BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Approval of Their Energy Efficiency and Peak Demand Reduction Program Portfolio Plans for 2017 through 2019.	:	Case No. 16-743-EL-POR

INITIAL BRIEF
SUBMITTED ON BEHALF OF
THE PUBLIC UTILITIES COMMMISSION OF OHIO

I. Introduction

The Stipulation and Recommendation ("Stipulation") presenting the amended Energy Efficiency and Peak Demand Reduction Plans for 2017 through 2019 for The Ohio Edison Company ("OE"), The Cleveland Electric Illuminating Company ("CEI"), and The Toledo Edison Company ("TE") (collectively, "FirstEnergy" or the "Companies") fails the three-prong test established by the Public Utilities Commission of Ohio ("PUCO" or "the Commission") to evaluate a stipulation. The Stipulation, as a package, is not reasonable and should not be adopted because it does not benefit ratepayers and the public interest, and it violates an important regulatory principle or practice. The Stipulation lacks a provision controlling the costs of programs and shared savings. And the Stipulation allows the Companies to receive as much as $10 million in shared savings for 2017 before meeting their statutory compliance benchmarks. To satisfy the three-prong test, the Commission should modify the Stipulation to include an overall cost cap on the program costs and shared savings incurred through the Companies' plans and reject the 14% reduction to the shared savings trigger.

II. Statement of Facts

On April 15, 2016, FirstEnergy filed an application with the Commission for approval of their energy efficiency and peak demand reduction program portfolio plans for 2017 through 2019. In an attempt to settle the case, the Companies filed a Stipulation joined by several intervening parties, on December 9, 2016. The Ohio Consumers' Counsel, the Ohio Hospital Association, and the PUCO Staff ("Staff") did not join the Stipulation.

Along with the Stipulation, the Companies filed revised plans with a revised budget in response to an entry in FirstEnergy's Case No. 14-1297-EL-SSO ("ESP IV case"). In that entry, the Commission required that the Companies lower their budget to target their annual benchmarks, and not the savings above and beyond the benchmark that the Companies pledged to strive for in the ESP IV stipulation.[1] The entry also limited FirstEnergy's shared savings to $10 million.[2] The revised plans filed by the Companies re-projected the savings required for 2017 through 2019, and have a new annual budget of approximately $89.5 million.

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[1] *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, Fifth Entry on Rehearing at 147 (Oct. 12, 2016).

[2] *Id*.

An evidentiary hearing on the Stipulation began on January 23, 2017 and continued for several days.

III. Law and Discussion

Rule 4901-1-30, Ohio Adm. Code, authorizes parties to Commission proceedings to enter into stipulations. Although not binding upon the Commission, the terms of such agreements are to be accorded substantial weight.[3] The ultimate issue for the Commission's consideration is whether the agreement is reasonable and should be adopted. In considering the reasonableness of a stipulation, the Commission has used the following criteria;

(1) Is the settlement a product of serious bargaining among capable, knowledgeable parties?

(2) Does the settlement, as a package, benefit ratepayers and the public interest?

(3) Does the settlement package violate any important regulatory principle or practice?[4]

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3 *Consumers' Counsel v. Pub. Util. Comm*., 64 Ohio St, 3d 123 at 125 (1992), citing *Akron v. Pub. Util. Comm*., 55 Ohio St.2d 155 (1978).

4 *See, e.g., Cincinnati Gas & Electric Co.*, Case No. 91-410-EL-AIR (Order on Remand) (Apr. 14, 1994); *Ohio Edison Co*., Case No. 92-1463-GA-AIR, *et al*. (Opinion and Order) (Aug. 26, 1993); *Ohio Edison Co*., Case No. 89-1001-EL-AIR (Order on Remand) (Aug. 19, 1993); *The Cleveland Electric Illumination Co.*, Case No. 88-170-EL-AIR (Opinion and Order) (Jan. 31, 1989); and *Restatement of Accounts and Records (Zimmer Plant)*; Case No, 84-1187-EL-UNC (Opinion and Order) (Nov. 26, 1985).

The Ohio Supreme Court has endorsed the Commission's analysis using these criteria to resolve cases.[5] When the Commission reviews a contested stipulation, as is the case here, the Court has also been clear that the requirement of evidentiary support remains operative. While the Commission "may place substantial weight on the terms of a stipulation," it "must determine, from the evidence, what is just and reasonable."[6]

The Stipulation here does not meet the three-prong test because it does not benefit ratepayers and the public interest, and it violates an important regulatory principle or practice. By modifying the Stipulation as Staff suggests below, the Stipulation could be found to be reasonable under the three-prong test and could then be approved by the Commission.

A. The Stipulation should be modified to include a cost cap on program costs and shared savings.

1. The Stipulation does not benefit ratepayers and the public interest.

The Stipulation should be modified to include a cost cap on program costs and shared savings. As it pertains to costs to consumers, the Stipulation as filed does not benefit ratepayers and the public interest. The Companies' riders for their energy efficiency programs are among the largest riders on customers' bills. Staff witness Donlon testified that the energy efficiency rider is the fourth largest rider on the bills of

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[5] *Indus. Energy Consumers of Ohio Power Co. v. Pub. Util. Comm.*, 68 Ohio St. 3d 559 (1994), citing, *Consumers' Counsel, supra*, at 126.

[6] *Consumers' Counsel v. Pub. Util. Comm.*, 64 Ohio St.3d 123, 126, 592 N.E.2d 1370 (1992).

Toledo Edison and Cleveland Electric Illuminating's customers, and the fifth largest rider on the bills of Ohio Edison's customers.[7] A Commission-approved budget for the portfolio plans does not necessarily control costs. A budget does not preclude recovery of additional costs that the Companies may spend to meet and exceed the statutory mandate.[8] The cost cap would do just that.

2. Staff proposes that a cost cap of approximately $80.1 million be applied to FirstEnergy's energy efficiency program costs and shared savings.

The cost cap proposed by Staff is calculated for each company by taking the annual operating revenues as reported on the company's 2015 FERC Form 1, page 300, line 10 ("Line 10") and multiplying it by 3%. The annual operating revenues for 2015, along with the applicable 3% cap, are listed in the table below for each of the Companies.[9]

	FERC Form 1, Page 300, Line 10	3% Cost Cap
Ohio Edison Co.	$1,270,927,604	$38,127,828
The Cleveland Electric Illuminating Co.	$950,172,128	$28,505,164
The Toledo Edison Co.	$448,885,315	$13,466,559
Total Amounts	$2,669,985,047	$80,099,551

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7 Tr. Vol. II at 328.

8 *Id.*

9 Amended Testimony of Patrick Donlon, Case No. 16-743-EL-POR (Staff Ex. 1) (January 10, 2017) at 5.

When searching for an appropriate percentage and baseline, Staff concluded that 3% of Line 10 would provide the ratepayers with price security while allowing the Companies to meet and exceed their statutory mandates.[10] If the Companies find that they are unable to reasonably meet the statutory mandate within the cost cap, R.C. 4928.66(A)(2)(b) allows the Companies to request that the Commission amend the mandate. R.C. 4928.66(A)(2)(b) requires that the Companies provide "regulatory, economic, or technological reasons beyond [their] control" that hinder the Companies from "reasonably achiev[ing] the benchmarks." FirstEnergy has used this provision before[11] and therefore should be familiar with the process and requirements.

The Companies will continue to file an annual rider case for Staff to review the prudence of costs incurred. Any costs that exceed the cost cap will be disallowed from recovery, or refunded to customers if already collected.[12]

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10 *Id*. at 6.

11 *See In the Matter of the Application of Ohio Edison Company, the Cleveland Electric Illuminating Company, and The Toledo Edison Company to Amend their Energy Efficiency and Peak Demand Reduction Benchmarks,* Case No. 11-126-EL-EEC, *et al.*, Application (Jan. 11, 2011); *In the Matter of the Application of Ohio Edison Company, the Cleveland Electric Illuminating Company, and The Toledo Edison Company to Amend their Energy Efficiency Benchmarks,* Case No. 09-1004-EL-EEC, *et al.,* Application (Oct. 27, 2009).

12 *Id*. at 6-7.

3. A cost cap of $80.1 million is sufficient to allow FirstEnergy to meet and exceed the benchmarks for 2017 through 2019.

Given FirstEnergy's history of compliance, Staff strongly believes that the Companies are capable of meeting and exceeding its benchmarks within a 3% cost cap. On average, in 2012 through 2014, the Companies underspent their budgets by 21% and over-achieved their benchmarks by 50%.[13] Specifically, in 2014, the Companies spent $55 million and achieved 773,372 MWH in savings.[14] Beyond that, when the Companies suspended the majority of their energy efficiency programs in 2015 and only spent $16 million, they still achieved 657,632 MWH in savings.[15] The projected benchmark for 2017 is approximately 535,000 MWH, and "slightly lower than that" for 2018 and 2019.[16]

The Companies' projected benchmarks, however, do not take into account the customers who will choose to opt out of the energy efficiency rider.[17] In spite of the fact that the Companies have had two years of experience with opt out customers during 2015 and 2016, the Companies chose not to make use of that experience in projecting an anticipated level of opt outs starting in 2017. These opt outs affect the Companies' baseline for energy savings, which is used to calculate the benchmark. The baseline for

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13 Tr. Vol. II at 339.

14 Tr. Vol. V at 624.

15 Tr. Vol. V at 607.

16 Tr. Vol. I at 69.

17 Tr. Vol. I at 24.

energy savings is "the average of the total kilowatt hours the electric distribution utility sold in the preceding three calendar years."[18] R.C. 4928.66(A)(2)(a)(ii) requires the Companies to reduce the baseline for customers that opt out of the portfolio plan. In order to calculate the benchmarks for 2017 through 2019, the baselines must be multiplied by 1%.[19] The lower the baseline, the lower the benchmark the Companies must achieve.[20] By failing to include opt outs in their projected benchmarks, the projected savings requirements and the projected budgets put forth by FirstEnergy are overstated.

The overall costs of the portfolio programs can also be offset by the revenues the Companies receive from PJM for bidding energy efficiency into the RPM auction.[21] The PJM revenues are credited back to the customers through the rider, thus reducing the cost of the programs paid by customers. Given the Companies prior spending and overachievement of its benchmark, along with the inclusion of opt outs and offsets from PJM revenues, a cap of $80.1 million should comfortably allow the Companies to meet the statutory benchmarks.

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18 R.C. 4928.66(A)(2)(a).

19 R.C. 4928.66(A)(1)(a).

20 *Id*.

21 Staff Ex. 1 at 7.

4. The inclusion of a cost cap provision in the Stipulation would benefit ratepayers and the public interest.

Modifying the Stipulation to include a cost cap would benefit ratepayers and the public interest. A cost cap "requires the Companies to pick the most cost effective and efficient means of achieving their benchmarks, thus avoiding unnecessary charges to customers."[22] Staff believes that energy efficiency is beneficial and supports such measures and programs.[23] But given the escalating costs and the large size of the Companies' energy efficiency riders on residential customers' bills, Staff also believes that a mechanism for controlling costs will provide some price assurances to customers while also supporting energy efficiency.[24]

B. The proposed Shared Savings Trigger Reduction for 2017 fails to benefit ratepayers and the public interest, and violates an important regulatory principle or practice.

Among the miscellaneous provisions in the Stipulation, the Signatory Parties propose a term that changes the eligibility trigger for shared savings in 2017. The provision reads as follows:

> In recognition of the delay in portfolio implementation resulting from continuances to the procedural schedule, the Signatory Parties agree that each Company's shared savings trigger for 2017 shall be reduced by 14% ("Amended 2017 Shared Savings Triggers"). The Companies' shared savings incentive tiers, compliance percentages,

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22 Tr. Vol. I at 7.

23 Staff Ex. 1 at 5.

24 *Id.*

and incentive percentages shall remain the same as in Article 7.0 of the Proposed EE/PDR Plan and be calculated utilizing the Amended 2017 Shared Savings Triggers.[25]

According to the amended plan, the shared savings incentive tiers, compliance percentages, and incentive percentages in the Shared Savings Mechanism Table do not change for 2017.[26] Below is the Table depicted in the amended plan: [27]

Incentive Tier	Compliance Percentage	Incentive Percentage
1	<= 100%	0.0%
2	>100-105%	5.0%
3	>105-110%	7.5%
4	>110-115%	10.0%

25 Stipulation and Recommendation, Case No. 16-0743-EL-POR (Joint Ex. 1) (December 8, 2016) at 8-9.

26 Joint Ex. 1 at Exhibit B, p. 106.

27 Joint Ex. 1 at Exhibit B, p. 106.

5	>115%	13.0%

However, what the amended plan does change is the energy efficiency savings required to trigger the shared savings mechanism. FirstEnergy represents in the amended plan that the mechanism would be triggered only if the Companies exceed both their annual and cumulative energy savings targets as set forth in R.C. 4928.66(A)(1)(a) in any given year.[28] FirstEnergy also represents that the shared savings mechanism will be calculated annually on an individual EDU basis.[29] The impact of the proposed 14% reduction is not apparent until you apply the Table to the reduced savings needed to trigger the incentive mechanism. It then becomes clear that the Companies in 2017 are eligible for the maximum incentive percentage in the shared savings mechanism before exceeding the 1% statutory target for energy efficiency savings.

Under R.C. 4928.66 (A)(1)(a), FirstEnergy must implement energy efficiency programs that achieve energy savings equivalent to at least 1% of the energy efficiency baseline. In the amended plan, the energy efficiency baseline for each of the Companies for 2017 is:

<u>CEI</u> <u>OE</u> <u>TE</u> <u>Total</u>

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28 *Id*. at Exhibit B, p. 105.

29 *Id*.

2017	18,845 GWh	24,123 GWh	10,555 GWh	53,523 GWh[30]

Multiplying the baseline for each of the Companies by 1%, the resulting benchmarks for the Companies are:

	CEI	OE	TE	Total
2017	188.45 GWh	241.23 GWh	105.55 GWh	535.23 GWh[31]

To calculate the proposed shared savings trigger for 2017, FirstEnergy would take the 1% statutory benchmark requirement listed above and reduce that number by 14%. This leaves the Companies with the following reduced shared savings triggers:

	CEI	OE	TE	Total
2017	162.07 GWh	207.46 GWh	90.77 GWh	460.3 GWh

As confirmed by FirstEnergy witness Eren Demiray during cross examination, Ohio Edison Company's baseline in 2017 is 24,123 GWh.[32] A 1% annual target as utilized in the Shared Savings Mechanism translates into 241.23 GWh ("Annual Target").[33]

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30 Amended Direct Testimony of Denise J. Mullins on Behalf of Ohio Edison Company, The Cleveland Electric Illuminating Company, The Toledo Edison Company, Case No. 16-0743-EL-POR (Company Ex. 1) (December 8, 2016) at Exhibit DJM-A2.

31 Tr. Vol. I at 16, 22-24.

32 Tr. Vol. I at 148-151; *see also Amended Direct Testimony of Eren G. Demiray on Behalf of Ohio Edison Company, The Cleveland Electric Illuminating Company, The Toledo Edison Company*, Case No. 16-0743-EL-POR (December 8, 2016), at 6.

33 *Id.*

Applying a 14% reduction to the Annual Target, the amended shared savings trigger being proposed in the Stipulation would be reduced to 207.46 GWh.[34]

1. The Proposed shared savings Trigger Reduction fails to benefit ratepayers and the public interest.

If Ohio Edison exceeds 207.46 GWh in 2017 by 115% to become eligible for the maximum incentive of 13%, it would achieve 238.58 GWh in energy efficiency savings.[35] In comparison, 238.58 GWh is lower than the 241.23 GWh that Ohio Edison must achieve to satisfy its 1% statutory benchmark.[36] Shared savings is a Commission-created incentive mechanism to encourage the Companies to exceed the state-mandated level of energy efficiency savings in a cost effective manner.[37] By reducing the trigger for shared savings by 14%, the Companies will not be incentivized to exceed the state mandated level of savings.[38] Under the Stipulation, by achieving only 86% of their mandate, the Companies will be eligible to receive $10 million in shared savings before achieving their 1% statutory mandate. [39]

In Case No. 09-1947-EL-POR, the Commission stated that it "believes that incentive mechanisms, including shared savings, are an effective means of aligning the

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34 *Id.*

35 Tr. Vol. I at 151.

36 Tr. Vol. 1 at 150-151.

37 Staff Ex. 1at 8.

38 *Id.*

39 *Id.*

utilities' and consumers' interests in implementing energy efficiency programs."[40] The reduced shared savings trigger in 2017 fails to make that alignment because it favors FirstEnergy's pecuniary interests over the interests of ratepayers. By drastically reducing the shared savings trigger for 2017, the Stipulation distorts the purpose of the incentive mechanism; it no longer takes consumers' interests into account and only rewards the Companies for subpar performance on its energy efficiency programs.[41]

The reduced trigger does not benefit ratepayers and the public interest. After grossing up the $10 million for taxes, customers could be on the hook for up to approximately $15.6 million for the shared savings incentive.[42] Ratepayers will be harmed if required to pay the Companies $15.6 million in shared savings incentives and taxes when ratepayers will not receive the benefit of any additional savings beyond the statutory mandate. Ratepayers should not be required to pay FirstEnergy a financial incentive of $10 million for the Companies to meet their statutory benchmark, which is already a requirement under the law. An incentive already exists for FirstEnergy to meet or exceed their benchmarks under R.C. 4928.66(C), a provision that could subject them to a penalty if they failed to comply with the benchmark requirements.

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40 *In the Matter of the Application of the Cleveland Electric Illuminating Company, Ohio Edison 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 Recovery Mechanism*, Case No. 09-1947-EL-POR, Opinion and Order at 15 (March 23, 2011).

41 Staff Ex. 1 at 9.

42 Tr. Vol. I at 145.

2. The Proposed Trigger Reduction Violates an Important Regulatory Principal or Practice.

The proposed trigger reduction in the Stipulation violates the Commission's precedent on the shared savings incentive by allowing the Companies to collect the incentive without meeting and exceeding the mandate.[43] In Case No. 14-457-EL-RDR, the Commission noted that the "tiered incentive structure is designed to motivate and reward the utility for exceeding energy efficiency standards on an annual basis."[44] The proposed reduction eliminates the incentive for the Companies to exceed their targeted benchmarks and achieve more savings.

The shared savings cap of $10 million would not change based on the suggested reduction of the shared savings trigger.[45] Under the amended plan, the Companies would be eligible to receive the full $10 million in shared savings and they would not have to achieve as much energy savings to do so.[46]

The Companies allege that the reduced trigger is warranted because of the regulatory delay in having their energy efficiency portfolio plans approved by the

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43 *Id.*

44 *In the Matter of the Application of Duke Energy Ohio, Inc. for Recovery of Program Costs, Lost Distribution Revenue, and Performance Incentives Related to its Energy Efficiency and Demand Response Programs*, Case No. 14-457-EL-RDR, Finding and Order at 5, (May 20, 2015).

45 Staff Ex. 1 at 10.

46 *Id.*

Commission.[47] The Companies here, like the other three Electric Distribution Utilities in Ohio, may elect to wait to implement some or all of their programs until after Commission approval.[48] Each company has that choice.[49] Other companies have implemented or continued to run their programs while not having an order.[50] FirstEnergy chose to suspend their energy efficiency programs under S.B. 310 for two years (2015-2016) and now FirstEnergy is waiting to implement their programs in this case until after a Commission order is issued.[51] That is a business decision made by FirstEnergy. Now FirstEnergy is seeking to burden its ratepayers by requiring them to pay for that business decision through a reduced shared savings trigger.

Any delay in FirstEnergy's portfolio plan implementation does not provide good cause to change or alter established regulatory principle and practice involving the Commission's financial incentive for utilities to achieve energy efficiency savings beyond the statutory benchmarks. AEP, DP&L, and Duke are similarly situated, but have never proposed such a drastic and inequitable change to this mechanism. The Commission should decline the invitation to treat FirstEnergy any differently than the other similarly situated utilities implementing their portfolio plans.

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[47] Supplemental Direct Testimony of Edward C. Miller, Case No. 16-743-EL-POR (Companies Ex. 4) (Dec. 9, 2016) at 18.

[48] Tr. Vol. III at 438.

[49] *Id*.

[50] *Id*.

[51] *Id*. at 438-439.

IV. Conclusion

For the reasons stated above, the Commission should modify the Stipulation filed by the Companies to include a cost cap and to eliminate the reduction proposed to the shared savings trigger. With those modifications, the Stipulation would satisfy the three-part test and should be approved.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the foregoing **Initial Brief** was served by regular U.S. mail email postage prepaid and/or electronic email, this 21st day of February 2017, on the parties listed below.

Respectfully submitted,

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