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

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

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I. INTRODUCTION

Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company (collectively, "FirstEnergy" or "the Companies") inappropriately make several conclusions not supported by any evidence found in the record regarding settlement discussions surrounding the cost cap proposed by the Staff of the Public Utilities Commission of Ohio ("Staff). The record contains no evidence that the signatory parties here "considered and rejected Staff's Cost Cap Proposal."[1] There is also no evidence on the record in this case that explains why the signatory parties signed

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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 Approval of their Energy Efficiency and Peak Demand Reduction Program Portfolio Plans for 2017 through 2019*, Case No. 16-743-EL-POR, Post-Hearing Brief of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company in Support of the Stipulation and Recommendation at 58 (February 21, 2017) (hereinafter "FirstEnergy Post-Hearing Brief").

the stipulation. FirstEnergy boldly makes these false assertions without citing to the record. What *is* on the record is that the environmental intervenors were the only signatory parties, other than FirstEnergy, to actively oppose the cost cap at the hearing. No other party has made any remarks on the record concerning the cost cap. What is also on the record is that all but one of the intervenors in this case were signatory parties of the global settlement in AEP's current portfolio plan case, which contained a cost cap.[2]

In this case, Staff has put forth a thoughtful and balanced proposal that protects FirstEnergy's customers from increasing and unnecessary costs and promotes energy efficiency. Staff's cost cap is the product of a careful analysis of the Companies' current budget and history of compliance, the increasing costs of energy efficiency measures, and different methodologies to lower the costs of FirstEnergy's 2017-2019 portfolio plan. While the Companies, environmental intervenors, and OPAE would prefer for Staff to have taken a different path and reached a different conclusion, that does not negate the fact that Staff performed a proper and full analysis that led to a reasonable solution. In this brief, Staff clarifies several flawed arguments put forth by the Companies and the environmental intervenors.

[2] *In the Matter of the Application of Ohio Power Company for Approval of its Energy Efficiency and Peak Demand Reduction Program Portfolio Plan for 2017 through 2020*, Case No. 16-574-EL-POR, Opinion and Order at 4 (January 18, 2017).

II. DISCUSSION

A. The Commission has authority to impose a cost cap on the Companies' 2017-2019 portfolio plan.

The fact that the General Assembly did not specifically require a cost cap for energy efficiency and peak demand reduction programs in R.C. 4928.66 does not mean that the Commission has no power to impose a cost cap on those programs. In fact, R.C. 4928.66 does not contain any language prohibiting the Commission from setting a cost cap._ The Court in *Kazmaier Supermarket, Inc. v. Toledo Edison Co.* stated:

> The General Assembly has created a broad and comprehensive statutory scheme for regulating the business activities of public utilities. R.C. Title 49 sets forth a detailed statutory framework for the regulation of utility service and the fixation of rates charged by public utilities to their customers. As part of that scheme, the legislature created the Public Utilities Commission and empowered it with broad authority to administer and enforce the provisions of Title 49.[3]

The Commission has broad authority to regulate a utility's portfolio plan under R.C. 4928.66, including its costs and bill impacts to customers. If the General Assembly intended to specifically prohibit the Commission from imposing a cost cap, it would have stated so in the statute. Instead, the General Assembly chose to leave that issue to the Commission's discretion.

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[3] 61 Ohio St.3d 147, 150, 573 N.E. 2d 655, 658 (1991); *See, also,* State ex rel. Columbus S. Power Company v. Fais, 117 Ohio St.3d 340, 343, 2008- Ohio-849, 884 N.E.2d 1, 4.

B. Staff's proposed cost cap is enforceable.

In its Post-Hearing Brief, FirstEnergy attempts to characterize Staff's cost cap proposal as a "rule" under R.C. 111.15. This bizarre approach fails because the cost cap proposal does not meet the definition of "rule" in R.C. 111.15. And any cases cited by FirstEnergy are distinguishable from the present case.

Staff's cost cap proposal does not meet the definition of a "rule" under R.C. 111.15, and therefore does not require the Commission to engage the rulemaking process in order to impose the cap. A "rule" is defined in the statute as "any rule, regulation, bylaw, or standard having a general and uniform operation adopted by an agency under the authority of the laws governing the agency."[4] First, there is no new legal standard being imposed here. The Commission is authorized to regulate rates set by the Companies.[5] In fact, the Commission has regulated the amount that the Companies have collected from customers for charges incurred through their previous energy efficiency portfolio plans.[6] By imposing a cost cap in this case, the Commission would be doing the same. The Commission would only be changing the manner in which it regulates the Companies rates; rather than setting a suggested budget and only approving costs

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4 R.C. 111.15(A)(1).

5 *See* Ohio Adm.Code 4901:1-39-07.

6 *See, e.g., 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 Plans for 2013 through 2015*, Case No. 12-2190-EL-POR, Opinion and Order at 43-44 (March 20, 2013).

incurred after the fact, the Commission would first be setting a reasonable cap beyond which the Companies would not be allowed to recover program costs and shared savings.

Despite the argument put forth, FirstEnergy also does not believe that imposing a cost cap would amount to a new legal standard. At one point in their brief, the Companies argue that a cost cap is unnecessary because the budget would operate as a cap.[7] If the Companies believe that a budget and a cost cap operate similarly, it seems strange that they would also argue that implementing a cost cap would be imposing a new legal standard on the Companies.

The cost cap is also not a "rule" under R.C. 111.15 because it does not have "general and uniform operation." This case stands alone. The Commission's findings in this case do not have general application to the other EDUs in Ohio. The ultimate findings in this case, including whether to impose a cost cap, also do not control any future portfolio plans to be put forth by the Companies. Staff's proposed cost cap in this case deals only with FirstEnergy's current three-year portfolio plan.[8] Moreover, as the Companies were quick to point out, the cost cap is not uniform across all EDUs. The AEP and DP&L stipulations set the cost cap at 4%, where Staff proposed a cost cap at 3% for FirstEnergy. It is of no consequence that Staff put forth similar (but not uniform) proposals for other EDUs. Staff generally seeks to treat the different regulated entities

7 FiestEnergy Post-Hearing Brief at 69-70.

8 Tr. Vol. II at 346-347.

similarly for the sake of fairness, ease, and transparency.[9] But similar treatment does not meet the standard set by R.C. 111.15. The new "rule" must be uniform. Here, it obviously is not.

The Companies cite several cases that are easily distinguishable from the present case. In both *Fairfield Cty. Bd. of Comm'rs. v. Nally* and *Ohio Nurses Ass'n. v. State Bd. of Nursing Educ. & Nursing Registration*, the Court was dealing with general and uniform rules put out by a state agency that imposed new legal standards generally across their respective industries. In *Fairfield*, the Ohio EPA set a new total maximum daily load (TMDL) that applied to "all current and future dischargers in the Big Walnut Creek watershed."[10] The new standard applied to a "large segment of the public rather than a narrow group and is generally and uniformly applicable."[11] The Court stated that Ohio EPA's action required the rulemaking process to "ensure[] that all stakeholders in the watershed have an opportunity to express their view on the wisdom of the proposal and to contest its legality if they so desire."[12] In *Ohio Nurses Ass'n.*, the agency published a position paper that expanded the scope of practice for licensed practical nurses (LPNs).[13]

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9 Tr. Vol. III at 398.

10 *Fairfield Cty. Bd. of Comm'rs. v. Nally*, 2015-Ohio-991, 143 Ohio St.3d 93, 34 N.E.3d 873, ¶30.

11 *Id.*

12 *Id.*

13 *Ohio Nurses Ass'n. v. State Bd. of Nursing Educ. & Nursing Registration*, 44 Ohio St.3d 73, 75, 540 N.E.2d 1354 (1989).

It applied generally to all LPNs in Ohio, allowing them to perform certain procedures that they were not previously licensed to perform.[14] The Court reasoned that, by foregoing the rulemaking process, "the board has effectively denied members of the nursing profession, as well as other interested members of the public, a full and fair analysis of the impact and validity of the new standards."[15]

Fairfield and *Ohio Nurses Ass'n.* are distinguishable from this case because the Commission's holding in this case will only apply to FirstEnergy, "a narrow group." The cost cap will not be applied generally to any other companies. Those cases also do not apply here because the Companies have had the opportunity to litigate this issue through a full hearing and by filing testimony and briefs. FirstEnergy has expressed its views regarding this proposal and is currently contesting its legality; it has performed an "analysis of the impact and validity of the cost cap." The Companies have had sufficient process to debate the issue.

FirstEnergy's argument that the cost cap is unenforceable is illogical and leads to absurd results. If FirstEnergy's argument held up, the Commission would have to make a great majority of its decisions through the rulemaking process. Not only is that administratively burdensome, it would delay policy implementation and rate regulation significantly. Surely that is not what the General Assembly has in mind for public utility

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14 *Id.*

15 *Id.* at 76.

regulation. Regardless, the cost cap does not fit the definition of a "rule" under R.C. 111.15. The Commission has the power to approve Staff's proposal and impose a cost cap on FirstEnergy's portfolio plan in this case.

C. Staff's proposed cost cap is necessary.

Energy efficiency costs are escalating.[16] 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 Toledo Edison and Cleveland Electric Illuminating's customers, and the fifth largest rider on the bills of Ohio Edison's customers.[17] Staff Witness Donlon did agree that these riders will decrease for 2015 and 2016, but he went further to explain that the reason for that decrease is because FirstEnergy discontinued its programs in 2015 under Senate Bill 310.[18] With a new plan in place implementing new programs, that decrease is not likely to be the case going forward. A cost cap is necessary to control the costs paid under these riders. A Commission-approved budget for the portfolio plans does not necessarily control costs. A budget is different from a cap.[19] A budget does not preclude recovery of

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16 Staff Ex. 1 at 5.

17 Tr. Vol. II at 328.

18 Tr. Vol. II at 328.

19 *See* Tr. Vol. II at 301, 366.

additional costs that the Companies may spend to meet and exceed the statutory mandate.[20] The cost cap would do just that.

FirstEnergy argues that Staff's proposed cost cap essentially imposes a "double cap" on the Companies' shared savings incentive, rendering the shared savings increase in the ESP IV case meaningless.[21] Staff's proposal here does not breach the stipulation in the ESP IV case. The Companies' shared savings incentive is currently capped at $10 million after tax.[22] In the ESP IV case, the Commission has stayed the planned increase in the shared savings cap to $25 million after tax until FirstEnergy is no longer collecting rider DMR.[23] Rider DMR is expected to have a life of three years and begin January 1, 2017.[24] This time period overlaps exactly with the Companies proposed 2017-2019 portfolio plan.[25] The increase in the shared savings cap is irrelevant to this case as it will not occur until after this plan has expired.

FirstEnergy also erroneously argues that the cost cap is unnecessary because of the bill mitigation mechanism established in the ESP IV case. FirstEnergy explains that an

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20 *Id.*

21 FirstEnergy Post-Hearing Brief at 71.

22 *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).

23 *Id.*

24 Tr. Vol. I at 144-45.

25 *Id.*

average customer will not see an increase to their total bill for two years. While that may be true, the Companies neglected to explain that the lost revenue from the bill mitigation mechanism will be deferred by the Companies and will be eligible for recovery from customers eventually.[26]

FirstEnergy makes its argument that a cost cap is unnecessary by mischaracterizing the evidence. The record here shows that the Companies' riders for their energy efficiency programs are among the largest riders on customers' bills. That is a fact. With costs increasing, a cost cap on program costs and shared savings is necessary to control costs and protect customers.

D. Staff's proposed cost cap is fair.

Staff reached a stipulation in AEP's and DP&L's portfolio cases.[27] The stipulations each contain a provision that imposes a 4% cap on program costs and shared savings.[28] That cap was bargained for in each case. A stipulated agreement with several provisions, including a cost cap, was reached through concessions made by Staff and parties.[29] Although it did so improperly, FirstEnergy stated in its Post-Hearing Brief that it rejected Staff's offer to negotiate.[30] Staff treated FirstEnergy, DP&L, and AEP

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26 Tr. Vol. III at 389.

27 Tr. Vol. III at 399-400.

28 *Id.*

29 *Id.*

30 FirstEnergy Post-Hearing Brief at 58-59.

consistently in offering the potential for settlement. Furthermore, this idea of consistency arose as a justification for Staff's decision to base the cost cap on Line 10.[31] Staff never vowed to propose the exact same cap to each EDU.

A cost cap fairly allows FirstEnergy the opportunity to meet its benchmark and earn shared savings.[32] Based on FirstEnergy's history of compliance, the Companies are likely to under-spend their budget and over-comply with the mandate, leaving sufficient room within the cap to earn shared savings. On average, in 2012 through 2014, the Companies under-spent their budgets by 21% and over-achieved their benchmarks by 50%.[33] Specifically, in 2014, the Companies spent $55 million and achieved 773,372 MWH in savings.[34] 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.[35] The projected benchmark for 2017 is approximately 535,000 MWH, and "slightly lower than that" for 2018 and 2019.[36]

FirstEnergy's history of compliance shows that it has consistently under-spent its budget and over-achieved its benchmark. That fact speaks to FirstEnergy's management

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31 Staff Ex. 1 at 4.

32 *Id.* at 5.

33 Tr. Vol. II at 339.

34 Tr. Vol. V at 624.

35 Tr. Vol. V at 607.

36 Tr. Vol. I at 69.

of its portfolio plan. Despite the changes that have occurred in the energy market, there is no reason to expect that those changes would somehow change how FirstEnergy manages the budget and portfolio it has already set. In addition, Companies Witness Miller testified that the Companies always factor in a cushion into the projections for energy savings.[37] This admission helps explain how the Companies have consistently over-achieved their benchmarks by an average of 50% in 2012-2014.

FirstEnergy makes another nonsensical argument regarding the statutory benchmark amendment provided in R.C. 4928.66.[38] The statute states that the Commission may amend an EDU's benchmark if it finds it necessary to do so "because the utility cannot reasonably achieve the benchmarks due to regulatory, economic, or technological reasons beyond its control."[39] Although the statute does not specifically state "cost cap" as a reason for amending the benchmark, that does not preclude one of the three reasons listed in the statute from applying. If an EDU is unable to achieve its benchmark within a Commission-ordered cost cap, the Commission may grant an amended benchmark for regulatory or technological reasons.[40]

If FirstEnergy applies for an amended benchmark, it should forego shared savings for that year. This position is supported by Commission policy. The Commission has

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37 Tr. Vol. I at 71.

38 *See* FirstEnergy Post-Hearing Brief at 85.

39 R.C. 4928.66(A)(2)(b).

40 Tr. Vol. II at 358-59.

stated that "the tiered incentive structure is designed to motivate and reward the utility for exceeding energy efficiency standards on an annual basis."[41] If FirstEnergy cannot meet and exceed its established benchmark, it should not be eligible to receive a shared savings incentive under an amended benchmark.

FirstEnergy pretends not to understand the process for a benchmark amendment under R.C. 4928.66(A)(2)(b). However, FirstEnergy has used this provision before.[42] It should not feign ignorance regarding the process or timing of applying for an amended benchmark. The Companies are responsible for deciding how they should handle their portfolio programs and budgets. Staff will not take on that management role.

E. FirstEnergy's proposal to lower the shared savings trigger must be denied.

FirstEnergy argues that the Commission should reduce the shared savings trigger because of a delay in the procedural schedule that FirstEnergy alleges was entirely Staff's doing.[43] That assertion contradicts the evidence in this case, which shows that the

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41 *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).

42 *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).

43 FirstEnergy Post-Hearing Brief at 48.

Companies also had a hand in the delay when they filed a motion to continue the procedural schedule on November 15, 2016.[44] That is not the only gross mischaracterization of the evidence that the Companies make regarding the procedural delay. There is no evidence on the record that that no party, including FirstEnergy, did not support the motions filed by Staff to continue the procedural schedule. The evidence here only shows that FirstEnergy never opposed a continuance requested by Staff.[45] There is also no evidence on the record concerning the communications between the parties regarding the new January hearing date.[46] And there is no evidence on the record suggesting why the intervening parties agreed, during settlement discussions, with the reduced shared savings trigger.[47] FirstEnergy's remarks that have no support in the record should be disregarded when considering the reduced shared savings trigger provision.

The fundamental flaw in FirstEnergy's argument that they should receive shared savings for underperformance is that it assumes that FirstEnergy is *entitled* to the shared savings incentive. Shared savings is not an entitlement granted to the Companies simply for implementing an energy efficiency portfolio. It is something that they must earn by frugally managing their portfolio plan, controlling costs that are imposed on their ratepayers, and maximizing the energy efficiency gains achieved through their plan.

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[44] *See* OCC Ex. 3.

[45] *Id.*; Tr. Vol. I at 90-92.

[46] *See* FirstEnergy Post-Hearing Brief at 48-49.

[47] *See id.* at 49.

Shared savings is not granted by statute; it is a creation of the Commission. The Commission originally approved shared savings because it believed "that incentive mechanisms, including shared savings, are an effective means of aligning the utilities' and consumers' interests in implementing energy efficiency programs."[48] Shared savings is intended "to motivate and reward the utility for exceeding energy efficiency standards on an annuals basis."[49] If the Companies are allowed to receive up to $10 million after tax in shared savings before even meeting the benchmark, they will have no incentive to exceed the benchmark. Moreover, the Companies' proposal completely disregards the consumers' interests in additional energy savings. The Companies are already incentivized to meet their benchmark; they will be subject to a statutory penalty if they do not meet the benchmark.[50] It is unfair to allow the Companies to benefit from shared savings when consumers are not benefitting from additional savings. No argument put forth by the Companies can justify that absurd result.

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[48] *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).

[49] *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).

[50] R.C. 4928.66(C).

III. CONCLUSION

Staff's cost cap proposal is a thoughtful resolution to the issue of increasing energy efficiency costs. If approved by the Commission, Staff's proposed cost cap may require that the Companies make some changes to their portfolio plan. Changes that seek to maximize energy savings while taking into account the charges to consumers can only strengthen the Companies' energy efficiency portfolio. As Staff has stated previously, it believes that FirstEnergy will be able to meet and exceed its benchmark under the 3% cap. But how the Companies manage their programs to achieve that is left to the Companies.

The Commission should modify the Stipulation to include a cost cap and eliminate the reduced shared savings trigger.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the foregoing **Reply Brief** was served by regular U.S. mail email postage prepaid and/or electronic email, this 3rd day of March 2017, on the parties listed below.

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