BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Energy Efficiency and Peak Demand Reduction Program Portfolio of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company.	)))))	Case Nos. 09-580-EL-EEC 09-581-EL-EEC 09-582-EL-EEC
In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company For Approval of Their Initial Benchmark Reports.	)))))	Case Nos. 09-1942-EL-EEC 09-1943-EL-EEC 09-1944-EL-EEC
In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company For Approval of Their Energy Efficiency and Peak Demand Reduction Program Portfolio Plans for 2010 through 2012 and Associated Cost Recovery Mechanisms.	)))))))	Case Nos. 09-1947-EL-POR 09-1948-EL-POR 09-1949-EL-POR

POST-HEARING REPLY BRIEF BY THE OFFICE OF THE OHIO CONSUMERS' COUNSEL, CITIZEN POWER, THE CITIZENS COALITION, AND THE NATURAL RESOURCES DEFENSE COUNCIL

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I. INTRODUCTION

On December 15, 2009, Ohio Edison Company ("Ohio Edison"), the Cleveland Electric Illuminating Company ("CEI"), and the Toledo Edison Company ("Toledo Edison") (collectively "FirstEnergy" or "Companies") filed an application ("Application") to request approval of their Energy Efficiency and Peak Demand

Reduction Program Portfolio Plans ("Portfolios"), their initial Statutory Benchmark Report, and a Cost Recovery Mechanism that would allow FirstEnergy to charge customers for program costs. Initial briefs were filed on March 29, 2010.

Throughout the hearing process FirstEnergy has maintained a shroud of mystery regarding the money that was spent on the initial Compact Fluorescent Light ("CFL") bulb program (that resulted in the warehousing of 3.75 million light bulbs after the public outcry about FirstEnergy's program). FirstEnergy states in its post-hearing Initial Brief that it incurred $9,113,856 to implement the initial CFL Program during the September through November 4, 2009 period ("Original CFL Program").[1] FirstEnergy also states that the Commission's initial approval to start delivering the bulbs has the effect of "deeming" any expenditure as reasonable.[2] Residential consumers have a right to know how the money was spent and FirstEnergy has failed to do more than submit superficial "one-line item" statements into the record. The Commission should protect residential consumers by denying FirstEnergy's efforts to collect money from residential consumers without appropriate documentation.

FirstEnergy has never been able to explain the basis for the proposed shared savings mechanism. This mechanism contains none of the consumer protection provisions that other utility company proposals, from which the percentage amount of FirstEnergy's proposal was obtained, employ as governing provisions that act as consumer protections. This mechanism should not be approved by the Commission. In the alternative, the mechanism must be significantly modified prior to PUCO approval.

[1] FirstEnergy Initial Brief at 20.

[2] Id..

The contents of this OCEA[3] Post-Hearing Reply Brief are additional to, and not in substitution of, the contents of the Post-Hearing Initial Brief filed by the undersigned parties.

II. ARGUMENT

A. FirstEnergy Failed to Adequately Support the Reasonableness of its Request for Commission Approval to Collect from Customers One Million Four Hundred Thirty-Two Thousand Dollars in Questionable Costs.

Overall, FirstEnergy seeks to collect $9,113,856 from residential and small business customers for costs incurred to implement the original CFL Program.[4] FirstEnergy states that the $9,113,856 are the actual costs incurred by the Companies from September 23, 2009 through November 4, 2009, as part of the initial CFL program that was designed to "rapidly distribute CFL bulbs to residential and small-business customers in the fourth quarter of 2009…."[5] The Companies assert a right to the collection of this money from customers based upon the Companies' testimony, and allegedly because FirstEnergy has *carte blanche* authority to collect any costs incurred for the CFL program up to $13,125,000 "pursuant to a valid [Original CFL Program] Commission order."[6]

However, as discussed in detail below, FirstEnergy failed to support with documentation $1,432,000 of the $9,113,856 that the Companies assert were the "reasonable" costs incurred by the Companies. Without reasonable support and

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[3] The undersigned members of OCEA include the Office of the Ohio Consumers' Counsel, Citizen Power, Citizens Coalition and the Natural Resources Defense Council.

[4] FirstEnergy Initial Brief at 20.

[5] Id. at 19.

[6] Id. at 20.

documentation of such a significant amount of money, FirstEnergy's request to collect these funds from residential customers should be denied.

The Companies allege in their initial pre-hearing brief that all costs associated with the original CFL program are "deemed" reasonable.[7] This includes costs challenged by the undersigned OCEA members in our Initial Post-Hearing Brief as lacking enough evidence to support a "reasonableness" determination. In addition, FirstEnergy states that Mr. Toth's rebuttal testimony addresses the reasonableness of the original CFL costs that are challenged. But Mr. Toth's testimony and the evidence presented at hearing failed to provide adequate support to establish the following single-line item costs that the Companies seek collection for:

1. $630,000 for "Personnel Services" associated with the Original CFL program;
2. $225,000 for the "Management Services" that were incurred by the Companies associated with the Original CFL program;
3. $225,000, the miscalculated amount of money paid for CFLs for residential customers;
4. $73,000, the miscalculated amount of money paid for CFLs for small business customers; and
5. $279,000 of unverified and superficially documented invoice for newspaper and radio advertisement costs.

FirstEnergy's request to collect millions of dollars from consumers should include a reasonable opportunity for all parties to review the substance of the request. FirstEnergy

[7] Id.

failed to meet is burden of proof and provide a reasonable level of documentation for areas mentioned above. FirstEnergy's failure to provide a reasonable amount of support for over $1.4 million dollars in costs it seeks to collect from consumers has obstructed OCEA's ability to investigate this Application and destroys any level of transparency that has come to be expected in a hearing process.

1. The Companies' position that any costs incurred as part of the Original CFL Program Design are reasonable is not supported by the record in this case or the law and is not a basis for collecting the costs from customers.

FirstEnergy states that if the 3,750,000 CFL bulbs were distributed to consumers starting in September 2009 as initially proposed ("Original CFL Program") the estimated cost -- including all administrative and programs costs -- was $3.50 per bulb or $13,125,000.[8] FirstEnergy now has identified the cost for the re-designed program that was ordered by the Commission on November 4, 2009[9] ("Re-designed Program") at $3.51 per CFL bulb or $13,163,448.[10] FirstEnergy witness Greg Toth stated that FirstEnergy's primary goal with the re-designed CFL programs was simply to maintain the same level of costs as the initial design.[11] FirstEnergy seeks to collect, through the DSE2 rider, these alleged incurred CFL program costs from consumers as part of the initial set of portfolio charges.[12]

As discussed in the sections below, FirstEnergy asserts that costs allegedly incurred for distribution of the CFLs are reasonable to collect from customers. However,

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[8] Id. at 19.

[9] Entry on Rehearing at 3 (November 4, 2009) ("ORDERED, that FirstEnergy file a revised CFL Program with the Commission by November 30, 2009.".

[10] FirstEnergy Initial Brief at 20.

[11] Tr. Vol. 4 at 606 (Toth) (March 8, 2010).

[12] FirstEnergy Initial Brief at 18.

these alleged costs cannot be established as reasonable without sufficient documentation. The Companies assertion that the incurred costs are reasonable simply because they fall in line with the initial estimates is not enough. Only the costs that can be sufficiently documented can be collected from customers.

The Company's assertion that the incurred costs are reasonable simply because they fall in line with the initial estimates is in conflict with controlling precedent. Applying the standards set forth in *Cleveland v. Pub. Util. Comm.* (1980), 63 Ohio St. 2d 62, 406 N.E. 2d 1370, the PUCO declared that, "[of] course, the reasonableness of the total advertising program costs is not the applicable standard espoused by the Ohio Supreme Court and followed by this Commission."[13] The Commission excluded the collection of specific advertising costs where the company failed to support those costs on a specific basis. The company only provided evidence to demonstrate that the overall "total advertising program" was reasonable.[14] The Commission held that companies must ***demonstrate*** a direct, primary benefit to customers in order for ***each cost*** to be included in their expenses.[15] The Commission should therefore deny FirstEnergy's request to immediately start collecting $1,432,000 in its undocumented allegedly incurred costs.

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[13] *In the Matter of the Application of The Cleveland Electric Illuminating Co. for Authority to Amend and to Increase Certain of its Filed Schedules Fixing Rates and Charges for Electric Service*, Docket No. 84-188-EL-AIR, Opinion and Order at 94 (Mar. 7, 1985).

[14] Id. at 94-97.

[15] *See Cleveland v. Pub. Util. Comm*. (1980), 63 Ohio St. 2d 62, 406 N.E. 2d 1370, Syllabus.

a. The Companies' position that any "management" costs less than 2.5 percent of the overall costs are "deemed" reasonable should not be acceptable, and the costs should not be collected from customers.

FirstEnergy relies upon the rebuttal testimony of the FirstEnergy witness Toth to claim that the CFL program costs that are challenged by OCC's witnesses were reasonable at the time incurred.[16] Mr. Toth claimed the $225,000 that will be collected from consumers for "management services" is a negotiated cost that incorporates "substantial reductions" from vendors and rolled many of the original costs into the redesigned program.[17] Yet, at hearing Mr. Toth conceded the $225,000 was not a negotiated cost.[18]

As addressed in OCC's initial brief, Mr. Toth was unable to substantiate the $225,000 that FirstEnergy seeks to collect from residential customers for "management services" was incurred. Mr. Toth testified that through recent calls with the vendor he was able to state that the $225,000 figure can be broken into three components that add up to $225,000 ($40,750 + $31,250 + $153,000).[19] There are no invoices to support these three figures.[20] There is no documentation – other than Mr. Toth's testimony describing the telephone call to document these figures.

Furthermore, Mr. Toth testified that further documentation for the alleged $225,000 was not available nor was it necessary because *he* had "deemed" the costs incurred reasonable.

[16] FirstEnergy Initial Brief at 22.

[17] Id.

[18] Tr. Vol. 4 at 634.

[19] Id. at 631- 632.

[20] Id. at 632.

> $225,000 for a project from this vendor that was nearly 8.5 million [dollars] was, you know, less than 2.5 percent of the total price of the job for management, so it was well within line *and deemed reasonable*. Really anything between 2 and 5 percent would be considered reasonable for a management of a project this size.[21]

In fact, using Mr. Toth's logic any bill for management services that was less than $425,000 would be acceptable to him without review.[22] Thus, Witness Toth explained why no further documentation was necessary to establish that these costs were reasonable. In conclusion, FirstEnergy failed to present evidence to support the amount of money the Companies spent on management services and whether it was spent prudently or reasonably. FirstEnergy failed to demonstrate a direct, primary benefit to customers in order for this cost to be included in their expenses as required by the controlling precedent in *Cleveland v. Pub. Util. Comm.* (1980), 63 Ohio St. 2d 62, 406 N.E. 2d 1370. Therefore, FirstEnergy's request to collect the $225,000 from residential customers should be denied.

b. The Company failed to establish that it reasonably spent six hundred and thirty thousand dollars on "personnel" services as part of the staging of the original CFL roll-out, and the costs should not be collected from customers.

A single line-item on an invoice is the only documentation that FirstEnergy could produce for the alleged $630,000 in personnel services. This information is not proof of reasonableness nor should FirstEnergy's "deemed" reasonable philosophy be acceptable to the Commission for these costs.

[21] Id. at 588 (Emphasis added).

[22] Id. ($8.5 million multiplied by 5% equals 425,000).

FirstEnergy asserts that the reasonableness of the $630,000 in personnel services is supported by Mr. Toth's rebuttal testimony and the single line-item of an invoice.[23] No further information – such as dates, a timeframe, or even a breakdown of the $630,000 was provided.[24] The cost of the personnel services was not a "negotiated number" yet there is nothing in the record even from the initial CFL proposal by the Companies to identify how (or when) the money would be spent.[25] Mr. Toth stated that the brief description in his testimony regarding the services provided by the "personnel" and the Power Direct invoice that was attached to his testimony are the only documentation he could provide to support the alleged $630,000 amount.[26]

Six hundred and thirty thousand dollars is a lot of money to simply "deem reasonable" based on one line of an invoice, and a hearing record, that provides only a terse explanation of the expenses (without any dollar amounts). However, that is the extent of the documentation that FirstEnergy has established in the record.[27] Even under Mr. Toth's stated method of "deemed reasonable" analysis for management costs -- that any costs less that 2.5 percent of the total price are appropriate to deem reasonable -- $630,000 is too much to qualify under this shallow methodology.

Again, FirstEnergy failed to present enough evidence to prove that the money for personnel services was spent prudently, or reasonably. FirstEnergy failed again to sufficiently demonstrate a direct, primary benefit to customers in order for this cost to be

[23] FirstEnergy Initial Brief at 21 (March 29, 2010) (citing Toth Rebuttal testimony at 10-11).

[24] Tr. Vol. 4 at 659 (Toth) (March 8, 2010).

[25] Id.

[26] Id. at 586 and 615.

[27] FirstEnergy Ex. 12 at 10 (March 6, 2010). Mr. Toth identifies "personnel" services as potentially falling under the management category of costs. As discussed earlier, Mr. Toth testified that management services are ripe for the "deemed reasonable" level of analysis.

included in their expenses as required by the controlling precedent in *Cleveland v. Pub. Util. Comm.* (1980), 63 Ohio St. 2d 62, 406 N.E. 2d 1370. Therefore FirstEnergy's request to collect the alleged $630,000 from residential customers should be denied.

c. The Companies failed to establish that it was reasonable to spend an additional two hundred ninety-eight thousand dollars on the CFLs bulbs as part of the staging of the original CFL roll-out, and the costs should not be collected from customers.

FirstEnergy's reliance upon the rebuttal testimony of the Companies' witness Gregory Toth to establish that all of the challenged CFL program costs are reasonable at the time they were incurred fails to account for the inaccuracies in the Power Direct invoice addressing CFL costs.[28] In addition, FirstEnergy's "deemed" reasonable approach to avoid review of these inconsistencies in the Power Direct invoice should not be acceptable to the Commission for these costs. As addressed in OCEA's initial brief, the Companies failed to establish in the record the accuracy – and therefore the reasonableness -- of $298,000 of the $5,906,250 it proposed to collect from customers for CFL costs.[29]

The Companies' accrual of CFL expenditures was completed by Mid-October.[30] Yet, the Environmental Law & Policy Center ("ELPC") convincingly established in its Initial Brief that the Companies only evidence supporting the costs incurred -- six months earlier -- for CFLs, the Power Direct Invoice, was unreliable and supported by

[28] FirstEnergy Initial Brief at 20.

[29] OCC Ex. 17. (The Company identified $5,996,250 in CFL costs in the November 24, 2009 e-mail, but that figure is incorrect according to the Power Direct invoice.).

[30] Tr. Vol. 4 at 674 (Toth) (March 8, 2010).

conversations with manufacturers rather then actual documentation.[31] FirstEnergy's reliance upon an invoice that contained miscalculations as the only basis for the CFL costs in this case simply is not proof of reasonableness. The Companies failed to present accurate evidence to support how the $5,906,250 amount for CFLs was determined and whether the money was reasonably spent on CFLs. As mentioned in OCEA's initial brief, the Power Direct invoice states that 1,500,000 bulbs were purchased for residential customers at a price of $3.00 a piece that equals $4,500,000, not $4,725,000 as identified on the invoice.[32] The Power Direct invoice also states that 375,000 light bulbs were purchased for business customers at a rate of $3.00 a bulb that equal $1,125,000, not $1,181,250 as identified on the invoice.[33] Mr. Toth stated that he could not explain why the figures on the Power Direct invoice did not match.[34] Therefore $298,000 ($225,000 + $73,000) of the amount FirstEnergy is seeking to collect for CFL costs from residential customers should be denied.

d. The Companies failed to present evidence to support the prudence and reasonableness of spending approximately two hundred seventy-nine thousand dollars on advertising for the original CFL roll-out, and the costs should not be collected from customers.

Again, FirstEnergy relies upon the rebuttal testimony of the Companies' witness Gregory Toth to claim the CFL program costs – including advertising costs -- that are challenged by OCC's witnesses were reasonable at the time incurred.[35] As part of Mr.

[31] ELPC Initial Brief at 17-19.

[32] FirstEnergy Ex. 12, attachment GMT-1, Power Direct Invoice.

[33] Id.

[34] Tr. Vol. 4. at 620 (Toth) (March 8, 2010). ("I think [Power Direct] meant to have $3.15 in as the rate , not $3, but I'll have to dig into that a little deeper.").

[35] FirstEnergy Initial Brief at 22.

Toth's rebuttal testimony he attached two two-page receipts that outlined the advertising costs for the original CFL program.[36] FirstEnergy's decision to provide documentation that is so scant of detail regarding the incurred $279,000 in advertising costs making it impervious to review by other parties is not reasonable, nor should FirstEnergy's "deemed" reasonable philosophy for these types of costs be acceptable to the Commission.

As addressed in OCEA's initial brief, FirstEnergy has stated that $405,140 in pre-market/pre-advertising costs that it is seeking to collect from customers for the Original CFL Program is a negotiated – and reasonable – figure. A FirstEnergy witness stated that this $405,140 figure includes $279,000 that is the result of his negotiations from two IMR invoices that originally totaled approximately almost $800,000.[37] A reduction of costs from $800,000 to $279,000 is significant but the reasonableness of the reduction can only be determined after reviewing the details behind the original $800,000.

For example, FirstEnergy asserts that an IMR invoice identifying $510,792 in costs for a newspaper campaign was part of the original $800,000 that FirstEnergy incurred. The invoice identifies a single line item for "Cleveland Plain Dealer" for $177,601. The invoice also identifies another single line-item of $38,954 for the "Akron Beacon Journal." There is no other information that was provided on the invoice or through testimony regarding the "Cleveland Plain Dealer" or the "Akron Beacon Journal" costs. Mr. Toth could not provide any further information to describe the type, number,

[36] FirstEnergy Ex. 12, Attachment GMT-1, IMR invoice "Big Idea" CFL Give-Away Promotion – Newspaper Campaign -- $510,792; IMR invoice "Big Idea" CFL Give-Away Promotion – Radio Campaign -- $238,341 (Toth) (March 4, 2010).

[37] Id. at 642 (Toth) (March 8, 2010); see also FirstEnergy Ex. 12, Attachment GMT-1, IMR invoice "Big Idea" CFL Give-Away Promotion – Newspaper Campaign -- $510,792; IMR invoice "Big Idea" CFL Give-Away Promotion – Radio Campaign -- $238,341 (Toth) (March 4, 2010).

or dates of the newspaper advertisements that were bought.[38] FirstEnergy could not even identify if the advertisements were published.

The information regarding the $510,792 of the $800,000 in original costs identified by FirstEnergy in the record was not sufficient to address whether the costs were reasonable or prudent. FirstEnergy failed to demonstrate a direct, primary benefit to customers in order for each of these costs to be included in their expenses as required by the precedent in *Cleveland v. Pub. Util. Comm.* (1980). Therefore FirstEnergy's request to collect the $279,000 from residential customers should be denied.

2. The Companies reliance on the Commission's September 23, 2009 Finding and Order to Assert that No review of the Companies Spending on the Original CFL Program Design is required cannot be substantiated nor is it reasonable.

FirstEnergy asserts that any costs associated with the Original CFL Program design are "deemed" reasonable because they were incurred pursuant to the Commission's September 23, 2009 Finding and Order.[39] In addition, FirstEnergy's underlying assertion that it is permitted a "safe harbor" for all of the original CFL program costs that were incurred prior to the Commission's November 4, 2009 Entry on Rehearing is incorrect. FirstEnergy relies upon R.C. 4903.10(B) to support its analysis that no review of the incurred costs is permitted because any costs are "deemed" reasonable.[40] However, FirstEnergy's reliance on R.C. 4903.10(B) is overstated and its characterization of when the costs associated with the original CFL program were incurred is not supported by the record.

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[38] Id. at 644-647.

[39] FirstEnergy Initial Brief at 20.

[40] Id.

FirstEnergy relies on R.C. 4903.10(B) for the conclusion that if the Original CFL Program design costs were incurred during the time period between the Commission's September 23, 2009 Finding and Order and the Commissions November 4, 2009 Entry on Rehearing they are automatically entitled to collection without any review.[41] However, R.C. 4903.10(B) only permits FirstEnergy alleged estoppel and a limited estoppel, for actions taken in reliance upon the Original Commission Finding and Order (September 23, 2009) until the Companies received notice of OCC's application for rehearing that was filed on October 8, 2009.[42] The Companies incorrectly stated that the estoppel period extends through the Commission's November 4, 2009 Entry on Rehearing.[43] FirstEnergy's estoppel period, if any, would have been September 23, 2009 through October 8, 2009. Furthermore, consumers should not bear costs relating to the Companies' decision to incur costs after October 7, when it publicly announced that it would abide by requests of the Governor and Chairman of the Commission and halt all activity.[44]

In addition, the alleged estoppel period is irrelevant to this proceeding because, as addressed above, and in initial briefs by OCEA and ELPC, FirstEnergy failed to identify a discernable timeframe for the $1,432,000 in questioned CFL program costs. In

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[41]Id.

[42] R.C. 4903.10(B) ("An order made after such rehearing, abrogating or modifying the original order, shall have the same effect as an original order, but shall not affect any right or the enforcement of any right arising from or by virtue of the original order *prior to the receipt of notice by the affected party* of the filing of the application for rehearing." (Emphasis added).

[43] FirstEnergy Initial Brief at 20.

[44] OCC Ex. 2 (FirstEnergy press release "FirstEnergy to Postpone Energy-Efficient Light Bulb Distribution" October 8, 2009).

particular, the timeframes for the costs associated with the Management Services;[45] Personnel Services; the CFLs;[46] and the advertising costs are not clear in the record.

FirstEnergy also asserts that the language of R.C. 4903.10(B) permits the Companies to declare *any* costs associated with the Original CFL program as "deemed reasonable" because they were incurred pursuant to September 23, 2009 Finding and Order.[47] FirstEnergy's assertion is not supported by the September 23, 2009 Finding and Order. The Order approves a recovery mechanism for collecting costs from customers but does not automatically "deem" all costs reasonable to collect from customers.

In fact, the September 23, 2009 Finding and Order states that the request for recovery of the costs associated with the implementation of these programs "does not appear" to be unjust or unreasonable.[48] This tentative language does not immunize the alleged costs of the CFL program submitted by FirstEnergy to any challenge of reasonableness – and for good reason. FirstEnergy did not have invoices for the challenged costs until after the September 23, 2009 Finding and Order,[49] and did not share those invoices with the Commission or any other party until February 11, 2010.[50] The September 23, 2009 Finding and Order was written to permit the Companies' to incur costs pursuant to the specific items requested while leaving open the question of whether or not the costs may be reasonable. FirstEnergy's reliance, therefore, upon the

[45] Tr. Vol. 4 at 611 (Toth) (March 8, 2010) (The management services started "way back" with the development and planning and continued through assistance with re-designing the new program).

[46] Tr. Vol. 4 at 629. (On questions from the bench, Mr. Toth stated that he could not identify an exact date but he recalls that CFLs were purchased through the middle of October.

[47] FirstEnergy Initial Brief at 20.

[48] Finding and Order at 2 (September 23, 2009).

[49] FirstEnergy Ex. 12 at Attachment GMT-1.

[50] Tr. Vol. 4 at 588 (Toth) (March 8, 2010).

original September 23, 2009 Finding and Order for determining proof of reasonableness of costs not explicitly stated in the initial Order is misplaced.

B. FirstEnergy's Shared Savings Mechanism, Which has no Calculated Basis or Relevance to the Companies' Particular Circumstances, Should not be Approved by the Commission. In the Alternative, FirstEnergy's Shared Savings Mechanism Should be Modified to Include Customer Protections Such as Cost Caps.

FirstEnergy claims that its shared savings component is a "reasonable mechanism"[51] to induce the Companies to achieve a level of compliance in excess of the statutory benchmarks. In the context of energy efficiency programs, shared savings is a performance-based mechanism employed to reward a utility for developing and implementing new and cost-effective energy efficiency programs that deliver high net benefits to customers.[52] This claim is based on an "internal review" and a review of the Duke and AEP proposed shared savings mechanisms.[53] FirstEnergy further supports its claim by using the simplistic observation that "no intervenor proposed an alternative" to the fifteen percent number.[54] However, the evidence on the record, including statements made by the Companies' witness, indicate that the proposed shared savings component does not resemble other utility companies' proposals, and would require considerable modification in order to qualify as a serious proposal for approval.

The PUCO should not approve FirstEnergy's shared savings mechanism as submitted by the Companies. In the alternative, any shared savings component approved

[51] FirstEnergy Initial Brief at 24.

[52] OCC Ex. 12 at 6 (Sawmiller)(February 17, 2010).

[53] FirstEnergy Initial Brief at 23.

[54] Id.

by the PUCO should include significant modifications to the current proposal, including consumer safeguards described by the intervenor witnesses.[55]

1. An effective shared savings mechanism calculation must be properly defined to achieve the purpose of rewarding cost-effective programs delivered to customers.

FirstEnergy states that, "as a preliminary matter, shared savings is intended to incent the Companies to exceed their statutory benchmarks."[56] This is unsupported by any further explanation from FirstEnergy. A more accurate and precise description of shared savings is presented in the direct testimony of NRDC witness Dylan Sullivan, who notes that shared savings mechanisms are designed to reward utilities that do an exemplary job of delivering energy efficiency to customers.[57] A similar definition is presented by OCC witness Dan Sawmiller.[58]

It is important to distinguish that FirstEnergy's definition broadly focuses on the Companies' incentive to overshoot the benchmark, rather than on specific, Company efforts to deliver programs to customers. It is the *Companies'* energy efficiency efforts that should produce the eligibility for reward, as opposed to a total that includes projects primarily undertaken for other purposes, or customer-funded and directed projects that occurred independently of a utility company program or incentive . Only the former (specific company energy efficiency program efforts) should be rewarded; the latter (transmission and distribution projects and customer self-directed projects) should be excluded from any calculation of shared savings.

[55] Initial post-hearing brief of the Office of the Ohio Consumers' Counsel, Citizen Power, Natural Resources Defense Council and Citizens Coalition at 36-39 (March 29, 2010).

[56] FirstEnergy Initial Brief at 23.

[57] NRDC Exhibit 1 at 3 (Sullivan).

[58] OCC Exhibit 12 at 6 (Sawmiller).

A shared savings mechanism should not automatically trigger at compliance without first excluding mercantile self-directed programs and Transmission and Distribution ("T&D") savings. To allow these items as part of a shared savings calculation would reward the Companies for pursuing compliance strategies that inhibit the exploitation of new cost-effective energy efficiency in its service territory. To this point, PUCO Staff witness Greg Scheck stated that a utility company should only receive shared savings for a program initiated by a company, rather than something that an individual customer or customers paid for out-of-pocket.[59] FirstEnergy's proposal, while appearing to exclude self-directed mercantile projects from its calculation, includes T&D in its calculation.[60] FirstEnergy notes that while inclusion of T&D projects in the calculation is unlikely, due to the remote possibility that such projects would produce net benefits, the fact is they are still included.[61]

The Companies try to justify inclusion of T&D in the shared savings mechanism by pointing out that the applicable statute allows T&D to be counted towards achievement of the benchmarks.[62] However, inclusion towards the achievement of the benchmarks is not the same as receiving a net of benefits bonus for projects undertaken for reliability, system upgrades and growth purposes.[63] The Companies' witness admitted these projects are not primarily undertaken for energy efficiency purposes.[64] PUCO Staff witness Scheck further stated that unless T&D projects are undertaken

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[59] Tr. Vol. 2 at 395 (Scheck) (March 3, 2010).

[60] Tr. Vol. 1 at 172-173 (Ouellette) (March 2, 2010).

[61] FirstEnergy Initial Brief at 24.

[62] Id. at 23.

[63] Tr. Vol. 1 at 173 (Ouellette) (March 2, 2010).

[64] Tr. Vol. 1 at 173 (Ouellette) (March 2, 2010).

"strictly or primarily for energy efficiency purposes" such projects should be excluded from a shared savings calculation.[65] The PUCO should not approve the proposed mechanism, which includes transmission and distribution projects under certain circumstances. Any modified mechanism proposed by the Commission as an alternative should continue the exclusion of self-directed mercantile projects, and exclude T&D projects.

2. The FirstEnergy shared savings as proposed does not resemble the other utilities' proposals which provide detailed and prescriptive governing provisions clarifying when a company is eligible for shared savings, what projects are included in the calculation, and limits on the amount of shared savings which may be collected from customers.

FirstEnergy's determination that its shared savings proposal is reasonable because it is similar to other utilities' proposals is flawed and offers no basis for Commission approval. In the Initial Brief, FirstEnergy reveals the entirety of its shared savings analysis:

> The Companies determined that sharing in fifteen percent of the net benefits was reasonable by reviewing AEP's and Duke Energy's proposed shared savings programs and conducting an internal review of what percentage would likely incent the Companies to overshoot their benchmarks.[66]

First, the Companies' proposal does not resemble these other Ohio utilities' proposals. As noted on the record, Duke's shared savings proposal contains certain cost caps which

[65] Tr. Vol. 2 at 398 (Scheck) (March 3, 2010).

[66] FirstEnergy Initial Brief at 23, citing Tr. Vol. 1 at 161-162.

limit the amount of shared savings those Companies can collect from their customers.[67] FirstEnergy's witness Ouellette stated that he was aware of AEP's similar provisions.[68]

Second, the Companies performed no analysis, research, or calculations to determine that the fifteen percent proposal was an appropriate percentage to incent the Companies to overshoot the benchmarks.[69] The FirstEnergy witness noted that the only other action taken by the Companies to determine the shared savings level were discussions to determine "whether a fifteen percent net of benefit was significant enough that [the Companies] would, in fact, be incented to overshoot their benchmarks."[70] These remarks were not further explained, and no documentation was offered by the Company to present why this would be an effective incentive.

More troubling, however, is the fact that no documentation or estimates were provided by FirstEnergy to demonstrate what this "significant" incentive would cost FirstEnergy's customers. Without more documentation, this fifteen percent incentive, which, unlike the other Ohio utilities' proposals contains no limiting provisions, is an unsupported guess on the part of the Companies as to what it would take to induce FirstEnergy to overshoot its benchmarks.

Further, it is an irresponsible action that may place a significant, financial burden on FirstEnergy's customers in the future, depending on the amount by which the Companies exceed their benchmarks. With no effort on the Companies' part to justify the mechanism or provide estimates as to what it may cost consumers, the PUCO should not

[67] Tr. Vol. 1 at 166-169 (Ouellette) (March 2, 2010).

[68] Id. at 171.

[69] Id. at 160-162.

[70] Id. at 162.

approve it. The shared savings mechanism, as proposed by FirstEnergy, should be denied. In the alternative, modifications that place caps on the shared savings amount must be in place prior to Commission approval.

3. Intervenor testimony in this case outlined the design of an appropriate shared savings mechanism.

FirstEnergy claims that a shared savings mechanism of fifteen percent net of benefits must be reasonable because no intervenor witness provided an alternative percentage.[71] However, as pointed out by other witnesses, this lack of justification is a big part of the problem with FirstEnergy's proposed shared savings mechanism. As PUCO Staff witness Scheck pointed out, the shared savings amount should not be a matter of "just pulling a number out of the air."[72] Rather, there should be a tangible basis for the determination of the shared savings mechanism amount or percentage.

Instead of peeking at other filings and making a guess, some witnesses noted other ways in which the mechanism amount would be determined. Witness Scheck stated that it could be similar to "the [Companies'] rate of return on other assets."[73] NUCOR Steel Marion witness Dr. Dennis Goins noted that there were several established mechanism types and that FirstEnergy presented no evaluation of any of them.[74] Dr. Goins further noted that many mechanisms are made by an agreement among the parties.[75] This is how the AEP mechanism was developed.[76] Further, the FirstEnergy

[71] FirstEnergy Initial Brief at 23.

[72] Tr. Vol. 2 at 396 (Scheck) (March 3, 2010).

[73] Id.

[74] Tr. Vol. 3 at 433 (Goins) (March 4, 2010).

[75] Id. at 434.

[76] Tr. Vol. 1 at 164 (Ouellette) (March 2, 2010).

witness was aware that AEP's shared savings mechanism was a part of a stipulation.[77] FirstEnergy made no attempt in these cases to negotiate an agreement with parties regarding shared savings.

FirstEnergy cannot relate its proposal to any sort of tangible reference point. It cannot point to any negotiations or an agreement among knowledgeable parties for the mechanism basis. The absence of any documented analysis, coupled with a lack of governing provisions that protect consumers, add up to an unknown quantity that FirstEnergy's Ohio customers should not be subjected to at a later date. While FirstEnergy claims that the proposed shared savings mechanism is reasonable, the shared savings mechanism is a wild guess that was taken *sans* consumer protections from other utility company proposals. Fifteen percent represents only a small part of the two larger and carefully negotiated proposals submitted by Duke and AEP.

The PUCO should not approve this shared savings mechanism. In the alternative, the proposal must be significantly modified as described in the testimony of NRDC witness Dylan Sullivan, if the PUCO were to adopt it.[78]

C. The Commission Should Reject FirstEnergy's Efforts to Extend the Terms of the Lost Distribution Revenue Provisions Beyond Programs Implemented in 2011.

The Companies assert that the collection of lost distribution revenue resulting from the implementation of all energy efficiency programs approved by the Commission is reasonable.[79] FirstEnergy also asserts that it has the right to collect the lost distribution

[77] Id.

[78] NRDC Exhibit 1 at 4-9 (Sullivan).

[79] FirstEnergy Initial Brief at 21.

revenue for programs initiated in 2010, 2011, and 2012.[80] The Companies state that its "Rider DSE is designed to include recovery" of lost revenues and that "the parties to the ESP Case agreed" that the Companies' Rider DSE would recover costs of energy efficiency programs, including lost revenues.[81] However, FirstEnergy's assertion that its proposed recovery of lost revenues is reflective of a recent "agreement" between the Companies and parties mischaracterizes the applicable 2009 ESP Stipulation and should be disregarded.

FirstEnergy cites to provisions of the recent, and pending, ESP II Stipulation, which is pending a hearing and then an order.[82] But FirstEnergy fails to accurately reflect the language in the approved ESP Stipulation from the Companies Initial ESP case[83] addressing the recovery of lost revenues from energy efficiency programs. Section E.6.a. of the 2009 ESP Stipulation states that "The Companies' Stipulated ESP provides for the following Energy Efficiency and Peak Demand Program **for the period 2009 through 2011**."[84] It is clear that the parties only agreed to lost revenue collection in the Stipulation for programs implemented through 2011. The Company is attempting to extend the terms of the stipulation beyond the time period to which parties agreed. The Commission should allow the Company's collection of lost revenues for programs implemented in

[80] Energy Efficiency & Peak Demand Reduction Program Plan, The Cleveland Electric Illuminating Company, Appendix F, Case No. 09-1947-EL-POR.

[81] Id. at 21 (Post-Hearing Brief) (March 29, 2010), citing the Stipulation and Recommendation filed on March 23, 2010, in the ESP II Case.

[82] FirstEnergy Initial Brief at 21.Fn. 112.

[83] *In re: FirstEnergy Application for Authority to Establish a Standard Service Offer Pursuant to R.C. 4928.143 in the Form of an Electric Security Plan et. al.*, Case No. 08-935-EL-SSO, Stipulation and Recommendation at 21 (February 19, 2009).

[84] Stipulation and Recommendation, Section E6a, Case No. 08-935-EL-SSO (Emphasis added).

2010 and 2011. For the time period thereafter, the Commission should immediately initiate a process leading to implementation of revenue decoupling in 2012.[85]

III. CONCLUSION

The Commission should deny FirstEnergy's request to collect from customers any costs associated with the Compact Fluorescent Light ("CFL") program that the Companies have failed to prove as reasonable and prudent. Further, the Commission should not approve the shared savings mechanism proposed by FirstEnergy. FirstEnergy offers no estimates on cost, includes items in its calculations that do not reflect the Companies' efforts at delivering energy efficiency to customers, and offers no cost cap provisions or other consumer safeguards that would serve to govern and limit any shared savings mechanism that would be recovered from customers. Finally, the lost revenue agreement from the ESP stipulation should not be continued automatically past 2011. Instead, revenue decoupling should be instituted at the conclusion of the ESP agreement which, unlike collecting lost revenues from customers, would include a regular true-up in rates, ensuring that only Commission-approved fixed costs are collected by the Companies from their customers.[86]

[85] Citizen Power is not taking a position on whether revenue decoupling should be instituted beginning in 2012.

[86] Citizen Power is not taking a position on whether revenue decoupling should be instituted beginning in 2012.

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CERTIFICATE OF SERVICE

I hereby certify that I served a true copy of the foregoing Post-Hearing Reply Brief by the Office of the Ohio Consumers' Counsel upon the following via electronic transmission this 12th day of April, 2010.

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