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

MOTION OF OHIO EDISON COMPANY, THE CLEVELAND ELECTRIC ILLUMINATING COMPANY, AND THE TOLEDO EDISON COMPANY TO STRIKE PORTIONS OF THE OFFICE OF THE OHIO CONSUMERS' COUNSEL POST-HEARING BRIEFING

Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company (the "Companies") respectfully move to strike the following portions of the Office of the Ohio Consumers' Counsel's ("OCC") Post-Hearing Briefing:

OCC's Initial Post-Hearing Brief:

1. Exhibit A, titled "Potential Adjustments to Portfolio to Reduce Costs that Consumers Pay for Energy Efficiency Programs;"

2. Page 21, first full paragraph, beginning with "Exhibit A" and ending with " . . . to reduce costs"; and

3. Page 1, second paragraph, beginning with "Just last month" and continuing on Page 2, ending with " Consistent with this ruling."

OCC's Reply Brief:

1. Page 3, second paragraph, beginning with "Exhibit A to OCC's" and continuing through the end of the paragraph on Page 4, ending with "99.6% of its statutory benchmark," including accompanying footnotes 6, 7, and 8; and

2. Page 1, second paragraph, beginning with "In AEP Ohio's" and continuing on Page 2, ending with " to approve FirstEnergy's Settlement."

The Commission should strike any and all references to Exhibit A from OCC's briefing because Exhibit A is not in evidence and is not part of the evidentiary record in this proceeding. Exhibit A to OCC's Post-Hearing Brief also constitutes belated expert testimony, which cannot be introduced after the close of the record. Further, portions of the introductory sections in OCC's briefing rely on language from a Commission order that has been clarified by the Commission as non-binding dicta. OCC's reference to that dicta as "sound regulatory policy" should thus be stricken.

For these reasons, fully set forth in the attached memorandum in support, the Commission should grant this Motion and strike the requested portions of OCC's Post-Hearing Briefing.

March 10, 2017

Respectfully submitted,

/s/ Carrie M. Dunn

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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

MEMORANDUM IN SUPPORT OF MOTION OF OHIO EDISON COMPANY, THE CLEVELAND ELECTRIC ILLUMINATING COMPANY, AND THE TOLEDO EDISON COMPANY TO STRIKE PORTIONS OF THE OHIO CONSUMERS' COUNSEL POST-HEARING BRIEFING

I. INTRODUCTION

The Office of the Ohio Consumers' Counsel ("OCC") attached a chart to its Post-Hearing Brief as "Exhibit A," which, according to OCC, "provides several examples of ways FirstEnergy could adjust its portfolio to reduce the total cost that customers pay for energy efficiency programs while still saving enough energy to satisfy the statutory savings requirements."[1] In its Reply Brief, OCC again relies on Exhibit A, asserting that it "provides three examples of what FirstEnergy's portfolio could look like with an $80.1 million annual spending limit."[2] OCC's Exhibit A and all references to it in its Post-Hearing Briefing should be stricken for two reasons.

First, Exhibit A was not presented at the hearing in this proceeding and is not part of the

[1] The Office of the Ohio Consumers' Counsel's Initial Post-Hearing Brief ("OCC Initial Brief") at 21; *see id.* at Exhibit A.
[2] The Office of the Ohio Consumers' Counsel's Reply Brief ("OCC Reply Brief") at 3.

evidentiary record. In fact, at the hearing, OCC presented no direct evidence related to the Companies' ability to adjust their Revised EE/PDR Portfolio Plans to comply with Staff's proposed overall cost cap. OCC cannot now rely on information not in the evidentiary record in an attempt to bolster its argument. ***Second***, Exhibit A constitutes expert testimony that had to be filed in advance of the hearing. It is beyond dispute that OCC never offered such expert testimony.

Furthermore, in the introductory sections of both of its post-hearing briefs, OCC refers to and relies on language from the Commission's recent order in AEP Ohio's EE/PDR proceeding regarding cost caps.[3] These references should be stricken because the Commission clarified the language at issue, which OCC itself has recognized as dicta that is "neither material . . . nor binding."[4]

Accordingly, the Commission should grant the Companies' Motion and strike the relevant portions of OCC's Post-Hearing Briefing.

II. LAW & ARGUMENT

A. Exhibit A Should Be Stricken

1. OCC may not rely on evidence that is not in the record.

OCC attempts to bolster its argument that the Companies can comply with Staff's proposed cost cap by simply "adjusting" their Revised EE/PDR Portfolio Plans by belatedly offering Exhibit A. Specifically, OCC contends that Exhibit A shows "ways FirstEnergy could adjust its portfolio to reduce the total cost that customers pay for energy efficiency programs while still saving enough energy to satisfy the statutory savings requirements."[5] This attempt, however, is improper because

[3] OCC Initial Brief at 1-2; OCC Reply Brief at 1-2.
[4] Case No.16-574-EL-POR, OCC's Memo. Contra Environmental Intervenor's Application for Rehearing at 4 (Jan. 30, 2017) (emphasis added); *see id.* at 5 ("Thus, by definition, ***the Cost Cap Sentences are dicta*** . . .") (emphasis added).
[5] OCC Initial Brief at 21; *id.* at Exhibit A; OCC Reply Brief at 3-4.

Exhibit A is not part of the evidentiary record. Indeed, nowhere in its briefing did OCC cite to any record evidence in support of its assertions related to its Exhibit A.

It is well-established that "new information should not be introduced after the closure of the record."[6] As the Commission has previously observed, if evidence were allowed "to be admitted in such a manner, any document in question would not be supported by testimony and the opposing party would have no opportunity to conduct cross-examination concerning the document or refute statements contained in the document."[7]

In January, the Commission held a five-day hearing that resulted in the introduction of hundreds of pages of pre-filed direct testimony, supplemental testimony, rebuttal testimony, live testimony, and exhibits.[8] At the end of the fifth day of the hearing (January 31, 2017), the Attorney Examiner formally closed the record in this proceeding.[9] OCC, of course, was a party to that proceeding, and it participated substantially through the introduction of testimony and exhibits, as wells as though cross-examination. OCC, however, chose not to introduce any direct evidence at the hearing on "ways FirstEnergy could adjust its portfolio to reduce the total cost" of the Companies' portfolio plans so as to comply with Staff's proposed cost cap.[10]

To bolster its argument, OCC now seeks to rely on "Exhibit A" to its Post-Hearing Brief. Such reliance, however, is improper at this juncture.[11] Indeed, Exhibit A was not offered (let alone admitted) at the hearing, and its author was not subject to cross-examination. Because Exhibit A

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[6] *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Authority to Provide for a Standard Service Offer Pursuant to R.C. 4928.143 in the Form of an Electric Security Plan*, Case No. 14-1297-EL-SSO, Opinion & Order, p. 37 (Mar. 31 2016) ("ESP IV March 31 Order").

[7] *See In the Matter of FAF, Inc., Notice of Apparent Violation and Intent to Assess Forfeiture*, Case No. 06-0786-TR-CVF, Opinion & Order, p. 2 (Nov. 21, 2006) (granting motion to strike and holding that documents that are not part of the record may not be relied upon in post-hearing briefing).

[8] *See generally*, Hearing Tr.

[9] *Id.* at 636:6-8 ("Anything further? Well then, this record will be closed and submitted for the Commission's decision.").

[10] OCC Initial Brief at 21.

[11] *See* ESP IV March 31 Order at 37.

was never introduced at the hearing, the Companies did not receive the opportunity to explore how the proposed "adjustments" in Exhibit A would have affected a number of metrics, including the TRC scores of the Revised EE/PDR Portfolio Plans, or whether the Companies could actually meet their statutory benchmarks or earn shared savings under OCC's alternative scenarios. Nor did the Companies receive the opportunity to test the nature of the modeling—if any—OCC conducted to support the recommendations in Exhibit A.[12]

Thus, the Commission should strike the portions of OCC's Post-Hearing Briefing that rely on or reference Exhibit A.

2 OCC may not now introduce belated expert testimony.

Moreover, Exhibit A constitutes expert testimony because it pertains to subject matter that is "beyond the knowledge or experience possessed by lay persons" and requires "specialized knowledge" regarding energy efficiency and related legal and regulatory standards.[13] As such, by Commission Rule, it had to be "filed with the [C]ommission, and served upon all parties prior to the time such testimony is to be offered."[14]

While OCC offered expert testimony from Mr. Richard Spellman, nowhere in his testimony[15] did Mr. Spellman suggest, let alone explain, specific programmatic adjustments the Companies should make to their Revised EE/PDR portfolio plans to comply with Staff's cost cap proposal.[16] Nor did he offer or authenticate Exhibit A or any equivalent chart. Because OCC did

[12] OCC incorrectly assumes that the elimination of a program or sub-program from the Companies' Revised EE/PDR Portfolio Plans automatically leads to a corresponding reduction in the overall portfolio budget. However, the precise impact of any programmatic changes cannot be ascertained without a remodeling of the portfolio plan. Without the opportunity to address Exhibit A during the evidentiary hearing, the Companies were unable to test OCC's assumption or to explore its treatment of other metrics related to portfolio plans.
[13] See OHIO R. EVID. 702(A), (B).
[14] *See* O.A.C. § 4901-1-29(A); *id.* at§ 4901-1-29(A)(1)(h).
[15] *See generally* OCC Exhibit 9B, Case No. 16-0743-EL-POR, Supplemental Direct Testimony of Richard F. Spellman (Jan. 10, 2017).
[16] The Companies, on the other hand, provided expert testimony on the programmatic changes included in the Revised EE/PDR Portfolio Plans, as well as on the reasons why Staff's proposed cost cap is not viable. *See* Companies' Exhibit 5, Case No. 16-0743-EL-POR, Supplemental Direct Testimony of Edward C. Miller (Dec. 8, 2016) ("Miller Supp.

not comply with the Commission's Rule on expert testimony with respect to Exhibit A, it should be stricken.

B. OCC May Not Refer To Non-Binding Dicta As "Sound Regulatory Policy."

In the introductory sections of both of its post-hearing briefs, OCC relies on language from a Commission order in the AEP Ohio EE/PDR proceeding, where the Commission: (i) stated that the addition of a cost cap in AEP Ohio's case was "a reasonable response" to cost increases in EE/PDR programs; and (ii) suggested that it may be "reluctant" to approve stipulations in other EE/PDR proceedings that do not include "similar caps."[17] Pointing to that language, OCC contends that the Commission "expressed a sound regulatory policy regarding energy efficiency that . . . protects customers from paying too much for energy efficiency."[18] But OCC leaves out two salient facts in asserting its position.

First, OCC fails to mention that it previously took the position in the AEP Ohio proceeding that the very language at issue was "dicta."[19] Indeed, in opposing an application for rehearing, OCC argued that the Commission's language upon which it now seeks to rely was "***neither material to [its] decision nor binding***."[20] ***Second***, OCC also fails to mention that the Commission agreed that the language was non-binding dicta. In fact, the Commission expressly clarified that "whether a similar cost cap should be included in other electric distribution utility's EE/PDR program portfolio plan will only take place after a hearing on the matter."[21] OCC's attempt to now

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Testimony"); Companies' Exhibit 17, Case No. 16-0743-EL-POR, Rebuttal Testimony of Edward C. Miller (Jan. 27, 2017) ("Miller Rebuttal Testimony").

[17] OCC Initial Brief at 1-2; OCC Reply Brief at 1-2; *see also* Case No.16-574-EL-POR, Opinion and Order at 8 (Jan. 18, 2017).

[18] OCC Reply Brief at 2.

[19] Case No.16-574-EL-POR, OCC's Memo. Contra Environmental Intervenor's Application for Rehearing at 4 (Jan. 30, 2017) (emphasis added).

[20] *Id.*; *see id.* at 5 ("Thus, by definition, ***the Cost Cap Sentences are dicta*** . . .") (emphasis added).

[21] *Id.* at Entry on Rehearing at 3 (Feb. 8, 2017).

rely on that dicta by characterizing it as a "sound [and binding] regulatory policy"[22] is disingenuous.

Accordingly, OCC's references to the Commission's dicta in the AEP Ohio proceeding and characterizations of the same as binding regulatory policy should be stricken.

III. CONCLUSION

For the foregoing reasons, the Companies respectfully request that the Commission grant the Companies' Motion by striking the following portions of OCC's Post-Hearing Briefing:

OCC's Initial Post-Hearing Brief:

1. Exhibit A, titled "Potential Adjustments to Portfolio to Reduce Costs that Consumers Pay for Energy Efficiency Programs;"

2. Page 21, first full paragraph, beginning with "Exhibit A" and ending with " . . . to reduce costs"; and

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2. Page 1, second paragraph, beginning with "In AEP Ohio's" and continuing on Page 2, ending with " to approve FirstEnergy's Settlement."

[22] OCC Reply Brief at 2.

March 10, 2017

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *Motion To Strike Portions Of The Office of the Ohio Consumers' Counsel's' Post-Hearing Briefing* will be served on this 10th 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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Summary: Motion --Motion and Memorandum in Support of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company to Strike Portions of the Office of the Ohio Consumers' Counsel Post-Hearing Briefing electronically filed by Mr. Joshua R. Eckert on behalf of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company