

**BEFORE THE
PUBLIC UTILITIES COMMISSION OF OHIO**

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

**MEMORANDUM CONTRA THE COMPANIES' EXPEDITED MOTION TO STRIKE
PORTIONS OF INTERVENOR WITNESSES' FILED TESTIMONY AND TO
PRECLUDE FUTURE TESTIMONY RELATED TO PREVIOUSLY LITIGATED
ISSUES**

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I. Introduction

First Energy appears to fundamentally misunderstand the Commission's March 31, 2016 Opinion and Order. The shared savings issue raised in the testimony of Trish Demeter, on behalf of the Ohio Environmental Council ("OEC") and Environmental Defense Fund ("EDF"), has not been previously litigated, as First Energy claims, nor should it be relegated to discussion only in the ESP IV case, as that case specifically noted that certain aspects of energy efficiency plans would be dealt with in future energy efficiency filings of the utility, exactly as it has been raised in the instant matter. For the reasons set forth below, First Energy's Motion to Strike should be denied.

II. Law & Argument

First Energy's Application was filed on April 15, 2016, and contains new proposals related to the inclusion of CAP and ESID energy savings in the shared savings program that had yet to come before the Commission. These particular proposed programs have not been previously addressed by the intervenors, and there has been no litigation over whether they are appropriate to include as part of First Energy's energy efficiency portfolio plan for 2017-2019.

A. The Testimony on Shared Savings Refers to a New Proposal from First Energy.

First Energy has moved to strike all portions of the testimony of the Ohio Environmental Council ("OEC") and Environmental Defense Fund's ("EDF") expert witness, Trish Demeter, that refer to First Energy's proposal in its energy efficiency portfolio plan, filed April 15, 2016, to include shared savings calculations in its benchmark calculations, despite the fact that First Energy has no material role in producing the energy savings.¹ First Energy's proposal (the

¹ Although this is the only topic First Energy attempts to strike from Ms. Demeter's testimony, First Energy also argues that OEC/EDF previously filed a joint application for rehearing related to raising the annual shared savings

Customer Action Program or “CAP”) would allow it to survey customers, (residential, small C/I, and mercantile classes), to determine what types of energy efficiencies each customer has independently installed, and then allow First Energy to use those energy savings totals toward its benchmark requirements and subsequently receive incentives based upon those benchmarks. The proposal would also permit First Energy to count energy savings from the independent efforts of Ohio townships and municipalities to create special districts (“ESIDs”) for Property Assessed Clean Energy (“PACE”) financing to install qualified energy improvements under Ohio law, despite the utility having no role in creating the program. First Energy wants credit for doing nothing. It wants a hand out for the independent good behavior of its customers.

B. Testimony on Whether the Customer Action Program and Energy Special Improvement District Energy Savings Should be Included in Shared Savings is Not Barred by Collateral Estoppel.

First Energy’s argument that these issues were litigated in Public Utilities Commission of Ohio Case No. 14-1297-EL-SSO and therefore barred by collateral estoppel is flawed. Collateral estoppel prevents relitigation of a “point of law or fact that was at issue in a former action between the same parties and was passed upon by a court of competent jurisdiction.”² The doctrine, therefore, is inapplicable where the point of law or fact is not identical and therefore was not litigated previously.³

The Commission’s March 31, 2016 Opinion and Order (“ESP IV Order”)⁴ discusses and

cap to \$25 million. (*See Motion to Strike*, at 14-15). Because OEC/EDF did not file testimony related to this topic in the instant case, this Memorandum Contra does not address it. However, OEC/EDF maintain that this topic, like shared savings, is not barred by collateral estoppel, and the motion should be denied as to all testimony related to the \$25 million cap as well.

² *Consumers' Counsel v. Pub. Util. Comm.*, 16 Ohio St.3d 9, 10, 475 N.E.2d 782 (1985).

³ *See, e.g., Ohio Consumers' Counsel v. Pub. Util. Comm.*, 2007-Ohio-4276, 114 Ohio St. 3d 340, 872 N.E.2d 269.

⁴ *In The Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The*

approves only the idea that cost-effective programs may be part of the shared savings program.⁵ Simply because the Commission deemed cost-effective programs eligible for shared savings does not mean all programs now proposed by First Energy (or any other utility) are therefore removed from any further discussion about whether a program *should* be included in a future proposal. The CAP and ESID programs proposed by First Energy are required to be cost-effective by the Commission's order, and First Energy has yet to show that the program proposed in the instant case is, in fact, cost-effective.⁶ First Energy's argument implies that the Commission should rubber stamp its proposals based solely upon First Energy's word that the program is cost-effective, which is not what is stated in the order in the ESP IV case.

For example, a prior order by the Commission approving a rate stabilization surcharge had no collateral estoppel effect on a subsequent proceeding on the amount that the utility could charge in a rate stabilization rider.⁷ The same logic applies here--where the Commission approved the idea that cost-effective programs could be included in shared savings, the inclusion of a proposed program is not automatically barred by collateral estoppel in the next case where the utility proposes a new program for inclusion.

The Commission's rationale for these shared savings programs is that it "encourages the Companies to seek to provide to their customers all available cost-effective energy efficiency opportunities", incentivizing the utility to go above and beyond its requirements in order to

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, Mar. 31, 2016.

⁵ *Id.* at 95.

⁶ *Id.* at 111 (noting that "nothing in the Stipulations waive[s] the cost-effectiveness requirements of Ohio Adm. Code 4901:1-39-03 and -04, and [...] the Commission expects that the portfolio implemented by the Companies under the Stipulations will continue to be cost-effective").

⁷ See, e.g., *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 2007-Ohio-4276, ¶ 12, 114 Ohio St. 3d 340, 342, 872 N.E.2d 269, 273.

achieve these additional savings on behalf of its customers. However, the CAP and ESID shared savings components are not cost-effective, which will be demonstrated during this case and which was not litigated previously. This is specifically what the testimony First Energy attempts to strike addresses, and is appropriate to include in litigation related to First Energy's new shared savings proposal.

C. The CAP and ESID Shared Savings Issue Should Not be Litigated in the ESP IV Case.

The appropriate forum for whether or not the CAP and ESID programs are appropriate for inclusion in First Energy's energy efficiency portfolio plan and cost-effective is the instant case, not the ESP IV case. First Energy's proposal is directly related to the portfolio plan filing for 2017-2019, and relegating it to the prior case which does not address whether the specific proposal is cost-effective and appropriate for inclusion in the 2017-2019 portfolio plan confuses the issue and places it in the wrong forum to address the issue.

D. Intervenors are Not "Cherry-Picking" Issues from a Prior Settlement, and the Challenges to First Energy's Energy Efficiency Portfolio Plan are Appropriate.

As previously discussed, the proposed energy efficiency plan for 2017-2019 filed by First Energy raises new issues of whether the proposed shared savings programs are appropriate for inclusion in the portfolio plan and whether they are cost-effective. It is not a selective attack on a comprehensive settlement, and regardless, OEC/EDF were not parties to that settlement. The questions raised in the testimony filed by OEC/EDF are appropriate, and exploration of whether or not these "programs" should be permitted as part of the 2017-2019 portfolio plan should be permitted moving forward.

III. CONCLUSION

For the foregoing reasons, First Energy's *Motion to Strike Portions of Intervenor Witnesses' Filed Testimony and to Preclude Future Testimony Related to Previously Litigated Issues*, specifically testimony provided by Trish Demeter on behalf of OEC/EDF, should be denied.

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing has been served upon all parties of record by electronic mail this 30th day of September, 2016.

/s/ Miranda Leppla
Miranda Leppla

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Summary: Memorandum Contra the Companies' Expedited Motion to Strike Portions of Intervenor Witnesses' Filed Testimony and to Preclude Future Testimony Related to Previously Litigated Issues electronically filed by Ms. Miranda R Leppla on behalf of Ohio Environmental Council and Environmental Defense Fund