

**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)	Case No. 16-0743-EL-POR
Edison Company for Approval of Their)	
Energy Efficiency and Peak Demand)	
Reduction Program Portfolio Plans for)	
2017 through 2019)	

**INITIAL POST-HEARING BRIEF OF ENVIRONMENTAL LAW & POLICY CENTER,
THE NATURAL RESOURCES DEFENSE COUNCIL, THE OHIO ENVIRONMENTAL
COUNCIL, AND THE ENVIRONMENTAL DEFENSE FUND**

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I. INTRODUCTION

The 2017-2019 Energy Efficiency & Peak Demand Reduction Program Portfolio Plans, (“Revised Plans” or “Plans”) proposed by the Ohio Edison Company, the Cleveland Electric Illuminating Company, and the Toledo Edison Company (“FirstEnergy” or “Companies”) provide the Companies’ customers with good efficiency programs that will generate significant cost savings. Staff of the Public Utilities Commission (“Staff”) and the Office of the Ohio Consumers’ Counsel (“OCC”) express concern about the cost of the Plans, and argue that the Commission should impose a 3 percent spending cap on overall plan and shareholder incentive costs. However, neither Staff nor OCC establish that a cap is necessary to control energy efficiency program costs or that customers are not otherwise receiving value from the programs. Hence, the fundamental issue is: would FirstEnergy customers benefit from a 3 percent spending cap on energy efficiency? Environmental Law and Policy Center, Natural Resources Defense Council, Ohio Environmental Council, and Environmental Defense Fund (“Environmental Intervenors”), submit they would not.

Environmental Intervenors and FirstEnergy present the *only* analyses in the record on the impacts of the proposed cap on the Revised Plans, and that evidence demonstrates that a cap would greatly reduce customer benefits. While a 3 percent cap would slightly lower the annual rider that customers see on their bills, it would also result in higher bills and lower-quality programs for FirstEnergy customers. Staff and OCC present no evidence rebutting this conclusion. And while they assert that FirstEnergy would still be able to meet its annual statutory energy efficiency targets under a 3 percent cap, neither Staff nor OCC present any analysis to support this claim.

Environmental Intervenors agree that controlling energy efficiency program costs is a desirable goal, but FirstEnergy's Revised Plans already accomplish this by providing good programs that produce savings and drive down the cost of power for all of the Companies' customers. A spending cap would not ensure that customers receive adequate value, because it would focus on only the cost part of the equation and ignore the benefits. The evidence in this case clearly shows that a cap would reduce value to consumers—reducing benefits more than it would costs.

II. FACTS

FirstEnergy submitted its Revised Plans for approval, supported by numerous parties to the Stipulation and Recommendation (“Stipulation”), on December 9, 2016. Staff Witness Patrick Donlon proposes a cap on the Companies' annual energy efficiency program costs and shared savings, equal to 3 percent of Company revenues reported on line 10 of page 300 of the 2015 versions of FERC Form 1. Staff Ex. 1, Donlon Amended Direct Test. at 3. OCC Witness Richard Spellman also supports a 3 percent cost cap, with the modification that, for each program year, the cost cap be based on each Company's filed FERC Form 1 for the year prior. OCC Ex. 9B, Spellman Supp. Direct Test. at 14.

In its Revised Plans, FirstEnergy proposes to spend approximately \$95.5 million per year across the three Companies on program costs, not including FirstEnergy's potential annual shared savings incentive. Mr. Donlon calculates that under the proposed cost cap the three Companies combined would be permitted to spend \$80.1 million annually. Staff Ex. 1, Donlon Amended Test. at 5. The cap would apply not just to program spending, but to the sum of program spending *plus* shareholder incentives. *Id.* If the Commission approves FirstEnergy's proposed shareholder incentive mechanism, it would be eligible to earn up to \$10 million in

after-tax profits. That is equivalent to approximately \$15.6 million in pre-tax profits. Env. Int. Ex. 1, Neme Rebuttal Test. at 14-15; Co. Ex. 17, Miller Rebuttal Test. at 8. Thus, assuming FirstEnergy plans to achieve its maximum shareholder incentive, it would only be left with an annual program budget of \$64.5 million. *Id.* Accordingly, imposition of the proposed spending cap would represent a \$31 million (or 32 percent) reduction from the annual average \$95.5 million budget the parties agreed to in the Stipulation, which closely tracks the Companies' achievement of the annual statutory targets.¹ *Id.* at 15.

Residential customers pay for the energy efficiency programs through a rider that averages between \$1.98 and \$2.90 per month according to Staff. Tr. V. III at 446-447. The energy savings the programs produce replace generation, thereby saving customers money. FirstEnergy projects that the programs in the Revised Plans will cost \$268 million over three years, while at the same time producing total projected savings of \$375 million for consumers. Joint Ex. 1, Stip. and Rec., Ex. B (Revised Plans) at 5. The Revised Plans are evaluated based on the Total Resource Cost Test ("TRC"). The TRC compares the cost of programs to both the utility and participating customer to the avoided costs of purchasing supply, including energy, transmission and distribution, and operation and maintenance. The TRC scores range from 1.5-1.6 across the three utilities. *Id.* Both participants and non-participants benefit from the Revised Plans. ELPC Ex.1, Staff Report to Energy Mandates Study Committee. While customer savings will depend on the nature and volume of participation, a customer who takes the minimal step of replacing ten incandescent bulbs with ten LEDs through, for example, Cleveland Illuminating

¹ These figures exclude PJM revenues that the utilities may receive and that are not currently counted towards the cap. While FirstEnergy would have the option of applying these revenues to program spending, they are anticipated to be only \$2-2.5 million per year and thus will not significantly offset a cap constraint. Tr. V at 629. Moreover, in addition to the program costs included in the budget, under the ESP IV stipulation FirstEnergy committed \$6 million per year to Ohio Partners for Affordable Energy to implement low income programs. Co. Ex. 17, Miller Rebuttal Test. at 7-8, 12-13. This will draw down the energy efficiency budget, but it is not included in Staff's \$81 million estimate for program spending under the proposed cap.

Company's residential lighting subprogram, will save a conservative \$50 per year for that Company's customers—significantly more than Staff's estimated cost of the rider.² Across all three Companies, FirstEnergy projects the residential lighting subprogram will result in the replacement of over 2.8 million bulbs over the term of the Revised Plans. Joint Ex. 1, Ex. B (Revised Plans), Ohio Edison App. C-2 at 2; Cleveland Electric Illuminating App. C-2 at 2; Toledo Edison App. C-2 at 2 (*sum of LED lamp units for all three program years*).

Additionally, both participants and non-participants will save an average of 5.7 percent on the cost of generation based on Staff's own estimates of wholesale market price suppression from the efficiency programs—savings from reducing energy consumption at times of peak demand, which avoids the purchase of electricity from the most expensive sources and lowers wholesale market prices for everyone. ELPC Ex.1, Staff Report to Energy Mandate Study Committee at 12. These reduced prices provide additional cost savings on top of the avoided cost benefits measured through the TRC test.

III. STANDARD OF REVIEW

The Revised Plans are the product of the Stipulation supported by the Companies and a range of intervening parties, including Environmental Intervenors. In reviewing such a proposed stipulation, the Commission has explained that “[t]he ultimate issue for our consideration is whether the agreement, which embodies considerable time and effort by the signatory parties, is reasonable and should be adopted.” *In re Columbia Gas of Ohio*, Case Nos. 16-1309 *et al.*,

² Based on average LED savings per lamp derived from appendices to the Revised Plans and other exhibits on the record: savings of 37kWh/year, at the average customer rate of 14 cents/kWh. See Joint Ex. 1, Ex. B (Revised Plans), Cleveland Electric Illuminating App. C-1 at 2 of 8 (source of savings estimate for LED lighting subprogram); *see also* Tr. Vol. III at 419, Co. Ex. 14 (source of average residential customer rate for the electric Standard Service Offer in Cleveland Electric Illuminating Company's territory). The \$50 per year estimate is conservative, given that it does not account for other savings customers (including non-participants) would realize from avoided T&D investment, avoided capacity costs, market price suppression effects, etc.

Opinion and Order (Dec. 21, 2016) at 21. In conducting this inquiry, the Commission has traditionally considered three criteria:

- (1) Is the settlement a product of serious bargaining among capable, knowledgeable parties?
- (2) Does the settlement, as a package, benefit ratepayers and the public interest?
- (3) Does the settlement package violate any important regulatory principle or practice?

Id. While the Commission is not bound by a stipulation, it may place substantial weight on its terms. *Id.*

The Commission has placed particular emphasis on the thoroughness of opposing parties' analysis in applying the standard of review for a stipulation. For example, in its recent decision regarding Columbia Gas's efficiency programs, the Commission rejected a recommended revision to that utility's demand-side management plan that would shift funding toward customer education about smart thermostats and additional smart thermostat rebates in part because "the record does not include sufficient information of the cost-effectiveness of the Simple Energy Solutions program if revised as opposing intervenors recommend." *Id.* at 36. Similarly, in approving stipulations establishing power purchase agreements proposed by both FirstEnergy and Ohio Power Company ("AEP"), the Commission cited the lack of alternative analysis by opposing intervenors when it rejected criticisms of forecasts of the financial impacts of those power purchase agreements. *In re FirstEnergy ESP IV*, Case No. 14-1297-EL-SSO, Opinion and Order (Mar. 31, 2016) at 81 ("Although we are mindful of the fact that FirstEnergy has the burden of proof in this proceeding, no other party has presented a full projection of energy prices and the net revenues under Rider RRS."); *In re Ohio Power Co.*, Case Nos. 14-1693-EL-RDR *et al.*, Opinion and Order (Mar. 31, 2016) at 80.

Having required such rigorous analysis from prior stipulation opponents, the Commission should do the same here. Staff and OCC's opposition to the Stipulation and their insistence on applying a cost cap to forward-looking program years based solely on a cursory review of FirstEnergy's prior 2012-2014 program years, as discussed below, does not meet that standard.

IV. ARGUMENT

FirstEnergy's Revised Plans will help both participants and non-participants lower their bills by increasing energy efficiency opportunities, and will help pave the way for future, deeper savings by developing the market for new technologies such as LED lighting and smart thermostats. Joint Ex. 1, Stip. and Rec. at 4, 5. Additionally, the Plans will open up new areas for program engagement in previously under-served customer classes, such as in FirstEnergy's commitment to develop an integrated multi-family residential efficiency program. *Id.* at 5. FirstEnergy's Revised Plans represent a significant improvement over the quality of programs and the benefits to customers from its prior 2013-2015 Plan. In the process of reaching agreement on the Stipulation, the Companies addressed many of Environmental Intervenors' concerns and developed an innovative and comprehensive portfolio of programs that optimizes costs and benefits consistent with Staff and OCC's desire to protect customers.

But imposing a cap on the Revised Plans would jeopardize these portfolio improvements and customer benefits. Staff and OCC fail to address the impacts of the cap on programs and customers' bills. They also fail to provide any cost-benefit analysis needed to support their position, instead relying solely on retrospective data from prior program years that is irrelevant to the 2017 to 2019 plan period, and anecdotal comparisons with other states. In contrast, FirstEnergy and Environmental Intervenor witnesses present initial analysis of the detrimental

impacts of such a cap on program quality and savings opportunities for customers, and find that OCC's comparisons with other states are outdated, incorrect, or irrelevant to the Revised Plans.

In the final analysis, the parties to the Stipulation present ample record evidence supporting its approval, while Staff and OCC fail to provide such evidence. The likely outcome of a cap would be a significant reduction in consumer benefits and a portfolio that is inconsistent with the fundamental principles of relevant statute and Commission rules.

A. The Proposed Cap is Inconsistent with Law and Commission Orders that Emphasize the Value of Energy Efficiency Savings and High Quality Programs.

The Revised Plans exceed the criteria used by the Commission to evaluate efficiency programs. Focusing on the second and third prongs of the Commission's stipulation review standard, the record clearly shows that the Revised Plans will benefit ratepayers and the public interest, and implement applicable laws and regulations. The Plans are designed to cost-effectively deliver significant energy savings that will lower bills for both participants and non-participants, while putting FirstEnergy on a path to continue running successful energy programs during future plan periods.

Ohio Revised Code Section 4928.66 states "Beginning in 2009, an electric distribution utility shall implement energy efficiency programs that achieve energy savings equivalent to at least three-tenths of one percent of the total, annual average..." The key term being "at least."

The Commission Rules similarly state:

Such programs, at a minimum, shall achieve established statutory benchmarks for energy efficiency * * * The purpose of this chapter is to establish rules for the implementation of electric utility programs that will encourage innovation and market access for cost-effective energy efficiency and peak-demand reduction, achieve the statutory benchmark for peak-demand reduction, meet or exceed the statutory benchmark for energy efficiency, and provide for the participation of stakeholders in developing energy efficiency and peak-demand reduction programs for the benefit of the state of Ohio.

Ohio Admin. Code 4901:1-39-02(A) (Dec. 10, 2009). Two things stand out in this section. First, the rules require utilities to “at a minimum” meet or exceed their annual benchmarks. Second, the rules require utilities to consider factors such as encouragement of innovation and market access in developing plans. The Revised Plans reflect consideration of both of these issues, while Staff appears to disregard them (as discussed further in Section B below).

In addition to the statute and rules encouraging innovation and market access, the Commission noted the following in a statement regarding shared savings, less than one year ago:

[T]he increase in the shared savings cap is in the public interest because it encourages the Companies to seek to provide to their customers all available cost effective energy opportunities. As the Commission has previously stated “because *** energy savings must be cost-effective, by definition, customers in the aggregate save money when the Companies deliver energy savings opportunities to their customers instead energy. To the extent the Companies accelerate the delivery of cost-effective energy savings opportunities to their customers, they will also accelerate the net savings which customers enjoy. Thus, every kWh of energy that can be displaced through cost-effective energy efficiency programs is a savings, not a cost to the Companies’ customer.

In re FirstEnergy ESP IV, Case No. 14- 1297 EL-SSO, Opinion and Order (Mar. 31, 2016) at 95 (citing Case No. 09-1947, Entry on Rehearing (Sept. 7, 2011) at 6). The Commission could not have been clearer that it believes additional energy efficiency provides benefits to customers, and that every kWh of energy production that can be displaced through cost-effective energy efficiency programs is a savings – not a cost – to the Companies’ customers. This Commission order also explains the whole premise behind net savings – when companies accelerate the delivery of cost-effective efficiency they accelerate savings. That fundamental premise that customers save money from efficiency is consistent with the definition of “cost-effective.”

Staff does acknowledge that energy efficiency is “beneficial,” but then goes on to focus on the size of the rider in which energy efficiency costs are collected, despite its statement that the residential customer rider averages less than \$3 per month. Staff Ex. 1, Donlon Amended

Test. at 5; Tr. V. III at 446-447. Most glaringly, Staff seems to ignore the fact that energy efficiency is not an expense added on to customers' bills after the utility purchases generation; efficiency *replaces* generation. Each unit of saved energy is cheaper to produce than generating a unit of electricity, and thus customers save the more energy efficiency is created. Staff does not address the fact that less efficiency means more generation, which ultimately raises bills.

Even assuming FirstEnergy would be able to provide adequate kWh savings under the proposed cap (which, as explained in Section B below, is highly doubtful), it will come at the expense of a robust portfolio of programs (as discussed in more detail in Section C). The Commission's own regulations recognize that there are many criteria relevant to building successful efficiency programs over the long-term, beyond just cost per kWh. Ohio Admin. Code 4901:1-39-03 sets forth thirteen criteria that a utility must take into consideration in designing its portfolio plan, including but by no means limited to, cost-effectiveness:

- (1) Relative cost-effectiveness.
- (2) Benefit to all members of a customer class, including nonparticipants.
- (3) Potential for broad participation within the targeted customer class.
- (4) Likely magnitude of aggregate energy savings or peak-demand reduction.
- (5) Nonenergy benefits.
- (6) Equity among customer classes.
- (7) Relative advantages or disadvantages of energy efficiency and peak-demand reduction programs for the construction of new facilities, replacement of retiring capital stock, or retrofitting existing capital stock.
- (8) Potential to integrate the proposed program with similar programs offered by other utilities, if such integration produces the most cost-effective result and is in the public interest.
- (9) The degree to which a program bundles measures 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.

(10) The degree to which the program design engages the energy efficiency supply chain and leverages partners in program delivery.

(11) The degree to which the program successfully addresses market barriers or market failures.

(12) The degree to which the program leverages knowledge gained from existing program successes and failures.

(13) The degree to which the program promotes market transformation.

Ohio Admin. Code 4901:1-39-03(B).

The Revised Plans reasonably balance these considerations and potential benefits, delivering savings at a projected cost of approximately 16 cents per first-year kWh saved (Co. Ex. 17, Miller Supp. Direct Test. at 6),³ while making important advancements from FirstEnergy's 2013-2015 plans on the types of considerations enumerated above. For example, the Revised Plans promote markets for key energy efficient products such as LED lighting and smart thermostats. Joint Ex. 1, Stip. and Rec., Ex. B (Revised Plans) at 35. LED bulbs are particularly important since they last significantly longer than CFLs, with a projected measure life of 15 years versus 7 years for CFLs. *See, e.g., Id.*, Ex. B (Revised Plans), Ohio Edison App. C-1 at 2 of 8. Thus, even though these measures may (at least for now) be more expensive on a first-year per-kWh basis, they provide more lasting benefits and ensure that program money is spent on developing statewide markets for improved, more innovative efficiency products rather than only facilitating adoption of current-day (or even outdated) technology.

The Commission has recognized the value of investing in well-designed efficiency programs that provide additional benefits beyond just cost-effective first-year electricity savings.

³ Of note, focusing on first-year costs can be misleading, as it measures only the savings produced in the very first year following the installation of efficiency measures; no consideration is given to the longevity of those savings. All else being equal, the cost per *lifetime* kWh saved is a better indicator of value to consumers than the cost per first year kWh saved. Putting this in context, the 16 cents per kWh first year cost of saved energy estimated for the Revised Plans is far lower when compared to the average life of the measures, translating to 2 cents per kWh assuming an eight year measure life. Env. Int. Ex. 1, Neme Rebuttal Test. at 9-10.

In FirstEnergy's ESP IV case, the Commission approved funding for the small business and low income efficiency programs that were included in these very Revised Plans, explaining that the programs would advance "Ohio policy, which calls upon the Commission to protect at-risk populations and to encourage the education of small business owners regarding the use of, and to encourage the use of, energy efficiency programs. R.C. 4928.02(L), (M)." Case No. 14-1297 Order at 44; and 94-95, March 31, 2016. The Commission found this to be a sufficient basis to approve these stipulation provisions because of the benefits they provide aside from cost-effective energy savings alone. *Id.* at 106.

The Commission Rules require the Commission to consider these factors, yet Staff never even addresses them. As detailed in Sections B and D below, neither Staff nor OCC has done any analysis of the program changes that would likely be necessary if a cap is imposed. As a result, the Commission lacks important information that would help it determine whether the cost cap would force revisions that would sacrifice the important interests detailed above. The testimony of Environmental Intervenors' witness Chris Neme discussed below indicates that such sacrifices would likely be significant.

B. Staff and OCC Fail to Support their Conclusion that FirstEnergy Can Meet Their Statutory Targets with Drastically Reduced Spending, Relying Largely on Outdated Results from 2012-2014.

Staff argues that the Companies can "meet or exceed" their statutory benchmarks while keeping their budget within 3 percent of total revenues as reported on FERC Form 1 Line 10. Staff Ex. 1, Donlon Amended Test. at 5-6. However, Staff reaches this conclusion, "based on the Companies 2012-2014 annual status reports demonstrating achievement related to their prior

compliance.” *Id.* at 5.⁴ Mr. Donlon provides no actual analysis of the programs that produced the results in the 2012-2014 status reports, and he points to no specific details or programs from that period which Staff finds relevant for the 2017-2019 program years. Staff merely makes a conclusory statement that FirstEnergy can meet its annual statutory goal.

Mr. Neme points out that several programs that FirstEnergy implemented in 2012-2014, and which accounted for a significant percentage of overall portfolio savings, are now outdated:

I found several examples in which FirstEnergy’s costs per unit of savings in the next few years will be significantly more expensive to acquire than they were in 2012 to 2014:

- **Residential CFLs:** The savings per light bulb that FirstEnergy is planning to claim for residential CFLs in 2017 through 2019 is nearly 40% less than it claimed in 2014.
- **Residential Efficiency Kits:** The savings per residential efficiency kit that FirstEnergy is planning to claim for 2017 through 2019 is nearly 40% less than it claimed in 2014 for Direct Mail kits.
- **Residential Appliance Turn-Ins:** The savings per appliance turn-in that FirstEnergy is planning to claim for 2017 through 2019 is about 40% less than it claimed in 2014.

Env. Int. Ex. 1, Neme Rebuttal Test. at 19. In fact, Mr. Neme testified at hearing that, based on his extensive experience with efficiency programs, “I can’t think of any significant new opportunity for getting savings less expensively than were achieved in 2012 to 2014 that is possible in the 2017 to 2019 time horizon.” Tr. Vol. IV at 531-532.

Similarly, FirstEnergy’s witness Ed Miller notes that the Companies achieved approximately 50 percent of their actual savings in the 2012-2014 period from lighting, as compared to a 30 percent contribution of savings from lighting in the 2017-2019 Revised Plans. In the prior plan, the Companies incented CFLs at \$1.00 per bulb, but will now incent LEDs at \$3.00 (a 200 percent increase in costs, for longer term cost-effective savings). Co. Ex. 17, Miller Rebuttal Test. at 5-6. Mr. Miller also notes that the transmission and distribution savings for

⁴ Staff consistently references 2012-2014 results, which is somewhat confusing given that FirstEnergy’s last plan encompassed the years 2013-2015.

2014 constituted approximately 7 percent of the total savings with no money from the energy efficiency budget, which has been cut to 1 percent in the Revised Plans. *Id.* at 7. These analyses directly undercut Mr. Donlon’s assertion—and a central basis for its arguments—that there is a general trend of “technology continuing and costs coming down on many projects.” Tr. Vol. II at 343. Hence, Staff’s focus on 2012-2014 has limited value in estimating savings for the 2017-2019 Revised Plans. The testimony of OCC witness Richard Spellman suffers from similar flaws, as further discussed in Section D below. Of note, Mr. Spellman focuses on historical data on energy efficiency programs and budgets, without acknowledging that programs in the 2017-2019 period will rest on very different cost, benefit, and market considerations.

Looking at this issue from a cost per kWh perspective, Environmental Intervenors share FirstEnergy’s concern that the Revised Plans would fall short of the statutory benchmarks if subjected to a cost cap. OCC asserts that the cost cap would effectively require that FirstEnergy achieve savings at a cost of about 15 cents per first year kWh saved. OCC Ex. 9B, Spellman Supp. Test. at 17. But this figure assumes that FirstEnergy would only just meet its statutory savings target each year, and that it would not earn any shareholder incentive. It ignores the reality that the Companies, undoubtedly, will endeavor to achieve the maximum shareholder incentive levels that they can, within the constraints of a cap. Thus, under this more realistic scenario that accounts for shared savings, the proposed 3 percent cap would actually require FirstEnergy to hold its individual program costs to an average of 10.6 cents per first year kWh saved across the Companies—11.3 cents for Ohio Edison, 10.7 cents for Cleveland Electric and 8.6 cents for Toledo Edison. Env. Int. Ex. 1, Neme Rebuttal Test. at 15-16, Table 1 (Scenario 2). When asked directly about the potential for FirstEnergy to meet those targets Mr. Neme answered, “It’s not reasonable if you want a balanced portfolio.” Tr. Vol. IV at 518. Moreover,

with respect to Toledo Edison's low figure of 8.6 cents per kWh savings he stated, "Even if you put aside concerns about having a balanced portfolio... I'm not sure that's possible." *Id.* at 520.

In contrast to Staff and OCC, Mr. Neme analyzed every single FirstEnergy program and found that only four out of 42—*less than 10 percent*—have a price per kWh low enough to qualify under the cap for any of the three Companies. Env. Int. Ex. 1, Neme Rebuttal Test. at 23-24. These four programs produce only a small fraction of the budget and the annual savings, except for the residential Behavioral Program, which has a very low cost (5.5 cents/kWh), but produces only short-lived first year savings. *Id.* at Table 2. While this program has value as currently proposed, reliance on it should not be increased because it would shift funding away from programs with greater long term value. Again, Staff admits that it did no analysis of the proposed individual program costs; it only looked at the 2012-2014 program results and concluded that FirstEnergy would be able to make a cap work. Staff Ex. 1, Donlon Amended Direct Test. at 5; Tr. Vol. III at 315-316. Staff's testimony is insufficient to rebut Mr. Neme's detailed analysis and fails to meet any reasonable standard of proof.

Further highlighting the arbitrary nature of the proposed cap, the Commission recently approved a 2017-2020 portfolio plan for AEP Ohio (supported by Staff and OCC) that included a cost cap allowing it 15.7 cents per first-year kWh saved to reach its annual savings targets, *including* the ability to reach its maximum shared savings tier. Env. Int. Ex. 1, Neme Rebuttal Test. at 16, 28-29; *In Re AEP Ohio Program Portfolio Plan for 2017 Through 2020*, Case No. 16-0574-EL-POR, Opinion and Order, January 19, 2017. That order permitted AEP to run programs at a cost per first-year kWh saved that is 50 percent more than the 10.6 cents on average FirstEnergy would be permitted under the proposed cost cap with shared savings. Staff

has not identified any reasonable basis why the Commission should sanction a cost cap that treats FirstEnergy and its customers differently than AEP.

C. A Cost Cap Would Harm Customers by Driving FirstEnergy To Rely on Programs that Greatly Reduce Consumer Benefits.

Compounding Staff and OCC's unsubstantiated claims, both Mr. Neme and Mr. Miller point out that the cost cap creates the wrong incentives for FirstEnergy and would ultimately undermine quality programs and deprive customers of valuable cost savings. A cap would constrain the Companies' ability to meet their statutory targets while also achieving shared savings. Thus, in an effort to achieve both, the Companies would be driven to modify their program mix to one that has a greater emphasis on programs with shorter-lived savings, that yield less savings from harder-to-reach customer groups (i.e. a less equitable program portfolio), or that focus on customer action savings that would occur even in the absence of the programs. Env. Int. Ex. 1, Neme Rebuttal Test. at 8; Co. Ex. 17, Miller Rebuttal Test. at 13. This could have serious impacts, namely the elimination or scaling back of a wide range of important, cost-effective programs. Env. Int. Ex. 1, Neme Rebuttal Test. at 22-24. As previously discussed in Section B, the vast majority of otherwise cost-effective programs in the Revised Plans would not clear the cost per first-year kWh saved threshold necessary to meet the cap.

Mr. Miller confirms these concerns, stating:

The Companies would need to adjust the program mix and significantly increase reliance on "low hanging fruit" being available. Second, I would expect some of the more comprehensive and more expensive programs and measures to be eliminated. Either of these actions would result in a less robust plan with fewer opportunities for customer participation.

Miller at 13.

Similarly, Mr. Neme elaborates:

It is important to understand that FirstEnergy has the option to deploy a variety of combinations of efficiency programs to meet its statutory savings targets. Efficiency

programs come in many different forms with a variety of different attributes. Some document actions taken by customers outside of utility-administered programs (e.g. FirstEnergy's Customer Action Programs). Some have short-lived savings (e.g. the Residential Behavior Program whose savings FirstEnergy estimates will last only one year); others have long-lived savings which are often more expensive to acquire (e.g. HVAC equipment and building insulation measures). Some target customers for whom barriers to investment in efficiency are modest (e.g. some larger businesses); others target customers with significant barriers which are more expensive to overcome (e.g. low income and multi-family buildings). Some promote well-established technology (e.g. CFLs or linear fluorescent commercial lighting fixtures); others promote newer technology that may be more expensive today, but can lay the foundation for acquiring savings more cost-effectively in the future (e.g. LED lighting). Each combination would have a different set of costs, benefits and value to ratepayers. But because a cost cap—by its very name—focuses solely on *costs*, it does not encourage consideration of trade-offs in value between different programs and/or different combinations of programs.

Neme at 12.

Environmental Intervenors support the Stipulation based in large part on the fact that the Revised Plans strike a balance among these important factors outlined by Mr. Neme, yet the cap would limit their consideration. Put simply, while an optimal plan takes a number of factors into account, Staff's proposed cap sends the unfortunate signal that cost is the *only* factor worth considering.

The Revised Plans also contain numerous improvements to the individual programs from the initial April filing and from the prior 2013-2015 plan. These include, just to name a few, the elimination of discounts for CFLs in favor of more advanced LED technology, the reduction in reliance on free kits, expansion of the multi-family program, a new smart thermostat program designed to reach thousands of customers, improved outreach to low income customers, and increased incentives for CHP. Joint Ex. 1, Stip. and Rec. at 4-7. Yet Staff acknowledges it did not review the Revised Plans in developing its cap proposal nor did they take specific programs into consideration, merely concluding that the Companies "can meet or exceed their statutory benchmarks" based on their 2012-2014 compliance. Staff Ex. 1, Donlon Amended Direct Test. at 5; Tr. Vol. II at 315-316. While Staff participated in all relevant collaboratives, they never

expressed concerns about the programs or cost of the programs during that process. Tr. Vol. III at 442-444.

D. OCC's Comparisons to Other States are Outdated, Misleading and Fail to Address Important Differences.

The testimony of OCC witness Mr. Spellman regarding cost cap policies in other states fails to provide any additional support for the assertion that Staff's cost cap proposal in this case is reasonable. Mr. Spellman asserts that the cost cap would effectively require that FirstEnergy achieve savings at a cost of about 15 cents per first year kWh saved. OCC Ex. 9B, Spellman Supp. Test. at 17. But, as noted above, this figure ignores the reality that the Companies will endeavor to achieve the maximum shareholder incentive levels that they can, within the constraints of the proposed cap.

Besides ignoring the issue of shared savings, Mr. Spellman's testimony has two significant flaws. Most importantly, like Staff, Mr. Spellman focuses only on the past application of cost caps to energy efficiency programs, without acknowledging that programs in the 2017-2019 period will rest on very different cost and benefit considerations. Second, Mr. Spellman suggests that each of the states he references impose a program cost cap such as that proposed by Staff, when in fact they do not. The examples he provides regarding Commission-determined budgets involve a far more nuanced analysis of the reasonableness of program spending in light of other policy objectives.

Fundamentally, both Staff witness Mr. Donlon and OCC witness Mr. Spellman unreasonably subscribe to the idea that past performance is a guarantee of future results. For his part, Mr. Spellman cites to Pennsylvania programs in 2009-2013, and Texas, Illinois, Wisconsin, and Maine programs from 2015 as examples of energy savings ostensibly achieved at low costs per first year kWh saved. OCC Ex. 9B, Spellman Supp. Test. at 18-21. However, a closer

examination of the Pennsylvania example illustrates exactly why this focus on past years does not justify Staff’s cost cap proposal. Mr. Spellman reports that for 2009-2013, Pennsylvania electric utilities achieved approximately 1 percent incremental annual kWh savings at a cost of less than 2 percent of their 2006 annual electric operating revenues. But Mr. Spellman’s testimony omits any discussion of the Pennsylvania utilities’ costs for more recent years, let alone the period including 2017-2019.

Looking to past years as a basis for judging the feasibility of future achievement ignores the fact that, as utilities obtain “low-hanging fruit” and as the efficiency of technologies such as lighting and appliances increases, low-cost energy savings that were available in the past either are no longer available or cost more. Env. Int. Ex. 1, Neme Rebuttal Test. at 18. Mr. Spellman himself acknowledges this effect with respect to residential lighting—traditionally a large source of savings for most utilities, including FirstEnergy⁵—in his role as statewide evaluator for the Pennsylvania utilities’ efficiency programs:

Energy efficient lighting programs are also typically considered to have a great deal of “low-hanging fruit” measures. The initial years of these programs often net the greatest savings at the highest cost-effectiveness. . . . Furthermore, because of increasing efficiency of readily available lighting products on the market, baseline wattages for the most common lighting types tend to rise over time. For example, for PY2 [Plan Year 2] Duquesne estimated a savings of 41 kWh/year for its measure ‘Interior Compact Fluorescent 281 Fixture, 5 – 25 watts’, whereas for Phase II that estimated savings was reduced to 30 kWh/year.⁶

In fact, in its order on the state’s energy efficiency programs for 2016-2020, the Pennsylvania Public Utilities Commission noted that the anticipated cost per first year kWh for utility

⁵ For example, in the 2014 program year FirstEnergy reported 96,895 MWh in savings from residential lighting rebates, almost 20 percent of the 2014 annual benchmark of 526,263 MWh. See 2014 Portfolio Status Report, App. D at 2; App. A at 1, 3, 4.

⁶ See GDS Associates et al., Act 129 Statewide Evaluator Final Annual Report, Phase I: June 1, 2009-May 31, 2013 at 240 (Mar. 4, 2014), <http://www.puc.pa.gov/pcdocs/1274547.pdf> (cited in Env. Int. Ex. 1, Neme Rebuttal Test. at 18).

programs under the cost cap would be 18.4 cents. Co. Ex. 8, Pennsylvania PUC Phase 3 Implementation Order at 51, Tbl. 6.

By contrast, the cost cap proposed in this case would (at best) permit FirstEnergy to spend about 15 cents per first year kWh saved, assuming the Companies earn no shared savings. OCC Ex. 9B, Spellman Supp. Test. at 17. As discussed in Section B, under a more realistic scenario in which the Companies seek to maximize shared savings as they have in the past, they would have to spend on average less than 10 cents per first-year kWh saved. Mr. Spellman's examples from other states contain similar flaws. Env. Int. Ex. 1, Neme Rebuttal Test. at 20-22. Comparing apples to apples—*i.e.*, the anticipated program costs of Pennsylvania utilities in the future versus FirstEnergy's available program budget under the proposed 2017-2019 cost cap—it is clear that Mr. Spellman's focus on outdated historic program costs is not sufficient to support the reasonableness of Staff's cost cap proposal for the 2017-2019 Revised Plans.

Mr. Spellman's examples purporting to represent regulator-imposed caps also fail to provide convincing precedent for Staff's proposal. He asserts that Florida and New York have "implemented cost caps through regulatory commission regulations or rules." OCC Ex. 9B, Spellman Supp. Test. at 22-23. However, both of those state commissions undertook a process very different from Staff's approach here, and neither resulted in a cost cap.

In Florida, the commission evaluated the potential costs and energy savings from an array of energy efficiency measures through technical and achievable potential studies, and then approved savings goals based on implementation of all measures deemed cost-effective under a version of the TRC (also applied in Ohio's existing portfolio planning process under Ohio Admin. Code 4901:1-39-03) and a budget. *In re Commission Review of Numeric Conservation Goals*, Case Nos. 080407-EG *et al.*, Final Order (Fla. PSC Dec. 30, 2009) at 26. Mr. Spellman

acknowledged that the resulting program budget is *not* the same as a predetermined cost cap like the one Staff proposes in this case. Tr. II at 300:17-301:19. Likewise, the New York planning process referenced by Mr. Spellman provides for commission approval of an overall budget based on programs designed to cost-effectively achieve, “at a minimum,” an existing annual savings goal, but also taking into account longer-term goals of “increasing market penetration of efficient technologies and processes.”⁷ *In re Reforming the Energy Vision*, Case No. 14-M-0101, Order (NY PSC Feb. 26, 2015) at 72.

These examples do not, in fact, resemble Staff’s pre-selection of an arbitrary cost cap without any prospective evaluation of the costs and benefits of the programs in FirstEnergy’s 2017-2019 Revised Plans. If anything, the Florida and New York examples are similar to the Commission’s already existing plan review process under Ohio Admin. Code 4901:1-39-03 and -04, which provides for the setting of binding program budgets based on a full consideration of projected cost-effectiveness along with the many other criteria relevant to determining the value of utility efficiency programs.

E. A Cost Cap Runs Contrary to Recent Commission Direction on Efficiency and Ignores the Process the Commission Established to Develop Portfolio Plans.

The Commission recently emphasized the value of efficiency programs when it approved a stipulation in the FirstEnergy ESP IV case based in part on the Companies’ commitment to pursue significant energy savings for its customers.

In the FirstEnergy ESP IV docket the Companies committed to filing a plan that saved 800,000 MWh hours annually as part of a stipulation to settle that case. Case No. 14-1297-EL-

⁷ Notably, these utility program budgets are complemented by separate spending on efficiency programs through the New York State Energy Research and Development Authority that focus on achieving market transformation goals. *In re Reforming the Energy Vision*, Case No. 14-M-0101, Order at 26, 75 (NY PSC Feb. 26, 2015) (noting on page 26 that “[m]eeting the goals described in the Draft State Energy Plan will require more efficiency than can be accomplished using only surcharge-funded programs. Market transformation strategies will leverage more customer investment to accomplish greater efficiency than is currently contemplated in state program targets.”).

SSO, Opinion and Order (Mar. 31, 2016) at 94. The current EE/PDR docket opened on April 15, 2016, when FirstEnergy filed its initial proposed plans for 2017-2019. At that time FirstEnergy budgeted for \$323 million in program costs across three years. In October 2016, the Commission issued an order approving the ESP IV stipulation, but rejected FirstEnergy's plans to budget for the 800,000 MWh target. Instead, the Commission ordered the Companies to scale back their original \$323 million budget for the 2017-2019 plan, ordering them "to budget for the annual statutory mandate rather than the goal." Case No. 14-1297-EL-SSO, Fifth Entry on Rehearing (Oct. 12, 2016) at 147. But while the Commission requested a slimmed down budget, it did not prohibit the Companies from striving within that revised framework to nonetheless achieve the 800,000 MWh goal itself, stating, "The Commission expects the goal to be achieved by efficiency administering the approved programs and achieving energy savings for the least cost rather than by setting the program budget to the stipulated goal." *Id.*

Hence, as recently as October 12, 2016, the Commission directed FirstEnergy to attempt to achieve 800,000 MWh while budgeting to meet the statutory target of 1 percent savings. That October 12 order served as guidance for FirstEnergy, Environmental Intervenors and other parties negotiating the Stipulation.

Parties worked with FirstEnergy for more than a year before it filed its Revised Plans, making several adjustments to address Commission directives from the ESP IV case. Moreover, to its credit, FirstEnergy worked with a number of intervenors to improve the programs, producing additional customer benefits in the process. Notably, when OCC filed its initial testimony in September along with other intervenors, they did not raise the overall cost issue at

that stage, despite the fact that the initial 2017-2019 portfolio included more spending than the Revised Plans (\$323 million compared to \$268 million).⁸

Similarly, Staff's last-minute proposal of a blanket cost cap, without any analysis of the consequences for FirstEnergy's program mix, runs contrary to the careful and detailed planning process that the Commission has previously envisioned:

The planning process provides for transparency and meaningful participation by stakeholders in determining the appropriate program mix and whether an electric utility is doing all that it can. The Commission strongly believes in the value of such public vetting. In such a context, after-the-fact review of rejected programs will be minimized by publicly reviewing programs in advance.

In addition, Section 4928.66(A)(2)(b), Revised Code, allows the Commission to adjust benchmarks due to regulatory, economic, or technological reasons beyond an electric utility's control. Our belief is that the statutory benchmarks represent the minimum requirement, and that a rigorous planning process is the only way to determine whether better efficiency can be achieved, or whether an electric utility has exhausted all reasonable opportunities for achieving energy efficiency.

Case No. 08-888-EL-ORD, Entry on Rehearing (June 17, 2009). This process allows for the level of detailed analysis of FirstEnergy programs that is necessary to identify whether FirstEnergy's program expenditures are delivering actual value to customers, the kind of analysis lacking as a basis for Staff's assertions about the reasonableness of the cost cap proposal. Env. Int. Ex. 1, Neme Rebuttal Test. at 27-28.

V. CONCLUSION

The Commission must carefully consider the facts in the record in determining the reasonableness of the Stipulation and Revised Plans. In conjunction with the numerous parties to the Stipulation, FirstEnergy has developed a suite of programs that optimize costs and benefits

⁸ OCC witness Mr. Spellman did raise some limited issues over non-cost effective programs and the costs of restarting other programs, but overall program costs did not appear to be a concern. See OCC Ex. 9A, Spellman Direct Test. at 54-64.

consistent with all of the legal standards discussed above. The Revised Plans will produce savings well beyond costs, and applying a cap would likely harm, rather than protect consumers.

Environmental Intervenors' analysis demonstrates that all customers will benefit from the Revised Plans as currently constructed, and the programs will produce far greater benefits than would be possible under the proposed cap. Mr. Neme's extensive analysis supports this conclusion, while Staff's minimal review of the 2012-2014 program years ignores major changes in savings potential and the outdated results from outdated programs. Staff and OCC fail to demonstrate that FirstEnergy would be able to achieve its annual savings requirements under a cap, while also taking into account the factors required in Commission Rules such as innovative programming and accessibility to low income customers. The failure of Staff witness Mr. Donlan and OCC witness Mr. Spellman to analyze individual programs, and their reliance on broad generalizations, precludes the Commission from imposing a cap on the Revised Plans.

The parties supporting the Stipulation have met their burden of proof, while opponents have not. Environmental Intervenors respectfully request that the Commission approve the Stipulation and Revised Plans, and reject Staff and OCC's proposals for a cost cap.

Dated: February 21, 2017

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing *Initial Post-Hearing Brief* submitted on behalf of the Natural Resource Defense Council, Environmental Law & Policy Center, the Ohio Environmental Council, and the Environmental Defense Fund was served by electronic mail upon the following Parties of Record on February 21, 2017.

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Summary: Brief Initial Brief of the Environmental Law & Policy Center, the Natural Resources Defense Council, the Ohio Environmental Council, and the Environmental Defense Fund electronically filed by Madeline Fleisher on behalf of Environmental Law and Policy Center and Natural Resources Defense Council and Ohio Environmental Council and Environmental Defense Fund