BEFORE THE
PUBLIC UTILITIES COMMISSION OF OHIO

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

POST-HEARING BRIEF OF OHIO EDISON COMPANY, THE CLEVELAND ELECTRIC ILLUMINATING COMPANY, AND THE TOLEDO EDISON COMPANY IN SUPPORT OF THE STIPULATION AND RECOMMENDATION

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I. INTRODUCTION

Ohio Edison Company ("OE"), The Cleveland Electric Illuminating Company ("CEI"), and The Toledo Edison Company ("TE") (collectively, the "Companies"), filed their proposed energy efficiency ("EE") and peak demand reduction ("PDR") portfolio plans for approval by the Commission on April 15, 2016—over ten months ago. Since then, the Companies have revised their respective EE/PDR portfolio plans to include changes and revisions suggested by intervening parties as part of lengthy and comprehensive settlement efforts, as well as to comply with the Commission's directives in its Fifth Entry on Rehearing in the Companies' ESP IV case (the "Revised Plans"). Those efforts culminated in an extensive Stipulation and Recommendation ("Stipulation") which, among other things, recommends that the Commission approve the Companies' Revised Plans as filed and without modification. The Stipulation was executed by nearly every party in this case, resolving all of the issues in this proceeding among those parties. As set forth below, the Stipulation and the Revised Plans contained therein are just, reasonable, and should be approved and adopted by the Commission.

The Revised Plans comply with all statutory and regulatory requirements under Ohio law, and there is no credible evidence to the contrary. The Companies correctly calculated their respective EE/PDR baselines and corresponding benchmarks, and the uncontested savings estimates in the portfolio plans are amply supported and reasonable. Moreover, as required by the Commission's Rules, the Revised Plans are "cost-effective" on both a portfolio and program basis (with the only exception being the Companies' Low-Income EE Program). Finally, the Revised Plans include all other required elements under the Commission's Rules, including an executive summary and market potential study, as well as descriptions of stakeholder participation, attempts by the Companies to align and coordinate programs with other public

utilities in Ohio, and the Companies' EE/PDR programs. All in all, the Revised Plans fully comply with the Commission's requirements.

Not only do the Revised Plans comply with all statutory and regulatory requirements, but the Stipulation supporting those Plans also satisfies the Commission's three-part test for stipulation approval. ***First***, there can be no dispute that the Stipulation is the product of lengthy, serious bargaining among capable and knowledgeable parties in a cooperative process. Every party to this proceeding was invited to participate in settlement discussions. Ultimately, all but three parties executed the Stipulation, which reflects an accommodation of the diverse interests represented by the intervening environmental advocates, the low and moderate income residential customer advocate, an industrial customer consultant, a certified retail electric service provider, and a capacity aggregator and marketer. In short, the Stipulation is the culmination of a comprehensive and detailed process among the Companies and a diverse group of parties who intervened in this proceeding.

Second, the Stipulation is in the public interest and benefits the customers in the Companies' service territories. The Revised Plans provide opportunities for the Companies to meet or exceed their statutory EE/PDR benchmarks in a reasonable and cost-effective manner, while at the same time offering the Companies' customers a wide array of programs that will help them achieve energy and cost savings. The Revised Plans also include a reasonable shared savings incentive mechanism, one which is nearly-identical to the Companies' previously-approved mechanism. That mechanism will incentivize the Companies to operate their programs in a manner that maximizes benefits created for their customers. In this fashion, the interests of the customers, the State's policies, and the Companies are aligned.

Third, the Stipulation does not violate any important regulatory principal or practice. To

the contrary, through the adoption of the Revised Plans, the Stipulation promotes and furthers state policies and goals with respect to electric service. For instance, the Stipulation promotes the availability of adequate, reliable, safe, efficient, nondiscriminatory, and reasonably priced retail electric service in Ohio. The Stipulation also promotes innovation and market access for cost-effective supply and demand-side retail service. Moreover, the Stipulation seeks to protect at-risk populations in Ohio, such as low-income consumers, as well as encourages the education of small business owners in the State with respect to the use of EE programs. Nothing in the record contradicts these points, nor does the record otherwise support the conclusion that the Stipulation somehow violates an important regulatory principle in Ohio. Accordingly, the Stipulation passes the Commission's three-part test.

Despite the fact the Revised Plans comply with all statutory and regulatory requirements under Ohio law, and despite the fact the Stipulation passes the Commission's test for approval, Staff is requesting that the Commission modify the Stipulation by imposing upon each of the Revised Plans an "overall cost cap." The parties to the Stipulation, however, rejected Staff's proposal, which was not presented until after months of settlement negotiations had resulted in a comprehensive resolution among the parties. In fact, other than OCC, no intervenor in this proceeding supports the proposal. That is because Staff's proposed cost cap is (i) unenforceable, (ii) unnecessary, and (iii) unfair.

Staff's proposal is unenforceable and contrary to law because the General Assembly has not conferred upon the Commission the authority to cap the costs of compliance with Ohio's EE/PDR mandates. Moreover, even if a cost cap was within the Commission's purview, governmental entities in Ohio must follow specific procedures when implementing legal standards that did not previously exist. It is undisputed that Staff's cost cap proposal has not

gone through the rigors of those rule-making procedures. Accordingly, Staff's proposal is unenforceable, and adopting it would violate Ohio law.

Staff's cost cap proposal, even if it were legal, is also unnecessary in this case. ***First***, the Revised Plans include a proposed three-year budget, which, once approved by the Commission, will operate as a "cap" on all costs related to the Plans. ***Second***, the Companies' shared savings opportunities are already subject to a Commission-approved cap, currently set at $10 million (after tax) across the three Companies. There is thus no need to create a "double-cap" on shared savings that would almost certainly eliminate the Companies' shared savings incentive to exceed their EE goals. ***Third***, the Companies' customers are currently enjoying a two-year bill mitigation mechanism designed to protect them against rate volatility and price fluctuations.

In addition to being unenforceable and unnecessary, the Commission should also reject Staff's proposal because it is inherently unfair. ***First***, despite Staff's desire to create "consistency amongst all the utilities in the state," its proposal does not place Ohio's electric distribution utilities ("EDUs") on a level playing field. While Staff's proposed cost cap for the Companies is set at 3% of their respective FERC Forms 1, Page 300, Line 10s, its proposals for AEP Ohio ("AEP") and Dayton Power & Light Co. ("DP&L") are set at 4% of their respective Line 10s. Staff also recently proposed a 3.5% cap for Duke Energy Ohio ("Duke"). In other words, Staff seeks to impose on the Companies a cost cap percentage that is lower than that for any other EDU in the state. The difference among Staff's proposals for the EDUs, while small in percentage, is quite large in application. Indeed, the difference between a 3% cap and a 4% cap for the Companies is approximately $26.7 million.

Second, an analysis of the first-year EE acquisition costs across Ohio's EDUs demonstrates that Staff's proposed cost cap would prejudice the Companies by permitting them

to spend significantly less money for each kilowatt hour ("kWh") of energy saved compared to their in-state counterparts. For the Companies to have the same opportunity AEP has to comply with their EE/PDR goals, the Companies' annual cost cap would have to be $135 million, which is nearly ***69% higher*** than what Staff is currently proposing. There is no reasoned explanation for this inequity.

Third, Staff's proposal ignores the inherent differences among EDUs that makes use of FERC Form 1, Page 300, Line 10 inequitable from the outset. Most notably, Staff fails to consider the impact "switch rates" have on an EDU's Line 10, which, as explained below, is significant. In short, customer switch rates (or "shopping") have a direct impact on total sales reported on Line 10, which, in turn, directly impact the cost cap calculation. Staff's failure to recognize these realities unfairly impacts the Companies, who have the highest switch rates among Ohio EDUs.

Fourth, the unfairness of using FERC Form 1, Page 300, Line 10 as the basis for Staff's proposed cost cap is further highlighted by comparing AEP's average revenue per kWh delivered with that of the Companies. As fully demonstrated below, the Companies' average revenue per kWh delivered is approximately 78% of AEP, which, again, unfairly impacts Line 10 and the cost cap calculation.

Fifth, Staff's proposal unfairly restricts the Companies' ability to meet their statutory benchmarks and earn shared savings. Indeed, Staff's proposal was based on its review of a limited set of ***historical cost data*** and results in a maximum annual aggregate budget for the Companies of $80.1 million (including shared savings). By contrast, the Companies' $90 million annual aggregate budget for the Revised Plans (not including shared savings and other costs recovered through Rider DSE2) was calculated utilizing the Companies' experience in

constructing and budgeting EE portfolio plans in Ohio and other jurisdictions and was based on the most current ***actual pricing***. Put simply, the costs of the Revised Plans necessarily exceed Staff's proposed cost cap, jeopardizing the Companies' ability to meet their statutory benchmarks with new EE savings and earn shared savings.

For all these reasons, the Commission should reject Staff's cost cap proposal and approve the Stipulation, without revision or modification.

II. BACKGROUND

A. Prior Energy Efficiency and Peak Demand Reduction Portfolio Plans.

FirstEnergy Corp. ("FirstEnergy") is a diversified energy company headquartered in Akron, Ohio. Among its ten wholly-owned electric utility subsidiaries are the Companies, the three public utilities in Ohio relevant to this proceeding. Together, the Companies provide electric service to over 2 million customers in Ohio.[1]

In 2008, Ohio passed an energy bill that required all EDUs in the State to implement EE and PDR programs to achieve certain savings levels, or "benchmarks."[2] Consistent with that energy bill, the Companies are required to submit three-year portfolio plans that are specifically designed to meet or exceed those benchmarks.[3] The Commission's Rules required EDUs to propose their first comprehensive EE and PDR portfolio plans by January 1, 2010, and every third year thereafter.[4]

The Companies' first EE/PDR portfolio plans, covering 2010, 2011, and 2012, were

[1] Companies' Exhibit 4, Case No. 16-0743-EL-POR, Direct Testimony of Edward C. Miller (Apr. 15, 2016) ("Miller Testimony") at 5.
[2] O.R.C. § 4928.66(A)(1).
[3] O.A.C. § 4901:1-39-04(A).
[4] *Id*.

timely filed for approval with the Commission on December 15, 2009.[5] Those portfolio plans were approved on March 23, 2011, at which time the Companies immediately implemented the plans.[6] The Companies filed their second EE/PDR portfolio plans—covering years 2013, 2014, and 2015—on July 31, 2012.[7] The Commission approved the Companies' second EE/PDR portfolio plans on March 20, 2013.[8] Nearly a year and a half later, on September 12, 2014, Substitute Senate Bill Number 310 ("Senate Bill 310") went into effect, amending certain portions of the EE/PDR statute, freezing the cumulative EE and PDR benchmarks for EDUs in 2015 and 2016 to 2014 levels.[9] Senate Bill 310 also permitted EDUs in Ohio to seek amendments to their existing EE/PDR portfolio plans, which the Companies did on September 24, 2014.[10] The Commission approved the Companies' application for amendment on November 20, 2014, which resulted in the extension of the amended EE/PDR portfolio plans through the end of 2016.[11] The Companies operated under the amended EE/PDR portfolio plans through 2016.

B. The Companies' Application For EE/PDR Portfolio Plans For 2017 Through 2019 And Procedural Delay.

Pursuant to the Commission's Rules, the Companies timely filed their applications for new three-year EE/PDR portfolio plans on April 15, 2016 ("Proposed Plans").[12] The relevant

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[5] *In the Matter of the Application of [The Companies'] for Approval of Their [EE] and [PDR] Program Portfolio Plans for 2012 and Associated Cost Recovery Mechanisms,* Case Nos. 09-1947-EL-POR et al., Application (Dec. 15, 2009) ("Case No. 09-1947-EL-POR").

[6] *Id.* at Opinion and Order (Mar. 23, 2011).

[7] *In the Matter of the Application of the [Companies] For Approval of Their [EE & PDR] Program Portfolio Plans for 2013 through 2015*, Case Nos. 12-2190-EL-POR et al., Application (July 31, 2012) ("Case No. 12-2190-EL-POR"); Miller Testimony at 6.

[8] Case No. 12-2190-EL-POR at Opinion and Order (Mar. 20, 2013).

[9] Miller Testimony at 6.

[10] Case No. 12-2190-EL-POR, Verified Application for Approval of Amended EE and PDR Plans for 2015 Through 2016 (Sep. 24, 2014; Miller Testimony at 6.

[11] Case No. 12-2190-EL-POR, Finding and Order (Nov. 20, 2014); Miller Testimony at 6-7.

[12] Case No. 16-0743-EL-POR, Application (Apr. 15, 2016).

time period covered by the Proposed Plans commenced on January 1 2017, and runs through December 31, 2019 ("Plan Period"). Prior to the development of the Proposed Plans, the Companies recognized that other interested parties had knowledge, experience, and expertise with regard to EE and PDR programs and thus were a valuable part of the development of those Plans.[13] The Companies thus engaged energy efficiency consultants ADM Associates, Inc. ("ADM"), Applied Energy Group ("AEG"), and Harbourfront Group, Inc. ("Harbourfront"), as well as met with their Ohio Collaborative Group (established prior to the Companies' submission of their first EE/PDR portfolio plans) specifically to request input from and openly share the Companies' thoughts and overall vision on the programs and measures being considered for inclusion in the Proposed Plans. Those meetings also included draft projections and information on the development of the Companies' 2016 Market Potential Study ("MPS"), which was conducted by Harbourfront at the direction of its President and CEO, who has over 40 years of industry experience.[14] The Companies actively solicited input and suggestions from their consultants and the Collaborative Group on the Proposed Plans, and, based on such feedback, designed the Proposed Plans to reflect many of the suggestions received.[15]

Shortly after the Companies filed their Proposed Plans for approval with the Commission, several parties moved to intervene in this proceeding, including the Ohio Environmental Council ("OEC"), the Environmental Defense Fund ("EDF"), the Natural Resources Defense Council ("NRDC"), the Environmental Law & Policy Center ("ELPC"),

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[13] *Id*. at 1.

[14] *Id.* Application at 1 (Apr. 15, 2016); Companies' Exhibit 2, Case No. 16-0743-EL-POR, Amended Direct Testimony of George L. Fitzpatrick (Dec. 8, 2016) ("Fitzpatrick Am. Testimony") at 2, attaching and incorporating by reference Case No. 16-0743-EL-POR, Direct Testimony of George L. Fitzpatrick (Apr. 15, 2016) ("Fitzpatrick Testimony") at 2, 4. *See also* Companies' Exhibit 3, Case No. 16-0743-EL-POR, Application at Appendix D, p. 8 & 25 (FirstEnergy Ohio Operating Companies Market Potential Study April 2016) (Apr. 15, 2016) ("MPS").

[15] Case No. 16-0743-EL-POR, Application at 1-2 (Apr. 15, 2016).

Energy Management Solutions, Inc. ("EMS"), EnerNoc, Inc. ("EnerNOC"), Ohio Partners for Affordable Energy ("OPAE"), Interstate Gas Supply, Inc. ("IGS"), the Kroger Co. ("Kroger"), the Ohio Manufacturer's Association Energy Group ("OMAEG"), Industrial Energy Users-Ohio ("IEU"), the Ohio Hospitals Association ("OHA"), and the Office of Ohio Consumers' Counsel ("OCC").[16] The Attorney Examiner entered a procedural schedule in May 2016 that set the evidentiary hearing in this case for July 25, 2016.[17] That schedule, however, was delayed on several occasions.

To start, Staff of the Commission ("Staff") moved for an extension of the procedural schedule, including the hearing date, in late June 2016.[18] No other party joined Staff's motion, which was filed on an expedited basis. The Attorney Examiner granted Staff's motion the next day, setting the evidentiary hearing for October 11, 2016.[19] Staff moved for a second extension of the procedural schedule in late September 2016—less than two weeks before the hearing was set to commence.[20] This time, Staff requested an indefinite continuance, which again, no party joined. The Attorney Examiner granted Staff's motion the next day.[21] Nearly a month later, the Attorney Examiner scheduled the evidentiary hearing for November 21, 2016.[22] That date, however, was also continued, as the parties were engaged in settlement discussions at the time and had made significant progress toward reaching a resolution in this case. For that reason, the parties filed an unopposed joint motion to vacate the November hearing date,[23] which the

[16] *See generally* OCC Exhibit 3, Docket in Case No. 16-0743-EL-POR.
[17] Case No. 16-0743-EL-POR, Entry at 3 (May 23, 2016).
[18] *Id.* at Staff's Expedited Motion for Continuance (June 27, 2016).
[19] *Id.* at Entry (June 28, 2016).
[20] *Id.* at Staff's Second Expedited Motion for Continuance (Sep. 29, 2016).
[21] *Id.* at Entry (Sep. 30, 2016).
[22] *Id.* at Entry (Oct. 26, 2016).
[23] *Id.* at Unopposed Joint Motion for Continuance (Nov. 15, 2016). OCC and IEU did not join the motion; however, neither party opposed.

Attorney Examiner granted on November 18, 2016.[24] A new hearing date was set by agreement of the parties for December 12, 2016.[25] The Attorney Examiner continued the December 12 hearing date to allow parties time to review Staff's testimony, which was filed on December 5, as well as to allow non-settling parties time to review the terms of the settlement that had just been reached by most of the parties in this case.[26] The evidentiary hearing was ultimately scheduled to commence on January 23, 2017.[27]

C. The Stipulation and Recommendation.

Beginning in August and continuing through early December 2016, the Companies were engaged in comprehensive and lengthy settlement discussions with intervenors and Staff. All parties in this proceeding were invited to participate in those discussions, each of which was represented by competent counsel—many of whom regularly practice before the Commission and have experience in EE/PDR portfolio cases and other related regulatory proceedings.[28] The Companies began the settlement process by inviting each of the intervening parties who submitted opposing testimony in this case to individually meet, either in person or by telephone, to discuss their objections to the Proposed Plans and the changes they would like to see made to those Plans.[29] After numerous one-on-one discussions with individual parties, the Companies developed a proposed settlement term sheet, which became the focal point for all further settlement negotiations in this matter.[30]

All intervening parties, as well as Staff, were invited to participate in additional joint and

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[24] *Id.* at Entry (Nov. 18, 2016).
[25] *Id.* at Entry (Nov. 22, 2016).
[26] *Id.* at Entry (Dec. 9, 2016); Case No. 16-0743-EL-POR, Entry (Dec. 14, 2016).
[27] *Id.* at Entry (Dec. 14, 2016).
[28] Companies' Exhibit 5, Case No. 16-0743-EL-POR, Supplemental Direct Testimony of Edward C. Miller (Dec. 8, 2016) ("Miller Supp. Testimony") at 8-9.
[29] Miller Supp. Testimony at 8-9.
[30] *Id.* at 9.

individual settlement meetings and discussions with the Companies. All parties received numerous iterations of a draft settlement stipulation, which was based on the initial proposed settlement term sheet.[31] After months of extensive discussions and spirited debate, a compromise was reached among a majority of the parties in this case. That compromise was reduced to writing in a Stipulation and Recommendation pursuant to Rule 4901-1-30 of the Ohio Administrative Code, which authorizes parties to Commission proceedings to enter into written stipulations. The Companies filed that Stipulation with the Commission for approval and adoption on December 9, 2016.[32] In addition to the three Companies, eight intervenors executed the Stipulation as signatory parties—OEC, EDF, NRDC, ELPC, EMS, EnerNoc, OPAE, and IGS (together with the Companies, the "Signatory Parties").[33] Three additional intervenors, while not signatory parties, agreed as part of the settlement to sign the Stipulation as "non-opposing parties"—Kroger, OMAEG, and IEU.[34] The only parties that did not sign the Stipulation in any capacity are OCC, OHA, and Staff.

The Stipulation recommends that the Commission fully approve the Companies' Proposed Plans, as amended and revised under the terms and conditions of the Stipulation ("Revised Plans"). While there are other provisions in the Stipulation, the key provisions can be generally categorized as: (i) programmatic changes (*e.g.*, prioritizing of LED lighting over CFL lighting); (ii) commitments to the Collaborative members (*e.g.*, reporting to Collaborative cleared capacity after each base residual and incremental PJM auction); and (iii) a one-time

[31] *Id*.

[32] Joint Exhibit 1, Case No. 16-0743-EL-POR, Stipulation and Recommendation (Dec. 8, 2016) ("Stipulation") at 13. An amended signature page to the Stipulation was filed on December 23, 2016, and an amended page 89 of Exhibit B to the Stipulation was filed on January 11, 2017. The Stipulation, as amended on the docket, will be referred to simply as the "Stipulation."

[33] Stipulation at 13.

[34] *Id.* at 13.

reduction to the shared savings trigger in 2017.[35] Companies' Witness Miller summarized and described the programmatic changes included in the Revised Plans pursuant to the agreement of the Signatory Parties.[36] Notably, no one in this proceeding challenged or opposed those changes. Mr. Miller also summarized the Collaborative commitments included in the Stipulation, which, again, were unopposed by any party in this case.[37] The one-time shared savings trigger reduction was also described by Companies' Witness Miller. That reduction is reasonable and necessary in light of the delay to the procedural schedule in this case.[38]

D. Staff's Last Minute Cost Cap Proposal.

Staff filed its direct testimony in this proceeding on December 5, 2017—one week before the hearing was set to commence and nearly three months after intervenors submitted their respective testimonies.[39] Through its testimony, Staff, for the first time in this proceeding, formally requested the implementation of an overall cost cap. Specifically, Staff requests that the Commission modify the Stipulation by implementing an overall cost cap for each of the three Companies set at 3% of their respective 2015 FERC Forms 1, page 300, line 10.[40] In doing so, Staff asks the Commission to upset the balance and accommodations of competing interests that the Signatory Parties achieved through extensive and detailed discussions—discussions that Staff chose not to substantively participate in. Indeed, despite the parties' various requests for Staff's input on the Companies' Proposed Plans, Staff failed to meaningfully participate in the process. As set forth below, Staff's cost cap proposal, which the Signatory Parties have uniformly

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[35] *See generally* Stipulation; Miller Supp. Testimony at 9.

[36] Miller Supp. Testimony at 9-13.

[37] *Id.* at 17.

[38] *Id.* at 19-20.

[39] Case No. 16-0743-EL-POR, Prepared Testimony of Patrick Donlon ("Donlon Testimony") (Dec. 5, 2016). Staff filed an amended version of its testimony approximately a month later. *See* Staff Exhibit 1, Case No. 16-0743-EL-POR, Amended Testimony of Patrick Donlon ("Donlon Am. Testimony") (Jan. 10, 2016).

[40] Donlon Am. Testimony at 3,7; Hearing Tr. Vol. II at 321:17-323:12 (Donlon Cross).

rejected, is unenforceable, unnecessary, and unfair.

E. Evidentiary Hearing.

The Attorney Examiner conducted a five-day evidentiary hearing in this case that commenced on January 23, 2017 and ended on January 31, 2017. On the first day of the hearing, the Companies presented their case in support of the Stipulation through the testimonies of Denise J. Mullins, George L. Fitzpatrick, Edward C. Miller, and Eren G. Demiray.[41] OCC and Staff presented their opposition to the Stipulation on the second day of the hearing through the testimonies of Richard F. Spellman (OCC) and Patrick Donlon (Staff).[42] Cross-examination of Staff's witness continued through day three of the hearing. While OHA cross-examined the Companies' witnesses, it did not present any testimony in this case. The rebuttal case lasted two days, with NRDC, ELPC, OEC, and EDF presenting their joint rebuttal case on the fourth day through the testimony of Chris Neme.[43] The Companies presented their rebuttal case on the last day of the hearing through the testimonies of Eren G. Demiray and Edward C. Miller.[44] The Attorney Examiner closed the record in this case and submitted the matter for the Commission's decision promptly after close of rebuttal.[45]

Pursuant to the Attorney Examiners' directive, the Companies now submit this initial brief in support of the Stipulation and the Revised Plans contained therein.

[41] *See generally* Hearing Tr. Vol. I.
[42] *See generally* Hearing Tr. Vol. II & III.
[43] *See generally* Hearing Tr. Vol. IV.
[44] *See generally* Hearing Tr. Vol. V.
[45] Hearing Tr. Vol. V at 636:6-9.

III. LAW & ARGUMENT

A. The Revised Plans Comply With All Statutory And Regulatory Requirements.

The Companies are required under Ohio law to achieve cumulative energy savings of at least 5.2%, 6.2%, and 7.2%, for the years 2017, 2018 and 2019, respectively, and peak demand reductions of 5.50%, 6.25% and 7.00% for these same years based on a three-year rolling average of kilowatt hour sales and kilowatt peak demand.[46] To meet those goals, the Commission's Rules require the Companies to develop three-year portfolio plans that are designed to "meet or exceed" the energy reduction targets and meet the peak demand reduction targets under Ohio law.[47]

These portfolio plans must be "cost-effective" on a portfolio and program basis[48] and must include, at a minimum: (i) an executive summary, along with a market potential study; (ii) a description of stakeholder participation in program planning efforts and program development; (iii) a description of attempts to coordinate programs with other public utilities' programs; (iv) a description of existing programs and whether the programs should continue; and (v) a description of proposed programs that includes information such as program objectives, targeted customer segments, proposed duration of the program, estimated program participation levels, program participation requirements, marketing approach, including any rebates or other incentives, program implementation approach, program budgets, participant costs, if any, market transformation activities, and a description of the Companies' evaluation, measurement, and verification ("EM&V") processes.[49] Furthermore, in developing programs for inclusion in the

[46] O.R.C. § 4928.66(A)(1) and (2).
[47] O.A.C. § 4901:1-39-04(A).
[48] O.A.C. § 4901:1-39-04(B); *see also* O.A.C. § 4901:1-39-01(Y).
[49] O.A.C. § 4901:1-39-04(C)(1)-(5); *see also* O.A.C. § 4901:1-39-03(A).

portfolio plans, the Companies are required to consider certain "program design criteria" set forth in the Commission's Rules, as well as identify promising measures considered for inclusion in the plans but not found to be cost-effective and/or achievable.[50]

As fully explained below, the Revised Plans meet all of the above requirements and criteria. As such, the Commission should approve and adopt the Revised Plans as part of the Stipulation without modification.

1. The Revised Plans are designed to achieve the statutory energy efficiency and peak demand reduction benchmarks.

(a) The Companies correctly calculated the statutory energy efficiency and peak demand reduction baselines and benchmarks.

Ohio law requires all EDUs in the State to implement EE programs that achieve certain energy savings set by statute.[51] The annual level of energy savings that an EDU must achieve in Ohio is known as the "energy efficiency benchmark."[52] That benchmark is calculated as a percentage of the "energy baseline," which is defined by the Commission's Rules as the "average total kilowatt-hours of distribution service sold to retail customers of the [EDU] in the preceding three calendar years . . . ."[53] For years 2017, 2018, and 2019—the time period covered under the Revised Plans—the cumulative EE benchmarks are 5.2%, 6.2%, and 7.2%, respectively.[54] In addition to these EE mandates, Ohio law also requires all EDUs to implement PDR programs to achieve annual PDR benchmarks that are also calculated as percentages of an

[50] O.A.C. § 4901:1-39-03(B)-(C).

[51] O.R.C. § 4928.66(A)(1)(a); *see also* O.A.C. § 4901:1-39-01(K).

[52] O.A.C. § 4901:1-39-01(K).

[53] O.R.C. § 4928.66(A)(2)(a); *see also* O.A.C. § 4901:1-39-01(J).

[54] Companies' Exhibit 1, Case No. 16-0743-EL-POR, Amended Direct Testimony of Denise J. Mullins (Dec. 8, 2016) ("Mullins Am. Testimony") at 2, attaching and incorporating by reference Case No. 16-0743-EL-POR, Direct Testimony of Denise J. Mullins (Apr. 15, 2016) ("Mullins Testimony") at 4-9; Mullins Am. Testimony at Exhibit DJM-A2.

EDU's PDR baseline.[55] The cumulative PDR benchmarks for 2017, 2018, and 2019 are 5.50%, 6.25% and 7.00%, respectively.[56]

Companies' Witness Denise Mullins submitted testimony describing how the Companies calculated both the baselines and the EE and PDR benchmarks derived from these baselines, resulting in the following EE and PDR requirements during the Plan Period:

Energy Efficiency Requirements (GWhs)[57]

Company	2017	2018	2019
OE	1,254	1,462	1,678
CEI	980	1,157	1,335
TE	549	655	759

Demand Reduction Requirements (MWs)[58]

Company	2017	2018	2019
OE	276	317	354
CEI	213	241	270
TE	116	130	145

No party objected to these calculations, nor did any party dispute their accuracy. Staff Witness Donlon, for instance, does not reference Miss Mullins' calculations in his testimony, let alone dispute them, and OCC Witness Spellman testified that he did not have any reason to dispute those calculations.[59] Moreover, as discussed below, no party challenged the Companies' projections regarding the Revised Plan's ability to achieve these EE and PDR requirements during the Plan Period. Accordingly, the Commission should find that the Companies accurately calculated the statutory EE and PDR baselines and benchmarks in this case.

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[55] O.R.C. § 4928.66(A)(1)(b); *see also* O.A.C. § 4901:1-39-01(S)-(T).

[56] Mullins Testimony at 10-14 (incorporated by reference in Mullins Am. Testimony at 2); Mullins Am. Testimony at Exhibit DJM-3.

[57] Mullins Am. Testimony at Exhibit DJM-A2.

[58] *Id.* at Exhibit DJM-3.

[59] Hearing Tr. Vol. II at 185:16-186:6 (Spellman Cross).

(b) The Companies' savings estimates are well-supported and reasonable.

As discussed, the Revised Plans are specifically designed to achieve the statutory EE and PDR benchmarks set forth in Section 4928.66 of the Ohio Revised Code.[60] However, as Companies' Witness Miller explained, the Companies had to incorporate a "cushion" in their plan design to accommodate for uncertainties surrounding the numerous modeling assumptions.[61] This cushion resulted in estimated aggregate savings for the three Companies of 1,781,833 MWh.[62] Notably, the Commission has approved previous EE/PDR portfolio plans containing similar "cushion" levels in their plan design, either for the Companies or for other utilities in Ohio.[63]

The savings projections included in the Revised Plans are based on an assessment of every measure included therein, the results of which are specifically detailed in Appendices C-1 of the Revised Plans. Among other things, the tables in those appendices set forth the measure life, energy, and demand savings used for modeling purposes, and the source upon which each assumption is based.[64] Energy savings projections were predominantly based upon the protocols included in the Ohio Technical Reference Manual ("TRM") or Pennsylvania TRM, as adjusted when appropriate to incorporate more recent industry information.[65]

Moreover, the modeled savings for the refrigerator and freezer measures included in the Appliance Turn-In Program were adjusted downward based on a recommendation of an

[60] Hearing Tr. Vol. I at 70 (Miller Cross).
[61] *Id.* at 70-71. (Miller Cross).
[62] *Id.*
[63] *Id.* at 122 (Miller Redirect).
[64] Stipulation, Ex. B at Appendices C-1 ("Measure Assumptions").
[65] *Id.* Ex. B at 8.

intervening party.[66] No other party recommended any adjustments to the modeled savings values for any of the Companies' programs in the Revised Plans. In fact, Staff raised no issues or objections regarding any of the Companies' programs included in the Revised Plans.[67] Similarly, nowhere in OCC Witness Spellman's testimony does he challenge the Companies' modeled energy savings values.

Furthermore, estimated program participation values (which are applied to measure savings projections) were informed by experience gained through implementation of prior portfolio plans in Ohio and other jurisdictions where FirstEnergy does business, as well as through the MPS and the Companies' consultants' expertise and experiences with other utility programs throughout the country.

In sum, the Companies utilized the same process for establishing the modeled energy savings values included in the Revised Plans as has been done in the past, both in Ohio, as well as in other jurisdictions in which FirstEnergy does business. Such a process is based predominantly on TRM protocols, with none of the modeled energy savings values being challenged in this proceeding. In light of the foregoing, the Companies' savings estimates are reasonable and should be approved as part of the Commission's approval of the Stipulation.

2. The Revised Plans are cost-effective on a portfolio and program basis, and credible evidence to the contrary does not exist.

The Commission Rules require the Companies' Revised Plans to be "cost-effective" on both a portfolio and a program basis.[68] Notably, individual measures within a particular plan program need not be cost-effective, so long as the plan as a whole and programs therein are cost-

[66] *Compare* Stipulation, Ex. B at Appendices C-1 ("Measure Assumptions") (Superseded) p. 1 of 8 *with* Appendices C-1 ("Measure Assumptions"), p. 1 of 8; Miller Supp. Testimony at 4.
[67] Hearing Tr. Vol. II at 315-16 (Donlon Cross).
[68] O.A.C. § 4901:1-39-04(B).

effective (other than those providing "substantial nonenergy benefits").[69] Cost-effectiveness under the Commission's Rules for plan approval is analyzed by using the Total Resource Cost ("TRC") test,[70] which measures the net costs and benefits of a particular EE or PDR program (or of a portfolio plan) based on the total costs of that particular program, including participant and utility costs.[71] In essence, the TRC test compares the benefits to a utility's entire service territory with the participants' incremental costs of installing or adopting the particular EE/PDR program measure plus the cost of plan administration and/or program implementation. The rationale of the TRC test is to determine whether ratepayers should invest in EE/PDR or if it is simply cheaper to rely on supply-side resources. To be cost-effective under the TRC test, a program (or portfolio plan) must receive a "score" (benefit-cost ratio) that is greater than 1.0.[72]

Here, each of the Revised Plans passes the TRC test on a portfolio plan and individual program basis (with the exception of the Companies' Low-Income EE Programs, which, as explained below, do not have to pass the TRC test). Section 8.0 in each of the Revised Plans describes how the TRC test was performed on both a portfolio plan and program basis.[73] The TRC test results are set forth in PUCO Tables 1 and 7A through 7G in each of the Revised Plans.[74] On a portfolio plan basis, the TRC score for OE is 1.5, and the TRC score for both CEI and TE is 1.6.[75] Neither the Companies' calculations nor the results of the Revised Plans' cost-effectiveness were opposed or contradicted. In fact, OCC Witness Spellman readily admitted

[69] *Id.*
[70] O.A.C. § 4901:1-39-01(F).
[71] O.A.C. § 4901:1-39-01(Y).
[72] Hearing Tr. Vol. I at 37:14-18 (Fitzpatrick Cross).
[73] Stipulation, Ex. B at Section 8.0 ("Cost Effectiveness").
[74] *Id.* at Appendices C-4, PUCO 1 ("Portfolio Summary of Lifetime Costs and Benefits") & PUCO 7A-G ("TRC Benefits Tables"). Please note that Ex. B includes a separate "Appendix C" for each of the individual Companies.
[75] *Id.* at Appendices C-4, PUCO 1 ("Portfolio Summary of Lifetime Costs and Benefits"); Miller Supp. Testimony at 6.

that each of the Revised Plans was cost-effective on a portfolio plan basis, each with a TRC score above 1.0.[76] As such, there is no basis for arguing that the Revised Plans are not cost-effective on a portfolio plan basis. The Commission should thus find that the Revised Plans meet this requirement.

The individual programs included in the Revised Plans are also cost-effective under the TRC test.[77] As an initial matter, no opposing party disputes the TRC calculations and results for the individual programs, which can be found in PUCO Tables 7A through 7G in each of the Revised Plans.[78] Staff Witness Donlon did not address (or even mention) the cost-effectiveness of the programs in his direct testimony; in fact, he conceded at the hearing that Staff was not taking a position on the programs included in the Revised Plans.[79] Similarly, OCC Witness Spellman does not dispute the TRC scores included in the Revised Plans. Indeed, nowhere does Mr. Spellman criticize the Companies' TRC calculations, nor does he provide any analysis showing that the programs listed in PUCO Tables 1 and 7A through 7G are somehow not cost-effective. Instead, Mr. Spellman argues that the following sub-programs should be removed from the Revised Plans because he believes they are not cost-effective: (i) Direct Load Control; (ii) Behavioral; (iii) Audits & Education; (iv) HVAC; and (v) Smart Thermostat.[80] Mr. Spellman

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[76] Hearing Tr. Vol. II at 208:23-209:5 (Spellman Cross).

[77] The sole exception is the Companies' "Low Income Energy Efficiency Programs," which have TRC scores below 1.0. *See* Stipulation, Ex. B at Appendices C-4, PUCO 7A-B ("TRC Benefits Table – Residential"). However, these low-income programs need not be cost-effective under the TRC test, as each provides "substantial nonenergy benefits." O.A.C. § 4901:1-39-04(B); O.A.C. § 4901:1-39-01(Q). No party opposes this fact. *See* OCC Exhibit 9B, Case No. 16-0743-EL-POR, Supplemental Direct Testimony of Richard F. Spellman (Jan. 10, 2017) ("Spellman Supp. Testimony") at 65-66; Hearing Tr. Vol. II at 320:19-321:3 (Donlon Cross).

[78] Stipulation, Ex. B at Appendices C-4, PUCO 7A-G ("TRC Benefits Tables").

[79] Hearing Tr. Vol. II at 315:16-316:11; 320:19-321:7 (Donlon Cross).

[80] Hearing Tr. Vol. II at 279:11-20, 280:1-5 (Spellman Cross); Spellman Supp. Testimony at 65-66. OCC Witness Spellman identified the Low Income Program and the School Education sub-program in his pre-filed direct testimony as programs that should be excluded from the Revised Plans, *see* Spellman Supp. Testimony at 65-66; however, Spellman clarified his position at the hearing that he was not asking the Commission to exclude those from inclusion in the Revised Plans. *See* Hearing Tr. Vol. II at 273:23-274:2, 277:21-279:25 (Spellman Cross).

is wrong for two main reasons.

First and foremost, Mr. Spellman confuses the term "sub-program" with the term "Program" in the Revised Plans. This confusion is critical, as only "Programs" need be cost-effective under the Commission's Rules.[81] Sub-programs, on the other hand, do not need to be cost-effective in and of themselves, as each sub-program is part of a specific "program" in the Revised Plans and is necessarily included in the Companies' determination of whether that particular program passes the TRC test.[82] The Companies use the term "sub-program" as "either a single measure or a natural grouping of measures that are combined by the Companies because they target similar activities, such as educating customers, or comprise a natural combination of offerings through a program, such as the various energy end uses included within the Energy Efficient Products Program (*e.g.*, lighting, appliances, HVAC)."[83] As Companies' Witness Miller stated, "[b]y grouping measures this way, the Companies, stakeholders, and customers have a direct line of sight to and transparency with the various components being offered ***through a program***."[84] Moreover, "[t]his approach supports improved program administration, development, implementation, and customer education."[85] The Companies have incorporated their sub-program design into their prior EE/PDR portfolio plans in Ohio, while their sister utilities have done the same in Pennsylvania, Maryland, and West Virginia.[86]

Put simply, the term "sub-programs" in the Revised Plans is used by the Companies to

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[81] O.A.C. § 4901:1-39-04(B).

[82] Companies' Exhibit 17, Case No. 16-0743-EL-POR, Rebuttal Testimony of Edward C. Miller (Jan. 27, 2017) ("Miller Rebuttal Testimony") at 20-21; *see also* Hearing Tr. Vol. I at 62:1-22 (Miller Cross) (explaining that all sub-program budgets for a particular program under the Revised Plans add up to create the overall budget for that program).

[83] Miller Rebuttal Testimony at 20; *see also* Hearing Tr. Vol. I at 61:5-7, 63:12-64:11 (Miller Cross).

[84] Miller Rebuttal Testimony at 20 (emphasis added); *see also* Hearing Tr. Vol. I at 62:1-22 (Miller Cross).

[85] Miller Rebuttal Testimony at 20.

[86] *Id.* at 20-21.

reflect measures, or a group of measures, that are part of broader Programs and thus do not need to be cost-effective in isolation.[87] At the hearing, Companies' Witness Miller testified that the Companies considered the cost-effectiveness of each Program in the Revised Plans.[88] Mr. Miller also clarified that the Audits and Education, Behavioral, and Smart Thermostat sub-programs were "measures," as well as that the HVAC sub-program was a group of measures.[89] Moreover, the Stipulation itself makes clear that the Direct Load Control sub-program makes up the "Residential Demand Response Program," the Behavioral sub-program, the Audits & Education sub-program, and the Smart Thermostat sub-programs are each part of the "Energy Efficient Homes Program," and the HVAC sub-program is part of the "Energy Efficient Products Program."[90] The Revised Plans also make the distinction clear, as each clarifies that the sub-programs Mr. Spellman addresses are part of broader "Programs"—none of which Mr. Spellman argues are not cost-effective under the TRC test.[91] This alone warrants rejection of his argument.

Mr. Spellman is wrong for a second, additional reason. In short, Mr. Spellman incorrectly asserts that the sub-programs at issue are not cost-effective. Mr. Spellman conducted no analyses or studies of his own to conclude that the sub-programs fail to pass the TRC test.[92] That fact, in and of itself, should lead the Commission to eschew his opinion. Indeed, Mr. Spellman admitted that his opinion was based solely on the TRC scores included for those sub-

[87] O.A.C. § 4901:1-39-04(B) (measures "need not be cost effective").

[88] Hearing Tr. Vol. I at 76:1-3 (Miller Cross).

[89] Hearing Tr. Vol. I at 118:18-25; 119:18-21; 125:20-126:6 (Miller Re-Direct).

[90] Stipulation at Ex. A.

[91] Stipulation, Ex. B at Section 3.0, Table 7, p. 28 ("Proposed Residential Portfolio (Revised)"); *id.* at Appendix B-1 ("Program Cost by Program Year"); *id.* at Appendix B-2 ("Program Savings by Program Year"); *id.* at Appendix C-1 ("Measure Assumptions"); *id.* at Appendix C-2 ("Number of Units"); *id.* at Appendix C-3 ("Calculation Methods and Assumptions – Rebate Strategy"); *id.* at Section 5.0, Figure 2 ("Sub-program Implementation Schedule"); *id.* at Section 2.0, p. 14 (stating the "smart thermostat sub-program," the "Audits sub-program," and the "Behavioral sub-program" fall under the "Energy Efficient Homes Program," as well as that the "HVAC sub-program" falls under the "Energy Efficient Products Program").

[92] Spellman Supp. Testimony at 66, fn. 73 (citing MPS Tables).

programs in the Companies' MPS.[93] The Companies, however, ***did not*** use or rely on the TRC scores contained in the MPS in submitting their Revised Plans for Commission approval, nor do they rely on the MPS to support the cost-effectiveness of the programs contained in those Plans. While the MPS is an important tool in helping ***inform*** the Companies' design of its EE/PDR portfolio plans, its main purpose is to analyze the technical, economic, and achievable potential for EE/PDR in the Companies' footprint—not to present final TRC values for inclusion in the Companies' final proposed portfolio plans.[94] Rather, the Companies completed cost-effectiveness testing on all of the programs included in their Revised Plans, as presented in PUCO Tables 7A through 7G in each of the Plans.[95] Those calculations are not disputed.

Furthermore, Companies' Witness Miller confirmed that the measures included in the MPS are not precisely the same measures that the Companies used in designing their Revised Plans.[96] This, of course, is critical, given that the cost-effectiveness of a particular program under the Revised Plans is measured by whether that program, as a whole (including all measures), passes the TRC test.[97] Moreover, the negotiated Stipulation in this case resulted in many programmatic and other changes to the Companies' EE/PDR portfolio plans, none of which were considered in the MPS (which occurred months prior). As the record in this case demonstrates, the Companies rely on Section 8.0 in each of the Revised Plans to support the cost-effectiveness of the proposed programs, along with the TRC test results set forth in the various appendices of those Plans.[98]

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[93] Hearing Tr. Vol. II at 207:23-208:22, 293:2-15 (Spellman Cross).
[94] *See* Case No. 16-0743-EL-POR, Application (Apr. 15, 2016), MPS at 8, 25.
[95] Stipulation, Ex. B. at Appendices C-4, PUCO 7A through 7G ("TRC Benefits Tables").
[96] Hearing Tr. Vol. I at 122:13-123:6 (Miller Re-Direct).
[97] Hearing Tr. Vol. I at 157:3-158:13 (Demiray Cross).
[98] Stipulation, Ex. B at Appendices C-4, PUCO 1 ("Portfolio Summary of Lifetime Costs and Benefits") & PUCO 7A-G ("TRC Benefits Tables-Residential").

Because OCC Witness Spellman mischaracterizes certain "sub-programs" as "Programs" in the Revised Plans, and because he conducted no analysis supporting his opinion that those sub-programs are somehow not "cost-effective" (inappropriately relying on the MPS), the Commission should find that the Revised Plans contain programs that pass the TRC test and are thus cost-effective. The record in this case contains no credible evidence to the contrary.

3. The Revised Plans include all other required elements under the Commission's Rules.

In addition to the above requirements, the Revised Plans also include all other elements required under the Commission's Rules. As set forth in greater detail below, the Revised Plans contain: (i) an executive summary and an assessment of potential; (ii) a description of stakeholder participation; (iii) a description of attempts to align and coordinate programs with other public utilities; and (iv) a description of existing and proposed programs.[99] Accordingly, the Revised Plans include all required elements under the Commission's Rules, and no party contends otherwise.

(a) The Revised Plans include an executive summary and market potential study.

Section 4901:1-39-04(C)(1) of the Ohio Administrative Code requires the Revised Plans to contain an executive summary and an assessment of technical, economic, and achievable potential.[100] The Revised Plans clearly meet these requirements. As an initial matter, Section 1.0 of the Revised Plans includes an executive summary that provides a detailed overview of the Plans, including information about the Companies' statutory targets, the proposed programs included in the Revised Plans, the processes used and key assumptions made in designing and

[99] *See* O.A.C. § 4901:1-39-04(C).
[100] *See* O.A.C. § 4901:1-39-04(C)(1).

developing the Revised Plans, the Companies' implementation strategy for the Revised Plans, the Companies' EM&V processes, the applicable cost recovery mechanisms, and the transition of existing programs or suspended programs to new programs.[101]

The Revised Plans also include the MPS, which details the Companies' assessment of the Plans' technical, economic, and achievable potential as required by the Commission's Rules.[102] Indeed, Exhibit B to the Stipulation incorporates the MPS by reference, which is attached as Appendix D to the Companies' Application filed in this proceeding on April 15, 2016.[103] The Companies commissioned Harbourfront to prepare the MPS for the period 2017 through 2031, with a focus on January 1, 2017, through December 31, 2019.[104] As discussed by Companies' Witness Fitzpatrick, a nationally-recognized expert with over 40 years experience in utility management and consulting (including economic and statistical analyses for EE and PDR forecasting), the MPS supports the Revised Plans filed by the Companies in this proceeding, which have been endorsed by numerous parties.[105] These requirements are therefore satisfied.

(b) The Revised Plans include a description of stakeholder participation.

The Revised Plans also include a description of stakeholder participation in program planning efforts and program portfolio development, as is required under the Commission's Rules.[106] Pursuant to the stipulation filed in Case No. 08-0935-EL-SSO, the Companies created the Ohio Collaborative Group, which consists of interested stakeholders representing various

[101] *See* Stipulation, Ex. B at Sections 1.0 through 1.7.
[102] O.A.C. § 4901:1-39-04(C)(1); O.A.C. § 4901:1-39-03(A).
[103] *See* Stipulation, Ex. B; MPS.
[104] Fitzpatrick Am. Testimony at Exhibit GLF-A1, pp. 6, 16-20.
[105] *Id.* at 3, 4-9.
[106] *See* O.A.C. § 4901:1-39-04(C)(2).

customer groups and industry interests.[107] One purpose of the Collaborative Group is to help provide insight into EE and PDR opportunities available in the Companies' service territories.[108] As described in Section 3.1.5 of the Revised Plans, the Companies utilized the Collaborative Group throughout the process of developing the Revised Plans.[109] The first meeting of the Collaborative Group relating to the development of the portfolio plans occurred in December 2015.[110] Another meeting was held in February 2016, where the Companies shared their thoughts on programs and measures being considered for the portfolio plans and specifically solicited input from Collaborative Group members.[111]

Further details regarding the development of the portfolio plans, including draft programs, saving and budget projections, and development of the MPS, were provided to members of the Collaborative Group during a subsequent meeting in March 2016.[112] In addition to these meetings, personnel for the Companies participated in multiple conference calls and exchanged communications with various members of the Collaborative Group throughout the development process.[113] Input from the Collaborative Group was critical in the Companies' design and development of the Proposed Plans. Indeed, as Companies' Witness Miller testified, the Companies ultimately incorporated many of the Collaborative Group's suggestions into the Proposed Plans, including, for example, a greater focus on LED lighting, inclusion of hot water circulating pumps in the residential and small enterprise sectors, direct installations for small

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[107] *See* Stipulation, Ex. B at Section 3.1.5 ("Describe Stakeholder processes used for program development").

[108] *Id.*

[109] *Id.*

[110] *Id.*

[111] *See* Miller Testimony at 11-14.

[112] *Id.* at 13-17.

[113] *See* Stipulation, Ex. B at Section 3.1.5 ("Describe Stakeholder processes used for program development").

businesses, and analytics-enabled energy efficiency recommendations.[114] Notably, neither Staff nor OCC raised concerns regarding the Companies' overall budget estimates when the Companies sought input on their EE/PDR concept portfolio plans in March 2016.

Stakeholder participation did not end with the Companies' filing their Proposed Plans for approval. As discussed above, members of the Collaborative Group were a critical part of the settlement process in this case, which resulted in the Stipulation now pending before the Commission. Companies' Witness Miller describes all of the programmatic changes incorporated into the Revised Plans as a result of the Stipulation in this proceeding.[115] Those changes include, by way of example, a reduction in the Residential Behavioral sub-program, prioritization of LED lighting over CFL lamps, an increase targeting of low-income customers for participation in the Companies' EE kit offerings, and the implementation of a mid-stream or upstream program approach for residential heat-pump water heaters, select EnergyStar certified products, and residential and non-residential circulation pumps.[116]

Furthermore, the Companies also made various commitments to members of the Collaborative Group as a result of lengthy settlement efforts.[117] These commitments include: (i) a renewal of the Companies' commitment to work with various members of the Collaborative Group through activities such as participation in select conferences and EE outreach events; (ii) providing, upon reasonable request, requesting Collaborative members with a Company contact who is knowledgeable about aspects of the Revised Plans in which the requesting Collaborative member is interested; (iii) reporting to the Collaborative Group cleared capacity after each PJM base residual and incremental auction; (iv) providing member consumption information in

[114] *See* Miller Testimony at 13, 18-23.
[115] *See* Miller Supp. Testimony at 9-13.
[116] *Id.* at 10-11.
[117] *Id.* at 17.

electronic spreadsheet format, subject to appropriate customer authorizations, to assist OHA with its Energy Star benchmarking program; and (v) assisting OMAEG's Energy Group with mutually agreeable member outreach activities.[118] As Companies' Witness Miller testified, "[t]hese commitments reaffirm the Companies' philosophy and practice of maintaining open communications with members of the Collaborative Group in an ongoing effort to improve customer satisfaction and increase participation in the Companies' EE and PDR programs."[119]

(c) The Revised Plans include a description of attempts to align and coordinate programs with other public utilities.

Section 3.1.6 of the Revised Plans includes the requisite description of the Companies' attempts to align and coordinate their programs with those of other public utilities. There is no dispute that the Companies took several steps when developing their portfolio plans to attempt to align and coordinate with other utilities. First, the Companies designed the Revised Plans to ensure commonality amongst the Companies as it relates to program offerings, program participation requirements, and EM&V protocols.[120] Second, the Companies reviewed the portfolio plans of other Ohio utilities to determine if the implementation of some of these utilities' ideas might improve the Companies' own portfolio plans.[121] Third, the Companies have maintained good working relationships with the other Ohio utilities and have engaged them in discussions of program implementation, EM&V challenges, and other concerns related to EE/PDR portfolio plans.[122] Finally, the Companies actively participated in Commission-sponsored workshops related to EE/PDR program issues and plan to continue participating in

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[118] *Id.*
[119] *Id.* at 18, 3-6.
[120] *See* Stipulation, Ex. B at Section 3.1.6 ("Describe alignment with other utility and non-utility programs").
[121] *Id.*
[122] *Id.*

such workshops.[123]

The Revised Plans additionally outline several steps the Companies took to identify and utilize synergies amongst Ohio utilities and programs offered throughout the state. By way of example, the Companies' Community Connections sub-program partners with OPAE, who is able to implement the sub-program through other partnerships and funds provided by various public agencies in Ohio.[124] The Companies also modeled the school education component of their Energy Efficient Homes Program to be consistent with school programs offered by other Ohio utilities.[125] By leveraging opportunities such as these, the Companies are able to reduce costs for customers and ensure the smooth implementation of their Revised Plans.

(d) The Revised Plans include a description of programs.

Sections 2.0 and 3.0 of the Revised Plans include detailed descriptions of the programs proposed and endorsed by the Signatory Parties and the processes the Companies followed in deciding which programs would be included in the Revised Plans. Program design and development was an iterative process, which required the Companies to take many steps to ensure the development of a comprehensive portfolio plan.[126]

(i) The Companies considered the required program design criteria.

The Commission's Rules include thirteen specific criteria that an EDU must consider when developing programs for inclusion in its EE/PDR portfolio plan.[127] As described in Sections 9.1 through 9.8 of the Revised Plans, the Companies carefully considered each of these

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[123] *Id.*
[124] *Id.*
[125] *Id.*
[126] *See id.* at Section 3.1 ("Discussion of criteria and process used for selection of programs"); *see also* Miller Testimony at 10-13.
[127] *See* O.A.C. § 4901:1-39-03(B).

criteria, as well as other important considerations, when determining what programs to include in the Revised Plans.[128] Indeed, the Companies considered many other factors in determining which programs should comprise the Revised Plans, including, but not limited to, feedback received from stakeholders and consultants, best practices in Ohio and across the nation, and the Companies' and their sister utilities' experiences in implementing EE/PDR programs.[129] The Companies' consideration of all these factors led to the development of comprehensive and robust EE/PDR portfolio plans that benefit all of the Companies' customers.

(ii) The Companies provide a description of existing and proposed programs.

The Commission's Rules also require the Companies to provide detailed information in the Revised Plans related to the Companies' existing programs and any new programs the Companies' are proposing to implement during the Plan Period.[130] The Companies complied with these requirements. To start, Table 4 in Section 1.1 of the Revised Plans lists every program the Companies propose and illustrates how those programs align with programs offered under the Companies' prior portfolio plans, while Section 2.0 includes a summary of each proposed program and specifies whether the programs are new or are continuations of previous

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[128] The thirteen specific criteria are discussed in the Stipulation, Ex. B at Sections 9.1.2 ("Cost-effectiveness on a portfolio basis"), 9.1.3 ("Benefit to all members of a customer class, including non-participants"), 9.1.1 ("Potential for broad participation within the targeted customer class"), 9.1.4 ("Likely magnitude of aggregate energy savings or peak-demand reduction"), 9.1.5 ("Non-energy benefits"), 9.1.6 ("Equity among customer classes"), 9.2 ("[R]elative advantages or disadvantages of [EE] and [PDR] programs for the construction of new facilities, replacement of retiring capital stock, or retrofitting existing capital stock"), 9.3 ("[P]otential to integrate the proposed programs with similar programs offered by other utilities, if such integration produces the most cost-effective results and is in the public interest"), 9.4 ("[T]he degree to which measures may be bundled within a program so as to avoid lost opportunities to attain energy savings or peak reductions that would not be cost-effective or would be less cost-effective if installed individually"), 9.5 ("[T]he degree to which the program designs engage the [EE] supply chain and leverage partners in program delivery"), 9.6 ("[T]he degree to which programs successfully address market barriers or market failures"), 9.7 ("[T]he degree to which the programs leverage knowledge gained from existing programs successes and failures"), and 9.8 ("[T]he degree to which the programs promote market transformation.").

[129] The program selection process for the Revised Plans is described in detail in Section 3.1 of the Revised Plans. *See* Stipulation, Ex. B at Section 3.1 ("Discussion of criteria and process used for selection of programs").

[130] *See* O.A.C. § 4901:1-39-04(C)(4)-(5).

programs (with certain changes).[131]

Section 3.0 of the Revised Plans describes in detail each of the programs proposed in the Plans.[132] These descriptions include: (i) program title and years during which the program will be implemented; (ii) program objectives and metrics; (iii) target markets and participation requirements; (iv) program approach, rationale, and description; (v) implementation strategy; (vi) program issues, risks, and risk management strategies; (vii) program ramp-up strategies; (viii) marketing strategy; (ix) market transformation strategy; (x) eligible measures and incentive strategy; (xi) non-energy benefits; and (xii) any other necessary information.[133] Projected participation rates and program budgets for each program are set forth in the Revised Plans at Appendices C-2 and B-1, respectively. The Revised Plans also describe the Companies' planning, reporting and tracking systems,[134] management and implementation strategies,[135] and EM&V processes[136] that will be followed during the Plan Period. Accordingly, the Revised Plans contain the necessary detail for each proposed program as is required under the Commission's Rules.

(iii) The Companies identify promising measures not selected.

Pursuant to the Commission's Rules, the Companies also identified several promising measures that were not ultimately selected for inclusion in the Revised Plans for various reasons.[137] These measures include clothes washer recycling, set top boxes, pool pump motors, pool pump load shifting, behavioral demand response, portable hot tubs, dishwashers, water

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[131] Stipulation, Ex. B at Section 1.1, Table 4 ("Prior & New Programs"); *see also id.* at Sections 2.0 to 2.6.
[132] *Id.* at Section 3.0 ("Program Descriptions").
[133] *See, e.g.*, *id.* at Section 3.0, p. 29-30.
[134] *Id.* at Section 4.0 ("Planning, Reporting and Tracking Systems").
[135] *Id.* at Section 5.0 ("Portfolio Management and Implementation Strategies").
[136] *Id.* at Section 6.0 ("Utility [EM&V] Activities").
[137] *See* O.A.C. § 4901:1-39-03(C).

coolers, induction cooking appliances, air purifier/cleaner, whole house fan, faucet controls, kettle cookers, and motors—single phase.[138] While considered, each of these measures were left out of the Revised Plans due to implementation barriers, questionable or limited participation or savings estimates, historic results, and/or cost.[139] As Companies' Witness Miller testified, "the Companies will regularly evaluate the programs and program participation to evaluate whether changes should be made to existing programs or whether certain programs and measures should be modified to include measures originally considered but not included."[140] The Companies also plan to periodically discuss opportunities with the Collaborative Group as they are identified.[141]

For all these reasons, the Revised Plans fully comply with all statutory and regulatory requirements under Ohio law.

B. The Stipulation Satisfies The Commission's Three-Part Test For Stipulation Approval.

The standard of review for considering the reasonableness of the Stipulation is well-established under Commission precedent and has been approved and endorsed by the Ohio Supreme Court.[142] The ultimate issue for consideration is whether the Stipulation, "which embodies considerable time and effort by the signatory parties, is reasonable and should be adopted."[143] The Commission makes that determination by considering the following three factors: (1) whether the Stipulation is the "product of serious bargaining among capable, knowledgeable parties"; (2) whether the Stipulation "as a package, benefits ratepayers and the

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[138] Miller Testimony at 16-17.

[139] *Id.*

[140] *Id.* at 17.

[141] *Id.*

[142] *See Indus. Energy Cons. Of Ohio Power v. Pub. Util. Comm.*, 68 Ohio St. 3d 559, 561, 629 N.E.2d 423 (1994) (citing *Consumers' Counsel v. Pub. Util. Comm'n*, 64 Ohio St. 3d 123, 125, 592 N.E.2d 1370 (1992); *AK Steel Corp. v. Pub. Util. Comm'n*, 95 Ohio St. 3d 81, 82-83, 765 N.E.2d 862 (2002)).

[143] *In the Matter of the Application of [the Companies] for Authority to Provide for a Standard Service Offer Pursuant to R.C. 4928.143 in the Form of an Electric Security Plan*, Case No. 14-1297-EL-SSO, Opinion and Order at 39 (Mar. 31, 2016) ("Case No. 14-1297-EL-SSO").

public interest"; and (3) whether the Stipulation "violate[s] any important regulatory principle or practice."[144]

Here, each of the above three elements is satisfied. Indeed, as the Signatory Parties declared:

> The [Stipulation] is supported by adequate data and information; represents a just and reasonable resolution of issues in this proceeding; violates no regulatory principle or precedent; is the product of lengthy, serious bargaining among knowledgeable and capable Signatory Parties in a cooperative process; and is undertaken by the Signatory Parties representing a wide range of interests to resolve the aforementioned issues. The [Stipulation] represents the culmination of an exhaustive process and is an accommodation of the diverse interests represented by the Signatory Parties. It is entitled to careful consideration by the Commission.[145]

That careful consideration should demonstrate that the Stipulation more than satisfies the Commission's test for approval.

1. The Stipulation is the product of serious bargaining among capable and knowledgeable parties.

The Stipulation passes the first element of the Commission's test. When evaluating this element, the Commission considers: (i) the level of participation in settlement discussions; (ii) the level of expertise among the parties involved in those discussions; and (iii) the interests represented by the signatory parties.[146] The negotiations were robust among parties possessing a wide range of interests who were represented by experienced counsel and, accordingly, the first two elements of the Commission's analysis are satisfied.[147] Only the third criterion is being challenged and, as explained below, the challenge is baseless.

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[144] *Id.*; *Consumers' Counsel*, 64 Ohio St. 3d at 126; *AK Steel Corp.*, 95 Ohio St. 3d at 82-83.

[145] Stipulation at 2-3.

[146] *In re Application of Dayton Power and Light Co. for Approval to Modify its Competitive Bid True Up Rider,* Case No. 14-563-EL-RDR, Opinion and Order at 5 (Sept. 9, 2015) ("Case No. 14-563-EL-RDR").

[147] Stipulation at 3; Miller Supp. Testimony at 8.

As Companies' Witness Miller testified, all parties to this proceeding were invited to participate in the settlement discussions, each of which was represented by experienced, competent counsel—many of whom regularly participate in other EE/PDR portfolio cases and other regulatory proceedings before the Commission.[148] The Companies first extended to each of the intervening parties who submitted testimony in this proceeding an invitation to individually meet with the Companies either in person or via telephone to discuss their initial objections to the Proposed Plans and the changes that each would like to see made to those Plans. Once the Companies met with each of these individual parties, the Companies developed a proposed settlement term sheet, which incorporated many of the recommendations received from the parties and which became the focal point for settlement discussions.[149] That term sheet eventually became a draft settlement stipulation, which all intervening parties received. All parties were also invited to participate in a number of further settlement meetings hosted by the Companies.[150] Through these meetings, a compromise was reached and, except for Staff, OHA and OCC, all parties signed the final Stipulation, either as a Signatory Party or as one that does not oppose the settlement.[151] There thus cannot be a dispute that the first two criteria are met.[152]

The third criterion of the Commission's analysis is also satisfied. There can be no doubt that the Signatory Parties represent a wide range of interests, including those of: (i) the Companies, (ii) all customer classes interested in environmental issues and concerns, as

[148] Miller Supp. Testimony at 8.
[149] *Id.* at 8-9.
[150] *Id*. at 8-9.
[151] *See generally*, Case No. 16-0743-EL-POR, Notice of Amended Signature Page at 13 (Dec. 23, 2016).
[152] In fact, although OCC and OHA did not ultimately join the Stipulation, the Companies left intact multiple provisions in the Stipulation negotiated by those parties. For instance, the Stipulation contains a commitment by the Companies to assist OHA with its Energy Star benchmarking program. *See* Stipulation at 8. The Stipulation also contains several provisions that seek to expand participation in EE programs among the Companies' low-income customers. *See id.* at 4, 6.

represented by OEC, EDF, NRDC, and ELPC; (iii) industrial clients of EMS, an "efficiency expert with significant and specific experience in the development, deployment, and installation of energy efficiency and peak demand reduction retrofits, facilities and programs;"[153] (iv) customers of EnerNOC, an energy manager and marketer for over 1,000 Ohio customer sites with energy, capacity and/or ancillary services available for bid into those markets;[154] (v) low and moderate income residential customers represented by OPAE;[155] and (vi) large industrial, residential, and small commercial customers taking products and electric generation service from IGS, a certified retail electric service provider.[156] Furthermore, one of the largest grocers in the country (Kroger),[157] an advocacy group for Ohio manufacturers' interests (OMAEG),[158] and an advocacy group representing the interests of industrial and commercial customers (IEU)[159] each executed the Stipulation as a "non-opposing party."

Staff does not challenge any of the relevant criteria and, while OCC Witness Spellman claims that the Stipulation "lacks a diversity of interests among the signatory parties,"[160] his testimony is baseless and unsupported. Indeed, in support of his position, Mr. Spellman merely recites which parties executed the Stipulation and which did not. He provides no reason or explanation supporting his belief that the Stipulation lacks a "diversity of interests." In fact, Mr. Spellman admitted during his cross-examination that he never read the Commission case upon

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[153] Case No. 16-0743-EL-POR, Mem. in Support of Motion to Intervene of EMS at 4-5 (June 3, 2016).

[154] *Id.* at Mem. in Support of Motion to Intervene of EnerNOC at 3 (June 14, 2016).

[155] *Id.* at OPAE's Motion to Intervene and Mem. in Support at 2 (April 22, 2016).

[156] *Id.* at Mem. in Support of Motion to Intervene of IGS at 4 (June 14, 2016); *In the Matter of the Application of [IGS] for Certification as a Retail Electric Supplier,* Case No. 11-5326-EL-CRS ("Case No. 11-5326-EL-CRS").

[157] *Id.* at Mem. in Support of Motion to Intervene of Kroger at 4 (May 17, 2016).

[158] *Id.* at Mem. in Support of Motion to Intervene of OMA at 4 (May 9, 2016).

[159] *Id.* at Mem. in Support of Motion to Intervene of IEU at 3 (May 6, 2016); www.ieu-ohio.org.

[160] Spellman Supp. Testimony at 5, 70-71.

which he allegedly relied when making this statement.[161] He also admitted that he has never read any other Commission case on this element.[162] In fact, Mr. Spellman never even heard of and, thus, knew nothing about five of the eight Signatory Parties (ELPC, OEC, OPAE, IGS or EMS),[163] and, at the time of his testimony, was completely unaware that IEU also executed the Stipulation as a non-opposing party.[164] In light of the foregoing, there is no credible evidence to support OCC Witness Spellman's assertion and, accordingly, his testimony on the subject should be rejected.

For these reasons, the Commission should find that the first element of its three-part stipulation test is satisfied.

2. The Stipulation benefits customers and is in the public interest.

The Stipulation also satisfies the second element of the Commission's test. As discussed below, the proposed programs in the Revised Plans are just and reasonable, as are the proposed costs for those programs. Moreover, the Stipulation supports the Revised Plans' inclusion of a reasonable Shared Savings Mechanism, as well as a reasonable PJM capacity market bidding strategy. When considered together, it is readily apparent that the Stipulation benefits the Companies' customers and is in the public interest.

(a) The programs in the Revised Plans are just and reasonable and should be approved.

The Revised Plans are similar in design and format to not only the Companies' prior portfolio plans approved by the Commission, but also to portfolio plans approved in other jurisdictions in which FirstEnergy does business. This approach allows the Companies to

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[161] Hearing Tr. Vol. II at 201-202 (Spellman Cross).
[162] *Id*. at 202-203 (Spellman Cross).
[163] *Id*. at 204-205 (Spellman Cross).
[164] *Id*. at 206 (Spellman Cross).

continue to: (i) capitalize on the economies of scale and synergies created through common plan administration and program implementation activities; (ii) simplify EM&V and program performance evaluations; and (iii) streamline program tracking and reporting, which collectively contributes to lower overall administrative costs.[165] While the programs included in the Revised Plans are generally an extension of those included in the Companies' most recent EE/PDR portfolio plans approved by the Commission, the programs have been enhanced to provide even more opportunities for customer participation and savings through the addition of new measures and expanded end-uses incorporated by the Companies[166] or suggested by members of the Companies' Collaborative Group.[167]

Sections 1.0 and 3.0 of the Revised Plans describe in detail how the programs included in the Companies' EE/PDR portfolio plans were designed and developed. Generally, in order to establish a universe of programs and measures for consideration, the Companies: (i) reviewed the existing programs, sub-programs and measures in the Companies' prior portfolio plans; (ii) identified other potential programs and measures by reviewing program ideas and best practices from utility peers in Ohio and nationally; (iii) evaluated other programs and measures suggested by the Collaborative Group; and (iv) leveraged the experience gained through implementation and EM&V activities during prior plan periods in Ohio, as well as other jurisdictions within the FirstEnergy footprint. The Companies also conducted preliminary modeling, taking into account many factors, including: (i) implementation experience; (ii) program costs; (iii) the Ohio and Pennsylvania TRMs and other industry information for EE programs; (iv) the MPS; (v) the Avoided T&D Cost Study; and (vi) other sources identified in Appendices C-1 of the Revised

[165] Miller Testimony at 8-10.
[166] *Id.* at 9.
[167] *Id.* at 13.

Plans.[168]

Once all programs were designed and modeled, the portfolio plans were evaluated to balance results and costs to ensure the reasonableness of the plans and compliance with statutory benchmarks and other commitments made in the Companies' ESP IV case (Case No. 14-1294-EL-SSO) in a cost-effective manner. Based on the results of the iterative modeling process and, after additional review by the Companies and the Collaborative Group, the Companies finalized the programs for inclusion in the Companies' EE/PDR portfolios originally filed in this case.[169]

The scope of the programs in the Proposed Plans were scaled back pursuant to the Commission's Fifth Entry on Rehearing in the Companies' ESP IV Case. However, all of the programs included in the Proposed Plans are also included in the Revised Plans, with the only exceptions being: (i) the removal of the New Homes sub-program from the Residential Energy Efficient Homes Program; and (ii) the removal of the continuous improvement offering from the C&I Energy Solutions for Business Program – Large.[170] The Companies' offerings in the Revised Plans have been further enhanced by incorporating suggestions provided by the intervening parties during the settlement process and as reflected in the Stipulation.[171]

Collectively, the programs in the Revised Plans provide reasonable opportunities for energy and cost savings for customers in the Companies' service territories. Like the Companies' prior portfolio plans, the Revised Plans include a portfolio of EE programs targeted to a variety of customer segments, including: (i) Residential-Low Income; (ii) Residential-Other; (iii) Small Enterprise; (iv) Mercantile-Utility; and (v) Governmental.[172]

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[168] *Id.* at 10-11.
[169] *Id.* at 11.
[170] Miller Supp. Testimony at 4.
[171] *Id.*
[172] In O.A.C. 4901:1-39-03(B), the Commission sets forth a list of factors to be considered when designing

No party challenges the program design or selection of programs included in the Revised Plans. Indeed, Staff admitted that it performed no analysis on the Companies' programs and takes no position on the issue.[173] Similarly, OCC Witness Spellman made no recommendations regarding program design or program selection beyond recommending the removal of certain "programs" based on an assertion that they are not cost-effective. However, as already established, Mr. Spellman's assertion in that respect is flawed, as he mischaracterizes certain "sub-programs" as "Programs" in the Revised Plans, and because he conducted no analysis supporting his opinion that the relevant sub-programs are somehow not "cost-effective."[174] Moreover, as can be seen on Exhibit A to the Stipulation, each of the sub-programs identified by Mr. Spellman "rolls up" into Programs in the Revised Plans, which even he concedes are cost-effective.[175] Accordingly, Mr. Spellman's assertions should be disregarded.

(b) The costs of the programs in the Revised Plans are just and reasonable.

Not only are the programs in the Revised Plans just and reasonable, but so are the costs of those programs. Indeed, the program budgets included in the Revised Plans are the product of the Companies' EE Department's expertise and experience in designing, developing, and implementing EE and PDR portfolio plans throughout the FirstEnergy utilities' service territories.

The Compliance and Development Team within the EE Department is primarily

(continued…)

programs. Section 9.0 of the Revised Plans (Stipulation, Ex. B at Section 9.0 ("Plan Compliance Information on Other Key Issues") describes how the Companies considered each factor when developing the programs included in the Revised Plans.

[173] Hearing Tr. Vol. II at 315-316 (Donlon Cross).

[174] *See* Section III.A.2, *supra* at p. 18-23.

[175] Hearing Tr. Vol. II at 277 (Spellman Cross).

responsible for the development of the Revised Plans, as well as the development of other EE/PDR portfolio plans offered by the Companies' sister utilities in other states.[176] This group designs programs consistently throughout the FirstEnergy service territories whenever practical to create economies of scale, both with respect to program administration and measurement and verification activities.[177] When designing EE/PDR portfolio plans, including the Revised Plans, "this group relies not only on its expertise and experience, but also on the experience and expertise brought by the Companies' consultants, including Harbourfront, the Companies' EM&V consultant [ADM], and the Companies' Tracking and Reporting vendor [AEG]."[178]

As previously discussed, Sections 1.0 and 3.0 of the Revised Plans describe how the Plans were developed.[179] Detailed program budgets and additional data tables are included as appendices to the Revised Plans.[180] Specifically, all estimated program budget totals are detailed by year in Appendices B-1 to the Revised Plans.[181] These budgets are broken down by Sector, Program, and into the sub-program level. At the hearing, Companies' Witness Miller explained that the Companies create budgets at the sub-program level when designing EE/PDR portfolio plans "to support transparency to the components of the various programs."[182] Going down to the sub-program level supports "transparency to [the Companies'] customers, to [the Companies'] implementation team, as well as to the [C]ollaborative and to [the Companies'] stakeholders" and ensures that all "parties are aware of the components of [the Companies']

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[176] Miller Testimony at 12.

[177] *Id*.

[178] *Id*.

[179] Stipulation, Ex. B at Sections 1.0 ("Overview of Plans") & 3.0 ("Program Descriptions"); Miller Testimony at 10-11.

[180] Additional data tables include, for example, the number of participants (measured in terms of "units") broken down by Sector, Program, sub-program, and measure (Appendices C-2) and a detailed breakdown of all assumptions made at the measure level (Appendices C-1). *See* Stipulation, Ex. B at Appendices C-2 ("Number of Units") and Appendices C-1 ("Measure Assumptions").

[181] Stipulation, Ex. B at Appendices B-1 ("Program Cost By Program Year").

[182] Hearing Tr. Vol. I at 120:1-5 (Miller Re-Direct).

program[s] and what [their] projections are for each of the components of the programs."[183] The Companies also projected costs by relying on actual pricing under their prior EE/PDR portfolio plans, as well as on pricing for common program offerings from other jurisdictions in which FirstEnergy subsidiaries have EE and PDR programs in place.[184] Administrative costs and other program operations costs under the Revised Plans were similarly based on actual costs or internal estimations.[185]

Critically, neither Staff nor OCC opposed the program budgets in the Revised Plans or introduced any evidence demonstrating that the proposed budgets and/or appendices in the Revised Plans are somehow unreasonable. In fact, Staff Witness Donlon readily admitted that Staff does not have a position on "the individual budgets that the [C]ompanies are proposing for any of the programs" under the Revised Plans.[186] OCC Witness Spellman also conducted no analysis or study to show that the proposed program budgets in the Revised Plans are unreasonable or should otherwise be amended.[187] Put simply, the record is devoid of any credible evidence supporting the notion that the costs of the programs in the Revised Plans are not reasonable.

Because the program budgets in the Revised Plans are just and reasonable, the Commission should approve them.

[183] Hearing Tr. Vol. I at 120:4-11 (Miller Re-Direct).
[184] Miller Testimony at 27.
[185] *Id.*
[186] Hearing Tr. Vol. II at 315:16-24 (Donlon Cross).
[187] While Spellman believes the Companies should not receive shared savings for simply exceeding the statutory benchmarks (as is permitted by law), he does not argue that the budgets in the Revised Plans are unreasonable. *See* Spellman Supp. Testimony at 32-33.

(c) The Revised Plans include a reasonable shared savings mechanism.

In approving the Companies' EE/PDR portfolio plans for 2010-2012, the Commission encouraged the Companies to develop a shared savings incentive mechanism.[188] The shared savings mechanism developed by the Companies was approved and adopted by the Commission (with certain modifications) in the Companies' 2013-2015 EE/PDR case.[189] That previously approved mechanism is the same mechanism the Companies have proposed in Section 7.1 of the Revised Plans, with the addition of the changes approved by the Commission in the Companies' ESP IV case and as agreed to in the Stipulation ("Shared Savings Mechanism").[190]

For reasons fully discussed below, the Shared Savings Mechanism is reasonable and should be approved.

(i) The Companies' shared savings mechanism is reasonable and should be approved.

Shared savings incentives allow utilities such as the Companies to share some portion of the net benefits of successful EE programs with their ratepayers. Shared savings create a win-win situation for all involved, as participating customers enjoy lower electric bills, ratepayers benefit from the reduction to the costs of providing electric services, and the utility is permitted to retain a small portion of the net benefits as additional earnings. A successful shared savings incentive will thus encourage a utility, through financial incentives, to strive to exceed its statutorily mandated EE goals and maximize the net benefits created for customers. The Shared

[188] Case No. 09-1947-EL-POR, Opinion and Order at 15 (Mar. 23, 2011).

[189] Stipulation, Ex. B at Section 7.1 ("Provide and describe tariffs and a cost recovery mechanism"); *see also* Case No. 12-2190-EL-POR, Opinion and Order at 16 (Mar. 20, 2013); Hearing Tr. Vol. V at 556:8-10 (Demiray Rebuttal Cross).

[190] Stipulation, Ex. B at Section 7.1 ("Provide and describe tariffs and a cost recovery mechanism"); Companies' Exhibit 6, Case No. 16-0743-EL-POR, Amended Direct Testimony of Eren G. Demiray (Dec. 8, 2016) ("Demiray Am. Testimony") at 5.

Savings Mechanism in the Revised Plans does just that, as it provides the Companies a reasonable opportunity to improve earnings by encouraging participation in cost-effective EE programs that maximize net benefits and reach savings levels beyond statutorily-required benchmarks.[191]

The Shared Savings Mechanism will run concurrently with the Plan Period and will be "triggered" only if a Company exceeds both its annual and cumulative energy savings targets as set forth in R.C. § 4928.66(A)(1)(a) in any given year.[192] Should the mechanism be triggered in a given year, the incentive will be calculated using two components: (i) an incentive percentage, and (ii) adjusted discounted net lifetime benefits based upon the Utility Cost Test ("UCT") ("Adjusted Net Benefits").[193]

The Shared Savings Mechanism incentive percentage is based upon "a tiered structure that increases the Companies' financial incentives as increased [EE] savings are delivered to the Companies' customers."[194] In fact, the Companies have proposed the same incentive tiers in the Revised Plans that the Commission approved in adopting the Companies' Shared Savings Mechanism in the prior EE/PDR case.[195] These tiers start with an incentive percentage of 5% for exceeding the benchmarks by up to 105% and increase to a top tier of 13% for exceeding the

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[191] Stipulation, Ex. B at Section 7.1 ("Provide and describe tariffs and a cost recovery mechanism"), p. 105-107; Demiray Am. Testimony at 5; Hearing Tr. Vol. I at 159:14-24 (Demiray Cross).

[192] Stipulation, Ex. B at Section 7.1 ("Provide and describe tariffs and a cost recovery mechanism"), p. 105-106; OCC Exhibit 5, Case No. 12-2190, Direct Testimony of Eren G. Demiray (July 31, 2012) ("OCC Ex. 5") at 7-8. For 2017, the shared savings trigger would be reduced by 14% for each of the three Companies, as discussed below.

[193] Stipulation, Ex. B at Section 7.1 ("Provide and describe tariffs and a cost recovery mechanism"), p. 105-106; OCC Ex. 5 at 9.

[194] Companies' Exhibit 16, Case No. 16-743-EL-POR, Rebuttal Testimony of Eren G. Demiray (Jan. 27, 2017) ("Demiray Rebuttal Testimony") at 3.

[195] Stipulation, Ex. B at Section 7.1 ("Provide and describe tariffs and a cost recovery mechanism"); *see also* Case No. 12-2190-EL-POR, Opinion and Order at 16 (Mar. 20, 2013).

benchmarks by more than 115%.[196] As Companies' Witness Demiray explained, this design means that "[t]he clear majority (no less than 87%) of the calculated benefits produced through cost effective management and delivery of energy efficiency programs accrue to the Companies' customers."[197] The tiers are as follows:

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%

As set forth in the Revised Plans, the Adjusted Net Benefits will be calculated by modifying the Total Discounted Net Lifetime Benefits produced by a Revised Plan in a given year to exclude the impacts of energy savings under the Customer Action Program, the historic Mercantile Customer Program, Energy Special Improvement District projects, the Companies' T&D Upgrades Program, any projects that receive any funding from the Universal Service Fund (under Section 4928.51 of the Revised Code), and any programs that are not determined to be cost-effective under the UCT.[198]

The Companies utilize the UCT to calculate Adjusted Net Benefits because the UCT includes only those program costs recovered from ratepayers.[199] As Companies' Witness Demiray testified, use of UCT "aligns ratepayer and the Companies' objectives to control [EE]

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[196] Stipulation, Ex. B at Section 7.1("Provide and describe tariffs and a cost recovery mechanism"), p. 105-106.

[197] Demiray Rebuttal Testimony at 3.

[198] Stipulation, Ex. B at Section 7.1 ("Provide and describe tariffs and a cost recovery mechanism"), p. 105-107.

[199] O.A.C. § 4901:1-39-01(Y) (definition of Total Resource Cost test).

program expenses by focusing on costs that are within the Companies' direct control."[200] Moreover, use of the UCT "encourages the Companies to establish incentive levels that are high enough to drive customer participation in program offerings, but balanced so as not to unnecessarily overcompensate."[201] This approach, utilizing the TRC for program planning and UCT for shared savings determinations, leads to "a system that encourages the Companies to make prudent and cost effective decisions through program design, administration, and implementation."[202] The Commission recognized this benefit in the Companies' 2013-2015 portfolio plans and approved the use of the UCT over the TRC in determining shared savings, holding that "use of the UCT will encourage the Companies to keep administrative costs low" and will encourage the Companies "to minimize the costs of their EE/PDR programs while still achieving full compliance with their statutory mandates."[203]

Shared savings are earned on a Company-specific basis (results are not aggregated across the Companies) when a Company achieves more savings than are mandated by statute in any given year.[204] Moreover, if a Company "triggers" shared savings, that Company collects the incentive dollars based on an allocation at the rate schedule level.[205] That "allocation is proportionate to the Adjusted Net Benefits achieved by programs serving that class of the Company's customers."[206] Companies' Witness Demiray provided the following example: "if programs offered to the Residential class of customers produce 40% of a Company's Adjusted

[200] Demiray Rebuttal Testimony at 11.
[201] *Id.*; OCC Ex. 5 at 4-5.
[202] Demiray Rebuttal Testimony at 12.
[203] Case No. 12-2190-EL-POR, Opinion and Order at 17 (Mar. 20, 2013); Hearing Tr. Vol. I. at 155:23-25 (Demiray Cross).
[204] Stipulation, Ex. B at Section 7.1 ("Provide and describe tariffs and a cost recovery mechanism"), p. 105.
[205] Demiray Rebuttal Testimony at 4; Stipulation, Ex. B at Section 7.1 ("Provide and describe tariffs and a cost recovery mechanism"), p. 105-106; OCC Ex. 5 at 11-12.
[206] Demiray Rebuttal Testimony at 4; Hearing Tr. Vol. I at 163:5-23 (Demiray Cross).

Net Benefits, any financial incentive that Company earned would be collected with 40% borne by the same Residential customer class."[207] In other words, the Shared Savings Mechanism ensures that any "shared savings are appropriately allocated from customer classes that are directly served and receive the resulting benefits of programs provided to that customer class."[208]

The amount of shared savings will be calculated consistent with the methodology outlined above and in Section 7.1 of the Revised Plans. Furthermore, and pursuant to the Commission's directive, shared savings will be capped at a maximum of $10 million, after-tax, per year across the three Companies.[209] This cap means that the Shared Savings Mechanism has a built-in protection for the Companies' customers.[210] If reached, the shared savings cap limits the level at which the Companies collect shared savings, thus resulting in a lower effective incentive rate.[211] Indeed, as Companies' Witness Demiray demonstrated, the shared savings cap for years 2013 through 2014 resulted in an effective incentive rate for the Companies between 5.3% and 8.8%.[212]

In sum, the Companies and the other Signatory Parties believe that the Shared Savings Mechanism included in the Revised Plans balances the interests of all parties and represents a reasonable approach. The mechanism also incents the Companies to strive to minimize costs and maximize customer benefit through the delivery of cost-effective EE programs. Moreover, the Shared Savings Mechanism is materially consistent with AEP's mechanism, which was recently

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[207] Demiray Rebuttal Testimony at 4.

[208] *Id.*

[209] Stipulation, Ex. B at Section 7.1 ("Provide and describe tariffs and a cost recovery mechanism"), p. 107; Hearing Tr. Vol. I. at 146:4-9 (Demiray Cross); *see also* Case No. 14-1297-EL-SSO, Fifth Entry on Rehearing at 147 (Oct. 12, 2016); Case No. 12-2190-EL-POR, Opinion and Order at 16 (Mar. 20, 2013).

[210] Demiray Rebuttal Testimony at 3; Hearing Tr. Vol. I. at 148:6-11 (Demiray Cross).

[211] Demiray Rebuttal Testimony at 6-7.

[212] *Id.* at 7.

approved by the Commission,[213] as well as with the mechanism approved by the Commission for the Companies' previous EE/PDR portfolio plans.[214] The Commission should thus approve use of the Shared Savings Mechanism.

(ii) The shared savings trigger reduction for 2017 is a reasonable response to the procedural delays and will benefit customers.

In recognition of the procedural delays in the implementation of the Companies' EE/PDR portfolios, the Signatory Parties agreed in the Stipulation that the shared savings trigger for 2017 should be reduced by 14% for each of the three Companies ("Amended Trigger").[215] The Amended Trigger will apply only to 2017, and not for the 2018 and 2019 plan years.[216] The Companies' shared savings incentive tiers, compliance percentages, and incentive percentages will remain the same as set forth in Section 7.0 of the Revised Plans.[217] Companies' Witness Demiray illustrates in his testimony how the Amended Trigger will work in 2017.[218] As discussed below, this trigger reduction is a reasonable response in light of the delays to the procedural schedule, which have prejudiced the Companies' abilities to earn shared savings. Moreover, the Amended Trigger will benefit the Companies' customers, as well as the public interest. For these reasons, the Commission should approve and adopt the Amended Trigger.

(1) Delays to the procedural schedule.

The Companies filed their original EE/PDR portfolio plans for the Plan Period in April

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[213] *In the Matter of the Application of the Ohio Power Company for Approval of its [EE & PDR] Program Portfolio Plan for 2017 through 2020*, Case No. 16-0574-EL-POR, Opinion and Order (Jan. 18, 2017) ("Case No. 16-0574-EL-POR").

[214] Case No. 12-2190-EL-POR, Opinion and Order at 16 (Mar. 20, 2013).

[215] Stipulation at 8-9.

[216] Demiray Am. Testimony at 6; Stipulation at 8-9; Stipulation, Ex. B at Section 7.0 ("Cost-Recovery Mechanism"), p. 106.

[217] Stipulation at 9; Stipulation, Ex. B at Section 7.0 ("Cost-Recovery Mechanism"), p. 105-07.

[218] Demiray Am. Testimony at 6.

2016—***well-over 10 months ago***. The programs under those Proposed Plans were set to commence on January 1, 2017, but that date has come and gone. As a result, the Companies' customers were delayed in their ability to participate in the beneficial EE offerings proposed by the Companies, and the Companies themselves are at risk of relying on their accrued savings bank in an attempt to comply with their 2017 benchmarks. The delay has not been at the hands of the Companies, but rather Staff. As previously stated, the Attorney Examiner originally scheduled the evidentiary hearing in this matter for July 25, 2016.[219] Staff, however, unilaterally moved for the continuance of that hearing—first to October 2016, and then indefinitely.[220] The Companies did not support those motions—in fact, no other party joined Staff's continued efforts to delay the proceeding.[221]

Following the initial delays, a new hearing date was set for December 12, 2016.[222] Staff, however, filed direct testimony opposing the Companies' proposed portfolio plans on December 5, 2016—just one week before the hearing was set to commence.[223] Every intervenor that opposed the Companies' Proposed Plans filed their respective testimonies nearly three months prior, in mid-September.[224] The Attorney Examiner continued the December 12 hearing date upon Staff's (and OCC's) oral request. Even after the Attorney Examiner granted Staff's oral motion for a continuance, the Companies expressed their concern regarding further delay and asked that the hearing not be pushed into late January. Staff, however, persisted that the hearing

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[219] Case No. 16-0743-EL-POR, Entry at 3 (May 23, 2016).

[220] *Id.* at Staff's Expedited Motion for Continuance (June 27, 2016); *Id.* at Staff's Second Expedited Motion for Continuance (Sep. 29, 2016).

[221] The Companies did not file oppositions to Staff's motions, but that is simply because EDUs do not typically oppose Staff's motions on procedural issues such as scheduling.

[222] Case No. 16-0743-EL-POR, Entry (Nov. 22, 2016).

[223] Staff Exhibit 1, Case No. 16-0743-EL-POR, Prepared Testimony of Patrick Donlon ("Donlon Testimony") (Dec. 5, 2016).

[224] *See generally*, docket entries on September 13, 2016, Case No. 16-0743-EL-POR.

should not be set prior to the week of January 23, 2017. The evidentiary hearing was ultimately scheduled to commence on that day.[225]

This ongoing procedural delay carried significant implications, a fact that was well-understood by the Signatory Parties during the settlement process. The Companies conducted an analysis to determine the effect the delay had on the Companies' abilities to meet their statutory benchmarks in 2017 through new EE savings and offerings.[226] The Companies' assessment demonstrated that the delays in this case cost the Companies the opportunity to achieve, at the very least, 75 GWh of EE savings in 2017.[227] The lost 75 GWh of EE savings, which translates roughly to a one and half month delay in the Companies' abilities to implement their EE programs, is equal to approximately 14% of the Companies' annual statutory EE benchmarks.[228] The Amended Trigger is thus a reasonable response to this lost opportunity, which was not the result of the Companies' own doing. That is precisely why the Signatory Parties agreed to include the Amended Trigger provision in the Stipulation.

(2) The delays to the procedural schedule have prejudiced the Companies' abilities to earn shared savings.

The delays have made it unlikely that the Companies will be able to earn any shared savings in 2017. Due to the delays, the evidentiary hearing in this matter did not take place until more than three weeks ***after*** the Revised Plans were set to commence. The post-hearing briefing in this matter will not be completed until March 3, 2017. As such, the Commission will not issue

[225] Case No. 16-0743-EL-POR, Entry (Dec. 14, 2016).

[226] Miller Supp. Testimony at 18-19; Hearing Tr. Vol. I at 115:7-116:1 (Miller Cross); Hearing Tr. Vol. I at 129:8-130:2 (Miller Re-Direct).

[227] *Id.* at 19; Hearing Tr. Vol. I at 115:7-116:1 (Miller Cross); Hearing Tr. Vol. I at 129:8-130:2 (Miller Re-Direct).

[228] *Id.*; Hearing Tr. Vol. I at 115:7-116:1 (Miller Cross); Hearing Tr. Vol. I at 129:8-130:2 (Miller Re-Direct); Hearing Tr. Vol. I at 168:13-24 (Demiray Cross).

its order until, at the very earliest, late March.

The delay and resulting uncertainty with respect to the Revised Plans means that the Companies are unable to finalize agreements with all of their program vendors.[229] Even after the Commission approves the Revised Plans, there is a three-month "ramp up" period, which "is generally anticipated before the launch [of] many of the programs" in those Plans.[230] As Companies' Witness Miller explained, this means that "the Companies' ability to achieve the statutory benchmarks in 2017 without relying on the excess energy savings accumulated and banked during the previous plan periods is unlikely."[231] Simply put, even assuming an order is issued by the end of March, the Companies would only have nine months to achieve twelve months' worth of EE (and that is ignoring the typical "ramp up" period). If the Companies are unable to meet their EE benchmarks, then, without the agreed-upon trigger reduction, they certainly will be unable to earn ***any*** shared savings (let alone an amount that reaches their permissible cap), which are only available upon exceeding annual and cumulative energy benchmarks as set forth in Section 4928.66(A)(1)(a) of the Revised Code.

The Commission has recognized and addressed the consequences of similar procedural delays on previous occasions. For instance, in Case No. 11-126-EL-EEC, the Commission amended OE's statutory EE/PDR benchmark for 2010 to "the actual amount of energy savings achieved by OE" that year.[232] OE submitted to the Commission its EE/PDR portfolio plan for years 2010-2012 on December 15, 2009.[233] Those portfolio plans, however, were not approved

[229] Miller Supp. Testimony at 18.
[230] *Id.*
[231] *Id.* at 18-19.
[232] *In the Matter of the Application of [the Companies] to Amend Their* [*EE and PDR*] *Benchmarks*, Case Nos. 11-126-EL-EEC, et al., Finding and Order at 5 (May 19, 2011) ("Case No. 11-126-EL-EEC").
[233] Case No. 09-1947-EL-POR, Application (Dec. 15, 2009).

until March 23, 2011.[234] The delay in the Commission's approval was outside OE's control. Indeed, as OE noted in that docket, "the Companies [could] not be certain that any of the programs included in the [proposed portfolio plans] will be approved as proposed, [] preventing them from launching these programs prior to receiving approval from the Commission to do so."[235] Recognizing this fact, the Commission held that "OE could not reasonably achieve its EE/PDR benchmark due to regulatory reasons beyond its control."[236] An amendment was thus appropriate.

The same reasoning should apply here. The same delay has not only risked the Companies' abilities to meet their benchmarks without relying on their savings bank, but it has prejudiced their opportunity to earn any shared savings. Just as an amendment was necessary to remedy the prejudice OE suffered with respect to its ability to meet its 2010 benchmarks, a remedy is necessary for the Companies in this instance in light of the prolonged delay. The Amended Trigger provides that reasonable remedy, one which has already been approved and agreed to by the Signatory Parties. The Commission should likewise approve this reasonable response to delays that the Companies did not cause.

(3) The Amended Trigger will benefit customers.

The Amended Trigger should also be approved because it is beneficial to the Companies' customers and is in the public interest. As set forth above, the procedural delays discussed above and the anticipated timeline in which the Commission will issue its Order in this proceeding make it highly unlikely that the Companies can achieve their EE benchmarks without using their

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[234] *Id.* at Opinion and Order (Mar. 23, 2011).
[235] *Id.* Application at 6 (Jan. 11, 2011).
[236] Case No. 11-126-EL-EEC, Finding and Order at 5 (May 19, 2011).

accrued and banked savings.[237] Of course, tapping into the Companies' "bank" will not create ***new*** energy savings for the Companies' customers. However, as Companies' Witness Miller explained, the Companies can be incented to try to achieve their benchmarks through the creation of ***new*** energy savings if the Commission approves the Amended Trigger, which will reduce the threshold to earn shared savings for the Companies in 2017.[238] This created incentive will have two outcomes, both of which benefit customers and are in the public interest.

First, additional ***new*** energy savings that have not yet been achieved in Ohio will be created for customers through the Companies' programs.[239] These new savings will avoid or delay the need for other utility investment, which ultimately results in lower costs to customers.[240] Not only does this directly benefit customers in the Companies' footprint, but it also leads to less environmental emissions—an outcome that also benefits the public interest.[241] Second, "the use of the bank can be deferred to a period when the cost of statutory compliance will be greater." As Companies' Witness Miller explained, "[a]s the lowest cost options (or low hanging fruit) become exhausted, the cost of compliance will increase. The banked savings is [thus] a natural hedge against increased costs of compliance in the future. Deferring the need to use the bank provides a tool to mitigate future rate increases and allows for rate gradualism," which is a benefit to the Companies' customers.[242]

For these additional reasons, the Commission should find that the Amended Trigger contained in the Stipulation is reasonable and should be adopted.

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[237] Miller Supp. Testimony at 19.
[238] *Id.*
[239] *Id.* at 20.
[240] *Id.*
[241] *Id.*
[242] *Id.*

(d) The Companies' PJM capacity market bidding strategy is reasonable and should be approved.

As previously ordered by the Commission and as set forth in Section 7.1 of the Revised Plans, the Companies are proposing to continue offering eligible capacity resources associated with installed EE and PDR resources into future PJM capacity auctions, as well as continue the 80%/20% revenue sharing mechanism between the Companies and their customers.[243] In addition, the Companies will offer a reasonable percentage (at least 60%) of eligible planned EE resources that meet PJM's offering requirements into the PJM base residual capacity auction. Those offerings will also be subject to the 80%/20% revenue sharing mechanism.[244] To the extent possible and with consideration of risks involved, the Companies will also offer additional available and eligible resources into PJM's incremental capacity auctions that were not offered into the base residual auction.[245] No party in this proceeding opposes the Companies' PJM capacity market bidding strategy. To the contrary, the Signatory Parties expressly approve the Companies' PJM strategy in the Stipulation, which is designed to appropriately manage risk, is consistent with the Commission's past directives, and is reasonable.[246] The Commission should thus approve said strategy.

Thus, the Stipulation benefits the Companies' customers and is in the public interest. Accordingly, the Commission should find that the Signatory Parties have satisfied the second element of the test for stipulation approval.

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[243] Stipulation, Ex. B at Section 7.1 ("Provide and describe tariffs and a cost recovery mechanism"); Demiray Am. Testimony at 8; *see also In the Matter 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 Section 4928.143, Revised Code, in the Form of an Electric Security Plan*, Case No. 12-1230-EL-SSO, Opinion and Order at 38 (July 18, 2012) ("Case No. 12-1230-EL-SSO").

[244] Stipulation, Ex. B at Section 7.1 ("Provide and describe tariffs and a cost recovery mechanism"); Demiray Am. Testimony at 8.

[245] Stipulation, Ex. B at Section 7.1 ("Provide and describe tariffs and a cost recovery mechanism"); Demiray Am. Testimony at 8.

[246] Stipulation at 7-8; *see also* Case No. 12-2190-EL-POR, Opinion and Order at 20-21.

3. The Stipulation does not violate any important regulatory principal or practice and furthers State policies and goals.

The Stipulation also satisfies the third and final element for stipulation approval. This final element requires that the Stipulation's terms not violate any important regulatory principle or practice in Ohio.[247] As described below, the record in this proceeding demonstrates that the Stipulation does not violate any important regulatory principle or practice; in fact, the record shows that the Stipulation actually ***furthers*** State policies and goals by promoting access to energy saving programs and measures for every single Ohioan in the Companies' footprints.

(a) The Stipulation and Revised Plans promote State energy policies.

The only evidence in this proceeding shows that the terms of the Stipulation are consistent with and further the State's energy policies as set forth in Section 4928.02 of the Ohio Revised Code.[248] For example, the Stipulation and Revised Plans promote "the availability to consumers of adequate, reliable, safe, efficient, nondiscriminatory, and reasonably priced retail electric service" by providing the Companies' customers with the opportunity to enhance the efficiency of their electric usage and reduce their electric bills.[249] This cannot be disputed.

The Stipulation and Revised Plans also promote the diversity of electricity supplies and suppliers "by encouraging the development of distributed and small generation facilities."[250] One of the key commitments made by the Companies in the Stipulation is to expand and promote combined heat and power ("CHP") projects.[251] The incentives provided by the Companies under these programs encourage the development of efficient CHP systems, which can offset the

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[247] *Consumers' Counsel v. Pub. Util. Comm'n*, 64 Ohio St. 3d 123, 126, 592 N.E.2d 1370 (1992); *AK Steel Corp. v. Pub. Util. Comm'n*, 95 Ohio St. 3d 81, 82-83, 765 N.E.2d 862 (2002).
[248] O.R.C. § 4928.02.
[249] O.R.C. § 4928.02(A).
[250] O.R.C. § 4928.02(C).
[251] Stipulation at 6-7.

provision of electricity that would otherwise be delivered by the Companies, and provide electricity back to the grid if the customer's usage is ultimately less than what is generated by the customer's system. In such circumstances, the customer implementing the CHP system is acting as a distributed generator. Accordingly, the Companies' are encouraging the development of distributed and small generation facilities by incentivizing CHP projects in the Stipulation and Revised Plans.

In addition to promoting the availability of reliable electric service and promoting diversity of electricity supplies and suppliers, the Stipulation and Revised Plans also promote "innovation and market access for cost-effective supply and demand-side retail electric service, including . . . demand-side management [and] . . . waste energy recovery ["WER"] systems."[252] As just discussed, one of the key provisions in the Stipulation focuses on the Companies' expansion and promotion of CHP projects, which also serve as WER systems. Further, many of the Companies' programs directly promote demand-side management by providing incentives to customers and educating them on demand-side EE measures.[253] These provisions of the Stipulation and Revised Plans directly further the State's policy of ensuring the diversity of electricity supplies and suppliers by encouraging the development of WER systems and the implementation of demand-side management energy efficiency measures.

The Stipulation and Revised Plans also promote State energy policies because they protect at-risk populations.[254] Indeed, the Companies have partnered with OPAE, a Signatory Party and an advocate for low- and moderate-income customers, to facilitate the implementation

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[252] O.R.C. § 4928.02(D).
[253] *See* Stipulation, Ex. B at Sections 3.2-3.6.
[254] O.R.C. § 4928.02(L).

of the Companies' low-income EE programs.[255] The Companies are also offering a new sub-program to low-income customers that encourages the construction of new EE housing or the major rehabilitation of old housing to improve EE.[256] The Companies' partnership with OPAE and the new proposed sub-program protect low-income customers by ensuring they have adequate access to EE programs and by providing the opportunity to reduce electric usage, ultimately leading to lower electric bills.

Finally, the Stipulation and Revised Plans also further State energy policies because they encourage the education of small business owners regarding the use of EE programs, as well as encourage small business owners to participate in EE programs.[257] The Revised Plans include thirteen different sub-programs, comprised of seventy-seven different measures, targeted specifically towards small businesses.[258] These sub-programs and measures, while largely a reactivation and consolidation of the Companies' prior C&I Energy Efficient Equipment Program – Small and C&I Energy Efficient Buildings Program – Small, also include new offerings, such as the addition of efficient clothes dryers to the Appliances sub-program and the addition of circulation pumps to the HVAC sub-program.[259] The Companies have also expanded the services available to small businesses under the Audits & Education sub-program to include energy manager, benchmarking, and behavioral offerings to educate and increase small business owners' awareness of their energy usage and EE opportunities.[260] Additionally, the Companies agreed in the Stipulation to expand the Audits & Education sub-program to allow for targeted

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[255] *See* Stipulation, Ex. B at Section 2.2 ("Residential Low-Income program summaries").

[256] *Id.*

[257] *See* O.R.C. § 4928.02(M).

[258] *See* Stipulation, Ex. B at Section 3.3 ("Small Enterprise Programs"), Table 9: "Proposed C/I Small Enterprise Portfolio."

[259] Miller Testimony at 21, 4-23.

[260] *See* Stipulation, Ex. B at Section 2.3 ("Small Enterprise program summaries").

energy analysis and audits of individual processes or systems, further helping small businesses improve their EE.[261] All in all, the offerings available to small businesses through the Revised Plans are vast. These offerings provide immense opportunity for small business owners to educate themselves on EE and to participate in programs specifically tailored to their needs.

(b) The Revised Plans do not violate any State policy or goal.

There is no evidence in the record that the Stipulation and Revised Plans therein somehow violate any State policy or goal. To the contrary, and as set forth above, the terms of the Stipulation are consistent with and further the State's energy policies. Moreover, as fully outlined above, the Stipulation and Revised Plans also comply with each and every single requirement related to the design of an EE/PDR portfolio plan under Ohio law and the Commission's Rules.[262] Put simply, the record in this proceeding is devoid of any evidence supporting the notion that the Stipulation somehow violates any State policy or goal.

Thus, the Commission should find that the third and final element for stipulation approval is satisfied.

C. Staff's Cost Cap Proposal Should Be Rejected Because It Is Unenforceable, Unnecessary, and Unfair.

As already established, the Revised Plans comply with all statutory and regulatory requirements under Ohio law and the Commission's Rules. Staff does not oppose this point. Nor does Staff offer to the Commission any evidence that the Revised Plans—or any of the programs or program costs contained therein—are somehow unjust or unreasonable. Nevertheless, Staff is requesting that the Commission modify the Stipulation by imposing upon each of the Revised Plans "an overall cost cap on the program costs and shared savings incurred

[261] Stipulation at 7.
[262] *See* Section III.A, *supra* at p. 14-31.

through" those Plans.[263] Specifically, Staff requests the implementation of a cost cap for each of the three Companies set at 3% of their respective 2015 FERC Forms 1, page 300, line 10 ("Line 10").[264] That cap would apply against the sum of (i) all program costs and (ii) pre-tax shared savings for a given plan year under a Company's Revised Plan, minus (iii) any PJM revenues that the Company receives and credits back to customers that year (the "Cost Cap Proposal").[265]

The Signatory Parties considered and rejected Staff's Cost Cap Proposal in executing the Stipulation in this matter. In fact, to date, no intervenor in this proceeding other than OCC has come forward in support of the proposal.[266] That is because Staff's Cost Cap Proposal exceeds the Commission's statutory and regulatory authority, needlessly duplicates existing cost-control measures, and arbitrarily impacts and prejudices the Companies. In short, Staff's Cost Cap Proposal is unenforceable, unnecessary, and unfair.

For these reasons, the Commission should follow the Signatory Parties' lead and reject the proposal in its entirety.

1. Staff's Cost Cap Proposal is unenforceable.

The Companies' EE/PDR obligations stem from Section 4928.66 of the Ohio Revised Code. That Section does not authorize the Commission to approve the imposition of an overall cost cap on the efforts of EDUs in Ohio to meet their respective statutory EE/PDR benchmarks. Moreover, even if a cost cap was within the Commission's purview, Ohio agencies ***must*** follow

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[263] Staff Exhibit 1, Case No. 16-0743-EL-POR, Amended Testimony of Patrick Donlon ("Donlon Am. Testimony") (Dec. 5, 2016) at 3; Hearing Tr. Vol. II at 321:17-322:7 (Donlon Cross).

[264] Donlon Am. Testimony at 3, 7.

[265] Donlon Am. Testimony at 3,7; Hearing Tr. Vol. II at 321:17-323:12 (Donlon Cross).

[266] OCC supports the Cost Cap Proposal with one modification. *See* Spellman Supp. Testimony at 14-15. OCC contends that "the cost cap should be based on each Company's [sic] filed FERC Form 1 for the year prior," not on the fixed based year of 2015. *Id.* OCC's modification is flawed for all the same reasons discussed with respect to Staff's proposal.

specific procedures when implementing legal standards that did not previously exist.[267] It is undisputed that Staff's Cost Cap Proposal has not gone through the rigors of those rule-making procedures, making the proposal invalid and unenforceable.[268]

(a) Implementing Staff's Cost Cap Proposal would exceed the Commission's statutory authority.

The Ohio Supreme Court has "consistently recognized that the [] Commission is a creature of the General Assembly and may exercise ***no jurisdiction*** beyond that conferred by statute."[269] While the Commission is statutorily vested with the authority to review an EDU's costs of compliance with its EE/PDR obligations to ensure such costs are just and reasonable, the General Assembly has not vested the Commission with the authority to predetermine an EDU's permissible amount of spending through an inflexible, overall cost cap.[270] Had the General Assembly wished to cap the amount of spending allowed for compliance with its EE/PDR benchmark provisions, it would have expressly done so in enacting Section 4928.66 of the Ohio Revised Code.

Indeed, the General Assembly enacted Section 4928.66 at the same time it enacted Section 4928.64, both of which were part of Senate Bill 221 and signed into law in July 2008.[271] The former provision, which includes the relevant EE/PDR standards, does not include a cost cap. By contrast, the latter provision, which deals with alternative energy, does include a cost cap. This distinction is telling, as it demonstrates the General Assembly's intent to treat the

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[267] *See* O.R.C. § 111.15; *see also Fairfield Cty. Bd. of Comm'rs. v. Nally*, 143 Ohio St. 3d 93, 34 N.E.3d 873 (2015).

[268] Hearing Tr. Vol. II at 335:17-336:9 (Donlon Cross).

[269] *Pike Nat. Gas Co. v. Pub. Utilities Comm'n*, 68 Ohio St. 2d 181, 183, 429 N.E.2d 444 (1981) (citations omitted; emphasis added); *see also Canton Storage & Transfer Co., Inc. v. Pub. Util. Comm'n of Ohio*, 72 Ohio St. 3d 1, 5, 647 N.E.2d 136 (1995).

[270] *See* O.R.C. § 4928.66.

[271] *See* O.R.C. §§ 4928.64, 4928.66.

provisions differently with respect to the imposition of a cost cap.

More specifically, Section 4928.64 contains Ohio's "renewable energy portfolio standard," which requires that 12.5% of electricity sold by Ohio's EDUs be generated from renewable energy sources by 2027.[272] That Section (unlike Section 4928.66) expressly includes a cost cap that sets the cost of compliance at 3% of the "reasonably expected cost of otherwise producing or acquiring the requisite electricity."[273] Given the General Assembly's mandate, the Commission promulgated rules and regulations to effectuate that cost cap.[274] One of those regulations, expressly labeled "Cost Cap," provides that an EDU does not need to comply with its "renewable energy resource benchmark" or its "advanced energy resource benchmark" if the EDU's cost of compliance exceeds its cost of generation by 3% or more.[275]

There is no similar statutory mandate with respect to Section 4928.66. That is undisputed. As a creature of statute, the Commission derives its authority from the General Assembly, which has not given the Commission the power to cap the costs of an EDU's compliance with Section 4928.66. When the General Assembly wishes to impose a cost cap, it does so through legislation.[276] Accordingly, the Commission lacks the authority to adopt Staff's Cost Cap Proposal.

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[272] *See* O.R.C. § 4928.64.

[273] O.R.C. § 4928.64(C)(3).

[274] *See* O.A.C. § 4901:1-40 ("Alternative Energy Portfolio Standard").

[275] O.A.C. § 4901:1-40-07(A), (B).

[276] Section 4928.64 of the Ohio Revised Code is only one example of a cost cap enacted by the General Assembly. *See also* O.R.C. § 5164.70 (cap on certain Medicaid payments); *id.* at §5709.212 (cap on certain application fees); *id.* at § 6137.051 (cap on repair costs by county engineer); *id.* at § 2101.16 (cap on advance deposit required by probate court); *id.* at § 4769.08 (cap on certain investigation and adjudication costs).

(b) Ohio law establishes procedures that must be followed before adopting new rules.

Even if the Commission had the statutory authority to adopt Staff's Cost Cap Proposal, it could not do so in this instance because the proposal has not been subjected to Ohio's mandatory rule-making procedures. Section 111.15 of the Ohio Revised Code unequivocally requires certain agencies in Ohio, including the Commission, to file for review and approval each proposed rule with: (i) the secretary of state, (ii) the director of the legislative service commission, and (iii) the Joint Committee on Agency Rule Review ("JCARR").[277] If the proposed rule "has an adverse impact on business," the agency must also file a "business impact analysis" along with the proposed rule.[278] Once properly filed, the proposed rule is then subjected to review under Section 106.021 of the Ohio Revised Code to ensure that it does not: (i) "exceed[] the scope of its statutory authority," (ii) "conflict[] with the legislative intent of the statute under which it was proposed," or (iii) "conflict[] with another proposed or existing rule."[279]

The review process also ensures that the agency proposing the rule complied with other important statutory requirements, such as "prepar[ing] a complete and accurate rule summary and fiscal analysis of the proposed rule [under Section 127.18 of the Ohio Revised Code]," as well as "demonstrat[ing] through the business impact analysis, recommendations from the common sense initiative office, and the memorandum of response that the regulatory intent of the proposed rule . . . justifies its adverse impact on business in this state."[280] If a proposed rule is ultimately approved and adopted, it will be recorded under the title of the agency and assigned

[277] O.R.C. § 111.15 (B)-(C). The Commission falls under the purview of this statute. *See* O.R.C. § 111.15 (A)(2) ("'Agency' means any governmental entity of the state and includes . . . any . . . commission.").
[278] O.R.C. § 111.15 (D).
[279] O.R.C. § 106.021 (A)-(C).
[280] O.R.C. § 106.021 (E)-(F).

a "review date," which must occur within five years of the rule's effective date.[281]

The Commission itself publicly describes this well-established process on its website:

> In order to implement various sections of the Ohio Revised Code, [the Commission] adopts administrative rules. Rules which have been adopted by the [Commission] must then be approved by the Joint Committee on Agency Rule Review (JCARR). After JCARR's approval, the rules are codified in the Ohio Administrative Code . . . .
>
> The process begins with a rules workshop at which stakeholders and the public can attend and informally provide verbal comments to [Staff] about the rule pending review. Then [Staff] prepares proposed rules for written comment and allows interested parties the opportunity to comment on the proposed changes. If comments are received, reply comments are usually also permitted. The [Commission] also evaluates rules to complete a business impact analysis (BIA) to determine if there is an adverse impact on business and provides the draft rules and the BIA to the Common Sense Initiative (CSI). [Commission] rules are issued for comment in a case before the [Commission] and can be found in our DIS system. After all comments and replies have been considered, the Commission will issue an order approving the proposed rules and directing that the rules be filed with JCARR.
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> Proposed changes may be further modified if any party files for rehearing.[282]

Staff's Cost Cap Proposal meets the requirements of a "rule" under Section 111.15 and, accordingly, must be subjected to these mandatory procedures. It was not. Indeed, the Cost Cap Proposal was not filed with JCARR (or with any of the other necessary entities) for review, does not contain the requisite "business impact analysis," and has not passed the statutorily-defined review process. This is undisputed. Ohio's rule-making procedures are not mere technicalities that can be ignored. Rather, they are legal requirements promulgated by the General Assembly to ensure that parties are afforded basic due process rights prior to governmental bodies creating new legal duties or obligations that did not previously exist.[283]

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[281] O.R.C. § 111.15 (B)(1).

[282] *See* http://www.puco.ohio.gov/puco/index.cfm/rules/the-rule-making-process/#sthash.s7k8U9uK.dpbs.

[283] *See, e.g.*, *Ohio Assoc. of Cty. Bds. of Mental Ret. and Dev. Disabilities v. P.E.R.S.*, 585 N.E.2d 597, 601 (Franklin Cty. Ct. Comm. Pl. 1990) ("An administrative rule, having the force and operation of a statute, which

(c) Staff's Cost Cap Proposal is a "rule" subject to Ohio's rule-making procedures.

A "rule" under Section 111.15 is defined as "any rule, regulation, bylaw, or standard having a general and uniform operation adopted by an agency . . . ."[284] Ohio Courts have emphasized that an agency's proposal is appropriately characterized as a "rule" under Ohio's administrative laws when it "***prescribes a legal standard that did not previously exist***."[285] There can be no doubt that Staff's Cost Cap Proposal fits these criteria.

As an initial matter, the Cost Cap Proposal is a legal standard that "did not previously exist." Ohio passed its EE/PDR laws in 2008, which went into effect in 2009. Since that time, EDUs have had to submit for Commission approval three-year portfolio plans that are cost-effective and meet other enumerated requirements. Never, however, has an EDU had to ensure that its proposed EE/PDR plan complied with an overall cost cap, let alone one based on a fixed dollar figure, such as Line 10. Put simply, Staff's Cost Cap Proposal "prescribes a legal standard that did not previously exist" and that expands the Companies' legal requirements for satisfying their EE/PDR obligations. Ohio case law establishes that such a proposal may only be implemented through Ohio's rule-making process.

(continued…)

extinguishes or impairs a vested legal relationship, creates a new obligation, imposes a new duty or attaches a new disability to previous transactions constitutes a retroactive enactment and results in a deprivation of property without due process of law.").

[284] O.R.C. § 111.15 (A)(1).

[285] *Fairfield Cty. Bd. of Comm'rs. v. Nally*, 143 Ohio St. 3d 93, 99, 34 N.E.3d 873 (2015) (emphasis added). While *Nally* was interpreting a similar administrative rule-making procedure contained in Section 119 of the Ohio Revised Code, the Supreme Court's interpretation and definition of "rule" apply with equal force to Section 111.15, given that both statutes define "rule" in nearly identical terms. *Compare* O.R.C. § 119.01(C) ("'Rule' means any rule, regulation, or standard, having a general and uniform operation, adopted, promulgated, and enforced by any agency under the authority of the laws governing such agency, and includes any appendix to a rule.") *with* O.R.C. § 111.15(A)(1) ("'Rule' includes any rule, regulation, bylaw, or standard having a general or uniform operation adopted by an agency under the authority of the laws governing the agency; any appendix to a rule; and any internal management rule . . . .").

In *Fairfield Cty. Bd. of Comm'rs. v. Nally*, for instance, the Ohio Supreme Court held that the Ohio Environmental Protection Agency ("EPA") was required to follow Ohio's rule-making procedures before submitting a total maximum daily load ("TMDL") to the federal Environmental Protection Agency in satisfaction of the federal Water Pollution Control Act.[286] In so doing, the Supreme Court rejected the agency's argument that the TMDL was merely "guideline," not a "rule," holding that Ohio's rule-making procedures "apply broadly to ***any action*** by an agency that functions as a rule."[287] The Supreme Court specifically held that the TMDL was "a 'standard' that ha[d] 'a general and uniform operation'" that did more than simply "aid in the interpretation of existing rules or statutes."[288] The TMDL "prescribe[d] a legal standard that ***did not previously exist***" in Ohio, making it invalid and unenforceable until the EPA complied with formal rule-making procedures.[289]

Similarly, in *Ohio Nurses Ass'n v. State Bd. of Nursing Educ. & Nurse Registration*, the Ohio Supreme Court held that a "position paper" issued by the State Board of Nursing Education and Nurse Registration was a "rule" subject to statutory promulgation requirements because it "greatly expanded the authority of licensed practical nurses ("LPNs") to administer intravenous fluids or 'IVs.'"[290] Because the position paper gave LPNs legal authority ***that did not previously exist*** to perform certain procedures, the Board was required to follow rule-making procedures. In reaching that conclusion, the court held that Ohio's rule-making requirements "are designed to permit a full and fair analysis of the impact and validity of a proposed rule. By failing to rule-file the [] position paper, the board has effectively denied members of the nursing profession, as

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[286] *Fairfield Cty. Bd. of Comm'rs. v. Nally*, 143 Ohio St. 3d 93, 34 N.E.3d 873 (2015).
[287] *Id.* at 102 (emphasis added).
[288] *Id.* at 100.
[289] *Id.* (emphasis added).
[290] *Ohio Nurses Ass'n, Inc. v. State Bd. of Nursing Educ. & Nurse Registration*, 44 Ohio St. 3d 73, 73, 540 N.E.2d 1354 (1989).

well as other interested members of the public, a full and fair analysis of the impact and validity of the new standards of LPN practice . . . ."[291]

As in *Nally* and *Ohio Nurses Ass'n*, Staff's Cost Cap Proposal expands the Companies' legal obligations with respect to EE/PDR and prescribes a standard that "did not previously exist" in Ohio. Accordingly, the Cost Cap Proposal is a "rule" that may only be implemented through Ohio's statutorily mandated rule-making procedures.

Furthermore, Staff's Cost Cap Proposal also has "a general and uniform operation."[292] Indeed, Staff has introduced, recommended, and/or supported an overall cost cap proposal in the EE/PDR proceedings for each of the major EDUs in Ohio.[293] Each proposal is based on the EDUs' respective 2015 FERC Forms 1, page 300, line 10. Moreover, Staff Witness Donlon admitted at the hearing that Staff, in making its proposal, is seeking "consistency amongst all the utilities in the state."[294] Because Staff's Cost Cap Proposal seeks to have a general and uniform operation, it is properly characterized as a "rule" under Ohio law.[295] There is simply no reasonable basis for concluding that the Commission's regulation requiring EE/PDR portfolio plans to be "cost-effective" is properly characterized as a "rule," while at the same time

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[291] *Id.* at 76.

[292] As discussed below, however, Staff's proposed general and uniform operation results in many inequities that make its proposal inherently unfair. *See* Section III.C.3, *infra* at p. 73-85.

[293] *See* Case No. 16-0574-EL-POR, Stipulation and Recommendation at 3-4 (Dec. 9, 2016); *id.* at Opinion and Order at 8-9 (Jan. 18, 2017); *In the Matter of the Application of [DP&L] for Approval of Its [EE] Portfolio Plan*, Case Nos. 16-649-EL-POR et al., Stipulation and Recommendation at 6 (Dec. 13, 2016) ("Case No. 16-649-EL-POR"); *In the Matter of the Application of [Duke] for Approval of The [EE and PDR] Program Portfolio Plans*, Case No. 16-576-EL-POR, Prefiled Direct Testimony of Patrick Donlon at 4 (Feb. 6, 2017) ("Case No. 16-576-EL-POR").

[294] Hearing Tr. Vol. III at 397:24-398:13 (Donlon Cross); Donlon Am. Testimony at 4 (explaining that Staff's proposal uses Line 10 because it "allows for consistency amongst all the utilities in the state").

[295] *See, e.g.*, *B&T Express, Inc. v. Pub. Util. Comm.*, 145 Ohio App. 3d 656, 665, 763 N.E.2d 1241 (2001) (holding that the Commission's adoption of certain federal motor carrier safety regulations constituted "rules" under Section 111.15 because the rules had "'general and uniform operation' for motor carriers operating in Ohio"); *Livisay v. Ohio Bd. of Dietetics*, 73 Ohio App. 3d 288, 290-91, 596 N.E.2d 1129 (1991) (holding that an "interpretation" by the Ohio Board of Dietetics was actually a "rule" requiring rule-making procedures because it was "designed to have general and uniform application to any applicant for grandfather licensure that did not have a degree in nutrition").

concluding that the requirement for those same plans to fall within an overall cost cap is not a "rule."

Thus, Staff's Cost Cap Proposal constitutes a "rule" under Ohio law and is subject to the formal rule-making procedures set forth in Section 111.15. Because the proposal has not been subjected to the rigors of those procedures, it is invalid and unenforceable.

(d) Courts routinely invalidate rules for failing to comply with Ohio's rule-making procedures.

The Ohio Supreme Court has cautioned that Ohio's rule-making requirements "are mandatory protections against the arbitrary imposition of regulatory requirements" and "are fundamental to the administrative process."[296] Moreover, the rule-making process is "designed to permit a full and fair analysis of the impact and validity of a proposed rule."[297] As such, courts in Ohio require "strict adherence" to rule-making procedures, routinely invalidating rules and holding them unenforceable for failing to comply with the statutory procedures. This includes rules and regulations promulgated by the Commission.

For instance, in *B&T Express v. Pub. Util. Comm.*, the Tenth District reversed a Commission order that found a motor carrier had violated the Federal Motor Carrier Safety Regulations ("FMCSRs"), which the Commission adopted as rules, because the Commission failed to comply with the filing requirements set forth in Section 111.15 of the Ohio Revised Code.[298] The Commission's failure to fully comply with Ohio's rule-making procedures made the rules at issue unenforceable and invalid. Notably (and unlike here), the Commission had actually adopted the regulations as rules. That was not enough, however, because the Commission failed to file the proposed rules (the FMCSRs) with JCARR as required under the

[296] *Fairfield Cty. Bd. of Comm'rs. v. Nally*, 143 Ohio St. 3d 93, 102, 34 N.E.3d 873 (2015).
[297] *Condee v. Lindley*, 12 Ohio St. 3d 90, 93, 465 N.E.2d 450 (1984).
[298] *B&T Express, Inc. v. Pub. Util. Comm'n*, 145 Ohio App. 3d 656, 763 N.E.2d 1241(2001).

statute.[299] As the Court explained, Ohio courts require "***strict adherence***" to Section 111.15.[300] The court went further, explaining that "[o]ne of the primary purposes behind the filing requirements set forth in R.C. 111.15(B)(1) and (D) is to provide JCARR with an opportunity to review the substantive portions of new rules to determine whether the rules exceed the scope of the adopting agency's authority, conflict with other rules, or conflict with the legislative intent of the statute pursuant to which the rules are being adopted."[301] Because the Commission "failed to comply with these filing requirements, the FMCSRs that it adopted [we]re invalid."[302]

The *B&T Express* case does not stand alone. Court decisions invalidating rules, regulations, and/or other analogous standards for failing to follow established rule-making procedures are ubiquitous in Ohio.[303] Agencies cannot "sidestep" these requirements, which

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[299] *Id.* at 665-67.

[300] *Id.* at 667 (emphasis added).

[301] *Id.* at 665.

[302] *Id.* at 667; *see also, e.g.*, *State ex rel. Ryan v. State Teachers Ret. Sys.*, 71 Ohio St. 3d 362, 366, 643 N.E.2d 1122 (1994) (requiring strict adherence to Section 111.15 and holding that "the disputed resolutions were invalid rules and regulations because they were not promulgated in accordance with [Section] 111.15"); *State ex rel. Bd. of Edn. of N. Canton Exempted Village School Dist. v. Holt*, 174 Ohio St. 55, 57, 186 N.E.2d 862 (1962) (holding that rules that do not fully comply with Ohio's rule-making procedures are invalid, specifically noting that Section 111.15 "was enacted by the General Assembly to protect parties from bureaucratic red tape created by regulations and rules of administrative agencies").

[303] *See, e.g.*, *State ex rel. United Auto Aerospace & Agric. Implement Workers of Am. v. Ohio Bur. of Workers' Comp.*, 95 Ohio St. 3d 408, 411, 768 N.E.2d 1129 (2002) (affirming writ of mandamus invalidating the Ohio Bureau of Workers' Compensation decision to provide a one-time-only premium reduction credit to employers who pay into the state insurance fund because the Bureau failed to promulgate this rule pursuant to rule-making procedures); *Condee v. Lindley*, 12 Ohio St. 3d 90, 93, 465 N.E.2d 450 (1984) (holding Tax Commissioner could not avoid the rulemaking requirements, which are "designed to permit a full and fair analysis of the impact and validity of a proposed rule" before it is imposed upon the regulated community); *McLean Trucking Co. v. Lindley*, 70 Ohio St. 2d 106, 116, 435 N.E.2d 414 (1982) (holding the Tax Commissioner's adoption of a "special instruction" of uniform application without compliance with rule-making requirements rendered the instruction invalid); *Delbianco v. The Ohio State Racing Comm'n*, No. 01AP-395, 2001 WL 1222454, at *5 (Ohio Ct. App. Oct. 16, 2001) (affirming order finding a racehorse trainer was not in violation of a "rule" regarding total carbon dioxide levels in horses because such "per se 'rule'" had not been properly promulgated); *Jackson Cty. Envtl. Comm. v. Schregardus*, 95 Ohio App. 3d 527, 530, 642 N.E.2d 1142 (1994) (holding Ohio EPA could not regulate through "guidelines" that are in reality rules requiring formal promulgation pursuant to rule-making requirements.); *Ohio State Chiropractic Ass'n v. Ohio Bureau of Workers' Comp.*, No. 92AP-874, 1993 WL 14190, at *5 (Ohio Ct. App. Jan. 21, 1993) (affirming order finding a chapter in the Ohio Bureau of Workers' Compensation's Provider and Reimbursement Manual to be invalid because it "contain[ed] rules as defined by R.C. 119.01(C)" and "was not adopted in a manner mandated by R.C. Chapter 119"). While these cases specifically deal with Section 119 of the Ohio Revised Code, the rationale used by courts to invalidate informal regulatory standards applies with equal force

Ohio courts recognize are an essential part of ensuring due process and fairness in the administrative process. Because Staff's Cost Cap Proposal has failed to follow those requirements, it is invalid. Accordingly, the Commission should adopt the Stipulation without modification.

(e) Other Commission "costs caps" complied with Ohio's rule-making procedures.

As the Ohio Supreme Court held in invalidating a rule for non-compliance with Section 111.15, "ignorance of the law is no excuse."[304] Staff, however, is not ignorant of the rule-making process for Commission rules and regulations. To the contrary, Staff is intimately familiar with the process, yet decided to forgo the process with respect to its Cost Cap Proposal.

Staff has proposed formal changes to the Commission's Rules on EE/PDR; yet, it has never formally proposed the implementation of its Cost Cap Proposal or of a similar cost cap on EE/PDR portfolio plans. Indeed, Staff proposed several changes and revisions during the Commission's most-recent five-year review of its EE/PDR rules (4901:1-39).[305] Staff's proposed changes (which, again, did not include its Cost Cap Proposal) came after consideration of stakeholder comments provided during multiple workshops held by the Commission as part of its rule-review process.[306] The Commission expressly recognized the importance of the rule-review process with respect to new rule proposals, emphasizing that "[a]n agency must

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to Section 111.15. Indeed, as previously discussed, the two provisions use the nearly-identical definition of "rule," and both provisions stem from due process considerations.

[304] *State ex rel. Bd. of Edn. of N. Canton Exempted Village School Dist. v. Holt*, 174 Ohio St. 55, 57, 186 N.E.2d 862 (1962).

[305] *In the Matter of the Commission's Review of its Rules for [EE] Programs Contained in Chapter 4901:1-39 of the Ohio Administrative Code*, Case Nos. 13-651-EL-ORD et al, Entry at 3 and Attachment A (Jan. 26, 2014) ("Case No. 13-651-EL-ORD").

[306] *Id.* at 2-3.

demonstrate that it has included stakeholders in the development of the rules, that it has evaluated the impact of the rules on businesses, and that the purpose of the rules is important enough to justify the impact."[307] Staff followed the process for each rule proposal made in that docket and should do the same here.

Moreover, Staff is aware that cost caps are appropriately promulgated as Commission regulations. As discussed above, Section 4928.64 of the Ohio Revised Code contains a cost cap with respect to Ohio's "renewable energy portfolio standard."[308] The Commission promulgated rules and regulations to effectuate that law,[309] including rules implementing the 3% "Cost Cap."[310] In other words, the Commission's cost cap for renewable energy standards went through the formal rule-making process. The same should be true for any cost cap that applies to the Commission's EE/PDR standards.

Because it is undisputed that Staff's Cost Cap Proposal failed to follow the mandatory rule-making process, its adoption would violate Ohio law.

2. Staff's cost cap proposal is unnecessary.

Not only is Staff's Cost Cap Proposal unenforceable, it is also unnecessary in this proceeding for at least three reasons. ***First***, the Revised Plans include a proposed three-year budget, which, once approved by the Commission, will operate as a "cap" on all costs related to the Plans. As such, the Revised Plans already include a mechanism that controls the costs of the Plans. ***Second***, the Companies' shared savings opportunities are already subject to a Commission-approved cap, currently set at $10 million (after tax) across the three Companies. Staff's Cost Cap Proposal would thus create an unfair double-cap on shared savings that would

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[307] *Id.*
[308] *See* O.R.C. § 4928.64(C)(3).
[309] *See* O.A.C. § 4901:1-40 ("Alternative Energy Portfolio Standard").
[310] O.A.C. § 4901:1-40-07(A), (B); *see also* O.R.C. § 4928.64(C)(3).

almost certainly eliminate the Companies' shared savings incentive to exceed its EE goals and render the shared savings cap approved by the Commission in the Companies' ESP IV case meaningless. ***Third***, the Companies' customers are currently enjoying a two-year bill mitigation mechanism designed to protect them against rate volatility and price fluctuations.

(a) Once approved by the Commission, the Companies' portfolio plan budgets operate as cost caps.

As previously addressed, the proposed three-year budgets for the Revised Plans, which are fully supported by the Signatory Parties in the Stipulation, are just and reasonable. Those budgets meet the Commission's cost-effective requirements, and no party has challenged or raised any issue with any of the individual program budgets.[311] Exhibit A to the Stipulation summarizes those budgets, which are described in detail in the Revised Plans.[312] As Companies' Witness Miller explained, once approved and adopted by the Commission, "the approved budget[s] will serve as a 'cap' that will control the costs of the Revised Plans, including all program costs and shared savings."[313] Indeed, the Companies will be precluded "from recovering ***any costs*** above the approved budget[s] without first seeking further Commission approval."[314] Staff Witness Donlon acknowledged and conceded these points at the hearing.[315] Accordingly, Mr. Donlon is simply wrong in asserting that the Revised Plans "lack[] a provision controlling the costs of programs and shared savings."[316] Given that the Commission-approved budgets for the Revised Plans will "cap" the overall costs of the Plans, there is no need for

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[311] *See* Section III.A.2, *supra* at p. 18-23.

[312] Stipulation, Ex. A; *id.* Ex. B at Section 3.7 ("Program Budgets and Data Tables"); *id.* at Appendices C-4, PUCO 3 ("Summary of Portfolio Costs").

[313] Miller Rebuttal Testimony at 4; Hearing Tr. Vol. V at 573:2-12 (Miller Rebuttal Cross).

[314] Miller Rebuttal Testimony at 4 (emphasis added); Hearing Tr. Vol. V at 577:3-12 (Miller Rebuttal Cross).

[315] Hearing Tr. Vol. II at 365:7-20 (Donlon Cross).

[316] Donlon Am. Testimony at 7.

Staff's Cost Cap Proposal.

(b) The Companies' shared savings is already subject to a Commission approved cap.

In addition to the portfolio plan budgets, the Revised Plans are also subject to a Commission-approved cap on any shared savings. Specifically, the Companies' annual cumulative shared savings opportunities are currently capped at $10 million, after-tax, across all three Companies.[317] The Commission approved an increase of that cap to $25 million, after-tax; however, the increase was stayed until the Companies are no longer receiving revenues under Rider DMR.[318] Notably, the Commission approved the cap increase pursuant to a stipulation filed in the Companies' ESP IV case, which, as Staff Witness Donlon admitted, Staff joined and executed as a signatory party.[319]

Capping shared savings yet again under Staff's Cost Cap Proposal would result in a "double cap."[320] Even Mr. Donlon recognized this fact, agreeing that Staff's proposal would mean that the Companies' shared savings "would be subject to both the cap in the ESP [IV] case as well as [S]taff's cap."[321] This double cap would effectively breach the commitment Staff made in the Companies' ESP IV case to an increased shared savings cap and would carry significant implications for the Companies and their customers. As explained by Companies' Witness Miller, imposing a "double cap would not only make reaching the $10 million shared savings level currently permitted by the Commission nearly impossible, but it would also render

[317] Case No. 12-2190-EL-POR, Opinion and Order at 16 (Mar. 20, 2013).

[318] Case No. 14-1297-EL-SSO, Opinion and Order at 95 (Mar. 31, 2016); *id.* at Fifth Entry on Rehearing at 147 (Oct. 12, 2016).

[319] Hearing Tr. Vol. II at 370:4-24 (Donlon Cross); Case No. 14-1297-EL-SSO, Third Supplemental Stipulation and Recommendation at 11-12, 22 (Dec. 1, 2015).

[320] Miller Rebuttal Testimony at 4.

[321] Hearing Tr. Vol. II at 371:7-24 (Donlon Cross).

the Commission's approved increase of the shared savings cap to $25 million meaningless."[322] As a result, the Companies would no longer be incented through the shared savings mechanism to strive to exceed their statutorily mandated EE goals. This result would frustrate the very purpose behind shared savings, which the Commission has supported in its prior decisions.

(c) The Companies' Rider DSE2 is already subject to a two-year bill mitigation mechanism.

Staff's Cost Cap Proposal is unnecessary for a third reason—namely, because the Companies are already subject to a bill mitigation mechanism that limits average customer bills and establishes a "ceiling" on the total bill customers will pay over the next two-year period.[323] Staff's concern with the "escalating" costs of Rider DSE2 are thus misplaced.[324]

Indeed, Staff asserts that its Cost Cap Proposal is justified because Rider DSE2 "has become one of the highest riders on residential customer bills."[325] At the hearing, Staff Witness Donlon clarified that out of sixteen riders, Rider DSE2 was the fourth highest for CEI and TE and the fifth highest for OE.[326] Mr. Donlon, however, admitted that he expected Rider DSE2 revenues to ***decrease*** for the Companies from 2014 to 2015, and then again from 2015 to 2016.[327] As such, Staff's concern with the increased cost of Rider DSE2 is misplaced from the start. More importantly, however, the Companies' bill mitigation mechanism (which includes Rider DSE2) will ensure that, between June 2016 and May 2018, average customer bills do not increase beyond averages set between June 2015 and May 2016.[328] As the Commission held in

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[322] Miller Rebuttal Testimony at 4.
[323] Case No. 14-1297-EL-SSO, Opinion and Order at 86 (Mar. 31, 2016); Miller Rebuttal Testimony at 5.
[324] Donlon Am. Testimony at 5.
[325] *Id.*
[326] Hearing Tr. Vol. II at 328:6-23 (Donlon Cross).
[327] *Id.* at 328:6-15 (Donlon Cross).
[328] Case No. 14-1297-EL-SSO, Opinion and Order at 86 (Mar. 31, 2016); Miller Rebuttal Testimony at 5; Hearing Tr. Vol. V at 577:25-578:9 (Miller Rebuttal Cross).

adopting this mechanism, the mechanism will "protect customers against rate volatility and price fluctuations," as well as "provide [] rate stability for [the Companies'] customers."[329]

Put simply, "the average customer bill will see ***no total bill increase*** for two years."[330] This means that Staff's concerns with rising Rider DSE2 costs for the Companies' customers are overstated, as is its drastic proposal of an overall cost cap on the Companies' Revised Plans. For these reasons, Staff's Cost Cap Proposal must be rejected.

3. Staff's Cost Cap Proposal is unfair.

In addition to being unenforceable and unnecessary, the Commission should also reject Staff's Cost Cap Proposal because it is inherently unfair. This is so for at least five reasons, any of which should lead the Commission to reject Staff's proposal. ***First***, despite Staff's desire to create "consistency amongst all the utilities in the state," its proposal does not place Ohio's EDUs on a level playing field, as Staff proposes a 3% cap for the Companies while recommending higher cost caps for other utilities in the State. ***Second***, an analysis of the first-year EE acquisition costs across Ohio's EDUs demonstrates that Staff's Cost Cap Proposal would prejudice the Companies by permitting them to spend significantly less money for each kWh of energy saved compared to their in-state counterparts. ***Third***, Staff's Cost Cap Proposal ignores the inherent differences among EDUs' "switch rates" that makes use of Line 10 inequitable from the outset. ***Fourth***, the Companies' average revenue per kWh delivered is approximately 78% of AEP, which, again, unfairly impacts Line 10 and the cost cap calculation. ***Fifth***, Staff's Cost Cap Proposal is based on a review of a limited set of historical cost data, which ignores actual pricing data and unfairly restricts the Companies' ability to meet their

[329] Case No. 14-1297-EL-SSO, Opinion and Order at 86 (Mar. 31, 2016).
[330] *Id.* (emphasis added).

statutory benchmarks and earn shared savings.

For each of these reasons, Staff's Cost Cap Proposal is unfair and should be rejected.

(a) Staff has proposed a 3% cap for the Companies but has agreed to higher cost caps for the other EDUs in the state.

Staff's Cost Cap Proposal is unfair from the start. At the hearing, Staff Witness Donlon confirmed that Staff wants "consistency amongst all the utilities in the state."[331] The record, however, shows that Staff is not following its own mandate. Staff's Cost Cap Proposal sets the Companies' overall cost cap at ***3%*** of the amount reported on the Companies' respective Line 10s. Yet, the Commission recently approved a Staff-endorsed settlement in which AEP's overall cost cap was set by taking AEP's Line 10 and multiplying that figure by ***4%***.[332] Similarly, Staff has executed a settlement with DP&L, which also allows DP&L's overall cost cap to be based on ***4%*** of the revenues reported on its Line 10.[333] In addition, Staff recently proposed a ***3.5%*** overall cost cap for Duke, which, like the caps for AEP and DP&L, is also higher than what it is proposing for the Companies in this proceeding.[334]

While the percentage differences among Staff's proposals for the EDUs in this state may appear to be small, the real-life implications of those differences are quite large. Indeed, as demonstrated by Companies' Witness Miller, "if the Companies were permitted a cost cap of 4% (instead of 3%) of Line 10, the difference [would be] ***approximately $26.7 million more***."[335] In other words, all else being equal (which, as discussed below, is not the case), treating the

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[331] Donlon Am. Testimony at 4; Hearing Tr. Vol. III at 397:24-398: 9 (Donlon Cross).

[332] Hearing Tr. Vol. III at 400:8-20 (Donlon Cross) ("[S]taff did agree to [] 4 percent.") *See also* Case No. 16-0574-EL-POR, Stipulation and Recommendation at 3-4 (Dec. 9, 2016); *id.* at Opinion and Order at 8-9 (Jan. 18, 2017).

[333] Hearing Tr. Vol. III at 400:21-25 (Donlon Cross) ("[S]taff agreed to [] 4 percent."); *See also* Case No. 16-649-EL-POR, Stipulation and Recommendation at 6 (Dec. 13, 2016).

[334] *See* Case No. 16-576-EL-POR, Prefiled Direct Testimony of Patrick Donlon at 4 (Feb. 6, 2017).

[335] Miller Rebuttal Testimony at 14 (emphasis added).

Companies the same as AEP would require at least a 33% increase in Staff's Cost Cap Proposal. This plainly highlights the inherent unfairness of Staff's proposal from the outset.

(b) A comparison of first-year energy efficiency acquisition costs for the Companies, AEP, and DPL demonstrates that Staff's Cost Cap Proposal would unfairly prejudice the Companies.

Staff's Cost Cap Proposal also results in inequities because it fails to consider the EDUs' respective EE savings targets for 2017 or the resulting acquisition costs. Staff Witness Donlon contended at the hearing that Staff looked at acquisition costs as part of its development process for its Cost Cap Proposal but ultimately decided not to rely on that metric.[336] However, a straightforward analysis of the first-year EE acquisition costs across Ohio's EDUs would have demonstrated to Staff that its Cost Cap Proposal prejudiced the Companies by permitting them to spend significantly less money for each kWh of energy saved compared to the other Ohio utilities.

First-year acquisition costs are calculated by taking the proposed cost cap amount (or "Budget Cap," as referred to in Table 2) and dividing that figure by an EDU's 2017 benchmark (or "2017 Statutory Incremental Target," as referred to in Table 2).[337] The calculation yields the amount that an EDU may spend per each kWh of energy saved under its EE/PDR program portfolio plan.[338] Companies' Witness Miller explained in his Rebuttal Testimony how Staff's failure to consider acquisition costs "produces significantly disproportionate results" for the Companies "when compared to other utilities in the State."[339] Mr. Miller's Table 2, shown below, highlights those disproportionate results:[340]

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[336] Hearing Tr. Vol. III at 420:23-421:2, 426:13-24 (Donlon Cross).
[337] Miller Rebuttal Testimony at 16-17; Hearing Tr. Vol. III at 432:19-25 (Donlon Cross).
[338] *Id.*; Hearing Tr. Vol. III at 432:19-424:9 (Donlon Cross).
[339] *Id.*
[340] *Id.* at 17 ("Table 2 – Acquisition Cost Comparison").

TABLE 2 – ACQUISITION COST COMPARISON

Company		Cap %	Budget Cap (1)	2017 Statutory Incremental Target (2)	Acqusition Cost Cap
			(A)	(B)	= (A) / (B) / 1,000,000
		%	$	GWh	$/kWh
AEP		4%	110,319,902	431.7	0.256
DP&L		4%	33,022,141	140.8	0.235
FE Combined		3%	80,099,551	535.2	0.150
	CE	3%	28,505,164	188.5	0.151
	OE	3%	38,127,828	241.2	0.158
	TE	3%	13,466,559	105.6	0.128

Notes

1 2015 FERC Form 1, page 300 line 10 multiplied by Cap %.

2 AEP's Target comes from Table 1 of AEP's 2017-2019 EE/PDR Plan Filing, Case No. 16-0574-EL-POR. DP&L's Target is calculated by taking 1% of baselines sales as reported on page 6 of Exhibit 2 in DP&L's Plan Filing, Case No. 16-0649-EL-POR. .For the FE Companies, target is calculated as 1% of baseline sales from Mullins Exhibit DJM-A2.

As demonstrated in Table 2, using Line 10 and Staff's proposed multiplier for the Companies, AEP, and DP&L results in the following acquisition costs: $0.256 per kWh saved for AEP; $0.235 per kWh saved for DP&L; and only $0.15 per kWh saved for the Companies on a combined basis.[341] When asked if he agreed with these calculations with respect to AEP and the Companies, Staff Witness Donlon answered in the affirmative.[342] In other words, Staff is recommending to the Commission that it permit the Companies to spend no more than 15 cents per kWh saved while at the same time permit AEP to spend over 25 cents per kWh saved.[343] At the extreme, TE has to achieve its 2017 statutory targets at ***half the acquisition cost*** that AEP has available.[344] To stress the incongruity even further, the Companies' acquisition costs, even assuming a 4% cap, would sill result in less than 20 cents per kWh saved—substantially less than AEP's and DP&L's levels.[345]

Staff's proposal makes no sense, particularly in light of the fact the Companies have the

[341] *Id.* at 17.

[342] Hearing Tr. Vol. III at 422:18-424:16 (the Companies' acquisition cost), 426:25-429:10 (AEP's acquisition costs) (Donlon Cross).

[343] Hearing Tr. Vol. III at 430:17-25 (Donlon Cross).

[344] Miller Rebuttal Testimony at 17 ("Table 2 – Acquisition Cost Comparison").

[345] Hearing Tr. Vol. III at 431:1-432:1 (Donlon Cross).

highest MWh sales in Ohio, meaning their savings obligations are the highest in the State.[346] Put another way, "the Companies have a target that is 100 GWh ***greater*** than AEP, even though Staff's proposed cost cap for the Companies is over $30 million ***less*** than that of AEP."[347] To provide the Companies with the same opportunity AEP has for complying with EE/PDR benchmarks, "the Companies' annual cost cap would have to be $135 million," which is nearly ***69% higher*** than what Staff is currently proposing.[348] There is no reasoned explanation for this inequity, nor did Staff offer one at the hearing.

(c) Staff's Cost Cap Proposal fails to consider the impact of switch rates on FERC Line 10 and the cost cap.

In Ohio, energy customers are able to "shop" for energy generation from a group of competitive suppliers certified by the Commission.[349] In other words, if multiple suppliers offer electric generation services in a particular customer's area, that customer has the opportunity to choose the specific company that supplies the electric generation for his or her use. To be clear, that customer cannot choose which EDU ***distributes*** that electricity; only which company ***generates*** it prior to distribution.[350] If an EDU's customer "shops" for an electric generation supplier other than the EDU, then generation revenues rightfully belong to the generation supplier, not the EDU.[351] As a result, EDUs cannot and do not report generation revenue for shopping customers on their respective Line 10s.[352] Staff's Cost Cap Proposal, however, fails to recognize this important fact, which results in an unfair application of Line 10 across Ohio's

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[346] FERC Form 1, Page 301, Line 10 reflects the annual "MEGAWATT HOURS SOLD" by an EDU to all classes of consumers. The figure across the three Companies from 2015 is 53,248,148 MWh, which is significantly higher than the figure for the AEP (43,415,882 MWh). *See* FERC Forms 1, Page 301, Line 10 for the Companies and AEP, available at: *https://www.ferc.gov/docs-filing/forms/form-1/data.asp*.

[347] Miller Rebuttal Testimony at 17 (bold emphasis added).

[348] *Id.* at 17.

[349] Hearing Tr. Vol. III at 402:17-403:10 (Donlon Cross); *see also* http://www.energychoice.ohio.gov/.

[350] *Id.*

[351] *Id.* at 405:7-406:6 (Donlon Cross).

[352] *Id.* at 405:20-406:6 (Donlon Cross).

EDUs.

Indeed, as Staff Witness Donlon conceded at the hearing, the number of customers that "shop" for a supplier of generation (known as an EDU's "switch rate") varies from EDU to EDU in Ohio.[353] The difference in switch rates greatly impacts an EDU's cost cap under Staff's proposed methodology. For instance, if 80% of a particular EDU's customers shopped for generation (meaning an 80% "switch rate"), then Line 10 for that EDU would only include generation revenues for 20% of its customers.[354] On the other hand, if only 20% of another EDU's customers shopped for generation, then Line 10 for that EDU would include generation revenues for 80% of its customers.[355] In other words, all else being equal, Line 10 would be higher for the second utility, resulting in a higher cost cap under Staff's proposal.[356] While illustrative of the problem, hypothetical scenarios are not necessary to demonstrate the inherent unfairness in Staff's methodology. A simple comparison of publicly-available data for switch rates across Ohio's EDUs highlights the prejudice to the Companies.

Staff Witness Donlon's department publishes quarterly switch rate reports for Ohio's EDUs, which, at the time of the hearing, were available through year-end 2015.[357] Those reports demonstrate clear discrepancies across Ohio's EDU's with respect to switch rates, which, again, ultimately affect Line 10 figures and thus impact Staff's cost cap calculations. By way of example, CEI had a switch rate of 84.07% at the end of 2015, meaning 84.07% of the MWh sold

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[353] *Id.* at 406:7-16 (Donlon Cross).

[354] *Id.* at 406:17-24 (Donlon Cross).

[355] *Id.* at 406:25-407:6 (Donlon Cross).

[356] *Id.* at 407:7-20 (Donlon Cross).

[357] Companies' Exhibit 13, PUCO Energy & Environment, Summary of Switch Rates from EDUs to CRES Providers, 2015 ("Companies' Exhibit 13"); Hearing Tr. Vol. III at 409:21-411:7 (Donlon Cross) ("We prepare this document and post it on the website.").

to CEI's customers were "shopped" and provided by electric choice suppliers.[358] Those generation revenues are not reported on CEI's Line 10. AEP, however, had a switch rate during that same time period of only 70.18%, meaning that approximately 14% less of AEP's total MWh sold were "shopped" and provided by electric choice suppliers when compared to CEI.[359] All else being equal, Staff's proposed methodology and use of Line 10 would result in a significantly higher cost cap for AEP as compared to CEI. The below tables from Staff's reports illustrate this inequity:[360]

Provider Name	EDU Service Area	Quarter Ending	Year	Residential Sales	Commercial Sales	Industrial Sales	Total Sales*
Cleveland Electric Illuminating Company	CEI	31-Dec	2015	117,874	49,539	57,858	225,271
CRES Providers	CEI	31-Dec	2015	291,556	453,858	443,553	1,188,967
Total Sales	CEI	31-Dec	2015	409,430	503,397	501,411	1,414,238
EDU Share	CEI	31-Dec	2015	28.79%	9.84%	11.54%	15.93%
Electric Choice Sales Switch Rates	**CEI**	**31-Dec**	**2015**	**71.21%**	**90.16%**	**88.46%**	**84.07%**

Provider Name	EDU Service Area	Quarter Ending	Year	Residential Sales	Commercial Sales	Industrial Sales	Total Sales*
**AEP - Ohio	AEP	31-Dec	2015	778,713	175,900	111,209	1,068,693
CRES Providers	AEP	31-Dec	2015	381,534	1,002,424	1,123,378	2,515,631
Total Sales	AEP	31-Dec	2015	1,160,247	1,178,324	1,234,587	3,584,324
EDU Share	AEP	31-Dec	2015	67.12%	14.93%	9.01%	29.82%
Electric Choice Sales Switch Rates	**AEP**	**31-Dec**	**2015**	**32.88%**	**85.07%**	**90.99%**	**70.18%**

While CEI provides a good example of the inequality, the switch rates for OE and TE during that same time frame were 78.98% and 76.81%, respectively—also significantly higher than AEP's switch rates.[361] In fact, as Mr. Donlon admitted at the hearing, every single EDU in Ohio—AEP, DP&L, and Duke—had a lower switch rate than each of the three Companies during that time frame.[362]

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[358] Companies' Exhibit 13 at 7; Hearing Tr. Vol. III at 411:8-20 (Donlon Cross).

[359] *Id.*; Hearing Tr. Vol. III at 413:2-9 (Donlon Cross).

[360] Companies' Exhibit 13 at 7.

[361] *Id.* at 7-8; Hearing Tr. Vol. III at 413:10-414:5 (Donlon Cross).

[362] Hearing Tr. Vol. III at 414:2-5 (Donlon Cross); *see also* Companies' Exhibit 13 at 7-8. Staff recently released switch rate data through the end of the third quarter in 2016. The 2016 data is just as telling. TE, for instance, had a switch rate as of September 2016 of 89.02%. During the same time frame, the switch rates for CEI and OE were 87.27% and 82.05%, respectively. Those rates are much higher than those for the other EDUs, such as

Therefore, while the ***use*** of Line 10 in Staff's methodology for its Cost Cap Proposal may be consistent among Ohio's EDUs, the ***results*** from using Line 10 definitely are not.[363] Relying on Line 10 fails to recognize inherent differences among Ohio's EDUs that are caused by several important factors, the most notable one being customer shopping levels.[364] As such, Staff's proposed methodology is flawed, and its adoption would create inequitable and unfair results among Ohio's EDUs.

(d) Staff's Cost Cap Proposal fails to consider the impact of disparate revenue per kWh on FERC Line 10 and the cost cap.

Companies' Witness Miller described a similar inequity that is revealed when comparing the Companies' average revenue per kWh delivered with that of AEP's.[365] Mr. Miller, in rebuttal, "compare[d] the Companies with AEP by using the amount reported on each utility's Line 10, and dividing it by the total number of kWh delivered to the utility's customers, as reported on FERC Form 1, Page 301, Line 10."[366] This calculation, shown in Table 1 below, "illustrates the combined impact of all the variables that affect a utility's Line 10":[367]

(continued…)

AEP, whose switch rate was only 71.53% during the same time frame. *See* PUCO Energy & Environment, Summary of Switch Rates from EDUs to CRES Providers, 2016, available at: *https://www.puco.ohio.gov/puco/index.cfm/industry-information/statistical-reports/electric-customer-choice-switch-rates-and-aggregation-activity/electric-switch-rates-by-sales/sales-3q2016/*.

[363] Miller Rebuttal Testimony at 15.
[364] *Id*.
[365] *Id.* at 15-16.
[366] *Id.* at 15.
[367] *Id.* at 15-16.

TABLE 1 – FERC FORM 1 REVENUE AND SALES COMPARISON

Company		2015 FERC Form 1 Revenue	2015 FERC Form 1 Sales	2015 FERC Form 1 Revenues / Sales
Notes		*1*	*2*	
		(A)	*(B)*	*(C) = (A) / (B)*
		$	kWh	$/kWh
AEP		2,757,997,562	43,415,882,000	0.064
FE Combined		2,669,985,047	53,248,148,000	0.050
	CE	950,172,128	18,501,986,000	0.051
	OE	1,270,927,604	24,291,651,000	0.052
	TE	448,885,315	10,454,511,000	0.043

Notes
1 2015 FERC Form 1, page 300 line 10
2 2015 FERC Form 1, page 301 line 10

As Mr. Miller explained, Table 1 shows that the Companies on a combined basis "have an average revenue per kWh that is approximately 78% of AEP's average revenue per kWh."[368] Of course, as explained above, the higher the revenue, the higher the value on Line 10, and, ultimately, the higher the cost cap under Staff's proposal. Thus, Staff's proposed use of Line 10 fails to place Ohio EDUs on an equal plane "so as to provide each with the same opportunity to comply with their respective statutory mandates."[369]

(e) Staff's Cost Cap Proposal unfairly restricts the Companies' ability to meet their statutory benchmarks and earn shared savings.

In Staff's estimation, implementing its Cost Cap Proposal will still afford the Companies the ability to "meet or exceed their statutory benchmark[s]."[370] But comparing the amount that the Companies would be permitted to spend under the Cost Cap Proposal to the amount the Companies have budgeted in their Revised Plans demonstrates that is plainly not the case.

Under Staff's Cost Cap Proposal, the Companies would be permitted to spend

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[368] *Id.* at 16.
[369] *Id.* at 16.
[370] Donlon Am. Testimony at 5, 3; Hearing Tr. Vol. II at 321:17-322:7 (Donlon Cross).

approximately $80.1 million annually on their EE/PDR portfolio plans.[371] That amount, however, does not consider any shared savings the Companies may earn, which would also be subjected to the cap on a pre-tax basis. Accordingly, if the Companies are to have the opportunity to earn the maximum amount of shared savings approved by the Commission, the Companies would have to fit an additional $15.6 million within the cost cap (which equates to the after-tax cap of $10 million).[372] In addition to the program costs in the budgets and any shared savings, the Companies are obligated to pay $6 million per year to OPAE for operation of the Companies' Community Connections Program.[373] That amount would also fall under Staff's Cost Cap Proposal.[374] Finally, Companies' Witness Miller explained that there are also "other costs that would be recovered through Rider DSE2 and be subject to Staff's proposed cap that [are outside the program budgets and] cannot be estimated with certainty, such as rebates authorized by individual mercantile applications approved by the Commission in separate dockets."[375] Thus, after considering all costs that would fall under Staff's Cost Cap Proposal, the Companies would have less than $60 million per year to spend on EE/PDR programs.

Staff Witness Donlon testified at the hearing that Staff recommended its Cost Cap Proposal based on its review of the Companies' annual status reports from 2012 through 2014.[376] Mr. Donlon's simplistic assumption that 2012-2014 status reports will accurately predict future costs is unsupported. Indeed, "[s]ince 2012, costs have increased not only through inflation, but also because standards and efficient conditions have changed, which impacts savings and costs

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[371] *Id.*

[372] Miller Rebuttal Testimony at 8.

[373] *Id.* at 7-8. Case No. 14-1297-EL-SSO, Opinion and Order at 75 (Mar. 31, 2016); Hearing Tr. Vol. V at 578:18-24 (Miller Rebuttal Cross).

[374] Hearing Tr. Vol. II at 323:13-23 (Donlon Cross).

[375] Miller Rebuttal Testimony at 8; Hearing Tr. Vol. V at 578:25-579:11 (Miller Rebuttal Cross).

[376] Hearing Tr. Vol. II at 338:19-339:8 (Donlon Cross); Donlon Am. Testimony at 5.

for certain measures."[377] As Companies' Witness Miller explained, "[i]n some cases, the amount of savings have decreased, requiring more participation simply to achieve the same levels of savings as in the past. In other cases, technologies have evolved and have become more expensive, requiring an increase in the incentive levels offered to customers."[378]

Mr. Miller provided a good example of how increased costs of compliance have a direct impact on an EDU's ability to meet its statutory targets. Between 2012 and 2014, which is the period Staff relies on for its proposal, the Companies were incentivizing residential CFL lighting at approximately $1.00 per light bulb through its EE/PDR portfolio plans.[379] The Revised Plans, however, phase out standard CFL lighting in favor of more efficient LED lighting, which requires higher customer incentives to offset the higher costs of LED technology.[380] Average lighting incentives for LEDs under the Revised Plans are projected at $3.00 per bulb—an increase of 200% when compared to CFLs.[381] While LED lighting is more efficient than CFL lighting, LED savings is approximately 40% less in the Revised Plans due to the change in the baselines, though the Companies are paying three times the incentive on a per-unit basis under the Revised Plans.[382] Moreover, the Companies achieved nearly 50% of their actual savings between 2012 and 2014 through lighting measures, whereas the Revised Plans project that only about 30% of the total savings will come from lighting (including LED).[383] As Mr. Miller explained, "[t]his reduction requires approximately 20% of savings once achieved through lighting measures to be captured from other measures, many of which now are more expensive

[377] Miller Rebuttal Testimony at 6.
[378] *Id.*; Hearing Tr. Vol. V at 629:23-630:6 (Miller Rebuttal Re-Direct).
[379] Miller Rebuttal Testimony at 6.
[380] *Id.*
[381] *Id.*
[382] Hearing Tr. Vol. V at 630:23-631:21(Miller Rebuttal Re-Direct).
[383] Miller Rebuttal Testimony at 6.

on a cost per kWh basis."[384] Mr. Miller's lighting example is just one example of "an evolution commonly occurring throughout the industry as 'low hanging fruit' is realized."[385]

The Companies, on the other hand, designed and developed the Revised Plans with the assistance of the Collaborative Group and the Signatory Parties "using a bottom-up approach" based on "the most recent ***actual pricing*** for programs and escalated them for inflation, if necessary."[386] The Companies also "relied upon pricing information and experience gained from the prior and current plans of the Companies and their sister utilities in other states."[387] That careful and methodical approach in designing the Revised Plans resulted "in an average annual budget of approximately $90 million, ***before*** factoring in shared savings and other costs outside of these budgets that would also fall under Staff's proposed cost cap."[388]

Thus, Mr. Miller testified that the Companies cannot realistically achieve their statutory EE/PDR benchmarks under Staff's Proposed Cost Cap with new savings.[389] Mr. Miller explained that "the cost of the Revised Plans is significantly greater than what the $80.1 million cost cap would permit" and that implementing a portfolio plan that met such a cost cap would require the Companies to eliminate a number of programs and/or measures and restart the Collaborative process.[390] Moreover, as Companies' Witness Miller explained, "[i]f the Companies cannot even meet their benchmarks, they obviously will be unable to earn any shared savings in years where shared savings triggers are set at the benchmarks."[391] This, of course,

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[384] *Id.*; Hearing Tr. Vol. V at 630:8-631:21 (Miller Rebuttal Re-Direct).
[385] Miller Rebuttal Testimony at 6-7. Miller cited T&D projects as another example in his testimony and at the hearing. *Id.* at 7; Hearing Tr. Vol. V at 631:22-632:19 (Miller Rebuttal Re-Direct).
[386] Miller Rebuttal Testimony at 5 (emphasis added).
[387] *Id.*
[388] *Id.* at 7 (emphasis added); Hearing Tr. Vol. V at 578:10-17 (Miller Rebuttal Cross).
[389] Miller Rebuttal Testimony at 7.
[390] *Id.* at 8-9.
[391] *Id.* at 10.

renders illusory the Companies' opportunity to earn the maximum amount of shared savings authorized by the Commission.

Finally, Staff's suggestion that the Companies can merely seek an amendment to their benchmarks when they are unable to meet their EE/PDR benchmarks within Staff's Cost Cap Proposal is flawed for several reasons and should be rejected out of hand.[392] First, Section 4928.66(A)(2)(b) of the Ohio Revised Code, which is the only provision that permits amendments to statutory EE/PDR benchmarks, allows amendments only upon the Commission's finding that an EDU "cannot reasonably achieve the benchmarks due to regulatory, economic, or technological reasons beyond its reasonable control." To be sure (and not surprisingly since there is no cost cap authorized by Ohio law), there is no mention of failure to meet a cost cap as grounds for relief. Second, there is no statutory basis for Staff's proposed prohibition on earning shared savings during years the Companies seek benchmark relief.[393] Finally, Staff provides no details about how its benchmark amendment proposal would work, including what would happen to the programs while the application is pending, what would happen if the Commission denies the request, whether the Companies would be subject to statutory penalties pending the application, or how long such a process would take.[394]

For all these reasons, the Commission should reject Staff's Cost Cap Proposal, which is unenforceable, unnecessary, and unfair, and approve the Stipulation as filed. Not only does the Stipulation in this proceeding pass the Commission's test for approval, but it also adequately addresses concerns regarding the impact EE costs may have on the Companies' customers—concerns which the Companies always seek to address in designing and developing EE/PDR

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[392] Donlon Am. Testimony at 6; Hearing Tr. Vol. II at 350:6-15, 357:2-16 (Donlon Cross).

[393] Donlon Am. Testimony at 6.

[394] *See* Companies' Exhibit 12, Case No. 11-126-EL-EEC, Finding and Order (May 19, 2011) (OE benchmark amendment process that lasted over four months).

portfolio plans. Indeed, as demonstrated above, all costs associated with the Revised Plans are just, reasonable, and fully supported by the record in this proceeding.[395]

D. The Commission Should Grant The Companies' Request To Waive The Annual Compliance Filing Deadline.

The Commission's Rules currently require the Companies to submit their compliance filing by March 15 of each year.[396] However, the Commission previously granted the Companies' request for a waiver of this rule and authorized the Companies (as well as other EDUs) to file their Annual Status Reports by May 15 each year through 2018.[397] The Companies respectfully request an extension of this waiver and ask that the Commission grant the same two-month extension through the filing of the Companies' 2019 status report.

The Companies' request, which is unopposed, is reasonable and should be granted. As Companies' Witness Demiray explained, "compliance with the March 15 deadline is difficult because the data necessary for the report must first be collected and studied and then collated into the necessary format."[398] The underlying participation data, however, "is not available from the program participants until February or March each year."[399] Moreover, "[p]rogram data is often compiled by a contractor, a retailer, or a coupon processor, who must then relay the information to the Companies' implementation vendors who validate and summarize the data for use by the Companies and the Companies' Independent Evaluator for reporting purposes."[400] This "process imposes a natural delay, and there is no alternative means by which to hasten this

[395] *See* Section III.B.2, *supra* at p. 36-41.
[396] O.A.C. § 4901:1-39-05(C).
[397] *See In re the Joint Application of [the Companies] for Waiver with Regard to OAC 4901:1-39-05(C)*, Case No. 16-0072-EL-WVR, Entry at 2 (Feb. 24, 2016) ("Case No. 16-0072-EL-WVR").
[398] Demiray Am. Testimony at 7.
[399] *Id.*
[400] *Id.*

process."[401] This request is also consistent with Staff's recommendation to permanently change the filing deadline to May 15.[402] Accordingly, the Companies' unopposed request to waive the annual compliance filing deadline and extend the Commission's previous two-month extension is reasonable and should be granted.

E. The Companies Request An Order Approving The Stipulation And The Companies' Revised Plans At The Commission's Earliest Convenience.

The Companies respectfully request that the Commission issue its order approving the Stipulation at its earliest convenience. As set forth above, each day of further delay in this matter prejudices the Companies by making it more unlikely that the Companies will be in a position to meet—let alone exceed—their statutory benchmarks without using banked savings. It has been over ten months since the Companies first submitted their EE/PDR portfolio plans to the Commission, which were set to commence nearly two months ago. Given the "ramp-up" period required for many of the programs in the Revised Plans, it is crucial that the Companies be permitted to fully implement the Revised Plans as soon as possible.

Further delay also puts the Companies at risk of not being able to fulfill their commitment to the Signatory Parties with respect to PJM bidding. The Companies agreed in the Stipulation to offer eligible planned EE resources that meet PJM's offering requirements into the PJM base residual and incremental capacity auctions during the Plan Period.[403] However, the PJM base residual auction for delivery years 2020/2021 will occur between May 10 and May 16, 2017,[404] which, without the approval of the Revised Plans, means the Companies will not be in a position to offer eligible planned EE resources from the Revised Plans. Indeed, the last day to

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[401] *Id.* at 7-8.
[402] *See* Case No. 13-651-EL-ORD, Entry, Attachment A at 20 (Jan. 29, 2014).
[403] Stipulation at 7-8.
[404] *See* PJM Online Calendar, available at: http://www.pjm.com/Home/Calendar.aspx?CalendarType=RELIABILITY_PRICING_MODEL_EVENTS.

submit eligible resources for bidding is April 10, 2017—the date when the Companies' PJM Initial Measurement and Verification Plan would be due for the May 2017 base residual auction. This is yet another reason why the Companies respectfully request an order approving and adopting the Stipulation at the Commission's earliest convenience.

IV. CONCLUSION

The evidence presented in this proceeding (which is almost entirely uncontradicted) demonstrates that the Revised Plans comply with all statutory and regulatory requirements. In addition, the Stipulation satisfies each of the Commission's three elements for stipulation approval, as it: (i) is the result of serious bargaining among capable, knowledgeable parties; (ii) benefits the Companies' customers and the public interest; and (iii) does not violate any important regulatory principle or practice. For these reasons, the Companies respectfully request that the Commission issue an order at its earliest convenience in which:

- the Stipulation is approved and adopted, without modification;
- the costs of the Revised Plans are found to be just and reasonable;
- Staff's Cost Cap Proposal is rejected in its entirety; and
- the request for a waiver of the annual compliance filing deadline for the Companies is granted through the filing of the 2019 status report.

February 21, 2017

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *Post-Hearing Brief* will be served on this 21st day of February, 2017 by the Commission's e-filing system to the parties who have electronically subscribed to this case and via electronic mail upon the following counsel of record:

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