BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Company, and the Toledo Ohio Edison Company for Approval of Their Energy Efficiency and Peak Demand Reduction Program Portfolio Plans for 2017 through 2019	: : : :	Case No. 16-0743-EL-POR

NATURAL RESOURCES DEFENSE COUNCIL'S MEMORANDUM CONTRA TO THE COMPANIES' MOTION TO STRIKE PORTIONS OF CHRIS NEME'S FILED TESTIMONY AND TO PRECLUDE FUTURE TESTIMONY RELATED TO THOSE ISSUES

I. INTRODUCTION

Ohio Edison Company, The Cleveland Electric Company, and the Toledo Edison Company ("FirstEnergy" or the "Companies") filed an Application for Approval of Their Energy Efficiency and Peak Demand Reduction Program Portfolio Plans for 2017 through 2019 on April 15, 2016 (the "Proposed Plans"). Natural Resources Defense Council ("NRDC") intervened in this case on April 27, 2016 and filed the direct testimony of its witness, Chris Neme, on September 13, 2016. On September 23, 2016, FirstEnergy filed a Motion to Strike Portions of Intervenor Witnesses' Testimony and Preclude Future Testimony Related to Previously Litigated Issues ("Motion to Strike"). Specifically, FirstEnergy seeks to strike the portions of Mr. Neme's testimony regarding the so-called "Customer Action Program" ("CAP"). [1] Mr. Neme's testimony

[1] NRDC notes that FirstEnergy seeks to also strike testimony on the CAP offered by Ohio Consumers' Counsel, Ohio Environmental Council/Environmental Defense Fund, Environmental Law and Policy Center, and Ohio Manufacturers' Association Energy Group. *See* Motion to Strike at 10-11. While we do

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raises a range of concerns with the CAP, including whether it rises to the level of scrutiny that would qualify it for inclusion in the Companies' annual shared savings award for the Proposed Plans. FirstEnergy claims that Mr. Neme's testimony on these issues is barred by collateral estoppel, because (it claims) these questions were conclusively decided in the docket on the Companies' Fourth Electric Security Plan ("ESP IV Case"). In that case, the Commission approved the Third Supplement Stipulation ("ESP IV Stipulation") and cited FirstEnergy's statement that "[c]ost-effective energy efficiency programs shall be eligible for shared savings."[2] FirstEnergy also claims that the statement, "the increase in the shared savings cap is in the public interest because it encourages the Companies to seek to provide to their customers all available cost-effective energy efficiency opportunities"[3] is definitive proof that the Commission has already approved the "eligibility **and** inclusion of all cost-effective programs for shared savings."[4]

NRDC respectfully requests that the Commission deny FirstEnergy's Motion to preemptively strike Mr. Neme's testimony on a critical issue relevant to the Proposed Plans. As discussed below, FirstEnergy fails to meet the elements of collateral estoppel because the issue of the CAP and its relation to shared savings was not litigated and decided in the ESP IV Case, nor was it passed upon and determined by the Commission. Specifically, FirstEnergy omits the critical threshold step of demonstrating that the CAP is—in fact—"cost-effective," that it should

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not specifically address the request to strike other intervenors' testimony here, the law and facts that would dictate rejection of FirstEnergy's Motion to Strike as to NRDC's testimony would apply with equal force to other intervenors' testimony on the CAP and its inclusion in shared savings.

[2] *In The Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Authority to Provide For a Standard Service Offer Pursuant to R.C. 4928.143 in the Form of an Electric Security Plan*, Pub. Util. Comm. No. 14-1297-EL-SSO ("ESP IV"), Opinion and Order at 68 (March 31, 2016).

[3] ESP IV Order at 95.

[4] Companies' Motion to Strike at 11. (Emphasis added.)

be considered a "program," and that it provides any "energy efficiency opportunities" to customers, *before* it can be considered for inclusion in shared savings. The Companies also overstate the plain reading of the provision at issue in the ESP IV Order, and they ignore Commission precedent on shared savings. In addition, FirstEnergy fails in its assertion that these issues should be reserved for the ESP IV Case, as the appropriate forum for resolving the present dispute over shared savings is in the current docket on the Proposed Plans. Similarly, because inclusion of the CAP in shared savings was never actually and directly litigated in the ESP IV Case, nor was it passed upon by the Commission, Mr. Neme's testimony on this issue cannot be deemed a "selective attack" on the ESP IV Stipulation.

Finally, it is important to note the consequences of FirstEnergy's request. In casting the ESP IV Stipulation and Order as the last word on the shared savings question, FirstEnergy would strip the Commission of its authority to review the appropriateness of the CAP (and, for that matter, all programs in the Proposed Plans) and its application toward shared savings. Ultimately, it would remove the Commission's and the parties' opportunities to participate in shaping the Proposed Plans and to ensure the programs therein provide optimal benefits to Ohio's consumers. This could not have been the intent when the ESP IV Stipulation was approved.

II. LAW AND ARGUMENT

A. Collateral Estoppel is Not Applicable to Testimony on the CAP and Shared Savings in FirstEnergy's Proposed Plans.

FirstEnergy claims that the CAP's inclusion in its shared savings calculation was conclusively decided by the Commission in the ESP IV Case, and therefore any testimony on the issue in the present docket is barred by collateral estoppel, including the cited testimony of

NRDC's expert witness, Chris Neme.[5] The Supreme Court of Ohio characterizes "collateral estoppel" as precluding the re-litigation of an issue that has been "actually and necessarily litigated and determined in a prior action * * *."[6] "When an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim."[7] The Court held that the elements of collateral estoppel are: 1) a fact or a point that was actually and directly at issue in a previous action; 2) that was passed upon and determined by a court of competent jurisdiction; and 3) between the same parties or their privies.[8] Finally, the Court held that, "an absolute due process prerequisite to the application of collateral estoppel is that the party asserting the preclusion must prove that the identical issue was actually litigated, directly determined, and essential to the judgment in the prior action."[9]

None of these elements are met, and thus NRDC respectfully requests that the Commission reject FirstEnergy's motion to strike portions of Mr. Neme's testimony. Further, the case law that FirstEnergy cites on collateral estoppel is distinguishable from the present case and does not dictate striking testimony at this (or any) stage of the litigation on the Proposed Plans.

[5] Companies' Motion to Strike at 11-12.
[6] *New Winchester Gardens, Ltd. v. Franklin Cty. Brd. Of Revision*, 80 Ohio St. 3d 36, 41, 684 N.E.2d 312, (1997).
[7] Restatement of the Law, Second, Judgments, Section 27.
[8] *Fort Frye Teachers Ass'n, OEA/NEA v. State Employment Relations Bd.*, 1998-Ohio-435, 81 Ohio St.3d 392, 395, 692 N.E.2d 140.
[9] *Goodson v. McDonough Power Equip., Inc*., 2 Ohio St.3d 193, 201, 443 N.E.2d 978 (1983).

1. Inclusion of the CAP in shared savings was not actually and directly at issue in the ESP IV Case, and was not passed upon and determined by the Commission.

FirstEnergy's assertion of collateral estoppel fails, because: 1) the Companies overstate the treatment of the CAP in the ESP IV Order and the Commission's determination on that issue; 2) serious questions remain as to whether the CAP is "cost-effective," is a "program" worthy of inclusion in the Proposed Plans, and whether it provides any "energy efficiency opportunities" for customers, all of which are questions the parties should be permitted to litigate in the present case; 3) the Companies misrepresent the clear language in the ESP IV Stipulation and the Order, that only guarantees cost-effective programs will be "eligible," not definitively approved for "inclusion" in shared savings; and 4) the Companies ignore precedent that leaves the door open for the Commission to exercise its authority to determine in the present portfolio case which programs should—in fact—qualify for shared savings.

i. <u>The issue of which of the eligible programs are properly included in the shared savings calculation is unresolved.</u>

First, the Companies claim that the question of the CAP's inclusion in its shared savings calculation has been conclusively decided by the Commission in the ESP IV Order.[10] But this conclusion does not logically follow from a review of the cited provisions. The Commission never independently discussed the CAP in the ESP IV Order, nor is the CAP mentioned in the 15 pages following the "Commission Decision" subheading. It is common practice for the Commission to note the various parties' arguments in an order, and the ESP IV Case is no different. To be sure, in the ESP IV Order the Commission makes note of the *Companies'* references to the CAP and the *Companies'* opinion that it would qualify for shared savings, as

[10] Companies' Motion to Strike at 11-12.

well as concerns raised on this issue by a small handful of parties.[11] However, mere acknowledgment of the existence of testimony on the CAP (most of which was proffered by FirstEnergy) does not amount to full Commission resolution on the issue, nor—as FirstEnergy claims—does it mean that the Commission has explicitly approved the inclusion of programs like CAP in shared savings. Indeed, under *Goodson*, "an absolute due process prerequisite to the application of collateral estoppel is that the party asserting the preclusion must prove that the identical issue was actually litigated, directly determined, and essential to the judgment in the prior action."[12] FirstEnergy simply cannot meet that prerequisite.

Tellingly, FirstEnergy twists the ESP IV Order into knots in an attempt to cast this issue as fully litigated. For example, the Companies state that the Commission held, "that the eligibility and inclusion of all cost-effective programs for shared savings '[wa]s in the public interest because it encourages the Companies to seek to provide to their customers ***all available cost-effective energy efficiency opportunities***.'"[13] However, the cited language is taken out of context. It was used by the Commission in discussing a proposed increase in the shared savings cap—it had no bearing on the CAP. This is evident when the full sentence is provided: "We find, therefore, that the increase in the shared savings cap is in the public interest because it encourages the Companies to seek to provide to their customers all available cost-effective energy efficiency opportunities."[14] FirstEnergy's application of this language to the CAP discussion is inappropriate.

[11] *Id*. at 5. (citing ESP IV Order at 68.)
[12] *Goodson* at 102.
[13] Companies' Motion to Strike at 11. (Citing ESP IV Order at 95) (Emphasis added by the Companies.)
[14] ESP IV Order at 95.

ii. Whether the CAP is "cost-effective," a "program," or even provides customers any "energy efficiency opportunities" is still to be determined.

Second, in its haste to strike highly relevant expert testimony from the record on the CAP, FirstEnergy omits the critical step of demonstrating that the CAP meets the explicit criteria set out in the provisions at issue in the ESP IV Stipulation and Order ("[***c***]***ost-effective*** energy efficiency ***programs*** shall be eligible for shared savings" and that programs provide **"*energy efficiency opportunities*"** to customers), as well as the criteria the Commission typically applies to energy efficiency portfolio plans.

The threshold determination of cost-effectiveness is not automatic, nor is it merely a formality. Ohio Adm. Code 4901:1-39-04(B) requires utilities to demonstrate that their programs are cost-effective.[15] Company witness Mikkelson testified at the ESP IV Case hearing that the Companies "consider" the CAP to qualify as cost-effective.[16] But wishing doesn't make it so; a thorough vetting on the current record is necessary to ensure that the proposed suite of energy efficiency programs provide more benefits to customers than their costs to implement. In fact, the question of whether the CAP is cost-effective is currently in dispute in this case, raised in the expert testimony of Ohio Manufacturers' Association Energy Group ("OMAEG") and Environmental Law & Policy Center ("ELPC")[17] (some of the very testimony that FirstEnergy would have preemptively struck from the record).[18]

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[15] OAC 4901:1-39-04(B) ("Each electric utility shall demonstrate that its program portfolio plan is cost effective on a portfolio basis. In general, each program proposed within a program portfolio plan must also be cost-effective, although each measure within a program need not be cost-effective.").
[16] *See* Pub. Util. Comm. No. 14-1297-EL-SSO, Application for Rehearing by The Environmental Law & Policy Center, Ohio Environmental Council, and Environmental Defense Fund at 17 (May 2, 2016) (citing ESP IV Tr. XXXVII at 7866).
[17] *See* Direct Testimony of John Seryak on Behalf of OMAEG at 3:18-23, 4-14 ("CAP does not produce energy or cost savings above a business-as-usual case. Thus, it produces no cost benefits and fails both the Total Resource Cost (TRC) and Utility Cost Test (UCT). Moreover, the CAP undermines the successful mercantile self-direct program, creating costs for ratepayers. As a result, I recommend that the Commission reject approval of the CAP and disallow CAP from the Portfolio Plan."); *See also* Direct

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The Commission itself has expressed similar skepticism in other dockets about the cost-effectiveness of the CAP and the methodology for calculating "savings." In 2014, FirstEnergy sought to amend its 2012 to 2014 energy efficiency portfolio following the passage of S.B. 310 and proposed to include the CAP as a new "program." While the Commission provisionally approved the inclusion of the CAP in that amended portfolio, it cautioned that its effectiveness in generating savings had yet to be proven and would require further vetting:

> As to the Customer Action Program, however, the Commission notes that FirstEnergy has included little information on the EM&V approaches that will be used to verify savings. Consequently, the Commission stresses that, although FirstEnergy may proceed with this new program, any savings resulting from the program may not be counted until it can be measured and verified, as FirstEnergy conceded in its comments. Additionally, the Commission directs FirstEnergy to work with its collaborative to develop more detailed information on how the Customer Action Program should be implemented.[19]

In that same docket, the Commission also rejected the notion that the CAP's cost-effectiveness was automatically established, reserving the issue for future consideration:

> The Commission disagrees that FirstEnergy does not need to demonstrate cost-effectiveness for its Customer Action Program merely because such a plan is permissible under the statute. Although the statute permits FirstEnergy to count savings from such a program, nothing exempts FirstEnergy from the requirement that it demonstrate cost-effectiveness. Nevertheless, given the time constraints of this proceeding, the Commission finds that this program may be included in the Amended Plan, subject to the TRC test as part of future audits.[20]

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Testimony of John Paul Jewell on Behalf of ELPC at 35 (questioning whether the CAP can be considered to produce any energy savings, and noting that it is "simply an expensive counting exercise.").

[18] Companies' Motion to Strike at 10-11.

[19] *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Approval of Their Energy Efficiency and Peak Demand Reduction Program Plans for 2013 through 2015*, Pub. Util. Comm. No. 12-2190, Finding and Order at 9 (November 20, 2014).

[20] *Id*. at 12-13.

Also in that 2014 amended portfolio docket, the Commission never reached the question of whether it would be appropriate to include the CAP in the shared savings calculation. FirstEnergy clarified that it did not intend to use the net benefits calculated from the CAP (or any of the programs that were being continued in the amended plan) toward shared savings through 2016.[21] Thus, it remains an open question whether the Commission will ultimately permit FirstEnergy to include the CAP toward shared savings in the Proposed Plans currently at issue.

Further, there are serious questions about whether the CAP should even be considered a "program" worthy of inclusion in the Proposed Plans. As with the question of cost-effectiveness, expert testimony for OMAEG recommends that the Commission reject approval of the CAP and disallow it from the Proposed Plans, noting that the "CAP simply surveys customers on what energy-efficiency investments and actions they have taken, without the Companies' involvement."[22] NRDC's expert also calls into question the validity of the "program" moniker for the CAP, as well as any notion that it represents a best practice amongst utility energy efficiency portfolios.[23] Expert testimony for ELPC opines that the CAP "does not represent implementation of a program, nor does it cause any energy savings."[24]

In addition, in its Motion to Strike FirstEnergy relies heavily on Commission language in the ESP IV Order that raising the shared savings cap "[wa]s in the public interest because it

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[21] *Id*. at 17. (Citing FirstEnergy's Reply at 10, accepting Staff's recommendation to include only the Residential Low Income Program and Residential Direct Load Control Program amongst the new programs qualifying for shared savings through 2016, and going "one step further – the Companies will not claim Adjusted Net Benefits produced by any of the programs identified to continue in the Amended Plan.")

[22] Direct Testimony of John Seryak at 9.

[23] *See* Testimony or Chris Neme on Behalf of NRDC at page 23, FN 35 ("The data collected from such an inquiry may be interesting to gauge customer uptake and trends, but does not rise to the level of being a "program," let alone one that represents "best practice" or is worthy of rewarding through a shareholder incentive mechanism"); *see also Id*. at 11:125-134, 12:145-147, 150-153, 20:284-287, 22:332-340 (repeated references to CAP as a "program" and dispute as to whether it represents best practice).

[24] Direct Testimony of John Paul Jewell at 35.

encourages the Companies to seek to provide to their customers ***all available cost-effective energy efficiency opportunities***.'"[25] Putting aside the fact (as noted above) that the Companies take this language out of context (it was never related to the CAP), there remains an open question of whether the CAP would provide customers any "energy efficiency opportunities." Nearly every witness for whom FirstEnergy now seeks to strike testimony noted their concern that FirstEnergy is providing nothing to its customers through the CAP.[26] Indeed, the CAP merely logs the energy efficiency actions that customers are already taking independently, offering no further "opportunities" for additional cost-effective energy savings through any material utility action. If anything, allowing the CAP to count towards shared savings would be taking opportunities *away* from customers and would actually harm them by reducing the proportion of other programs in the portfolio that provide new, direct benefits to customers. Mr. Neme raised this latter concern in his testimony, as did OCC and OMAEG.[27]

Given these very real disputes, it is not yet resolved whether the CAP would survive Commission scrutiny even with respect to inclusion in the Proposed Plans, let alone whether it

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[25] Companies' Motion to Strike at 11. (Citing ESP IV Order at 95) (Emphasis added by the Companies).
[26] Direct Testimony of Chris Neme at 21-22 (noting concern that the CAP does not "produce any new savings."); Direct Testimony of John Seryak at 10 ("Because [the CAP] is business-as-usual efficiency, there is no additional financial benefit to customers."); Testimony of Richard Spellman on Behalf of OCC at 42 ("FirstEnergy plays no role in customers achieving savings from the CAP and does not provide any incentives to customers to reduce usage or demand . . . In each of these programs, the customer achieves savings outside of FirstEnergy's programs, and FirstEnergy merely counts those savings towards its benchmark and to increase its profits."); Direct Testimony of John Paul Jewell at 35 ("The funds allocated toward the Customer Action Program should be reduced as low as possible, because they do not produce real results, and those funds should be directed [to] other programs that actually produce savings.")
[27] Direct Testimony of Chris Neme at 21, 22-23 ("[Inclusion of CAP in shared savings] would provide a significant incentive for the Companies to increase focus on programs that merely document savings that the Companies did not have a material role in producing – and lessen focus on other programs that are actively designed to provide new, cost-effective benefits to customers."); Direct Testimony of John Seryak at 13-14 (raising the concern that the CAP undermines the existing mercantile self-direct program); Direct Testimony of Richard Spellman at 42 ("Customers should not be forced to pay a shared savings incentive for EE/PDR activities where First Energy has had no effect on customers' decisions to adopt energy efficiency. This takes money from customers for nothing.")

counts toward shared savings. And FirstEnergy offers no other evidence that these factors have already been determined, nor do they claim that these questions were resolved via the ESP IV Order.

iii. The ESP IV Order only established that certain programs would be *eligible* for shared savings, not that they would be automatically *included* in the calculation.

Third, contrary to FirstEnergy's claims, the ESP IV Order did not definitively "resolve" the inclusion of CAP in the shared savings calculation.[28] The language that FirstEnergy raises ("[c]ost-effective energy efficiency programs shall be ***eligible*** for shared savings")[29] *on its face* retains Commission authority to make an independent determination in the current Proposed Plans docket as to which programs should be included in the shared savings calculation. Further, the cited language comes from FirstEnergy itself; the Commission was merely noting it.[30] At best, the Commission simply approved the language at issue, but did not (as FirstEnergy asserts) foreclose further analysis on it.[31] A reasonable reading of this provision is that it represents just the first step in determining the universe of programs that could ultimately count towards shared savings. Indeed, the Commission did not find that cost-effective programs shall be "included" in shared savings, nor did the Commission specifically weigh in on whether the CAP itself would qualify. Instead, the Commission left the door open for a more thorough consideration in the present case.

[28] Companies' Motion to Strike at 11(claiming that "[t]hese issues were resolved through the ESP IV Case, and thus the first element of collateral estoppel is satisfied.")
[29] ESP IV Order at 68. (Emphasis added).
[30] *Id*.
[31] Even the Companies distinguish "eligible" from definitive "inclusion" in shared savings in their Motion. *See* Motion to Strike at 11 (claiming that the Commission approved the "eligibility **and** inclusion" of all cost-effective programs.).

Striking the testimony of Chris Neme (and of other parties' expert witnesses) on this issue would be preemptive and would remove the involvement of Staff and the Commission from this important threshold determination.

iv. The Companies ignore Commission precedent that clearly identifies additional criteria on whether shared savings should be awarded for a given "program."

Fourth, precedent on the criteria that Staff and the Commission have used to determine which programs qualify for shared savings provides further evidence that the ESP IV Order is not the final word. Staff comments and Commission orders in prior energy efficiency portfolio dockets demonstrate that there are other elements (beyond even cost-effectiveness and whether the proposal should be considered a "program") that the Commission considers in determining whether a given program rises to the level of rigor and performance that would qualify it for shared savings. In FirstEnergy's last portfolio plan case, for example, Staff made clear that direct utility involvement in producing savings was tantamount to meeting this heightened bar:

> Staff believes that a shared savings mechanism for the First Energy electric distribution utilities should only be for those activities for which First Energy has had a material affect in their customers' decisions in adopting energy efficiency. Only those programs that are under their direct or indirect supervision or management of the Company should be able to count toward those savings that exceed their annual benchmarks. This means that savings from efficiency measures or programs implemented by mercantile customers independent of the Company would not count toward a utility based incentive mechanism even though those savings could count toward their annual benchmarks.[32]

[32] *In the Matter of the Application of The Cleveland Electric Illuminating Company, Ohio Edison Company, and The Toledo Edison Company for Approval of Their Energy Efficiency and Peak Demand Reduction Program Portfolio Plans for 2010 through 2012 and Associated Cost Recovery Mechanism , and Tariffs for Generation Service*. Pub. Util. Comm. No. 09-1947, Staff Proposal for Incentivizing Utility Energy Efficiency Performance (proposal never decided upon Commission due to settlement discussions/deferral of issue to next portfolio plan, Case No. 12-2190) (available at http://dis.puc.state.oh.us/TiffToPDf/A1001001A11J24B01952E26108.pdf).

Although Staff was discussing mercantile self-direct programs in this passage, the same logic applies to the CAP, which (similar to Staff's concern about self-direct programs) does little more than log the independent energy efficiency decisions and actions of customers. Similarly, Staff weighed in on the 2014 amended portfolio request from FirstEnergy following the passage of S.B. 310. Prior to FirstEnergy clarifying that it would only be seeking limited shared savings on that amended plan, Staff recommended that, in order for it to serve as an effective incentive, a shared savings mechanism should reward only active steps by a utility that actually result in energy savings[33]

This approach is consistent with prior Commission orders. For example, in a prior AEP efficiency portfolio case the Commission approved the stipulated exclusion of mercantile self-direct programs from the calculation of shared savings.[34] In FirstEnergy's application for its 2012 to 2014 portfolio plan, the Companies *themselves* proposed the exclusion of mercantile self-direct programs from shared savings—which, as Commission Staff then described, "reflect the independent decisions of these customers to make their facilities more energy efficient."[35]

In these prior comments and orders, Staff and the Commission unquestionably focus their evaluation of shared savings on whether a utility demonstrates active involvement in generating

[33] *See*, Pub. Util. Comm. No. 12-2190, Staff Comments at 3 (Oct. 20, 2014). Although Staff do not explicitly reference the CAP in this comment, in practice their comments would suggest that the CAP should not count toward shared savings. Staff specifically states that FirstEnergy "should not be financially rewarded if they are not actively influencing retail customers to invest in and implement energy efficiency programs, and incurring no financial risk with respect to these programs." It is currently an open issue on the portfolio plan docket whether the CAP lacks this active influence on the part of the utility.

[34] *See, e.g.*, *In the Matter of the Application of Columbus Southern Power Company for Approval of its Program Portfolio Plan and Request for Expedited Consideration In the Matter of the Application of Ohio Power Company for Approval of its Program Portfolio Plan and Request for Expedited Consideration*, Pub. Util. Comm. No. 11-5568-EL-POR, Order at 15 (Mar. 21, 2012) (approving stipulation providing that "the Companies will not receive any shared savings for the Self Direct program, which counts retrospective savings by mercantile customers").

[35] *See*, Pub. Util. Comm. No. 12-2190-EL-POR, Opinion and Order at 13, 16 (March 20, 2013).

savings. This is a distinct element that has been critical to determining what programs should be counted towards shared savings. Nowhere in the prior energy efficiency portfolio dockets does it suggest that cost-effectiveness is the sole criteria upon which a program stands or falls with respect to the shared savings calculation. Thus, accepting FirstEnergy's notion that this matter is closed would create an absurd result where otherwise sub-par programs are awarded shared savings *carte blanche*. It would strip the Commission of all authority to determine on a case-by-case basis whether a proposed program rises to the level of rigor typically applied when considering shared savings awards.

Further, as a practical matter, omitting expert testimony on the appropriateness of including certain programs in shared savings would all but guarantee that FirstEnergy shareholders will be rewarded for doing very little. It would also create a perverse incentive. Rather than encouraging FirstEnergy to innovate and maximize the most cost-effective programs on behalf of its customers, such a broad shared savings mechanism would instead incent the utility to focus on programs that allow it to merely "check a box" on independent customer energy efficiency savings that the Companies had no direct or material role in producing. This could not have been the Commission's intent in approving the provision in question in the ESP IV Case, nor is it consistent with precedent.

2. NRDC was not a party to the ESP IV case nor was it in privity with any other party.

FirstEnergy claims that NRDC, while not a party to the ESP IV Case, was nonetheless in privity with other intervenors to that case.[36] The main basis for this claim is that NRDC is an environmental organization, and since other environmental groups had intervenor status in that

[36] Companies' Motion to Strike at 13-14.

case, NRDC's interests must have been represented.[37] But this ignores the fact that NRDC and the environmental intervenors in the ESP IV Case represent different members (to the extent they have members), have different perspectives as organizations, bring different expertise and skills to the table, and at times promote different strategies to accomplish their policy objectives. Of note, NRDC has 10,600 members in Ohio whose interest it represents, separate and apart from the interests represented by any other environmental organization that was party to the ESP IV Case.

Similar arguments claiming that other environmental groups can adequately represent NRDC's interests have been rejected in prior dockets. In 13-2385-EL-SSO, the Attorney Examiner rejected a Memoranda Contra NRDC's Motion to Intervene filed by Industrial Energy Users-Ohio ("IEU-Ohio"), in which IEU-Ohio claimed (among other things) that NRDC and its members' interests would be adequately represented in that proceeding by ELPC.[38] The AE found that NRDC met the standards for intervention in that case, and specifically, that NRDC asserted a "real and substantial interest that is not represented by another party to these matters."[39] FirstEnergy's parallel argument in the present case holds no water, particularly given

[37] *Id*. at 14.
[38] *In the Matter of the Application of Ohio Power Company for Authority to Establish a Standard Service Offer Pursuant to §4928.143, Ohio Rev. Code, in the Form of an Electric Security Plan*, Pub. Util. Comm. No. 13-2385-EL-SSO, Attorney Examiner Entry at 4 (April 21, 2014).
[39] Ohio Revised Code states that "[a]ny other person who may be adversely affected by a public utilities commission proceeding may intervene in such proceeding" [39] provided the Commission makes the following determinations set out in §4903.221(B): (1) The nature and extent of the prospective intervenor's interest; (2) The legal position advanced by the prospective intervenor and its probable relation to the merits of the case; (3) Whether the intervention by the prospective intervenor will unduly prolong or delay the proceedings; [and] (4) Whether the prospective intervenor will significantly contribute to full development and equitable resolution of the factual issues. The O.A.C. similarly provides that any person may intervene where "[t]he person has a real and substantial interest in the proceeding." O.A.C. §4901-1-11(A)(2). These rules set forth the same four standards that are established in O.R.C. § 4903.221(B) for determining whether a party may be "adversely affected," and also add a fifth factor regarding "the extent to which the person's interest is represented by existing parties." O.A.C. §4901-1-11(B).

the fact that NRDC has a longstanding record of engagement on Ohio's energy-related dockets and has met the standards for intervention time after time.

The Commission should also reject FirstEnergy's assertion that allowing NRDC to raise the CAP issue will unleash a torrent of never-ending litigation, simply by adding new parties. NRDC is raising an issue that was never directly litigated nor decided in the ESP IV Case, thus it cannot be barred from introducing testimony in the present case. Further, under FirstEnergy's broad application of this element of collateral estoppel, any issue found in a stipulation would be forever barred from further consideration by the Commission. The Commission should reject FirstEnergy's interpretation which is contrary to precedent and would strip the Commission of its statutory authority to review and approve utility energy efficiency programs.

On a final note, when applying collateral estoppel, the Commission has primarily emphasized whether parties have been afforded a fair opportunity to litigate the issue. The Commission has noted that it is guided by the following general policy considerations: (1) fairness to the prevailing party requires that it not be subjected to the expense and potential harassment associated with re-litigating matters which were, or should have been, litigated in an earlier action, and (2) judicial economy requires that litigation arising from a particular controversy not be continued indefinitely.[40] In this case, neither policy consideration is implicated by allowing NRDC to present testimony regarding the inclusion of the CAP in shared savings. First and foremost, because this issue has not previously been decided, there can be no additional expense because, nor can there be any harassment. Additionally, because this issue

[40] *See e.g. In the Matter of the Regulation of the Electric Fuel Component Contained Within the Rate Schedules of The Toledo Edison Company and Related Matters*, Case No. 86-05-EL-EFC, Entry at ¶5 (Nov. 10, 1986).

has not been previously decided, judicial economy would actually dictate it be determined in the present case.

3. FirstEnergy's cited case law is inapposite and does not dictate striking Mr. Neme's testimony.

FirstEnergy's cited case law offers no further support for its attempts to bar witness testimony on unresolved issues relevant to the Proposed Plans.[41] None of the cited cases are applicable to the present case. For example, the first case FirstEnergy cites is a Commission order in a Duke Energy Electricity Security Plan ("ESP") in which collateral estoppel precluded re-litigation of issues previously decided in a prior ESP proceeding.[42] But the Commission only applied the doctrine after holding a full hearing on the issues.[43] The Commission stated:

> At the outset of these proceedings, the Commission determined that, given the proposal set forth in Duke's application, it was appropriate to provide Duke the opportunity to present its arguments, both substantive and legal, prior to determining whether the factual and legal basis for Duke's claims had merit. Accordingly, rather than summarily dismiss these cases, as the Joint Movants requested, we proceeded with the evidentiary process to ensure that we fully considered the issues presented by Duke and the opposing parties prior to issuing our decision. After consideration of the evidence presented during the 11 days of hearing, including almost 3,000 pages of transcript, and almost 200 exhibits, not to mention the extensive briefs, the Commission finds that Duke has raised nothing new that had not already been considered, addressed, and open for litigation through our review and consideration of the application and the ESP stipulation in the Duke ESP Case. Therefore, the Commission finds that, even if Duke were to sustain its burden of proof in these proceedings, the doctrine of res judicata and collateral estoppel would preclude us from approving Duke's application.[44]

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[41] Companies' Motion to Strike at 9, fn. 33.
[42] *Id*.
[43] *In re the Application of Duke Energy Ohio, Inc., for the Establishment of a Charge Pursuant to Section 4909.18 Revised Code; In re the Application of Duke Energy Ohio, Inc., for Approval to Change Accounting Methods; In re the Application of Duke Energy Ohio, Inc., for the Approval of a Tariff for a New Service*, Pub. Util. Comm. No. 12-2400-EL-UNC, 12-2401-EL-AAM, 12-2402-EL-ETA, 2014 Ohio PUC LEXIS 23, Opinion & Order at *90-94 (Feb. 13, 2014).
[44] *Id*. *90.

Thus, while FirstEnergy is correct that collateral estoppel ultimately barred the re-litigation of issues in that case, the Commission only came to that determination after an *11 day hearing* in which it considered *over 200 exhibits*. The Commission explicitly stated it allowed the hearing to go forward to determine if Duke's claims had merit, *before* deciding to bar testimony from the record. To be sure, this case would certainly not bar NRDC's expert witness testimony at this early pre-hearing stage, even if the elements of collateral estoppel had been established by FirstEnergy.

Another case that FirstEnergy cites would actually dictate that collateral estoppel *not apply* in the present docket. FirstEnergy asserts that the Commission barred re-litigation of certain issues in the Companies' prior Electric Fuel Component ("EFC") case.[45] However, in that case the Commission discussed collateral estoppel and decided it should *not be applied* to methods of calculation and cost assignment.[46] The Commission stated:

> The question becomes not whether [collateral estoppel] can be applied, but whether the doctrine should be applied in this proceeding. In the past the doctrine has only been applied to Commission findings of facts. *Ohio Edison Co.*, Case No. 83-34-EL-EFC (Entry, December 7, 1983); *Ohio Suburban Water Co.*, Case No. 81-657-WW-AIR (Entry, April 7, 1982). In the present case, the Company has requested that we apply the doctrine to Commission decisions where in a necessary exercise of discretion the Commission has adopted an approach (modified 115% method; modified 110% method) that was the most appropriate in light of the evidence presented, applicable law, and precedent on the matter. We do not believe the doctrine of collateral estoppel should be generally applied to policy decisions because we require unfettered discretion to review policy decisions on a prospective basis and may alter our policy with respect to fluid and changing conditions.[47]

[45] Companies' Motion to Strike at 9, fn 33; *See also In re the Regulation of the Electric Fuel Component Contained Within the Rate Schedules of Ohio Edison Company and Related Matters*, Pub. Util. Comm. No. 83-34 EL-EFC, 1984 Ohio PUC LEXIS 60, Opinion & Order at *9-11 (Jan. 31, 1984) (applying "collateral estoppel to bar re-litigation of certain issues").
[46] Pub. Util Com. No. 83-84-EL-EFC, Opinion and Order at *45 (Jan. 31, 1984).
[47] *Id*.

The Commission made clear that it disfavors applying collateral estoppel to issues of policy because it would eliminate flexibility and its ability to adapt to changing circumstances.

The remaining cases the Companies cite do not apply because they all pertain to issues that—in contrast to the CAP and shared savings in the ESP IV Case—were very clearly directly at issue and litigated in the prior proceeding. Given that the CAP and its application to shared savings were not actually and directly at issue in the ESP IV Case, were not passed upon and determined by the Commission, and remain very much still in dispute, the cited cases are simply inapposite.

The issue of whether the CAP should be included in the calculation of shared savings in the Proposed Plans was never actually and directly at issue in the ESP IV Case, nor was it decided or discussed by the Commission. FirstEnergy fails to establish the elements of collateral estoppel, thus their request to strike portions of Mr. Neme's testimony and preclude future testimony on these issues should be denied.

B. Stipulations, even if approved, are not completely binding on the Commission, and FirstEnergy's interpretation otherwise would remove Commission authority.

Notwithstanding the fact that collateral estoppel is inapplicable to Mr. Neme's testimony on the CAP and shared savings, in the alternative, the doctrine would still not be an automatic bar to the Commission addressing these issues in the present case. Ohio Admin. Code 4901-1-30(D) states that no stipulation shall be considered binding on the Commission. The Ohio Supreme Court held that any stipulation presented to the Commission is only entitled to force of law if the Commission gives an order approving it.[48] Even once approved, however, the Ohio Supreme Court held that the Commission still has the ability to modify a previous order as long as it can justify the

[48] *AK Steel Corp. v. Pub. Util. Comm.*, 95 Ohio St.3d 81, 82-83, *765 N.E.2d 862, (2002).*

modifications with record evidence.[49] In *Ohio Consumers' Counsel v. Pub. Util. Comm.*, the Ohio Supreme Court upheld the Commission's decision to allow a utility to increase a previously agreed-upon, Commission-accepted rate in order to recover generation costs.[50] The Court held that the Commission adequately justified its decision to alter the previously ordered stipulation on the grounds of changed circumstances.[51] In doing so, the Court noted that certain projections had not materialized (including the development of the competitive market in the utility's service territory which the rate agreement had relied on), and the fuel and environmental costs had far exceeded initial expectations.[52]

In *the Matter of the Regulation of the Electric Fuel Component Contained within the Rate Schedules of Columbus Southern Power Company and Related Matters*, the Commission considered an EFC order given two months prior, and ordered a reconciliation adjustment in the company's favor to account for a clerical error found by the financial auditor in the proceeding. [53] The OCC asserted that the new order was barred by res judicata, but the Commission held otherwise, noting that an error was discovered in the same audit period as the initial proceeding and that the EFC rate had not been at issue in the prior proceeding.[54]

The Commission also has the power to modify or address issues in a prior stipulation as needed. This was the situation in the Duke ESP case where all the signatories to the stipulation asserted that Duke's subsequent application was barred by collateral estoppel. Even in that circumstance, the Commission declined to preemptively strike testimony, opting instead for a full

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[49] *Office of Consumer's Counsel v. Pub. Util. Comm.*, 10 Ohio St.3d 49, 50-51, 461 N.E.2d 303, (1984).
[50] *Ohio Consumers' Counsel v. Pub. Util. Comm., 114 Ohio St.3d 340, 2007-Ohio-4276, 872 N.E.2d 269, ¶1-¶8.*
[51] *Id*. at ¶14.
[52] *Id*.
[53] *In the Matter of the Regulation of the Electric Fuel Component Contained within the Rate Schedules of Columbus Southern Power Company and Related Matters*, Pub. Util. Comm. No. 87-102-EL-EFC, 1987 Ohio PUC LEXIS 17, (December 29, 1987).
[54] *Id*. at 1-2.

hearing before deciding on the application of the doctrine.[55] Further, in an Ohio Edison EFC case, the Commission stated that it requires unfettered access to address decisions and issues of policy, even if those issues were previously decided.[56] The Commission noted in that case that the question is not only whether collateral estoppel *can* apply, but whether it *should* apply.[57]

In the present case, even in the unlikely event the Commission determines that collateral estoppel *could* apply, the doctrine should nonetheless *not* bar the testimony in question. The Commission retains the authority to revisit elements of the ESP IV Stipulation as needed. If the Commission accepts FirstEnergy's contention that any issue mentioned in the ESP IV Stipulation is barred for further consideration, it would be ceding a portion of it authority to review and approve the current slate of proposed energy efficiency programs. At its most extreme, this interpretation would automatically qualify *any program* in the shared savings calculation (as long as it is cost-effective), without any Commission oversight. Notwithstanding the fact that the elements of collateral estoppel do not apply here, the Commission has latitude to revisit the ESP IV Stipulation and reassert its authority to review and approve the entirety of the Proposed Plans.

C. It is Appropriate to Resolve the Issue of the CAP's Inclusion in Shared Savings in the Present Case, and NRDC's Testimony Does Not Constitute a Selective Attack on the ESP IV Stipulation.

Finally, FirstEnergy fails in its assertion that the CAP and shared savings should be reserved for the ESP IV Case. Notwithstanding the fact that these issues were not litigated and conclusively decided in that case, to entertain FirstEnergy's request to deny the parties the opportunity to fully vet the CAP in the current proceeding would be contrary to Commission rules. Ohio Administrative Code 4901:1-39-04(D) specifically provides that the public should

[55] Pub. Util. Comm. No. 12-2400-EL-UNC, 2014 Ohio PUC LEXIS 23, Opinion & Order at *90 (Feb. 13, 2014).
[56] Pub. Util Com. No. 83-84-EL-EFC, Opinion and Order at *45 (Jan. 31, 1984).
[57] *Id*.

have an opportunity to evaluate and comment on a utility's EE/PDR portfolio plan, stating that "any person may file objections . . . after the filing of an electric utility's program portfolio plan." The present case is the appropriate forum to vet the proposed programs and to determine which are properly included in the shared savings calculation. There is no additional burden to considering this issue in the present docket because all the relevant facts and information necessary to make that determination will be (and are being) raised on the record in the current Proposed Plans. It would be inefficient to reserve these issues for any other docket.

Moreover, the question of the CAP's inclusion in shared savings is no small issue. As noted by Mr. Neme, the three Customer Action Programs and the Mercantile Customer Program together account for about 23 percent of the Utility Cost Test net benefits that the Companies estimate the Proposed Plans will produce and which would be "shared" with customers under the proposed shared savings mechanism.[58] To deny the parties the opportunity to present evidence on a potentially significant contributor to the shared savings calculation—and one that is currently disputed—would fly in the face of Commission rules on energy efficiency portfolio plans.

Similarly, as previously discussed, the Commission never passed upon the CAP's inclusion in shared savings in the ESP IV Case, and thus it remains an open, unresolved question. Yet, FirstEnergy claims that Mr. Neme's testimony on this issue amounts to "cherry picking" settlement provisions. As discussed at length in Section A, there are numerous flaws in FirstEnergy's assertion that the CAP was "fully litigated," even putting aside its generous reading of the ESP IV Stipulation's treatment of shared savings. The ESP IV Stipulation is simply not the final word on the CAP, or on shared savings. The Commission should reject

[58] Direct Testimony of Chris Neme at 20.

FirstEnergy's Motion to Strike portions of Mr. Neme's testimony, as well as the request to preclude future testimony on the issues raised.

III. CONCLUSION

For the foregoing, NRDC respectfully requests that the Commission deny FirstEnergy's Motion to Strike. In addition, given the quick turnaround on the currently-approved procedural schedule, NRDC supports an expedited ruling on the Motion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, the undersigned counsel, certify that on this 30th day of September, 2016, a true and accurate copy of the foregoing was served via electronic mail upon the following counsel of record:

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Summary: Memorandum Contra to the Companies' Motion to Strike Portions of Chris Neme's Filed Testimony and to Preclude Testimony Related to those Issues electronically filed by Mr. Robert Dove on behalf of The Natural Resources Defense Council