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. 16-743-EL-POR

REPLY BRIEF
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REPLY BRIEF BY THE OFFICE OF THE OHIO CONSUMERS' COUNSEL

In this energy efficiency portfolio case, the PUCO must answer an important question: should there be an annual limit on the amount that Ohio electric distribution utilities can charge their customers for energy efficiency program costs and utility profits? OCC and the PUCO Staff's answer to this question is "yes." Both OCC and PUCO Staff recommend capping (at $80.1 million) the amount customers pay each year for energy efficiency.

In AEP Ohio's recent energy efficiency case, the PUCO also answered this question affirmatively. It approved a settlement that included an annual cap on customer energy efficiency charges, concluding:

> The addition of an annual cost cap is a reasonable response to concerns which have been raised regarding potential increases in the cost of EE/PDR programs, and the annual cost cap should incent AEP Ohio to manage the costs of the programs in the most efficient manner possible. In light of the importance of the annual cost cap, the Commission notes that we will be reluctant to approve stipulations in other EE/PDR program portfolio cases which do not include a similar cap on EE/PDR program costs.[1]

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[1] Opinion & Order, Case No. 16-574-EL-POR (Jan. 18, 2017).

In this current case involving FirstEnergy and its customers, FirstEnergy and other parties propose, in a settlement,[2] that there be no cap on annual energy efficiency charges for 1.9 million Ohioans. Instead, the settling parties propose to charge customers at least $330 million over the next three years for energy efficiency program costs and utility profits. And the signatory parties have not submitted any evidence that should convince the PUCO to change its views on limiting customer charges for energy efficiency.

In AEP Ohio's case, the PUCO expressed a sound regulatory policy regarding energy efficiency that not only allows electric utilities in Ohio to offer significant, diverse portfolios of energy efficiency programs for their customers, but also protects customers from paying too much for energy efficiency. The PUCO should not deviate from that policy when deciding whether to approve FirstEnergy's Settlement. The Settlement should be modified, as proposed by the PUCO Staff and OCC, to include an $80.1 million annual limit on total energy efficiency charges to customers. Without this and other consumer protections,[3] the Settlement fails the PUCO's three-prong test for approving settlements and should not be approved.

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[2] Joint Ex. 1 (the "Settlement").

[3] See generally Post-Hearing Brief by The Office of the Ohio Consumers' Counsel (Feb. 21, 2017) (the "OCC Initial Brief").

I. ARGUMENT

A. The PUCO Staff's and OCC's proposed $80.1 million annual cap on program costs and utility profits (shared savings) is reasonable and benefits customers.

i. The $80.1 million cost cap does meaningfully accounts for the benefits of energy efficiency.

In their initial briefs, certain Signatory Parties argue that the PUCO Staff's and OCC's proposed $80.1 million cost cap focuses only on costs and ignores the benefits of energy efficiency.[4] These parties also argue that FirstEnergy will need to gut its energy efficiency portfolio and focus only on programs with inexpensive short-term savings as opposed to programs that result in savings for many years.[5] These arguments are unfounded. The cost cap proposal adequately considers both short- and long-term benefits to customers from energy efficiency, and there is ample record evidence of those benefits.

If FirstEnergy were to spend less than $80.1 million on energy efficiency programs, customers would still receive substantial benefits from those programs. Exhibit A to OCC's Initial Brief provides three examples of what FirstEnergy's portfolio could look like with an $80.1 million annual spending limit. In scenario 1, FirstEnergy could spend $80.0 million per year and save 1,669,123 MWh over three years, which is substantially over its estimated 1,587,140 MWh statutory benchmark.[6] In scenario 2,

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[4] See Ohio Partners for Affordable Energy's Post-Hearing Brief (the "OPAE Brief") at 4 ("The Staff's Cost Caps Ignore the Benefits of Energy Efficiency."); Initial Post-Hearing Brief of Environmental Law & Policy Center, the Natural Resources Defense Council, the Ohio Environmental Council, and the Environmental Defense Fund (the "Environmental Intervenor Brief") at 4 (the cost cap "would focus on only the cost part of the equation and ignore the benefits").

[5] See OPAE Brief at 6 (arguing that under a cost cap, FirstEnergy "will forego more expensive savings that provide more benefit over the long-term"); Environmental Intervenor Brief at 12 (stressing the importance of long-term energy savings).

[6] See OCC Initial Brief, Ex. A; Company Ex. 2, Exhibit DJM-A2.

FirstEnergy could spend $75.0 million per year and save 1,643,741 MWh, which is still above the statutory benchmark.[7] And in scenario 3, FirstEnergy could spend just $67.0 million per year and achieve 99.6% of its statutory benchmark.[8]

Customers can receive substantial benefits from FirstEnergy's programs, even if FirstEnergy is prohibited from charging customers more than $80.1 million per year for those programs. The proposed $80.1 million cost cap is reasonable. The PUCO should adopt it.

ii. It is reasonable for the PUCO to focus on the cost of first-year energy savings, as opposed to lifetime energy savings, because only first-year energy savings count toward the energy savings benchmarks under R.C. 4928.66.

Signatory Parties argue that the PUCO Staff's and OCC's proposed cost cap places undue focus on the cost of first-year energy savings and does not adequately account for energy savings that occur over the lifetime of installed energy efficiency measures.[9] The law does not support this argument.

Under R.C. 4928.66, Ohio electric distribution utilities are required to achieve annual energy savings of 1.0% of their respective energy baselines.[10] When an energy efficient measure is installed under a utility-administered program, only the energy saved in the first year count toward the benchmark—savings in future years (commonly called

[7] See OCC Initial Brief, Ex. A; Company Ex. 2, Exhibit DJM-A2.

[8] See OCC Initial Brief, Ex. A; Company Ex. 2, Exhibit DJM-A2. Because FirstEnergy failed to account for nonresidential customer opt outs, its benchmark is certain to be below the projected 1,587,140 MWh. See OCC Initial Brief at 9-14. Thus, under scenario 3, FirstEnergy can meet its statutory benchmarks while spending just $67.0 million per year on programs.

[9] See, e.g., OPAE Initial Brief at 6, 12; Environmental Intervenor Initial Brief at 17.

[10] R.C. 4928.66(A)(1)(a) (benchmarks); R.C. 4928.66(A)(2) (defining "baseline").

"lifetime" savings) do not count.[11] Thus, in enacting R.C. 4928.66, the General Assembly signaled that Ohio utilities are to focus on energy saved in the first year, not energy saved over the life of the measure. Consistent with the General Assembly's directive, the PUCO should place substantial weight on OCC's evidence that FirstEnergy can achieve its statutory benchmark energy savings at a low first-year cost.[12]

iii. FirstEnergy will still have an opportunity to earn shared savings under an $80.1 million cost cap.

FirstEnergy complains that the proposed $80.1 million limit on annual energy efficiency costs will restrict it from charging customers for utility profits (shared savings).[13] The PUCO should give this argument no weight because (a) FirstEnergy is not *entitled* to profit from energy efficiency,[14] and (b) FirstEnergy has demonstrated in the past that it is able to profit from energy efficiency even when it spends very little on programs.

In 2015 and 2016, following the enactment of Senate Bill 310, FirstEnergy cancelled most of its energy efficiency programs.[15] In 2015, under a limited portfolio of programs, FirstEnergy charged customers $27.3 million in program costs.[16] Yet FirstEnergy still reported that it achieved enough energy savings in 2015 to charge customers the maximum amount of profits: about $15.6 million ($10 million after

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[11] Environmental Ex. 1 (Neme Rebuttal) at 8 ("Ohio's statutory savings targets are expressed in terms of 'first year savings'").

[12] OCC Ex. 9B (Spellman Supplemental) at 16-17 (explaining that FirstEnergy can achieve its statutory benchmark while spending a reasonable 15 cents per first-year kWh).

[13] FirstEnergy Brief at 81-86.

[14] See OCC Initial Brief at 17-19.

[15] OCC Ex. 9B (Spellman Supplemental) at 11.

[16] Energy Efficiency and Peak Demand Reduction Program Portfolio Status Report § 3.1, Case No. 16-941-EL-EEC (May 12, 2016) (showing total program costs from 2013-2015 of $133.8 million); Energy Efficiency and Peak Demand Reduction Program Portfolio Status Report § 3.1, Case No. 15-900-EL-EEC (showing total program costs from 2013-2014 of $106.5 million). $133.8 - $106.5 = $27.3 million.

taxes).[17] This amounts to a whopping 57% return on its energy efficiency investment. FirstEnergy's claim that it will be unable to earn any profits under an $80.1 million cost cap is not credible, given its past experience. The PUCO should dismiss arguments that FirstEnergy has made in this regard.

iv. The PUCO has the legal authority to approve the PUCO Staff's and OCC's proposed $80.1 million annual cost cap.

FirstEnergy argues that the PUCO does not have the legal authority to approve an annual limit on the amount that FirstEnergy can charge customers for energy efficiency program costs and utility profits (shared savings).[18] According to FirstEnergy, the authority to cap energy efficiency spending would need to be explicit in R.C. 4928.66.[19] FirstEnergy is wrong.

The PUCO has broad authority over the rates that Ohio electric distribution utilities charge their customers. R.C. 4905.22 requires all utility charges to customers to be just and reasonable. R.C. 4928.02 establishes as a state policy that customers are entitled to retail electric service that is reasonably priced. In determining whether to approve the PUCO Staff's and OCC's proposed $80.1 million annual cost cap, the PUCO would be exercising its statutory authority over customers' utility rates. Indeed, FirstEnergy itself admits that the statutory requirements for just and reasonable rates and reasonably priced electric service apply to its energy efficiency rider charges.[20] The mere fact that R.C. 4928.66 does not contain an explicit cost cap does not strip the PUCO of its

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[17] Energy Efficiency and Peak Demand Reduction Program Portfolio Status Report, Appendix A (Shared Savings Determination), Case No. 16-941-EL-EEC (May 12, 2016).

[18] FirstEnergy Initial Brief at 59-60.

[19] Id. at 59.

[20] FirstEnergy Initial Brief at 59 (stating that the PUCO has the authority to ensure that FirstEnergy's energy efficiency costs are just and reasonable).

more general authority to regulate customers' utility rates under R.C. 4905.22 and 4928.02.

v. Approval of the proposed $80.1 million cost cap would not constitute rulemaking under Ohio law.

In an attempt to prevent the PUCO from imposing a limit on the amount that FirstEnergy can charge its customers for energy efficiency program costs and utility profits, FirstEnergy argues that any cap on costs must be imposed in a formal PUCO rulemaking proceeding. FirstEnergy's strained reading of Ohio rulemaking laws and precedent should be rejected.

As FirstEnergy notes in its brief, R.C. 111.15 requires Ohio agencies to follow certain procedures when adopting rules.[21] Under R.C. 111.15, a "rule" is any "rule, regulation, bylaw, or standard having a general and uniform operation adopted by an agency under the authority of the laws governing the agency."[22] The PUCO Staff's and OCC's proposal for an annual limit on FirstEnergy's energy efficiency costs is not a "rule," so R.C. 111.15 does not apply.

In support of its argument that the proposed cost cap is "rule," FirstEnergy cites two cases that are clearly distinguishable from the cost cap proposal in this case. First, FirstEnergy cites *Fairfield County Board of Commissioners v. Nally*.[23] In *Fairfield County*, the Ohio Supreme Court found that the Ohio Environmental Protection Agency failed to follow the rulemaking procedures found in R.C. 119.01 when it imposed a guideline that "prescribe[d] a legal standard that did not previously exist."[24] From this,

[21] R.C. 111.15; FirstEnergy Brief at 61.

[22] R.C. 111.15(A)(1).

[23] 143 Ohio St. 3d 93 (2015).

[24] Id. at 100.

FirstEnergy concludes that any agency proposal that "prescribes a legal standard that did not previously exist" is a "rule" under Ohio law that must be subject to formal rulemaking procedures.[25]

FirstEnergy's interpretation of *Fairfield County* is erroneous. In *Fairfield County*, the Supreme Court interpreted certain rulemaking provisions found in R.C. 119.01, not R.C. 111.15. But R.C. 119.01 does not apply to the PUCO. The statute itself plainly states: "Section 119.01 to 119.13 of the Revised Code do not apply to the public utilities commission."[26] *Fairfield County* does not cite or otherwise rely on R.C. 111.15, the relevant rulemaking statute for the PUCO.[27] Thus, *Fairfield County* has no bearing on this energy efficiency portfolio proceeding.

Second, FirstEnergy cites *Ohio Nurses Association v. State Board of Nursing Education.*[28] Like *Fairfield County*, the Supreme Court in *Ohio Nurses Association* did not interpret or apply R.C. 111.15. And like *Fairfield County*, the *Ohio Nurses Association* decision pertains to R.C. 119.01, which does not apply to the PUCO.

Even if *Ohio Nurses Association* did interpret R.C. 111.15, it still would not help FirstEnergy's case. There, the State Board of Nursing Education issued a position paper that had the effect of substantially enlarging the scope of practice for licensed practical nurses.[29] The board's changes applied identically to every licensed practical nurse in the state.[30] The PUCO Staff's and OCC's proposed cost cap, in contrast, is tailored

[25] FirstEnergy Brief at 63.

[26] R.C. 119.01(A)(1).

[27] Id.

[28] 44 Ohio St. 3d 73 (1989).

[29] Id. at 75.

[30] Id. at 75-76.

exclusively to FirstEnergy and does not have universal application to all electric utilities in Ohio.

The PUCO Staff and OCC are proposing an annual $80.1 million cap for FirstEnergy for three years (2017-2019). This cap is 3% of FirstEnergy's total sales to ultimate customers, as reported on FERC Form 1, page 300, line 10.[31] In this case, the PUCO will decide only whether this proposed cap should apply to FirstEnergy based on the facts of this case as they pertain to FirstEnergy. The PUCO will not decide whether to apply this 3% cap to AEP Ohio, Duke Energy Ohio, or Dayton Power & Light. Thus, there is simply no way to interpret the PUCO Staff's proposed 3% cap on FirstEnergy's programs as having "general and uniform operation" as required by R.C. 111.15(A)(1).

Furthermore, the PUCO Staff's proposal is not uniform across all of the Ohio utilities. In AEP Ohio's case, the PUCO Staff and the utility, among others, agreed, through a stipulation, to a cost cap of 4% as opposed to 3%.[32] The AEP cost cap is for four years but could be reduced to two years,[33] whereas the PUCO Staff is proposing a three-year cap for FirstEnergy. In Dayton Power and Light's case, the PUCO also agreed to a 4% cap, but that cap is only for one year.[34] And in Duke's case, the PUCO is proposing a cap of 3.5%.[35]

Indeed, FirstEnergy goes to great lengths in its brief to explain why it believes the 3% cap is "unfair" to FirstEnergy because it treats FirstEnergy differently than other Ohio

[31] PUCO Staff Ex. 1 (Donlon Direct), Attachments 1-3.

[32] Tr. Vol. III at 400:8-20 (Donlon).

[33] Opinion & Order ¶ 21, Case No. 16-574-EL-POR (Jan. 18, 2017).

[34] Tr. Vol. III at 400:21-25 (Donlon).

[35] See FirstEnergy Brief at 74.

utilities.[36] Among other things, FirstEnergy cites differences in the PUCO Staff's proposed cost cap among the Ohio electric distribution utilities related to the cap percentages, customer shopping rates, revenues per kWh, costs per first-year kWh, and the different utilities' ability to profit from energy efficiency.[37] This variation and case by case approach shows exactly why FirstEnergy's rulemaking arguments must fail. The PUCO Staff's proposed cost cap is individually tailored to each Ohio electric utility. It does not have "general and uniform operation" and is not a "rule" under R.C. 111.15. The PUCO has the authority to approve the PUCO Staff's and OCC's proposed annual $80.1 million cap for energy efficiency without enacting a formal PUCO rule.

vi. From the outset of this case, OCC has demonstrated a concern for the costs that customers pay for energy efficiency program costs and utility profits.

The Environmental Intervenors falsely claim that OCC was not concerned with the overall cost of FirstEnergy's programs when it filed its initial testimony in September 2016 before the Settlement was filed.[38] This assertion is unfounded and contrary to the record evidence. OCC witness Spellman has consistently advocated for significant reductions in the amount that customers pay for energy efficiency. In his initial testimony, Mr. Spellman: (a) recommended a $70 million reduction in the amount of shared savings that customers would pay to FirstEnergy,[39] (b) recommended the elimination of residential programs that were projected to cost $34.6 million,[40] (c) identified the potential to eliminate an additional $70 million in nonresidential

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[36] FirstEnergy Brief at 73-86.

[37] FirstEnergy Brief at 73-86.

[38] Environmental Intervenor Brief at 23-24.

[39] OCC Ex. 9A (Spellman Initial Direct) at 48-54.

[40] Id. at 58.

programs,[41] and (d) proposed a $10 million reduction in charges to customers for programs that were cancelled in 2015 and 2016.[42] OCC's concerns for customer charges for energy efficiency are not new. Customers deserve protection from paying too much for energy efficiency program costs and utility profits.

B. FirstEnergy proposes to charge customers for shared savings (utility profits) in 2017 even if FirstEnergy does not meet its statutory benchmark energy savings. This does not benefit customers.

The Settlement provides that FirstEnergy can charge customers for shared savings in 2017 as long as FirstEnergy's programs achieve energy savings at least 14% below the statutory benchmark.[43] This will benefit FirstEnergy with customers paying higher profits to FirstEnergy even if FirstEnergy does not meet the minimum requirements of the law. Customers should not reward FirstEnergy with shared savings when FirstEnergy's energy efficiency savings are not even meeting the minimum requirements.

FirstEnergy claims that if the bar for shared savings eligibility is not reduced, it will have no incentive to create new energy savings through its programs and it may simply rely on its banked energy savings.[44] According to FirstEnergy, reliance on banked savings would not benefit customers.[45]

The flaw in FirstEnergy's argument is that it cannot simply decline to offer new programs and rely on its bank for statutory compliance in 2017, 2018, and 2019. In its December 1, 2015 ESP IV settlement, FirstEnergy agreed to "strive to achieve over

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[41] Id.

[42] Id. at 61-62.

[43] Settlement § V.R.

[44] FirstEnergy Brief at 51-52.

[45] Id.

800,000 MWh of energy savings annually, subject to customer opt outs."[46] FirstEnergy also agreed to reactive the programs that it cancelled in 2015 and 2016 and to "expand offerings through May 31, 2024, to include best practice ideas from utility peers in Ohio and nationally."[47] This means that to fulfill its commitments under the ESP IV settlement, FirstEnergy is required to offer new programs that result in new energy savings. FirstEnergy cannot comply with its commitment to "strive to achieve over 800,000 MWh of energy savings annually" by relying on its banked savings.

Whether the bar for shared savings eligibility is lowered or not, FirstEnergy will need to efficiently run its programs to generate new savings for the benefit of customers. Customers should not pay higher profits to FirstEnergy when FirstEnergy does not meet its statutory benchmark. The PUCO should not allow it.

FirstEnergy also complains that it will be difficult for it to earn shared savings in 2017 because there is a three month "ramp up" period to get its programs started after the portfolio is approved.[48] FirstEnergy's ramp-up argument fails for at least two reasons. First, as explained in OCC's initial brief, FirstEnergy has already made programs available to customers that are projected to result in significant energy savings in 2017.[49] Second, FirstEnergy is responsible for any lengthy ramp-up period that is necessary to get its programs started. If FirstEnergy had not cancelled nearly all of its programs in 2015 and 2016, then it likely could have ramped them back up more quickly.[50] FirstEnergy

[46] OCC Ex. 1 at 11.

[47] Id.

[48] FirstEnergy Brief at 50.

[49] See OCC Brief at 27-28.

[50] OCC Ex. 9B (Spellman Supplemental) at 11.

should not be permitted to charge customers higher utility profits as a result of its own decision to eliminate nearly all of its energy efficiency programs in 2015 and 2016.

II. CONCLUSION

The Settlement is unreasonable because it does not adequately protect customers from paying too much for FirstEnergy's energy efficiency programs. The PUCO should modify the Settlement to include an $80.1 million annual limit on the program costs and utility profits (shared savings) that customers pay, as recommended by OCC and the PUCO Staff. Without this limit, the Settlement does not benefit customers or the public interest, and it fails the PUCO's three-prong test for settlement approval.

Respectfully submitted,

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CERTIFICATE OF SERVICE

It is hereby certified that a true copy of the foregoing Reply Brief was served by electronic transmission upon the parties below this 3rd day of March 2017.

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