

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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| In the Matter of the 2015 Application for |) | |
| the Energy Efficiency and Peak Demand |) | Case No. 16-941-EL-EEC |
| Reduction Portfolio Status Report of the |) | |
| Ohio Edison Company |) | |

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| In the Matter of the 2015 Application for |) | |
| the Energy Efficiency and Peak Demand |) | Case No. 16-942-EL-EEC |
| Reduction Portfolio Status Report of the |) | |
| Cleveland Electric Illuminating Company |) | |

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| In the Matter of the 2015 Application for |) | |
| the Energy Efficiency and Peak Demand |) | Case No. 16-943-EL-EEC |
| Reduction Portfolio Status Report of the |) | |
| Toledo Edison Company. |) | |

COMMENTS OF THE ENVIRONMENTAL LAW & POLICY CENTER

I. INTRODUCTION

The Environmental Law & Policy Center (“ELPC”) hereby files these comments on the 2015 Energy Efficiency and Peak Demand Reduction Portfolio Status Report (“2015 Portfolio Status Report”) filed by the Ohio Edison Company, the Cleveland Electric Illuminating Company, and the Toledo Edison Company (collectively, “FirstEnergy” or “Companies”) pursuant to Ohio Admin. Code 4901:1-39-06(A). FirstEnergy’s Portfolio Status Report includes a calculation of its “shared savings” incentive payment for 2015 based on the mechanism approved by the Public Utilities Commission of Ohio (“Commission”) as part of FirstEnergy’s 2013-2015 Energy Efficiency and Peak Demand Reduction Program Portfolio (“2013-2015 Portfolio Plan”) in Case Nos. 12-2190-EL-POR *et al.* In 2014, FirstEnergy canceled the bulk of its planned 2015 programs under a 2014 law that allowed it to amend its 2013-2015 Portfolio Plan and in the process of doing so change its 2015 required savings benchmark from

approximately 600,000 MWh to zero. S.B. 310, Section 6(B). FirstEnergy now seeks the maximum possible level of \$10 million in shared savings based solely on having completed projects in 2015 that were approved under its now-suspended 2014 programs. As an initial matter, it appears that FirstEnergy has inadvertently overestimated the energy savings eligible for inclusion in its shared savings calculation for 2015. Additionally, regardless of the amount of eligible energy savings, FirstEnergy’s minimal efforts in 2015 at best merit a payment on the net benefits of those savings at the lowest incentive level of 5% rather than the top incentive level of 13% sought by the Companies. Accordingly, the Commission should not approve FirstEnergy’s shared savings claim as presented in the Portfolio Status Report, which could require customers to over-pay the utility by millions of dollars.

II. FACTS

Under the shared savings mechanism incorporated into the Plan, each of the FirstEnergy distribution utilities receives an incentive payment calculated as a given percentage of the Discounted Net Lifetime Benefits resulting from energy savings achieved through that Company’s efficiency programs in a given year. That “incentive percentage” increases as the Companies exceed their statutory annual savings targets for the year – their respective “compliance percentages” – by greater amounts, as follows:

| Incentive Tier | Compliance Percentage | Incentive Percentage |
|-----------------------|------------------------------|-----------------------------|
| 1 | <100% | 0% |
| 2 | 100-105% | 5% |
| 3 | >105%-110% | 7.5% |
| 4 | >110-115% | 10% |
| 5 | >115% | 13% |

Therefore, to determine the applicable incentive percentage, each of the Companies must calculate their compliance percentage by dividing their achieved annual energy savings by the

amount of statutorily required energy savings for that year. FirstEnergy depicted this mathematical calculation in the illustrative example included in its initial application for the approved shared savings mechanism. Case Nos. 12-2190-EL-POR *et al.*, Demiray Test. (July 31, 2012), Ex. EGD-1 (annual compliance percentage equals achieved annual energy savings MWh divided by annual target MWh).

When the Commission approved the 2013-2015 Portfolio Plan, FirstEnergy's incremental energy savings target for 2015, pursuant to R.C. 4928.66(A)(1)(a), was over 600,000 MWh. Case Nos. 12-2190 *et al.*, Application, Att. A (July 31, 2012) at 1, OE Tbl. 2 (difference between cumulative 2015 and 2014 "Required Energy Efficiency Savings MWh"). Given that annual benchmark, FirstEnergy's programs would have to produce more than 690,000 MWh of energy savings for customers in order for FirstEnergy to qualify for shared savings at the highest level of 13% (since 690,000 divided by 600,000 equals 1.15).

However, a two-year "freeze" of the energy efficiency standard enacted under Senate Bill 310 in 2014 gave FirstEnergy the option to amend its 2013-2015 Portfolio Plan and trigger a reset of its 2015 statutory savings target under R.C. 4928.66(A)(1)(a) to zero. *See* S.B. 310, Section 6(B); R.C. 4928.66(A)(1)(a); Portfolio Status Report (May 12, 2016), Appendix A, Tbls. CE-1, OE-1, TE-1. FirstEnergy chose to freeze most of its efficiency programs for 2015 and 2016 pursuant to an application approved by the Commission on November 20, 2014. Case Nos. 12-2190-EL-POR *et al.*, Finding and Order ("Plan Amendment Order") (Nov. 20, 2014) at 3. This plan amendment means that, as of January 1, 2015, FirstEnergy no longer offered the following programs approved as part of its 2013-2015 Portfolio Plan: the Residential Appliance Turn-In Program, Residential Energy Efficient Products Program, Residential Home Performance Program, Commercial and Industrial ("C&I") Energy Efficient Equipment Program

– Small, C&I Energy Efficient Buildings Program – Small, C&I Energy Efficient Equipment Program – Large, and C&I Energy Efficient Buildings Program – Large. *See* Case Nos. 12-2190 *et al.*, Application, Att. A (July 31, 2012) at 1; Case Nos. 12-2190 *et al.*, Application for Approval of Amended Plan (Sept. 24, 2014) at 2 (listing continued programs). The only program that FirstEnergy continued in 2015 that offered any form of significant energy efficiency incentives or services to customers was its Low-Income Program. *Id.*

FirstEnergy has still claimed achieved annual energy savings of 379,652 MWh for 2015 for purposes of its shared savings calculation, based in large part on savings from projects that it approved under the 2014 programs but that were not completed until 2015. Portfolio Status Report (May 12, 2016), Appendix A, Tbls. CE-1, OE-1, TE-1; *id.* at Appendix A, 1 & n.1. FirstEnergy’s request for approval of a \$10 million shared savings payment rests on the assertion that it should earn the top-tier incentive payment of 13% of the net benefits resulting from these eligible energy savings. *Id.* at Appendix A, Tbls. CE-2, OE-2, TE-2. This incentive percentage would result in a collective 2015 shared savings payment of \$14,793,513 on Total Adjusted Discounted Net Lifetime Benefits of \$113,796,252, subject to a Commission-ordered cap of \$10 million. Portfolio Status Report (May 12, 2016), Appendix A at 1. If FirstEnergy were to earn only the lowest tier incentive percentage of 5% on these claimed net benefits, the shared savings amount would be \$5,689,813.

III. DISCUSSION

A. FirstEnergy Appears to Have Miscalculated the Megawatt-Hour Savings Eligible for Inclusion in Its Shared Savings Claim.

The Commission’s 2014 order approving FirstEnergy’s amendments to its 2013-2015 Portfolio Plan addressed the question of which energy savings would be eligible for the 2015 shared savings calculation in light of the Companies’ suspension of most of their 2015 programs.

The Commission recognized that FirstEnergy had agreed in its reply comments to forfeit any shared savings based on “adjusted net benefits for any of the programs to be continued in the Amended Plan, but only seeks to continue counting for shared savings purposes savings related to customer commitments made under the Existing Plan for projects that will not be completed until 2015.” Case Nos. 12-2190-EL-POR *et al.*, Finding and Order (Nov. 20, 2014) at 17. In accordance with this holding, FirstEnergy’s shared savings claim should only include energy savings resulting from “customer commitments made under the Existing Plan,” *i.e.*, programs from the original approved 2013-2015 Portfolio Plan. The Commission’s ruling primarily excludes savings attributed to a new “Customer Action Program” instituted by FirstEnergy in 2015 to measure energy savings “achieved through actions taken by customers outside of utility-administered programs,” such as independent purchases of efficient lighting and appliances. 2015 Portfolio Status Report, Appendix I at 1-1, 1-3 to 1-4.

However, the energy savings documented by FirstEnergy for the eligible programs in its 2015 Portfolio Status Report total only about 233,000 MWh – far short of the 379,652 MWh that FirstEnergy has claimed for purposes of its shared savings calculation. The below table summarizes FirstEnergy’s reported 2015 kwh savings for each of its programs, as documented in Appendices B through I of the 2015 Portfolio Status Report, along with the claimed kwh savings in its shared savings calculation:

| Program | CEI | OE | TE | Total |
|--|------------|------------|------------|--------------|
| Direct Load Control | 18,712 | 29,980 | 4,028 | 52,720 |
| Low income | 3,038,813 | 2,486,769 | 2,047,419 | 7,573,001 |
| Appliance Turn-In | 153,261 | 202,539 | 33,661 | 389,461 |
| Commercial & Industrial (Equipment and Buildings) | 50,092,565 | 84,858,936 | 60,320,216 | 195,271,717 |

| | | | | |
|--|------------|-------------|------------|-------------|
| Energy Efficient Products | 6,645,378 | 7,089,500 | 2,027,706 | 15,762,584 |
| Home Performance | 3,017 | 2,963 | 4,279 | 10,259 |
| Mercantile | 4,637,989 | 9,267,685 | 33,910 | 13,939,584 |
| Customer Action Program (Residential) | 59,271,948 | 82,322,149 | 23,050,203 | 164,644,300 |
| Customer Action Program (Commercial/Industrial) | 43,914,720 | 37,665,060 | 8,803,838 | 90,383,618 |
| Total (no Customer Action Program) | 64,589,735 | 103,938,372 | 64,471,219 | 232,999,326 |
| Claimed | 99,603,000 | 190,614,000 | 89,435,000 | 379,652,000 |

As evident from comparison of the “Total” and “Claimed” figures, the documented savings from FirstEnergy’s eligible programs are significantly less than the savings that it claims to have achieved for purposes of the shared savings calculation. It is not clear whether this discrepancy results from inclusion of savings from the Customer Action Program or some other error. Regardless, the Commission should not allow FirstEnergy to recover shared savings based on claimed achieved energy savings that are not documented in the utility’s own filed report.

B. The Commission Should Allow FirstEnergy to Recover Shared Savings Only to the Extent It Has Gone Above and Beyond Energy Efficiency Requirements in 2015.

When it first approved shared savings for FirstEnergy as part of its 2010-2012 Portfolio Plan, the Commission explained its view “that incentive mechanisms, including shared savings, are an effective means of aligning the utilities’ and consumers’ interests in implementing energy efficiency programs.” *In re FirstEnergy Application for Approval of Energy Efficiency and Peak Demand Reduction Program Portfolio Plans for 2010 through 2012*, Case Nos. 09-1947-EL-POR *et al.*, Opinion and Order (Mar. 23, 2011) at 15. This statement reflects the premise that such mechanisms are designed to incentivize utilities to take actions that they would not

otherwise be required to take in order to provide customers with benefits. Moreover, as the Commission has recently explained in barring Duke Energy from claiming shared savings based on compliance levels that reflect energy savings banked in prior years, “the tiered incentive structure is designed to motivate and reward the utility for exceeding energy efficiency standards *on an annual basis.*” *In re Application of Duke Energy Ohio, Inc. for Recovery of Program Costs, Lost Distribution Revenue, and Performance Incentives*, Case No. 14-457-EL-RDR, Finding and Order (May 20, 2015) at 5 (emphasis added). Hence, the Commission’s goal in applying the shared savings mechanism should be to reward First Energy for its performance in 2015.

Along these lines, as noted above the Commission indicated in the Plan Amendment Order that First Energy can earn shared savings on “savings related to customer commitments made under the Existing Plan for projects that will not be completed until 2015.” Case Nos. 12-2190-EL-POR *et al.*, Finding and Order (Nov. 20, 2014) at 17. The Commission also stated that “First Energy may collect shared savings for exceeding the 4.2 percent benchmark for 2015 and 2016.” *Id.* However, the Commission never explained exactly what it might mean to “exceed[] the 4.2% benchmark for 2015 and 2016.” The 4.2% benchmark applies to cumulative savings since 2009 rather than annual savings for 2015 and 2016, and FirstEnergy has already met that benchmark before even counting savings from 2015. It would not be logical to assume that FirstEnergy can earn shared savings for 2015 by virtue of its actions in 2014 and prior years, for the same reason the Commission does not allow Duke or other utilities to earn shared savings on banked savings – the purpose of shared savings is to give utilities an annual incentive. That same logic dictates that to earn the incentives for 2015 FirstEnergy must meet the preexisting

annual 2015 target of approximately 600,000 MWh rather than relying on the cumulative savings resulting from programs in past years.

C. The Commission Should Award Any Shared Savings to FirstEnergy Only at the Lowest Incentive Percentage.

While the Plan Amendment Order at least partially addressed the application of FirstEnergy's shared savings mechanism going forward, neither FirstEnergy nor the Commission considered at that time how the Companies would calculate their incentive percentage for 2015. FirstEnergy now asserts that it should receive the highest incentive percentage of 13% of net benefits. However, this claim is based on the mathematically impossible calculation that FirstEnergy exceeded the zero MWh annual savings target for 2015 by more than 15 percent. More fundamentally, the Companies' application of its shared savings mechanism rests on the premise that FirstEnergy should receive the highest possible level of shared savings for 2015 – despite having suspended the vast majority of its programs for 2015 – simply because the Companies did not cut off the completion of projects approved under its 2014 programs in calendar year 2015. That approach will result in FirstEnergy collecting more than \$4 million extra from customers than if it received the minimum tier of shared savings. Although the Commission has ruled that FirstEnergy should be able to recover shared savings on these 2014 “overflow” applications, it should not allow the Companies to collect the windfall of shared savings at the highest possible level that is meant to reward efforts well above and beyond a utility's statutory requirements.

The approved approach for calculating the applicable incentive percentage under FirstEnergy's shared savings mechanism – dividing the achieved MWh savings by the annual MWh savings target to determine the compliance percentage – is mathematically impossible where the statutory target is zero. Wikipedia, Division by Zero,

https://en.wikipedia.org/wiki/Division_by_zero (last visited June 10, 2016) (“In ordinary arithmetic, . . . division by zero is undefined.”). Yet FirstEnergy has claimed the highest possible incentive percentage, 13%, without acknowledging this problem. Portfolio Status Report, Appendix A, Tables OE-2, CE-2, and TE-2. This approach means that FirstEnergy seeks a 2015 shared savings payment of \$14,793,513 on Total Adjusted Discounted Net Lifetime Benefits of \$113,796,252, subject to a Commission-ordered cap of \$10 million. At the lowest incentive percentage of 5%, FirstEnergy’s shared savings payment on this amount of net benefits would be \$5,689,813. Effectively, FirstEnergy seeks more than \$4 million in extra incentive payments based on what can only charitably be called “fuzzy math.”

Just as basic mathematics does not justify this shared savings claim, neither does the underlying purpose of the incentive payment mechanism. As noted above, the Commission has made clear that the tiered incentive structure for shared savings is meant to encourage a utility to do more than it is legally required to do in the year that the incentive payment is awarded. *In re Application of Duke Energy Ohio, Inc. for Recovery of Program Costs, Lost Distribution Revenue, and Performance Incentives*, Case No. 14-457-EL-RDR, Finding and Order (May 20, 2015) at 5. In this case, FirstEnergy did nothing extra to exceed the 2015 benchmark or maximize net benefits to customers beyond following through on commitments it had already made in 2014. As the Portfolio Status Report explains:

For the 2015 reporting year, the Incentive Mechanism calculation includes savings from only those programs suspended at the end of 2014. The calculation of shared savings includes the net benefits related to customer commitments made under these programs *prior to their suspension* for projects that were completed in 2015.

Portfolio Status Report, Appendix A at 1 (emphasis added). The Companies did not add any new programs in 2015 or improve any existing ones in order to produce additional savings for its

customers. Thus, there is no reason to reward FirstEnergy for its minimal action – continuing to process applications submitted under 2014 programs – with a windfall of \$4.3 million beyond the minimum tier of shared savings.

IV. CONCLUSION

Before approving FirstEnergy’s shared savings calculation, the Commission must require FirstEnergy to adequately document the savings claimed as eligible for that incentive mechanism. Additionally, FirstEnergy’s incentive payment should reflect the magnitude of its efforts to exceed its statutory savings target in a given year. With respect to the incentive tier that FirstEnergy may claim, it is impossible to quantitatively calculate the applicable incentive percentage for 2015 under the mechanism approved by the Commission in 2013. As a qualitative matter, FirstEnergy should not earn the highest level incentive percentage in 2015 simply for the minimal effort of following through on commitments made under its 2014 programs at the same time it discontinued the vast majority of its efficiency programs for the year. Therefore, the Commission should at most approve a shared savings payment at the lowest incentive percentage of 5%.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Comments were submitted on behalf of the Environmental Law & Policy Center was served by electronic mail, upon the following Parties of Record on June 13, 2016.

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Summary: Comments Comments of the Environmental Law & Policy Center electronically filed by Madeline Fleisher on behalf of Environmental Law and Policy Center