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

OHIO EDISON COMPANY, THE CLEVELAND ELECTRIC ILLUMINATING COMPANY, AND THE TOLEDO EDISON COMPANY'S APPLICATION FOR REHEARING

Pursuant to Section 4903.10 of the Ohio Revised Code and Rule 4901-1-35, O.A.C., Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company (the "Companies"), hereby apply for rehearing of the Opinion and Order issued in this proceeding on November 21, 2017 (the "Order"). As demonstrated in the attached Memorandum in Support, the Order is unlawful and unreasonable on the following grounds:

1. The Order is unlawful because the Commission lacks the statutory authority to adopt and implement a cost cap on the Companies' recovery of EE/PDR program costs and shared savings.

2. The Order is unlawful because it adopts a cost cap on the Companies' recovery of EE/PDR program costs and shared savings that was not subjected to Ohio's mandatory rule-making procedures.

3. The Order is unreasonable because there is no basis in the evidentiary record to support the adoption of a cost cap, which is inherently unfair and leads to significant inequities among Ohio's EDUs.

For the reasons set forth in the attached Memorandum in Support, the Commission should grant the Companies' Application for Rehearing.

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OHIO EDISON COMPANY, THE CLEVELAND ELECTRIC ILLUMINATING COMPANY, AND THE TOLEDO EDISON COMPANY'S MEMORANDUM IN SUPPORT OF APPLICATION FOR REHEARING

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I. INTRODUCTION

The Commission's Order in this proceeding is unlawful and unreasonable and, as such, should be modified on rehearing. While the Commission found that the Stipulation submitted by the Signatory Parties met the established three-part test for approval, it modified the Stipulation to include an overall cost cap on the Companies' recovery of program costs and shared savings set at 4% of the 2015 FERC Forms 1, page 300, line 10 ("Line 10") for Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company (the "Companies"). Rather than considering the evidence regarding how the cost cap would be inequitable for the Companies, the Commission chose this cost cap simply by following the formula derived from Staff's original 3% Cost Cap Proposal[1] and increasing it to 4% "to align FirstEnergy's cost caps with those of the other Ohio utilities."[2]

Rehearing on the adoption and implementation of the cost cap in the Order is warranted for three main reasons. ***First***, and foremost, the imposition of a cost cap in this case is unlawful, as the General Assembly has not conferred upon the Commission the authority to cap the costs of compliance with Ohio's statutory EE/PDR mandates. The General Assembly has previously demonstrated that it knows how to provide for the implementation of a cost cap on programs if it so chooses. The General Assembly declined to do so in Section 4928.66, making the Commission's implementation of a cost cap, without statutory authority to do so, unlawful.

Second, even if a cost cap was within the Commission's purview, governmental entities in Ohio, including the Commission, must follow specific procedures when implementing legal standards that did not previously exist. It is undisputed that the cost cap in the Order did not go

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[1] Defined terms will have the same meaning as in the Companies' Initial Post-Hearing Brief (filed February 21, 2017).

[2] Order at ¶23.

through the rigors of those rule-making procedures. Accordingly, the cost cap is unlawful, and its implementation violates well-settled Ohio law.

And third, the Order is unreasonable because there is no basis in the record to support the adoption of a cost cap in this case. Indeed, there is simply no evidence justifying or supporting the arbitrary methodology employed by Staff in arriving at its proposed cap. That methodology unreasonably relied on a limited set of ***historical*** data, while ignoring ***current*** pricing, costs of compliance, and other important factors. In fact, the record evidence demonstrates the exact opposite—that the adoption of the cost cap in this case is inherently unfair, unreasonable, and leads to significant inequities among Ohio's EDUs.

For all these reasons, the Commission should grant rehearing and vacate the portions of its Order modifying the Stipulation to include a 4% cost cap and enter an order adopting the Stipulation, without the cost cap modification.

II. ARGUMENT

A. The Order Is Unlawful Because The Commission Lacks The Authority To Adopt And Implement A Cost Cap On The Companies' Recovery Of Program Costs And Shared Savings.

The Companies' EE/PDR obligations stem from Section 4928.66 of the Ohio Revised Code. That Section (or any other section of the Ohio Revised Code) ***does not*** authorize the Commission to approve the imposition of an overall cost cap on the efforts of Ohio's EDUs to meet their respective statutory EE/PDR benchmarks. Nevertheless, the Order adopts and implements a "cap on recovery of EE/PDR programs and shared savings [equal] to four percent of the Companies' 2015 FERC-reported revenues."[3] According to the Order, the adoption of such a

[3] Order at 23, 28.

cap "is a permissible exercise of the Commission's broad authority" because "the General Assembly did not specifically prohibit a cost cap."[4] That conclusion is contrary to established law.

As an initial matter, that the General Assembly has not "specifically prohibited" the imposition of a cost cap is of no import. Indeed, the Ohio Supreme Court has "consistently recognized that the [] Commission is a creature of the General Assembly and may exercise ***no jurisdiction*** beyond that conferred by statute."[5] While the Commission is certainly vested with the statutory authority to review an EDU's costs of compliance with its EE/PDR obligations to ensure such costs are "just and reasonable," the General Assembly ***has not*** vested the Commission with the authority to predetermine an EDU's permissible amount of spending through an inflexible, overall cost cap.[6] Had the General Assembly wished to cap the amount of spending allowed for compliance with its EE/PDR benchmark provisions, it would have expressly done so in enacting Section 4928.66 of the Ohio Revised Code.

As explained in the Companies' post-hearing briefing, the General Assembly enacted Section 4928.66 at the same time it enacted Section 4928.64, both of which were part of Senate Bill 221 and signed into law in July 2008.[7] The former provision, which includes the relevant EE/PDR standards, ***does not*** include a cost cap. By contrast, the latter provision, which deals with alternative energy standards, ***does*** include a cost cap. This distinction cannot be ignored, as it clearly demonstrates the General Assembly's intent to treat the provisions differently with respect to the imposition of a cost cap.

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[4] *Id.* at 23 (citing *Kazmaier Supermarket, Inc. v. Toledo Edison Co.*, 61 Ohio St. 3d 147, 150, 573 N.E.2d 655 (1991)).

[5] *Pike Nat. Gas Co. v. Pub. Util. Comm'n of Ohio*, 68 Ohio St. 2d 181, 183, 429 N.E.2d 444 (1981) (citations omitted; emphasis added); *see also Canton Storage & Transfer Co., Inc. v. Pub. Util. Comm'n of Ohio*, 72 Ohio St. 3d 1, 5, 647 N.E.2d 136 (1995).

[6] *See* O.R.C. § 4928.66.

[7] *See* O.R.C. §§ 4928.64, 4928.66.

More specifically, Section 4928.64 contains Ohio's "renewable energy portfolio standard," which requires that 12.5% of electricity sold by Ohio's EDUs be generated from renewable energy sources by 2027.[8] That Section (unlike Section 4928.66) ***expressly*** includes a cost cap that sets the cost of compliance at 3% of the "reasonably expected cost of otherwise producing or acquiring the requisite electricity."[9] Given the General Assembly's mandate, the Commission promulgated rules and regulations to effectuate that cost cap.[10] One of those regulations, expressly labeled "Cost Cap," provides that an EDU does not need to comply with its "renewable energy resource benchmark" or its "advanced energy resource benchmark" if the EDU's cost of compliance exceeds its cost of generation by 3% or more.[11]

There is no similar statutory mandate with respect to Section 4928.66, nor does the Order point to any other authority permitting the implementation of a cost cap in this instance. As a creature of statute, the Commission derives its authority from the General Assembly, which has not given the Commission the power to cap the costs of an EDU's compliance with Section 4928.66. When the General Assembly wishes to impose a cost cap, it does so through legislation.[12] Because the Commission lacks the authority to adopt and implement the overall cost cap set forth in the Order, the cost cap is unlawful. The Companies seek rehearing on that issue.

[8] *See* O.R.C. § 4928.64.

[9] O.R.C. § 4928.64(C)(3).

[10] *See* O.A.C. § 4901:1-40 ("Alternative Energy Portfolio Standard").

[11] O.A.C. § 4901:1-40-07(A), (B).

[12] Section 4928.64 of the Ohio Revised Code is only one example of a cost cap enacted by the General Assembly. *See, e.g.*, O.R.C. § 5164.70 (cap on certain Medicaid payments); *id.* at § 5709.212 (cap on certain application fees); *id.* at § 6137.051 (cap on repair costs by county engineer); *id.* at § 2101.16 (cap on advance deposit required by probate court); *id.* at § 4769.08 (cap on certain investigation and adjudication costs).

B. The Order Is Unlawful Because The Adopted Cost Cap Was Not Subjected To Ohio's Mandatory Rule-Making Procedures.

Even if a cost cap was within the Commission's purview (and it is not), Ohio agencies ***must*** follow specific procedures when implementing legal standards that did not previously exist.[13] Here, it is undisputed that the cost cap on the recovery of EE/PDR program costs and shared savings did not go through the rigors of those rule-making procedures, making the implementation of the cost cap in the Order unlawful.[14]

1. The cost cap in the Order is a "rule" subject to Ohio's rule-making procedures.

In their previous briefs, the Companies detailed how the implementation of a cost cap would violate Section 111.15 of the Ohio Revised Code by creating a rule without following the appropriate rule-making requirements. The Order, however, avoids any discussion of the requirements, instead concluding, without further explanation, that the "adoption of a cost cap in this proceeding does not constitute a new legal standard or rule as defined under R.C. 111.15."[15] But a "rule" under Section 111.15 is defined broadly as "any rule, regulation, bylaw, or standard having a general and uniform operation adopted by an agency . . . ."[16] Ohio Courts have emphasized that an agency's proposal is appropriately characterized as a "rule" under Ohio's administrative laws when it "***prescribes a legal standard that did not previously exist***."[17] The cost cap adopted and implemented in the Order meets this criteria.

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[13] *See* O.R.C. § 111.15; *see also Fairfield Cty. Bd. of Comm'rs. v. Nally*, 143 Ohio St. 3d 93, 34 N.E.3d 873 (2015).

[14] Hearing Tr. Vol. II at 335:17-336:9 (Donlon Cross).

[15] Order at 23.

[16] O.R.C. § 111.15 (A)(1).

[17] *Fairfield Cty. Bd. of Comm'rs. v. Nally*, 143 Ohio St. 3d 93, 100, 34 N.E.3d 873 (2015) (emphasis added). While *Nally* was interpreting a similar administrative rule-making procedure contained in Section 119 of the Ohio Revised Code, as discussed above, the Supreme Court's interpretation and definition of "rule" apply with equal force to Section 111.15, given that both statutes define "rule" in nearly identical terms.

The cost cap in the Order is a legal standard that "did not previously exist." Ohio passed its EE/PDR laws in 2008, which went into effect in 2009. Since that time, EDUs have had to submit, for Commission approval, portfolio plans that are cost-effective and meet other enumerated requirements. Never before, however, has an EDU had to ensure that its proposed EE/PDR plan complied with an overall cost cap, let alone one based on a fixed dollar figure, such as FERC Form 1, Line 10. Put simply, the cost cap in the Order "prescribes a legal standard that did not previously exist" and that expands the Companies' legal requirements for satisfying their EE/PDR obligations. Ohio case law establishes that such a regulation may only be implemented through Ohio's rule-making process.

In *Fairfield Cty. Bd. of Comm'rs. v. Nally*, for instance, the Ohio Supreme Court held that the Ohio Environmental Protection Agency ("EPA") was required to follow Ohio's rule-making procedures before submitting a total maximum daily load ("TMDL") to the federal Environmental Protection Agency in satisfaction of the federal Water Pollution Control Act.[18] In so doing, the Supreme Court rejected the agency's argument that the TMDL was merely a "guideline," and not a "rule," holding that Ohio's rule-making procedures "apply broadly to ***any action*** by an agency that functions as a rule."[19] The Supreme Court specifically held that the TMDL "prescribe[d] a legal standard that ***did not previously exist***" in Ohio, making it invalid and unenforceable until the EPA complied with formal rule-making procedures.[20]

[18] *Fairfield Cty. Bd. of Comm'rs. v. Nally*, 143 Ohio St. 3d 93, 34 N.E.3d 873 (2015); *see also Ohio Nurses Ass'n, Inc. v. State Bd. of Nursing Educ. & Nurse Registration*, 44 Ohio St. 3d 73, 73, 540 N.E.2d 1354 (1989) (holding that a "position paper" issued by the State Board of Nursing Education and Nurse Registration was a rule subject to statutory promulgation requirements because it "greatly expanded the authority of licensed practical nurses ("LPNs") to administer intravenous fluids or 'IVs'")

[19] *Fairfield Cty. Bd. Of Comm'rs* at 102 (emphasis added).

[20] *Id.* at 102 (emphasis added).

Moreover, the cost cap has "a general and uniform operation." Indeed, the Commission has implemented an overall cost cap in the EE/PDR proceedings for ***each*** of the major EDUs in Ohio.[21] In fact, the Commission was careful to ensure that the adopted cost cap "aligne[ed] . . . with those of the other Ohio utilities."[22] As a result, the implemented cost caps are facially ***identical***.[23] The cost cap is based on the respective 2015 FERC Forms 1, page 300, Line 10, and each is set precisely at 4%.[24] In other words, the Commission purposefully adopted a "general and uniform" cost cap for the major EDUs in the state.[25]

Furthermore, it is well-established in Ohio that cost caps are appropriately promulgated as Commission regulations. As discussed above, Section 4928.64 of the Ohio Revised Code contains a cost cap with respect to Ohio's "renewable energy portfolio standard."[26] The Commission specifically promulgated rules and regulations to effectuate that law,[27] ***including rules implementing the 3% "Cost Cap."***[28] The Commission's cost cap for renewable energy standards

[21] *See In the Matter of the Application of [AEP] for Approval of Its [EE/PDR]] Program Portfolio Plan for 2017 Through 2020*, Case No. 16-0574-EL-POR, Opinion and Order at 8-9 (Jan. 18, 2017) ("Case No. 16-0574-EL-POR"); *In the Matter of the Application of [DP&L] for Approval of Its [EE/PDR] Program Portfolio Plan*, Case Nos. 16-649-EL-POR et al., Opinion and Order at 14 (Sept. 27, 2017) ("Case No. 16-649-EL-POR"); *In the Matter of the Application of [Duke] for Approval of The [EE and PDR] Program Portfolio Plans*, Case No. 16-576-EL-POR, Opinion and Order at 15, 23 (Sept. 27, 2017) ("Case No. 16-576-EL-POR").

[22] Order at 23; Case No. 16-576-EL-POR, Opinion and Order at 15 (noting that a four percent cap "was recently adopted by the Commission for AEP Ohio . . . and for Dayton Power and Light Company").

[23] As discussed below, however, the cost cap in the Order results in many inequities that make its implementation unreasonable and inherently unfair. *See* Section II.C.2, *infra* at p. 18-25.

[24] *See* Order at 23; Case No. 16-0574-EL-POR, Opinion and Order at 8-9; Case No. 16-649-EL-POR, Opinion and Order at 14; *id*. at Stipulation and Recommendation at 6 (Dec. 13, 2016); Case No. 16-576-EL-POR, Opinion and Order at 15, 23.

[25] Critically, Staff Witness Donlon admitted at the hearing that Staff, in making its proposal for a cost cap, was seeking "consistency amongst all the utilities in the state." Hearing Tr. Vol. III at 397:24-398:13 (Donlon Cross); Donlon Am. Testimony at 4 (explaining that Staff's proposal uses Line 10 because it "allows for consistency amongst all the utilities in the state").

[26] *See* O.R.C. § 4928.64(C)(3).

[27] *See* O.A.C. § 4901:1-40 ("Alternative Energy Portfolio Standard").

[28] O.A.C. § 4901:1-40-07(A), (B); *see also* O.R.C. § 4928.64(C)(3).

went through the formal rule-making process. The same should hold true for any cost cap that applies to the Commission's EE/PDR standards.

Because the cost cap in the Order prescribes a new standard that seeks to have a general and uniform operation, it is properly characterized as a "rule" under Ohio law.[29] Accordingly, the cost cap in the Order may only be implemented through Ohio's statutorily mandated rule-making procedures set forth in Section 111.15. Because it was not, as further explained below, its implementation is unlawful.

2. The Commission must follow Ohio's mandatory rule-making procedures.

Section 111.15 of the Ohio Revised Code explicitly requires certain agencies in Ohio, including the Commission, to file for review and approval ***each and every*** proposed rule with: (i) the Secretary of State; (ii) the Director of the Legislative Service Commission; and (iii) the Joint Committee on Agency Rule Review ("JCARR").[30] If the proposed rule "has an adverse impact on businesses," the agency must also file a "business impact analysis" along with the proposed rule.[31] Once properly filed, the proposed rule is then subjected to review under Section 106.021 of the Ohio Revised Code to ensure that it does not: (i) "exceed[] the scope of its statutory authority;" (ii) "conflict[] with the legislative intent of the statute under which it was proposed;" or (iii) "conflict[] with another proposed or existing rule."[32]

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[29] *See, e.g.*, *B&T Express, Inc. v. Pub. Util. Comm. of Ohio*, 145 Ohio App. 3d 656, 665, 763 N.E.2d 1241 (2001) (holding that the Commission's adoption of certain federal motor carrier safety regulations constituted "rules" under Section 111.15 because the rules had "'general and uniform operation' for motor carriers operating in Ohio"); *Livisay v. Ohio Bd. of Dietetics*, 73 Ohio App. 3d 288, 290-91, 596 N.E.2d 1129 (1991) (holding that an "interpretation" by the Ohio Board of Dietetics was actually a "rule" requiring rule-making procedures because it was "designed to have general and uniform application to any applicant for grandfather licensure that did not have a degree in nutrition").

[30] O.R.C. § 111.15 (B)-(C). The Commission falls under the purview of this statute. *See* O.R.C. § 111.15 (A)(2) ("'Agency' means any governmental entity of the state and includes . . . any . . . commission.").

[31] O.R.C. § 111.15 (D).

[32] O.R.C. § 106.021 (A)-(C).

As the Ohio Supreme Court has cautioned, Ohio's rule-making requirements "are mandatory protections against the arbitrary imposition of regulatory requirements" and "are fundamental to the administrative process."[33] Moreover, the rule-making process is "designed to permit a full and fair analysis of the impact and validity of a proposed rule."[34] As such, courts in Ohio require "strict adherence" to rule-making procedures, routinely invalidating rules and holding them unenforceable for failing to comply with the statutory procedures, including rules and regulations promulgated by the Commission. The Order does not address—let alone apply—these well-established principles.

As explained in the Companies' prior briefing, Court decisions invalidating rules, regulations, and other analogous standards for failing to follow established rule-making procedures are ubiquitous in Ohio. Agencies cannot sidestep these requirements, which Ohio courts recognize are an essential part of ensuring due process and fairness in the administrative process.[35] Indeed,

[33] *Fairfield Cty. Bd. of Comm'rs. v. Nally*, 143 Ohio St. 3d 93, 102, 34 N.E.3d 873 (2015).

[34] *Condee v. Lindley*, 12 Ohio St. 3d 90, 93, 465 N.E.2d 450 (1984).

[35] *See, e.g.*, *State ex rel. United Auto Aerospace & Agric. Implement Workers of Am. v. Ohio Bur. of Workers' Comp.*, 95 Ohio St. 3d 408, 411, 768 N.E.2d 1129 (2002) (affirming writ of mandamus invalidating the Ohio Bureau of Workers' Compensation decision to provide a one-time-only premium reduction credit to employers who pay into the state insurance fund because the Bureau failed to promulgate this rule pursuant to rule-making procedures); *Condee v. Lindley*, 12 Ohio St. 3d 90, 93, 465 N.E.2d 450 (1984) (holding Tax Commissioner could not avoid the rulemaking requirements, which are "designed to permit a full and fair analysis of the impact and validity of a proposed rule" before it is imposed upon the regulated community); *McLean Trucking Co. v. Lindley*, 70 Ohio St. 2d 106, 116, 435 N.E.2d 414 (1982) (holding the Tax Commissioner's adoption of a "special instruction" of uniform application without compliance with rule-making requirements rendered the instruction invalid); *Delbianco v. The Ohio State Racing Comm'n*, No. 01AP-395, 2001 WL 1222454, at *5 (Ohio Ct. App. Oct. 16, 2001) (affirming order finding a racehorse trainer was not in violation of a "rule" regarding total carbon dioxide levels in horses because such "per se 'rule'" had not been properly promulgated); *Jackson Cty. Envtl. Comm. v. Schregardus*, 95 Ohio App. 3d 527, 530, 642 N.E.2d 1142 (1994) (holding Ohio EPA could not regulate through "guidelines" that are in reality rules requiring formal promulgation pursuant to rule-making requirements.); *Ohio State Chiropractic Ass'n v. Ohio Bureau of Workers' Comp.*, No. 92AP-874, 1993 WL 14190, at *5 (Ohio Ct. App. Jan. 21, 1993) (affirming order finding a chapter in the Ohio Bureau of Workers' Compensation's Provider and Reimbursement Manual to be invalid because it "contain[ed] rules as defined by R.C. 119.01(C)" and "was not adopted in a manner mandated by R.C. Chapter 119"). While these cases specifically deal with Section 119 of the Ohio Revised Code, the rationale used by courts to invalidate informal regulatory standards applies with equal force to Section 111.15. Indeed, the two provisions use the nearly-identical definition of "rule," and both provisions stem from due process considerations. *Compare* O.R.C. § 119.01(C) ("'Rule' means any rule, regulation, or standard, having a general and uniform operation, adopted, promulgated, and enforced by any agency under the authority of the laws governing such agency,

the Commission recently recognized this in one of its own entries on rehearing when it reversed its previous decision requiring competitive retail electric service ("CRES") providers to label CRES contracts in a certain manner, finding that "the question of labeling contracts is better addressed through the rulemaking process."[36]

Here, it is undisputed that the cost cap set forth in the Order was not filed with JCARR (or with any of the other necessary entities) for review, does not contain the requisite "business impact analysis," and has not passed the statutorily-defined review process. Accordingly, its informal adoption was unlawful. The Companies seek rehearing on this issue.

C. The Order Is Unreasonable Because There Is No Basis In The Record To Support The Cost Cap.

In addition to being unlawful under Ohio law, the cost cap in the Order is also unreasonable because it is unsupported (and contradicted) by the record in this proceeding. Indeed, the Commission in its Order recognized the merits of the Stipulation in this case. But it then modified the expectations and commitments of the Signatory Parties by amending the Stipulation to impose a cost cap that cannot be reconciled with the record evidence and, in fact, is inherently unreasonable. Accordingly, the Companies seek rehearing.

1. The cost cap in the Order is not based on any reasoned methodology.

The evidence and record in this proceeding demonstrate that Staff's Cost Cap Proposal, which serves as the basis for the cost cap in the Order, was not based on any credible methodology and instead unreasonably relied on a limited set of ***historical*** data, which ignored ***current*** data,

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and includes any appendix to a rule.") *with* O.R.C. § 111.15(A)(1) ("'Rule' includes any rule, regulation, bylaw, or standard having a general or uniform operation adopted by an agency under the authority of the laws governing the agency; any appendix to a rule; and any internal management rule . . . .").

[36] *See e.g. In the Matter of the Commission-Ordered Investigation of Marketing Practices in the Competitive Retail Electric Service Market*, Case No. 14-568-EL-COI, Fourth Entry on Rehearing at 4 (Sept. 27, 2017).

among other crucial factors and considerations. This flaw was not adequately addressed in the Order.

Specifically, Staff Witness Donlon testified at the hearing that Staff recommended its Cost Cap Proposal based solely on its review of the Companies' annual status reports from ***2012 through 2014***.[37] The Companies, however, presented evidence that demonstrated why Mr. Donlon's simplistic assumption that 2012-2014 status reports will accurately predict future costs was unsupported. For instance, the costs of compliance have significantly increased since 2012, which undermines any reliance on historical data.[38] Indeed, "[s]ince 2012, costs have increased not only through inflation, but also because standards and efficient conditions have changed, which impacts savings and costs for certain measures."[39] As Companies' Witness Miller explained, "[i]n some cases, the amount of savings have decreased, requiring more participation simply to achieve the same levels of savings as in the past. In other cases, technologies have evolved and have become more expensive, requiring an increase in the incentive levels offered to customers."[40]

[37] Hearing Tr. Vol. II at 338:19-339:8 (Donlon Cross); Donlon Am. Testimony at 5; Staff Initial Brief at 7. OCC likewise relied on inapposite data from 2013 to 2015. *See* OCC Initial Brief at 15.

[38] Miller Rebuttal Testimony at 6; Companies' Initial Brief, Section III.C.3.e. at 83-84; Companies' Reply Brief at 18.

[39] *Id*. As an example, the Energy Independence and Security Act ("EISA") increased savings baselines and reduced estimated savings for lighting. Miller Rebuttal Testimony at 6; Hearing Tr. Vol. V at 630-631 (Miller Rebuttal Re-Direct). 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. *Id.* 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. *Id.*; *see also* Companies' Reply Brief at 18.

[40] *Id.*; Hearing Tr. Vol. V at 629:23-630:6 (Miller Rebuttal Re-Direct). The record also contains illustrative examples of how increased costs of compliance have a direct impact on an EDU's ability to meet its statutory targets. For example, due to increased technology costs, lighting incentives in the Revised Plans are 200% higher than they were under the Companies' previous EE/PDR portfolio plans. *See* Companies' Initial Brief, Section III.C.3.e at 83-84; Miller Rebuttal Testimony at 6; Companies' Reply Brief at 18. Moreover, the Companies have had to increase their reliance on more expensive measures as many of the lower cost measures have been achieved through prior energy efficiency plans. For instance, as a result, the Revised Plans project that only 30% of the Companies' total savings will be achieved through lighting measures, compared to 50% of the Companies' actual savings that was achieved through lighting measures between 2012 and 2015.

Unlike Staff, the Companies designed and developed the Revised Plans using a reasoned and meticulous approach. Specifically, the Revised Plans were developed with the assistance of the Collaborative Group and the Signatory Parties "using a bottom-up approach" based on "the most recent ***actual pricing*** for programs and escalated them for inflation, if necessary."[41] The Companies also relied upon ***real*** "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.[42] That careful and methodical approach in designing the Revised Plans resulted in an overall portfolio of cost-effective EE/PDR offerings.[43] Yet, the record in this proceeding is devoid of any evidence that Staff engaged in any similar process or analysis in formulating its Cost Cap Proposal.[44]

In short, Staff's reliance on outdated and unreliable historical data should have been rejected. Staff failed to offer actual analyses based on current data in support of its positions in this proceeding. Simple analysis demonstrates that the benefits of the Revised Plans, without the imposition of an arbitrary cost cap, far outweigh the costs. While Staff suggested that a cost cap was appropriate in this case because Rider DSE was among the "top five" highest riders on residential customers' bills,[45] such approach ignored the Commission's own methodology for gauging cost-effectiveness, which considers both costs ***and*** benefits.[46] Indeed, the Revised Plans

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[41] Miller Rebuttal Testimony at 5 (emphasis added); Companies' Reply Brief at 25.

[42] Miller Rebuttal Testimony at 5; Companies' Reply Brief at 25.

[43] Miller Rebuttal Testimony at 7; Hearing Tr. Vol. V at 578:10-17 (Miller Rebuttal Cross); Companies' Reply Brief at 25.

[44] 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.*, *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 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 at 80 (Mar. 31, 2016).

[45] Hearing Tr. Vol. II at 326:7-15, 328:6-329:5 (Donlon Cross); Donlon Am. Testimony at 5.

[46] *See, e.g.*, O.A.C. § 4901:1-39-01(F), (Y).

are projected to generate Total Discounted Lifetime Benefits ***to the Companies' customers*** of $785 million at a total plan cost of $268 million. Critically, no party (Staff included) challenged these calculations. Nor was there any attempt to explain how the proposed cost of the Revised Plans was unreasonable in light of those net lifetime benefits.[47]

2. The implementation of the unsupported cost cap leads to significant inequities among Ohio's major EDUs.

The implications of adopting and implementing an arbitrary cost cap separated from any reasoned methodology were highlighted in the evidentiary hearing. Indeed, the Companies demonstrated that the cost cap adopted in the Order is inherently unfair and will result in significant inequities among Ohio's EDUs. This is so for three main reasons, any of which provide adequate grounds for rehearing and reconsideration.

First, an analysis of the first-year EE acquisition costs across Ohio's EDUs demonstrates that the cost cap in the Order would prejudice the Companies by permitting them to spend significantly less money for each kWh of energy saved (less than $.20/kWh) compared to their in-state counterparts ($.256/kWh and $.235/kWh for AEP and DP&L, respectively).[48] ***Second***, the imposition of the cost cap ignores the inherent differences among EDUs' "switch rates" (of which

[47] Stipulation, Ex. B at 5; Companies' Reply Brief at 10. As fully explained in the Companies' post-hearing briefing, the savings projections included in the Revised Plans are based on a detailed assessment of every measure included therein. *See* Companies' Initial Brief, Section III at 17; *id.* Section III.C.3.e. at 84; *see also* Miller Rebuttal Testimony at 5; Companies' Reply Brief at 21. 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. *See* Miller Supp. Testimony at 6-7; *see also* Companies' Reply Brief at 21. That cost is reasonable, as even OCC Witness Spellman readily acknowledged. *See* Hearing Tr. Vol. II at 223:7-11 (Spellman Cross) ("16 cents in my opinion . . . is a reasonable number and well within the ballpark of other utilities in the region.").

[48] The implementation of an unfair cost cap makes no sense, particularly in light of the fact that the Companies have the highest MWh sales in Ohio, meaning their savings obligations are the highest in the State. *See* Companies' Initial Brief at 77. For instance, to provide the Companies with the same opportunity AEP has for complying with its EE/PDR benchmark, the Companies' annual cost cap would have to be $135 million – which is over $28 million more than what the 4% cost cap adopted in the Order permits (and nearly 69% higher than what Staff proposed. *Id.*; *see also* Miller Rebuttal Testimony at 17.

the Companies' have the highest over the period analyzed by Staff) that makes use of Line 10 inequitable from the outset. ***And third***, the Companies' average revenue per kWh delivered, as shown on Line 10, is approximately 78% of AEP, which, again, unfairly impacts the cost cap calculation as adopted in the Order.[49] While each of these arguments was previously raised by the Companies in its post-hearing briefing, the Order does not address any of them.

For all these reasons, the cost cap in the Order is unsupported by the record in this proceeding and, thus, is unfair and unreasonable. The Companies therefore request rehearing.

III. CONCLUSION

For the foregoing reasons, the Companies respectfully request that the Commission grant rehearing and correct the errors specifically discussed in this Application for Rehearing. To arrive at a lawful and reasonable result, the Commission should vacate the portions of its Order modifying the Stipulation in this case to include a 4% cost cap and instead enter an order adopting the Stipulation, without the cost cap modification.

[49] The average revenue per kWh delivered calculation "illustrates the combined impact of all variables that affect a utility's Line 10." *See* Miller Rebuttal Testimony at 15-16.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *Application for Rehearing* will be served on this 21st day of December, 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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