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

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

I. INTRODUCTION

In its opposition to the Companies' Motion to Strike, OCC defends its reliance on Exhibit A by arguing that it "consists entirely of record evidence."[1] In so arguing, OCC ignores the fact that Exhibit A also seeks to provide "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."[2] The fact these "adjustments" are not in the record is beyond dispute. Indeed, not only was Exhibit A not presented at the hearing, but 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 seek to do so now, after the evidentiary record is closed. Nor can OCC present Exhibit A at this juncture, as such arguments

[1] Case No. 16-0743-EL-POR, The Office of the Ohio Consumers' Counsel's Memorandum Contra Motion to Strike at 3 (Mar. 27, 2017) ("OCC Mem. Contra").
[2] Case No. 16-0743-EL-POR, The Office of the Ohio Consumers' Counsel's Initial Post-Hearing Brief at 21 (Feb. 21, 2017) ("OCC Initial Brief").

constitute expert testimony that had to be filed in advance of the hearing.

OCC also doubles down on its reliance on non-binding dicta as "sound regulatory policy" by asserting that the dicta is "persuasive authority."[3] OCC is wrong. The dicta is not "persuasive authority" because the Commission subsequently clarified on rehearing that "whether a similar cost cap should be included in [an]other electric distribution utility's EE/PDR program portfolio plan will only take place after a hearing on the matter"—a fact that OCC fails to acknowledge, let alone address.[4] The Commission's clarification makes sense, as the parties to the AEP EE/PDR proceeding did not offer any evidence or arguments about the enforceability, necessity, or fairness of Staff's cost cap proposal. Thus, OCC's references to the dicta are inappropriate.

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

II. LAW & ARGUMENT

A. OCC's Reliance On Exhibit A Is Inappropriate.

1. OCC mischaracterizes Exhibit A.

OCC contends that its reliance on Exhibit A to its briefs is appropriate because Exhibit A "consists entirely of record evidence and simple calculations that derive from this evidence."[5] Specifically, OCC claims that its Exhibit A "comes directly from (coincidentally) Exhibit A to the Settlement in this case ("Settlement Exhibit A"), which was admitted into the record as Joint Exhibit 1."[6] OCC's arguments mischaracterize the scope and its use of its Exhibit A.

Initially, OCC's Exhibit A does not come "directly from" Settlement Exhibit A, as OCC

[3] OCC Mem. Contra at 5-7.
[4] Case No. 16-574-EL-POR, Entry on Rehearing at 3 (Feb. 8, 2017).
[5] OCC Mem. Contra at 3.
[6] *Id.* at 3-4.

suggests. Indeed, a simple comparison of the two exhibits highlights significant differences. For instance, when developing its Exhibit A, OCC: (i) deleted several columns (11 to be exact) from Settlement Exhibit A; (ii) added $18,000,000 to the "Budget" column for the Companies' "Community Connections" sub-program; and, most significantly, (iii) added three "Scenarios" to Exhibit A, which reflect proposed programmatic changes and recommendations that were not introduced as evidence in this proceeding and are not reflected in admitted Settlement Exhibit A.[7] It is the after-the-fact elimination of information and the introduction of these proposed adjustments—and not the "$/kWh numbers [that] are the result of simple division" as OCC claims[8]—that are improper. These deletions and proposed "Scenarios" are simply not in evidence. Thus, OCC's introduction of them through its Exhibit A is inappropriate.

Moreover, because OCC's Exhibit A and its proposed "Scenarios" were never introduced at the hearing, the Companies did not receive the opportunity to explore how the proposed adjustments 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 under the alternative scenarios. Nor did the Companies receive the opportunity to test the nature of the modeling—if any—OCC conducted to support the recommendations included in its Exhibit A.

The two thirty-year old cases OCC cites do not support its position. In Case No. 83-303-GE-COI, the Commission denied a motion to strike because the specific calculations and tables at issue were "***present in the record and . . . ha[d] been subject to extensive cross-examination***."[9] Here, that is not the case, as neither Exhibit A nor the three "Scenarios" OCC

[7] *Compare* OCC Initial Brief at Exhibit A *with* Joint Exhibit 1 at Exhibit A.
[8] OCC Mem. Contra. at 4.
[9] *In the Matter of the Investigation into Long-Term Sols. Concerning Disconnection of Gas & Elec. Serv. in Winter Emergencies*, Case No. 83-303-GE-COI, 1984 WL 991349, at *2 (Aug. 2, 1984) (emphasis added).

recommends are in the record or have been subjected to cross-examination. Similarly, in Case No. 85-995-TP-AIR, the Commission denied a motion to strike because it was improperly raised in a reply brief and because the "simple mathematical calculations" at issue were based on testimony in the record.[10] Again, that is not the case here, as the Companies have properly raised this issue in a motion to strike, and OCC's mathematical calculations are not the issue. The issue, rather, is OCC's belated introduction of an exhibit that recommends specific programmatic changes to the Companies' Revised EE/PDR Portfolio Plans. OCC cannot deny that those recommended adjustments are not in the record.

In short, despite actively participating at the hearing in this proceeding, OCC chose not to introduce any direct evidence 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.[11] It cannot now bolster its argument through evidence that is not in the record.[12] 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."[13]

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

2. Exhibit A is belated expert testimony.

In its brief, OCC argues that "Exhibit A is not expert testimony" because it is merely

[10] *In the Matter of the Application of the Chillicothe Tel. Co. for an Increase in Its Rates & Charges for Tel. Serv.*, Case No. 85-995-TP-AIR, 1986 WL 1262033, at *5, fn 1 (Nov. 12, 1986).
[11] OCC Initial Brief at 21.
[12] *See 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").
[13] *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).

"[s]ummarizing record evidence and performing basic math (addition and division) [that] do not require specialized knowledge, skill, experience, training, or education."[14] OCC misapprehends the Companies' position.

As an initial matter, the "basic math" in Exhibit A is not the issue, as discussed above. In fact, nowhere in their Motion to Strike do the Companies attack the arithmetic OCC used when it created its Exhibit A. Accordingly, OCC's reliance on the *Madison* case is inapposite.[15] Moreover, and contrary to OCC's assertions, OCC is not merely "summarizing record evidence" through its Exhibit A. Instead, OCC is setting forth ***conclusions*** and proposing ***adjustments*** to the portfolio plans for the first time through its briefs (relying solely on its Exhibit A), instead of through expert testimony as is required by Commission Rule.[16] Indeed, expert testimony is required when the subject matter at issue is "beyond the knowledge or experience possessed by lay persons" and when it requires "specialized knowledge."[17] Here, that is plainly the case.

As explained in the Companies' Memorandum in Support, OCC is using its Exhibit A as the basis for unsupported determinations in its briefs that the Companies can simply "adjust" their portfolio plans to meet the proposed cost cap and their statutory obligations.[18] Those types of determinations, however, require expert testimony because they go "beyond the knowledge or experience possessed by lay persons" and because they require "specialized knowledge" regarding energy efficiency and related regulatory standards.[19] Indeed, adjusting an EE/PDR program portfolio plan goes well beyond basic math, as the precise impact of any programmatic changes cannot be ascertained without a remodeling of the plan in its entirety. The Commission

[14] OCC Mem. Contra at 5.
[15] *Id.*
[16] *See* O.A.C. § 4901-1-29(A).
[17] *See* OHIO R. EVID. 702(A), (B).
[18] *See, e.g.*, OCC Initial Brief at 21; Case No. 16-0743-EL-POR, The Office of the Ohio Consumers' Counsel's Reply Brief at 3-4 (Mar. 3, 2017) ("OCC Reply Brief").
[19] *See* OHIO R. EVID. 702(A), (B).

must also be in a position to consider how the adjustments impact a number of metrics, including the TRC scores for the portfolio plans. These determinations, of course, are beyond the scope of a lay person's capabilities. It is precisely for this reason that the Companies provided specific 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 under those Plans.[20]

While OCC utilized Mr. Richard Spellman as an expert in this proceeding, it is undisputed that Mr. Spellman did not suggest, let alone explain, any specific programmatic adjustments the Companies should make to their Revised EE/PDR portfolio plans to comply with Staff's cost cap proposal. OCC's belated attempt to offer such expert testimony through its Exhibit A and related briefing at this juncture is thus inappropriate and would prejudice the Companies. As discussed above, the Companies did not receive an opportunity to conduct cross-examination on OCC's proposed adjustments or on the nature of any modeling OCC used to support the recommendations in its Exhibit A.

Because OCC did not comply with the Commission's Rules on expert testimony, OCC's reliance on its Exhibit A and its related conclusions should be stricken.

B. OCC's Reliance On Non-Binding Dicta As "Sound Regulatory Policy" Is Improper.

OCC first asserts that it "did not argue that the AEP order is binding on the PUCO in FirstEnergy's case."[21] While OCC did not use the word "binding" in its briefing, that was certainly the implication:

> In AEP Ohio's case, the PUCO expressed a sound regulatory policy regarding energy efficiency that not only allows electric utilities in Ohio to offer significant, diverse portfolios of energy efficiency programs for their customers, but also

[20] *See* Companies' Exhibit 5, Case No. 16-0743-EL-POR, Supplemental Direct Testimony of Edward C. Miller (Dec. 8, 2016) ("Miller Supp. Testimony"); Companies' Exhibit 17, Case No. 16-0743-EL-POR, Rebuttal Testimony of Edward C. Miller (Jan. 27, 2017) ("Miller Rebuttal Testimony").
[21] OCC Mem. Contra. at 7.

> protects customers from paying too much for energy efficiency. The PUCO ***should not deviate from that policy*** when deciding whether to approve FirstEnergy's Settlement.[22]

In fact, OCC expressly characterized the dicta as a Commission "ruling"—not as a judicial comment that lacks precedential authority.[23]

Moreover, and quite tellingly, OCC omitted any explanation in its briefing that the language it was relying upon was clarified by the Commission in a subsequent entry on rehearing—indeed, OCC completely ignored the rehearing order.[24] Instead, OCC used the language at issue as the backbone of the introductory sections for both of its post-hearing briefs, despite previously arguing to the Commission that the same exact language was "***neither material . . . nor binding***."[25]

OCC also argues that reliance on the language from the AEP order was appropriate because "[d]icta is persuasive authority."[26] OCC goes too far—in fact, courts in Ohio routinely refuse to adhere to dicta.[27] Even OCC's citation to the *Central Green* case (which actually refused to adhere to dicta) supports the conclusion that dicta should only be accorded weight when it is "sufficiently persuasive."[28] As Justice O'Donnell aptly stated, "[t]he problem with dicta, and a good reason that it should not have the force of precedent for later cases, is that when a holding is unnecessary to the outcome of a case, it may be made with less care and

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[22] OCC Reply Brief at 1-2 (emphasis added).
[23] OCC Initial Brief at 2.
[24] Case No.16-574-EL-POR, Entry on Rehearing at 3 (Feb. 8, 2017).
[25] Case No.16-574-EL-POR, OCC's Memo. Contra Environmental Intervenor's Application for Rehearing at 4 (Jan. 30, 2017) (emphasis added); *id.* at 5 ("Thus, by definition, ***the Cost Cap Sentences are dicta*** . . .") (emphasis added).
[26] OCC Mem. Contra. at 5.
[27] *See, e.g.*, *State ex rel. WBNS TV, Inc. v. Dues*, 101 Ohio St. 3d 406, 413, 805 N.E.2d 1116, 1124 (2004) ("[T]hat dicta is not persuasive."); *see also Havel v. Villa St. Joseph*, 131 Ohio St. 3d 235, 245, 963 N.E.2d 1270, 1279 (2012) (refusing to "follow out-of-context dicta as precedent"); *Williams v. Ward*, 18 Ohio App. 2d 37, 39, 246 N.E.2d 780, 781 (Ohio Ct. App. 1969) (holding that "dicta . . . need not be followed by any court in Ohio").
[28] *Cent. Green Co. v. U.S.*, 531 U.S. 425, 431 (2001) ("Accordingly, we disavow that portion of *James'* dicta.").

thoroughness than if it were crucial to the outcome."[29] That is precisely why courts are skeptical of following dicta where "the point at issue was not fully debated."[30] That is the case here.

Indeed, the Commission made the comment at issue in the AEP case without the benefit of the evidence presented in this proceeding. No party in that case presented testimony or evidence against Staff's overall cost cap proposal, as Staff itself was a signatory party to the unopposed stipulation in that case.[31] The Commission thus did not have the opportunity to address the issues presented in this case, let alone "fully debate" them. For example, the Commission did not receive the opportunity to consider the fact that Staff's proposed cost cap prejudices the Companies by permitting them to spend significantly less money for each kilowatt hour ("kWh") of energy saved compared to the other Ohio utilities.[32] The Commission also did not consider the unfairness associated with Staff's proposed 3% cost cap for the Companies while offering the other utilities higher percentages.[33] Nor has the Commission considered the inherent unfairness of using FERC Form 1, Page 300, Line 10 as the basis for Staff's proposed caps, which is highlighted by a comparison of the switch rates across Ohio's utilities, as well as by a comparison of the average revenue per kWh delivered across the utilities.[34] Put simply, the language at issue is not "sufficiently persuasive," as Staff's cost cap proposal was not "fully debated" in the AEP case.

For these reasons, OCC's references to the Commission's dicta in the AEP proceeding and characterizations of the same as regulatory policy should be stricken.

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[29] *State v. Bodyke*, 126 Ohio St. 3d 266, 286, 933 N.E.2d 753, 772 (O'Donnell, J., concurring in part and dissenting in part) (quoting *Bauer v. Garden City*, 163 Mich.App. 562, 571, 414 N.W.2d 891 (1987)).
[30] *Cent. Virginia Cmty. Coll. v. Katz*, 546 U.S. 356, 356, 126 S. Ct. 990, 992 (2006) (citation omitted).
[31] *See generally* Case No. 16-0574-EL-POR, Stipulation and Recommendation (Dec. 9, 2016).
[32] 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 at 75-77 (Feb. 21, 2017) ("Companies' Initial Brief").
[33] *Id.* at 74-75.
[34] *Id.* at 77-81.

III. CONCLUSION

For the foregoing reasons, as well as for those set forth in the Companies' Motion to Strike and Memorandum in Support, 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

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."

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *Reply in Support of Motion To Strike Portions Of The Office of the Ohio Consumers' Counsel's' Post-Hearing Briefing* will be served on this 3rd day of April, 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: Text Reply in Support of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company's Motion to Strike Portions of the Office of the Ohio Consumers' Counsel's Post-Hearing Briefing electronically filed by Michael R. Gladman on behalf of The Ohio Edison Company and The Toledo Edison Company and The Cleveland Electric Illuminating Company