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 2013 through 2015.	)))))))	Case No. 12-2190-EL-POR Case No. 12-2191-EL-POR Case No. 12-2192-EL-POR

APPLICATION FOR REHEARING BY THE OFFICE OF THE OHIO CONSUMERS' COUNSEL

BRUCE J. WESTON
OHIO CONSUMERS' COUNSEL

Kyle L. Kern, Counsel of Record
Assistant Consumers' Counsel

Office of the Ohio Consumers' Counsel
10 West Broad Street, Suite 1800
Columbus, Ohio 43215-3485
614-466-9585 (Kern Telephone)
kern@occ.state.oh.us

April 19, 2013

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 2013 through 2015.	)))))))	Case No. 12-2190-EL-POR Case No. 12-2191-EL-POR Case No. 12-2192-EL-POR

APPLICATION FOR REHEARING
BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL

The Office of the Ohio Consumers' Counsel ("OCC") files this Application for Rehearing on behalf of all the approximately 1.9 million residential utility consumers of Ohio Edison Company ("Ohio Edison"), the Cleveland Electric Illuminating Company ("CEI"), and the Toledo Edison Company ("Toledo Edison") (collectively, "FirstEnergy" or the "Utilities"). At issue in this proceeding is the Utilities' August 31, 2012 application ("Application") requesting approval of their Energy Efficiency and Peak Demand Reduction Program Portfolio Plans ("EE/PDR Portfolios") for 2013 through 2015. The EE/PDR Portfolios contain programs that will be offered to all customer classes in FirstEnergy's service territory.

OCC applies for rehearing of the March 20, 2013, Opinion and Order ("March 20 Order") issued by the Public Utilities Commission of Ohio ("Commission" or "PUCO"). R.C. 4928.66(A) requires each electric distribution utility ("EDU") in Ohio to implement EE/PDR programs that achieve quantifiable electric energy savings. In this regard, the Utilities' EE/PDR Portfolios can result in lower prices for electric energy and capacity in the wholesale market leading to lower retail electric energy prices in competitively bid auctions. But the Commission's March 20 Order in this proceeding will not maximize savings for customers.

Under R.C. 4903.10 and Ohio Admin. Code 4901-1-35, the March 20 Order was unjust, unreasonable, and unlawful because:

A. The PUCO Erred as its Decision Fails to Set Forth Detailed Findings for its Approval of FirstEnergy's Proposed Shared Savings Mechanism as Required by R.C. 4903.09.

B. The PUCO Erred in Only Requiring FirstEnergy to Bid in 75% of its Planned Energy Efficiency Resources for the 2016/2017 Planning Year into the May 2013 PJM Base Residual Auction. In Doing so, the PUCO Failed to Maximize Benefits for Customers.

An explanation of the basis for this Application for Rehearing is set forth in the attached Memorandum in Support. Consistent with R.C. 4903.10 and the claim of error above, the PUCO should modify its Entry.

Respectfully submitted,

BRUCE J. WESTON
OHIO CONSUMERS' COUNSEL

*_/s/ Kyle L. Kern_*
Kyle L. Kern, Counsel of Record
Assistant Consumers' Counsel

Office of the Ohio Consumers' Counsel
10 West Broad Street, Suite 1800
Columbus, Ohio 43215-3485
614-466-9585 (Kern Telephone)
kern@occ.state.oh.us

TABLE OF CONTENTS

PAGE

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 2013 through 2015.	)	Case No. 12-2190-EL-POR Case No. 12-2191-EL-POR Case No. 12-2192-EL-POR

MEMORANDUM IN SUPPORT

I. INTRODUCTION

This proceeding is significant because an appropriately designed EE/PDR Portfolio can result in lower costs for electric energy and capacity in the wholesale market leading to lower retail electric energy prices for customers, and can also allow customers to better control their energy use. Optimizing the EE/PDR capacity resources that can be bid into the PJM auctions can also lead to future reductions in the Demand Side Management and Energy Efficiency Rider charged consumers.

But the Commission's March 20 Order prevents consumers from realizing the full potential of these benefits. To this end, the PUCO adopted the Utilities' proposed shared savings mechanism with limited modifications even though the Utilities' proposed mechanism lacked proper support and was based upon the shared savings mechanism approved by the Commission in a stipulated proceeding.[1] Stipulated proceedings do not provide precedent for future PUCO decisions. The PUCO failed to state the rationale or reason for its holding, as required by R.C. 4903.09.

[1] The Utilities primarily rely on the Shared Savings Mechanism approved in the AEP-Ohio EE/PDR proceeding (Case Nos. 11-5568-EL-POR and 11-5569-EL-POR), see FirstEnergy Tr. Ex. 5 (Demiray Direct Testimony) at 7.

In addition, the Commission's decision as to the FirstEnergy's PJM bidding strategy is flawed. In its March 20 Order, the Commission required the Utilities "to bid into the upcoming May 2013 PJM BRA [Base Residual Auction] 75 percent of the planned energy efficiency resources for the 2016/2017 planning year under their program portfolio."[2] OCC and other intervening parties argued throughout this proceeding that the Utilities should be required to bid all of their saved megawatts into the PJM Base Residual Auctions for the benefit of customers. But the PUCO's March 20 Order only requires the Utilities to bid in a percentage of its saved megawatts into the PJM Base Residual Auction for the 2016/2017 planning year. Further, the March 20 Order is vague as to what its directive to bid in 75 percent of planned efficiency actually means. Accordingly, OCC requests rehearing on these issues.

II. STANDARD OF REVIEW

Applications for rehearing are governed by R.C. 4903.10. This statute provides that any party may apply for rehearing on matters decided by the Commission within thirty days after an order is issued.[3] An application for rehearing must be written and must specify how the order is unreasonable or unlawful.[4]

In considering an application for rehearing, the Commission may grant rehearing requested in an application, if "sufficient reason therefore is made to appear."[5] If the Commission grants a rehearing and determines that its Order is unjust or unwarranted, or

---

[2] *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 2013 through 2015*, Case Nos. 12-2190-EL-POR, et al., Opinion and Order at 20 (March 20, 2013).

[3] R.C. 4903.10.

[4] Id.

[5] Id.

should be changed, it may abrogate or modify the Order.[6] Otherwise the Order is affirmed.

OCC meets both the statutory conditions applicable to an applicant for rehearing pursuant to R.C. 4903.10 and the requirements of the Commission's rule on applications for rehearing.[7] OCC is a party to the case. Additionally, OCC actively participated in this case, and thus, may apply for rehearing under R.C. 4903.10. OCC respectfully requests that the Commission determine that OCC has shown "sufficient reason" to grant rehearing on the matters specified below.

III. ARGUMENT

A. The Commission Erred As Its Decision Fails To Set Forth Detailed Findings For Its Approval Of FirstEnergy's Proposed Shared Savings Mechanism, As Required By R.C. 4903.09.

Although an electric utility ***may*** submit a request for recovery of a shared savings mechanism per Ohio Admin. Code 4901:1-39-07, such mechanism is not required under Ohio law. Ohio is an energy efficiency compliance state, where electric distribution utilities must meet an annual savings benchmark or be subject to penalties.[8] In this regard, OCC recommended throughout this proceeding that incentives through a shared savings mechanism only be made available for actual utility performance that is demonstrated to have exceeded the statutory benchmarks. However, the Commission adopted a shared savings mechanism for the Utilities in its March 20 Opinion and Order consistent with what FirstEnergy proposed in its Application, with limited modifications.[9]

[6] Id.

[7] See Ohio Adm. Code 4901-1-35.

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

[9] Opinion and Order at 16 (March 20, 2013).

The terms approved by the PUCO are identical to the terms the Utilities proposed in their Application, and are simply a reiteration of the shared savings mechanism approved in the Ohio Power Energy Efficiency Peak Demand Reduction Portfolio proceeding (Case Nos. Case Nos. 11-5568-EL-POR, et al.) (hereinafter, "AEP-Ohio EE/PDR"). The AEP-Ohio EE/PDR proceeding resulted, after considerable negotiating and compromise by the parties on individual topics, in a Stipulation.[10] And although the Commission adopted the shared savings mechanism proposed by FirstEnergy "subject to certain modifications,"[11] its decision does not set forth detailed findings, and thus, fails to comply with the requirements of R.C. 4903.09. The PUCO should not base its decision in this case on the stipulated result in a separate case.

1. The shared savings mechanism adopted by the Commission is based upon the proposed mechanism of the Utilities, which lacks proper support.

The Utilities' proposed shared savings mechanism lacked proper support and was based upon the shared savings mechanism approved by the Commission in a stipulated proceeding.[12] The shared savings tiers proposed by FirstEnergy in this proceeding (and consequently approved by the Commission) are **identical** to those approved in the AEP-Ohio EE/PDR case—a point the PUCO acknowledges in its March 20 Order.[13]

The AEP-Ohio EE/PDR proceeding was a negotiated case, resulting in a settlement. As such, the AEP-Ohio EE/PDR settlement included a package of

[10] Note too that the AEP-Ohio EE/PDR Stipulation was negotiated over a period of 6 months.

[11] Opinion and Order at 16 (March 20, 2013).

[12] The Utilities primarily relied on the Shared Savings Mechanism approved in the AEP-Ohio EE/PDR proceeding (Case Nos. 11-5568-EL-POR and 11-5569-EL-POR), see FirstEnergy Tr. Ex. 5 (Demiray Direct Testimony) at 7.

[13] Opinion and Order at 15, where the Commission states: "We note that the incentive tiers proposed by the Companies are consistent with tiers approved by the Commission in AEP-Ohio's most recent portfolio proceeding."

provisions—one of which was a shared savings mechanism. The Commission cites to this stipulated case multiple times when justifying the shared savings mechanism it approved for FirstEnergy.[14] As explained *infra*, the AEP-Ohio EE/PDR decision is relied on when justifying: 1) the incentive tiers,[15] 2) the calculation of the incentive tiers on an after-tax basis,[16] 3) the cap on the shared savings mechanism[17] and 4) the use of the Utility Cost Test over the Total Resource Cost test to determine shared savings.[18]

R.C. 4903.09 requires the PUCO to set forth "findings of fact and written opinions setting forth the reasons prompting the decisions arrived at, based upon said findings of fact." The law does not allow negotiated settlements to take the place of findings of fact. Where the PUCO does not set forth detailed findings, it fails to comply with the requirements of this section and its Order is unlawful.[19]

a. The shared savings incentive tiers approved by the Commission are unreasonable should be reduced.

The incentive tiers approved by the Commission in its March 20 Order are identical to those approved in the AEP-Ohio Stipulated proceeding. In this proceeding, FirstEnergy proposed the following incentive structure:[20]

[14] See Opinion and Order at 15 and 16 (March 20, 2013).

[15] Id. at 15.

[16] Id. at 16.

[17] Id.

[18] Id.

[19] *Ideal Transportation Co. v. Pub. Util. Comm.* (1975), 42 Ohio St.2d 195, 71 O.O.2d 183, 326 N.E.2d 861.

[20] See Direct Testimony of Eren G. Demiray at 10, Case No. 12-2190-EL-POR (July 31, 2012).

Incentive Tier	Compliance Percentage	Incentive Percentage
1	< 100%	0.0%
2	100-105%	5.0%
3	>105-110%	7.5%
4	> 110-115%	10.0%
5	> 115%	13.0%

The Commission approved the exact shared savings tiers proposed by the Utilities (and modeled after AEP-Ohio's). To this end, the Commission states: "[w]e note that the incentive tiers proposed by the Companies are consistent with tiers approved by the Commission in AEP-Ohio's most recent portfolio proceeding."[21] The Commission also approved the Utilities' proposed mechanism despite the fact that multiple parties,[22] including OCC, presented alternative shared savings mechanisms in this case. But the Commission's March 20 Order fails to explain why the Utilities' mechanism was selected over the various proposals presented by intervening parties in this case. The only rationale provided by the Commission for its decision is that the approved mechanism for FirstEnergy is consistent with the AEP-Ohio shared savings mechanism.[23] The PUCO is required under R.C. 4903.09 to address material arguments made by parties to the proceeding. The PUCO did not do so.

Specifically, the shared savings incentive mechanism proposed by FirstEnergy and adopted by the Commission allows the Utilities to collect from customers up to a maximum of 13 percent of the avoided energy and capacity costs for savings (minus utility program costs) if they achieve 115 percent of the statutory benchmark in

---

[21] Opinion and Order at 15 (March 20, 2013).

[22] For example, the PUCO Staff proposed a top tier of 10 percent, after tax, while OCC advocated for a top tier of 8 percent.

[23] Opinion and Order at 15 (March 20, 2013).

EE/PDR.[24] This incentive is too high. In addition, the Commission approved the Utilities' proposal, to receive an incentive of 5 percent for simply meeting the statutory requirement.[25] OCC opposed this because the Utilities should not receive an incentive for simply meeting the statutory benchmark. Incentives should only be made available for actual utility performance that is demonstrated to have exceeded the statutory benchmarks. A utility should not be provided an incentive to comply with the law. The Commission's March 20 Order does not explain why the Utilities incentive tiers were selected over the other proposals in the case, and it also does not explain why the Utilities are being provided an incentive for merely satisfying their statutory obligations. Again, incentive mechanisms should be used to reward exemplary performance, over and above the statutory requirements.

Although the Commission points out in the March 20 Order that there was "broad support for some type of shared savings mechanism for the [Utilities],"[26] this depiction is not entirely accurate. No intervening party supported the Utilities' incentive mechanism as proposed. In fact, several intervening parties proposed no shared savings or **alternative** shared savings mechanisms in this proceeding.[27] In addition, the consensus among the intervening parties was that the incentive tiers proposed by the Utilities are too high. Undoubtedly, the laddered incentive percentages proposed by the Utilities should

---

[24] *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 2013 through 2015*, Case Nos. 12-2190-EL-POR, et al, FirstEnergy Tr. Ex. 5, Demiray Direct Testimony at 10.

[25] Id.

[26] Opinion and Order at 15 (March 20, 2013).

[27] For example, Ohio Energy Group and Nucor Steel Marion, Inc., called for a rejection of FirstEnergy's shared savings mechanism altogether. (O & O at 15). OCC, Natural Resources Defense Council, Sierra Club, Citizen Power, PUCO Staff, Ohio Energy Group, and Nucor Steel Marion, Inc. all proposed alternative shared savings mechanisms, the latter two parties only if the Commission decided to approve a shared savings mechanism.

have been reduced, given FirstEnergy's lucrative arrangement for collecting lost revenues from customers that the PUCO approved (over OCC's opposition) in the settlement in the FirstEnergy Electric Security Plan III Proceeding (Case No. 12-1230-EL-SSO). But the Commission also rejected this point stating "[w]e reject the Environmental Advocates' contention that AEP-Ohio merits higher incentive levels because FirstEnergy collects lost distribution mechanism while AEP-Ohio does not collect lost distribution revenue from residential and small commercial customers."[28] Once again, the Commission is comparing FirstEnergy's portfolio filing to AEP-Ohio's, which was a stipulated case. This is wrong.

The Commission should adopt the incentive structure proposed by OCC in this proceeding. OCC's incentive structure is more consistent with the recommendations made by other intervening parties[29] and does not provide an incentive to the Utilities for simply meeting the statutory requirement. OCC's proposed incentive structure is as follows:[30]

Incentive Tier	**Compliance Percentage**	**Incentive Percentage**
1	< 100%	0.0%
2	>100-105%	2.0%
3	>105-110%	4.0%
4	> 110-115%	6.0%
5	> 115%	8.0%

[28] Opinion and Order at 15 (March 20, 2013).

[29] For example, the Ohio Energy Group ("OEG"), Natural Resources Defense Council ("NRDC"), Sierra Club, Citizen Power, and PUCO Staff all proposed alternative shared savings mechanisms. OEG and Nucor Steel Marion, Inc. ("Nucor") presented a modified incentive mechanism with a top tier of 6%, and did not recommend providing an incentive to the Utilities for simply meeting the statutory benchmarks. NRDC, Sierra Club and Citizen Power recommend that the maximum shared savings available to the Utilities should be 10%. PUCO Staff also suggested that the highest percentage level of savings should be 10%.

[30] See OCC Initial Post Hearing Brief at 10 (November 20, 2012).

The Commission's March 20 Order does not explain its rationale for approving the Utilities' proposed incentive tiers without any modification, as required by R.C. 4903.09. Although the March 20 Order summarizes the positions of the intervening parties with respect to a shared savings mechanism, it does not explain why these proposals were rejected.

b. The shared savings mechanism should be calculated on a pre-tax basis.

The PUCO determined that the Utilities' shared savings mechanism would be calculated on an after-tax basis, as proposed by the Utilities.[31] OCC recommended during the course of this proceeding that the calculation of the shared savings incentive be on a pre-tax basis.[32] Using an after-tax calculation is a concern for customers because customers will not only pay the Utilities an incentive on their shared savings, but will also be asked to pay for FirstEnergy's tax liability. But the Commission found, that consistent with the AEP-Ohio stipulated EE/PDR case, "the Companies proposal should be modified such that the tiered incentive levels will be calculated on an **after-tax basis**."[33] It is of no consequence how the incentive levels were calculated in the AEP-Ohio EE/PDR case since the manner in which those shared savings tiered incentive levels were calculated in a stipulated, negotiated case is not precedent here. And again, the Commission did not provide an explanation for its decision as required by R.C. 4903.09 other than to cite the AEP-Ohio EE/PDR stipulated and negotiated case. It also did not explain why it would be improper to calculate the shared savings mechanism on a pre-tax

[31] Id.

[32] OCC Initial Post Hearing Brief at 10 (Date). This position was also supported by OPAE. (O&O at 15).

[33] Opinion and Order at 16. (Emphasis added).

basis. The Commission failed to show the facts in the record upon which its order is based and failed to state the rationale for its decision.

c. The cap on the shared savings mechanism is unreasonable.

Although the Commission was mindful that various intervening parties supported a cap on shared savings, the PUCO again modeled the shared savings cap off of the AEP-Ohio stipulated proceeding. In its March 20 Order, the PUCO states:

> The Commission finds that a $10 million cap on the amount of shared savings that may be collected is appropriate. However, the Commission finds that, should FirstEnergy decouple distribution revenue from usage in the future, the cap on the amount of shared savings that may be collected shall increase to $20 million, which is the amount of the cap the Commission approved in the AEP-Portfolio Case.[34]

The $10 million dollar cap is too high. The incentive mechanism should have been at most an eight percent overall cap based on prudent management of energy efficiency program spending, as recommended by OCC.[35] This would equate to approximately $6.6 million dollars per year, rather than $10 million.[36] In addition, and as argued by OCC during this proceeding, an eight percent cap is within the range being offered to other utilities nationwide.[37] The Commission did not address material arguments made by intervening parties with respect to a cap, as required by R.C. 4903.09.

---

[34] Id.

[35] In addition, OEG and Nucor recommended that the level of annual incentive payments should be capped at no more than 8 percent of prudent program spending. Post-Hearing Brief of OEG at 10, and Post-Hearing Brief of Nucor at 6. This recommendation is consistent with OCC Witness Gonzalez' recommendation (see OCC Tr. Ex. 1 at 16).

[36] The Utilities' Portfolio plan filed budget totals $248,929,790. (Edward C. Miller Direct Testimony, Exhibit ECM-3). $249 million/3 = $83 million. $83 million x .08 = $6.6 million.

[37] See "Aligning Utility Incentives with Investment in Energy Efficiency," National Action Plan for Energy Efficiency, November 2007, pages 6-1through 6-2.

Finally, the incentive should not increase to $20 million if FirstEnergy decouples customers' electric use from revenue. Decoupling reduces the risk that FirstEnergy will not recover its authorized distribution revenue, and therefore, FirstEnergy is not disadvantaged by a decoupling mechanism.

d. The PUCO failed to explain why the Utility Cost Test should be used instead of the Total Resource Cost Test.

The Commission found that the Utility Cost Test ("UCT"), rather than the Total Resource Cost ("TRC"), should be used to determine the net shared savings in the shared savings calculation.[38] OCC recommended that the Commission reject FirstEnergy's proposal to use the UCT to determine shared savings on the basis that the UCT captures only the benefits of the programs to the utility and ignores individual customers' costs as a whole.[39] OCC argued that the TRC accounts for all of the costs and benefits of an energy efficiency program.[40] The downfall of the UCT is that it only captures the benefits of the program to the utility and ignores the individual customers' costs as a whole.[41] Natural Resources Defense Council ("NRDC"), Sierra Club and Citizen Power supported OCC on this issue.[42]

But the Commission found in its March 20 Order that the UCT should be used to determine the net shared savings in the shared savings calculation.[43] The Commission specifically states: "the Commission notes that use of the UCT is consistent with our

[38] Opinion and Order at 17 (March 20, 2013).

[39] OCC Initial Brief at 12-13, OCC Reply Brief at 7-8.

[40] Id.

[41] OCC Initial Brief at 13.

[42] Initial Brief of NRDC, Sierra Club and Citizen Power at 63.

[43] Opinion and Order at 17 (March 20, 2013).

decision in AEP-Ohio's most recent portfolio proceeding, where the Commission approved a stipulation which provided for use of the UCT in the shared savings calculation."[44] There is no justification or rationale for the PUCO's decision in this proceeding other than citing a stipulated negotiated case in a separate proceeding. There is also no rationale cited for why the TRC is improper. Thus, the March 20 Order does not comply with R.C. 4903.09.

e. The AEP-Ohio EE/PDR proceeding was a negotiated, stipulated case that should not be used as precedent in this proceeding.

The Commission supported the shared savings mechanism it approved for FirstEnergy by citing to the Stipulation approved in the AEP-Ohio EE/PDR proceeding. But stipulations filed before the PUCO often contain agreements that prevent the individual terms of the settlement agreement to be binding in a subsequent proceeding.[45] The AEP-Ohio EE/PDR Stipulation is no exception. To this end, it states:

- Except for enforcement purposes, neither this Stipulation nor the information and data contained herein or attached hereto shall be cited as a precedent in any future proceeding for or against any Signatory Party, or the Commission itself, if the Commission approves the Stipulation. Nor shall the acceptance of any provision as part of the settlement agreement be cited by any party or the Commission in any forum so as to imply or state that any signatory party agrees with any specific provision of the settlement.

- … no specific element or item contained in or supporting this Stipulation shall be construed or applied to attribute the results set forth in this Stipulation as the results that any

[44] Id.

[45] Parties not signatories to a stipulation are also not bound by the portion of agreement preventing its use as precedent in future proceedings. *In the Matter of the Long-Term Forecast Report of Ohio Power Company and Related Matters*, Case No. 10-501-EL-FOR et al., Opinion and Order, 2013 Ohio PUC LEXIS 3, *14 (Jan. 9, 2013).

Signatory Party might support or seek, but for this Stipulation in these proceedings or in any other proceeding.

- … this Stipulation, **taken as a whole**, represents a reasonable compromise of varying interests.[46] (Emphasis added)

And the Commission has recognized that stipulations should not be binding on signatory parties in other proceedings, given the bargaining and compromise that takes place when negotiating settlements, stating: "[w]e recognize that individual components of the *** stipulation should not be binding on the signatory parties in other proceedings, given that the signatory parties have agreed to the stipulation, bargaining and compromising on the various provisions."[47] The provisions prohibiting the use of a stipulation as precedent in a subsequent proceeding are intended to encourage the settlement process. If parties anticipate that any agreement they reach will be used against them in a subsequent proceeding, or used as precedent by the Commission to support its decisions in unrelated cases, undoubtedly, settlements will be more difficult to reach.

Although the Commission has held that it is not prohibited from imposing similar provisions of a stipulation in an unrelated case,[48] it is incongruous for the Commission to rely on individual terms of a stipulation as precedent in a subsequent litigated case, while prohibiting the use of individual terms within a stipulation from binding parties in a

---

[46] Case Nos. 11-5568-EL-POR, et al., Stipulation and Recommendation at 14. (Emphasis added).

[47] *In the Matter of the Application of Ohio Power Company for Approval of an Amendment to its Corporate Separation Plan*, Case No. 11-5333-EL-UNC, Finding and Order, at 16 (Jan. 23, 2012).

[48] Although individual components of stipulations should not bind the parties in subsequent proceedings, in at least one case, the Commission allowed reference to the stipulation when references to it were "limited in scope and did not create any prejudicial impact on parties that signed the stipulations." *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Authority to Establish a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan*, Case No. 11-346-EL-SSO et al., Opinion and Order, 2012 Ohio PUC LEXIS 738, *21 (Aug. 8, 2012).

subsequent proceeding. In relying on the separate and individual provisions of the AEP-Ohio EE/PDR Stipulation, the Commission fails to consider that parties to the AEP-Ohio agreement reached a meeting of the minds on the entire Stipulation as a package, and not to the individual terms contained therein. The Commission approved the AEP-Ohio EE/PDR Stipulation after finding that- on the whole- it benefits ratepayers and the public interest and does not violate important regulatory principles.[49] But the terms within the Stipulation (taken in isolation) may not individually satisfy the three-prong test by which the PUCO approves or denies stipulations. It is improper for the Commission to rely on concessions parties made in reaching the AEP-Ohio EE/PDR Stipulation as precedent in this case.

B. The PUCO Erred In Only Requiring FirstEnergy To Bid In 75% Of Its Planned Energy Efficiency Resources For The 2016/2017 Planning Year Into The May 2013 PJM Base Residual Auction. In Doing So, the Commission Failed to Maximize Benefits For Customers.

1. The Commission should have directed FirstEnergy to bid all of its saved megawatts into the PJM base residual auction.

In addressing the PJM bidding strategy of the Utilities in its March 20 Opinion and Order, the Commission found as follows:

> The Commission is mindful of the uncertainty of future PJM BRAs, including resources planned but not yet installed, unknown clearing prices for capacity in incremental auctions, risk of PJM penalties for obligations cleared, but not delivered, and uncertainty whether Riders ELR and OLR will expire. However, the Commission also finds that requiring Companies to bid all planned savings into future PJM BRAs could substantially benefit

[49] *In the Matter of the Applications of Columbus Southern Power Company and Ohio Power Company for Approval of their Program Portfolio Plan and Request for Expedited Consideration, Case No. 11-5568-EL-POR et al., Opinion and Order, at 18 (March 21, 2012)* ("The stipulation, *as a package*, meets the criteria used by the Commission to evaluate stipulations, is reasonable, and should be adopted.") (Emphasis added).

> ratepayers by lowering capacity auction prices and reducing Rider DSE costs. In order to create a reasonable balance between uncertainty and potentially substantial benefits, the Commission finds it appropriate to adopt a portion of Staff's recommendation. The Commission will require the Companies to bid into the upcoming May 2013 PJM BRA **75 percent of the planned energy efficiency** resources for the 2016/2017 planning year under their program portfolio. Thereafter, the Commission may issue an order addressing the Companies bids for the remaining two planning years. (Emphasis added).

Various intervening parties (including OCC) acknowledged that requiring the Utilities to bid energy efficiency savings into PJM auctions can substantially benefit customers. In fact, OCC advocated for the Utilities bidding in all potential capacity reductions into the PJM Base Residual Auctions for the benefit of customers, rather than only bidding in the "installed energy efficiency" as proposed by the Utilities.[50] In this regard, there are two major dollar benefit streams for customers from the Utilities' bidding in additional capacity to the PJM BRA.[51] These benefits are: 1) the potential impact of the energy efficiency bid to lower the final capacity auction price, and 2) the revenue payments received by FirstEnergy from PJM for the eligible energy efficiency and load management capacity bid into the BRA are used to reduce the energy efficiency program costs.[52]

However, the Commission determined that FirstEnergy is required to bid 75 percent of "the planned energy efficiency resources" in the upcoming May 2013 PJM Base Residual Auction for the 2016/2017 planning year.[53] The Commission made this determination in order to "create a reasonable balance between the uncertainty and

---

[50] All megawatts that comply with PJM Manual 18B: Energy Efficiency Measurement & Verification, March 1, 2010.

[51] OCC Trial Ex. 1, Gonzalez Direct at 19.

[52] Id.

[53] Opinion and Order at 20 (March 20, 2013).

potentially substantial benefits" of bidding planned resources into the PJM Base Residual Auction.[54] Forgoing the additional financial benefit that would accrue to customers from bidding the additional 25% of a portfolio's capacity value is too high of a price for an insurance policy[55] for customers to pay. This is especially the situation since the three incremental auctions preceding the delivery year provide a significant risk mitigation mechanism. The PUCO should have instead required the Utilities to bid in 100% of existing and planned energy efficiency as recommended by OCC.

FirstEnergy has experience in bidding energy efficiency and peak demand reduction into the PJM auctions. This is in contrast to AEP-Ohio who was making their initial foray when they bid in 75% of their energy efficiency capacity into the 2015/2016 auction.[56] In the alternative, the Commission could retain the risk mitigation mechanism (i.e. bidding less than 100%) in their Order but increase the percentage FirstEnergy is required to bid into the PJM auction from 75% to at least 85% and thereby attain a better risk-reward balance for consumers.

2. The Commission's order lacks specificity.

The Commission's March 20 Order concerning bidding into the PJM auction lacked specificity explaining what the term "planned energy efficiency resources" is meant to include. OCC would recommend that, at a minimum, the term "planned energy efficiency resources" be defined to mean existing and planned resources that meet the PJM capacity auction bidding requirements and that are likely to be cost-effective for consumers after the costs of any additional measurement and verification, or other costs

---

[54] Id.

[55] Insurance policy against the levying of penalties by PJM for not delivering the cleared EE/PDR program megawatts from the auction when due.

[56] Trial Transcript Vol. IV (Gonzalez) at 900.

related to the bidding of EE/PDR resources into the auction. The "planned energy efficiency resources" should also include residential customers' peak demand reduction programs (such as the Direct Load Control Program) that do not have an expiration date. And, the Commission did not specify the Utilities' bids for the remaining two planning years. It is important that the Commission define parameters for these two years or develop a process to define such parameters well before the 2017/2018 PJM BRA.

The Commission should grant rehearing to clarify the March 20 Order to define "planned energy efficiency resources" as existing and planned resources that meet the PJM bidding requirements.

IV. CONCLUSION

For the reasons stated herein, the Commission should grant OCC's application for rehearing and modify its March 20 Order. The shared savings incentive mechanism approved by the Commission for FirstEnergy is excessive and improperly supported. In addition, the Commission unreasonably and unlawfully failed to explain its rationale for the shared savings mechanism approved for FirstEnergy.

Finally, the Commission should require the Utilities to bid in all eligible existing and planned energy efficiency resources (saved MW) into the PJM Base Residual Auctions. The requirement for FirstEnergy to bid only 75% of planned energy efficiency resources, as ordered in this proceeding, leaves a substantial amount of customer benefits from being realized— meaning FirstEnergy would be costing customers' money.

Respectfully submitted,

BRUCE J. WESTON
OHIO CONSUMERS' COUNSEL

*/s/ Kyle L. Kern*_______________
Kyle L. Kern, Counsel of Record
Assistant Consumers' Counsel

Office of the Ohio Consumers' Counsel
10 West Broad Street, Suite 1800
Columbus, Ohio 43215-3485
614-466-9585 (Kern Telephone)
kern@occ.state.oh.us

CERTIFICATE OF SERVICE

I hereby certify that a copy of this Application for Rehearing was served on the persons stated below via electronic service this 19th day of April 2013.

*/s/ Kyle L. Kern*____________________
Kyle L. Kern
Assistant Consumers' Counsel

SERVICE LIST

Devin.parram@puc.state.oh.us
kjkolich@firstenergycorp.com
cdunn@firstenergycorp.com
toddm@wamenergylaw.com
cmooney2@columbus.rr.com
Cathy@theOEC.org
Trent@theOEC.org
callwein@wamenergylaw.com
jvickers@elpc.org
rkelter@elpc.org
dboehm@BKLlawfirm.com
mkurtz@BKLlawfirm.com
jkylercohn@BKLlawfirm.com

ricks@ohanet.org
tobrien@bricker.com
tsiwo@bricker.com
gpoulos@enernoc.com
sam@mwncmh.com
fdarr@mwncmh.com
joliker@mwncmh.com
mpritchard@mwncmh.com
mlavanga@bbrslaw.com
NMcDaniel@elpc.org
robinson@citizenpower.com
mandy.willey@puc.state.oh.us
Gregory.price@puc.state.oh.us