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 REPLY 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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TABLE OF CONTENTS

I. INTRODUCTION

"[E]very kWh of energy that can be displaced through cost-effective energy efficiency programs ***is a savings, not a cost*** to the Companies' customer[s]."[1] Indeed, the Commission could not have been more clear in recognizing that the Companies' "customers in the aggregate ***save money*** when the Companies deliver energy savings opportunities to their customers instead of energy."[2]

In arguing against the Stipulation, OCC and Staff ignore this bedrock principle and myopically focus on the ***costs*** associated with the Revised Plans, while turning a blind eye to the significant ***benefits*** those Plans produce. This approach is at odds with the Commission's own rules on cost-effectiveness, which require an examination of an EE/PDR portfolio plan's costs ***and*** benefits. And in that regard, the record is clear—the Companies demonstrated that the Revised Plans are cost-effective on a portfolio plan basis (meaning the benefits of the Revised Plans outweigh their costs), and there is no evidence to the contrary.

OCC and Staff's short-sighted view is evident even at the highest level. The implementation of the Revised Plans is projected to generate Total Discounted Lifetime Benefits to the Companies' customers of $785 million at a total plan cost of $268 million.[3] Critically, neither OCC nor Staff challenged these calculations in this proceeding. Nevertheless, both parties ask the Commission to ignore the fact that the Revised Plans will generate over $1.50 of

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[1] *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 (Mar. 31, 2016) ("Case No. 14-1297-EL-SSO") at 95 (emphasis added).

[2] *Id.* (emphasis added). Defined terms will have the same meaning as in the Companies' initial Post-Hearing Brief (filed February 21, 2017).

[3] Joint Exhibit 1, Case No. 16-0743-EL-POR, Stipulation and Recommendation (Dec. 8, 2016) ("Stipulation"), Ex. B at 5.

benefits for every $1.00 spent.[4] That ask is unreasonable, as the Commission must consider both costs ***and*** benefits in determining whether the Revised Plans and Stipulation, as a package, benefit the Companies' customers and are just and reasonable.

Indeed, that was precisely the approach the Signatory Parties employed in crafting the Stipulation. Those parties negotiated and worked for several months to strike the appropriate balance between costs and benefits, ultimately producing cost-effective portfolio plans that offer the Companies' customers significant benefits and savings opportunities, all at a reasonable cost. OCC and Staff ask the Commission to disrupt that balance by implementing an inflexible "cost cap" that is unenforceable, unnecessary, and unfair. The Commission should reject that request and adopt the Stipulation without modification, as it: (i) is the product of serious bargaining among capable and knowledgeable parties; (ii) will benefit customers and is in the public interest; and (iii) does not violate any important regulatory principle or practice.

While Staff and OCC present their arguments under the guise of protecting customers, ironically, it is their position in this proceeding—not that of the Signatory Parties—that will ultimately harm the Companies' customers by depriving them of cost-effective savings opportunities. As the Commission aptly held, when "the Companies accelerate the delivery of cost-effective energy savings opportunities to their customers, they [] also accelerate the net cost savings which customers enjoy."[5] The Commission should thus reject Staff's Cost Cap Proposal and approve the Stipulation and Revised Plans, without modification.

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[4] Indeed, as demonstrated in the Companies' Initial Brief, the TRC scores for the Companies are 1.5 (OE) and 1.6 (CEI and TE) on a portfolio plan basis. *See* Stipulation, Ex. B at Appendices C-4, PUCO 1 ("Portfolio Summary of Lifetime Costs and Benefits"); Companies' Exhibit 5, Case No. 16-0743-EL-POR, Supplemental Direct Testimony of Edward C. Miller (Dec. 8, 2016) ("Miller Supp. Testimony") at 6. This means that, from a TRC cost-effectiveness perspective, the Revised Plans generate $1.50 to $1.60 in benefits for every $1.00 spent (by customers and the Companies).

[5] Case No. 14-1297-EL-SSO, Opinion and Order at 95 (Mar. 31, 2016).

II. ARGUMENT

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

In their Initial Brief, the Companies demonstrated that the Revised Plans comply with all Ohio statutory and regulatory requirements.[6] For instance, 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.[7] 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).[8] The Revised Plans also include all other required elements under the Commission's Rules.[9] As set forth below, no party presents a meaningful challenge to this evidence.

1. Staff and OCC fail to identify any statutory or regulatory shortcoming.

Neither Staff nor OCC has presented any argument that the Revised Plans fail to satisfy the pertinent statutory and regulatory requirements. Staff and OCC have not contested the Companies' baseline or benchmark calculations.[10] Nor does either party contend that the Revised Plans are not cost-effective on a portfolio plan basis.[11] Additionally, Staff and OCC have presented no evidence or argument that the programs are not cost-effective, or that the Revised Plans somehow fail to meet any of the other required elements under the Commission's

[6] *See* 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, Section III.A. (Feb. 21, 2017) ("Companies' Initial Brief") at 14-32.

[7] *Id.* at 15-18.

[8] *Id.* at 18-24.

[9] *Id.* at 24-32.

[10] *See generally,* Case No. 16-0743-EL-POR, Post-Hearing Brief by the Office of the Ohio Consumers' Counsel (Feb. 21, 2017) ("OCC Initial Brief"); Case No. 16-0743-EL-POR, Initial Brief Submitted on Behalf of the Public Utilities Commission of Ohio (Feb. 21, 2017) ("Staff Initial Brief").

[11] *Id.*

Rules.[12] Simply put, the ***only*** evidence in this proceeding demonstrates that the Revised Plans satisfy all Ohio statutory and regulatory requirements.

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

OHA argues that the Companies have not met the requirement to describe attempts to align and coordinate programs with other public utilities because their "decision to terminate OHA as an administrator is at odds with every other Ohio electric distribution utility's current EE/PDR plan or proposed EE/PDR plan."[13] OHA, however, mischaracterizes the pertinent rule, which merely requires the Companies to provide a "***description*** of attempts to align and coordinate ***programs*** with other public utilities' programs."[14] It is undisputed that the Revised Plans, in Section 3, include the requisite description and thus satisfy the rule.[15] Moreover, and critically, the rule applies only to the alignment of programs, not to administrators (which are not required under the Commission's Rules).[16] There can be no dispute that the Revised Plans meet that requirement.

Regardless, merely because the Companies are no longer paying OHA to act as an administrator does not mean they are now unwilling to work with OHA for the benefit of its constituents. Indeed, despite OHA's refusal to sign the Stipulation, the Companies committed in the Stipulation to assist OHA in implementing its EnergyStar benchmarking program.[17] That, of

[12] *Id.*

[13] Case No. 16-0743-EL-POR, The Ohio Hospital Association's Initial Post-Hearing Brief (Feb. 21, 2017) ("OHA Initial Brief") at 6.

[14] O.A.C. § 4901:1-39-04(C)(3) (emphasis added).

[15] *See* Stipulation, Ex. B at Section 3.1.6. ("Describe alignment with other utility and non-utility programs").

[16] *Id.*

[17] Stipulation at Section V.R.

course, is a sign of good faith and of the Companies' willingness to work with OHA, despite the fact it no longer serves as a third-party administrator.

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

As the Companies established in their Initial Brief, the Stipulation (and the Revised Plans contained therein) satisfy the Commission's three-part test for approval because the Stipulation: (i) is the product of serious bargaining among capable and knowledgeable parties;[18] (ii) will benefit customers and is in the public interest;[19] and (iii) does not violate any important regulatory principle or practice.[20] As discussed below, any arguments to the contrary should be rejected.

1. No party disputes that the Stipulation is the product of serious bargaining among capable and knowledgeable parties.

After numerous meetings and spirited debate over the course of several months, the Companies, OEC, EDF, NRDC, ELPC, EMS, EnerNoc, OPAE, and IGS signed a comprehensive and robust settlement that is set forth in the Stipulation, which resolves all issues among those parties.[21] In exchange for various commitments in the Stipulation, three additional intervenors—Kroger, OMAEG, and IEU—each signed the Stipulation as "non-opposing parties."[22] Thus, as explained in the Companies' Initial Brief, there is no question that the Stipulation is the product of serious bargaining among capable and knowledgeable parties.[23]

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[18] Companies' Initial Brief, Section III.B.1. at 32-36.
[19] *Id.* Section III.B.1. at 36-53.
[20] *Id.* Section III.B.1. at 54-57.
[21] Stipulation at 13.
[22] *Id.*
[23] Companies' Initial Brief, Section III.B.1. at 33-36.

While none of the opposing parties claim otherwise,[24] OCC mistakenly contends that the parties participating in the Stipulation are not "diverse."[25] ***First***, OCC misstates the proper legal standard. The standard is not whether all classes support the settlement (as OCC seemingly suggests), but rather whether any customer class was excluded from the negotiating table.[26] The record is clear that no party was excluded from settlement discussions. Indeed, all parties were invited to participate in a number of settlement discussions and negotiations.[27]

Second, and setting aside the controlling standard, the parties to the settlement are certainly "diverse." OPAE, which represents the interests of low- and moderate-income residential customers, signed the Stipulation and has submitted a brief advocating for its unconditional approval.[28] Additional signatories to the Stipulation include the environmental advocates comprised of OEC, EDF, NRDC, and ELPC ("Environmental Intervenors"); EMS, an "efficiency expert with significant and specific experience in the development, deployment, and installation of industrial energy efficiency;"[29] EnerNOC, an energy manager and wholesale marketer for over 1,000 Ohio customer sites;[30] and IGS, a certified retail electric service provider.[31] Those Signatory Parties are joined by one of the largest grocers in the country (Kroger),[32] an advocacy group for Ohio manufacturers' interests (OMAEG),[33] and an advocacy

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[24] *See generally* Staff Initial Brief at 4; OHA Initial Brief.

[25] OCC Initial Brief at 34-37.

[26] *Time Warner AxS v. Pub. Util. Comm'n*, 75 Ohio St. 3d 229, 233 fn. 2, 661 N.E.2d 1097 (1996); *see also* Case No. 14-1297-EL-SSO, Opinion and Order at 43 (Mar. 31, 2016) (holding that not all customer classes must be included in a stipulation and approving stipulation that OCC did not sign).

[27] Companies' Initial Brief at 34; *see also* Miller Supp. Testimony at 8-9.

[28] *See generally* Case No. 16-0743-EL-POR, Ohio Partners for Affordable Energy's Post-Hearing Brief (Feb. 21, 2017) ("OPAE Initial Brief").

[29] *Id.* at Mem. in Support of Motion to Intervene of EMS at 4-5 (June 3, 2016).

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

[31] *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").

[32] Case No. 16-0743-EL-POR, Mem. in Support of Motion to Intervene of Kroger at 4 (May 17, 2016).

group representing the interests of industrial and commercial customers (IEU),[34] each of whom, as part of the settlement, agreed not to oppose the terms and conditions in the Stipulation. Thus, the parties represent the diverse interests of residential, commercial, and industrial customers, including those interested in environmental issues, wholesale marketing issues, large industrial generation projects, and competitive electric generation service.

Third, OCC relies on the testimony of its witness, Mr. Spellman, who was: (i) unfamiliar with five of the eight signatory parties[35] (and two of the three non-opposing parties);[36] (ii) unaware of the applicable criteria;[37] and (iii) unaware that the industrial customer advocate (IEU) had executed the Stipulation as a non-opposing party.[38] Mr. Spellman thus has no credibility on this issue, and his testimony should be rejected.

At bottom, OCC seeks veto-power over the Stipulation by contending that "consumers—who pay for the programs—are not Signatory Parties to the [s]ettlement."[39] OCC's contention is simply wrong. OCC is a consumer advocate; it is not a legal proxy for each of the Companies' customers. Indeed, while OCC represents the Companies' residential customers, it certainly is not the only consumer advocate representing the residential class.[40] In addition to the Environmental Intervenors, OPAE also represents residential customers (including those that struggle financially), and it fully endorses the Stipulation. The Commission should not overlook the fact OCC claims to be concerned about costs to customers, while the advocate for those least

(continued…)

[33] *Id.* at Mem. in Support of Motion to Intervene of OMA at 4 (May 9, 2016).
[34] *Id.* at Mem. in Support of Motion to Intervene of IEU at 3 (May 6, 2016); www.ieu-ohio.org.
[35] OCC Initial Brief at 35-36; Hearing Tr. Vol. II at 204-205 (Spellman Cross).
[36] Hearing Tr. Vol. II at 205 (Spellman Cross).
[37] *Id*. at 201-203 (Spellman Cross).
[38] *Id*. at 206 (Spellman Cross).
[39] OCC Initial Brief at 35.
[40] *Id.* at 36.

able to pay those costs is fully advocating for the Stipulation's approval. Regardless, the Commission has clearly stated that no single customer class or party may "veto" a settlement, holding that it "will not require any single party, ***including OCC***, to agree to a stipulation in order to meet the first prong of the three-prong test."[41]

In sum, OCC has no credible evidence on which to base its claim that the parties to the Stipulation lack diversity. The only evidence in the record supports the conclusion that the signatory and non-opposing parties represent a variety of interests encompassing all customer classes. Accordingly, the Commission should find that the first element has been satisfied.

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

The Companies explained in their Initial Brief the various ways the Stipulation is in the public interest and benefits the customers in their service territories.[42] In short, 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 broad portfolio of programs that will help them achieve energy and cost savings.[43] The Revised Plans also include a reasonable shared savings incentive mechanism, one which is nearly-identical to the Companies' previously-approved mechanism.[44]

Despite these facts, OCC and Staff contend that the Revised Plans will not benefit the Companies' customers. For reasons set forth below, each of their arguments should be rejected.

(a) Staff's Cost Cap Proposal will not benefit customers, but rather deprive them of cost-effective savings opportunities.

In their Initial Brief, the Companies carefully demonstrated the various reasons why

[41] Case No. 14-1297-EL-SSO, Opinion and Order at 43 (Mar. 31, 2016) (emphasis added).
[42] *See* Companies' Initial Brief, Section III.B.2. at 36-53.
[43] *Id.* at 36-42.
[44] *Id.* at 42-52.

Staff's Cost Cap Proposal cannot be adopted by the Commission in this case.[45] Specifically, Staff's proposal is: (i) unenforceable and contrary to law[46]; (ii) unnecessary[47]; and (iii) unfair.[48] Neither OCC nor Staff even attempted to defend the many inadequacies and flaws with the Cost Cap Proposal in their respective briefs, instead relying on over-simplified and unsound statements that the cap "benefits customers."

But that conclusion is fundamentally and irretrievably flawed because it ignores the significant benefits the Revised Plans produce, focusing exclusively on the costs of those Plans. That approach is at odds with the Commission's own rules on cost-effectiveness, which require an examination of an EE/PDR portfolio plan's costs ***and*** benefits. And in that regard, OCC and Staff fall short—the record is clear that the Revised Plans are cost-effective on a portfolio plan and program basis, meaning the benefits of the Revised Plans and programs therein outweigh their costs. Indeed, the Commission has recognized that "every kWh of energy that can be displaced through cost-effective energy efficiency programs ***is a savings, not a cost*** to the Companies' customer[s]."[49]

OCC and Staff ignore this foundational principle. They support the Cost Cap Proposal without demonstrating that the proposal is supported or justified by a cost-benefit analysis. In fact, OCC admitted that it conducted no cost-benefit analysis, and there is no evidence in the record that Staff conducted such an analysis either.[50] But even the simplest analysis

[45] *See* Companies' Initial Brief, Section III.C. at 57-86.
[46] *Id.* at 58-68.
[47] *Id.* at 69-72.
[48] *Id.* at 73-86.
[49] Case No. 14-1297-EL-SSO, Opinion and Order at 95 (Mar. 31, 2016) (emphasis added).
[50] Hearing Tr. Vol. II at 199:19-200:1 (Spellman Cross). As the Commission has recognized, the lack of analysis by a party in a regulatory proceeding is relevant to the Commission's ultimate determination of an issue. *See, e.g.*, Case No. 14-1297-EL-SSO, Opinion and Order at 81 (Mar. 31, 2016); *In the Matter of the Application Seeking Approval of Ohio Power Company's Proposal to Enter Into an Affiliate Power Purchase Agreement for Inclusion in the Power Purchase Agreement Rider*, Case No. 14-1693-EL-RDR et al., Opinion and Order (Mar. 31,

demonstrates that the benefits of the Revised Plans far outweigh the costs: the Revised Plans are projected to generate Total Discounted Lifetime Benefits to the Companies' customers of ***$785 million*** at a total plan cost of ***$268 million***.[51] Critically, neither OCC nor Staff challenged these calculations. Nor do they attempt to explain how the proposed cost of the Revised Plans is unreasonable in light of those net lifetime benefits. Instead, Staff suggests that its Cost Cap Proposal is warranted because Rider DSE2 is among the "top five" highest riders on residential customers' bills, ignoring the Commission's own methodology for gauging cost-effectiveness (that considers both costs ***and*** benefits), as well as the simple fact that customers are projected to receive over $1.50 in benefits for every $1.00 spent on the Revised Plans.[52]

For instance, at the hearing, Staff Witness Donlon expressed concern with the amount residential customers pay for the EE programs in the Revised Plans through Rider DSE2.[53] The Revised Plans, however, will produce energy savings that ***replace generation*** and save customers money on their electric bills—whether or not they are even participants in the Plans.[54] Moreover, even minimal participation in the Companies' offerings can materially lower a customer's electric bill and outweigh the costs of the rider. To be sure, a particular customer's savings will depend on the precise nature and volume of participation in the Revised Plans, but, as the Environmental Intervenors noted, a customer that simply replaces ten incandescent bulbs

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2016) ("Case No. 14-1693-EL-RDR") at 80.

[51] Stipulation, Ex. B at 5.

[52] *See* footnote 4 at 2; *see also* Hearing Tr. Vol. II at 326:7-15, 328:6-329:5 (Donlon Cross); Staff Exhibit 1, Case No. 16-0743-EL-POR, Amended Testimony of Patrick Donlon (Jan. 10, 2016) ("Donlon Am. Testimony") at 5; *see also* O.A.C. § 4901:1-39-01 (F), (Y).

[53] Hearing Tr. Vol. III at 446:18-447:9 (Donlon Cross).

[54] ELPC Exhibit 1, Staff Report to Energy Mandate Study Committee at 12; *see also* Case No. 16-0743-EL-POR, Initial Post-Hearing Brief of Environmental Law & Policy Center, The Natural Resources Defense Council, The Ohio Environmental Council, and The Environmental Defense Fund (Feb. 21, 2017) ("Environmentals' Initial Brief") at 6.

with LEDs offered through the Revised Plans will save a conservative $50 per year—a savings that ***by itself*** could outweigh the customer's total annual rider cost.[55] Similarly, a customer that participates in the smart thermostat sub-program can save, at a minimum, $100 to $180 per year in energy savings (which could also outweigh the cost of the rider).[56]

In short, by supporting the Cost Cap Proposal, both Staff and OCC ignore the fact that energy efficiency is not an expense added to customer's bills—it is a savings. That is precisely why the Commission aptly held that the Companies' customers, in the aggregate, "***save money*** when the Companies deliver energy savings opportunities to their customers instead of energy."[57] Accordingly, the Commission should reject Staff's Cost Cap Proposal, which does not benefit the Companies' customers and is not in the public interest.

(b) Staff's Cost Cap Proposal will not allow the Companies to meet their statutory benchmarks through the creation of new energy savings.

The Companies demonstrated in their Initial Brief how Staff's Cost Cap Proposal unfairly restricts their ability to meet their statutory benchmarks through the creation of new energy savings for their customers.[58] In short, 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 the Companies cannot meet the cap without making substantial changes to the Plans, including eliminating a number of programs and/or measures in

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[55] Environmentals' Initial Brief at 5-6.

[56] *See, e.g.*, IGS Exhibit 1, OCC Consumer's Fact Sheet: *Easy Ways to Save Energy and Money* (concluding that "[a] properly set programmable thermostat can save homeowners $100 to $180 per year if they maintain those settings"); Hearing Tr. Vol. II at 296:18-297:1 (Spellman Cross) (acknowledging that "a smart thermostat has all of the optionality of a programmable thermostat except for ***additional*** options such as demand response and auto-away options . . .") (emphasis added); *see also* Case No. 16-0743-EL-POR, Initial Brief of Interstate Gas Supply, Inc. (Feb. 21, 2017) ("IGS Initial Brief") at 6.

[57] Case No. 14-1297-EL-SSO, Opinion and Order at 95 (Mar. 31, 2016) (emphasis added).

[58] *See* Companies' Initial Brief, Section III.C.3.e. at 81-86.

the Plans, which would effectively unravel the Stipulation and force the Companies to revise their Plans yet again.[59] Nevertheless, OCC and Staff argue in support of the Cost Cap Proposal, insisting that the Companies can achieve their statutory energy requirements within the proposed cap. As set forth below, OCC and Staff are mistaken.

(i) OCC and Staff's reliance on uncertain opt-out rates is mistaken and unreasonable.

Both OCC and Staff argue that, because the Companies assumed that no customers would "opt-out" of the Revised Plans during the Plan Period, the Companies' benchmarks are likely to be inflated, thus causing customers to pay more than they otherwise should.[60] OCC specifically asserts that the Companies failed to incorporate historic opt-out data from 2014 and 2015 when determining the baselines for 2017 and 2018.[61] OCC also argues that the Companies should have forecast future customer opt-out data for 2016, 2017, and 2018.[62] As explained below, these arguments are flawed for three main reasons.

First, OCC's suggestion that the Companies should have "incorporated actual opt-out data from at least 2014 and 2015" in calculating their 2017 and 2018 baselines is invalid.[63] As an initial matter, no customers were eligible to opt-out in 2014. In its brief, OCC improperly conflates opt-outs with the separate concept of "mercantile rider exemptions," arguing:

> [F]rom 2008 to 2014, nonresidential customers could request to opt out of a utility's portfolio plan under R.C. 4928(A)(2)(c) [*sic*]. From 2015 to 2016, nonresidential customers could opt out under section 8 of SB 310 and could also continue to opt out under R.C. 4928(A)(2)(c) [*sic*]. And, beginning January 1, 2017 nonresidential customers can opt out under R.C. 4928.6611 and can continue to opt out under R.C. 4928(A)(2)(c) [*sic*].[64]

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[59] *Id.*
[60] OCC Initial Brief at 9-14; Staff Initial Brief at 7-8.
[61] OCC Initial Brief at 13.
[62] *Id.*
[63] *Id.*
[64] *Id.* at 10.

OCC's reference to Section 4928.66(A)(2)(c) is misplaced. That provision ***does not*** deal with customer opt-outs, but rather with the different "mercantile rider exemption." In short, Section 4928.66(A)(2)(c) allows mercantile customers to be exempt from paying the rider for a specific period of time approved by the Commission ***through a separate filing with the Commission***. Customer opt-outs, on the other hand, did not exist until January 1, 2015, when Section 8 of Senate Bill 310 allowed customers to opt-out of an EDU's EE/PDR portfolio plan if the EDU amended its plan (as the Companies did).[65] Notably, this opt-out election was only valid for the period in which the amended portfolio plan was in effect,[66] which, for the Companies, ran through December 31, 2016.

OCC's confusion is significant. For starters, the scope of customers eligible to opt-out is much narrower than the scope of those eligible for a rider exemption. By definition, mercantile customers are customers with usage greater than 700,000 kWh per year (or customers with a national account involving multiple facilities in one or more states).[67] However, to qualify for the opt-out election, a customer must take service above primary voltage or at least use 45,000,000 kWh in the year prior to the election (and be a registered tax self-assessor).[68] Most significantly, adjustments to the Companies' baselines under a mercantile exemption pursuant to Section 4928.66(A)(2)(c) result in an ***increase*** to the baselines; not a ***decrease*** as with customer opt-outs. As Ms. Mullins explained, "[a]ctual realized mercantile self-directed program savings will be ***added back*** once the actual realized savings are determined."[69] Simply stated, the usage

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[65] Section 8 of Am. Sub S.B. 310 of the 130th General Assembly ("Senate Bill 310").

[66] *Id*.

[67] O.R.C. § 4928.01(A)(19).

[68] O.R.C. § 4928.6610.

[69] Companies' Exhibit 1, Case No. 16-0743-EL-POR, Amended Direct Testimony of Denise J. Mullins, (Dec. 8, 2016) ("Mullins Am. Testimony"), DJM-A1 at 8 (emphasis added).

of mercantile customers (including any Commission-approved mercantile projects), unlike opt-out customers, is fully included in the Companies' baselines—exactly the opposite of what OCC suggests. As such, its reliance on mercantile exemptions under Section 4928.66(A)(2)(c)—which OCC confuses as "opt-outs"—actively undercuts OCC's argument.

OCC is also mistaken that the Companies could have incorporated opt-out data from 2015 in calculating baselines under the Revised Plans. As stated above, opt-outs under Section 8 of Senate Bill 310 were only valid through the end of 2016. While customers can opt-out under Section 4928.6611 of the Ohio Revised Code starting on January 1, 2017, opt-outs from Section 8 do not "carry over."[70] Therefore, customers that elected to previously opt-out of the Companies' amended 2015-2016 portfolio plans must submit new opt-out notices, which, if submitted, cannot become effective prior to January 1, 2017.[71] Because the impact of opt-outs on the Companies' baselines is determined by the population of opt-out customers that exist at the time the Companies' updated benchmark reports are filed for years 2017-2019, the Companies ***cannot*** use opt-out data from 2015 to calculate baseline reductions during the Plan Period.[72] Indeed, it would have been improper to factor opt-out data that is null and void into rolling three year averages. Critically, however, the Companies recalculate the benchmarks on an annual basis to reflect the actual usage that occurred during the baseline years, which includes appropriate adjustments for customers that are ***actually*** opted out at that time.[73]

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[70] Moreover, and contrary to OCC's assertion, Section 4928.6610 of the Ohio Revised Code extends the right to opt-out of subsequent EE/PDR portfolio plans starting on January 1, 2017 to a small percentage of non-residential customers. OCC's implication that all non-residential customers may elect to opt-out in 2017 is incorrect.

[71] Mullins Am. Testimony, DJM-A1 at 6.

[72] *See* O.A.C. § 4901:1-39-05 (C)(1)(a).

[73] Mullins Am. Testimony, DJM-A1 at 7-8. OCC makes an additional erroneous assumption in its brief. OCC incorrectly asserts that "customers pay" the Companies' proposed budgets in the Revised Plans. *See* OCC Initial Brief at 9 ("FirstEnergy created a program budget—which customers pay . . ."). That is wrong. Customers do not pay the amounts that are budgeted in the Revised Plans. As Ms. Mullins clarified, the baselines included in the

Second, OCC is also mistaken in asserting that the Companies should have forecast "opt-out data for 2016, 2017, and 2018."[74] According to OCC, "[n]othing prevented [the Companies] from using historical opt-out data to estimate future customer opt outs."[75] However, as just explained, any and all previous opt-outs expired, making the "historical data" obsolete and unreliable for use in calculating future benchmarks under the Revised Plans. Accordingly, it would be imprudent for the Companies to speculate on the level of customers that may opt out of the Revised Plans when calculating their benchmarks.

As discussed, all customers (even those who previously elected to opt out) must make a new election to opt out on or after January 1, 2017.[76] The Companies, however, determined the baselines for their Proposed Plans nearly seven months prior, in April 2016. The Revised Plans were also filed prior to January 1, 2017 (on December 9, 2016). As Companies' Witness Mullins testified, because the Companies could not forecast with any certainty the customers that would elect to opt out starting in 2017, the Companies could not adjust the EE baselines for customer opt-out usage.[77] Indeed, AEP likewise ***did not*** incorporate projected opt-out usage in calculating its benchmark, which the Commission recently approved.[78] There is simply no

(continued…)

Companies' Revised Plans will be adjusted to reflect actual results, including actual opt-out results, as that data becomes available and known. *See* Mullins Am. Testimony, DJM-A1 at 7-8. Customers thus pay for actual costs incurred through Rider DSE2—costs that are audited by Staff. *See* Hearing Tr. Vol. III at 460 (Donlon Cross).

[74] OCC Initial Brief at 13-14.

[75] *Id*.

[76] Mullins Am. Testimony, DJM-A1 at 6.

[77] *Id*.

[78] *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, Direct Testimony of Jon F. Williams, Ex. JFW-1, Vol. 1 at 6 (June 15, 2016) (The plan did not assume any customer would elect to opt out beginning in 2017. "***That information is not known and the impact of any opt outs to performance is difficult to predict***") (emphasis added) ("Case No. 16-0574-EL-POR").

evidence that any EDU in Ohio speculates on potential opt-outs when designing their respective plans to meet their benchmarks.

Even if the Companies could speculate on future opt-outs based on stale data, doing so would not make sense with respect to the Revised Plans. As Companies' Witness Miller explained, the Companies suspended most of their EE/PDR programs under their previous portfolio plan pursuant to Senate Bill 310.[79] Customers, therefore, did not have the same robust opportunities they now have through the implementation of the Revised Plans. The proposed programs and measures in the Revised Plans were also considerably enhanced through several modifications made in the Stipulation, many of which provide attractive incentives for customer projects or remove barriers to participation in customer programs.[80] These enhancements, as well as many more included in the Revised Plans, mean that customers have more opportunities and can enjoy broader benefits than before. As such, the Companies cannot simply assume that customers that elected to opt-out of the previous (and mostly-suspended) plans will forgo the new robust offerings of the Revised Plans by opting-out again.

Third, speculating on unknown opt-out figures and relying on unreliable data from previous opt-outs could have significantly increased the Companies' risk of non-compliance. Indeed, the Companies face substantial daily, cumulative forfeitures if they fail to meet their respective EE and PDR benchmarks.[81] No one knows which customers will opt-out of the Revised Plans, or when such opt-outs will occur. OCC's own witness admitted as much at the

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[79] Hearing Tr. Vol. V at 632:20-633:7 (Miller Rebuttal Re-Direct); *see also In re the Application of [the Companies'] for Approval of Their [EE & PDR] Reduction Program Plans for 2013 through 2015*, Case Nos. 12-2190-EL-POR, et al., Opinion and Order (Nov. 20, 2014) ("Case No. 12-2190-EL-POR") at 3.

[80] *See e.g.*, Stipulation Section V.M ("Expansion and Promotion of Combined Heat and Power Projects"); *id.* at Section V.L. ("Elimination Of The $500,000 Per Customer Per Year Rebate Cap in Mercantile Customer Program"); *id.* at Section V.N. ("Flexibility in The Audits & Education Sub-Program"); *id.* at Section V.O. ("Assistance in EE/PDR Education Efforts").

[81] O.R.C. § 4928.66(C).

hearing.[82] Given this uncertainty, it would be imprudent and unreasonable for the Companies to speculate as to when and which customers will actually opt-out of the Revised Plans. If the Companies did as OCC suggests and the opt-out forecast proved to be too high, the benchmarks would be understated, as would the corresponding budget. As Companies' Witness Miller explained, the Companies would then have to seek Commission approval for a budget increase through a separate proceeding.[83] That approach is not viable.

For these reasons, the Commission should reject OCC's (and Staff's) arguments and hold that the Companies' practice of not speculating on customer opt-outs when determining their initial benchmarks in the Revised Plans—an approach that is in line with the other Ohio EDUs—is reasonable and appropriate.

(ii) Historical EE results are not reliable indicators of future performance.

OCC and Staff each assert that the Companies' historical energy efficiency results demonstrate that the Companies can achieve their EE/PDR benchmarks during the Plan Period within Staff's Cost Cap Proposal.[84] Specifically, OCC claims that "[h]istorical energy efficiency results can be used to assess the potential cost of compliance for 2017-2019."[85] Staff argues similarly, stating that it "strongly believes," based on the Companies' history of compliance, that the Companies are capable of meeting or exceeding their statutory benchmarks within its proposal.[86] OCC relies on the Companies' data from 2013 to 2015,[87] while Staff relies on

[82] Hearing Tr. Vol. II at 186 (Spellman Cross).
[83] Companies' Exhibit 17, Case No. 16-0743-EL-POR, Rebuttal Testimony of Edward C. Miller (Jan. 27, 2017) ("Miller Rebuttal Testimony") at 4.
[84] OCC Initial Brief at 14-15; Staff Initial Brief at 7-8.
[85] OCC Initial Brief at 15.
[86] Staff Initial Brief at 7.
[87] OCC Initial Brief at 15.

similar data from 2012 to 2014.[88] Both OCC and Staff are wrong.

First, both OCC and Staff ignore the increased costs of compliance since 2012, which undermines their reliance on historical data. Some costs have increased due to inflation, which Staff and OCC have not considered.[89] Other costs have increased because standards have changed, impacting the estimated savings for many measures.[90] As an example, the Energy Independence and Security Act ("EISA") increased savings baselines and reduced estimated savings for lighting.[91] Although EISA went into effect in 2012, there was a transition period that ended in 2015, which continued the larger savings estimates after the effective date through the transition period.[92] Going forward, however, the savings estimates for lighting are approximately 40 percent less than what they were during 2012 through 2015, thus requiring more participation (and more costs) during the Plan Period simply to achieve the same levels of savings as in the past.[93]

In addition to inflation and evolving standards, efficient technologies have also evolved and many have become more expensive, requiring an increase in the incentive levels offered to customers.[94] Companies' Witness Miller provided an example that pertained to residential lighting, which the Companies summarized in their Initial Brief.[95] In short, due to increased technology costs, lighting incentives in the Revised Plans (for LED bulbs) are 200% higher than they were under the Companies' previous EE/PDR portfolio plans (for CFL bulbs).[96]

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[88] Staff Initial Brief at 7.
[89] Miller Rebuttal Testimony at 6.
[90] Miller Rebuttal Testimony at 6; Hearing Tr. Vol. V at 630-631 (Miller Rebuttal Re-Direct).
[91] *Id.*
[92] *Id.*
[93] *Id.*
[94] Miller Rebuttal Testimony at 6.
[95] *See* Companies' Initial Brief, Section III.C.3.e. at 83-84; Miller Rebuttal Testimony at 6.
[96] Companies' Initial Brief, Section III.C.3.e. at 83-84; Miller Rebuttal Testimony at 6.

Finally, over time, the Companies have had to increase their reliance on more expensive measures to meet their statutory targets, as many of the lower-cost measures—or "low hanging fruit"—have been achieved through prior energy efficiency plans.[97] By way of example, the Companies achieved approximately 50% of their actual savings between 2012 and 2015 through lighting measures, whereas the Revised Plans project only 30% of the total savings achieved will be from lighting.[98] In this instance, lighting is the "low hanging fruit," which the Companies can no longer count on as they previously could. This means the Companies have to find 20% of their total savings from other measures, many of which are more expensive on a cost per kWh basis.

Second, the costs of the Revised Plans are higher than the Companies' historical costs largely because the Companies reactivated the programs that were suspended in their previous EE/PDR portfolio plans.[99] As discussed, Senate Bill 310 (passed in September 2014) gave EDUs in Ohio the option to amend their existing EE/PDR portfolio plans.[100] The Companies did just that and suspended: (i) the Residential Appliance Turn-In Program; (ii) the Residential EE Products Program; (iii) the Residential Home Performance Program; (iv) the Small Commercial and Industrial ("SCI") EE Equipment Program; (v) the SCI EE Building Program; (vi) the Large Commercial and Industrial ("LCI") Demand Reduction Program; (vii) the LCI EE Equipment Program; and (viii) the EE Building Program.[101] The amended plans were left with only the Low Income Program, the Mercantile Customer Program, the T&D program, the Residential Direct Load Control Program, the Smart Grid Modernization Initiative, and the newly-added Customer

[97] Companies' Initial Brief, Section III.C.3.e. at 83-84; Miller Rebuttal Testimony at 6-7.

[98] Companies' Initial Brief, Section III.C.3.e. at 83-84; Miller Rebuttal Testimony at 6.

[99] The Companies agreed to reinstate all suspended programs in their ESP IV Case. *See* Case No. 14-1297-EL-SSO, Third Stipulation and Recommendation (Dec. 1, 2015) at 11.

[100] Senate Bill 310, Section 6(A).

[101] Case No. 12-2190-EL-POR, Opinion and Order at 3 (Nov. 20, 2014).

Action Program ("CAP").[102] Because the vast majority of programs were not operational during a large portion of OCC and Staff's historical review period, the costs during that period were, of course, significantly lower than what they otherwise would have been had those programs not been suspended. OCC and Staff, however, ignore this salient point.[103]

Third, Staff and OCC's attempt to legitimize their arguments by using misleading cost and savings data presented in the Companies' annual status reports merely confirms the above arguments. Staff notes that "when the Companies suspended the vast majority of their energy efficiency programs in 2015 and only spent [$27.3 million] they still achieved 657,632 MWh in savings."[104] OCC similarly notes that, from 2013 through 2015, the Companies achieved first-year energy savings at a cost of 6.3 cents per kWh.[105] But, for all the reasons just explained, neither of these facts should be surprising. The vast majority of the Companies' programs were suspended during 2015 and 2016, and the costs during that time frame are accordingly understated, resulting in a downward skewing of the results. Moreover, many of the programs that were operational during that period were very low cost, such as the T&D, CAP, and Mercantile Customer programs, which further skewed the results downward. Finally, as Mr.

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[102] *Id.*

[103] Staff and OCC also ignore the fact that the Companies anticipate much less of a contribution from very low-cost programs such as CAP and Transmission and Distribution (T&D") projects during the current Plan Period. From 2013 to 2015, a substantial amount of the Companies' actual savings—approximately 10%—came from T&D projects, which, except for negligible administrative costs, had no costs included in the portfolio budget under the Companies' prior EE/PDR plans. *See* Hearing Tr. Vol. V at 632 (Miller Rebuttal Re-Direct). However, under the Revised Plans, T&D projects will only account for approximately 1% of the total savings, thus requiring the 9% differential in EE savings to be replaced with more expensive measures. *Id*. Similarly, the Companies expect much less of a contribution from CAP. As Companies' Witness Miller explained, the Revised Plans are much more robust than their previous plans, with incentives for participation in various programs available to customers. *See* Hearing Tr. Vol. I at 125 (Mullins Re-Direct). Therefore, the Companies anticipate that utility-administered programs in the Revised Plans will capture the vast majority of customer projects, if for no other reason than the customers get paid to participate through the Companies' programs, while receiving no funds if they pursue projects on their own. *Id.*

[104] Staff Initial Brief at 7. Staff references $16 million, but that amount is incorrect. During cross-examination of Companies' Witness Miller, Staff's counsel requested agreement with that amount "subject to check." *See* Hearing Tr. Vol. V at 618 (Miller Rebuttal Cross). Mr. Miller has since checked and does not agree with the amount. The sum of the numbers under Staff's counsel's request is ***$27.3 million***, not $16 million.

[105] OCC Initial Brief at 15.

Miller explained, even though the Companies suspended many of their programs in 2015, the Companies provided a transition period and allowed customer projects that had been pre-approved during 2014 to be completed in 2015. The savings from those projects would thus be reflected in 2015, when the Companies were spending much less on implementing programs.[106]

Thus, OCC and Staff's reliance on outdated and unreliable historical data to predict future performance should be rejected. Neither party offered actual analyses based on current data in support of their positions. The Companies, however, did perform such an analysis. As fully explained in the Companies' Initial Brief, the savings projections included in the Revised Plans are based on a detailed assessment of ***every measure*** included therein.[107] Similarly, costs were established using a bottom-up approach based on actual pricing.[108] The Companies' careful approach to the Revised Plans resulted in a portfolio offering that costs, on average, $0.16 per kWh, which compares very favorably with the Companies' prior plans and industry averages.[109] That cost is reasonable, as even OCC Witness Spellman readily acknowledged.[110]

(iii) PJM revenues will not result in meaningful offsets to Staff's Cost Cap Proposal.

The overall cost cap Staff is proposing in this proceeding would apply against the sum of (i) all program costs and (ii) pre-tax shared savings, minus (iii) any PJM revenues that the Companies receive and credit back to customers that year.[111] Both OCC and Staff contend that the PJM "offset" built into Staff's Cost Cap Proposal will "enhance the Companies' ability to

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[106] Hearing Tr. Vol. V at 633 (Miller Rebuttal Re-Direct).

[107] Companies' Initial Brief, Section III at 17; *id.* Section III.C.3.e. at 84; *see also* Miller Rebuttal Testimony at 5.

[108] Companies' Initial Brief, Section III at 17; *id.* Section III.C.3.e. at 84; *see also* Miller Rebuttal Testimony at 5.

[109] Miller Supp. Testimony at 6-7.

[110] Hearing Tr. Vol. II at 223 (Spellman Cross) ("16 cents in my opinion . . . is a reasonable number and well within the ballpark of other utilities in the region.").

[111] Staff Initial Brief at 5; Donlon Am. Testimony at 3, 7; Hearing Tr. Vol. II at 321:17-323:12 (Donlon Cross).

meet their benchmarks" under the proposal.[112] They are wrong for three principal reasons.

First, PJM base residual auctions are held three years ***prior*** to the actual delivery year of resource commitments, which, as Companies' Witness Miller explained, means that a "majority of PJM revenues resulting from implementation of the Revised Plans will not be realized until the next plan cycle."[113] For example, the first base residual auction during the Plan Period will take place between May 10 and May 16, 2017.[114] That auction, however, is for delivery years 2020/2021 (when resulting revenues would be received), which is well-beyond the Plan Period. Moreover, the results of those auctions, as well as any associated revenues, are uncertain and unknown.[115] Thus, the majority of PJM revenues relating to the Revised Plans would have no impact on the cost cap calculation during the current Plan Period.

Second, any PJM revenues that the Companies may actually realize during the Plan Period from the Companies' previous EE/PDR portfolio plans will be limited.[116] As Companies' Witness Miller explained at the hearing, the Companies scaled-back their program offerings pursuant to Senate Bill 310.[117] As a result, the Companies expect to receive only limited PJM revenues during the Plan Period, estimated by Mr. Miller to be approximately $2 million to $2.5 million per year.[118] These limited revenues hardly allow for a meaningful offset under Staff's Cost Cap Proposal.

Third, as explained in more detail below, Staff's Cost Cap proposal would "force the Companies to make significant revisions to their Revised Plans, thereby limiting the amount of

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[112] Staff Initial Brief at 8; OCC Initial Brief at 16-17.
[113] Miller Rebuttal Testimony at 12; Hearing Tr. Vol. V at 571:16-23 (Miller Rebuttal Cross).
[114] *See* PJM Online Calendar, available at:
http://www.pjm.com/Home/Calendar.aspx?CalendarType=RELIABILITY_PRICING_MODEL_EVENTS.
[115] Miller Rebuttal Testimony at 12.
[116] Hearing Tr. Vol. V at 571:24-572:7 (Miller Rebuttal Cross).
[117] Hearing Tr. Vol. V at 571:24-572:7, 583:8-18 (Miller Rebuttal Cross).
[118] Hearing Tr. Vol. V at 572:2-7 (Miller Rebuttal Cross), 629: 11-22 (Miller Rebuttal Re-Direct).

EE resources eligible to be offered into PJM auctions."[119] This, quite obviously, would lead to less revenues and a decreased PJM offset amount under Staff's Cost Cap Proposal.

Thus, while PJM revenues might provide a small cost cap offset, these revenues do not make Staff's Cost Cap Proposal viable.

(iv) The Revised Plans cannot simply be "adjusted" to comply with Staff's Cost Cap Proposal.

OCC argues that the Companies can achieve their statutory benchmarks under Staff's Cost Cap Proposal by simply eliminating, reducing, and/or scaling-back certain cost-effective programs and/or sub-programs in the Revised Plans.[120] OCC even provides suggestions as to which programs and/or sub-programs should be reduced or eliminated, going as far as including an exhibit to its brief depicting the proposed "cuts" to the Revised Plans.[121] In essence, OCC is asking the Commission to undo the extensive Collaborative and settlement process that led to the design and development of the Revised Plans and to empower OCC as the unilateral decision-maker with respect to the Plans. The Commission should reject that invitation for at least three reasons.

First, the Revised Plans are the culmination of a robust process involving numerous parties with varied interests. The Companies cannot ignore that process and simply "cut" $32 million in program costs from the Revised Plans based ***solely*** on OCC's suggestions.[122] As described in the Companies' Initial Brief, the development process started in December 2015 with meetings with the Collaborative Group, which shared many thoughts and ideas on the

[119] Miller Rebuttal Testimony at 12-13.
[120] OCC Initial Brief at 19-21.
[121] *Id.* 19-21, Exhibit A.
[122] As Companies' Witness Miller testified, $32 million is approximately "[t]he minimum difference in terms of dollars between Staff's proposed cost cap and the currently known funding necessary to pay for program costs, other costs recovered through Rider DSE2, and the opportunity to earn the maximum amount of Commission-approved pre-tax shared savings." Miller Rebuttal Testimony at 13.

programs and measures being considered for inclusion in the EE/PDR portfolio plans.[123] The Companies provided many details to the Collaborative Group regarding the development of their portfolio plans, including draft programs, savings and budget projections, and development of the MPS.[124] Intervenors to this proceeding were also a critical part of the development process. Those many months of discussions and negotiations led to the Stipulation before the Commission.

Much of that process focused on programmatic revisions to the Companies' Proposed Plans.[125] Indeed, among other provisions, the Stipulation incorporated many programmatic changes requested by the Collaborative Group and intervenors (including OCC), such as a reduction in the Residential Behavioral sub-program, prioritization of LED lighting over CFL lamps, an increased 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.[126]

The Companies cannot simply cut or scale-back programs and/or measures in the Revised Plans at the magnitude required under Staff's Cost Cap Proposal without the consideration and input from members of the Collaborative Group and intervenors in this proceeding. For example, unilaterally eliminating the Companies' Smart Thermostat sub-program under OCC's "Scenario 3"[127] might well cause IGS and certain environmental advocates (who are proponents of smart thermostats), as well as other Signatory Parties, to reconsider their support for the

[123] Companies' Initial Brief, Section III.A.3.b. at 25-28.
[124] *Id.* at 26.
[125] *Id.* at 27; *see also* Miller Supp. Testimony at 9-13.
[126] Companies' Initial Brief, Section III.A.3.b. at 27; *see also* Miller Supp. Testimony at 9-13.
[127] OCC Initial Brief at Exhibit A.

carefully crafted Stipulation.[128] The same is true for OCC's other proposed cuts. Put simply, the Stipulation and Revised Plans reflect a balancing of interests among various parties. The Commission should not disrupt that balance by adopting arbitrary programmatic changes that no other party supports.[129]

Second, the Companies, unlike OCC, designed and developed the Revised Plans "using a bottom-up approach" based on "the most recent ***actual pricing*** for programs and escalated them for inflation, if necessary."[130] 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," including Pennsylvania, Maryland, and West Virginia.[131] That careful and methodical approach in designing the Revised Plans resulted in an overall portfolio of cost-effective EE/PDR offerings. Neither Staff nor OCC engaged in any such process.[132]

Third, OCC's suggested adjustments are inherently flawed and unsupported. OCC argues that the Companies could reduce the cost of their programs through the use of "competitive bidding."[133] According to OCC, "competitive bidding 'is the best way to achieve maximum savings for customers at the lowest cost.'"[134] OCC, however, assumes that program costs are not based on competitive bidding and presents ***no evidence*** in support of its position

[128] *See, e.g.*, IGS Initial Brief at 4-7.

[129] OCC's suggested "adjustments" are also nonsensical. While OCC purports to be concerned about the EE costs to ***residential customers***, its proposed adjustments mostly affect non-residential budgets. For instance, OCC's "Scenario 1" proposes no cuts at all to the budgets for the residential sector. *See* OCC Initial Brief at Exhibit A. Only 19% of OCC's proposed cuts in "Scenario 2" affect the residential sector, while 30% do so in "Scenario 3." *Id.*

[130] Companies' Initial Brief, Section III.C.3.e. at 84; *see also* Miller Rebuttal Testimony at 5 (emphasis added).

[131] Companies' Initial Brief, Section III.C.3.e. at 84; *see also* Miller Rebuttal Testimony at 5, 20-21.

[132] "Exhibit A" to OCC's initial brief fails to demonstrate what impact OCC's proposed changes would have on the Revised Plans' TRC scores or to explain the nature of the modeling (if any) OCC conducted to support its recommendations. Indeed, Exhibit A is nothing more than belated expert testimony OCC was required to file in advance of the hearing. *See* O.A.C. § 4901-1-29(A)(1).

[133] OCC Initial Brief at 20-21.

[134] *Id.* at 20 (quoting OCC Witness Spellman).

(which likely explains why OCC ultimately hedges in concluding that competitive bidding "***could*** reduce the costs").[135] Indeed, OCC cites no studies or analyses demonstrating that competitive bidding would have had any impact on the costs in the Revised Plans. In fact, at the hearing, OCC Witness Spellman admitted that he had not "done any independent research on that."[136]

OCC's proposed adjustments to the HVAC sub-program are similarly flawed.[137] According to OCC, the Companies should "eliminate the substantial [incremental] increase in costs for its residential HVAC [sub-]program," which "come at an excessive cost of $2.48 per kWh."[138] That assertion is misleading. As OCC's own exhibit demonstrates, the overall residential HVAC program is budgeted and projected at a much lower cost of $0.41 per kWh.[139] Notably, $0.41 per kWh is significantly less than the cost of AEP's recently-approved residential HVAC program, which is made up of measures that range from $0.57 per kWh (on the low-end) to $2.49 per kWh (on the high-end), with an un-weighted average of $0.91 per kWh.[140] OCC provides no explanation as to why it believes the Companies' customers should not have equal access to common EE programs.[141]

In sum, the Commission should reject OCC's request to discard the robust process that resulted in the Revised Plans and prohibit it from cherry picking the various programs and sub-programs it unilaterally deems suitable for inclusion in the Companies' portfolio plans.[142]

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[135] *Id.* at 21 (emphasis added).
[136] Hearing Tr. Vol. II at 306:19-308:4 (Spellman Cross).
[137] OCC Initial Brief at 20.
[138] *Id.* at 20-21.
[139] OCC Initial Brief at Exhibit A.
[140] Case No. 16-0574-EL-POR, Direct Testimony of Jon F. Williams, Ex. JFW-1, Vol. 1 at 108-109 (June 15, 2016).
[141] *See* O.A.C. § 4901:1-39-04(A); *id.* at § 4901:1-39-04(C)(3).
[142] OCC's related request that the Commission force the Companies "to reduce the scope of [their] programs" to achieve their statutory benchmarks (*see* OCC Initial Brief at 19) should also be rejected for the reasons

(v) The Companies are entitled to the opportunity to earn up to $10 million in after-tax shared savings.

In its opening brief, OCC argues that the Companies "wrongly assume[] that [they are] entitled to shared savings," while taking the mistaken position that "[c]ustomers do not benefit from paying shared savings to [the Companies]."[143] OCC also claims that certain jurisdictions outside of Ohio do not permit shared savings, urging that the Commission reverse itself and place an outright ban on any shared savings for the Companies. OCC is wrong on all counts.

First, the Companies have never argued that they are "entitled" to shared savings. In fact, as Companies' Witness Miller testified, "the Companies understand they are not guaranteed any amount of shared savings in any given year."[144] However, as Mr. Miller explained, "the Commission has ruled that the Companies are at least entitled to the ***opportunity to earn*** up to $10 million per year in after tax shared savings during the Plan Period."[145] OCC's assertion that the Commission "has made no such ruling" is incorrect.[146]

The Commission could not have been more clear that the Companies are eligible to receive shared savings upon exceeding their statutory mandates up to the established cap of $10 million in after-tax dollars.[147] The Commission actually approved the increase of that cap to $25 million (after-tax) last March, holding that doing so was "in the public interest."[148] The Commission, however, stayed the increase until the Companies are no longer receiving revenues

(continued…)

set forth in Section II.B.3.a, *infra* at p. 42-45.

[143] OCC Initial Brief at 17-18.

[144] Miller Rebuttal Testimony at 10.

[145] *Id.*

[146] OCC Initial Brief at 18.

[147] Case No. 12-2190-EL-POR, Opinion and Order at 16 (Mar. 20, 2013); Case No. 14-1297-EL-SSO, Opinion and Order at 95 (Mar. 31, 2016); *id.* Fifth Entry on Rehearing at 147 (Oct. 12, 2016).

[148] Case No. 14-1297-EL-SSO, Opinion and Order at 95 (Mar. 31, 2016).

under Rider DMR.[149] The Commission's stay ***did not*** impact the $10 million cap, and thus the Companies are still entitled to the opportunity to earn shared savings up to that amount.

Second, and contrary to OCC's assertion, the Companies' customers certainly do benefit from shared savings. OCC ignores the well-established policy and reasoning behind shared savings, which the Companies described in their Initial Brief. Shared savings opportunities encourage utilities, through financial incentives, to strive to exceed their statutorily mandated EE goals and maximize the net benefits created for customers.[150] In short, shared savings incentivize a utility to create cost-effective savings opportunities ***that would not otherwise exist***—opportunities that primarily benefit customers. Indeed, as Companies' Witness Demiray testified, the Shared Savings Mechanism in the Revised Plans is specifically designed so 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."[151] Shared savings thus create a win-win situation for all involved.[152]

Third, OCC's arguments regarding shared savings in other jurisdictions are of no moment. OCC does not address or discuss a single jurisdiction that has disallowed shared savings, let alone explain why that particular state's practices and policies on shared savings should be adopted by the Commission.[153] More to the point, it cannot be disputed that the

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

[150] Companies' Initial Brief, Section III.B.2.c. at 42-43; *see also* Companies' Exhibit 6, Case No. 16-0743-EL-POR, Amended Direct Testimony of Eren G. Demiray at 5 (Dec. 8, 2016) ("Demiray Am. Testimony"); Hearing Tr. Vol. I at 159:14-24 (Demiray Cross).

[151] Companies' Initial Brief, Section III.B.2.c. at 43-44; Companies' Exhibit 16, Case No. 16-0743-EL-POR, Rebuttal Testimony of Eren G. Demiray (Jan. 27, 2017) ("Demiray Rebuttal Testimony") at 3.

[152] Companies' Initial Brief, Section III.B.2.c. at 42-43.

[153] OCC Initial Brief at 18 (merely concluding that 16 jurisdictions do not have shared savings mechanisms).

Commission recognizes the benefits of shared savings to Ohio's utility customers.[154] Therefore, the fact other jurisdictions may provide alternative incentives to utilities (or even none at all) is irrelevant.

Put simply, OCC's dissatisfaction with the concept of shared savings is a moot issue. The Commission has spoken (repeatedly) on the issue and has decided (appropriately) that a reasonable shared savings mechanism such as the one proposed in the Revised Plans benefits Ohio utility customers.

(c) The Companies' Shared Savings Mechanism is reasonable and substantially similar to incentive mechanisms previously approved by the Commission.

The Companies described in detail the proposed Shared Savings Mechanism in their Initial Brief, explaining that the mechanism is the same mechanism that the Commission previously approved and adopted in the Companies' prior EE/PDR case, with the addition of some changes approved by the Commission in the Companies' ESP IV case and as agreed to in the Stipulation.[155] Tellingly, neither OCC nor Staff take issue in their briefs with most components of the Shared Savings Mechanism. For instance, neither party argues against the proposed "tiered" structure of the Shared Savings Mechanism, which is the same structure approved by the Commission in the Companies' previous EE/PDR case.[156] Nor do they argue against the methodology used to calculate Adjusted Net Benefits, including the use of the UCT

[154] Case No. 14-1297-EL-SSO, Opinion and Order at 95 (Mar. 31, 2016) (holding that allowing shared savings for the Companies "***is in the public interest*** because it encourages the Companies to seek to provide to their customers all available cost-effective energy efficiency opportunities") (emphasis added); *see also* Case No. 12-2190-EL-POR, Opinion and Order at 16 (Mar. 20, 2013); Case No. 16-0574-EL-POR, Opinion and Order (Jan. 18, 2017) (approving AEP's shared savings mechanism).

[155] Companies' Initial Brief, Section III.B.2.c. at 42-52.

[156] Companies' Initial Brief, Section III.B.2.c. at 43-44; *see also* 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).

(which the Commission has already endorsed).[157] Instead, OCC introduces three arguments against the Shared Savings Mechanism, all of which fail to persuade.

First, OCC argues that each of the three Companies should have its own annual shared savings cap because a single cap across all three Companies could result in one Company paying excessive amounts of shared savings.[158] Setting aside the fact that the Commission created the single shared savings cap across the three Companies,[159] OCC's argument should still be rejected, as OCC mischaracterizes the application of the Shared Savings Mechanism and how the shared savings cap operates.

The crux of OCC's argument is that a single cap could "result in one Company's customers paying more shared savings as a result of one of the *other* Company's energy efficiency program performance."[160] However, as Companies' Witness Demiray explained, "the application of the shared savings cap can only lower (not increase) a Company's incentive."[161] Indeed, in practice, the shared savings cap "limits the level at which the Companies collect shared savings and produces a lower effective incentive rate" for the Companies.[162] For example, from 2013-2015, the Companies triggered shared savings at the 13% incentive tier, with uncapped incentive levels as follows:[163]

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[157] Companies' Initial Brief, Section III.B.2.c. at 44-45; *see also* Stipulation, Ex. B, Section 7.1 ("Provide and describe tariffs and a cost recovery mechanism") at 105-107.

[158] OCC Initial Brief at 28-31.

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

[160] OCC Initial Brief at 29-30 (emphasis in original).

[161] Demiray Rebuttal Testimony at 6-7.

[162] *Id.*

[163] *Id.* at 6.

Portfolio Adjusted Net Benefits			
	2013	2014	2015
OE	$69,820,038	$85,580,411	$49,980,360
CE	$48,025,109	$67,906,548	$34,415,580
TE	$23,991,420	$35,316,290	$29,400,312
Total	$141,836,567	$188,803,249	$113,796,252

After-tax Shared Savings Incentive, Uncapped			
	2013	2014	2015
OE	$9,076,605	$11,125,453	$6,497,447
CE	$6,243,264	$8,827,851	$4,474,025
TE	$3,118,885	$4,591,118	$3,822,041
Total	$18,438,754	$24,544,422	$14,793,513

However, as Mr. Demiray demonstrates, in applying the $10 million (after-tax) cap, the cap "was allocated and spread across the Companies ***in proportion*** to the uncapped shared savings incentive amounts earned by each Company:"[164]

After-tax Shared Savings Incentive, Capped			
	2013	2014	2015
OE	$4,922,570	$4,532,783	$4,392,092
CE	$3,385,947	$3,596,683	$3,024,315
TE	$1,691,484	$1,870,534	$2,583,593
Total	$10,000,000	$10,000,000	$10,000,000

Thus, as shown on Mr. Demiray's table, the single cap across the three Companies "effectuated a limit on the collection of shared savings incentives."[165] Rather than receiving the 13% incentive, the Companies received a ***much lower*** effective incentive rate between 5.3% and 8.8%:[166]

Effective Incentive Rate			
	2013	2014	2015
Total Adj. Net Benefits	$141,836,567	$188,803,249	$113,796,252
Capped Incentive	$10,000,000	$10,000,000	$10,000,000
Effective Incentive Rate	7.1%	5.3%	8.8%

Accordingly, OCC's contention that a single cap is "unfair to each Company's customers" is wrong.[167]

[164] *Id.* at 7.
[165] *Id.*
[166] *Id.*
[167] OCC Initial Brief at 29.

Second, OCC contends that the Companies should not be allowed to include savings from their Energy Special Improvement District ("ESID") or Mercantile Customer Programs in their shared savings calculations.[168] OCC asserts that the Companies "intend to charge customers higher shared savings on account of savings from ESID and Mercantile Customer programs," but that is not true.[169] OCC's assertion ignores the evidence in the record and past Commission-approved practices among the Companies and its peer utilities in the State.

As approved in the Companies' previous EE/PDR portfolio plans,[170] and consistent with AEP's recently-approved plan,[171] the savings of all programs other than CAP will contribute towards the Companies' achieved annual energy savings used in determination of a shared savings trigger and the resulting incentive tier. However, as Companies' Witness Demiray explained, the Companies ***do not*** include ESID or historic Mercantile Customer Programs in their calculations of Adjusted Net Benefits, which is how the Companies' portion of earned shared savings is determined.[172]

The Companies explained as much in their Initial Brief, noting that 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 CAP, the historic Mercantile Customer Program, the ESID program, the Companies' T&D Upgrades Program, projects that receive any funding from the Universal Service Fund (under Section 4928.51 of the

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[168] OCC Initial Brief at 31-33.

[169] *Id.* at 32.

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

[171] Case No. 16-0574-EL-POR at Opinion and Order (Jan. 18, 2017) (approving AEP's shared savings mechanism).

[172] Hearing Tr. Vol. I at 162 (Demiray Cross).; *see also* Stipulation, Ex. B, Section 7.1 ("Provide and describe tariffs and a cost recovery mechanism") at 105-107.

Revised Code), and any programs that are not determined to be cost-effective under the UCT.[173] OCC's contention to the contrary is simply wrong.

Third, OCC argues that the Companies' should only be eligible to receive shared savings upon exceeding the budgeted savings in the Revised Plans, not upon exceeding their statutory mandates.[174] OCC is essentially asking the Commission to change its prior holdings on shared savings, which permit the "triggering" of shared savings when an EDU exceeds both its annual and cumulative energy savings targets as set forth in Section 4928.66(A)(1)(a) in any given year.[175] OCC asks too much.

Indeed, the Commission has expressly held that "shared savings are the result of the Companies exceeding the statutory mandates for energy efficiency."[176] In fact, the Commission recently approved AEP's shared savings mechanism, which likewise triggers when AEP "exceeds its EE/PDR benchmarks."[177] Moreover, as discussed below, the Commission routinely approves budgeted savings in EE/PDR portfolio plans that exceed statutory mandates ("cushions"), though not once has the Commission concluded that an EDU is only entitled to shared savings upon exceeding the budgeted (as opposed to statutory) amounts. For instance, AEP's approved plan for 2017-2020 budgeted for savings at 24% above its statutory mandate, though its trigger for shared savings remained at the statutory benchmark.[178] OCC provides no

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173 Companies' Initial Brief, Section III.B.2.c. at 44.

174 OCC Initial Brief at 33-34.

175 Case No. 12-2190-EL-POR, Opinion and Order at 16 (Mar. 20, 2013); *In the Matter of the Application of Columbus Southern Power Company for Approval of its Program Portfolio Plan and Request for Expedited Consideration*, Case Nos. 11-5568-EL-POR et al., Opinion and Order (Mar. 21, 2012) ("Case No. 11-5568-EL-POR") at 8.

176 Case No. 14-1297-EL-SSO, Opinion and Order at 95 (Mar. 31, 2016).

177 Case No. 16-0574-EL-POR, Direct Testimony of Jon F. Williams at 19 (June 15 2016); *see also id.* at Exhibit JFW-1 (Volume 1), Page 10 of 180, Table 3; Case No. 16-0574-EL-POR, Opinion and Order (Jan. 18, 2017) (approving AEP's shared savings mechanism); Demiray Rebuttal Testimony at 7-8.

178 Case No. 16-0574-EL-POR, Direct Testimony of Jon F. Williams (June 15, 2016) at Exhibit JFW-1 (Volume 1) Tables 1 and 3 (1,622,500 MWh cushion for 1,309,600 MWh mandate).

just reason why the Commission should now treat the Companies differently.

In sum, the Shared Savings Mechanism in the Revised Plans balances the interests of all parties and represents a reasonable approach. The mechanism incents the Companies to strive to minimize costs and maximize customer benefits through the delivery of cost-effective EE programs. The Shared Savings Mechanism is also materially consistent with AEP's recently-approved mechanism, as well as with the mechanism approved by the Commission for the Companies' previous EE/PDR portfolio plans. The Commission should thus approve the Shared Savings Mechanism.

(d) The Amended Trigger is reasonable and in the best interests of the Companies' customers.

As mentioned, the Shared Savings Mechanism will typically be "triggered" only if a Company exceeds both its annual and cumulative energy savings targets as set forth in Section 4928.66(A)(1)(a) in any given year.[179] However, in recognition of the significant procedural delays in the implementation of the Companies' EE/PDR portfolio plans, 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.[180] OCC and Staff, however, contend that this Amended Trigger will not benefit customers or the public interest. In support, OCC and Staff argue that the Companies should not be permitted to earn the highest possible level of shared savings before exceeding their respective statutory targets for energy efficiency savings.[181] OCC also argues that the Companies "contributed" to the delays in this proceeding, as well as that the Commission was somehow prohibited from holding the hearing in this case until January

[179] Companies' Initial Brief, Section III.B.2.c.i. at 43; *see also* Stipulation, Ex. B, Section 7.1 ("Provide and describe tariffs and a cost recovery mechanism") at 105-106.
[180] Stipulation at 8-9.
[181] OCC Initial Brief at 24-25; Staff Initial Brief at 11-14.

2017.[182] Lastly, OCC asserts that the Companies will have "ample opportunity to achieve [their] statutorily mandated energy savings in 2017" because some programs under the Revised Plans are already active.[183] These arguments are unavailing and should be rejected for five main reasons.

First, in discussing the Amended Trigger in their Initial Brief, the Companies specifically explained how it will benefit their customers.[184] Specifically, the Amended Trigger is beneficial to the Companies' customers and is in the public interest because, without it, the Companies will not be incentivized to try to exceed their benchmarks through the creation of ***new*** energy savings for their customers. New energy savings will avoid or delay the need for other utility investment, which results in lower costs to customers and leads to less environmental emissions (also benefiting customers and the public). Moreover, the creation of new savings will allow the Companies to defer the use of their banked savings "to a period when the cost of statutory compliance will be greater."[185]

Second, the Amended Trigger is a reasonable response to the procedural delays, which have prejudiced the Companies' ability to earn any shared savings in 2017. As explained in the Companies' Initial Brief, the uncertainty with respect to the Revised Plans means that the Companies are unable to finalize agreements with all of their program vendors.[186] Moreover, even after the Commission approves the Revised Plans, there is typically a three-month "ramp up" period before the launch of many of the programs.[187] This means that "the Companies'

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[182] OCC Initial Brief at 25-27.

[183] *Id.* at 27.

[184] Companies' Initial Brief, Section III.B.2.c.ii. at 47-52.

[185] Miller Supp. Testimony at 20; *see also* Miller Rebuttal Testimony at 9; Companies' Initial Brief, Section III.B.2.c.ii. at 51-52.

[186] Companies' Initial Brief, Section III.B.2.c.ii.2. at 49-51; *see also* Miller Supp. Testimony at 18.

[187] Companies' Initial Brief, Section III.B.2.c.ii.2. at 50; *see also* Miller Supp. Testimony at 18.

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."[188] In short, even assuming an order is issued by the end of March (which is not guaranteed) and there is no "ramp up" period (which is highly unlikely), the Companies would only have nine months to achieve twelve months' worth of EE savings.

Third, OCC's assertion that the Companies somehow "contributed to the postponements of the hearing in this case" is mistaken.[189] As set forth in detail in the Companies' Initial Brief, the delay in this proceeding has not been at the hands of the Companies.[190] Staff repeatedly moved to continue the procedural schedule in this case, and Staff's direct testimony proposing an overall cost cap was filed just one week before the hearing was scheduled.[191] Contrary to OCC's contention, the Companies' ***did not*** agree to any of Staff's continuance requests—they merely decided to not oppose.[192] But that is simply because EDUs do not typically oppose Staff's motions on procedural issues such as scheduling. OCC's argument that the Companies themselves filed a motion to continue is also flawed. That was a joint and unopposed motion, which every party in the case (except OCC and IEU) joined in light of pending settlement discussions.[193]

Fourth, and contrary to OCC's assertion, Senate Bill 310 did not limit the Commission's authority to manage and hear EE/PDR cases prior to January 1, 2017. Indeed, the Commission has already held that ***uncodified*** Section 7(B) of Senate Bill 310 does not prevent the

[188] Companies' Initial Brief, Section III.B.2.c.ii.2. at 50; *see also* Miller Supp. Testimony at 18-19.

[189] OCC Initial Brief at 25-26.

[190] Companies' Initial Brief, Section III.B.2.c.ii.1. at 47-49.

[191] *Id.* at 48.

[192] Case No. 16-0743-EL-POR, Staff's Motion to Continuance and Request for Expedited Treatment at 1 (June 27, 2016) ("Counsel has consulted with all the parties and they do not object to this motion.").

[193] Case No. 16-0743-EL-POR, Unopposed Joint Motion to Continue Procedural Schedule and Vacate Hearing Date (Nov. 15, 2016). While OCC and IEU did not join the motion, neither party opposed.

Commission from managing its EE/PDR docket prior to that date, including by holding evidentiary hearings. In applying for application waivers for their respective EE/PDR portfolio plans, both Duke and DP&L made the same faulty argument OCC presents here, asserting that "Section 7(B) of S.B. 310 prohibits the Commission from taking any action with regard to any portfolio plan or application regarding a portfolio plan prior to January 1, 2017."[194] The Commission unequivocally rejected that argument, holding: "We disagree with Duke and DP&L's insinuation that [Senate Bill 310] prohibits initiation of Commission proceedings regarding 2017 PORs before January 1, 2017."[195] The Commission ordered that Duke, DP&L, and AEP each submit their respective portfolio plans by June 15, 2016.[196] The Commission then scheduled those cases for hearing, each set ***prior*** to January 1, 2017.[197]

OCC's argument regarding Senate Bill 310 is also belied by the record in this proceeding. The Companies filed their original Proposed Plans in April 2016. OCC did not object to that filing as premature. The Attorney Examiner subsequently set the matter for hearing on July 25, 2016.[198] Again, there was no objection from OCC. Nor did OCC object to the various other scheduling orders that the Attorney Examiner entered, which set the hearing in this case for October 11, 2016,[199] November 21, 2016,[200] and December 12, 2016[201]—all of which would

[194] Case No. 16-0574-EL-POR, Entry at 2 (Apr. 7, 2016).
[195] *Id.* at 4.
[196] *Id.*
[197] AEP's hearing was originally scheduled for October 11, 2016, eventually continued to December 16, 2016. *See* Case No. 16-0574-EL-POR, Entry at 1 (Sep. 30, 2016); *id.* Entry at 1 (Nov. 25, 2016). Duke's hearing was originally scheduled for November 28, 2016. *See In the Matter of the Application of [Duke] For Approval of Its [EE & PDR] Program Portfolio Plans*, Case No. 16-576-EL-POR, Entry (Oct. 26, 2016) ("Case No. 16-576-EL-POR") at 1. DP&L's hearing was originally scheduled for December 1, 2016. *See In the Matter of the Application of [DP&L] for Approval of Its [EE] Portfolio Plan,* Case Nos. 16-649-EL-POR, et al., Entry (Oct. 26, 2016) ("Case No. 16-649-EL-POR") at 1.
[198] Case No. 16-0743-EL-POR, Entry at 3 (May 23, 2016).
[199] *Id.* at Entry (June 28, 2016).
[200] *Id.* at Entry (Oct. 26, 2016).
[201] *Id.* at Entry (Dec. 9, 2016); *Id.* at Entry (Dec. 14, 2016).

have occurred ***prior*** to January 1, 2017. Indeed, as discussed above, Staff itself requested some of these dates, meaning Staff also necessarily rejects OCC's position.

Fifth, the fact a limited number of program offerings under the Revised Plans are already available does not mean the Companies will achieve their 2017 benchmarks without having to use banked savings. Even OCC recognizes that the Companies' current offerings are limited, pointing only to four sub-programs (Custom and Custom Buildings in the Small and Large Enterprise customer sectors)[202] out of the 42 sub-programs that will eventually be offered under the Revised Plans.[203] OCC's assertion that those four sub-programs account for 483,000 MWh (27%) of the entire energy savings under the Revised Plans is misleading. That projection is for the ***entire three-year Plan Period***, and, in fact, the Companies project the ***least*** amount of total savings from these sub-programs in 2017 as compared to the remainder of the Plan Period.[204] Thus, the limited activation of some offerings under the Revised Plans does not change the fact that delays in this proceeding have significantly impaired the Companies' ability to meet their 2017 benchmarks through the creation of new energy savings.

For these reasons, the proposed Amended Trigger in the Stipulation is reasonable and in the best interests of the Companies' customers.

(e) The absence of OHA as a program administrator will not reduce the likelihood of hospital participation in the Revised Plans.

OHA argues that the Stipulation is not in the interest of the public because the Revised Plans do not include OHA as a program administrator, reducing the likelihood that hospitals will

[202] OCC Initial Brief at 27-28.
[203] Stipulation, Ex. A.
[204] Stipulation, Ex. B at Appendices B-2 ("Savings by Sub-Program by Year and Total").

participate in the Companies' programs.[205] There is no evidence in the record supporting this assertion, and the Commission should reject it.

First, OHA presented ***no evidence*** at the hearing demonstrating the impact its absence as an administrator could potentially have on the Companies' hospital customers under the Revised Plans.[206] OHA now seeks to rely on two letters that were filed as "public comments" weeks after the Attorney Examiner closed the record in this proceeding, but those letters are ***not in the record*** and are ***not evidence***.[207] Moreover, even if OHA had offered the letters at the hearing (which it did not), they would not have been admissible. The letters are out-of-court statements that OHA attempts to use to prove the truth of the matter asserted, which runs afoul of the hearsay rules.[208] Accordingly, nothing in the record supports OHA's assertion that "[h]ospitals in [the Companies'] territory support OHA's participation as program administrator."[209]

Second, the only evidence in the record demonstrates that the Stipulation and the Revised Plans will actually benefit hospitals, contrary to OHA's contention. As Companies' Witness Miller testified, "there is absolutely no reason why [OHA] could not work with their members and provide information to their members regarding [the Companies'] programs."[210] Indeed, the Revised Plans provide many resources to hospitals that wish to participate in the Companies' programs, and nothing is preventing OHA from working with those hospitals.[211] To be sure, OHA provides no explanation as to how it is supposedly precluded from assisting its

[205] OHA Initial Brief at 5.
[206] *See generally,* Hearing Tr.
[207] Hearing Tr. Vol. V at 636:7-9 (closing the record in this proceeding).
[208] *See* Ohio Fed. R. Evid. 801(C), 802.
[209] OHA Initial Brief at 6.
[210] Hearing Tr. Vol. I at 131:12-15 (Miller Re-Direct).
[211] *See* Hearing Tr. Vol. I at 130:3 – 131:15 (Miller Re-Direct).

membership with program participation merely because it is not a program administrator.[212] As OHA itself recognizes, "any opportunity for hospitals to reduce energy costs is critical to hospitals' financial ability to provide critical services to the public."[213] Whether or not OHA is a program administrator, hospitals within the Companies' territories will have every opportunity they would have otherwise had under the Revised Plans to reduce energy costs.[214]

For example, as Mr. Miller explained, the Companies contract with implementation vendors that "ha[ve] the responsibility to conduct outreach and marketing through customers who are eligible to participate in the programs ***which would include hospitals***."[215] Additionally, implementation vendors "are responsible for developing what [the Companies] refer to as a 'program ally network,' which typically consist of "entities who . . . have customers that [the allies] support with the programs."[216] There is no reason why OHA cannot serve as an ally under the Revised Plans and work directly with implementation vendors to facilitate their memberships' participation in the Revised Plans. Put simply, OHA does not have to be an administrator to assist its constituents with participation in energy efficiency programs.

Third, OHA's assertion that "[the Companies'] decision to terminate OHA's administrator contract for no reason is unjust and unreasonable" is a red herring.[217] OHA is asking the Commission to determine its contract rights under an administrator agreement the Companies' lawfully terminated,[218] which is beyond the scope of the Commission's

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[212] Hearing Tr. Vol. I at 131:12-15 (Miller Re-Direct).

[213] OHA Initial Brief at 8.

[214] And, as previously discussed, the Companies committed to assisting OHA with implementation of its EnergyStar program in the Stipulation. *See* Stipulation at 8. Thus, in stark contrast to OHA's assertions, OHA still has every opportunity under the Revised Plans to assist its membership with participation in the Revised Plans.

[215] Hearing Tr. Vol. I at 130:14-17 (Miller Re-Direct) (emphasis added).

[216] Hearing Tr. Vol. I at 130:18-21 (Miller Re-Direct).

[217] OHA Initial Brief at 2.

[218] OHA Initial Brief at 2, 8. While OHA alleges that the Companies "committed" to using OHA as an administrator, the agreement between OHA and the Companies unequivocally allowed the Companies to terminate

jurisdiction.[219] Moreover, the reason underlying the Companies' termination of OHA as an administrator is irrelevant to the question before the Commission—namely, whether the Stipulation and Revised Plans meet the Commission's criteria for approval. This proceeding is not a breach of contract case, and the Commission should not convert it to one by expending its time and resources addressing misguided contractual allegations, particularly when nothing in the Commission's Rules reference, let alone require, administrator agreements.[220] The Commission should thus reject OHA's argument.

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

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.[221] By way of example, the Stipulation promotes the availability of adequate, reliable, safe, efficient, nondiscriminatory, and reasonably

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(continued…)

after 2009 upon "at least thirty (30) days advance written notice." *See In the Matter of the Application of [the Companies] for Approval of Administrator Agreements and Statements of Work*, Case No. 09-553-EL-EEC, Application (June 30, 2009) at Exhibit 1.b, Section 11. The Companies complied with that notice provision.

[219] *See, e.g.*, *Marketing Research Services, Inc. v. Pub. Util. Comm'n*, 34 Ohio St. 3d 52, 56, 517 N.E.2d 540 (1987) ("The PUCO is not a court of general jurisdiction, and therefore has no power to determine legal rights and liabilities with regard to ***contract rights*** . . . even though a public utility is involved.") (emphasis added).

[220] The allegations are misguided because Ohio law clearly holds that a party to a contract can terminate that contract, without inquiry into reason or motive, if the contract expressly allows for termination upon written notice. *See, e.g.*, *Edelman v. Franklin Iron & Metal Corp.*, 87 Ohio App. 3d 406, 410-11, 622 N.E.2d 411 (1993) ("[E]xisting contract law in Ohio permits a party to a contract to exercise a right to terminate without reason if clearly expressed in the contract without inquiry into the motive for the termination"); *Midwestern Indem. Co. v. Luft & Assocs. Ins. Agency, Inc.*, No. 87AP-541, 1987 WL 31285, at *1 (Ohio Ct. App. 10th Dist. Dec. 23, 1987) (holding that evidence into a party's reasons for termination was "irrelevant" because the contract expressly allowed termination "upon thirty days written notice to the other"); *Belfance v. Standard Oil*, No. 14688, 1990 WL 203173, at *3 (Ohio Ct. App. 9th Dist. Dec. 12, 1990) (same). Therefore, even if the Commission had jurisdiction over contractual allegations (which it does not), OHA's arguments would fail.

[221] *See* Companies' Initial Brief, Section III.B.3. at 54-57.

priced retail electric service in Ohio.[222] 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.[223] 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.

Despite these facts, OCC and Staff argue that the third element of the Commission's test for stipulation approval is not satisfied. For support, OCC asserts that: (i) the Stipulation violates a Commission directive in the Companies' ESP IV case; and (ii) that the Amended Trigger violates a Commission regulatory principle and/or practice. Staff joins OCC's second argument, but both OCC and Staff are wrong.

(a) The Stipulation does not violate the Commission's Entry on Rehearing in the Companies' ESP IV case.

As set forth in the Companies' Initial Brief, the Revised Plans were specifically designed to achieve the statutory EE and PDR benchmarks set forth in Section 4928.66 of the Ohio Revised Code.[224] However, as Companies' Witness Miller explained, the Companies had to incorporate a reasonable "cushion" in their plan design to accommodate for uncertainties surrounding the numerous modeling assumptions.[225] This cushion resulted in estimated aggregate savings for the three Companies of 1,781,833 MWh.[226] In its brief, OCC takes issue with this cushion, arguing that it accounts for "12% above the statutory minimum," which violates a prior Commission directive in the Companies' ESP IV case and thus violates a

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[222] *Id.*
[223] *Id.*
[224] Companies' Initial Brief, Section III.A.1.b. at 17-18; *see also* Hearing Tr. Vol. I at 70 (Miller Cross).
[225] Companies' Initial Brief, Section III.A.1.b. at 17-18; *see also* Hearing Tr. Vol. I at 70-71 (Miller Cross).
[226] *Id.*

regulatory principle.[227] OCC is mistaken in several material ways.

First, as the Companies explained in their opening papers, the Commission has approved previous EE/PDR portfolio plans containing similar (or much higher) "cushion" levels in their plan design, either for the Companies or for other utilities in Ohio.[228] In fact, just in January 2017, the Commission approved and adopted the stipulation and recommendation in AEP's EE/PDR proceeding, which included a budget "cushion" that is ***twice as much*** as the Companies' proposed cushion.[229] Specifically, AEP's recently-approved portfolio plan budgeted a savings level of 1,622,500 MWh—more than ***24% above AEP's statutory mandate*** of 1,309,600 MWh.[230] Notably, OCC did not oppose AEP's 24% cushion, yet, for some unexplained reason, opposes a more modest 12% cushion for the Companies.[231] Moreover, AEP's 24% cushion is in line with its previous EE/PDR portfolio plan (for years 2012-2014), which included a savings cushion that was ***30% above its statutory mandate***.[232]

The Commission has similarly approved reasonable cushions for the Companies under their previous EE/PDR portfolio plans. For instance, the Commission approved an 11% cushion for the Companies under their portfolio plans for years 2013 through 2015.[233] That cushion is nearly identical to the one proposed under the Revised Plans. The same is true for the Commission-approved cushion under the Companies' EE/PDR portfolio plans for years 2010

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[227] OCC Initial Brief at 37-39.

[228] Companies' Initial Brief, Section III.A.1.b. at 17-18; *see also* Hearing Tr. Vol. I at 122 (Miller Re-Direct).

[229] Case No. 16-0574-EL-POR, Direct Testimony of Jon F. Williams (June 15, 2016) at Exhibit JFW-1 (Volume 1) Tables 1 and 3 (1,622,500 MWh cushion for 1,309,600 MWh mandate).

[230] *Id.*

[231] Case No. 16-0574-EL-POR, OCC Correspondence Regarding AEP Stipulation at 1 (Dec. 12, 2016).

[232] Case No. 11-5568-EL-POR, Exhibit A to Stipulation and Recommendation (Volume 1), Tables 1 and 3 (1,651,100 MWh cushion for 1,270,000 MWh mandate) (Nov. 29, 2011).

[233] Case No. 12-2190-EL-POR, Application at Table 1 (July 31, 2012); *Id.* Rebuttal Testimony of Eren G. Demiray at Exhibit EGD-R3 (Oct. 29, 2012).

through 2012, which was 10%.[234] OCC provides no argument why the Commission should change its practice of allowing reasonable savings cushions, especially when EDUs could face significant penalties should any of the assumptions made during the plan design process turn out to be wrong.

Second, OCC's contention that the Companies' reasonable cushion violates the Commission's Firth Entry on Rehearing in their ESP IV case is simply wrong.[235] There, the Commission held that the Companies were expected "to budget for the[ir] annual statutory energy efficiency mandate[s] rather than the [800,000 MWh savings] goal" made under a stipulation in that case.[236] As explained above, that is precisely what the Companies did, budgeting to meet their statutory mandates, which requires a reasonable cushion to account for uncertainty with all the assumptions.

Furthermore, and contrary to OCC's argument, the Commission ***did not*** hold that EDUs could no longer accommodate for uncertainty with modeling assumptions by incorporating reasonable "cushions" in their plan design. That much is clear, as demonstrated by the Commission's recent approval of a 24% cushion for AEP, which, as just discussed, is twice as much as the Companies' proposed cushion. Surely OCC is not suggesting that the Commission, going forward, has decided to allow reasonable cushions for AEP and other Ohio EDUs, ***but not the Companies***.[237]

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[234] *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 at PUCO Tables 2 ("Summary of Portfolio Energy and Demand Savigs") (Dec. 15, 2009) ("Case No. 09-1947-EL-POR").

[235] OCC Initial Brief at 37-39.

[236] Case No. 14-1297-EL-SSO, Fifth Entry on Rehearing at 147 (Oct. 12, 2016).

[237] The Environmental Intervenors accurately note that the statutory language in Section 4928.66 of the Ohio Revised Code, by its express terms, allows EDUs in Ohio to exceed the required savings goals. *See* Environmentals' Initial Brief at 9. Indeed, the relevant language states that an EDU must "achieve energy savings equivalent to ***at least*** three-tenths of one percent of the total annual average . . . ." O.R.C. § 4928.66(A)(1)(a)

Third, OCC ignores the fact that 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. The Companies explained that process in detail in their Initial Brief.[238] In short, that process was based predominantly on TRM protocols (adjusted when necessary to incorporate recent industry information).[239] This process was not challenged by any party in this proceeding. Nor did any opposing party challenge the Companies' modeled energy savings values in the Revised Plans.

Put simply, the Commission has recognized the need for a reasonable cushion in an EDU's plan design to accommodate for all the uncertainties surrounding the modeling assumptions that are inherent in the design process. These "cushions" are not contrary to Commission practices and/or principals; in fact, they are ***consistent*** with those practices and principles. Thus, the Companies' proposed "cushion" is reasonable and does not run afoul of the third element of the test for stipulation approval.

(b) The Amended Trigger does not violate the Commission's regulatory principle.

OCC and Staff assert that the proposed Amended Trigger in the Stipulation violates the regulatory principle that a utility should only be permitted to charge customers for shared savings if it exceeds its statutory requirements.[240] However, as discussed above, the Amended Trigger is

(continued…)

(emphasis added). The Commission's own Rules also state that an EDUs EE/PDR programs "***at a minimum***, shall achieve established statutory benchmarks for energy efficiency . . . ." O.A.C. § 4901:1-39-02(A) (emphasis added). OCC's implicit suggestion that a utility cannot, under any circumstance, budget for any amount in excess of the statutory mandate is thus contrary to the plain language of the pertinent laws.

238 *See* Companies' Initial Brief, Section III.A.1.b. at 17-18.

239 *Id.*; *see also* Stipulation, Ex. B at Appendices C-1 ("Measure Assumptions"); *id.* at 8.

240 OCC Initial Brief at 39; Staff Initial Brief at 15-17.

a reasonable response to the procedural delays in this proceeding and will ultimately benefit the Companies' customers by incentivizing the Companies to create ***new*** energy savings for their customers.[241] Moreover, the Commission has previously recognized and addressed the consequences of similar delays in prior cases.[242] As such, the Amended Trigger does not violate a regulatory principle.

III. CONCLUSION

For these reasons, and, as fully set forth in the Companies' Initial Brief, the Commission should reject Staff's Cost Cap Proposal and hold that the Stipulation: (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. The Commission should not adopt OCC and Staff's myopic fixation on one side of the cost-benefit equation while ignoring the benefits customers will enjoy from the Revised Plans. Indeed, the evidence in this proceeding leads to only one conclusion: the Revised Plans, as a package, benefit the Companies' customers, comply with all statutory and regulatory requirements, and therefore, are just and reasonable.

Accordingly, the Companies respectfully request that the Commission issue an order at its earliest convenience in which:

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

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[241] *See* Section II.B.2.d., *supra* at 34-38.
[242] *Id.*; Case No. 09-1947-EL-POR, Opinion and Order (Mar. 23, 2011).

March 3, 2017

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *Post-Hearing Reply Brief* will be served on this 3rd day of March, 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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