In The
SUPREME COURT OF OHIO

Elyria Foundry Company, Appellant, v. **The Public Utilities Commission of Ohio,** Appellee.	Case No. 07-860 On appeal from PUCO Case No. 05-796-EL-CSS, *In the Matter of the Complaint of Elyria Foundry (vs) Ohio Edison Company for Alleged Unlawful, Unjust, and/or Unreasonable Failure to Provide Clear and Transparent Definitions of, and Calculations for Incremental Revenues and Incremental Expenses.*

MERIT BRIEF

Submitted on Behalf of Appellee,
Public Utilities Commission of Ohio

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v.	:	
The Public Utilities Commission of Ohio,	:	
Appellee.	:	

MERIT BRIEF
Submitted on Behalf of Appellee,
Public Utilities Commission of Ohio

Introduction

Elyria Foundry (Foundry) is a retail customer of Ohio Edison Company (Ohio Edison). Foundry has the choice to buy electricity from Ohio Edison or from another supplier, and it has chosen to buy from Ohio Edison. As a large electricity user, it has a further choice between firm and interruptible service. Firm service is a constant supply of electricity in any quantity needed regardless of anything else. This is the sort of service provided to residential customers. Interruptible service is less expensive than firm. To receive a price discount, the customer takes on the risk that the service will be interrupted when market prices get high enough. Hence, the name "interruptible service." Foundry chose both. It takes some firm electric service for part of its electrical load and interruptible service for the remainder. Foundry has enjoyed significant savings under its inter-

ruptible arrangement and, despite opportunities to convert its interruptible load to firm service, Foundry has not found it economically advantageous to do so.

For nearly a decade, few interruptions were invoked, Foundry saved a lot of money, and was happy. In 2005, extreme weather conditions and high fuel prices sent wholesale power prices soaring, and Foundry was interrupted on 44 separate occasions. But even after paying for replacement power it still saved $450,000 that year. Having grown accustomed to paying less and experiencing few annual interruptions, Foundry now wants firm electric service at the discounted, interruptible rate. Although it has all along received the benefit of the bargain that it made, that bargain is now simply not good enough. It asks this Court to hand it a better deal than it deserves or pays for.

The principal issue before the Court is did Ohio Edison follow the requirements of Commission-approved Rider 75 when it called economic interruptions in 2005? It did. The Commission so found and its order should be affirmed.

Statement of the Facts and Case

The case below was initiated when Foundry filed a complaint under R.C. 4905.26 alleging an unreasonable number of interruptions by Ohio Edison in 2005, violations of various statutes, and discrimination and prejudice. Adjudicatory hearings were held on June 28 - 29, and August 6, 2006 and a large evidentiary record was compiled.

The facts are not disputed. In addition to its firm electrical service under Ohio Edison's Rider 23, Foundry also buys *interruptible* service under Ohio Edison's *optional* Rider 75 approved by the Commission. Tr. I at 101, Appellant's Supp. at S-256; Tr. II at

11, Appellant's Supp. at S-370.[1] Foundry chose to take interruptible service under Rider 75 to obtain a discounted rate. Tr. I at 101, Appellant's Supp. at S-256. Although a satisfied customer under Rider 75 since 1997, Foundry became disgruntled with the frequency of economic interruptions called in 2005. Unpredictable events precipitated more economic interruptions that year. Ohio experienced the hottest June and the fifth hottest July in the past 30 years. Direct Testimony of C. Idle at 10, Appellant's Supp. at S-37. Also, the first 21 days of December 2005 were the coldest ever recorded in Ohio, while the remainder of December saw warmer-than-usual temperatures. *Id.* These extreme weather conditions created higher-than-forecasted demands on the system. *Id.* Ohio and much of the midwest also experienced unprecedented fuel prices, due in part to coal shortages in the first quarter of 2005, and oil and natural gas shortages in the third and fourth quarters of 2005, predominately due to Hurricane Katrina. Higher customer demand for electricity coupled with higher fuel prices resulted in much higher energy costs in the wholesale market. *Id.* at 11, Appellant's Supp. at S-38. Foundry acknowledged the record temperatures and unprecedented fuel prices in 2005. Tr. I at S-145 and 146.

Under Rider 75, Ohio Edison can interrupt Foundry's service when the incremental revenue received from Foundry is less than the anticipated incremental expense to supply Foundry's interruptible load for a particular time period. Ohio Edison Rider 75 at 6, Appellant's Supp. at S-8. When an interruption is noticed, Foundry has several options.

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[1] References to appellant's supplement are denoted "Appellant's Supp. at ___;" references to appellants appendix are "Appellant's App. at ___;" references to appellee's second supplement are "Sec. Supp. at ___;" and references to appellee's appendix are "App. at ___."

It can: (1) arrange for service from another supplier; (2) purchase replacement power from Ohio Edison at a specified, pre-arranged contract price; (3) ignore the notice of interruption and buy replacement power from Ohio Edison; or (4) curtail its operations. Direct Testimony of S. Ouellette at 9, Appellant's Supp. at S-69. The 2005 interruptions ranged from 6.5 hours to 18 hours in duration per event for a total of 642 hours over 44 events. Direct Testimony of C. Idle at CJI-4, Sec. Supp. at 2. Foundry still saved $450,000 in 2005 under Rider 75 even after paying for replacement power from Ohio Edison to "buy-through" each interruption. Direct Testimony of S. Ouellette at 4-5, Appellant's Supp. at S-64 – S-65.

FirstEnergy Solutions Corp. (Solutions) administers the interruptible service program under an internal operating policy (2001 policy). The policy is a practical checklist that promotes timely and efficient implementation of economic interruptions and reduces interaction between FirstEnergy's regulated and unregulated business segments as the law requires. Tr. II at 69, Appellant's Supp. at S-428. The policy is to invoke an interruption when, for at least three consecutive hours, incremental out-of-pocket costs to supply power exceed a "strike price" of $65.00 per megawatt hour (MWh) and the current or expected load obligations exceed available planned resources by 300 megawatts or more. Utility Services Economic Interruption Policy, Appellant's Supp. at S-15; Direct Testimony of S. Ouellette at 6, Appellant's Supp. at S-66. The strike price represents approximately the *highest* incremental revenue received from any FirstEnergy interruptible customer in Ohio. *Id.* All interruptible customers under Rider 75 are interrupted at the same time and under the same terms. In 2005, for each economic interruption,

Foundry elected to consume replacement power from Ohio Edison rather than a third-party supplier as Rider 75 allowed. FirstEnergy shareholders absorb the differential between the uniform strike price of 6.5¢/kWh and the discounted tariffed rate of $5.135¢/kWh that Foundry normally pays during non-interruption periods. Direct Testimony of S. Ouellette at 8, 10, Appellant's Supp. at S-68, S-70.

Foundry concedes that Rider 75 does not limit the number of interruptions and admits that Ohio Edison's buy-through program "worked" from 1997 through 2004 when economic interruptions occurred less frequently. Tr. I at 13-14, 19-20, Sec. Supp. at 5-6, 7-8. Given the level of savings from the discounted interruptible rate, it is not surprising that Foundry has only nominally investigated alternative supply sources despite more frequent interruptions in 2005. Tr. I at 28-29, Sec. Supp. at 9-10. Nor does Solutions recover all of its costs of purchased power under economic interruption conditions. Ohio Edison witness Charles Idle explained that, during 2005, Ohio Edison received from interruptible customers incremental revenues based on a weighted average of 9.2¢ per kWh, while the weighted average to supply this same load, based on actual purchases, to Solutions was 9.4¢ per kWh. Direct Testimony of C. Idle at 4, 17, Exhibit CJI-4, Appellant's Supp. at S-31, S-44, Sec. Supp. at 2; Tr. II at 78, Appellant's Supp. at S-437. None of these facts are disputed.

Foundry does not contest how Solutions manages its energy supply portfolio (*i.e.*, power purchases and sales) on behalf of the operating companies. Tr. I at 43, Sec. Supp. at 11. Nor has it claimed that Solutions fails to properly plan to meet peak-load obligations. *Id.* at 44, Sec. Supp. at 12. Foundry does not challenge the level of purchased

power costs nor does it dispute the accuracy of billings by Solutions to Ohio Edison. Tr. III at 25, Appellant's Supp. at S-534. Foundry today remains a Rider 75 interruptible customer, despite an opportunity to convert that load to firm service on favorable terms ordered by the Commission. *In re Complaint of Elyria Foundry Co.*, Case No. 05-796-EL-CSS (hereinafter *In re Foundry*) (Opinion and Order at 10) (January 17, 2007), Appellant's App. at A-18.

On January 17, 2007, the Commission issued its opinion and order. The Commission found that Foundry failed to prove that Ohio Edison had violated any applicable statute, regulation, or guideline or any filing or notice requirement. *In re Foundry* (Opinion and Order at 11) (January 17, 2007), Appellant's App. at A-19. Additionally, the Commission found no evidence to support Foundry's claim that Ohio Edison administered Rider 75 in a way that discriminated or prejudiced Foundry in any way. *Id.* at 6-7, Appellant's App. at A-14 – A-15.

On February 16, 2007, Foundry filed an application for rehearing. On March 14, 2007, the Commission issued an entry denying rehearing. On April 4, 2007, Foundry filed a second application for rehearing that, on May 2, 2007, the Commission also denied.

This appeal ensued.

Argument

Proposition of Law No. I:

> **Foundry had the burden of proving the allegations in its complaint. Because Foundry failed to present any facts to show that Ohio Edison violated Commission-approved Rider 75, the Commission properly dismissed the complaint under R.C. 4905.26. *Luntz v. Pub. Util. Comm'n*, 79 Ohio St. 3d 509, 684 N.E.2d 43 (1997).**

The standard of review applicable to this case is provided under R.C. 4903.13. This provision provides that a Commission "order shall be reversed, vacated, or modified by this court only when, upon consideration of the record, the court finds the order to be unlawful or unreasonable." *Constellation New Energy, Inc. v. Pub. Util. Comm'n*, 104 Ohio St. 3d 530, 820 N.E.2d 885, ¶ 50 (2004). The Court will not reverse or modify a Commission decision as to questions of fact when the record contains sufficient probative evidence to show that the Commission's decision was not manifestly against the weight of the evidence and was not so clearly unsupported by the record as to show misapprehension, mistake, or willful disregard of duty. *Monongahela Power Co. v. Pub. Util. Comm'n*, 104 Ohio St. 3d 571, 820 N.E.2d 921, ¶ 29 (2004). The appellant bears the burden of demonstrating that the Commission's decision is against the manifest weight of the evidence or is clearly unsupported by the record. *Id.*

A. Dispute

Foundry has participated in Ohio Edison's *optional* interruptible service program since 1997. The program is *voluntary*. Foundry had no complaints with the operation or administration of Ohio Edison's interruptible service program prior to 2005. Tr. I at 19-

20, Sec. Supp. at 7-8. Foundry complained that Ohio Edison implemented Commission-approved Rider 75 differently in 2005, causing Foundry to be interrupted more frequently that year.

But the record shows that Ohio Edison did nothing different in 2005 than it did in prior years in implementing Rider 75. Specifically, Foundry makes a priority of service argument that would give it, as an interruptible customer, priority service after firm retail customers, but before Solutions' wholesale and competitive firm customers, when Ohio Edison's incremental revenue is less than its incremental expense to supply energy for its customers. But Rider 75 only makes sense, economically, if all firm service customers are prioritized over interruptible customers. To treat non-firm load over planned, firm load would defeat the purpose of having interruptible load. Moreover, it was unexpected conditions, extreme weather and fuel shortages, that caused higher than forecasted customer demand on the system and a significant increase in the cost to run peaking generation units. That, in turn, caused market prices to increase dramatically.

The issue before the Court is whether Ohio Edison called economic interruptions in accordance with Commission-approved Rider 75, that addresses the retail relationship between Ohio Edison and Foundry, and whether replacement purchased power costs were properly allocated to Ohio Edison under the Federal Energy Regulatory Commission (FERC)-approved Power Supply Agreement (PSA) under which Ohio Edison purchases all of its electricity to serve its customers' firm and interruptible loads. The PSA is a wholesale contract that covers all power purchases made by Solutions on Ohio Edison's behalf. Although these documents address distinct and different (*i.e.*, retail and whole-

sale) transactions, it is important to understand the interrelationship between the two. The confusion throughout Foundry's brief suggests a decided lack of such understanding. Under Commission-approved Rider 75, Ohio Edison offers customers an optional interruptible service program at discounted prices lower than standard tariff rates. In exchange, customers who choose Rider 75 are required either to curtail their interruptible electric consumption, or to buy replacement power from either Ohio Edison or a third-party, or pay Ohio Edison's actual cost to serve them during interruptible events. Rider 75 establishes generally when Ohio Edison can call an economic interruption. The PSA is the lawful and proper way to determine Ohio Edison's incremental costs of replacement power consumed by Foundry during economic interruptions. Ohio Edison Rider 75 at 6, Appellant's Supp. at S-8.

B. Energy Portfolio Management

Solutions manages the generation portfolio and energy planning on behalf of Ohio Edison and the other Ohio operating companies to provide all the electricity needs of their customers. Direct Testimony of C. Idle at 5-6, 8-9, Appellant's Supp. at S-32 – S-33, S-35 – S-36. Managing the portfolio and the related planning, although complex and detailed, is not an exact science. *Id.* at 16, Appellant's Supp. at S-43. There are times when Solutions makes sales of surplus energy while an economic interruption is in effect. Direct Testimony of C. Idle at 15-16, Appellant's Supp. at S-42 – S-43. There is nothing in Commission-approved tariff 75 that precludes this practice and it is expressly authorized under the 2001 policy used by Solutions to determine when to call an economic inter-

ruption/buy-through event. Appellant's Supp. at S-2 – S-15. More important, these hourly sales of capacity and energy are permitted under the Power Supply Agreement that governs Solutions' obligations to supply all the electricity needs of Ohio Edison. The availability of this surplus power can result from weather-related factors, more customers than expected curtailing their interruptible loads, and a host of other reasons. Direct Testimony of C. Idle at 15-16, Appellant's Supp. at S-42 – S-43.

Portfolio planning functions to ensure that at any given time adequate generation capacity is committed to serve the needs of Ohio Edison and the other FirstEnergy operating companies under *normal* conditions. This case examines the reciprocal rights and responsibilities of Ohio Edison to its interruptible customer Foundry under extreme, unplanned operating conditions, a retail relationship governed by Commission-approved Rider 75. Foundry does not contest how Solutions managed the energy portfolio in 2005 or how planning and forecasting to meet retail customer loads were performed that year. Tr. I at 43-44, Sec. Supp. at 11-12. Nor does Foundry argue that Solutions improperly billed Ohio Edison for more than its share of purchased power costs in 2005. Tr. III at 25, Appellant's Supp. at S-534.

C. Rider 75

Rider 75 is a Commission-approved tariff for interruptible service. It establishes the terms and conditions under which Ohio Edison serves its retail, interruptible customers. Normally, Foundry pays the discounted rate of 5.135¢/kWh. Direct Testimony of S. Ouellette at 10, Appellant's Supp. at S-70. The price that Foundry pays, under Rider 75,

for electricity that it chooses to consume during a buy-through event is the cost of energy obtained or generated by the company on a best-efforts basis at the lowest cost after *all other prior* obligations are met. Ohio Edison Rider 75 at 7, Appellant's Supp. at S-9. This delineation of service priority of firm load ahead of interruptible load during an economic interruption, is repeated at page 10 where Ohio Edison reserves the right to interrupt sale of replacement energy if, "*in the sole judgment of the Company*, such electricity is required to maintain service to the Company's *firm electric customers*...." *Id.* at 10, Appellant's Supp. at S-12 (emphasis added). The "buy-through" program simply allows Ohio Edison to pass on actual costs of purchased power to Foundry and other Rider 75 customers in exchange for a price discount that these customers pay during all other hours of the year when no economic interruptions/buy-through events are called. It is important to note that the program is intended only to recover costs and not to generate a profit. Direct Testimony of C. Idle at 14, Appellant's Supp. at S-41.

Generally, under Rider 75, Ohio Edison "reserves the right to interrupt service to the customer's interruptible load whenever the incremental revenue to be received from the customer is less than the anticipated incremental expense to supply the interruptible energy for the particular hour(s) of the interruption request." Ohio Edison Rider 75 at 6, Appellant's Supp. at S-8; Direct Testimony of S. Ouellette at 9, Appellant's Supp. at S-69. A Rider 75 customer has four options when an economic interruption (also called a "buy-through" event) occurs. The customer can: 1) arrange for up to five third-party suppliers to provide Ohio Edison with power that will be earmarked for delivery to the customer at a predetermined price; 2) purchase replacement power from Ohio Edison at the price

quoted at the time the buy-through event was noticed; 3) ignore the notice, continue to operate, and pay for replacement power consistent with the rider; or 4) curtail operations and reduce demand consistent with the customer's electric service contract. Addendum to Contract at 1, Appellant's Supp. at S-2 – S-14; Ohio Edison Rider 75 at 6-8, Appellant's Supp. at S-8 – S-10. In 2005, Foundry elected to buy-through each economic interruption and to purchase replacement power from Ohio Edison at quoted prices. Direct Testimony of S. Ouellette at 4, Appellant's Supp. at S-64.

Firm and interruptible electricity services are priced differently and treated differently in terms of service priority. Ohio Edison Rider 75 at 6, 10, Appellant's Supp. at S-8, S-12. Firm load is more expensive and, generally, subject to interruption only in extreme emergency circumstances. Interruptible load can be interrupted either under emergency or economic conditions (this case). Interruptible service is a supply-side resource that Ohio Edison uses in its planning to meet all of its electricity load obligations. Direct Testimony of C. Idle at 3, Appellant's Supp. at S-30. Fundamentally, the utility charges a customer a discounted price for its interruptible load in return for the customer agreeing to either curtail that load or accept the marketplace price risks of obtaining replacement power to serve it. When the customer chooses to curtail its interruptible load, replacement power need not be purchased on its behalf. Tr. III at 54, 72, Appellant's Supp. at S-563, S-581. If the customer instead chooses to "buy-through," as Foundry routinely does, replacement power must be obtained to serve the customer's load. *Id.* at 55, Appellant's Supp. at S-564. Foundry is allocated only the cost of power obtained on its behalf. It is always the customer's option.

D. Power Supply Agreement

Solutions supplies all power requirements of the Ohio operating companies under a Power Supply Agreement (PSA) approved by the FERC. Direct Testimony of C. Idle at 6, 12, Appellant's Supp. at S-33, S-39. All expenses are passed through the PSA, including all purchased power costs incurred for customers electing to buy generation from Ohio Edison during an economic interruption. Tr. I at 187-188, Appellant's Supp. at S-339 – S-340. The PSA establishes Ohio Edison's incremental cost of replacement power at any point in time. And, according to the PSA, unless Solutions is purchasing power to meet those needs, Ohio Edison only pays the fixed capacity and energy costs set forth in Sections IV (A) and (B) and Exhibit A to the PSA, regardless of the actual cost to Solutions. *See* Addendum to Contract, Sections IV(A) and (B), Exhibit A, Appellant's Supp. at S-18, S-25. When an interruptible event occurs, Rider 75 provides that, if customers choose to buy-through, they will pay the costs of energy obtained or generated by the company on a best efforts basis at the lowest cost after all other prior obligations are met. Ohio Edison Rider 75 at 7, Appellant's Supp. at S-9. This energy is obtained by Ohio Edison under the PSA.

The cost to Ohio Edison for power purchased by Solutions is governed by Paragraph IV(C) of the PSA, which states in pertinent part:

> Buyer [Ohio Edison] will pay a monthly charge equal to its pro rata share of the total cost of purchased Power ("Purchased Power") incurred by Seller [Solutions] for delivery to the FirstEnergy Control Area in the previous calendar month. The total cost of purchased Power for a month shall be calculated by adding the total of such amounts delivered to the FirstEnergy

> Control Area... The pro rata share of total cost payable by Buyer [Ohio Edison] shall be determined in accordance with Exhibit A.

Power Supply Agreement, Section IV(C); Appellant's Supp. at S-19.

While the PSA determines the amount of costs to be charged to Ohio Edison for wholesale purchased power, Ohio Edison's tariffed retail rates establish the price that its retail customers (Foundry) pay. Unless an interruptible event is called, Foundry pays the discounted rate provided under Rider 75 for its interruptible load. When an interruptible event is called, Solutions has determined that its committed generation resources will be at least 300 megawatts short for at least three hours at a cost in the marketplace of at least $65.00/MWh to cover this shortage. Direct Testimony of S. Ouellette at 6-7, Appellant's Supp. at S-66 – S-67. Because the PSA will allocate back to Ohio Edison only the portion of the costs of this 300 megawatts block of power consumed by Ohio Edison's interruptible customers, Ohio Edison pays only for the purchased power consumed by its customers. In this regard, the Commission correctly noted in its opinion and order that:

> If an interruptible customer chooses to curtail its usage or purchase its power requirements from another supplier during an interruption, the amount of power purchased under the PSA will be reduced by that amount. On the other hand, if an interruptible customer, such as Elyria Foundry, chooses to buy-through the interruption, Ohio Edison's costs under the PSA will increase by the amount of the buy-through. Thus, the pricing formula in the PSA is a true measure of incremental expense.

In re Foundry (Opinion and Order at 9) (January 17, 2007), Appellant's App. at A-17.

Foundry acknowledges that the billing methodology used by Solutions under the PSA, specifically paragraph 3 on Exhibit A of the PSA, has been approved by FERC. Tr.

III at 24, Appellant's Supp. at S-533. Foundry exhaustively audited and took no issue with Solutions' billings to Ohio Edison during 2005. *Id.* at 25, Appellant's Supp. at S-534. Foundry further agrees that the PSA's formula serves as the proper mechanism for allocating purchased power costs among the operating companies. Tr. I at 81-82, 99-100, Appellant's Supp. at S-236 – S-237, S-254 – S-255.

Foundry agrees that the PSA determines "incremental expense," for purposes of triggering an interruption under Rider 75. *Id.* at 68, Appellant's Supp. at S-223; Tr. III at 52-53, Appellant's Supp. at S-560 – S-561; Ohio Edison Rider 75 at 6, Appellant's Supp. at S-8; Tr. II at 99, Appellant's Supp. at S-458. "Incremental expense" refers to the last group of costs associated with the last purchase of energy used to meet the last block of demand. Surrebuttal Testimony of C. Idle at 6, Appellant's Supp. at S-52. In context, incremental cost during an economic buy-through interruption is the price of power consumed by Foundry to satisfy (rather than curtail) its interruptible load during the event. *Id.* "But for" the customer's election to buy-through the interruption, no additional power would need to be purchased and no incremental costs would be incurred. *Id.* at 6-7, Appellant's Supp. at S-52 – S-53.

E. Firm Versus Interruptible Electricity Load

At the heart of Foundry's assertions is a flawed premise. It argues for a priority of service that is fundamentally at odds with its choice to accept a price discount in return for the right to be interrupted. Firm service is of a higher quality and costs more than interruptible service. Foundry's Rider 75 service is *interruptible*. There is no dispute on this

point. All customers that Ohio Edison was required to serve, either contractually or under a state law obligation to serve, are considered to be firm commitments and must be served first. Direct Testimony of C. Idle at 4, 17, Appellant's Supp. at S-31, S-44. The customers that met this criterion included retail customers within Ohio Edison's service territory and long-term contractual wholesale customers, such as Potomac Energy or AMP-Ohio. *Id.* Because customers pay more for firm electricity supplies and, consequently, they are not asked to bear the same price risks that interruptible customers must bear. The Commission has adopted specific guidelines that recognize, without exception, the priority of service that firm service customers enjoy (and pay more for) over their interruptible brethren. *In re Interruptible Electric Service Guidelines*, Case No. 95-866-EL-UNC (Finding and Order) (December 22, 1998), App. at 7-18. The priority of firm service is expressly recognized in Commission-approved Rider 75 under which Foundry receives its interruptible buy-through service. *See, e.g.*, Ohio Edison Rider 75 at 10, Appellant's Supp. at S-12. Foundry chose to accept a lesser quality and priority of service at a discounted rate for its interruptible load that, when supplies are tight, is subordinate to all firm commitments of any kind. Direct Testimony of C. Idle at 17, Appellant's Supp. at S-44.

In addition to making sales to all the Ohio operating companies in the MISO portfolio, Solutions makes planned contractual power sales to unaffiliated power marketers and unregulated retail customers. Tr. II at 89, Appellant's Supp. at S-448. An example is the Potomac Edison contract. *Id.* at 89, 110-111, Appellant's Supp. at S-448, S-469 – S-470; Direct Testimony of C. Idle at 17-18, Appellant's Supp. at S-44 – S-45. This is a firm, longstanding contractual obligation that must be served consistent with the terms set

forth in the contract approved by the FERC. *Id.* Interruptible load is, by definition, non-firm load. *Id.* Foundry admits that interruptible load is not firm load and interruptible customers are not firm customers. Tr. I at 75, Appellant's Supp. at S-230. All firm contractual commitments are firm. Tr. II at 33, 35, Appellant's Supp. at S-392, S-394. The PSA under which Solutions provides all electricity needed by the Ohio operating companies in the MISO portfolio is a firm commitment of Solutions. *Id.* at 36, Appellant's Supp. at S-395.

The priority of service method advocated by Foundry, if adopted, would eliminate the economic interruptible buy-through program. *Id.* at 129-131, Appellant's Supp. at S-488 – S-490. Foundry's illogical cost-allocation proposal is premised upon a flawed priority of service that runs counter to the fundamental purpose of interruptible load as a supply planning resource tool. *Id.* at 75, 125, Appellant's Supp. at S-434, S-484. To eliminate this benefit to Ohio Edison, as Foundry's proposal would do, would also eliminate Ohio Edison's ability to continue to offer and fund rate discounts for interruptible customers. *Id.* at 129, Appellant's Supp. at S-488. Discounts provided program participants (like Foundry) are funded through savings achieved through the operating companies' ability to shift price risk to interruptible customers under economic buy-through conditions. *Id.* at 63, Appellant's Supp. at S-422. Indeed this is the fundamental premise that underlies interruptible service. Interruptible customers pay discounted rates in return for accepting pricing risks during times when customer demand for electricity is high and supplies are tight, precisely the market conditions that Ohio Edison was faced with each

time it called an economic interruption for Foundry in 2005. Direct Testimony of C. Idle at 10-11, Appellant's Supp. at S-37 – S-38; Tr. II at 129, Appellant's Supp. at S-488.

Foundry gladly accepted the price discounts and the risks associated with being an interruptible customer so long as it was only rarely interrupted. It now seeks premium firm service at a bargain, discounted, interruptible rate, contrary to the benefit of the bargain it made with Ohio Edison under Rider 75. In short, Foundry cannot reasonably expect to reap the benefits of interruptible service without the corresponding obligations. When it voluntarily agreed to take service under Rider 75, Foundry agreed to accept *both.*

Equally unpersuasive are Foundry's assertions regarding incremental costs. It argues that Ohio Edison failed to properly determine its incremental expense for purposes of calling an interruption in 2005 under Rider 75. Foundry claims costs to serve Solutions' competitive market obligations were improperly included when determining Ohio Edison's incremental expense to supply its retail interruptible load during economic interruptions called that year. Foundry is wrong.

Foundry further argues that the Commission unlawfully expanded the definition of firm service to include Solutions' competitive obligations, resulting in an excessive number of economic interruption events in 2005 and Foundry paying more replacement power costs. Foundry Brief at 16-17. Solutions must bill Ohio Edison for purchased power under the PSA formula. Surrebuttal Testimony of C. Idle at 8-9, Appellant's Supp. at S-54 – S-55. The formula allocates to Ohio Edison only the cost of power purchased on its behalf to serve its retail customers. Stated differently, any power purchased by Solutions to serve its "competitive" obligations is not allocated to nor paid by Foundry as

part of its costs to buy-through an economic interruption.[2] Foundry and other interruptible customers are billed only for their consumption during an economic buy-through event. *Id.* at 8, Appellant's Supp. at S-54. Foundry conveniently forgets that firm loads enjoy service priority over interruptible loads as both Rider 75 and the Commission's interruptible guidelines illustrate. Thus, the incremental cost to provide Foundry with replacement power during an economic interruption is the cost of the last block of power purchased to meet its interruptible demand that, but for Foundry's election to buy-through, would not have been needed. The Commission correctly noted that it was proper for Ohio Edison to determine its incremental cost to serve interruptible customers under the pricing formula in the PSA. *In re Foundry* (Opinion and Order at 9) (January 17, 2007), Appellant's App. at A-17. The FERC-approved PSA formula ensures and requires that Ohio Edison is billed only for power purchased on behalf of and consumed by its customers. Ohio Edison, in turn, allocates to Foundry only the costs of replacement power obtained on Foundry's behalf and consumed by Foundry during the economic interruption.

In sum, Ohio Edison followed Rider 75 and the incremental cost of replacement buy-through power needed to serve Foundry's interruptible load was also correctly determined under the FERC-approved PSA. There is no proof whatsoever that Ohio Edison did not, as required under Rider 75, use best efforts to obtain the lowest cost replacement power available for Foundry after all firm obligations were met. Although the priority of

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[2] Keeping in mind the purpose of the PSA and Rider 75, Solutions incurs the cost of all purchased power and pays those invoices. Pursuant to the Paragraph 3 of the PSA formula, Ohio Edison (and the other companies) is invoiced only for a portion of that total cost based on the consumption of their respective customers. Any remaining costs, *i.e.*, the portion not paid by the operating companies, remain with Solutions.

service and incremental cost of replacement power may not be to its liking, Foundry has not showed that the applicable contracts, the PSA (wholesale) and Rider 75 (retail) were improperly applied.

Proposition of Law No. II:

> **Internal company operating guidelines that merely implement a tariffed service but do not establish a rate or the terms and conditions of that service need not be filed with and approved by the Commission.**

Solutions administers the interruptible buy-through program on behalf of the Ohio operating companies. Direct Testimony of S. Ouellette at 5, Appellant's Supp. at S-65; Tr. I at 176, 182, 185, Appellant's Supp. at S-328, S-334, S-337. In 2001, the operating companies developed an internal policy checklist to assist Solutions in determining *when* to call an economic interruption on their behalf. The policy streamlines the administrative process and enables Solutions to timely and efficiently act when economic interruption conditions are presented. Surrebuttal Testimony of C. Idle at 4-5, Appellant's Supp. at S-50 – S-51; Tr. I at 182, 185, Appellant's Supp. at S-334, S-337. Generally, the policy permits an economic interruption to be called where at least 300 megawatts of electricity are needed for at least three consecutive hours at a price in excess of $65 per megawatt hour. The checklist conditions are straightforward and both consistent with and complementary to the terms and provisions of Rider 75 that *generally* establish when an economic interruption can be called. The policy minimizes the need for contact between FirstEnergy's competitive (FirstEnergy Solutions – generation) and regulated (Ohio Edison) business segments as required under R.C. 4928.17 and the Commission's code of

conduct rules. *See e.g.* Direct Testimony of S. Ouellette at 9, Appellant's Supp. at S-69; Tr. I at 176, Appellant's Supp. at S-328.

Foundry argues that the policy should have been approved under R.C. 4909.18 or R.C. 4905.31 and that it should have been publicly noticed under R.C. 4905.30. Foundry Brief at 20. The Commission rejected these arguments, finding that the 2001 policy merely documented Ohio Edison's internal operating standards for implementing an economic interruption rather than establishing or modifying any rate or service as contemplated under R.C. 4909.18. *In re Foundry* (Opinion and Order at 5-6) (January 17, 2007), Appellant's App. at A-13 – A-14. The Commission found that the 2001 policy did not negate any requirements of Rider 75 and did not affect any existing Commission-approved rate. *In re Foundry* (Entry on Rehearing at 3-6) (March 14, 2007), Appellant's App. at A-23 – A-26. No tariff amendment under R.C. 4909.18 or filing under R.C. 4905.31 was required, the Commission correctly reasoned, because Ohio Edison's interruptible program is already offered under *Commission-approved tariff Rider 75. Id.* Ohio Edison complied with the statutory filing requirement in R.C. 4905.30 when it filed Rider 75. Because the policy does not establish rates, charges, or related rules and regulations, the Commission found that R.C. 4905.30 was inapplicable to the 2001 policy. *Id.* at 6, Appellant's App. at A-26.

The policy is more stringent and thus customer-friendly than Rider 75 because it enumerates conditions over and above anything required in Rider 75 that must be met *before* Solutions can call an economic interruption. The policy checklist requires that

Ohio Edison must be short at least 300 megawatts[3] for at least three hours before an economic interruption can be called. Direct Testimony of S. Ouellette at 6, Appellant's Supp. at S-66. It also establishes a $65/MWh threshold by which Ohio Edison must measure whether incremental costs exceed incremental revenues to *implement* the Rider 75 requirement. Rider 75 has no minimum megawatt threshold or a three-hour requirement. The policy removes any confusion as to when an economic interruption may be called and results in fewer interruptions and the need to procure more expensive replacement power for customers, like Foundry, that elect not to curtail their interruptible loads.

The 2001 policy expressly requires that all contract and tariff restrictions must be followed and that nothing in the policy "undermines or diminishes [customers'] tariff or contractual rates." *See* Utility Services Economic Interruption Policy, Appellant's Supp. at S-15. Again, the 2001 policy is nothing more than a practical checklist to assist Solutions in determining how/when to implement an economic interruption/buy-through event. The policy does not affect or limit customer options under the Rider. Solutions applies the policy consistently to determine when an economic interruption should be called.

Rider 75 has already been filed with and approved by the Commission. The 2001 internal company policy implements and complements the terms and conditions of the Rider. Foundry's claims of statutory violations are wrong and should be rejected.

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[3] Solutions uses this block of power as an energy portfolio planning tool. 300 megawatts corresponds to the average estimate of load at any given time that Solutions would need to cover if all interruptible customers choose to buy-through (rather than curtail) an economic interruption as Foundry routinely elects to do. Tr. I at 173, 194-195, Appellant's Supp. at S-325, S-346 – S-347.

Proposition of Law No. III:

> **Ohio Edison's use of a higher, uniform strike price prevents customer confusion and benefits Foundry because it results in fewer economic interruptions. The Court will not reverse a Commission order unless the party seeking reversal demonstrates the prejudicial effect of the order. *Elyria Foundry Co., et al. v. Pub. Util. Comm'n*, 114 Ohio St. 3d 305, 871 N.E.2d 1176 (2007).**

Under Rider 75, Ohio Edison reserves the right to call an economic interruption when the incremental revenue received from the customer is less than the anticipated incremental expense to supply the customer for the particular hour(s) of the interruption request. Ohio Edison Rider 75 at 6, Appellant's Supp. at S-8. Ohio Edison developed a "strike price" to determine when an economic interruption event can be called under the program. Direct Testimony of S. Ouellette at 6, Appellant's Supp. at S-66. In 2005, the strike price was $65/MWh[4] (6.5¢/kWh), representing the highest level of incremental revenue received from any FirstEnergy Ohio interruptible customer. *Id.* at 6-7, Appellant's Supp. at S-66 – S-67. When the cost to purchase or produce replacement power for interruptible customers *exceeds* the uniform strike price (which is higher than the highest discounted rate paid by any interruptible customer), incremental costs exceed incremental revenues, and an economic interruption may be called under Rider 75.

All Rider 75 customers are interrupted under the same terms, at the same time, and for the same duration. *Id.* at 8-9, Appellant's Supp. at S-68 – S-69; Tr. I at 54, Appel-

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[4] The strike price was lowered to $65/MWh (6.5¢/kWh) because increased market volatility coupled with upward pricing pressures in wholesale electricity markets made it more difficult for Ohio Edison to absorb cost-recovery deficiencies created by the higher strike price load. Direct Testimony of S. Ouellette at 8, 10, Appellant's Supp. at S-68, S-70.

lant's Supp. at S-209. There is no discrimination or favoritism. Use of a uniform strike price is consistent with Solution's single energy planning portfolio and promotes ease of administration and customer understanding. *Id.* at 10, Appellant's Supp. at S-70. The strike price is set at a level that minimizes customer interruptions. It also keeps at manageable levels the amount of purchased power expense that FirstEnergy shareholders must absorb under the program. That is to say, Ohio Edison must continue to supply Foundry's interruptible load at the discounted 5.135¢/kWh rate even where the incremental cost to serve that load has increased to 6.4¢/kWh or just below the strike price trigger. *Id.* at 8, 10, Appellant's Supp. at S-67, S-70; Direct Testimony of C. Idle at 14, Appellant's Supp. at S-41.

Foundry alleges that it is unduly disadvantaged by a uniform strike price because customers paying higher incremental rates should receive higher service priority and less risk of interruption than customers who pay a lower incremental rate. Foundry Brief at 21-23. The Commission disagreed, finding no evidence of unlawful, prejudicial treatment under R.C. 4905.35. *In re Foundry* (Opinion and Order at 6) (January 17, 2007), Appellant's App. at A-14. Moreover, Foundry mixes apples and oranges. Rider 75 customers normally pay the Commission-approved, discounted tariffed rate provided by the program that is *individualized* to take into account that customer's specific usage and billing determinants. Direct Testimony of C. Idle at 18, Appellant's Supp. at S-45. Thus, other than being part of a general class of interruptible customers, their service characteristics are not similarly-situated. The strike price is not a rate but rather a trigger point above which incremental costs to serve customer interruptible loads exceed revenues to Ohio

Edison from those customers as required under Rider 75. Where Foundry elects to buy-through the economic interruption (rather than curtail its interruptible load), the incremental cost is the cost of market replacement power that Rider 75 customers elect to consume rather than to curtail during the interruption. Surrebuttal Testimony of C. Idle at 6-7, Appellant's Supp. at S-52 – S-53.

Foundry benefits from the $65/MWh uniform strike price. Direct Testimony of S. Ouellette at 9-10, Appellant's Supp. at S-69 – S-70. If each customer's incremental revenue (*i.e.*, discounted tariffed rate) were used as to strike price, it would be inefficient and administratively burdensome, if not impossible, for Ohio Edison to manage the economic buy-through program. *Id.* If Foundry's *lower* incremental price of 5.135¢/kWh were used (as opposed to the higher strike price of 6.50¢/kWh), Foundry would have been interrupted *more* often than it was in 2005. *Id.* at 10, Appellant's Supp. at S-70; Tr. I at 175, Appellant's Supp. at S-327. This could threaten some industries (steel and auto) with virtually daily interruption during summer months which would be ruinous for Ohio's economy. *Id.* FirstEnergy's *shareholders* would be unfairly harmed contrary to the self-funding purpose of the Rider 75 interruptible buy-through program. Direct Testimony of C. Idle at 14, Appellant's Supp. at S-41. The use of a uniform strike price is easy for customers to understand and for Ohio Edison to apply. There is neither undue discrimination nor prejudice to Foundry resulting from the use of a uniform strike price. The Court will not reverse a Commission order unless the party seeking reversal demonstrates the prejudicial effect of the order. *Elyria Foundry Co., et al. v. Pub. Util. Comm'n*, 114 Ohio St. 3d 305, 871 N.E.2d 1176 (2007). Foundry has made no such showing.

Proposition of Law No. IV:

> **Where it contains some factual basis and reasoning, a Commission decision meets the requirements of R.C. 4903.09. *Payphone Ass'n v. Pub. Util. Comm'n*, 109 Ohio St. 3d 453, 849 N.E.2d 4 (2006).**

The Court has often noted that the purpose of R.C. 4903.09 is to "enable the court to review the actions of the commission without reading the voluminous records in Public Utilities Commission cases." *MCI Telecommunications Corp. v. Pub. Util. Comm'n*, 32 Ohio St. 3d 306, 513 N.E.2d 337 (1987). Strict compliance with the statute is not required. *Tongren v. Pub. Util. Comm'n*, 85 Ohio St. 3d 87, 89, 706 N.E.2d 1255, 1257 (1999). The level of detail need be sufficient only to enable the Court to discern the Commission's reasoning. *Allnet Communications Serv. v. Pub. Util. Comm'n*, 70 Ohio St. 3d 202, 209, 638 N.E.2d 516, 521-522(1999). The Commission need only set forth "some factual basis and reasoning based thereon in reaching its conclusion." *Payphone, supra*, citing *Ohio Domestic Violence Network v. Pub. Util. Comm'n*, 70 Ohio St. 3d 311, 323, 638 N.E.2d 1012, 1022 (1994).

Foundry very narrowly argues that the Commission failed to comply with R.C. 4903.09. In arguing essentially for a higher strike price, Foundry presented, *for the first time in its rehearing application*, a mathematical example. Foundry Application for Rehearing at 25-28, Appellant's App. at A-70 – A-73. Ohio Edison responded, pointing out an obvious flaw in the example, noting that, "Moreover, Complainant's example is contrary to basic mathematics. Clearly if the total cost is to be allocated based on the percentage of consumption to get the unit cost, so too must the volume." Ohio Edison Memorandum Contra at 13, Sec. Supp. at 25.

When it addressed this specific argument, the Commission reiterated Ohio Edison's reasoning as the basis for its finding:

> The commission agrees with Ohio Edison on this issue. As stated by Ohio Edison in its memorandum contra, "if the total cost is to be allocated based on the percentage of consumption to get the unit cost, so too must the volume."

In re Foundry (Entry on Rehearing at 7) (March 14, 2007), Appellant's App. at A-27.

The Commission fully explained this finding and the basis for it. There is no "evidence" on which the Commission could rely because Foundry failed to sponsor any to support its math example during the hearing. This precluded Ohio Edison from identifying the flaw and presenting opposing evidence at that time. For the Commission to reject an obvious math error made by Foundry in an example that it created, hardly requires any evidentiary basis beyond the error itself. Foundry's tortured, self-serving mathematical exercise manipulates and misapplies, among other things, Ohio Edison's cost allocation factor (46.11%) to inflate the strike price to an astonishing and ridiculous level of $141/MWh. Foundry Application for Rehearing at 27-28, Appellant's App. at A-72 – A-73. It was not error for the Commission to note the arguments of the parties in their respective pleadings in support of its finding that Foundry's flawed mathematical example was wrong in application and in result. *In re Foundry* (Entry on Rehearing at 7) (March 14, 2007), Appellant's App. at A-27. The Commission's explanation rejecting Foundry's late-raised and flawed mathematical exercise was sufficient to satisfy R.C. 4903.09.

Conclusion

Complainant Foundry failed to meet its burden of proof. Ohio Edison followed the applicable Commission-approved tariff Rider 75, and its internal policy guidelines, for each economic interruption event called in 2005. There is undisputed probative evidence that extreme weather conditions and unprecedented fuel prices contributed significantly to the frequency of events called that year. The record shows that Foundry was allocated and that it paid only those costs caused by *its* election to "buy-through" and consume replacement power during each of the 2005 economic interruptions. Finally, the evidence shows that Foundry's voluntary choice to receive discounted interruptible power has worked well, resulting in considerable savings over the years, including $450,000 alone in 2005. Foundry's attempt to manufacture "issues" does not mask the real point – it simply does not want to pay the going rate for power purchased *on its behalf* in the market when *it chooses* to buy-through economic interruptions properly called under Rider 75. It wants only the benefits of interruptible service without the burdens. That is not what Rider 75 requires, nor is it the deal Foundry voluntarily agreed to years ago.

The Commission's decision should be affirmed.

Respectfully submitted,

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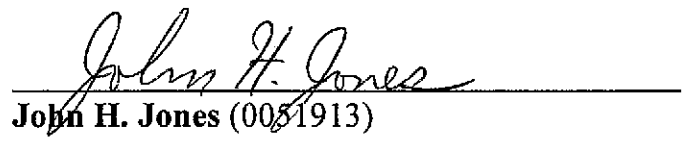

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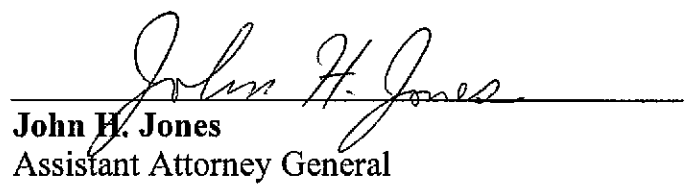
Proof of Service

I hereby certify that a true copy of the foregoing **Merit Brief** submitted on behalf of appellee, the Public Utilities Commission of Ohio, was served by regular U.S. mail, postage prepaid, or hand-delivered, upon the following parties of record, this 1st day of October, 2007.



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APPENDIX

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4903.09 Written opinions filed by commission in all contested cases.

In all contested cases heard by the public utilities commission, a complete record of all of the proceedings shall be made, including a transcript of all testimony and of all exhibits, and the commission shall file, with the records of such cases, findings of fact and written opinions setting forth the reasons prompting the decisions arrived at, based upon said findings of fact.

4905.26 Complaints as to service.

Upon complaint in writing against any public utility by any person, firm, or corporation, or upon the initiative or complaint of the public utilities commission, that any rate, fare, charge, toll, rental, schedule, classification, or service, or any joint rate, fare, charge, toll, rental, schedule, classification, or service rendered, charged, demanded, exacted, or proposed to be rendered, charged, demanded, or exacted, is in any respect unjust, unreasonable, unjustly discriminatory, unjustly preferential, or in violation of law, or that any regulation, measurement, or practice affecting or relating to any service furnished by the public utility, or in connection with such service, is, or will be, in any respect unreasonable, unjust, insufficient, unjustly discriminatory, or unjustly preferential, or that any service is, or will be, inadequate or cannot be obtained, and, upon complaint of a public utility as to any matter affecting its own product or service, if it appears that reasonable grounds for complaint are stated, the commission shall fix a time for hearing and shall notify complainants and the public utility thereof. Such notice shall be served not less than fifteen days before hearing and shall state the matters complained of. The commission may adjourn such hearing from time to time.

The parties to the complaint shall be entitled to be heard, represented by counsel, and to have process to enforce the attendance of witnesses.

Upon the filing of a complaint by one hundred subscribers or five per cent of the subscribers to any telephone exchange, whichever number be smaller, or by the legislative authority of any municipal corporation served by such telephone company that any regulation, measurement, standard of service, or practice affecting or relating to any service furnished by the telephone company, or in connection with such service is, or will be, in any respect unreasonable, unjust, discriminatory, or preferential, or that any service is, or will be, inadequate or cannot be obtained, the commission shall fix a time for the hearing of such complaint.

The hearing provided for in the next preceding paragraph shall be held in the county wherein resides the majority of the signers of such complaint, or wherein is located such municipal corporation. Notice of the date, time of day, and location of the hearing shall be served upon the telephone company complained of, upon each municipal corporation served by the telephone company in the county or counties affected, and shall be published for not less than two consecutive weeks in a newspaper of general circulation in the county or counties affected.

Such hearing shall be held not less than fifteen nor more than thirty days after the second publication of such notice.

4905.30 Printed schedules of rates must be filed.

Every public utility shall print and file with the public utilities commission schedules showing all rates, joint rates, rentals, tolls, classifications, and charges for service of every kind furnished by it, and all rules and regulations affecting them. Such schedules shall be plainly printed and kept open to public inspection. The commission may prescribe the form of every such schedule, and may prescribe, by order, changes in the form of such schedules. The commission may establish and modify rules and regulations for keeping such schedules open to public inspection. A copy of such schedules, or so much thereof as the commission deems necessary for the use and information of the public, shall be printed in plain type and kept on file or posted in such places and in such manner as the commission orders.

4905.31 Reasonable arrangements allowed - variable rate.

Except as provided in section 4933.29 of the Revised Code, Chapters 4901., 4903., 4905., 4907., 4909., 4921., and 4923. of the Revised Code do not prohibit a public utility from filing a schedule or entering into any reasonable arrangement with another public utility or with its customers, consumers, or employees providing for:

(A) The division or distribution of its surplus profits;

(B) A sliding scale of charges, including variations in rates based upon either of the following:

(1) Stipulated variations in cost as provided in the schedule or arrangement;

(2) Any emissions fee levied upon an electric light company under Substitute Senate Bill No. 359 of the 119th general assembly as provided in the schedule. The public utilities commission shall permit an electric light company to recover the emissions fee pursuant to such a variable rate schedule.

(3) Any emissions fee levied upon an electric light company under division (C) or (D) of section 3745.11 of the Revised Code as provided in the schedule. The public utilities commission shall permit an electric light company to recover any such emission fee pursuant to such a variable rate schedule.

(4) Any schedule of variable rates filed under division (B) of this section shall provide for the recovery of any such emissions fee by applying a uniform percentage increase to the base rate charged each customer of the electric light company for service during the period that the variable rate is in effect.

(C) A minimum charge for service to be rendered unless such minimum charge is made or prohibited by the terms of the franchise, grant, or ordinance under which such public utility is operated;

(D) A classification of service based upon the quantity used, the time when used, the purpose for which used, the duration of use, and any other reasonable consideration;

(E) Any other financial device that may be practicable or advantageous to the parties interested. No such arrangement, sliding scale, minimum charge, classification, variable rate, or device is lawful unless it is filed with and approved by the commission.

Every such public utility is required to conform its schedules of rates, tolls, and charges to such arrangement, sliding scale, classification, or other device, and where variable rates are provided for in any such schedule or arrangement, the cost data or factors upon which such rates are based and fixed shall be filed with the commission in such form and at such times as the commission directs. The commission shall review the cost data or factors upon which a variable rate schedule filed under division (B)(2) or (3) of this section is based and shall adjust the base rates of the electric light company or order the company to refund any charges that it has collected under the variable rate schedule that the commission finds to have resulted from errors or erroneous reporting. After recovery of all of the emissions fees upon which a variable rate authorized under division (B)(2) or (3) of this section is based, collection of the variable rate shall end and the variable rate schedule shall be terminated.

Every such arrangement, sliding scale, minimum charge, classification, variable rate, or device shall be under the supervision and regulation of the commission, and is subject to change, alteration, or modification by the commission.

4905.35 Prohibiting discrimination.

(A) No public utility shall make or give any undue or unreasonable preference or advantage to any person, firm, corporation, or locality, or subject any person, firm, corporation, or locality to any undue or unreasonable prejudice or disadvantage.

(B)(1) A natural gas company that is a public utility shall offer its regulated services or goods to all similarly situated consumers, including persons with which it is affiliated or which it controls, under comparable terms and conditions.

(2) A natural gas company that is a public utility and that offers to a consumer a bundled service that includes both regulated and unregulated services or goods shall offer, on an unbundled basis, to that same consumer the regulated services or goods that would have been part of the bundled service. Those regulated services or goods shall be of the same quality as or better quality than, and shall be offered at the same price as or a better price than and under the same terms and conditions as or better terms and conditions than, they would have been had they been part of the company's bundled service.

(3) No natural gas company that is a public utility shall condition or limit the availability of any regulated services or goods, or condition the availability of a discounted rate or improved quality, price, term, or condition for any regulated services or goods, on the basis of the identity of the supplier of any other services or goods or on the purchase of any unregulated services or goods from the company.

4909.18 Application to establish or change rate.

Any public utility desiring to establish any rate, joint rate, toll, classification, charge, or rental, or to modify, amend, change, increase, or reduce any existing rate, joint rate, toll, classification, charge, or rental, or any regulation or practice affecting the same, shall file a written application with the public utilities commission. Except for actions under section 4909.16 of the Revised Code, no public utility may issue the notice of intent to file an application pursuant to division (B) of section 4909.43 of the Revised Code to increase any existing rate, joint rate, toll, classification, charge, or rental, until a final order under this section has been issued by the commission on any pending prior application to increase the same rate, joint rate, toll, classification, charge, or rental or until two hundred seventy-five days after filing such application, whichever is sooner. Such application shall be verified by the president or a vice-president and the secretary or treasurer of the applicant. Such application shall contain a schedule of the existing rate, joint rate, toll, classification, charge, or rental, or regulation or practice affecting the same, a schedule of the modification amendment, change, increase, or reduction sought to be established, and a statement of the facts and grounds upon which such application is based. If such application proposes a new service or the use of new equipment, or proposes the establishment or amendment of a regulation, the application shall fully describe the new service or equipment, or the regulation proposed to be established or amended, and shall explain how the proposed service or equipment differs from services or equipment presently offered or in use, or how the regulation proposed to be established or amended differs from regulations presently in effect. The application shall provide such additional information as the commission may require in its discretion. If the commission determines that such application is not for an increase in any rate, joint rate, toll, classification, charge, or rental, the commission may permit the filing of the schedule proposed in the application and fix the time when such schedule shall take effect. If it appears to the commission that the proposals in the application may be unjust or unreasonable, the commission shall set the matter for hearing and shall give notice of such hearing by sending written notice of the date set for the hearing to the public utility and publishing notice of the hearing one time in a newspaper of general circulation in each county in the service area affected by the application. At such hearing, the burden of proof to show that the proposals in the application are just and reasonable shall be upon the public utility. After such hearing, the commission shall, where practicable, issue an appropriate order within six months from the date the application was filed.

If the commission determines that said application is for an increase in any rate, joint rate, toll, classification, charge, or rental there shall also, unless otherwise ordered by the commission, be filed with the application in duplicate the following exhibits:

(A) A report of its property used and useful in rendering the service referred to in such application, as provided in section 4909.05 of the Revised Code;

(B) A complete operating statement of its last fiscal year, showing in detail all its receipts, revenues, and incomes from all sources, all of its operating costs and other expenditures, and any analysis such public utility deems applicable to the matter referred to in said application;

(C) A statement of the income and expense anticipated under the application filed;

(D) A statement of financial condition summarizing assets, liabilities, and net worth;

(E) A proposed notice for newspaper publication fully disclosing the substance of the application. The notice shall prominently state that any person, firm, corporation, or association may file, pursuant to section 4909.19 of the Revised Code, an objection to such increase which may allege that such application contains proposals that are unjust and discriminatory or unreasonable. The notice shall further include the average percentage increase in rate that a representative industrial, commercial, and residential customer will bear should the increase be granted in full;

(F) Such other information as the commission may require in its discretion.

4928.17 Corporate separation plans.

(A) Except as otherwise provided in sections 4928.31 to 4928.40 of the Revised Code and beginning on the starting date of competitive retail electric service, no electric utility shall engage in this state, either directly or through an affiliate, in the businesses of supplying a noncompetitive retail electric service and supplying a competitive retail electric service, or in the businesses of supplying a noncompetitive retail electric service and supplying a product or service other than retail electric service, unless the utility implements and operates under a corporate separation plan that is approved by the public utilities commission under this section, is consistent with the policy specified in section 4928.02 of the Revised Code, and achieves all of the following:

(1) The plan provides, at minimum, for the provision of the competitive retail electric service or the nonelectric product or service through a fully separated affiliate of the utility, and the plan includes separate accounting requirements, the code of conduct as ordered by the commission pursuant to a rule it shall adopt under division (A) of section 4928.06 of the Revised Code, and such other measures as are necessary to effectuate the policy specified in section 4928.02 of the Revised Code.

(2) The plan satisfies the public interest in preventing unfair competitive advantage and preventing the abuse of market power.

(3) The plan is sufficient to ensure that the utility will not extend any undue preference or advantage to any affiliate, division, or part of its own business engaged in the business of supplying the competitive retail electric service or nonelectric product or service, including, but not limited to, utility resources such as trucks, tools, office equipment, office space, supplies, customer and marketing information, advertising, billing and mailing systems, personnel, and training, without compensation based upon fully loaded embedded costs charged to the affiliate; and to ensure that any such affiliate, division, or part will not receive undue preference or advantage from any affiliate, division, or part of the business engaged in business of supplying the noncompetitive retail electric service. No such utility, affiliate, division, or part shall extend

such undue preference. Notwithstanding any other division of this section, a utility's obligation under division (A)(3) of this section shall be effective January 1, 2000.

(B) The commission may approve, modify and approve, or disapprove a corporate separation plan filed with the commission under division (A) of this section. As part of the code of conduct required under division (A)(1) of this section, the commission shall adopt rules pursuant to division (A) of section 4928.06 of the Revised Code regarding corporate separation and procedures for plan filing and approval. The rules shall include limitations on affiliate practices solely for the purpose of maintaining a separation of the affiliate's business from the business of the utility to prevent unfair competitive advantage by virtue of that relationship. The rules also shall include an opportunity for any person having a real and substantial interest in the corporate separation plan to file specific objections to the plan and propose specific responses to issues raised in the objections, which objections and responses the commission shall address in its final order. Prior to commission approval of the plan, the commission shall afford a hearing upon those aspects of the plan that the commission determines reasonably require a hearing. The commission may reject and require refiling of a substantially inadequate plan under this section.

(C) The commission shall issue an order approving or modifying and approving a corporate separation plan under this section, to be effective on the date specified in the order, only upon findings that the plan reasonably complies with the requirements of division (A) of this section and will provide for ongoing compliance with the policy specified in section 4928.02 of the Revised Code. However, for good cause shown, the commission may issue an order approving or modifying and approving a corporate separation plan under this section that does not comply with division (A)(1) of this section but complies with such functional separation requirements as the commission authorizes to apply for an interim period prescribed in the order, upon a finding that such alternative plan will provide for ongoing compliance with the policy specified in section 4928.02 of the Revised Code.

(D) Any party may seek an amendment to a corporate separation plan approved under this section, and the commission, pursuant to a request from any party or on its own initiative, may order as it considers necessary the filing of an amended corporate separation plan to reflect changed circumstances.

(E) Notwithstanding section 4905.20, 4905.21, 4905.46, or 4905.48 of the Revised Code, an electric utility may divest itself of any generating asset at any time without commission approval, subject to the provisions of Title XLIX [49] of the Revised Code relating to the transfer of transmission, distribution, or ancillary service provided by such generating asset.

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of Interruptible Electric Service Guidelines, Pursuant to the Agreement by Participants in the Commission Roundtable on Competition in the Electric Industry.	))))	Case No. 95-866-EL-UNC Phase II

FINDING AND ORDER

The Commission finds:

(1) In April 1994, pursuant to Initiative No. 37 of the Ohio Energy Strategy, the Commission committed to "Facilitate informal roundtable discussions on issues concerning competition in the electric industry and promote increased competitive options for Ohio businesses that do not unduly harm the interests of utility company shareholders or ratepayers." In accordance with this directive, and recognizing the increasingly competitive nature of the electric utility industry, the Commission established in October 1994 a "Roundtable on Competition in the Electric Industry" (Roundtable).

(2) On September 22, 1995, the Pricing Committee of the Roundtable submitted to the Commission recommended guidelines relating to interruptible electric service. Those guidelines reflected terms and conditions negotiated by the various stakeholders involved in the Roundtable process such as electric utilities, a number of consumer groups (including industrial, commercial, residential, and environmental), and members of the Commission's staff (Staff). The guidelines included options for avoiding contractual interruptions and are intended to provide guidance on what the Commission would be looking for in its review of interruptible service contracts and tariffs pursuant to Sections 4905.30 and 4905.31, Revised Code.

(3) On February 15, 1996, the Commission, after issuing the proposed guidelines for public comment, issued a Finding and Order adopting interruptible buy-through (IBT) electric service guidelines which included various modifications to the guidelines proposed by the Pricing Committee at the Roundtable. In that Finding and Order the Commission stated its intent to "closely monitor the operation of these guidelines and the applicable tariffs and reserves the right to

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make changes where necessary to ensure the smooth, fair, and nondiscriminatory operation of interruptible buy-throughs." Subsequently, IBT service tariffs were filed by jurisdictional electric utilities and approved by the Commission.

(4) As of April 1998, the IBT guidelines have been in effect for two years and all electric utilities under our jurisdiction and their business customers have had an opportunity to gain experience with these options. Consistent with our intent to closely monitor the guidelines, as stated in Finding (3) above, our staff has been conducting a review of management performance in implementing the IBT guidelines to ensure they are being operated effectively, are being used in a non-discriminatory manner, and are promoting increased electric service options for Ohio businesses that do not unduly harm the interests of utility company shareholders or ratepayers. To assist the Commission with its review, the Commission issued an entry on March 12, 1998 directing the electric utilities under our jurisdiction to respond to the Staff's Initial Data Request appended to the entry and to related Staff requests for information. In that entry, we also requested comments by the Ohio business electric customers and power marketers participating in the IBT service regarding their satisfaction with the performance of the electric utilities under our jurisdiction in making this service available.

(5) The electric utilities under our jurisdiction, Industrial Energy User-Ohio (IEU-Ohio), and Whirlpool Corporation responded to the Commission's March 12, 1998 entry. With the information provided, the Staff has performed an assessment of how well the regulated utilities have performed in offering the IBT service to Ohio business customers on a nondiscriminatory basis, what role unregulated affiliates of the jurisdictional electric utilities have played in responding to the operation of the guidelines, and how well the program has been working to achieve stated goals. Based upon its review, the Staff proposed that "Performance Expectations" be established for the provision of IBT service to ensure that inappropriate utility-affiliate behavior regarding the operation of IBT service does not occur. By entry dated August 13, 1998, the Commission

provided interested persons the opportunity to comment on Staff's proposed performance expectations.

(6) Comments and/or reply comments were received from the electric utilities under our jurisdiction, IEU-Ohio, and Enron Energy Services. Before addressing certain of comments relating to specific performance expectations, the Commission will address the issues raised by various commentors regarding the status and legality of proposed expectations and the purpose of setting forth these expectations. The Commission wishes to clarify that the performance expectations are meant to provide guidance to the electric utilities as to what the Commission considers presumptively appropriate conduct in the implementation of IBT service. The Commission strongly encourages the utilities to follow the performance expectations. If the Commission receives a complaint regarding a utility's conduct with the affiliate involving IBT service, the Commission will determine the reasonableness of the utility's conduct based upon the facts and arguments presented in that case.

With regard to the purpose of setting forth such expectations, the Commission believes that it is prudent to let all interested parties know up front what may and may not be acceptable behavior in the provision of IBT service and to ensure all stakeholders understand what the Commission believes is appropriate to make IBT service work effectively. In the complaint case of *Youngstown Thermal L.P. v. Ohio Edison Company*, Case No. 93-1408-EL-CSS, which involved the utility's participation in a competitive bidding process, we applied this same principle when we stated that the lack of prior Commission interpretation of a statute was sufficient justification, based on the unique facts of the case, for not imposing penalties upon Ohio Edison Company. The argument that certain of these expectations may be considered or covered by present laws or regulations does not diminish the importance of restating them in these expectations. We further believe that with the advent of a more competitive environment for electric services greater opportunities will exist for abuses of utility-affiliate relationships. Accordingly, we believe it is important to issue these performance expectations.

(7) The Commission has reviewed the comments regarding the specific Staff-proposed expectations and observes the following.

With regard to staff-performance expectation 4, the Commission finds that the wording should read "The utility should process all requests for buy-through service in the same manner and on a first come, first served, basis" as proposed by IEU-Ohio. This change will help prevent confusion by eliminating language that easily could be subject to varying interpretations.

Staff-proposed performance expectation 5 provides that "The utility shall not disclose any information regarding an existing or potential buy-through arrangement, or any information about ongoing transactions conducted under such arrangements, unless the customer authorizes disclosure of such information." The Commission agrees with IEU-Ohio that the authorization should be in writing. The Commission also recognizes that there may be some instances where the information may be required to be disclosed such as reporting requirements by regulatory agencies or a court of law; however, we do not believe it is warranted to list every possible exception that may arise.

In the comments, there has been considerable discussion regarding the intent and applicability of Staff-proposed-expectation 6. Staff-proposed expectation 6 states that:

> Upon request of a supplier, and with the written consent of the customer, the utility shall make available customer information (e.g., energy usage data) and service interruption criteria and shall make such information available to non-affiliates upon the same terms and conditions and at the same time as it is made available to any affiliate. The information to be provided includes such information as may be reasonably necessary for customers to obtain futures and other hedging instruments to avoid price volatility at times of interruption.

Certain commenters seek classification as to which suppliers the expectation applies and whether once such information has been provided to one supplier must it then be provided to others without the customer's consent. The Commission has clarified the language in this expectation to reflect that it applies to requests made by all suppliers, including any affiliate of the utility. Further, although the utility would make such information available to non-affiliates upon the same terms and conditions as to any affiliate, this availability is subject, of course, to the written consent of the customer as noted earlier. The intent of the expectation is to ensure, when a customer decides to "shop around" for the best deal on replacement power or other forms of "insurance" against service interruptions, that all potential third-party suppliers (and not just the utility's affiliate) can obtain the information necessary to quote the customer a price. Regarding the question of what information should be provided, the Commission recognizes that, to a large extent, information requirements are dictated by the specific "hedge instrument" being offered. Consequently, it is difficult to be more specific about what information should be provided in addition to what is already stated in this expectation.

Staff-proposed expectation 7 states that "The utility's operating employees and the operating employees of its affiliate must function independently of each other." Several of the utilities have argued that this expectation 7 is overly broad and will negate legitimate efficiencies and economies of scale. The intent of this provision is to discourage the sharing of employees between the utility and its affiliate in order to prevent unfair sharing of customer-specific information as well as any cross-subsidization between the utility and its affiliate. We believe that either of these circumstances could give the affiliate an unfair advantage in the marketplace. However, given the limited nature of the service at issues, the Commission will reword the expectation. The Commission will also not use the word "operating" before employee, inasmuch as it may be difficult, and unnecessary, to distinguish between operating and management employees.

In accordance with staff-proposed expectation 8, the utility and its affiliate are to keep separate books of accounts and

records. Certain utilities have argued that the Commission has no authority to mandate what records and accounts are used by the affiliate. The intent of the expectation is to ensure that sufficient information is available for the Commission to determine whether, in the context of IBT service, the utility is cross-subsidizing the competitive activities of its unregulated affiliates. We do not believe that the expectation as it stands designates what records and accounting are used by the affiliate. Therefore, we find that this expectation is appropriate.

Some of the utilities have objected to staff-proposed expectation 9 which states that the utility is not to communicate to customers or others that it may be advantageous for the customer to choose the utility's affiliate to provide IBT energy. It is suggested that the prohibition is a constraint on free speech, impossible to enforce, and, if implemented, be limited to false or deceptive statements or advertising made by the utility. The intent of this provision is to prevent the utility from offering incentives to customers in order to persuade them to take buy-through service from the utility's affiliate. An example would be the utility offering the customer a discount on regulated electric service if the customer agrees to purchase replacement power (or some form of hedge) from the utility's affiliate. Another example would be the utility implying that the customer would be interrupted less frequently if the customer signed up for IBT service with the utility's affiliate. The expectation has nothing to do with false or deceptive advertising, but goes more to what might be called tying arrangements or similar anti-competitive inducements. This provision is intended to discourage a utility employee from answering questions about its affiliate's products. It would be better if the utility employee would simply refer all such inquiries to the affiliate. The Commission finds that the changes suggested above to this expectation are not warranted.

Most of the utilities have objected to staff-proposed expectation 10 regarding limitations on the utility's promotion of its affiliate relationships and the use of its logo or name. Staff-proposed expectation 10 supports such activity only if the promotion made or material circulated discloses that the affiliate is not the same entity as the utility and that the

customer does not have to buy the affiliate's products in order to continue to receive quality regulated service from the utility. The utilities believe that the staff's expectation on such promotion and use of logos is unnecessary and that there is nothing unlawful about co-marketing, joint use of marketing materials, or discretionary licensing of a corporate name to another corporation. The Commission does not see the need for this expectation with regard to IBT service inasmuch as IBT customers are large, sophisticated energy consumers who are not likely to be confused between the utility and an affiliated supplier. Accordingly, we agree with the utilities that this expectation should be deleted, although for different reasons, as noted above, then that stated by the utilities.

The last two staff-proposed performance expectations concern the utility's procedure for handling complaints regarding IBT implementation and note the availability of the alternative dispute resolution procedure established in our July 7, 1998 Finding and Order in Case No. 98-978-EL-UNC, regarding Ohio industrials' request for emergency relief. Some of the utilities question the usefulness for such expectations inasmuch as Section 4905.26, Revised Code, already establishes a procedure for complaints. It is also argued that the internal complaint process the utilities are encouraged to establish to handle complaints should be more flexible to allow the general counsel of the utility to appoint someone to act on his/her behalf to handle complaints. The intent of these expectations is to provide customers/suppliers with additional, and hopefully less time consuming and expensive, venues for lodging complaints regarding a utility's implementation of IBT service. They are not intended to replace any statutory or other Commission-initiated procedures or preclude the use of those procedures. The Commission finds these expectations to be appropriate and should be included in the expectations. However, we agree that the general counsel should be able to appoint other legal counsel to act on his/her behalf.

(8) The Commission also wishes to address the recommendation made by IEU-Ohio for an additional performance expectation, which is as follows:

> Absent a condition that creates a clear and present danger to the electric company's ability to meet the demands of human needs and public welfare customers, the replacement electricity supply of an interruptible buy-through customers shall be accepted and delivered by an electric company according to the terms of the applicable contract or tariff. Any interruption in the service entitlement of an interruptible buy-through customer resulting from such a condition shall be remedied as quickly as reasonably possible and must be preceded by the exhaustion of other reasonable alternatives to avoid the involuntary interruption of replacement electric service.
>
> In the event all or any portion of a supply or capacity entitlement is not available to an interruptible buy through customer as a result of the direct action of the electric company other than in cases of a bona fide system emergency, the interruptible buy-through customer not receiving the entitlement shall be entitled to compensation from the electric company. Compensation should take into consideration the cost incurred for all capacity entitlements, if any, the cost of the commodity purchased, the incremental cost incurred by an interruptible buy-through customer to obtain substitute energy, if an alternative is available and used, and any premium required by the market for the time of the capture.

The Commissions finds that the recommendation is not in keeping with the concepts under which the IBT service was devised. Each utility has an obligation to maintain system integrity and service to firm (especially "human needs") customers, and it is important to remember that IBT customers receive substantial discounts for accepting risk of

service interruption. While IBT service offers an opportunity to reduce that risk, it is not meant to eliminate it completely. Adoption of IEU-Ohio's recommendation would recommend delivery of buy-through supplies when capacity is needed for firm customers who may not necessarily be human needs or public welfare customers. We believe that the issue of interruption of replacement power is adequately covered in Section (5)(e) of our original IBT guidelines. In that section we stated that "any such interruption shall be remedied as quickly as reasonably possible and must be preceded by the exhaustion of other reasonable alternatives consistent with good utility practice to avoid the interruption. Regarding appropriate compensation when replacement power is captured, the Commission believes that this matter has also been considered and addressed in Section (5)(b)(4) of the original guidelines, where it is stated that the customer not receiving the designated replacement electricity shall be entitled to reasonable compensation from the utility for incurred costs. In addition, the Commission will review compensation disputes on a case-by-case basis. Therefore, the Commission will not include IEU-Ohio's recommendation in the Commission's expectations.

(9) Based on our findings above, the Commission is providing notice of the following performance expectations for the implementation of IBT service.

(a) The utility should apply any tariff provision relating to Interruptible Buy-through Service in a nondiscriminatory manner to the same or similarly situated entities.

(b) Utility billing practices for replacement power should conform to the tariffs under which service is provided.

(c) The utility should not, through a tariff provision or otherwise, give its affiliate or customers of its affiliate or customers of its affiliate, preference over non-affiliated suppliers or their customers in matters relating to buy-through services,

including the application of interruption criteria and protocol.

(d) The utility should process all similar requests for buy-through service in the same manner and on a first come, first served, basis.

(e) The utility should not disclose any information regarding an existing or potential buy-through arrangement, or any information about ongoing transactions conducted under such arrangements, unless the customer authorizes, in writing, disclosure of such information.

(f) Upon request of a supplier, including any affiliate of the utility, and with the written consent of the customer, the utility should make available customer information (e.g., energy usage data) and service interruption criteria. The utility should make such information available to non-affiliates upon the same terms and conditions as it is made available to any affiliate. The information to be provided should include such information as may be reasonably necessary for customers to obtain futures and other hedging instruments to avoid price volatility at times of interruption.

(g) The utility's employees and the employees of its affiliate should, to the extent practicable, function independently of each other in all areas where their failure to maintain independent operations may have the effect of harming customers or unfairly disadvantaging unaffiliated suppliers under the company's IBT service.

(h) The utility and its affiliate should keep separate books of accounts and records.

(i) The utility should not communicate to any customer, supplier or third party the idea that any advantage may accrue to such customer, supplier or other third party doing business with the utility's affiliate.

(j) The utility should establish a complaint procedure for issues concerning the implementation of IBT service. All complaints, whether written or verbal, should be referred to the General Counsel of the utility. The General Counsel, or other legal counsel on behalf of the General Counsel, should orally acknowledge such complaint within five (5) working days of receipt. The legal counsel should prepare a written statement of the complaint which should contain the name of the complainant and a detailed factual report of the complaint, including all relevant dates, companies involved, employees involved, and the specific claim. The legal counsel should communicate the results of the preliminary investigation to the complainant in writing within thirty (30) days after the complaint was received including a description of any course of action which was taken. The legal counsel should keep a file with all such complaint statements for a period of not less than three (3) years.

(k) Pursuant to its July 7, 1998 Finding and Order in Case No. 98-978-EL-UNC, the Commission has established an alternative dispute resolution procedure which may be used to address complaints regarding implementation of IBT service.

As used in the above expectations, the term "affiliate" means any person, corporation, utility, partnership, or other

entity that controls, is controlled by, or is under common control with a utility. Also, as used in the above expectations, the term "utility" means the regulated operating company, including persons acting on its behalf and action(s) taken on its behalf.

It is, therefore,

ORDERED, That notice of the Commission's performance expectations for IBT service be given to all parties who filed comments in this matter and all interested persons of record by serving a copy of this Finding and Order upon them.

THE PUBLIC UTILITIES COMMISSION OF OHIO

Craig A. Glazer, Chairman

Jolynn Barry Butler

Ronda Hartman Fergus

Judith A. Jones

Donald L. Mason

RRG/pdc/jkg

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Gary E. Vigorito
Secretary