notice, without inquiry into the motivation for the termination. Thus, OHA's disputed discovery requests into the reasons for the termination would remain

objectionable even in a broader breach of contract action because ***the Companies are not obligated to have any such reasons***.

Accordingly, the Companies respectfully request that the Motion be denied and that the Commission enter a protective order precluding any and all further attempts at such discovery.

II. BACKGROUND

The Companies entered into a written administrator agreement with OHA on June 24, 2009. (*See* Docket Entry dated June 30, 2009, Case No. 09-0553-EL-EEC at Exhibit 1.b (attached hereto as Exhibit 1).) That agreement was approved by the Commission on March 16, 2011. (*See* Second Finding and Order dated Mar. 16, 2011, Case No. 09-0553-EL-EEC.) The term of the agreement commenced on June 24, 2009 and ran through December 31, 2009. (*See* Exhibit 1 at Section 11.) By its express terms, the agreement automatically renewed for additional one-year terms "unless and until either party provide[d] the other with at least thirty (30) days advance written notice of its intent to terminate th[e] Agreement." (*See id.*). The agreement did not otherwise restrict the parties' right or ability to terminate, and the Companies provided the requisite notice to OHA on December 1, 2016. (*See* Mot. at Attachment A, Attachment A.) The termination notice expressly stated that the Companies' decision to terminate OHA's agreement was made pursuant to Section 11.

On December 19, 2016, OHA served the Companies with the discovery requests at issue. (*See* Mot. at Attachment A.) The Companies served their responses and objections on December 28, 2016. (*See* Mot. at Attachment B.) A day later, counsel for OHA notified the Companies of OHA's belief that the Companies' responses were incomplete. (*See* Mot. at Attachment C.) Counsel for the Companies promptly responded to OHA's communication, explaining that the Companies rejected OHA's contention and would be standing on their responses and objections to the discovery requests at issue. (*See* Mot. at Attachment C.) Specifically, the Companies

explained in detail that the requests at issue were out of bounds because any ***reasons*** for OHA's termination as a plan administrator would not be relevant to the Commission's determination of whether the Stipulation in this case meets the standards for adoption. Despite the Companies' explanation, OHA filed the Motion, demanding responses to: (i) Requests for Admission 1-5; (ii) Interrogatories 1-5, 7-8, and 10-12; and (iii) Request for Production 3.

III. LAW & ARGUMENT

A. The Commission's Rules Do Not Require The Companies To Respond To Discovery Requests That Go Beyond The Permissible Scope.

While O.A.C. Rule 4901-1-16(B) permits "discovery of any matter, not privileged, which is relevant to the subject matter of the proceeding," the Rule does not give parties serving discovery free rein to explore any and all matters. *See, e.g., Freeman v. Cleveland Clinic Found.*, 127 Ohio App. 3d 378, 388, 713 N.E.2d 33, 39 (1998) ("While the scope of relevance in discovery is broad, it is not limitless.") Indeed, the Rule, on its face, limits a requesting party to discovery that is "relevant" to the proceeding at issue.

For that reason, the Commissions' rules specifically permit a party responding to discovery requests to object to any requests that go beyond the permissible scope of discovery. *See* O.A.C. 4901-1-19 ("Each interrogatory shall be answered separately and fully . . . unless it is objected to, in which case the reason for the objection shall be stated in lieu of an answer."); O.A.C. 4901-1-20 ("The response shall state, with respect to each item or category, that the inspection and related activities will be permitted as requested, unless the request is objected to, in which case the reason for the objection shall be stated."); O.A.C. 49-1-1-22 ("The matter is admitted unless . . . the party to whom the request is directed serves upon the party requesting the admission a written answer or objection . . . . If an objection is made, the reasons therefor shall be stated.")

Here, each of the requests at issue go beyond the scope of permissible discovery. As such, the Companies are entitled to stand on their objections, and the Motion must be denied.

B. OHA's Requests Are Not Relevant To The Remaining Issue In This Case.

Pending before the Commission in this case is one—and only one—determination: whether the Stipulation executed by most parties in this proceeding satisfies the three-prong analysis that has been endorsed by the Ohio Supreme Court. *See Consumers' Counsel v. Pub. Util. Comm.*, 64 Ohio St.3d 123, 592 N.E.2d 1370 (1992). That determination requires the Commission to ask three questions: (i) does the Stipulation, as a package, benefit ratepayers and the public interest?; (ii) does the Stipulation violate any important regulatory principle or practice?; and (iii) is the Stipulation a product of serious bargaining among capable and knowledgeable parties? *See, e.g.*, *Cincinnati Gas & Elec. Co.*, Case No. 91-410-EL-AIR (Apr. 14, 1994); *Western Reserve Telephone Co.*, Case No. 93-230-TP-ALT (Mar. 30, 1994); *Ohio Edison Co.*, Case No. 91-698-EL-FOR, et al. (Dec. 30, 1993). OHA contends that the requests at issue are relevant to the first and third questions. OHA is wrong. The Companies' ***reasons*** for exercising their contractual rights to terminate OHA's administrator agreement without cause do not and cannot assist the Commission in its analysis.

1. OHA's requests seeking information about the reasons for its termination are not relevant to whether the Stipulation benefits the public interest.

In support of the disputed requests, OHA contends that they are relevant to the public interest prong of the Stipulation test. OHA initially suggests that it needs to know the reason why it was terminated as a plan administrator in order to probe how hospitals will be served by the Revised EE/PDR Portfolio Plans. (Mot. at 5-7.) OHA specifically argues that "FirstEnergy's termination of OHA as a contract administrator will negatively impact hospitals in FirstEnergy's territory." (*Id.* at 5; *see also id*. at 7 ("FirstEnergy's termination of OHA as

contract administrator will negatively impact the success of its portfolio plans with respect to hospitals.").) According to OHA, it "intends to shows [sic] that FirstEnergy arbitrarily terminated OHA despite the importance of OHA's role in assisting its member hospitals with participation in FirstEnergy's energy efficiency programs." (*Id.* at 5.) OHA also states that it "intends to recommend that the Commission modify the Stipulation to ensure that FirstEnergy works cooperatively with OHA during FirstEnergy's portfolio program." (*Id.* at 6.) OHA, however, conflates two distinct issues and, as a result, misses the mark.

Initially, there is the ***fact*** of OHA's termination as a plan administrator. The Companies are not resisting discovery on that issue, and the Companies have already identified for OHA which entities will actually serve as plan administrators under their Revised EE/PDR Portfolio Plans and how hospitals will be educated about those Plans. (*See* Mot. at Attachment B, Response to INT No. 6 (identifying entities that will serve as plan administrators); *id.* at Response to INT No. 23 (explaining how the Company will educate and market programs to hospitals under their Revised EE/PDR Portfolio Plans).).

By contrast, the ***reasons*** why the Companies exercised their contractual right to terminate without cause are unrelated to which entities will actually serve as administrators under the Companies' Revised EE/PDR Portfolio Plans and how hospital customers will be served. In other words, precluding this discovery will not prevent OHA from arguing, however wrong, that its termination as an administrator "will negatively impact hospitals," or that OHA plays an important "role in assisting its members hospitals" with participation in the Companies' energy efficiency programs. Similarly, precluding this discovery will not prevent OHA from

recommending to the Commission that it require the Companies to "work cooperatively with OHA."[1]

Thus, there is simply no reason or basis to permit the disputed discovery and OHA's Motion should be denied.[2]

2. OHA's requests seeking information about the reasons for its termination are not relevant to whether the Stipulation is the result of serious bargaining.

OHA next argues that the requests at issue "are designed to determine if FirstEnergy attempted to seriously bargain with OHA, or whether FirstEnergy's termination of OHA as contract administrator was punishment for not agreeing to sign the stipulation." (Mot. at 7-8.) This argument fails to persuade.

First, OHA cannot reasonably argue that the Stipulation is not the product of serious bargaining among capable parties. Indeed, the parties in this case (collectively and individually) had numerous conferences and in-person meetings in an attempt to resolve all issues in this case. Those conferences and meetings spanned across months, and OHA was an active participant in those efforts. In fact, the Stipulation that was ultimately executed includes an OHA-specific provision that was negotiated by OHA and ultimately accepted by the Companies, despite the fact that OHA decided not to sign the Stipulation:

> The Companies will assist the Ohio Hospital Association ("OHA") with its Energy Star benchmarking program by providing timely

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[1] The Companies note that OHA's proposed "cooperation" modification to the Stipulation is unnecessary, as nothing prevents OHA from doing whatever it deems appropriate to inform its members about the benefits of the Revised EE/PDR Portfolio Plans. Indeed, as discussed below, notwithstanding the fact that OHA refused to sign the Stipulation, the Companies included an OHA-specific provision stating that they would "assist [OHA] with its Energy Star benchmarking program. . ." (Stipulation at 8.)

[2] To the extent OHA believes that the Revised EE/PDR Portfolio Plans incorrectly identify OHA as an administrator (*see* Motion at 2-3), OHA was, in fact, a current administrator at the time those plans were filed. The Companies plan on filing a supplement to the Plans to reflect the termination of OHA's administrator agreement. Counsel for the Companies made this clear to counsel for OHA during the meet and confer process. (*See* Mot. at Attachment C.)

> member consumption information in electronic spreadsheet format, subject to appropriate member authorizations.

(Stipulation at 8.) This OHA-specific provision demonstrates that the Companies are willing to work with OHA on energy efficiency and peak demand reduction initiatives, even though OHA is not a signatory party.

But even if OHA could make such an argument, the Companies' ***reasons*** for exercising their contractual rights to terminate OHA's administrator agreement without cause would have no relevance to whether the Stipulation is the result of serious bargaining among capable parties. Those reasons for the termination will not reveal the number and duration of the negotiations, the wide-ranging interests and viewpoints of the parties involved in those negotiations, or the skills and experience of the counsel representing those parties in the negotiations. In short, discovery into any ***reasons*** for OHA's termination cannot and would not show that the Stipulation was not adequately bargained for by the parties in this case and cannot possibly prove that the vast settlement efforts were somehow inadequate.

Second, OHA's suggestion that the Companies may have terminated or retained plan administrators depending on whether they executed the Stipulation is similarly flawed. As an initial matter, there are eight signatory parties to the Stipulation in addition to the Companies, and none of those entities is a plan administrator for the Companies. But more to the point, OHA offers no explanation how allowing it to explore the reasons for its termination would be relevant to whether the Stipulation is the product of serious bargaining among capable parties. There is simply no connection between those discreet issues, and OHA's arguments to the contrary should be rejected.

C. The Reasons For OHA's Termination Would Not Be Discoverable Even In A Breach of Contract Action.

As set forth above, the ***reasons*** for OHA's termination as a plan administrator by the Companies are not discoverable in this proceeding or in any proceeding before the Commission. More broadly, however, such discovery would be impermissible even in an actual breach of contract action by OHA against the Companies (although such action could not be brought before the Commission).

Indeed, Ohio courts routinely enforce contracts that permit termination solely upon giving adequate written notice, without inquiry into the motive or reasons for termination. *See, e.g.*, *Edelman v. Franklin Iron & Metal Corp.*, 87 Ohio App. 3d 406, 410–11, 622 N.E.2d 411, 414–15 (1993) ("It appears to us that existing contract law in Ohio permits a party to a contract to exercise a right to terminate without reason if clearly expressed in the contract without inquiry into the motive for the termination, although arguably in bad faith, if not contrary to law."); *Midwestern Indem. Co. v. Luft & Assocs. Ins. Agency, Inc.*, No. 87AP-541, 1987 WL 31285, at *1 (Ohio Ct. App. Dec. 23, 1987) (holding that evidence into a party's reasons for termination was "irrelevant" because the contract expressly allowed termination "upon thirty days written notice to the other"); *see also Belfance v. Standard Oil*, No. 14688, 1990 WL 203173, at *3 (Ohio Ct. App. Dec. 12, 1990) (same).

That is plainly the case here, as the agreement at issue gave the Companies the right to terminate upon "at least thirty (30) days advance written notice of [their] intent to terminate th[e] Agreement." (*See* Exhibit 1 at Section 11.) The Companies' notice to OHA could not be more clear, as it explicitly stated that the decision to terminate the administrator contract was made pursuant to Section 11 of the agreement. (*See* Mot. at Attachment A, Attachment A.)

Thus, even in a broader breach of contract action (which the Commission does not have jurisdiction to entertain), the disputed discovery requests would be objectionable and should be rejected here.

IV. CONCLUSION

For the reasons set forth above, the Companies respectfully request that the Commission deny OHA's pending Motion and enter a protective order precluding any and all further attempts at such discovery.

January 5, 2016

Respectfully submitted,

/s/ *Erika Ostrowski*

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *The Companies Opposition to the Ohio Hospital Association's Motion to Compel and Request for Immediate Pre-Hearing Conference* will be served on this 5th day of January, 2016 by the Commission's e-filing system to the parties who have electronically subscribed to this case and via electronic mail upon the following counsel of record:

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/s/ Erika Ostrowski
An Attorney for Applicant Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company

EXHIBIT A

Program Administrator Agreement

This Program Administrator Agreement ("Agreement") is entered into by and between Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company (collectively, "Companies"), and OHA Solutions, Inc., with offices at 155 East Broad Street, 15th Floor, Columbus, Ohio 43215 ("Administrator"), on this 24th day of June, 2009, this Agreement shall be effective upon Commission approval ("Effective Date.")

WITNESSETH

WHEREAS, Section 4928.66, Revised Code, requires the Companies to implement energy efficiency and peak demand reduction programs that achieve prescribed energy savings and peak demand reductions; and

WHEREAS, pursuant to a Stipulation and Recommendation ("Stipulation") approved by the Public Utilities Commission of Ohio ("Commission") in Docket No. 08-935-EL-SSO, the Companies agreed to assign certain administrators specific programs in which said administrators will assist the Companies in meeting their energy savings and/or peak demand reduction ("EEDR") requirements; and

WHEREAS, Administrator represents an organization or target market that the Companies believe will qualify for participation in the Companies' programs and that can assist the Companies in meeting their respective EEDR requirements; and

WHEREAS, the Companies have elected to hire the Administrator who will use all commercially reasonable efforts to obtain a reasonable level of energy efficiency and/or peak demand reductions on behalf of those it represents, track and provide documentation evidencing any incremental energy reduction and actual kWh savings achieved, and perform certain other tasks associated with the programs designed by the Companies.

NOW THEREFORE, in consideration of the mutual promises set forth herein, and for other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the parties, intending to be legally bound, do hereby agree as follows:

1. **Services and Statements of Work**. The Companies, hereby hire Administrator to commit to obtain a reasonable level of energy efficiency and/or peak demand reductions pursuant to specified Statements of Work ("SOW") developed by the Companies and agreed to by the Administrator on behalf of those it represents ("Member"(s)), track and provide documentation evidencing any incremental energy reduction and actual kWh savings achieved, and perform certain other tasks associated with specific programs developed by the Companies (individually and collectively, "Services.") Such Services shall be performed on a Company specific service territory basis and shall include, without limitation, (i) the coordination of, and marketing to those represented by Administrator; (ii)

measuring as necessary, tracking and reporting program results; (iii) gathering documentation as required by the Companies; and (iv) other specified tasks as more fully described in the attached SOW. Each such Statement of Work shall be a separate arrangement between the parties, subject to the general terms herein and the specific terms included in the applicable SOW. To the extent that any of the general terms and conditions set forth herein contradicts those set forth in the applicable SOW, the latter shall prevail. No SOW shall be valid unless properly executed by both parties.

2. **Representation Overlap**. Administrator acknowledges that there may be some overlap between the member group represented by Administrator and that represented by another administrator or the Company. As an example only, the administrator representing hospitals may overlap with customers being represented by an administrator of small businesses. Administrator further acknowledges and agrees that each potential Member shall be entitled to select their administrator. Administrator shall provide the Companies written documentation evidencing that Administrator has been selected by each such Member represented. Such representation by Administrator shall continue for any and all programs in which Administrator provides Services until the Member provides Administrator with written notice of its desire to discontinue such representation.

3. **Program Design and Training**. It shall be the responsibility of the Companies to design the EEDR programs ("Program(s)") and to provide Administrator with any necessary training. Such training shall be a prerequisite to participation by Administrator in any such Program. The Companies, in their sole discretion, shall determine which of its Programs requires the Services of Administrator. Acceptance of Administrator's participation in any such Program shall be evidenced by an executed SOW. Upon acceptance and within a reasonable period of time following completion of any necessary training for a specific SOW, Administrator will provide the Companies with its projection of the amount of energy savings and/or peak demand reduction it will attempt to obtain from its Members under the SOW. While such projection shall not be binding, Administrator acknowledges that the Companies will be relying on said projections for purposes of planning their EEDR compliance. Therefore, during 2009, it shall be the responsibility of the Administrator to provide monthly progress reports that quantify actual results compared to projections in a format acceptable to the Companies, and to notify the Companies as soon as reasonably practical of any modifications to the original projections. Reporting in subsequent years shall be determined at a later date. Notwithstanding Article 12, absent events beyond the control of Administrator, the Companies, in their sole discretion, may immediately terminate this Agreement and any or all applicable SOWs if Administrator fails to substantially achieve projected or actual results under any given SOW. Notwithstanding Article 11, this Agreement may be terminated by the Administrator at any time in its sole discretion if the Companies place unreasonable requirements on the Administrator, unless otherwise mutually

agreed by the parties, such termination shall not affect the completion of any outstanding SOW and the terms of this agreement shall remain in effect until such SOW is fully completed.

4. **Tracking and Reporting**. Unless otherwise stated in the applicable SOW, Administrator shall be responsible for tracking and reporting the energy efficiency and peak demand reductions resulting from Projects in which Administrator participates for the period during which the Administrator may have received or be receiving compensation pursuant to an executed SOW. Said results shall be determined by Administrator consistent with any and all applicable rules and regulations, including without limitation, those promulgated by the Commission. Reporting of all results shall be in a format acceptable to the Companies, as such format is identified and provided during training. It shall be Administrator's responsibility to be aware of current measurement and verification requirements.

5. **Educational Outreach**. Unless otherwise stated in the applicable SOW, it shall be the responsibility of the Administrator to communicate information on the Programs to its Members, educate them regarding the participation requirements, and to encourage participation by the same.

6. **Compensation.** Unless otherwise stated in the applicable SOW, Administrator shall receive an administration fee of $2,500 per month, commencing on the first day of the first month after the Commission approves the payment of such fee consistent with the payment terms set forth in this Article 6, and continuing to be paid on or about the first day of each month thereafter until this Agreement is terminated. The monthly fee is inclusive of any sales, use, or other taxes as applicable, all of which are the responsibility of the Administrator. Payment of the monthly administration fee, as well as any additional compensation set forth in a SOW, is contingent upon the Commission approving the Companies' full and timely recovery of such payments, through its Demand Side Management and Energy Efficiency Rider, or its equivalent ("DSE Rider.") The Company shall seek approval of this agreement, including SOW 1, upon acceptance of the final terms and conditions of this Agreement by the group of administrators included in the Stipulation.

7. **Costs and Expenses.** Unless otherwise stated in a SOW, Administrator shall be responsible for any and all costs and expenses incurred while performing the Services.

8. **Independence of Administrator.** Administrator shall, at all times during the performance of this Agreement, be an independent contractor. The parties shall not have the authority to bind, represent or commit the other. Nothing in this Agreement shall be deemed or construed to create a joint venture, partnership or agency relationship between the parties for any purpose. The legal relationship between the Administrator and its members or customers shall not be changed or modified in any way by this Agreement. Nothing in this Agreement shall change

or modify the rights of the Administrator to intervene, commence or participate in any regulatory or legal proceeding involving the Companies.

9. Limitation of Liability. **IN NO EVENT SHALL EITHER PARTY BE LIABLE TO THE OTHER PARTY FOR CONSEQUENTIAL, INCIDENTAL, PUNITIVE, SPECIAL, EXEMPLARY OR INDIRECT DAMAGES, OR EXPENSES (INCLUDING LOST PROFITS OR SAVINGS), EVEN IF SUCH PARTY WAS ADVISED OF THE POSSIBILITY OF THE OCCURRENCE OF SUCH DAMAGES.**

10. Confidential Information. The parties agree to protect the confidentiality of any information designated as confidential in the same manner as it protects its own confidential information of like kind and shall restrict access to those of the recipients' personnel and third parties under the direct control of the recipient on a need to know basis. Neither party shall use the Confidential Information of the other, except as contemplated in this Agreement. Except as otherwise provided in any applicable SOW, nothing in this Agreement shall restrict either party's use of information (including, but not limited to, ideas, concepts, know-how, techniques, and methodologies) that: (a) is or becomes publicly available through no breach of this Agreement, (b) was previously known to it without obligation of confidence or (c) is acquired by it from a third party which is not, to its knowledge, under an obligation of confidence with respect to such information. In the event either party is required by law to disclose any information designated as confidential, through subpoena, Commission directive or other validly issued administrative or judicial process, the party being requested to make such disclosure shall promptly notify the other party of such request and may, thereafter, comply with such subpoena or process to the extent required by law. Notwithstanding the foregoing, the parties will take reasonable steps to protect the confidentiality of such information, including without limitation, the execution of non-disclosure agreements and the filing of such information under seal as permitted.

11. Term. The initial term of this Agreement shall commence on the Effective Date and shall continue through December 31, 2009. It shall automatically renew for additional one year terms thereafter unless and until either party provides the other with at least thirty (30) days advance written notice of its intent to terminate this Agreement. Except as otherwise provided in Article 3 or unless otherwise mutually agreed by the parties, such termination shall not affect the completion of any outstanding SOW and the terms of this agreement shall remain in effect until such SOW is fully completed. It shall be the responsibility of the Administrator to timely notify its Members that it no longer represents them in the Companies' Programs.

12. Notices. Unless otherwise stated herein, all notices, demands or requests required or permitted under this Agreement must be in writing and must be delivered or

sent by overnight express mail, courier service, electronic mail or facsimile transmission addressed as follows:

If to the Companies:	If to the Administrator:
FirstEnergy Service Company 76 South Main Street Akron, OH 44308 Atten: Kurt E. Turosky Telephone: 330-384-4506 Fax: 330-384-5847 Email: turoskyk@firstenergycorp.com	Ohio Hospital Association 155 East Broad Street, 15th Floor, Columbus, Ohio 43215 Atten: Rick Sites Telephone: xxx-xxx-xxxx Fax: xxx-xxx-xxxx Email: ricks@ohanet.org

13. **Assignment.** Administrator shall not assign this Agreement or any of its rights or obligations under this Agreement without the Companies' prior written consent. No assignment of this Agreement will relieve Administrator of any of its obligations under this Agreement until such obligations have been assumed by the assignee and all necessary consents have been obtained.

14. **Legal Representation of Parties.** This Agreement was negotiated by the parties with the benefit of legal representation and any rule of construction or interpretation otherwise requiring this Agreement or applicable SOW to be construed or interpreted against any party shall not apply to any construction or interpretation hereof or thereof.

15. **Entire Agreement.** This Agreement, along with the SOWs, constitutes the entire agreement and understanding of the parties with respect to the subject matter of this Agreement, and supersede all oral representations and negotiations and prior writings with respect to the subject matter hereof. Any notice, consent, amendment or modification of this Agreement shall be in writing and executed by duly authorized representatives of the parties and sent to the respective party's address indicated above, or such other address as provided consistent with this Article.

16. **Governing Law.** This Agreement shall be governed by the laws of the State of Ohio, without giving effect to its choice of law statutes. Any notice, consent, amendment or modification of this Agreement shall be in writing and executed by duly authorized representatives of the parties and sent to the respective party's address indicated above, or such other address as provided consistent with this Article.

IN WITNESS WHEREOF, the parties have caused this Agreement to be executed by their duly authorized representatives on the date set forth below.

FirstEnergy Service Company, on behalf of Ohio Edison Company, The Cleveland Electric Illuminating Company, and the Toledo Edison Company

By: /s/ John E. Paganie

Title: VP, Customer Service & Energy Efficiency

Date: June 24, 2009

OHA Solutions, Inc. (Ohio Hospital Association)

(Administrator)

By: John B. Callender

Title: CHAIR

Date:

Statement of Work No. 1
Historic Mercantile Customer Program

Program Description: *This is a program* designed to obtain EEDR results from customer directed EEDR projects implemented since January 1, 2006.

Scope of Work: In addition to the Services as described in the general terms and conditions of the Agreement, Administrator shall perform the following tasks related to this Program:

1. Educate the Members about the Program and encourage participation by the same.
2. Identify members of its organization who will be participating in the Program and provide an estimate of the amount of EEDR that Administrator believes such Members will contribute.
3. For those Members that are interested in participating, screen the potential customer project(s), using the screening criteria provided by the Companies.
4. For those projects that qualify, complete all necessary forms provided by the Companies and gather all documentation required by the Companies. Organize all such information and documentation in a format acceptable to the Companies as described during the training process.
5. Provide reasonable assistance to participating Members in the preparation of any customer reports required by law, rules or regulations.
6. Provide reasonable assistance to the Companies in the preparation of any filings to the Commission.

Irrevocable License and Relationship of Administrator With Its Members Or Customers: Administrator hereby grants to the Companies a nonexclusive, irrevocable, fully-paid-up and royalty-free, transferable, sublicensable, license to use, copy, communicate, and prepare modifications to any inventions, improvements, designs, drawings, documentation, plans, materials, schedules, programs, specifications, software, and other works of authorship conceived or written by Administrator during the term of this Agreement that pertain to products supplied to or services performed for the Companies. Nothing in this Agreement shall be applied to interfere with any rights, agreements, legal relationship, or licenses secured or maintained by the Administrator with its members or customers.

Due Dates:

For projects that are to be included in the Companies' annual compliance, Administrator shall provide a summary of results in a format acceptable to the Companies no later than thirty (30) days after the end of the year in which the results apply.

Compensation:

In addition to its monthly administration fee, Administrator shall receive the following fee based on performance:

Administrator shall be compensated at the rate of $0.01 for every kWh for the first 2,000,000 kWh of annual energy savings and $0.0025 for every kWh of annual energy savings greater than 2,000,000 kWh associated with projects for a customer account that are included in the joint application that will be filed by Company and the applicable Member participant, provided that such application is approved by the Commission. Administrator shall receive the performance fee thirty (30) days after the Commission issues an Opinion and Order approving the joint application.

Other Terms and Conditions:

1. The Companies will determine within their sole discretion whether a project qualifies for inclusion in their compliance plan.

READ, UNDERSTOOD AND AGREED:

FirstEnergy Service Company, on behalf of Ohio Edison Company, The Cleveland Electric Illuminating Company, and the Toledo Edison Company

By: /s/ John E. Paganie

Title: VP, Customer Service & Energy Efficiency

On: June 24, 2009

OHA Solutions, Inc. (Ohio Hospital Association)

(Administrator)

By: John E. Callender

John Callender

Title: CHAIR

On:

Summary: Brief in Opposition to OHA's Motion to Compel electronically filed by Michael R. Gladman on behalf of The Ohio Edison Company and The Cleveland Electric Illuminating Company and The Toledo Edison Company