BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Authority to Provide for a Standard Service Offer Pursuant to R.C. 4928.143 in the Form of an Electric Security Plan.	)))))))	**Case No. 14-1297-EL-SSO**

JOINT APPLICATION FOR REHEARING OF THE PJM POWER PROVIDERS GROUP AND THE ELECTRIC POWER SUPPLY ASSOCIATION

Pursuant to Ohio Revised Code Section ("R.C.") 4903.10 and Ohio Administrative Code Rule 4901-1-35, the PJM Power Providers Group ("P3")[1] and the Electric Power Supply Association ("EPSA")[2] submit this Joint Application for Rehearing of the July 6, 2016 Third Entry on Rehearing issued by the Public Utilities Commission of Ohio ("Commission") in this matter.

P3/EPSA jointly files this Application for Rehearing because the Commission's July 6, 2016 Third Entry on Rehearing is unreasonable and unlawful in the following respects:

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[1] P3 is a non-profit organization whose members are energy providers in the PJM Interconnection LLC ("PJM") region, conduct business in the PJM balancing authority area, and are signatories to various PJM agreements. Altogether, P3 members own over 84,000 megawatts ("MWs") of generation assets, produce enough power to supply over 20 million homes, and employ over 40,000 people in the PJM region, representing 13 states and the District of Columbia. This pleading does not necessarily reflect the specific views of any particular member of P3 with respect to any argument or issue, but collectively presents P3's positions.

[2] EPSA is a national trade association representing leading competitive power suppliers, including generators and marketers. Competitive suppliers, which collectively account for 40 percent of the installed generating capacity in the United States, provide reliable and competitively priced electricity from environmentally responsible facilities. EPSA seeks to bring the benefits of competition to all power customers. This pleading does not necessarily reflect the specific views of any particular member of EPSA with respect to any argument or issue, but collectively presents EPSA's positions.

1. The Commission erred in finding that the Application for Rehearing of Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company (collectively, "the Companies") filed in this proceeding on May 2, 2016 (the "Application for Rehearing") "consisted of three parts: the application for rehearing setting forth the assignments of error, a memorandum in support, detailing arguments in support of the assignments of error as well as providing the details of the Modified Rider RRS Proposal, and rehearing testimony in support of the Modified Rider RRS Proposal."

2. The Commission erred in finding that the sixth, seventh, and eights assignments of error in the Companies' Application for Rehearing "provided sufficient detail on which grounds the Companies claim that the Commission order is unreasonable and unlawful."

3. The Commission erred in finding that it has jurisdiction to consider the Companies' Modified Rider RRS proposal pursuant to R.C. 4903.10.

The facts and arguments that support these grounds for rehearing are set forth in the attached Memorandum in Support.

Respectfully submitted,

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MEMORANDUM IN SUPPORT

I. INTRODUCTION

The Commission's jurisdictional holding in this proceeding on Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company's (collectively, "the Companies") "Modified Rider RRS" proposal is contrary to both Ohio law and the Commission's past precedent that assignments of error cannot be set forth in a memorandum in support. Likewise, contrary to the Commission's finding in its July 6, 2016 Third Entry on Rehearing, unrelated assignments of error (Nos. 6, 7 and 8) do not replace the statutory mandate that all grounds for rehearing, including the Modified Rider RRS proposal, be set forth in the application for rehearing itself. To make matters worse, the Commission held that the Companies' application for rehearing not only included the memorandum in support but also the Companies' separately-filed rehearing testimony.

The Commission, in allowing the Companies to skirt established Ohio law, has set precedent that will result in years of parsing through memoranda in support in other cases, as well as parsing through any other document filed with an application for rehearing, for possible assignments of error. Likewise, the Supreme Court of Ohio will be left to guess as to what an appellant raised as an assignment of error before the Commission (given that only a Commission-raised assignment of error can go before the Court). That is not what the General Assembly intended when enacting Ohio Revised Code Section ("R.C.") 4903.10, which requires specifically stated assignments of error to be contained in the body of the application for rehearing itself—not in the memorandum in support, and not in entirely different documents with different purposes such as pre-filed testimony. The Companies made a mistake by not including the proposal in their application for rehearing and must live with that mistake. The Commission

should reverse its jurisdictional holding and find that the Companies' Modified Rider RRS proposal is not properly before the Commission on rehearing.

II. BACKGROUND

A. The Companies' Application for Rehearing and Modified Rider RRS

The Companies filed their Application for Rehearing on May 2, 2016, alleging eight assignments of error arising from the March 31, 2016 Opinion and Order in this proceeding (the "Order"), including the following:[3]

> 6. The Order is unreasonable because it requires the Companies to bear the burden for any capacity performance penalties.
>
> 7. The Order is unreasonable because the Commission prohibited cost recovery for Plant outages greater than 90 days.
>
> 8. The Order is unreasonable because it does not reflect the ruling by the Federal Energy Regulatory Commission Order issued on April 27, 2016 in Docket Number EL16-34-000.

(collectively "Assignments of Error Nos. 6-8"). In an accompanying Memorandum of Support, under the common heading relating to Assignments of Error No. 6-8, the Companies noted their opposition to the Commission's determination that the Companies bear the burden of capacity performance penalties under Rider RRS.[4] The Companies also challenged the Commission's modification to the Stipulation in this proceeding to prohibit cost recovery under Rider RRS for plant outages greater than 90 days.[5] But the Memorandum in Support went on to note that both of these errors would be moot if the "Commission approves the Companies' modified proposal discussed below."[6]

The Memorandum in Support then went on to state that the April 27, 2016 decision by FERC "has complicated the Companies' and Commission's efforts to provide customers with

[3] Companies' Application for Rehearing at 2.
[4] Memorandum in Support of Companies' Application for Rehearing at 13.
[5] *Id.*
[6] *Id.*

stability and other retail rate benefits provided by Stipulated ESP IV" and "which now render [*sic*] the Commission's March 31, 2016 Order unreasonable" because it would necessitate a review of the power purchase agreement ("PPA") underpinning Rider RRS by FERC—"a process that would likely require a much more lengthy time period to come to a conclusion."[7]

To address this impediment, the Memorandum in Support went on to say, the Companies "developed a modified Rider RRS proposal that is designed to be solely within the Commission's jurisdiction and that will rely on retail ratemaking mechanisms that do not utilize or refer to a PPA or any other contractual arrangement or other involvement of FES."[8] In support of their modified Rider RRS Proposal ("Modified Rider RRS"), the Companies separately filed on the same day as their Application for Rehearing the Rehearing Testimony of Eileen M. Mikkelsen. **Significantly, the Companies' Application for Rehearing itself contains no assignment of error relating to Modified Rider RRS.**

B. Subsequent Procedural History

On May 11, 2016, the Commission granted rehearing on all of the applications for rehearing filed in this proceeding arising from the Commission's Order.[9] The Commission also opened discovery in anticipation of potential future hearings.[10]

By a timely filed Memorandum Contra filed May 12, 2016, P3/EPSA noted that the Commission lacked jurisdiction to consider Modified Rider RRS because that proposal was not included in the Companies' Application for Rehearing, as required by R.C. 4903.10.

On May 19, 2016, P3/EPSA filed a motion to stay discovery pending the issuance of significant jurisdictional rulings pending before the Commission, including the question of

[7] *Id.* at 13.
[8] *Id.* at 15. "FES" refers to FirstEnergy Solutions Corp., an affiliate of the Companies.
[9] Entry on Rehearing at *3 (May 11, 2016).
[10] *Id.* at ¶ 9 (Emphasis added). This ruling was issued by the Commission prior to the deadline for parties to file any memorandum contra, per Ohio Administrative Code Rule 4901-1-34(B).

whether the Commission had jurisdiction to consider Modified Rider RRS. The Commission granted the stay on May 20, 2016.

On June 3, 2016, the attorney examiners issued an Entry lifting the stay. In that Entry, the attorney examiners determined that a hearing should be held on the new Rider RRS proposal and that the scope of the hearing would be limited to only the "provisions of, and alternatives to" Modified Rider RRS.[11]

On June 8, 2016, P3/EPSA filed a Joint Interlocutory Appeal and Joint Request for Certification, which contended that it was improper for the attorney examiners to lift the stay of discovery until the Commission ruled on the arguments pending before the Commission, including the argument that the Commission lacked jurisdiction to consider Modified Rider RRS.

C. Third Entry on Rehearing

On July 6, 2016, the Commission entered its Third Entry on Rehearing which, among other matters, rejected P3/EPSA's argument that the Commission had jurisdiction to consider Modified Rider RRS.

In concluding that it had jurisdiction to consider Modified Rider RRS, the Commission first determined that the Companies' Application for Rehearing consisted of three parts: (i) the application for rehearing setting forth the assignments of error; (ii) the memorandum in support; and (iii) the rehearing testimony of Eileen M. Mikkelsen.[12]

The Commission found that these three items, plus the fact that the Companies "proposed that the Commission hold a hearing to take additional evidence on the Modified RRS Proposal . . . complied with the requirements of R.C. 4903.10."[13]

[11] Entry at ¶ 15 (June 3, 2016).
[12] Third Entry on Rehearing at ¶ 27 (June 6, 2016).
[13] *Id.*

The Commission further ruled that "[t]he sixth, seventh, and eighth assignments of error provided sufficient detail on which grounds the Companies claim that the Commission order is unreasonable and unlawful, and the memorandum in support provided the details regarding the Modified RRS Proposal."[14]

Lastly, the Commission found that its assertion of jurisdiction to consider Modified Rider RRS was supported by the Supreme Court of Ohio's determination in *Ohio Consumers' Counsel v. Pub. Util. Comm'n,* 111 Ohio St. 3d 300 (2006) (the "*CG&E Case*").[15]

III. ARGUMENT

A. The Commission Unlawfully and Unreasonably Determined that the Companies' Application for Rehearing Consisted of the Filed Application for Rehearing, the Memorandum in Support and the Separately Rehearing Testimony.

1. The Commission cannot look outside of the application for rehearing itself to find assignments of error.

The Commission ruled that for purposes of its jurisdiction to consider Modified Rider RRS, the Companies' Application for Rehearing consisted of three parts: (i) the application for rehearing setting forth the assignments of error; (ii) the memorandum in support; and (iii) the rehearing testimony of Eileen M. Mikkelsen.[16] In so holding, the Commission looked beyond the Companies' Application for Rehearing (which omitted any reference to Modified Rider RRS) and to the Companies' Memorandum in Support and the Rehearing Testimony (which did specifically describe the Companies' new proposal). This was plain error. Because the Companies' Application for Rehearing did not itself include Modified Rider RRS as an assignment of error, the Commission had no authority to look to the Companies' Memorandum of Support or testimony in order to grant rehearing over that proposal.

[14] *Id.*
[15] *Id*.
[16] Third Entry on Rehearing at 10.

Plain statutory language requires that the application for rehearing itself—and not another pleading—set forth the assignments of error relied on by an applicant for rehearing. R.C. 4903.10 provides that an application for rehearing "shall be in writing and shall set forth specifically the ground or grounds on which the applicant considers the order to be unreasonable or unlawful" and that "*[n]o party shall* in any court *urge or rely on any ground for reversal, vacation, or modification not so set forth in the application."* (Emphasis added.)

Moreover, Ohio Administrative Code Rule ("Ohio Adm.Code") 4901-1-35(A) makes it clear that it is not sufficient for a ground for rehearing to be included only in the memorandum in support; rather, the memorandum in support may only explain the basis for the ground for rehearing already contained in the application itself:

> An application for rehearing must be accompanied by a memorandum in support, which sets forth an explanation of the basis for each ground for rehearing identified in the application for rehearing and which shall be filed no later than the application for rehearing.

Here, because nothing in the Companies' Application for Rehearing, including Assignments of Error Nos. 6-8, specifically urges the adoption of Modified Rider RRS, that proposal was not properly preserved for rehearing and the Commission lacks jurisdiction to consider it. It was error for the Commission to have ruled otherwise in its Third Entry on Rehearing.

2. The Commission has previously ruled that grounds for rehearing cannot be raised in a memorandum in support.

The Commission's ruling that it may look to either the Companies' Memorandum in Support or separately-filed testimony in determining whether the Companies perfected their rehearing over Modified Rider RRS **runs directly contrary to this Commission's own prior interpretation** of its limited statutory jurisdiction to consider applications for rehearing.

In Case No. 11-776-AU-ORD, the Commission undertook a review of its administrative rules, as required by R.C. 119.032. During that proceeding, Staff proposed changes to the rules at issue for comment.[17] Among changes under consideration was a revision to the rule governing applications for rehearing, Ohio Adm. Code 4901-1-35. Specifically, Staff had proposed language clarifying that applications for rehearing must set forth in numbered or lettered paragraphs the ground or grounds upon which the applicant considers the Commission order to be unreasonable or unlawful.[18]

Certain commentators objected to Staff's proposed change, submitting it was not clear "why this change is necessary rather than the current practice of filing a brief application for rehearing accompanied by a separate and much longer memorandum in support."[19] The Commission disagreed with these commentators and adopted Staff's language, ruling that:[20]

> **[T]he General Assembly has very clearly delineated the rehearing process.** Rather than introduce confusion, we find that the Staff-proposed modification adds clarity to the rehearing process. An applicant seeking rehearing must file an application and must set forth with specificity in the application the ground or grounds on which the applicant believes the Commission order is unreasonable or unlawful. **While rehearing applicant's** [*sic*] **are free to expound upon their assignments of error in a memorandum, the Commission legally can not consider any grounds for rehearing not contained within the application itself.** Staff's proposed revisions to Rule 35 will be adopted.

Thus, the Commission has already recognized that as a legal matter, it cannot consider any grounds for rehearing contained in anything other than the application for rehearing itself.[21]

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[17] *In the Matter of the Commission's Review of Chapters 4901-1, Rules of Practice and Procedure; 4901-3, Commission Meetings; 4901-9, Complaint Proceedings; and 4901:1-1, Utility Tariffs and Underground Protection, of the Ohio Administrative Code*, Case No. 11-776-AU-ORD, 2014 Ohio PUC LEXIS 12, Findings and Order at ¶ 3 (January 22, 2014).
[18] *Id.* at ¶ 60.
[19] *Id.*
[20] *Id.* (Emphasis added).
[21] Case No. 11-776-AU-ORD is not the first time the Commission had made this determination. *See, e.g., In Re Settlement Agreement in Case No. 07-564-WW-AIR and the Standards for Waterworks Companies and Sewage*

The Commission's ruling in this proceeding that it could look to either a memorandum in support or separately-filed testimony to determine whether the Companies perfected rehearing over Modified Rider RRS directly contravenes its ruling in Case No. 11-776-AU-ORD. Again, allowing parties to raise grounds for rehearing in a supporting memorandum or in separately filed documents as the Commission did in its Third Entry on Rehearing is not only contrary to law, but also will lead to untold confusion in years to come – both at the Commission and the Supreme Court of Ohio. That is not what the General Assembly intended when it enacted R.C. 4903.10.

B. The Commission Unlawfully and Unreasonably Determined that Assignments of Error Nos. 6-8 in the Companies' Application for Rehearing Provided Sufficient Detail for Modified Rider RRS to be a ground for rehearing.

1. Modified Rider RRS is not an "explanation" of Assignments of Error Nos. 6-8.

Ohio Adm.Code 4901-1-35(A) permits a memorandum in support of an application for rehearing to "set[] forth an explanation of the basis for each ground for rehearing identified in the application for rehearing." In the Companies' Memorandum in Support, Modified Rider RRS is presented under the captions concerning Assignments of Error Nos. 6-8. But Modified Rider RRS is not an "explanation" of those assignments of error. Rather, it is an entirely new proposal not referenced anywhere in the Companies' application for rehearing.

Assignment of Error No. 6 provides that "[t]he Order is unreasonable because it requires the Companies to bear the burden for any capacity performance penalties." The Memorandum in Support notes that Assignment of Error No. 6 would be mooted if Modified Rider RRS is adopted. But Modified Rider RRS does not "explain" Assignment of Error No. 6. That is,

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Disposal System Companies, Case No. 08-1125-WW-UNC, 2009 Ohio PUC LEXIS 854, *8-9 (October 14, 2009) (finding that an application that requests a rehearing but then merely refers to the memorandum in support for specific grounds does not substantially comply with statutory requirements).

Modified Rider RRS offers no clarification on why the Commission was unjust and unreasonable in requiring the Companies to bear the burden of capacity performance penalties.

Assignment of Error No. 7 states: "[t]he Order is unreasonable because the Commission prohibited cost recovery for Plant outages greater than 90 days." The Memorandum in Support notes that Assignment of Error No. 7 would also be mooted if the Commission was to adopt Modified Rider RRS. But here too, Modified Rider RRS is not an "explanation" for why the Commission was unjust and unreasonable in prohibiting cost recovery for Plant outages greater than 90 days.

Finally, Assignment of Error No. 8 provides that "[t]he Order is unreasonable because it does not reflect the ruling by the Federal Energy Regulatory Commission Order issued on April 27, 2016 in Docket Number EL16-34-000." But Modified Rider RRS does not offer an "explanation" for why the Commission's March 31, 2016 decision in this proceeding is unreasonable and unlawful due to the after-the-fact FERC Order. And if adopted by the Commission, Modified Rider RRS would not "reflect" the FERC's ruling. Rather, Modified Rider RRS is an attempt to *circumvent* FERC's Order by adopting a new rider based on a construct specifically calculated to avoid the reach of FERC's jurisdiction.

The Commission violated the letter and spirit of R.C. 4903.10 and Ohio Adm.Code 4901-1-35(A) by allowing the Companies to bootstrap Modified Rider RRS onto assignments of error lacking any discernible nexus to the Companies' proposal.

C. The Commission Acted Unlawfully and Unreasonably in Finding it has Jurisdiction to Hear the Modified Rider RRS Proposal.

1. The Companies' Application for Rehearing Fails to Specifically Set Forth Modified Rider RRS as an Assignment of Error.

In order for the Commission to have jurisdiction over the Modified Rider RRS proposal, it should have been included specifically as an assignment of error in the Companies' Application for Rehearing. It was not, depriving the Commission of jurisdiction to consider it.

R.C. 4903.10 states that an application for rehearing "shall be in writing and **shall set forth specifically** the ground or grounds on which the applicant considers the order to be unreasonable or unlawful." (Emphasis added.) Ohio Adm.Code 4901-1-35(A) similarly requires that the application for rehearing itself "set forth**,** in numbered or lettered paragraphs, the specific ground or grounds upon which the applicant considers the commission order to be unreasonable or unlawful."

The Supreme Court of Ohio has repeatedly emphasized that specificity in assignments of error is a jurisdictional requirement. *See, e.g., Disc. Cellular, Inc. v. Pub. Util. Comm.*, 112 Ohio St. 3d 360, 374 (2007) ("**[W]e have strictly construed the specificity test set forth in R.C. 4903.10**") (Emphasis added); *Specialized Transport, Inc. v. Pub. Util. Comm.*, 170 Ohio St. 539, 540 (1960) ("[I]t is not within the court's power to provide variable or different qualifying standards for rehearing applications, much less to deliberately sanction a disregard for those specifically named by statute.").

None of the specifically numerated grounds in the Companies' Application for Rehearing allege that the Commission is unlawful and unreasonable in failing to adopt Modified Rider RRS. This includes Assignments of Error No. 6-8, which provide:

> 6. The Order is unreasonable because it requires the Companies to bear the burden for any capacity performance penalties.

7. The Order is unreasonable because the Commission prohibited cost recovery for Plant outages greater than 90 days.

8. The Order is unreasonable because it does not reflect the ruling by the Federal Energy Regulatory Commission Order issued on April 27, 2016 in Docket Number EL16-34-000.

The foregoing assignments of error do not assert that the Commission acted unreasonably and unlawfully in failing to adopt Modified Rider RRS. In fact, without the benefit of the Companies' Memorandum of Support or the separately filed testimony, it would have been *impossible* for the Commission to analyze and discern whether it previously had erred in failing to address an alternative rider proposal calculated at avoiding the reach of FERC's jurisdiction.

The closest that the Application for Rehearing comes to implicating Modified Rider RRS is the Companies' vague assertion in the Application for Rehearing itself that the Commission's Order is "unreasonable because it does not reflect the ruling by the Federal Energy Regulatory Commission Order issued on April 27, 2016. . . ." But Modified Rider RRS is intended to *circumvent* FERC's jurisdiction by removing the PPA between the Companies and its generation affiliate. Stated otherwise, an order from this Commission that "reflected" FERC's April 27, 2016 Order would not, in any sense, give rise to Modified Rider RRS. The amorphous reference to FERC in Assignment of Error No. 8 falls far short of the specificity required by Ohio law.

In sum, because the Modified Rider RRS proposal was not raised or mentioned in the Companies' Application for Rehearing, the Commission lacks jurisdiction to consider it and the Commission erred in ruling otherwise in its Third Entry on Rehearing.

2. The *CG&E Case* does not support the Commission's jurisdiction to consider Modified Rider RRS on rehearing.

The Commission contends the *CG&E Case*[22] supports its decision to grant rehearing over Modified Rider RRS. That case concerned a wholly different application for rehearing and is inapplicable to the facts herein. In the *CG&E Case*, the Court upheld the Commission's granting of rehearing on an alternative proposal by The Cincinnati Gas & Electric Company ("CG&E") that *was included* in the company's application for rehearing.[23] The Court found that the Commission properly "treated CG&E's alternative proposal as an assignment of error on rehearing."[24]

The *CG&E Case* correctly decided the issue before it, but is completely distinguishable from the facts in this proceeding. Although CG&E did not style its alternative proposal as an enumerated assignment of error, CG&E's Application for Rehearing itself (and not an accompanying pleading) specifically urged the Commission to adopt the alternative proposal, devoting almost a full page to the topic under the heading "the Alternative Proposal" before describing the proposal more fully in a memorandum for support.[25] Conversely, here the Companies' Application for Rehearing is completely silent regarding Modified Rider RRS.

Therefore, because CG&E's application for rehearing took pains to specifically describe their proposal in the application for rehearing itself, the Court's ruling that the Commission properly "treated CG&E's alternative proposal as an assignment of error on rehearing"[26] was entirely consistent with R.C. 4903.10. Conversely, in this proceeding, nothing in the

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[22] *Ohio Consumers' Counsel v. Pub. Util. Comm'n*, 111 Ohio St. 3d 300 (2006).
[23] The *CG&E Case* at 302.
[24] *Id.* at 304.
[25] *See In the Matter of the Application of The Cincinnati Gas & Electric Company to Modify Its Nonresidential Generation Rates to Provide for Market-Based Standard Service Offer Pricing and to Establish an Alternative Competitive-Bid Service Rate Option Sub-Sequent to the Market Development Period*, Case Nos. 03-93-EL-ATA, et al., CG&E Application for Rehearing at 2, 4-5 (Oct. 29, 2004).
[26] *The CG&E Case* at 304.

Companies' Application for Rehearing references the Companies' Modified Rider RRS Proposal—a crucial distinction that makes the *CG&E Case* entirely inapplicable.

In sum, the *CG&E Case* involves an application for rehearing that specifically described the company's alternative proposal. That application for rehearing bears no resemblance to the Companies' Application for Rehearing, and therefore, the *CG&E Case* has no bearing on the question of the Commission's jurisdiction in this case.

IV. CONCLUSION

In the Third Entry on Rehearing, the Commission improperly found that the Companies' Application for Rehearing consisted of the Application for Rehearing, the memorandum in support and separately-filed rehearing testimony. The Commission also erred in finding that the Companies' Assignments of Error Nos. 6-8 provided sufficient detail for Modified Rider RRS to be a ground for rehearing. By failing to include a specific assignment of error urging the Commission to adopt their Modified Rider RRS proposal, the Companies failed to perfect rehearing over this issue and the Commission is without jurisdiction to rule on the Companies' proposal. The Commission should reverse its rulings in the Third Entry on Rehearing and find that it lacks jurisdiction to consider the Modified Rider RRS proposal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The Public Utilities Commission of Ohio's e-filing system will electronically serve notice of the filing of this document on the parties referenced on the service list of the docket card who have electronically subscribed to the case. In addition, the undersigned certifies that a courtesy copy of the foregoing document is also being served (via electronic mail) on the 5th day of August, 2016 upon all persons/entities listed below:

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