IN THE SUPREME COURT OF OHIO

OHIO EDISON COMPANY, THE CLEVELAND ELECTRIC ILLUMINATING COMPANY, AND THE TOLEDO EDISON COMPANY Appellants, v. PUBLIC UTILITIES COMMISSION OF OHIO Appellee.	)	CASE NO.________________ Appeal from the Public Utilities Commission of Ohio Public Utilities Commission of Ohio Case No. 16-0743-EL-POR *In the Matter of the Application of the 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.*

NOTICE OF APPEAL OF APPELLANTS OHIO EDISON COMPANY, THE CLEVELAND ELECTRIC ILLUMINATING COMPANY, AND THE TOLEDO EDISON COMPANY

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Pursuant to Sections 4903.11 and 4903.13 of the Ohio Revised Code, and Rules 4901-1-02(A) and 4901-1-36 of the Ohio Administrative Code, Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company (collectively, "the Companies"), hereby give notice of their appeal to this Court and to Appellee, the Public Utilities Commission of Ohio ("Commission"). The Companies are appealing from the Commission's Opinion and Order, dated November 21, 2017, and Entry on Rehearing, dated January 10, 2018 (attached hereto as Exhibits A and B, respectively). The case appealed, from Commission Case captioned *In the Matter of the Application of the 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,* No. 16-0743-EL-POR, involved the Commission's review and approval of the Companies' Energy Efficiency/Peak Demand Reduction ("EE/PDR") Program Portfolio Plan for 2017 through 2019 ("Plan").

The Companies were, and are, a party of record before the Commission in Case No. 16-0743-EL-POR. On December 21, 2017, the Companies timely filed an application for rehearing of the Commission's Opinion and Order, dated November 21, 2017 ("Application for Rehearing"). Therein, the Companies set forth all of the grounds that they now urge and rely upon for reversal, vacation, or modification of the orders on appeal.

The Companies contend that the Commission's Opinion and Order, dated November 21, 2017 (Exhibit A), and Entry on Rehearing, dated January 10, 2018 (Exhibit B), in the proceeding below are unlawful and unreasonable in the following respects as set forth in the Companies' Application for Rehearing:

1. The Opinion and Order and Entry on Rehearing are unlawful because the Commission lacks the statutory authority to adopt and implement a cost cap on the Companies' recovery of EE/PDR program costs and shared savings.[1]

2. The Opinion and Order and Entry on Rehearing are unlawful because, even if the Commission did have the statutory authority to adopt and implement a cost cap (which it does not), the Commission adopted a cost cap on the Companies' recovery of EE/PDR program costs and shared savings that was not subjected to Ohio's mandatory rule-making procedures.[2]

3. The Opinion and Order and Entry on Rehearing are unreasonable because there was no basis in the evidentiary record to support the arbitrary cost cap adopted in the Opinion and Order, which is inherently unfair in light of the statutory mandate to meet EE/PDR benchmarks and leads to significant inequities among Ohio's electric distribution utilities.[3]

Wherefore, the Companies respectfully submit that the Commission's Opinion and Order, dated November 21, 2017 (Exhibit A), and Entry on Rehearing, dated January 10, 2018 (Exhibit B), in the proceeding below are unlawful and unreasonable. The case should be reversed and remanded to the Commission with instructions to eliminate the cost cap on the Companies' recovery of EE/PDR program costs and shared savings.

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[1] *See* Application for Rehearing at 1; *id.* at Memorandum in Support at 2–4.
[2] *See* Application for Rehearing at 1; *id.* at Memorandum in Support at 5–10.
[3] *See* Application for Rehearing at 1; *id.* at Memorandum in Support at 10–14.

March 12, 2018

Respectfully submitted,

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CERTIFICATE OF FILING

I hereby certify that the foregoing Notice of Appeal of Appellants Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company, has been filed with the docketing division of the Public Utilities Commission of Ohio and served in accordance with R.C. 4903.13 and Rules 4901-1-02(A) and 4901-1-36 of the Ohio Administrative Code.

An Attorney for Appellants Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Notice of Appeal of Appellants Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company, was served by electronic mail on the 12th day of March, 2018, upon all parties to the proceeding before the Commission as well as counsel for Appellee:

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EXHIBIT A

THE PUBLIC UTILITIES COMMISSION OF OHIO

IN THE MATTER OF THE APPLICATION OF THE 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

OPINION AND ORDER

Entered in the Journal on November 21, 2017

I. SUMMARY

{¶ 1} The Commission approves the FirstEnergy Companies' Energy Efficiency and Peak Demand Reduction Program Portfolio Plan for 2017 through 2019, and to continue thereafter, as modified by the Stipulation and subject to a cost cap on the Companies' recovery of program costs and shared savings not to exceed four percent of the Company's total sales to ultimate customers in 2015.

II. APPLICABLE LAW

{¶ 2} Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company (collectively, FirstEnergy or the Companies) are electric distribution utilities as defined in R.C. 4928.01(A)(6) and public utilities as defined in R.C. 4905.02 and, as such, are subject to the energy efficiency and peak demand reduction (EE/PDR) requirements under R.C. 4928.64 and 4928.66.

{¶ 3} Ohio Adm.Code Chapter 4901:1-39 provides rules for the Commission's review of each electric utility's EE/PDR program portfolio plan (Portfolio Plan) that consists of cost-effective programs to encourage innovation and market access for all customer classes and achieve the statutory benchmarks for peak-demand reduction, and meet or exceed the statutory benchmarks for energy efficiency.

{¶ 4} On May 28, 2014, the General Assembly passed 2014 Sub S.B. No. 310 (S.B. 310), which became effective on September 12, 2014, and amended provisions in R.C.

Chapter 4928 to freeze the EE/PDR mandates at 2014 levels. S.B. 310 also gave each electric utility the option of extending its then-current Portfolio Plan through 2016, or amending its Portfolio Plan to adopt the frozen standard levels. The freezes enacted by S.B. 310 were lifted as of January 1, 2017, and the benchmarks under R.C. 4928.66 again apply.

{¶ 5} FirstEnergy was required to file an update to its Portfolio Plans by April 15, 2016, pursuant to Ohio Adm.Code 4901:1-39-04(A).

III. Procedural History

{¶ 6} FirstEnergy's Portfolio Plans were last approved for the January 1, 2015 through December 31, 2016 period in *In re Ohio Edison Co., et al., Energy Efficiency and Peak Demand Reduction Program Portfolio Plans for 2013 to 2015*, Case No. 12-2190-EL-POR, et al. (*FirstEnergy 2013-2015 POR*) Finding and Order (Nov. 20, 2014), which approved the Companies' application to amend their plans under the frozen EE/PDR mandated levels of S.B. 310.

{¶ 7} On March 31, 2016, the Commission issued its Opinion and Order in *In re Ohio Edison Co., et al., Application to Provide a Standard Service Offer in the Form of an Electric Security Plan*, Case No. 14-1297-EL-SSO (*FirstEnergy ESP IV*), approving the December 31, 2015 Third Supplemental Stipulation (Third ESP IV Stipulation), under which FirstEnergy agreed to reactivate all of its EE/PDR programs that had been approved in *FirstEnergy 2013-2015 POR*, but which had been suspended after FirstEnergy opted to amend its Portfolio Plans in light of the frozen EE/PDR mandates under S.B. 310. In addition, the Third ESP IV Stipulation required FirstEnergy to expand its EE/PDR program offerings to include best practice ideas from other Ohio utilities and nationally, and to strive to achieve over 800,000 MWh savings annually subject to customer opt-outs. *FirstEnergy ESP IV*, Opinion and Order (Mar. 31, 2016) and Third ESP IV Stipulation (Dec. 1, 2015) at 11.

{¶ 8} On April 15, 2016, FirstEnergy filed an application in this docket for the approval of its EE/PDR Portfolio Plans for 2017 through 2019, pursuant to R.C. 4928.66, and

Ohio Adm.Code Chapter 4901:1-39. In addition, FirstEnergy filed the direct testimony of FirstEnergy witnesses Denise J. Mullins, George L. Fitzpatrick, Edward C. Miller, and Eren G. Demiray in support of its proposed Portfolio Plans for the 2017-2019 period.

{¶ 9} Motions to intervene were thereafter filed jointly by the Ohio Environmental Council and Environmental Defense Fund (OEC/EDF), as well as by the Environmental Law & Policy Center (ELPC), Ohio Partners for Affordable Energy (OPAE), the Natural Resources Defense Council (NRDC), the Ohio Consumers' Counsel (OCC), the Industrial Energy Users-Ohio (IEU-Ohio), the Ohio Manufacturers' Association Energy Group (OMAEG), the Ohio Hospital Association (OHA), the Kroger Co. (Kroger), Energy Management Solutions, Inc. (EMS), EnerNOC, Inc. (EnerNOC), and IGS Energy, Inc. (IGS). Objections to FirstEnergy's proposed Portfolio Plans were filed by OPAE, OMAEG, OCC, and EMS.

{¶ 10} By entry issued May 23, 2016, the hearing of this matter was scheduled for July 25, 2016, but subsequently continued with the agreement of all parties to October 11, 2016, by entry issued on June 28, 2016. The hearing was further continued at the request of the parties to November 21, 2016, and then December 12, 2016, by entries issued on September 30, October 26, and November 22, 2016.

{¶ 11} On December 5, 2016, Staff filed the testimony of Patrick Donlon, which proposed the adoption of a cost cap on the Companies' recovery of the EE/PDR program costs and shared savings incurred through their Portfolio Plans.

{¶ 12} On December 9, 2016, FirstEnergy filed a Stipulation and Recommendation (Stipulation) that was joined by OEC/EDF, NRDC, ELPC, EMS, EnerNOC, OPAE, and IGS Energy. Although Kroger, OMAEG, and IEU-Ohio are not signatory parties, they do not oppose this Commission's adoption of the Stipulation. Along with the Stipulation, the Companies filed their revised plans for 2017 through 2019 (2017-2019 Revised Portfolio Plans), and the amended direct testimony of FirstEnergy witnesses Mullins, Fitzpatrick, and

Demiray, with the supplemental direct testimony of Mr. Miller in support of the Stipulation and Revised Portfolio Plans.

{¶ 13} A December 14, 2016 entry rescheduled the hearing for January 23, 2017 at the Companies' request with the agreement of all parties.

{¶ 14} On January 10, 2017, Staff filed the amended direct testimony of Mr. Donlon, and OCC filed the supplemental direct testimony of Richard F. Spellman, in opposition to the Stipulation.

{¶ 15} The hearing of this matter was held over five days, on January 23-31, 2017, and included the testimonies of FirstEnergy witnesses Mullins, Fitzpatrick, Miller, and Demiray, in support of the Stipulation, with opposition testimony by OCC witness Spellman and Staff witness Donlon. In addition, ELPC, NRDC and OEC/EDF (collectively, Environmental Intervenors) offered the rebuttal testimony of Chris Neme, filed on January 25, 2017, and FirstEnergy provided rebuttal testimony from Messrs. Miller and Demiray, filed on January 27, 2017, in support of the Stipulation.

{¶ 16} Initial briefs were filed on February 21, 2017, by FirstEnergy, the Environmental Intervenors, OPAE, and IGS in support of the Stipulation, and by Staff, OCC, and OHA in opposing the adoption of the Stipulation without modifications. Reply briefs were filed on March 3, 2017 by FirstEnergy, the Environmental Intervenors, OPAE, Staff, OCC, and OHA.

{¶ 17} On March 10, 2017, FirstEnergy filed motions to strike portions of the initial and reply briefs of both OCC and OHA. On March 15, 2017, Staff and OCC jointly filed a motion to strike portions of FirstEnergy's initial and reply briefs. Memoranda contra FirstEnergy's motions to strike were filed by OHA and OCC on March 23 and 27, 2017, respectively. On March 30, 2017, FirstEnergy filed its memorandum contra to the Staff/OCC motion to strike, and a reply to OHA's memorandum contra. On April 3, 2017, FirstEnergy filed its reply to OCC's memorandum contra, and on April 6, 2017, Staff and

OCC each filed a reply to FirstEnergy's memorandum contra the Staff/OCC motion to strike.

IV. Procedural Motions

A. *NRDC's Motion for Protective Order*

{¶ 18} On September 13, 2016, the NRDC filed a motion for protective order for certain information referenced in the testimony of its witness, Chris Neme, which NRDC obtained subject to a protective agreement with FirstEnergy, and which the Companies deem to be confidential. No objections to this motion have been filed.

{¶ 19} R.C. 4905.07 provides that all facts and information in the possession of the Commission shall be public, except as provided in R.C. 149.43, and as consistent with the purposes of R.C. Title 49. R.C. 149.43(A)(1)(v) specifies that the term "public records" excludes information which is prohibited from release under state or federal law. The Ohio Supreme Court has clarified that the state or federal law exemption is intended to cover trade secrets. *State ex rel. Besser v. Ohio State Univ.*, 89 Ohio St.3d 396, 399, 2000-Ohio-475. Ohio Adm.Code 4901-1-24 allows the Commission to issue an order to protect the confidentiality of information to the extent that state or federal law prohibits release of the information, including where the information is deemed to constitute a trade secret as defined by R.C. 1333.61(D). Ohio Adm.Code 4901-1-24(F) provides for the automatic expiration of orders prohibiting public disclosure trade secret confidential information after 24 months from the date of its issuance, unless otherwise ordered.

{¶ 20} As no objections have been filed, NRDC's motion for protective order should be granted for a period of 24 months, pursuant to Ohio Adm.Code 4901-1-24.

B. *FirstEnergy's Motion to Strike OHA's briefs*

{¶ 21} With respect to FirstEnergy's motion to strike portions of OHA's briefs, the Companies object to OHA's references to three letters filed as public comments in this docket from the director of facilities management for Cleveland's MetroHealth System, the president of the Ohio Society for Healthcare Facilities Management, and the vice president of support services for Lake Health. FirstEnergy asserts that these letters were not presented at the hearing and were not included in the evidentiary record in this proceeding. FirstEnergy notes that OHA presented no direct evidence related to hospital support of OHA's participation as an EE/PDR program administrator, and the Companies argue that, in any event, these letters constitute inadmissible hearsay.

{¶ 22} OHA argues that the Commission's docketing system allows customers to file public comments in any case they choose, and that the Commission is free to consider such comments when making decisions. OHA argues that these letters in support of OHA should not be stricken, as ignoring their existence would be unfair to the hospitals that voiced concerns with FirstEnergy's EE/PDR programs. OHA cites an AEP Ohio rate case in which the Commission took notice of numerous customer bills that showed disproportionately higher amounts than had been predicted after issuance of the Commission's Opinion granting a rate increase. *In re Ohio Power Co.*, Case Nos. 11-346-EL-SSO, et al., Entry on Rehearing at 11 (Feb. 23, 2012). OHA also notes the Commission's recognition of public comments in support of the Companies in *FirstEnergy ESP IV*, Opinion and Order at 12 (Mar. 31, 2016), in contending that FirstEnergy should not be allowed to benefit from public comments in one case, while seeking to silence the public in another. Further, OHA suggests that if the Commission grants FirstEnergy's motion to strike OHA's briefs, the Commission should also grant the Staff/OCC motion to strike references in FirstEnergy's briefs to confidential settlement discussions and non-record statements.

{¶ 23} While public comments are not considered evidence regarding the truth of the matters asserted therein, FirstEnergy does not dispute the authenticity of these letters, or that the officials of these organizations support OHA's position in this proceeding. Accordingly, FirstEnergy's motion to strike references in OHA's briefs to three letters filed as public comments in this case should be denied.

C. FirstEnergy's Motion to Strike OCC's briefs

{¶ 24} FirstEnergy also moves to strike OCC's Exhibit A attached to their initial brief regarding potential adjustments to FirstEnergy's 2017-2019 Revised Portfolio Plans that OCC suggests be adopted to reduce EE/PDR program costs. The Companies argue that OCC's Exhibit A is not part of the evidentiary record, but constitutes belated expert testimony which OCC should be prohibited from introducing after the close of the record. In addition, FirstEnergy seeks to strike OCC's reference to the Commission's discussion of the cost cap recently adopted in AEP Ohio's EE/PDR Portfolio Plan as "sound regulatory policy" when, FirstEnergy asserts, the Commission's subsequent Entry on Rehearing indicated that such language was non-binding dicta. *In re Ohio Power Co.*, Case No. 16-574-EL-POR, Opinion and Order (Jan. 18, 2017) at 8, and Entry on Rehearing (Feb. 8, 2017) at 3.

{¶ 25} In its memorandum contra, OCC argues that its Exhibit A consists entirely of record evidence from FirstEnergy's 2017-2019 Revised Portfolio Plans, and using simple calculations derived therefrom. FirstEnergy counters that OCC's exhibit and its proposed scenarios were never introduced at the hearing, and that the Companies had no opportunity to explore how OCC's proposed adjustments would affect metrics including TRC scores, whether the Companies could actually meet their statutory benchmarks under the alternative scenarios, or the modeling conducted by OCC to support its recommendations.

{¶ 26} We agree with FirstEnergy that OCC's Exhibit A attached to their initial brief and the corresponding references to it should be stricken. OCC should have introduced this chart through a witness and provided FirstEnergy with an opportunity to cross-examine the assumptions and calculations used to produce such exhibit during the hearing. However, FirstEnergy's motion to strike references to the Commission's discussion of the cost cap recently adopted in AEP Ohio's EE/PDR Portfolio Plan should be denied. FirstEnergy has not demonstrated that the Companies will suffer undue prejudice from OCC's characterization of this Commission's orders. Accordingly FirstEnergy's motion to strike portions of OCC's briefs is granted in part and denied in part, as set forth above.

D. Staff/OCC Motion to Strike FirstEnergy's briefs

{¶ 27} The joint motion filed by Staff and OCC seeks to strike references in FirstEnergy's initial and reply briefs on the basis that such language refers to confidential settlement communications and other information outside the record of this proceeding.

{¶ 28} In response, FirstEnergy argues that its references to Staff's lack of participation in the settlement process are not precluded by Ohio Adm.Code 4901-1-26(E). The Companies contend that their assertion that Staff failed to meaningfully participate in the settlement process does not reference any substantive discussions or offers among the parties to the settlement and are not, therefore, protected within the scope of Ohio Adm.Code 4901-1-26(E). Further, the Companies argue that their statements are not only permissible under the applicable evidentiary rules, but they address whether the stipulation was the product of serious bargaining among capable, knowledgeable parties. Similarly, FirstEnergy argues that any references to Stipulation provisions benefitting non-signatory parties are proper because such references do not identify any party offering or accepting a valuable consideration in compromising or attempting to compromise a disputed matter, do not involve conduct or statements made in compromise negotiations, and are not offered to prove liability for, or invalidity of, any dispute.

{¶ 29} Further, FirstEnergy contends that its citations to motions filed in this docket are also proper. The Companies cite the ruling of the attorney examiner during the cross-examination of Staff witness Donlon regarding the delays that occurred in this case, and they argue that they are entitled to rely on the docket card (Tr. III at 437-438). FirstEnergy argues that OCC's assertion that the Companies should not be permitted to cite Staff's motions to continue is inconsistent with OCC's own briefs which included citations to all of Staff's motions to continue. In addition, the Companies contend that they should be permitted to cite and rely upon the motions to intervene filed in this proceeding, as evidence of the diversity of the parties, even though these motions for intervention are not considered evidence in this case. Finally, FirstEnergy notes that OPAE and the Environmental

Intervenors have filed briefs expressly opposing Staff's proposed cost cap in defense of FirstEnergy's statement that no intervenor, other than OCC, supports Staff's proposal because the other intervenors believed such a cap would exceed the Commission's statutory and regulatory authority.

{¶ 30} In reply to FirstEnergy's memorandum contra, Staff argues that FirstEnergy is requesting to set a dangerous new precedent if counsel are allowed to include in their briefs, statements and judgments on the conduct of other parties during settlement negotiations that are not part of the record of evidence. Staff contends that while the Commission does consider whether parties were invited to participate in settlement discussions and had the opportunity to represent their interests, it does not consider the parties' conduct and statements made in such discussions. Staff notes that the Commission has recently reaffirmed that a party's efforts to resolve a dispute should not be considered evidence, and that evidence of conduct or statements made in compromise negotiations is not admissible. *In re Jentgen v. Ohio Edison Co.*, Case No. 15-245-EL-CSS, Entry on Rehearing (Dec. 7, 2016) at ¶33. Staff also contends that the Companies' statements identifying and describing OCC and OHA's settlement negotiations and positions regarding the Energy Star benchmarking program and expansion of participation among the low-income customers, involve substantive confidential negotiations and positions taken by parties who ultimately decided not to join the Stipulation. Staff claims that allowing such information to be cited in briefs could have a chilling effect on parties' negotiations in future cases.

{¶ 31} OCC filed a separate reply to the Companies' memoranda contra, arguing that FirstEnergy did not refute the Staff and OCC assertions that FirstEnergy's statements rely on facts not in evidence. OCC notes the lack of any evidence for FirstEnergy's claim that utilities do not typically oppose Staff's motions on procedural scheduling issues. OCC disputes FirstEnergy's claim that its reliance on the motion to intervene of a party is proper because the docket card in this case was admitted into evidence, and that FirstEnergy's statements are permissible because they address whether the stipulation is the product of serious bargaining (OCC Ex. 3, Tr. I at 133, Tr. III at 437-438). OCC contends that FirstEnergy fails to distinguish between OCC's citations to the docket card and FirstEnergy's citations to the actual substance of docketed filings that were not themselves admitted into the record. Finally, OCC emphasizes that FirstEnergy's explanations as to why signatory parties to the Stipulation may or may not have agreed to certain terms are not based on record evidence, and should be stricken.

{¶ 32} We agree, and will grant the joint motion to strike the materials identified in FirstEnergy's briefs. With respect to motions to strike extra-record materials, this Commission has held that each case must be resolved on its particular facts, but that references to procedural matters should be stricken where allowing such information could have a chilling effect on a party's willingness to engage in settlement discussions, or where the moving party did not have an opportunity to challenge such information. *Dayton Power and Light Co.*, Case No. 16-649-EL-POR, et. al., Opinion and Order (Sep. 27, 2017) at 5-6, citing *In re Columbia Gas of Ohio, Inc.*, Case No. 16-1309-GA-UNC, et al., Opinion and Order (Dec. 21, 2016). As noted above, the substance of these arguments go to FirstEnergy's attempt to assign blame for the regulatory delays in the approval of the Companies' Portfolio Plans, and such non-evidentiary accusations should be stricken due to the potential chilling effect that acceptance of such statements might have on a party's willingness to engage in future settlement discussions. Accordingly, the joint motion to strike should be granted.

V. SUMMARY OF THE STIPULATION

{¶ 33} As noted above, the Stipulation is supported by FirstEnergy, OEC/EDF, NRDC, ELPC, EMS, EnerNOC, OPAE, and IGS Energy, with Kroger, OMAEG, and IEU-Ohio agreeing not to oppose its adoption. Along with the Stipulation, the Companies filed their 2017-2019 Revised Portfolio Plans with an annual budget of approximately $89.5 million, in accordance with the *FirstEnergy ESP IV* Fifth Entry on Rehearing, which limited FirstEnergy's recovery of shared savings to $10 million and required the Companies to lower their EE/PDR program budgets to target their annual benchmarks, rather than the

800,000 MWh savings level that the Companies had pledged to strive for in the Third *ESP IV* Stipulation. *FirstEnergy ESP IV*, Fifth Entry on Rehearing (Oct. 12, 2016) at 147, Joint Ex. 1 Sections V.T at 9.

{¶ 34} The Stipulation in this proceeding also lists more than a dozen specific program changes, including:

- The Companies will prioritize LED lighting, and limit or eliminate CFL lighting if cost-competitive LED options become available during the plan period.
- The Companies will reduce the EE Kit subprogram budget by 14 percent and will work with interested parties to target low income customers and communities for participation in the EE Kit offering. Further, the Companies will target their marketing to residential customers who did not receive EE Kits during the 2013-2016 period, but will provide one EE Kit per Plan Period to any residential customer upon request.
- The Companies will reduce the Residential Behavioral subprogram budget by 50 percent.
- The Companies will eliminate the New Homes Sub-Program from the Energy Efficient Homes Program.
- The Companies will implement an integrated (one-stop-shop) multifamily program offering to target both basic and comprehensive services for individually metered and master metered multifamily properties, and will hold annual outreach activities for their multifamily program across their service territories.

- The Companies will implement a mid-stream or upstream program approach for residential heat-pump water heaters, select EnergyStar certified products, and for both residential and non-residential circulation pumps.

- The Companies will work with interested parties to increase their Smart Thermostat offerings by 30,000 units in the Energy Efficient Products Program.

- The Companies will investigate the feasibility of a geo-targeting pilot program and review their findings with interested parties.

- The Companies will revise their Behavioral subprogram to provide customized energy usage reports to participating low income customers with specific tips and recommendations, and will target low income customers and communities for participation in the EE kit offering.

- The Companies will expand their evaluation, measurement and verification plans to identify participation and savings from low income customers in the residential programs.

- The Companies will eliminate the $500,000 per customer per year rebate cap in the Mercantile Customer Program.

- The Companies will target and promote Combined Heat and Power (CHP) installations under their C&I Energy Solutions for Business Programs - Small and Large, Custom/LCI and SCI subprograms; and will work with developers to implement CHP and Waste Energy Recovery projects. The Companies will offer an incentive structure that will increase the floor for CHP incentives to \$.035/kWh with a maximum of up to \$.05/kWh with payment over a maximum five-year period. CHP projects processed under the Companies' Mercantile Customer Program will be rebated per the Commission's direction on a case-by- case basis and will not be subject to the \$250,000 project rebate cap in the Mercantile Customer Program.

- The Companies will be flexible in the implementation of their C&I Energy Solutions for Business Program, Audits & Education subprogram to allow for targeted energy analysis and audits of individual processes or systems. Customers served at or above the primary voltage level may apply for up to two targeted energy audits per building, not to exceed four targeted energy audits per site. The Companies will provide half of the audit cost, or may cover the full audit cost if audit-recommended measures are installed.

- During the 2017-2019 plan period, the Companies will continue to offer eligible installed energy efficiency resources into the PJM base residual and incremental capacity auctions. The Companies will offer at least 60 percent of eligible planned EE/PDR resources into the PJM base residual capacity auction and, to the extent possible, into PJM's incremental capacity auctions for additional available and eligible resources that were not offered into the base residual capacity auction. The Companies will receive 20 percent of any revenue obtained from offering EE/PDR resources into the PJM auctions, with the remaining 80 percent credited to offset the costs of FirstEnergy's EE/PDR programs. The Companies will report to the Collaborative cleared capacity after each base residual and incremental auction.

Joint Ex. 1, Sections V.A-Q at 4-8.

Included as a miscellaneous provision under the Stipulation, the signatory parties also agree that each Company's shared savings trigger for 2017 shall be reduced by 14 percent (Amended 2017 Shared Savings Triggers), but the Companies' shared savings incentive tiers, compliance percentages and incentive percentages will remain the same as originally proposed (Joint Ex. 1, ¶R at 8-9, Ex. B at 106-107).

VI. COMMISSION DISCUSSION

{¶ 35} Ohio Adm.Code 4901-1-30 authorizes parties to Commission proceedings to enter into a stipulation. Although not binding on the Commission, the terms of such an agreement are accorded substantial weight, particularly where the stipulation is unopposed by any party and resolves all issues in the proceeding. *Consumers Counsel v. Pub. Util. Comm.*, 64 Ohio St.3d 123, 125, 1992-Ohio-122, 592 N.E.2d 1370, citing *Akron v. Pub. Util. Comm.*, 55 Ohio St.2d 155, 157, 378 N.E.2d 480 (1978).

{¶ 36} The Commission has established a three-prong test in considering whether a stipulation is reasonable and should be adopted:

a. Is the settlement a product of serious bargaining among capable, knowledgeable parties?

b. Does the settlement, as a package, benefit ratepayers and the public interest?

c. Does the settlement package violate any important regulatory principle or practice?

The Supreme Court of Ohio has endorsed the Commission's use of these criteria to resolve issues in a manner economical to ratepayers and public utilities. *Indus. Energy Consumers of Ohio Power Co. v. Pub. Util. Comm.*, 68 Ohio St.3d 559, 1994-Ohio-435, 629 N.E.2d 423, citing *Consumers' Counsel* at 126. The Court stated in that case that the Commission may place substantial weight on the terms of a stipulation, even though the stipulation does not bind the Commission. In determining the reasonableness of a stipulation, the Commission should consider the agreement as a package. *In re Ohio Edison Co., et al.*, Case No. 14-1297-EL-SSO, Fifth Entry on Rehearing (Oct. 12, 2016) at 99-100.

{¶ 37} As noted above, the Stipulation is supported by FirstEnergy, OEC/EDF, NRDC, ELPC, EMS, EnerNOC, OPAE, and IGS Energy. Kroger, OMAEG, and IEU-Ohio neither support nor oppose its adoption. In their briefs, FirstEnergy, the Environmental Intervenors, OPAE, and IGS contend that the Stipulation and 2017-2019 Revised Portfolio Plans are just and reasonable, and should be approved by the Commission without modification.

{¶ 38} As discussed in detail below, Staff asserts that adoption of the Stipulation and 2017-2019 Revised Portfolio Plans would violate the last two prongs of the test, unless modified by a cap on the Companies' recovery of EE/PDR program costs and shared savings. OCC joins Staff's position, but also asserts that the Stipulation should be rejected because it violates regulatory principles and practices, in that the signatory parties are not diverse. OHA also opposes adoption of the Stipulation and 2017-2019 Revised Portfolio Plans, but only insofar as FirstEnergy's decision to terminate OHA as an EE/PDR program administrator.

A. Is the settlement a product of serious bargaining among capable, knowledgeable parties?

{¶ 39} As noted in the Stipulation and testimony of FirstEnergy witness Miller, the Companies held meetings with FirstEnergy's EE/PDR Collaborative Group relating to the development of the portfolio plans in December 2015 through March 2016, where the

Companies solicited input from Collaborative Group members, which ultimately lead to the Companies' original plans filed on April 15, 2016. Further changes and refinements that resulted from the settlement discussions, and are reflected in the Stipulation and 2017-2019 Revised Portfolio Plans, include a reduction in the Residential Behavioral sub-program, prioritization of LED lighting, hot water circulating pumps in the residential and small enterprise sectors, direct installations for small businesses, analytics-enabled energy efficiency recommendations, increased targeting of low-income customers for participation in the Companies' EE kit offerings, and select EnergyStar certified products (Co. Ex. 4 at 13).

{¶ 40} No party has challenged the adoption of the Stipulation and 2017-2019 Revised Portfolio Plans under the first prong of the Commission's test. We note the long procedural history of rescheduled hearing dates, including delays requested by both FirstEnergy and Staff in concluding that these parties were actively participating in efforts to settle the matters at issue in these proceedings,. The parties participating have regularly participated in other EE/PDR proceedings and FirstEnergy cases, and represent a diverse group of capable, knowledgeable stakeholders that include low-income residential customer, environmental, and industrial advocates, as well as a commercial customer, and a retail energy service provider (Joint Ex. 1 at 2-3, Co. Ex. 5 at 2-3, 8-9). Accordingly, the Commission finds that the first prong of the three-part test for the reasonableness of a stipulation has been met.

B. Does the settlement, as a package, benefit ratepayers and the public interest?

{¶ 41} According to the testimony of FirstEnergy witness Miller, the Stipulation and 2017-2019 Revised Portfolio Plans will benefit ratepayers and the public interest since they comply with FirstEnergy's commitments in their ESP IV case, and all programs are cost-effective. Further, Mr. Miller notes 13 specific program changes agreed to by the signatory parties, as well as the Companies' commitments to the EE/PDR Collaborative, and the revised plan budgets with the Commission-approved $10 million (after tax) cap on recovery of shared savings, as well as the new Amended 2017 Shared Savings Triggers provision (Joint Ex. 1 at 4-9, Co. Ex. 5 at 10-20).

{¶ 42} FirstEnergy is joined by the Environmental Intervenors, IGS and OPAE in contending that the Stipulation and 2017-2019 Revised Portfolio Plans, as a package, benefit ratepayers and the public interest asserts without Staff's proposed cap on EE/PDR program costs and shared savings. They argue that such a cap would almost certainly eliminate the Companies' shared savings incentive to exceed their EE/PDR goals and that FirstEnergy customers will be sufficiently protected by the Stipulation's two-year bill mitigation mechanism against rate volatility and price fluctuations.

1. Staff's Proposed Cost Cap on Recovery of EE/PDR Program Costs and Shared Savings

{¶ 43} Staff and OCC argue that the Stipulation does not benefit ratepayers and the public interest without Staff's proposed modification of a cost cap on the Companies' recovery of EE/PDR program costs and shared savings. Staff witness Donlon testified that the Companies' riders for their EE/PDR programs is the fourth largest rider on the bills of Toledo Edison and Cleveland Electric Illuminating customers, and the fifth largest for Ohio Edison's customers. He also asserted that such a measure is necessary despite Commission-approved budgets for the Companies' Revised Portfolio Plans, because the budgets will not preclude the Companies from recovering additional costs that the Companies may spend to meet and exceed their statutory mandates. He explained that Staff's proposed cap for each Company would be three percent of the Company's annual operating revenues for 2015 as reported on line 10, total sales to ultimate customers, on page 300 of the Company's FERC Form 1 report (3% Cap), and that Staff concluded that such a cap would provide FirstEnergy's ratepayers with price security while still allowing the Companies to meet and exceed their statutory mandates. He also stated that if the Companies find that they are unable to reasonably meet their statutory mandates within the 3% Cap, the Companies could request that the Commission amend the benchmarks pursuant to R.C. 4928.66(A)(2)(b). Mr. Donlon also explained that the Companies would continue to file an annual rider case for

Staff to review the prudence of EE/PDR costs incurred, and any costs that exceed the 3% Cap would be disallowed from recovery, or refunded to customers if already collected (Staff Ex. 1 at 5-7, Tr. II at 327-339).

{¶ 44} Mr. Donlon also testified that Staff believes that the Companies are capable of meeting and exceeding its benchmarks within the 3% Cap because, on average, the Companies underspent their budgets by 21 percent and over-achieved their benchmarks by 50 percent in 2012 through 2014 (Tr. II at 339). For 2014, Staff cites the rebuttal testimony of FirstEnergy witness Miller in noting that the Companies spent $55 million and achieved 773,372 MWH in savings, but for 2015 the Companies suspended the majority of their programs and spent only $16 million, yet still achieved 657,632 MWH in savings (Tr. V at 624 and 607, respectively).

{¶ 45} For 2017, Staff notes that Mr. Miller has projected that FirstEnergy's benchmarks will total approximately 535,000 MWH, and will be slightly lower for 2018 and 2019 (Tr. I at 69). Further, Staff notes that FirstEnergy witness Mullins testified that the Companies' projected benchmarks do not take into account the customers who will choose to opt out of the energy efficiency rider (Tr. I at 24). Staff and OCC contend that the Companies have had two years of experience with opt-out customers during 2015 and 2016, but chose not to make use of that data in projecting an anticipated level of opt-outs in 2017, and they assert that FirstEnergy has overstated its projected savings requirements and budgets by failing to include opt-outs in calculating their projected benchmarks.

{¶ 46} In addition, Staff and OCC note Mr. Donlon's testimony that the overall costs of FirstEnergy's EE/PDR programs can also be offset by the revenues the Companies receive from PJM for bidding energy efficiency into the RPM auction, which are credited back to the customers through the Companies' EE/PDR riders, thus reducing the program costs paid by customers (Staff Ex. 1 at 7). Given the Companies' prior spending and overachievement of their benchmarks, Staff and OCC conclude that a cap of $80.1 million should allow the Companies to meet their future statutory benchmarks after factoring in the opt-outs and offsets from PJM revenues.

{¶ 47} FirstEnergy, the Environmental Intervenors, and OPAE assert that Staff's cost cap proposal is unnecessary since the Stipulation and 2017-2019 Revised Portfolio Plans limit FirstEnergy's annual budget to $89.5 million, which is targeted to achieve the Companies' statutory benchmarks. They also contend that Staff's cost cap proposal is unnecessary since FirstEnergy customers are already protected under the two-year bill mitigation provision that limits total customer bills, including the Companies' EE/PDR rider amounts, which was approved in *FirstEnergy ESP IV*, Opinion and Order (Mar. 31, 2016) and the $10 million cap on FirstEnergy's recovery of shared savings, which was approved in *FirstEnergy ESP IV*, Fifth Entry on Rehearing at 147 (Oct. 12, 2016), and is expressly included in the Stipulation (Joint Ex. 1 Sections V.T at 9, Tr. III at 384-388). Further, they argue, that the record is clear that since the 2017-2019 Revised Portfolio Plans are cost-effective on a portfolio plan and program basis, the benefits to ratepayers must outweigh their costs, citing this Commission's recent recognition that "every kWh of energy that can be displaced through cost-effective energy efficiency programs is a savings, not a cost to the Companies' customer[s]" *FirstEnergy ESP IV*, Opinion and Order (Mar. 31, 2016) at 95. They also argue that OCC and Staff have not provided sufficient analysis to demonstrate that Staff's proposal will be cost-justified, noting that the 2017-2019 Revised Portfolio Plans are projected to generate Total Discounted Lifetime Benefits to the Companies' customers of $785 million at a total plan cost of only $268 million (Joint Ex. 1, Ex. B at 5).

{¶ 48} OPAE and the Environmental Intervenors argue that Staff's proposal would put regulation of FirstEnergy's EE/PDR programs on autopilot, whereas limitations on spending should be embodied in the program budgets after careful review of the costs and benefits. Further, they note that the Commission can always disallow imprudently incurred costs. They assert that Staff's cost cap will force the Companies to focus attention on the cost per first year kWh saved by a program or measure, rather than the program or measure's net lifetime energy savings. They contend that lifetime savings must be considered to understand the magnitude of electric system benefits produced by energy efficiency savings, and they are concerned that spending caps may force FirstEnergy to emphasize programs that produce inexpensive savings in the first year to meet the Companies' annual mandates, while foregoing more expensive savings that will ultimately provide more benefit over the long-term. While the Environmental Intervenors concede that Staff's proposed 3% Cap would slightly lower the EE/PDR rider on customer bills, they contend that Staff and OCC have not presented any evidence that Staff's proposal will not ultimately result in higher bills and lower-quality programs for FirstEnergy customers.

{¶ 49} The Environmental Intervenors also argue that Staff's proposal is inconsistent with R.C. 4928.66 and Ohio Adm.Code 4901:1-39-02(A), which set minimum levels for achievement, and they note the 12 other criteria, in addition to cost-effectiveness, listed under Ohio Adm.Code 4901:1-39-03(B)(2)-(13) that should be considered the assessment of EE/PDR programs. FirstEnergy argues that the Commission lacks statutory authority under R.C. 4928.66 to impose Staff's proposed cap, and that such a measure is unenforceable because it must be approved by the Joint Committee on Agency Rule Review (JCARR) under R.C. 101.35, and the applicable rule-making provisions of R.C. 111.15. FirstEnergy notes that R.C. 4928.64(C)(3) expressly sets a three percent cost cap on the compliance costs for renewable energy mandates, and concluded that the General Assembly could have provided a similar cost cap for R.C. 4928.66 compliance costs had it wished to do so. FirstEnergy cites *Fairfield Cty. Bd. of Comm'rs. v. Nally*, 143 Ohio St. 3d 93, 99, 2015-Ohio-991, 34 N.E.3d 873, and *Ohio Nurses Ass'n v. State Bd. of Nursing Educ. & Nurse Registration*, 44 Ohio St. 3d 73, 73, 540 N.E.2d 1354 (1989), in arguing that Staff's cost cap proposal would create a legal standard that did not previously exist, such that Ohio's rule-making restrictions would apply. FirstEnergy also notes that Staff has not included a cost cap in its most recent proposed changes to Ohio Adm.Code Chapter 4901:1-39 in Case No. 13-651-EL-ORD.

{¶ 50} Staff and OCC contend that the proposed cost cap will not impose a new legal standard upon FirstEnergy, and that the Commission is authorized to regulate rates set by the Companies under Ohio Adm.Code 4901:1-39-07, and its more general authority to regulate customer utility rates under R.C. 4905.22 and 4928.02. They argue that the proposed cap in this case is not a rule as it will only apply to FirstEnergy, rather than all EDUs, and is, therefore, not a rule "having a general and uniform operation" as defined by R.C. 111.15(A)(1). Staff notes FirstEnergy's assertions that the proposed cost cap is unnecessary because the program budgets will act as a cap on limiting recovery of EE/PDR costs, and argues that such assertions are inconsistent with FirstEnergy's argument that Staff's proposed cap would create a new legal standard.

{¶ 51} Staff and OCC argue that the absence of a cost cap provision for EE/PDR programs in R.C. 4928.66 does not mean that the Commission has no power to impose a cost cap on those programs. They cite *Kazmaier Supermarket, Inc. v. Toledo Edison Co.*, 61 Ohio St.3d 147, 150, 573 N.E. 2d 655, 658 (1991), for the proposition that the Commission is empowered with broad authority to administer and enforce the provisions of R.C. Title 49, and they contend that the Commission has broad authority to regulate a utility's portfolio plan under R.C. 4928.66, including its costs and bill impacts on customers, since the General Assembly did not specifically prohibit the Commission from imposing a cost cap.

{¶ 52} FirstEnergy, OPAE, and the Environmental Intervenors contest the Staff and OCC's contentions that the Companies will be able to meet their annual statutory energy efficiency targets under the proposed 3% Cap. They note Mr. Donlon's testimony that average residential customer pays between $1.98 and $2.90 per month through the EE/PDR rider, and that Staff's proposed cap would apply to both program spending plus shareholder incentives (Tr. III at 446-447, Staff Ex. 1, at 5). They cite the testimony of NRDC witness Neme and FirstEnergy witness Miller, that under the proposed shareholder incentive mechanism, the Companies would be eligible to earn up to $10 million in after-tax ($15.6 million pre-tax) profits; and that, if FirstEnergy achieves its maximum shareholder incentive, only $64.5

million would be left for annual program budgets (Env. Int. Ex. 1, at 14-15; Co. Ex. 17, at 8). Staff's proposal, they calculate, would result in a $31 million (or 32 percent) reduction from the annual average $95.5 million budget in the Stipulation which tracks the Companies' achievement of their annual statutory targets.

{¶ 53} FirstEnergy, OPAE, and the Environmental Intervenors argue that both Staff and OCC witness Spellman have based their analysis on obsolete data from the Companies' 2012-2014 annual status reports (Staff Ex. 1, at 5; Tr. IV at 531-532). They cite Mr. Miller's testimony that the Companies achieved about half of their actual savings in the 2012-2014 period from lighting, as compared to a 30 percent contribution of savings expected from lighting in the 2017-2019 Revised Plans, and that transmission and distribution savings constituted approximately seven percent of the total savings for 2014, with no money from the energy efficiency budget, but has been cut to one percent in the Revised Plans (Co. Ex. 17 at 5-7). Mr. Miller's analysis, they maintain, directly undercuts Mr. Donlon's assertion of a general trend in technology driving costs down on many projects (Tr. II at 343).

{¶ 54} In any event, FirstEnergy, OPAE, and the Environmental Intervenors assert that the imposition of Staff's proposed 3% Cap would be unfair to impose on FirstEnergy relative to the four percent caps recently approved in the other Ohio EDU Portfolio Plan cases. See, *In re Ohio Power Co.*, Case No. 16-574-EL-POR, Opinion and Order (Jan. 18, 2017) at 8; *In re Dayton Power and Light Co.*, Case No. 16-649-EL-POR, et al., Opinion and Order (Sep. 27, 2017) at 14; and *In re Duke Energy Ohio, Inc.*, Case No. 16-576-EL-POR, Opinion and Order (Sep. 27, 2017) at 15-16.

{¶ 55} We agree that a 3% Cap would be unfair to impose on FirstEnergy in light of the caps recently approved in the other Ohio EDU Portfolio Plan decisions cited above. As noted in our recent decisions involving the other Ohio EDU Portfolio Plan cases referenced above, we find that a cost cap on the potential EE/PDR program costs and shared savings to be borne by ratepayers is reasonable measure given the rising EE/PDR rider amounts billed to customers, as reported by Mr. Donlon (Staff Ex. 1 at 5-7, Tr. II at 328, Tr.

III at 446-447). Although FirstEnergy, OPAE, and the Environmental Intervenors argue that cost-effective EE/PDR programs will ultimately result in lower bills for ratepayers, this Commission must weigh the potential ultimate program benefits against the bill impacts to customers in the 2017-2019 Portfolio Plan period.

{¶ 56} We find that our adoption of a cost cap in this proceeding does not constitute a new legal standard or rule as defined under R.C. 111.15, but is a permissible exercise of this Commission's broad authority to administer and enforce the provisions of R.C. Title 49, and to regulate a utility's portfolio plan under R.C. 4928.66, since the General Assembly did not specifically prohibit a cost cap. *Kazmaier Supermarket*, 61 Ohio St.3d 147, 150 (1991). While the evidence of record is unclear whether the Companies will be able to meet their statutory mandates within Staff's proposed cost cap, we will raise the cap on recovery of EE/PDR programs and shared savings to four percent of the Companies' 2015 FERC-reported revenues to align FirstEnergy's cost caps with those of the other Ohio utilities. *In re Ohio Power Co.*, Case No. 16-574-EL-POR, Opinion and Order (Jan. 18, 2017) at 8; *In re Dayton Power and Light Co.*, Case No. 16-649-EL-POR, et al., Opinion and Order (Sep. 27, 2017) at 14; and *In re Duke Energy Ohio, Inc.*, Case No. 16-576-EL-POR, Opinion and Order (Sep. 27, 2017) at 15-16. Moreover, the Companies may request that the Commission amend their benchmarks pursuant to R.C. 4928.66(A)(2)(b).

{¶ 57} Accordingly, we find that the Stipulation and 2017-2019 Revised Portfolio Plans should be modified to include a cost cap on the Companies' recovery of EE/PDR program costs and shared savings not to exceed four percent of the Company's 2015 total sales to ultimate customers as reported on FERC Form 1 (approximately $107 million), in order to benefit ratepayers and the public interest (Tr. III at 431).

2. The Stipulation's Amended 2017 Shared Savings Triggers

{¶ 58} Staff and OCC also assert that the Amended 2017 Shared Savings Triggers provision under the Stipulation does not benefit ratepayers and the public interest, and violates an important regulatory principle. Staff asserts that although FirstEnergy represents that 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, the shared savings mechanism will be calculated annually on an individual EDU basis (Joint Ex. 1, Exhibit B at). Staff cites the testimony of FirstEnergy witness Demiray in calculating that under the Amended 2017 Shared Savings Triggers, the Companies could achieve only 86 percent of their statutory mandates but still be eligible to receive $10 million in shared savings (Co Ex. 1 at 6, Exhibit DJM-A2, Tr. I at 16, 22-24, 148-151).

{¶ 59} As discussed above, we are adopting Staff's proposed cap on FirstEnergy's recovery of EE/PDR program costs and shared savings, though at four percent of the Companies' 2015 FERC-reported revenues. Moreover, as further discussed below in considering the third prong of the test for settlements, we are clarifying in this proceeding that a utility should not be rewarded by collecting shared savings from ratepayers when the utility has failed to meet its statutory mandates, or has used banked energy efficiency savings to meet its mandated levels. With those clarifications and modifications, we find that the Stipulation will benefit ratepayers and the public interest.

3. Diversity of the Signatory Parties

{¶ 60} OCC is the only party to raise the issue of whether the Stipulation should be rejected because the signatory parties are not diverse. OCC argues that this lack of diversity causes the Stipulation to fail the second prong of the Commission's test because none of the signatory parties represent the Companies' residential customers who will pay FirstEnergy's EE/PDR program costs and shared savings. OPAE, the Environmental Intervenors and FirstEnergy dispute OCC's assertions that OCC is the only representative of residential customer interests and, as noted above, they argue that cost-effective EE/PDR programs will actually lower the bills of all customers, including the residential class, thereby benefitting FirstEnergy's ratepayers and the public interest.

{¶ 61} While the diversity of the signatory parties may be a consideration in determining whether a settlement is a product of serious bargaining among capable, knowledgeable parties under the first prong of the Commission's test, there is no diversity requirement that the residential customers' statutory representative be a signatory party for agreements which may result in increased costs for the residential class. The record here reflects that the hearing dates and filing deadlines were postponed numerous times to accommodate additional settlement discussions at the request of Staff and FirstEnergy, and there is no evidence that OCC was excluded from settlement discussions. Further, the Stipulation in this case is actively supported by OPAE on behalf of low-income residential customers. No single customer class or party, even the residential customers' statutory representative, should have the power to effectively veto a stipulation. *FirstEnergy ESP IV*, Opinion and Order (Mar. 31, 2016) at 43 (citing *Dominion Retail v. Dayton Power & Light Co.*, Case No. 03-2405-EL-CSS, Opinion and Order (Feb. 2, 2005) at 18; Entry on Rehearing (Mar. 23, 2005) at 7.

{¶ 62} Accordingly, we find that the Stipulation, as a package, and as modified by our adoption of the cost cap discussed above, will benefit ratepayers and the public interest, notwithstanding the absence of OCC as a signatory party.

4. TERMINATION OF OHA AS A PROGRAM ADMINISTRATOR

{¶ 63} As noted above, OHA's opposition to the Stipulation is a result of FirstEnergy's decision to terminate OHA as a program administrator. OHA contends that such termination was unjust and without reason, and that approval of the Stipulation and 2017-2019 Revised Portfolio Plans is not in the public interest because OHA's termination would result in less hospital participation in EE/PDR programs in FirstEnergy's territory. OHA requests that the Commission order FirstEnergy to renew OHA as a program administrator.

{¶ 64} We cannot agree with OHA that its termination as a program administrator is sufficient to establish that the Stipulation and 2017-2019 Revised Portfolio Plans, as a package, does not benefit ratepayers and the public interest. We are, however, concerned that such action may reflect poorly on FirstEnergy's management of its EE/PDR programs and customer relations. Accordingly, we direct FirstEnergy to review this issue with Staff, and include a detailed account of its decisions and any impacts with respect to this issue in its next EE/PDR annual report filing.

{¶ 65} After consideration of the foregoing arguments of the parties and the evidence of record, we find that the Stipulation and 2017-2019 Revised Portfolio Plans, as modified by our adoption of the four percent cost cap set forth above, will, as a package, benefit ratepayers and the public interest.

C. Does the settlement package violate any important regulatory principle or practice?

{¶ 66} FirstEnergy asserts that the Stipulation and 2017-2019 Revised Portfolio Plans meet all of statutory and regulatory requirements, including the Commission's rules for EE/PDR portfolio plans in Ohio Adm.Code Chapter 4901:1-39. The Companies note the testimony of FirstEnergy witness Mullins that the Companies accurately calculated their EE/PDR requirements for the 2017-2019 period. Further, FirstEnergy notes that no party has claimed that the 2017-2019 Revised Portfolio Plans are not cost-effective on a portfolio plan basis, or has challenged the Companies' projections regarding FirstEnergy's ability to achieve its statutory mandates under the 2017-2019 Revised Portfolio Plans (Co. Ex. 1 at 2, Exhibits DJM-A2 and DJM-3, Tr. II at 185-86).

{¶ 67} As noted above, OCC asserts that the Stipulation should be rejected because it violates regulatory principles and practices, in that the signatory parties are not diverse. As discussed above, the diversity of the signatory parties may be a consideration in determining whether a settlement is a product of serious bargaining among capable, knowledgeable parties under the first prong of the Commission's test. However, there is no diversity requirement that the residential customers' statutory representative be a signatory party for agreements which may result in increased costs for the residential class. Accordingly, we find OCC's argument to be without merit.

{¶ 68} Both Staff and OCC argue that the Amended 2017 Shared Savings Triggers included in the Stipulation violate regulatory principles by potentially allowing FirstEnergy to recover $10 million in shared savings, while still failing to achieve their statutory mandates. While the FirstEnergy witnesses have testified that such a result is not intended, we will take this opportunity to clarify that under no circumstances should a utility be rewarded by collecting shared savings from ratepayers when the utility has failed to meet its statutory mandates, which includes any use of banked energy efficiency savings. With this clarification, we find that the Stipulation and 2017-2019 Revised Portfolio Plans, as modified by our adoption of the four percent cost cap discussed above, does not violate any important regulatory principle or practice.

{¶ 69} OCC also argues that the Commission should not approve the Stipulation because it violates the plain language of ¶325 of the *FirstEnergy ESP IV*, Fifth Entry on Rehearing (Oct. 12, 2016) at 147, which clarified that the goal of 800,000 MWh of energy efficiency savings annually was simply a goal, and that the Companies are expected to set their EE/PDR budgets to meet their annual statutory energy efficiency mandates rather than the 800,000 MWh goal. The *FirstEnergy ESP IV* Fifth Entry on Rehearing went on to explain that the Commission expects the goal to be achieved by efficiently administering the approved programs and achieving energy savings for the least cost rather than by setting the program budget to the stipulated goal.

{¶ 70} OCC calculates that under R.C. 4298.66(A), FirstEnergy's statutory mandated savings for all three Companies over the 2017 to 2019 period is 1,587 GWh (OCC Initial brief at 38-39, Co. Ex. 1, Exhibit DJM-A2, Column 8). OCC notes, however, that the Stipulation and FirstEnergy's 2017-2019 Revised Portfolio Plans provide for EE/PDR budgets totaling 1,782 GWh, which include a cushion of more than 12 percent above the statutory minimums (Jt. Exhibit 1, Exhibit A, Tr. 1 at 71). OCC argues that this cushion violates the *FirstEnergy ESP IV* Fifth Entry on Rehearing and, therefore, the Stipulation fails the third prong of the test.

{¶ 71} While we reaffirm our language in the *FirstEnergy ESP IV* Fifth Entry on Rehearing that we expect utilities to set their EE/PDR budgets to meet their annual statutory energy efficiency mandates, we believe that our adoption of the four percent cost cap on recovery of EE/PDR savings and program expenditures discussed above, will provide reasonable protection for FirstEnergy ratepayers against EE/PDR rider increases over the 2017-2019 Plan period. After consideration of the evidence of record and our analysis of the Stipulation set forth above, we find that the Stipulation and FirstEnergy's 2017-2019 Revised Portfolio Plans, as modified by our adoption of the four percent cost cap above, does not violate any important regulatory principle or practice. Accordingly we find the Stipulation, as modified, passes the three-part test and should be adopted.

{¶ 72} Finally, we note that Staff has identified some inconsistencies that should be resolved to improve the reporting and analysis of EE/PDR savings and program expenditures (Tr. III at 437-438). For future proceedings, FirstEnergy is directed to work collaboratively with its Stakeholders and Staff to develop a uniform system of reporting program savings and expenditures on an annual basis, which shall be included as part of each Company's annual status report.

VII. ORDER

{¶ 73} It is, therefore,

{¶ 74} ORDERED, That the Stipulation and the Companies' Revised 2017-2019 Portfolio Plans be approved, subject to a cost cap on the Companies' recovery of EE/PDR program costs and shared savings not to exceed four percent of the Companies' 2015 total sales to ultimate customers reported on FERC Form 1. It is, further,

{¶ 75} ORDERED, That the Companies' Revised 2017-2019 Portfolio Plans, as modified and approved in this Opinion and Order, continue in effect until otherwise ordered by this Commission. It is, further,

{¶ 76} ORDERED, That the NRDC's motion for protective order be granted for a period of 24 months from the issuance of this Opinion and Order. It is, further,

{¶ 77} ORDERED, That FirstEnergy's motion to strike portions of OHA's briefs be denied. It is, further,

{¶ 78} ORDERED, That FirstEnergy's motion to strike portions of OCC's briefs be granted in part and denied in part, as set forth above. It is, further,

{¶ 79} ORDERED, That joint motion of Staff and OCC to strike portions of the Company's initial and reply briefs be granted. It is, further,

{¶ 80} ORDERED, That the Companies take all actions consistent with the Stipulation and this Opinion and Order. It is, further,

{¶ 81} ORDERED, That a copy of this Opinion and Order be served upon all parties of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO

Asim Z. Haque, Chairman

M. Beth Trombold

Thomas W. Johnson

Lawrence K. Friedeman

Daniel R. Conway

RMB/vrm

Entered in the Journal

NOV 2 1 2017

Barcy F. McNeal

Barcy F. McNeal
Secretary

EXHIBIT B

THE PUBLIC UTILITIES COMMISSION OF OHIO

IN THE MATTER OF THE APPLICATION OF THE 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

ENTRY ON REHEARING

Entered in the Journal on January 10, 2018

I. SUMMARY

{¶ 1} The Commission denies the applications for rehearing of the November 21, 2017 Opinion and Order, as the matters raised therein have been fully considered.

II. PROCEDURAL HISTORY

{¶ 2} Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company (collectively, FirstEnergy or the Companies) are electric distribution utilities as defined in R.C. 4928.01(A)(6) and public utilities as defined in R.C. 4905.02, and as such, are subject to the energy efficiency and peak demand reduction (EE/PDR) requirements under R.C. 4928.64 and 4928.66. In this proceeding, the Commission reviewed FirstEnergy's EE/PDR Program Portfolio Plan for 2017 through 2019 (2017-2019 Portfolio Plan), pursuant to Ohio Adm.Code Chapter 4901:1-39, to ensure that the Companies' 2017-2019 Portfolio Plan consists of cost-effective EE/PDR programs that achieve the statutory benchmarks for peak-demand reduction, and meet or exceed the statutory benchmarks for energy efficiency.

{¶ 3} On November 21, 2017, the Commission issued its Opinion and Order approving FirstEnergy's 2017-2019 Portfolio Plan, as modified by the Stipulation filed December 9, 2016, but also imposing an annual cap of approximately $107 million on the Company's recovery of EE/PDR program costs and shared savings from customers, a limit of four percent of the Companies' 2015 operating revenues (4% Cap). *In re Ohio Edison Co.,* *et al., for Approval of Energy Efficiency and Peak Demand Reduction Program Portfolio Plans for 2017 through 2019*, Case No. 16-743-EL-POR, Opinion and Order (Nov. 21, 2017) (Opinion and Order) at ¶¶1, 57, 74-75.

{¶ 4} On December 21, 2017, applications for rehearing of the Opinion and Order were filed jointly by the Environmental Law & Policy Center, the Natural Resources Defense Council, the Ohio Environmental Council, and the Environmental Defense Fund (Environmental Advocates, collectively), and by FirstEnergy.

{¶ 5} On January 2, 2018, the Ohio Consumers' Counsel (OCC) filed memoranda contra both applications for rehearing.

III. Applications for Rehearing

{¶ 6} R.C. 4903.10 states that any party who has entered an appearance in a Commission proceeding may apply for rehearing with respect to any matters determined therein by filing an application within 30 days after the entry of the order upon the Commission's journal.

A. *Environmental Advocates' Application for Rehearing*

{¶ 7} As their only ground for rehearing, the Environmental Advocates contend that the Opinion and Order is unlawful and unreasonable because the likely result will be less spending on cost-effective energy efficiency and higher overall bills for FirstEnergy's customers. They concede that the rising rider amounts being billed to customers to pay for EE/PDR programs and shared savings incentives constitute a valid concern but argue that FirstEnergy's EE/PDR rider amounts to only $2 to $3 per month for a typical residential customer and that FirstEnergy's EE/PDR programs are subject to budget limits and prudency reviews for any cost overruns (Tr. II at 446-47; Co. Ex. 14). They contend that the Opinion and Order fails to address concerns raised in the record that the 4% Cap may result in higher bills for customers. They cite *MCI Telecommunications Corp. v. Pub. Util. Comm.*, 32 Ohio St.3d 306, 312, 513 N.E.2d 337 (1987) in arguing that the Opinion and Order violates R.C. 4903.09 by failing to set forth, in sufficient detail, the facts in the record upon which the order is based, and the reasoning of the Commission in reaching its conclusion; and *Indus. Energy Users-Ohio v. Pub. Util. Comm.*, 117 Ohio St.3d 486, 2008-Ohio-990, 885 N.E.2d 195 at ¶30, for the proposition that the Commission abuses its discretion if it renders an opinion on an issue without record support.

{¶ 8} The Environmental Advocates note that the 4% Cap approved in the Opinion and Order will limit FirstEnergy's recovery of EE/PDR program costs and shared savings to approximately $107 million and, assuming FirstEnergy is able to earn its maximum shared savings incentive payment of $15.6 million, the resulting annual program budget of $91.4 million will require the Companies to cut about $4.1 million from its projected average annual budget of $95.5 million for 2018 and 2019 (Opinion and Order at ¶¶52-53, 57; Co. Ex. 17, at 8; Env. Int. Ex. 1 at 14). The Environmental Advocates argue that since these programs have been determined to be cost effective, as required by Ohio Adm.Code 4901:1-39-04(B), these programs cost less than the generation they replace, and the 4% Cap will result in higher customer bills overall.

{¶ 9} This argument was fully considered by the Commission. Opinion and Order at ¶¶47-55. As noted by the Commission, the 4% Cap on the potential EE/PDR program costs and shared savings to be borne by ratepayers is a reasonable measure given the rising EE/PDR rider amounts billed to customers, as reported by Staff witness Donlon (Staff Ex. 1 at 5-7; Tr. II at 328; Tr. III at 446-47). Although cost-effective EE/PDR programs may ultimately result in lower bills for ratepayers in the aggregate, this Commission must weigh the potential program benefits against the potential bill impacts to individual customers in the 2017-2019 Portfolio Plan period. Opinion and Order at ¶55. The Commission must balance the current costs of the Companies' EE/PDR riders against the potential future cost savings to customers from the Companies' EE/PDR programs. Accordingly, as the Environmental Advocates have not raised any new issues for the Commission's consideration, their application for rehearing will be denied.

B. FirstEnergy's Application for Rehearing

1. THE COMMISSION LACKS AUTHORITY TO ADOPT THE 4% CAP.

{**¶ 10**} In their application for rehearing, the Companies argue that the Opinion and Order is unlawful and unreasonable on three separate grounds, the first being that the Commission lacks statutory authority to adopt the 4% Cap on the Companies' recovery of EE/PDR program costs and shared savings. FirstEnergy argues that the Commission is a creature of the General Assembly and may exercise no jurisdiction beyond that conferred by statute, citing *Pike Nat. Gas Co. v. Pub. Util. Comm.*, 68 Ohio St. 2d 181, 183, 429 N.E.2d 444 (1981) and *Canton Storage & Transfer Co. v. Pub. Util. Comm.*, 72 Ohio St. 3d 1, 5, 647 N.E.2d 136, 141 (1995). Further, FirstEnergy maintains that R.C. 4928.66 does not authorize the Commission to approve the imposition of an overall cost cap on the efforts of Ohio's electric distribution utilities (EDUs) to meet their respective statutory EE/PDR benchmarks. FirstEnergy notes that both R.C. 4928.64 and 4928.66 were enacted as part of the same legislation in 2008, and that the renewable energy standards include a cost cap under R.C. 4928.64(C)(3), whereas R.C. 4928.66 does not include a similar provision for the EE/PDR standards. This distinction, FirstEnergy argues, clearly demonstrates the General Assembly's intent to treat the provisions differently with respect to the imposition of a cost cap.

{**¶ 11**} These arguments were considered and rejected by the Commission. Opinion and Order at ¶¶49-51, ¶56. As noted in the Commission's decision, the 4% Cap is a reasonable measure to moderate the bill impacts of rising EE/PDR rider charges on FirstEnergy customers under this Commission's broad authority to administer and enforce the provisions of R.C. Title 49, which has been recognized by the Court. *Kazmaier Supermarket, Inc. v. The Toledo Edison Co.*, 61 Ohio St.3d 147, 150, 573 N.E. 2d 655, 658 (1991).

{**¶ 12**} The renewable energy cost cap provision cited by FirstEnergy in R.C. 4928.64(C)(3) allows an electric utility or competitive retail electric service (CRES) provider to avoid compliance penalties even if it fails to meet its renewable energy benchmarks, if the reasonably expected cost of compliance would exceed the reasonably expected cost of otherwise producing or acquiring the requisite electricity by three percent or more. This provision is not mandatory and is an option for the utility or CRES provider, participating in a competitive marketplace. Moreover, EE/PDR costs are recovered from all customers on a nonbypassable basis.

{¶ 13} In contrast, the 4% Cap adopted in the Opinion and Order will protect the utility's customers from increasing rider charges, particularly where the utility's EE/PDR program budgets seek to achieve targets beyond the utility's statutory mandates under R.C. 4928.66. Accordingly, and because FirstEnergy raises no new issues for the Commission's consideration, this ground for rehearing will be denied.

2. THE 4% CAP WAS NOT SUBJECTED TO OHIO'S MANDATORY RULE-MAKING PROCEDURES.

{¶ 14} As its second ground for rehearing, FirstEnergy argues that the Opinion and Order is unlawful because our adoption of the 4% Cap constitutes the creation of a legal standard that did not previously exist, and therefore is a rule that has not been adopted under the appropriate rule-making requirements of R.C. 111.15. FirstEnergy cites *Fairfield Cty. Bd. of Comm'rs. v. Nally*, 143 Ohio St. 3d 93, 100, 2015-Ohio-991, 34 N.E.3d 873, in which the Court held that the Ohio Environmental Protection Agency must comply with the similar administrative rule-making procedures in R.C. Chapter 119 in establishing a total maximum daily load water-quality standard. FirstEnergy also references *B&T Express, Inc. v. Pub. Util. Comm. of Ohio*, 145 Ohio App. 3d 656, 665, 763 N.E.2d 1241 (2001) in which the Commission's adoption of federal motor carrier safety regulations were held to constitute rules under R.C. 111.15 because they had a "general and uniform operation" for motor carriers operating in Ohio. FirstEnergy asserts that Ohio's electric utilities have never before had to adjust their proposed EE/PDR plans to comply with an overall cost cap, and that the 4% Cap is being applied in a general and uniform manner to the recovery of EE/PDR program costs and shared savings for all of the Ohio electric utilities. Furthermore, FirstEnergy notes the Commission's adoption of Ohio Adm.Code 4901:1-40-07 for the renewable energy cost cap under R.C. 4928.64(C)(3), suggesting that the 4% Cap for recovery of EE/PDR costs must likewise be codified.

{¶ 15} In its memorandum contra, OCC argues that the lack of an explicit cost cap in R.C. 4928.66 does not strip the Commission of its more general authority to regulate customers' utility rates under R.C. 4905.22 and 4928.02. OCC cites the caps approved for FirstEnergy's delivery capital recovery rider in FirstEnergy's 2010 and 2012 ESP cases, despite there being no explicit mention of a cost cap in R.C. 4928.143. *In re Ohio Edison Co., et al. to Establish a Standard Service Offer under an Elec. Security Plan,* Case No. 10-388-EL-SSO, Opinion & Order (Aug. 25, 2010), and Case No. 12-1230-EL-SSO, Opinion & Order (July 18, 2012).

{¶ 16} This argument was raised and rejected by the Commission. Opinion and Order at ¶¶49-51, 54-57. We disagree that the 4% Cap constitutes the creation of a legal standard that did not previously exist and is, therefore, a rule subject to the rule-making requirements of R.C. 111.15. The 4% Cap adopted in the Opinion and Order is not a "guideline" like the water standard in *Nally, supra,* which applied generally and uniformly to a large segment of the public. And while we have applied a 4% Cap on the recovery of EE/PDR costs for each Ohio electric utility, the Commission has done so on an individual basis, giving each utility an opportunity to litigate its position on this issue. This cost cap provision is not a requirement imposed upon the electric utility. Rather, the 4% Cap is a limitation on the utility's recovery of EE/PDR costs, which balances the impact upon the customer who is required to pay for a program before the full cost savings from such program is realized. The result is that customer bills increase as the EE/PDR rider increases, notwithstanding any future benefits that such program may ultimately produce to lower customer bills at some future date.

{¶ 17} Moreover, the Commission's rule now promulgated as Ohio Adm.Code 4901:1-40-07 was adopted in response to the renewable energy cost cap under R.C. 4928.64(C)(3). There was no similar statutory provision for EE/PDR programs to suggest that the Commission incorporate a cost cap for the rules now codified in Ohio Adm.Code Chapter 4901:1-39. This Commission has broad discretionary authority to make rules in its supervision of electric utilities under R.C. 4905.05, 4905.06, and 4928.06. Moreover, the choice to proceed by rule or by individual, ad hoc litigation is one that lies primarily in the informed discretion of the administrative agency. *Duff Truck Line, Inc. v. Pub. Util. Comm.*, 46 Ohio St.2d 186, 348 N.E.2d 127, 75 O.O.2d 229 (1976), citing *Securities & Exchange Comm. v. Chenery Corp.*, 332 U.S. 194, 203, 67 S.Ct. 1575, 1580, 91 L.Ed. 1995 (1947); *National Labor Relations Board v. Bell Aerospace Co.*, 416 U.S. 267, 94 S.Ct. 1757, 40 L.Ed.2d 134 (1974). Accordingly, and because FirstEnergy fails to raise any new issues for the Commission's consideration, this ground for rehearing will be denied.

3. THERE IS NO EVIDENCE TO SUPPORT THE 4% CAP, WHICH IS INHERENTLY UNFAIR AND LEADS TO SIGNIFICANT INEQUITIES AMONG OHIO'S EDUS.

{¶ 18} As its final ground for rehearing, FirstEnergy argues that there is no evidence to support the adoption of the 4% Cap, which is inherently unfair and leads to significant inequities among Ohio's EDUs.

{¶ 19} These argument were raised and fully considered in the Opinion and Order at ¶¶52-57. As discussed above, the 4% Cap was adopted as a reasonable measure to limit the rate impact on FirstEnergy customers in response to credible Staff testimony regarding the Companies' increasing EE/PDR riders. While the impact of the 4% Cap may affect each of the Ohio EDUs somewhat differently, the application of a four percent cap based on each EDU's reported total sales to ultimate customers should mitigate any unfairness to FirstEnergy shareholders. Accordingly, this ground for rehearing and FirstEnergy's application for rehearing will be denied.

IV. ORDER

{¶ 20} It is, therefore,

{¶ 21} ORDERED, That the applications for rehearing filed by the Environmental Advocates and FirstEnergy be denied. It is, further,

{¶ 22} ORDERED, That a copy of this Entry on Rehearing be served upon all parties of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO

Asim Z. Haque, Chairman

M. Beth Trombold

Thomas W. Johnson

Lawrence K. Friedeman

Daniel R. Conway

RMB/vrm

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Secretary