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IN THE SUPREME COURT OF OHIO

ENVIRONMENTAL LAW & POLICY CENTER, ENVIRONMENTAL DEFENSE FUND, NATURAL RESOURCES DEFENSE COUNCIL, AND OHIO ENVIRONMENTAL COUNCIL, Appellants	Case No. 2018-0379 On Appeal from the Public Utilities Commission of Ohio *In the Matter of the Application of the 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*
v.	
PUBLIC UTILITIES COMMISSION OF OHIO, Appellee	Case No. 16-743-EL-POR

NOTICE OF APPEAL OF APPELLANTS, ENVIRONMENTAL LAW & POLICY CENTER, ENVIRONMENTAL DEFENSE FUND, NATURAL RESOURCES DEFENSE COUNCIL, AND OHIO ENVIRONMENTAL COUNCIL

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NOTICE OF APPEAL

Pursuant to Ohio Revised Code ("R.C.") 4903.11 and 4903.13, Appellants the Environmental Law and Policy Center, Environmental Defense Fund, Natural Resources Defense Council, and Ohio Environmental Council (collectively, "Environmental Advocates") hereby give their notice of appeal to the Supreme Court of Ohio from an Opinion and Order of the Public Utilities Commission of Ohio ("Commission" or "PUCO") dated November 21, 2017, and an Entry on Rehearing dated January 10, 2018 (Attachments A and B, respectively) in PUCO Case No. 16-743-EL-POR. The case involves a three-year energy efficiency program plan proposed by the Ohio Edison Company, Cleveland Electric Illuminating Company, and Toledo Edison Company (collectively, "FirstEnergy").

Environmental Advocates arrived at a stipulated agreement with FirstEnergy regarding its efficiency programs that was designed to provide cost-effective energy savings to more than two million FirstEnergy customers. This appeal challenges the PUCO's decision to impose a "cost cap" arbitrarily limiting the funds FirstEnergy may spend on implementing this agreed-upon plan. In its decisions imposing this cost cap, the PUCO failed to comply with the basic requirement of R.C. 4903.09 to provide "findings of fact and written opinions setting forth the reasons prompting the decisions arrived at, based upon said findings of fact." Specifically, the PUCO entirely failed to address two key flaws of the cost cap: (1) that the methodology for the cost cap would inequitably leave FirstEnergy less money to spend on efficiency programs for its customers than other Ohio electric utilities; and (2) that the cost cap would actually raise customer bills by taking away funding for energy efficiency measures that are less expensive than the generation they replace.

The Environmental Advocates were and are parties of record in Case No. 16-743-EL-POR and timely filed their Joint Application for Rehearing of the November 21, 2017 Opinion and Order on December 21, 2017, as did FirstEnergy. Both Applications for Rehearing were denied January 10, 2018.

Environmental Advocates contend that the PUCO's November 21, 2017 Opinion and Order and January 10, 2018 Entry on Rehearing in Case No. 16-743-EL-POR are unlawful and unreasonable in the following respects, as set forth in the Environmental Advocates' and FirstEnergy's Applications for Rehearing:

1. The PUCO violated R.C. 4903.09 when it failed to address the parties' argument that the cost cap methodology, which had already been applied to other Ohio electric utilities, would in fact allow FirstEnergy to spend less money on efficiency programs for its customers than those other Ohio utilities.

(*FirstEnergy Memorandum in Support of Application for Rehearing*, at 13-14.)

2. The PUCO violated R.C. 4903.09 when it failed to address the parties' argument that the cost cap would increase customer bills by preventing customers from using cost-effective energy efficiency measures to lower their spending on more expensive generation.

(*Memorandum in Support of Application for Rehearing by the Environmental Advocates*, at 3-6.)

Wherefore, the Environmental Advocates respectfully submit that the PUCO's November 21, 2017 Opinion and Order and January 10, 2018 Entry on Rehearing in Case No. 16-743-EL-POR are unlawful, unjust, and unreasonable. This Court should reverse the PUCO's decision and remand to the Commission with instructions to correct the errors complained of herein.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Notice of Appeal, submitted on behalf of the Environmental Law & Policy Center, Environmental Defense Fund, Natural Resources Defense Council, and Ohio Environmental Council, was served by a combination of electronic and paper mail to all parties to the proceedings before the Public Utilities Commission and pursuant to section 4903.13 of the Ohio Revised Code on March 12, 2018.

Madeline Fleisher

CERTIFICATE OF FILING

The undersigned counsel certifies that, in accordance with Supreme Court Rule of Practice 3.11(D)(2), a copy of this Notice of Appeal was filed with the docketing division of the Public Utilities Commission of Ohio in accordance with sections 4901-1-02(A) and 4901-1-36 of the Ohio Administrative Code on March 12, 2018. The copy was delivered in person.

Madeline Fleisher

Attachment A

THE PUBLIC UTILITIES COMMISSION OF OHIO

IN THE MATTER OF THE APPLICATION OF THE OHIO EDISON COMPANY, THE CLEVELAND ELECTRIC ILLUMINATING COMPANY, AND THE TOLEDO EDISON COMPANY FOR APPROVAL OF THEIR ENERGY EFFICIENCY AND PEAK DEMAND REDUCTION PROGRAM PORTFOLIO PLANS FOR 2017 THROUGH 2019.	CASE NO. 16-743-EL-POR

OPINION AND ORDER

Entered in the Journal on November 21, 2017

I. SUMMARY

{¶ 1} The Commission approves the FirstEnergy Companies' Energy Efficiency and Peak Demand Reduction Program Portfolio Plan for 2017 through 2019, and to continue thereafter, as modified by the Stipulation and subject to a cost cap on the Companies' recovery of program costs and shared savings not to exceed four percent of the Company's total sales to ultimate customers in 2015.

II. APPLICABLE LAW

{¶ 2} Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company (collectively, FirstEnergy or the Companies) are electric distribution utilities as defined in R.C. 4928.01(A)(6) and public utilities as defined in R.C. 4905.02 and, as such, are subject to the energy efficiency and peak demand reduction (EE/PDR) requirements under R.C. 4928.64 and 4928.66.

{¶ 3} Ohio Adm.Code Chapter 4901:1-39 provides rules for the Commission's review of each electric utility's EE/PDR program portfolio plan (Portfolio Plan) that consists of cost-effective programs to encourage innovation and market access for all customer classes and achieve the statutory benchmarks for peak-demand reduction, and meet or exceed the statutory benchmarks for energy efficiency.

{¶ 4} On May 28, 2014, the General Assembly passed 2014 Sub S.B. No. 310 (S.B. 310), which became effective on September 12, 2014, and amended provisions in R.C.

Chapter 4928 to freeze the EE/PDR mandates at 2014 levels. S.B. 310 also gave each electric utility the option of extending its then-current Portfolio Plan through 2016, or amending its Portfolio Plan to adopt the frozen standard levels. The freezes enacted by S.B. 310 were lifted as of January 1, 2017, and the benchmarks under R.C. 4928.66 again apply.

{¶ 5} FirstEnergy was required to file an update to its Portfolio Plans by April 15, 2016, pursuant to Ohio Adm.Code 4901:1-39-04(A).

III. Procedural History

{¶ 6} FirstEnergy's Portfolio Plans were last approved for the January 1, 2015 through December 31, 2016 period in *In re Ohio Edison Co., et al., Energy Efficiency and Peak Demand Reduction Program Portfolio Plans for 2013 to 2015*, Case No. 12-2190-EL-POR, et al. (*FirstEnergy 2013-2015 POR*) Finding and Order (Nov. 20, 2014), which approved the Companies' application to amend their plans under the frozen EE/PDR mandated levels of S.B. 310.

{¶ 7} On March 31, 2016, the Commission issued its Opinion and Order in *In re Ohio Edison Co., et al., Application to Provide a Standard Service Offer in the Form of an Electric Security Plan*, Case No. 14-1297-EL-SSO (*FirstEnergy ESP IV*), approving the December 31, 2015 Third Supplemental Stipulation (Third ESP IV Stipulation), under which FirstEnergy agreed to reactivate all of its EE/PDR programs that had been approved in *FirstEnergy 2013-2015 POR*, but which had been suspended after FirstEnergy opted to amend its Portfolio Plans in light of the frozen EE/PDR mandates under S.B. 310. In addition, the Third ESP IV Stipulation required FirstEnergy to expand its EE/PDR program offerings to include best practice ideas from other Ohio utilities and nationally, and to strive to achieve over 800,000 MWh savings annually subject to customer opt-outs. *FirstEnergy ESP IV*, Opinion and Order (Mar. 31, 2016) and Third ESP IV Stipulation (Dec. 1, 2015) at 11.

{¶ 8} On April 15, 2016, FirstEnergy filed an application in this docket for the approval of its EE/PDR Portfolio Plans for 2017 through 2019, pursuant to R.C. 4928.66, and

Ohio Adm.Code Chapter 4901:1-39. In addition, FirstEnergy filed the direct testimony of FirstEnergy witnesses Denise J. Mullins, George L. Fitzpatrick, Edward C. Miller, and Eren G. Demiray in support of its proposed Portfolio Plans for the 2017-2019 period.

{¶ 9} Motions to intervene were thereafter filed jointly by the Ohio Environmental Council and Environmental Defense Fund (OEC/EDF), as well as by the Environmental Law & Policy Center (ELPC), Ohio Partners for Affordable Energy (OPAE), the Natural Resources Defense Council (NRDC), the Ohio Consumers' Counsel (OCC), the Industrial Energy Users-Ohio (IEU-Ohio), the Ohio Manufacturers' Association Energy Group (OMAEG), the Ohio Hospital Association (OHA), the Kroger Co. (Kroger), Energy Management Solutions, Inc. (EMS), EnerNOC, Inc. (EnerNOC), and IGS Energy, Inc. (IGS). Objections to FirstEnergy's proposed Portfolio Plans were filed by OPAE, OMAEG, OCC, and EMS.

{¶ 10} By entry issued May 23, 2016, the hearing of this matter was scheduled for July 25, 2016, but subsequently continued with the agreement of all parties to October 11, 2016, by entry issued on June 28, 2016. The hearing was further continued at the request of the parties to November 21, 2016, and then December 12, 2016, by entries issued on September 30, October 26, and November 22, 2016.

{¶ 11} On December 5, 2016, Staff filed the testimony of Patrick Donlon, which proposed the adoption of a cost cap on the Companies' recovery of the EE/PDR program costs and shared savings incurred through their Portfolio Plans.

{¶ 12} On December 9, 2016, FirstEnergy filed a Stipulation and Recommendation (Stipulation) that was joined by OEC/EDF, NRDC, ELPC, EMS, EnerNOC, OPAE, and IGS Energy. Although Kroger, OMAEG, and IEU-Ohio are not signatory parties, they do not oppose this Commission's adoption of the Stipulation. Along with the Stipulation, the Companies filed their revised plans for 2017 through 2019 (2017-2019 Revised Portfolio Plans), and the amended direct testimony of FirstEnergy witnesses Mullins, Fitzpatrick, and

Demiray, with the supplemental direct testimony of Mr. Miller in support of the Stipulation and Revised Portfolio Plans.

{¶ 13} A December 14, 2016 entry rescheduled the hearing for January 23, 2017 at the Companies' request with the agreement of all parties.

{¶ 14} On January 10, 2017, Staff filed the amended direct testimony of Mr. Donlon, and OCC filed the supplemental direct testimony of Richard F. Spellman, in opposition to the Stipulation.

{¶ 15} The hearing of this matter was held over five days, on January 23-31, 2017, and included the testimonies of FirstEnergy witnesses Mullins, Fitzpatrick, Miller, and Demiray, in support of the Stipulation, with opposition testimony by OCC witness Spellman and Staff witness Donlon. In addition, ELPC, NRDC and OEC/EDF (collectively, Environmental Intervenors) offered the rebuttal testimony of Chris Neme, filed on January 25, 2017, and FirstEnergy provided rebuttal testimony from Messrs. Miller and Demiray, filed on January 27, 2017, in support of the Stipulation.

{¶ 16} Initial briefs were filed on February 21, 2017, by FirstEnergy, the Environmental Intervenors, OPAE, and IGS in support of the Stipulation, and by Staff, OCC, and OHA in opposing the adoption of the Stipulation without modifications. Reply briefs were filed on March 3, 2017 by FirstEnergy, the Environmental Intervenors, OPAE, Staff, OCC, and OHA.

{¶ 17} On March 10, 2017, FirstEnergy filed motions to strike portions of the initial and reply briefs of both OCC and OHA. On March 15, 2017, Staff and OCC jointly filed a motion to strike portions of FirstEnergy's initial and reply briefs. Memoranda contra FirstEnergy's motions to strike were filed by OHA and OCC on March 23 and 27, 2017, respectively. On March 30, 2017, FirstEnergy filed its memorandum contra to the Staff/OCC motion to strike, and a reply to OHA's memorandum contra. On April 3, 2017, FirstEnergy filed its reply to OCC's memorandum contra, and on April 6, 2017, Staff and

OCC each filed a reply to FirstEnergy's memorandum contra the Staff/OCC motion to strike.

IV. Procedural Motions

A. *NRDC's Motion for Protective Order*

{¶ 18} On September 13, 2016, the NRDC filed a motion for protective order for certain information referenced in the testimony of its witness, Chris Neme, which NRDC obtained subject to a protective agreement with FirstEnergy, and which the Companies deem to be confidential. No objections to this motion have been filed.

{¶ 19} R.C. 4905.07 provides that all facts and information in the possession of the Commission shall be public, except as provided in R.C. 149.43, and as consistent with the purposes of R.C. Title 49. R.C. 149.43(A)(1)(v) specifies that the term "public records" excludes information which is prohibited from release under state or federal law. The Ohio Supreme Court has clarified that the state or federal law exemption is intended to cover trade secrets. *State ex rel. Besser v. Ohio State Univ.*, 89 Ohio St.3d 396, 399, 2000-Ohio-475. Ohio Adm.Code 4901-1-24 allows the Commission to issue an order to protect the confidentiality of information to the extent that state or federal law prohibits release of the information, including where the information is deemed to constitute a trade secret as defined by R.C. 1333.61(D). Ohio Adm.Code 4901-1-24(F) provides for the automatic expiration of orders prohibiting public disclosure trade secret confidential information after 24 months from the date of its issuance, unless otherwise ordered.

{¶ 20} As no objections have been filed, NRDC's motion for protective order should be granted for a period of 24 months, pursuant to Ohio Adm.Code 4901-1-24.

B. *FirstEnergy's Motion to Strike OHA's briefs*

{¶ 21} With respect to FirstEnergy's motion to strike portions of OHA's briefs, the Companies object to OHA's references to three letters filed as public comments in this docket from the director of facilities management for Cleveland's MetroHealth System, the president of the Ohio Society for Healthcare Facilities Management, and the vice president of support services for Lake Health. FirstEnergy asserts that these letters were not presented at the hearing and were not included in the evidentiary record in this proceeding. FirstEnergy notes that OHA presented no direct evidence related to hospital support of OHA's participation as an EE/PDR program administrator, and the Companies argue that, in any event, these letters constitute inadmissible hearsay.

{¶ 22} OHA argues that the Commission's docketing system allows customers to file public comments in any case they choose, and that the Commission is free to consider such comments when making decisions. OHA argues that these letters in support of OHA should not be stricken, as ignoring their existence would be unfair to the hospitals that voiced concerns with FirstEnergy's EE/PDR programs. OHA cites an AEP Ohio rate case in which the Commission took notice of numerous customer bills that showed disproportionately higher amounts than had been predicted after issuance of the Commission's Opinion granting a rate increase. *In re Ohio Power Co.*, Case Nos. 11-346-EL-SSO, et al., Entry on Rehearing at 11 (Feb. 23, 2012). OHA also notes the Commission's recognition of public comments in support of the Companies in *FirstEnergy ESP IV*, Opinion and Order at 12 (Mar. 31, 2016), in contending that FirstEnergy should not be allowed to benefit from public comments in one case, while seeking to silence the public in another. Further, OHA suggests that if the Commission grants FirstEnergy's motion to strike OHA's briefs, the Commission should also grant the Staff/OCC motion to strike references in FirstEnergy's briefs to confidential settlement discussions and non-record statements.

{¶ 23} While public comments are not considered evidence regarding the truth of the matters asserted therein, FirstEnergy does not dispute the authenticity of these letters, or that the officials of these organizations support OHA's position in this proceeding. Accordingly, FirstEnergy's motion to strike references in OHA's briefs to three letters filed as public comments in this case should be denied.

C. FirstEnergy's Motion to Strike OCC's briefs

{¶ 24} FirstEnergy also moves to strike OCC's Exhibit A attached to their initial brief regarding potential adjustments to FirstEnergy's 2017-2019 Revised Portfolio Plans that OCC suggests be adopted to reduce EE/PDR program costs. The Companies argue that OCC's Exhibit A is not part of the evidentiary record, but constitutes belated expert testimony which OCC should be prohibited from introducing after the close of the record. In addition, FirstEnergy seeks to strike OCC's reference to the Commission's discussion of the cost cap recently adopted in AEP Ohio's EE/PDR Portfolio Plan as "sound regulatory policy" when, FirstEnergy asserts, the Commission's subsequent Entry on Rehearing indicated that such language was non-binding dicta. *In re Ohio Power Co.*, Case No. 16-574-EL-POR, Opinion and Order (Jan. 18, 2017) at 8, and Entry on Rehearing (Feb. 8, 2017) at 3.

{¶ 25} In its memorandum contra, OCC argues that its Exhibit A consists entirely of record evidence from FirstEnergy's 2017-2019 Revised Portfolio Plans, and using simple calculations derived therefrom. FirstEnergy counters that OCC's exhibit and its proposed scenarios were never introduced at the hearing, and that the Companies had no opportunity to explore how OCC's proposed adjustments would affect metrics including TRC scores, whether the Companies could actually meet their statutory benchmarks under the alternative scenarios, or the modeling conducted by OCC to support its recommendations.

{¶ 26} We agree with FirstEnergy that OCC's Exhibit A attached to their initial brief and the corresponding references to it should be stricken. OCC should have introduced this chart through a witness and provided FirstEnergy with an opportunity to cross-examine the assumptions and calculations used to produce such exhibit during the hearing. However, FirstEnergy's motion to strike references to the Commission's discussion of the cost cap recently adopted in AEP Ohio's EE/PDR Portfolio Plan should be denied. FirstEnergy has not demonstrated that the Companies will suffer undue prejudice from OCC's characterization of this Commission's orders. Accordingly FirstEnergy's motion to strike portions of OCC's briefs is granted in part and denied in part, as set forth above.

D. *Staff/OCC Motion to Strike FirstEnergy's briefs*

{¶ 27} The joint motion filed by Staff and OCC seeks to strike references in FirstEnergy's initial and reply briefs on the basis that such language refers to confidential settlement communications and other information outside the record of this proceeding.

{¶ 28} In response, FirstEnergy argues that its references to Staff's lack of participation in the settlement process are not precluded by Ohio Adm.Code 4901-1-26(E). The Companies contend that their assertion that Staff failed to meaningfully participate in the settlement process does not reference any substantive discussions or offers among the parties to the settlement and are not, therefore, protected within the scope of Ohio Adm.Code 4901-1-26(E). Further, the Companies argue that their statements are not only permissible under the applicable evidentiary rules, but they address whether the stipulation was the product of serious bargaining among capable, knowledgeable parties. Similarly, FirstEnergy argues that any references to Stipulation provisions benefitting non-signatory parties are proper because such references do not identify any party offering or accepting a valuable consideration in compromising or attempting to compromise a disputed matter, do not involve conduct or statements made in compromise negotiations, and are not offered to prove liability for, or invalidity of, any dispute.

{¶ 29} Further, FirstEnergy contends that its citations to motions filed in this docket are also proper. The Companies cite the ruling of the attorney examiner during the cross-examination of Staff witness Donlon regarding the delays that occurred in this case, and they argue that they are entitled to rely on the docket card (Tr. III at 437-438). FirstEnergy argues that OCC's assertion that the Companies should not be permitted to cite Staff's motions to continue is inconsistent with OCC's own briefs which included citations to all of Staff's motions to continue. In addition, the Companies contend that they should be permitted to cite and rely upon the motions to intervene filed in this proceeding, as evidence of the diversity of the parties, even though these motions for intervention are not considered evidence in this case. Finally, FirstEnergy notes that OPAE and the Environmental

Intervenors have filed briefs expressly opposing Staff's proposed cost cap in defense of FirstEnergy's statement that no intervenor, other than OCC, supports Staff's proposal because the other intervenors believed such a cap would exceed the Commission's statutory and regulatory authority.

{¶ 30} In reply to FirstEnergy's memorandum contra, Staff argues that FirstEnergy is requesting to set a dangerous new precedent if counsel are allowed to include in their briefs, statements and judgments on the conduct of other parties during settlement negotiations that are not part of the record of evidence. Staff contends that while the Commission does consider whether parties were invited to participate in settlement discussions and had the opportunity to represent their interests, it does not consider the parties' conduct and statements made in such discussions. Staff notes that the Commission has recently reaffirmed that a party's efforts to resolve a dispute should not be considered evidence, and that evidence of conduct or statements made in compromise negotiations is not admissible. *In re Jentgen v. Ohio Edison Co.*, Case No. 15-245-EL-CSS, Entry on Rehearing (Dec. 7, 2016) at ¶33. Staff also contends that the Companies' statements identifying and describing OCC and OHA's settlement negotiations and positions regarding the Energy Star benchmarking program and expansion of participation among the low-income customers, involve substantive confidential negotiations and positions taken by parties who ultimately decided not to join the Stipulation. Staff claims that allowing such information to be cited in briefs could have a chilling effect on parties' negotiations in future cases.

{¶ 31} OCC filed a separate reply to the Companies' memoranda contra, arguing that FirstEnergy did not refute the Staff and OCC assertions that FirstEnergy's statements rely on facts not in evidence. OCC notes the lack of any evidence for FirstEnergy's claim that utilities do not typically oppose Staff's motions on procedural scheduling issues. OCC disputes FirstEnergy's claim that its reliance on the motion to intervene of a party is proper because the docket card in this case was admitted into evidence, and that FirstEnergy's statements are permissible because they address whether the stipulation is the product of serious bargaining (OCC Ex. 3, Tr. I at 133, Tr. III at 437-438). OCC contends that FirstEnergy fails to distinguish between OCC's citations to the docket card and FirstEnergy's citations to the actual substance of docketed filings that were not themselves admitted into the record. Finally, OCC emphasizes that FirstEnergy's explanations as to why signatory parties to the Stipulation may or may not have agreed to certain terms are not based on record evidence, and should be stricken.

{¶ 32} We agree, and will grant the joint motion to strike the materials identified in FirstEnergy's briefs. With respect to motions to strike extra-record materials, this Commission has held that each case must be resolved on its particular facts, but that references to procedural matters should be stricken where allowing such information could have a chilling effect on a party's willingness to engage in settlement discussions, or where the moving party did not have an opportunity to challenge such information. *Dayton Power and Light Co.*, Case No. 16-649-EL-POR, et. al., Opinion and Order (Sep. 27, 2017) at 5-6, citing *In re Columbia Gas of Ohio, Inc.*, Case No. 16-1309-GA-UNC, et al., Opinion and Order (Dec. 21, 2016). As noted above, the substance of these arguments go to FirstEnergy's attempt to assign blame for the regulatory delays in the approval of the Companies' Portfolio Plans, and such non-evidentiary accusations should be stricken due to the potential chilling effect that acceptance of such statements might have on a party's willingness to engage in future settlement discussions. Accordingly, the joint motion to strike should be granted.

V. SUMMARY OF THE STIPULATION

{¶ 33} As noted above, the Stipulation is supported by FirstEnergy, OEC/EDF, NRDC, ELPC, EMS, EnerNOC, OPAE, and IGS Energy, with Kroger, OMAEG, and IEU-Ohio agreeing not to oppose its adoption. Along with the Stipulation, the Companies filed their 2017-2019 Revised Portfolio Plans with an annual budget of approximately $89.5 million, in accordance with the *FirstEnergy ESP IV* Fifth Entry on Rehearing, which limited FirstEnergy's recovery of shared savings to $10 million and required the Companies to lower their EE/PDR program budgets to target their annual benchmarks, rather than the

800,000 MWh savings level that the Companies had pledged to strive for in the Third *ESP IV* Stipulation. *FirstEnergy ESP IV*, Fifth Entry on Rehearing (Oct. 12, 2016) at 147, Joint Ex. 1 Sections V.T at 9.

{¶ 34} The Stipulation in this proceeding also lists more than a dozen specific program changes, including:

- The Companies will prioritize LED lighting, and limit or eliminate CFL lighting if cost-competitive LED options become available during the plan period.

- The Companies will reduce the EE Kit subprogram budget by 14 percent and will work with interested parties to target low income customers and communities for participation in the EE Kit offering. Further, the Companies will target their marketing to residential customers who did not receive EE Kits during the 2013-2016 period, but will provide one EE Kit per Plan Period to any residential customer upon request.

- The Companies will reduce the Residential Behavioral subprogram budget by 50 percent.

- The Companies will eliminate the New Homes Sub-Program from the Energy Efficient Homes Program.

- The Companies will implement an integrated (one-stop-shop) multifamily program offering to target both basic and comprehensive services for individually metered and master metered multifamily properties, and will hold annual outreach activities for their multifamily program across their service territories.

- The Companies will implement a mid-stream or upstream program approach for residential heat-pump water heaters, select EnergyStar certified products, and for both residential and non-residential circulation pumps.

- The Companies will work with interested parties to increase their Smart Thermostat offerings by 30,000 units in the Energy Efficient Products Program.

- The Companies will investigate the feasibility of a geo-targeting pilot program and review their findings with interested parties.

- The Companies will revise their Behavioral subprogram to provide customized energy usage reports to participating low income customers with specific tips and recommendations, and will target low income customers and communities for participation in the EE kit offering.

- The Companies will expand their evaluation, measurement and verification plans to identify participation and savings from low income customers in the residential programs.

- The Companies will eliminate the $500,000 per customer per year rebate cap in the Mercantile Customer Program.

- The Companies will target and promote Combined Heat and Power (CHP) installations under their C&I Energy Solutions for Business Programs - Small and Large, Custom/LCI and SCI subprograms; and will work with developers to implement CHP and Waste Energy Recovery projects. The Companies will offer an incentive structure that will increase the floor for CHP incentives to \$.035/kWh with a maximum of up to \$.05/kWh with payment over a maximum five-year period. CHP projects processed under the Companies' Mercantile Customer Program will be rebated per the Commission's direction on a case-by- case basis and will not be subject to the \$250,000 project rebate cap in the Mercantile Customer Program.

- The Companies will be flexible in the implementation of their C&I Energy Solutions for Business Program, Audits & Education subprogram to allow for targeted energy analysis and audits of individual processes or systems. Customers served at or above the primary voltage level may apply for up to two targeted energy audits per building, not to exceed four targeted energy audits per site. The Companies will provide half of the audit cost, or may cover the full audit cost if audit-recommended measures are installed.

- During the 2017-2019 plan period, the Companies will continue to offer eligible installed energy efficiency resources into the PJM base residual and incremental capacity auctions. The Companies will offer at least 60 percent of eligible planned EE/PDR resources into the PJM base residual capacity auction and, to the extent possible, into PJM's incremental capacity auctions for additional available and eligible resources that were not offered into the base residual capacity auction. The Companies will receive 20 percent of any revenue obtained from offering EE/PDR resources into the PJM auctions, with the remaining 80 percent credited to offset the costs of FirstEnergy's EE/PDR programs. The Companies will report to the Collaborative cleared capacity after each base residual and incremental auction.

Joint Ex. 1, Sections V.A-Q at 4-8.

Included as a miscellaneous provision under the Stipulation, the signatory parties also agree that each Company's shared savings trigger for 2017 shall be reduced by 14 percent (Amended 2017 Shared Savings Triggers), but the Companies' shared savings incentive tiers, compliance percentages and incentive percentages will remain the same as originally proposed (Joint Ex. 1, ¶R at 8-9, Ex. B at 106-107).

VI. COMMISSION DISCUSSION

{¶ 35} Ohio Adm.Code 4901-1-30 authorizes parties to Commission proceedings to enter into a stipulation. Although not binding on the Commission, the terms of such an agreement are accorded substantial weight, particularly where the stipulation is unopposed by any party and resolves all issues in the proceeding. *Consumers Counsel v. Pub. Util. Comm.*, 64 Ohio St.3d 123, 125, 1992-Ohio-122, 592 N.E.2d 1370, citing *Akron v. Pub. Util. Comm.*, 55 Ohio St.2d 155, 157, 378 N.E.2d 480 (1978).

{¶ 36} The Commission has established a three-prong test in considering whether a stipulation is reasonable and should be adopted:

a. Is the settlement a product of serious bargaining among capable, knowledgeable parties?

b. Does the settlement, as a package, benefit ratepayers and the public interest?

c. Does the settlement package violate any important regulatory principle or practice?

The Supreme Court of Ohio has endorsed the Commission's use of these criteria to resolve issues in a manner economical to ratepayers and public utilities. *Indus. Energy Consumers of Ohio Power Co. v. Pub. Util. Comm.*, 68 Ohio St.3d 559, 1994-Ohio-435, 629 N.E.2d 423, citing *Consumers' Counsel* at 126. The Court stated in that case that the Commission may place substantial weight on the terms of a stipulation, even though the stipulation does not bind the Commission. In determining the reasonableness of a stipulation, the Commission should consider the agreement as a package. *In re Ohio Edison Co., et al.*, Case No. 14-1297-EL-SSO, Fifth Entry on Rehearing (Oct. 12, 2016) at 99-100.

{¶ 37} As noted above, the Stipulation is supported by FirstEnergy, OEC/EDF, NRDC, ELPC, EMS, EnerNOC, OPAE, and IGS Energy. Kroger, OMAEG, and IEU-Ohio neither support nor oppose its adoption. In their briefs, FirstEnergy, the Environmental Intervenors, OPAE, and IGS contend that the Stipulation and 2017-2019 Revised Portfolio Plans are just and reasonable, and should be approved by the Commission without modification.

{¶ 38} As discussed in detail below, Staff asserts that adoption of the Stipulation and 2017-2019 Revised Portfolio Plans would violate the last two prongs of the test, unless modified by a cap on the Companies' recovery of EE/PDR program costs and shared savings. OCC joins Staff's position, but also asserts that the Stipulation should be rejected because it violates regulatory principles and practices, in that the signatory parties are not diverse. OHA also opposes adoption of the Stipulation and 2017-2019 Revised Portfolio Plans, but only insofar as FirstEnergy's decision to terminate OHA as an EE/PDR program administrator.

A. *Is the settlement a product of serious bargaining among capable, knowledgeable parties?*

{¶ 39} As noted in the Stipulation and testimony of FirstEnergy witness Miller, the Companies held meetings with FirstEnergy's EE/PDR Collaborative Group relating to the development of the portfolio plans in December 2015 through March 2016, where the

Companies solicited input from Collaborative Group members, which ultimately lead to the Companies' original plans filed on April 15, 2016. Further changes and refinements that resulted from the settlement discussions, and are reflected in the Stipulation and 2017-2019 Revised Portfolio Plans, include a reduction in the Residential Behavioral sub-program, prioritization of LED lighting, hot water circulating pumps in the residential and small enterprise sectors, direct installations for small businesses, analytics-enabled energy efficiency recommendations, increased targeting of low-income customers for participation in the Companies' EE kit offerings, and select EnergyStar certified products (Co. Ex. 4 at 13).

{¶ 40} No party has challenged the adoption of the Stipulation and 2017-2019 Revised Portfolio Plans under the first prong of the Commission's test. We note the long procedural history of rescheduled hearing dates, including delays requested by both FirstEnergy and Staff in concluding that these parties were actively participating in efforts to settle the matters at issue in these proceedings,. The parties participating have regularly participated in other EE/PDR proceedings and FirstEnergy cases, and represent a diverse group of capable, knowledgeable stakeholders that include low-income residential customer, environmental, and industrial advocates, as well as a commercial customer, and a retail energy service provider (Joint Ex. 1 at 2-3, Co. Ex. 5 at 2-3, 8-9). Accordingly, the Commission finds that the first prong of the three-part test for the reasonableness of a stipulation has been met.

B. *Does the settlement, as a package, benefit ratepayers and the public interest?*

{¶ 41} According to the testimony of FirstEnergy witness Miller, the Stipulation and 2017-2019 Revised Portfolio Plans will benefit ratepayers and the public interest since they comply with FirstEnergy's commitments in their ESP IV case, and all programs are cost-effective. Further, Mr. Miller notes 13 specific program changes agreed to by the signatory parties, as well as the Companies' commitments to the EE/PDR Collaborative, and the revised plan budgets with the Commission-approved $10 million (after tax) cap on recovery of shared savings, as well as the new Amended 2017 Shared Savings Triggers provision (Joint Ex. 1 at 4-9, Co. Ex. 5 at 10-20).

{¶ 42} FirstEnergy is joined by the Environmental Intervenors, IGS and OPAE in contending that the Stipulation and 2017-2019 Revised Portfolio Plans, as a package, benefit ratepayers and the public interest asserts without Staff's proposed cap on EE/PDR program costs and shared savings. They argue that such a cap would almost certainly eliminate the Companies' shared savings incentive to exceed their EE/PDR goals and that FirstEnergy customers will be sufficiently protected by the Stipulation's two-year bill mitigation mechanism against rate volatility and price fluctuations.

1. Staff's Proposed Cost Cap on Recovery of EE/PDR Program Costs and Shared Savings

{¶ 43} Staff and OCC argue that the Stipulation does not benefit ratepayers and the public interest without Staff's proposed modification of a cost cap on the Companies' recovery of EE/PDR program costs and shared savings. Staff witness Donlon testified that the Companies' riders for their EE/PDR programs is the fourth largest rider on the bills of Toledo Edison and Cleveland Electric Illuminating customers, and the fifth largest for Ohio Edison's customers. He also asserted that such a measure is necessary despite Commission-approved budgets for the Companies' Revised Portfolio Plans, because the budgets will not preclude the Companies from recovering additional costs that the Companies may spend to meet and exceed their statutory mandates. He explained that Staff's proposed cap for each Company would be three percent of the Company's annual operating revenues for 2015 as reported on line 10, total sales to ultimate customers, on page 300 of the Company's FERC Form 1 report (3% Cap), and that Staff concluded that such a cap would provide FirstEnergy's ratepayers with price security while still allowing the Companies to meet and exceed their statutory mandates. He also stated that if the Companies find that they are unable to reasonably meet their statutory mandates within the 3% Cap, the Companies could request that the Commission amend the benchmarks pursuant to R.C. 4928.66(A)(2)(b). Mr. Donlon also explained that the Companies would continue to file an annual rider case for

Staff to review the prudence of EE/PDR costs incurred, and any costs that exceed the 3% Cap would be disallowed from recovery, or refunded to customers if already collected (Staff Ex. 1 at 5-7, Tr. II at 327-339).

{¶ 44} Mr. Donlon also testified that Staff believes that the Companies are capable of meeting and exceeding its benchmarks within the 3% Cap because, on average, the Companies underspent their budgets by 21 percent and over-achieved their benchmarks by 50 percent in 2012 through 2014 (Tr. II at 339). For 2014, Staff cites the rebuttal testimony of FirstEnergy witness Miller in noting that the Companies spent $55 million and achieved 773,372 MWH in savings, but for 2015 the Companies suspended the majority of their programs and spent only $16 million, yet still achieved 657,632 MWH in savings (Tr. V at 624 and 607, respectively).

{¶ 45} For 2017, Staff notes that Mr. Miller has projected that FirstEnergy's benchmarks will total approximately 535,000 MWH, and will be slightly lower for 2018 and 2019 (Tr. I at 69). Further, Staff notes that FirstEnergy witness Mullins testified that the Companies' projected benchmarks do not take into account the customers who will choose to opt out of the energy efficiency rider (Tr. I at 24). Staff and OCC contend that the Companies have had two years of experience with opt-out customers during 2015 and 2016, but chose not to make use of that data in projecting an anticipated level of opt-outs in 2017, and they assert that FirstEnergy has overstated its projected savings requirements and budgets by failing to include opt-outs in calculating their projected benchmarks.

{¶ 46} In addition, Staff and OCC note Mr. Donlon's testimony that the overall costs of FirstEnergy's EE/PDR programs can also be offset by the revenues the Companies receive from PJM for bidding energy efficiency into the RPM auction, which are credited back to the customers through the Companies' EE/PDR riders, thus reducing the program costs paid by customers (Staff Ex. 1 at 7). Given the Companies' prior spending and overachievement of their benchmarks, Staff and OCC conclude that a cap of $80.1 million should allow the Companies to meet their future statutory benchmarks after factoring in the opt-outs and offsets from PJM revenues.

{¶ 47} FirstEnergy, the Environmental Intervenors, and OPAE assert that Staff's cost cap proposal is unnecessary since the Stipulation and 2017-2019 Revised Portfolio Plans limit FirstEnergy's annual budget to $89.5 million, which is targeted to achieve the Companies' statutory benchmarks. They also contend that Staff's cost cap proposal is unnecessary since FirstEnergy customers are already protected under the two-year bill mitigation provision that limits total customer bills, including the Companies' EE/PDR rider amounts, which was approved in *FirstEnergy ESP IV*, Opinion and Order (Mar. 31, 2016) and the $10 million cap on FirstEnergy's recovery of shared savings, which was approved in *FirstEnergy ESP IV*, Fifth Entry on Rehearing at 147 (Oct. 12, 2016), and is expressly included in the Stipulation (Joint Ex. 1 Sections V.T at 9, Tr. III at 384-388). Further, they argue, that the record is clear that since the 2017-2019 Revised Portfolio Plans are cost-effective on a portfolio plan and program basis, the benefits to ratepayers must outweigh their costs, citing this Commission's recent recognition 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]" *FirstEnergy ESP IV*, Opinion and Order (Mar. 31, 2016) at 95. They also argue that OCC and Staff have not provided sufficient analysis to demonstrate that Staff's proposal will be cost-justified, noting that the 2017-2019 Revised Portfolio Plans are projected to generate Total Discounted Lifetime Benefits to the Companies' customers of $785 million at a total plan cost of only $268 million (Joint Ex. 1, Ex. B at 5).

{¶ 48} OPAE and the Environmental Intervenors argue that Staff's proposal would put regulation of FirstEnergy's EE/PDR programs on autopilot, whereas limitations on spending should be embodied in the program budgets after careful review of the costs and benefits. Further, they note that the Commission can always disallow imprudently incurred costs. They assert that Staff's cost cap will force the Companies to focus attention on the cost per first year kWh saved by a program or measure, rather than the program or measure's net lifetime energy savings. They contend that lifetime savings must be considered to understand the magnitude of electric system benefits produced by energy efficiency savings, and they are concerned that spending caps may force FirstEnergy to emphasize programs that produce inexpensive savings in the first year to meet the Companies' annual mandates, while foregoing more expensive savings that will ultimately provide more benefit over the long-term. While the Environmental Intervenors concede that Staff's proposed 3% Cap would slightly lower the EE/PDR rider on customer bills, they contend that Staff and OCC have not presented any evidence that Staff's proposal will not ultimately result in higher bills and lower-quality programs for FirstEnergy customers.

{¶ 49} The Environmental Intervenors also argue that Staff's proposal is inconsistent with R.C. 4928.66 and Ohio Adm.Code 4901:1-39-02(A), which set minimum levels for achievement, and they note the 12 other criteria, in addition to cost-effectiveness, listed under Ohio Adm.Code 4901:1-39-03(B)(2)-(13) that should be considered the assessment of EE/PDR programs. FirstEnergy argues that the Commission lacks statutory authority under R.C. 4928.66 to impose Staff's proposed cap, and that such a measure is unenforceable because it must be approved by the Joint Committee on Agency Rule Review (JCARR) under R.C. 101.35, and the applicable rule-making provisions of R.C. 111.15. FirstEnergy notes that R.C. 4928.64(C)(3) expressly sets a three percent cost cap on the compliance costs for renewable energy mandates, and concluded that the General Assembly could have provided a similar cost cap for R.C. 4928.66 compliance costs had it wished to do so. FirstEnergy cites *Fairfield Cty. Bd. of Comm'rs. v. Nally*, 143 Ohio St. 3d 93, 99, 2015-Ohio-991, 34 N.E.3d 873, and *Ohio Nurses Ass'n v. State Bd. of Nursing Educ. & Nurse Registration*, 44 Ohio St. 3d 73, 73, 540 N.E.2d 1354 (1989), in arguing that Staff's cost cap proposal would create a legal standard that did not previously exist, such that Ohio's rule-making restrictions would apply. FirstEnergy also notes that Staff has not included a cost cap in its most recent proposed changes to Ohio Adm.Code Chapter 4901:1-39 in Case No. 13-651-EL-ORD.

{¶ 50} Staff and OCC contend that the proposed cost cap will not impose a new legal standard upon FirstEnergy, and that the Commission is authorized to regulate rates set by the Companies under Ohio Adm.Code 4901:1-39-07, and its more general authority to regulate customer utility rates under R.C. 4905.22 and 4928.02. They argue that the proposed cap in this case is not a rule as it will only apply to FirstEnergy, rather than all EDUs, and is, therefore, not a rule "having a general and uniform operation" as defined by R.C. 111.15(A)(1). Staff notes FirstEnergy's assertions that the proposed cost cap is unnecessary because the program budgets will act as a cap on limiting recovery of EE/PDR costs, and argues that such assertions are inconsistent with FirstEnergy's argument that Staff's proposed cap would create a new legal standard.

{¶ 51} Staff and OCC argue that the absence of a cost cap provision for EE/PDR programs in R.C. 4928.66 does not mean that the Commission has no power to impose a cost cap on those programs. They cite *Kazmaier Supermarket, Inc. v. Toledo Edison Co.*, 61 Ohio St.3d 147, 150, 573 N.E. 2d 655, 658 (1991), for the proposition that the Commission is empowered with broad authority to administer and enforce the provisions of R.C. Title 49, and they contend that the Commission has broad authority to regulate a utility's portfolio plan under R.C. 4928.66, including its costs and bill impacts on customers, since the General Assembly did not specifically prohibit the Commission from imposing a cost cap.

{¶ 52} FirstEnergy, OPAE, and the Environmental Intervenors contest the Staff and OCC's contentions that the Companies will be able to meet their annual statutory energy efficiency targets under the proposed 3% Cap. They note Mr. Donlon's testimony that average residential customer pays between $1.98 and $2.90 per month through the EE/PDR rider, and that Staff's proposed cap would apply to both program spending plus shareholder incentives (Tr. III at 446-447, Staff Ex. 1, at 5). They cite the testimony of NRDC witness Neme and FirstEnergy witness Miller, that under the proposed shareholder incentive mechanism, the Companies would be eligible to earn up to $10 million in after-tax ($15.6 million pre-tax) profits; and that, if FirstEnergy achieves its maximum shareholder incentive, only $64.5

million would be left for annual program budgets (Env. Int. Ex. 1, at 14-15; Co. Ex. 17, at 8). Staff's proposal, they calculate, would result in a $31 million (or 32 percent) reduction from the annual average $95.5 million budget in the Stipulation which tracks the Companies' achievement of their annual statutory targets.

{¶ 53} FirstEnergy, OPAE, and the Environmental Intervenors argue that both Staff and OCC witness Spellman have based their analysis on obsolete data from the Companies' 2012-2014 annual status reports (Staff Ex. 1, at 5; Tr. IV at 531-532). They cite Mr. Miller's testimony that the Companies achieved about half of their actual savings in the 2012-2014 period from lighting, as compared to a 30 percent contribution of savings expected from lighting in the 2017-2019 Revised Plans, and that transmission and distribution savings constituted approximately seven percent of the total savings for 2014, with no money from the energy efficiency budget, but has been cut to one percent in the Revised Plans (Co. Ex. 17 at 5-7). Mr. Miller's analysis, they maintain, directly undercuts Mr. Donlon's assertion of a general trend in technology driving costs down on many projects (Tr. II at 343).

{¶ 54} In any event, FirstEnergy, OPAE, and the Environmental Intervenors assert that the imposition of Staff's proposed 3% Cap would be unfair to impose on FirstEnergy relative to the four percent caps recently approved in the other Ohio EDU Portfolio Plan cases. See, *In re Ohio Power Co.*, Case No. 16-574-EL-POR, Opinion and Order (Jan. 18, 2017) at 8; *In re Dayton Power and Light Co.*, Case No. 16-649-EL-POR, et al., Opinion and Order (Sep. 27, 2017) at 14; and *In re Duke Energy Ohio, Inc.*, Case No. 16-576-EL-POR, Opinion and Order (Sep. 27, 2017) at 15-16.

{¶ 55} We agree that a 3% Cap would be unfair to impose on FirstEnergy in light of the caps recently approved in the other Ohio EDU Portfolio Plan decisions cited above. As noted in our recent decisions involving the other Ohio EDU Portfolio Plan cases referenced above, we find that a cost cap on the potential EE/PDR program costs and shared savings to be borne by ratepayers is reasonable measure given the rising EE/PDR rider amounts billed to customers, as reported by Mr. Donlon (Staff Ex. 1 at 5-7, Tr. II at 328, Tr.

III at 446-447). Although FirstEnergy, OPAE, and the Environmental Intervenors argue that cost-effective EE/PDR programs will ultimately result in lower bills for ratepayers, this Commission must weigh the potential ultimate program benefits against the bill impacts to customers in the 2017-2019 Portfolio Plan period.

{¶ 56} We find that our adoption of a cost cap in this proceeding does not constitute a new legal standard or rule as defined under R.C. 111.15, but is a permissible exercise of this Commission's broad authority to administer and enforce the provisions of R.C. Title 49, and to regulate a utility's portfolio plan under R.C. 4928.66, since the General Assembly did not specifically prohibit a cost cap. *Kazmaier Supermarket,* 61 Ohio St.3d 147, 150 (1991). While the evidence of record is unclear whether the Companies will be able to meet their statutory mandates within Staff's proposed cost cap, we will raise the cap on recovery of EE/PDR programs and shared savings to four percent of the Companies' 2015 FERC-reported revenues to align FirstEnergy's cost caps with those of the other Ohio utilities. *In re Ohio Power Co.,* Case No. 16-574-EL-POR, Opinion and Order (Jan. 18, 2017) at 8; *In re Dayton Power and Light Co.,* Case No. 16-649-EL-POR, et al., Opinion and Order (Sep. 27, 2017) at 14; and *In re Duke Energy Ohio, Inc.,* Case No. 16-576-EL-POR, Opinion and Order (Sep. 27, 2017) at 15-16. Moreover, the Companies may request that the Commission amend their benchmarks pursuant to R.C. 4928.66(A)(2)(b).

{¶ 57} Accordingly, we find that the Stipulation and 2017-2019 Revised Portfolio Plans should be modified to include a cost cap on the Companies' recovery of EE/PDR program costs and shared savings not to exceed four percent of the Company's 2015 total sales to ultimate customers as reported on FERC Form 1 (approximately $107 million), in order to benefit ratepayers and the public interest (Tr. III at 431).

2. The Stipulation's Amended 2017 Shared Savings Triggers

{¶ 58} Staff and OCC also assert that the Amended 2017 Shared Savings Triggers provision under the Stipulation does not benefit ratepayers and the public interest, and violates an important regulatory principle. Staff asserts that although FirstEnergy represents that in the amended plan that the mechanism would be triggered only if the Companies exceed both their annual and cumulative energy savings targets as set forth in R.C. 4928.66(A)(1)(a) in any given year, the shared savings mechanism will be calculated annually on an individual EDU basis (Joint Ex. 1, Exhibit B at). Staff cites the testimony of FirstEnergy witness Demiray in calculating that under the Amended 2017 Shared Savings Triggers, the Companies could achieve only 86 percent of their statutory mandates but still be eligible to receive $10 million in shared savings (Co Ex. 1 at 6, Exhibit DJM-A2, Tr. I at 16, 22-24, 148-151).

{¶ 59} As discussed above, we are adopting Staff's proposed cap on FirstEnergy's recovery of EE/PDR program costs and shared savings, though at four percent of the Companies' 2015 FERC-reported revenues. Moreover, as further discussed below in considering the third prong of the test for settlements, we are clarifying in this proceeding that a utility should not be rewarded by collecting shared savings from ratepayers when the utility has failed to meet its statutory mandates, or has used banked energy efficiency savings to meet its mandated levels. With those clarifications and modifications, we find that the Stipulation will benefit ratepayers and the public interest.

3. Diversity of the Signatory Parties

{¶ 60} OCC is the only party to raise the issue of whether the Stipulation should be rejected because the signatory parties are not diverse. OCC argues that this lack of diversity causes the Stipulation to fail the second prong of the Commission's test because none of the signatory parties represent the Companies' residential customers who will pay FirstEnergy's EE/PDR program costs and shared savings. OPAE, the Environmental Intervenors and FirstEnergy dispute OCC's assertions that OCC is the only representative of residential customer interests and, as noted above, they argue that cost-effective EE/PDR programs will actually lower the bills of all customers, including the residential class, thereby benefitting FirstEnergy's ratepayers and the public interest.

{¶ 61} While the diversity of the signatory parties may be a consideration in determining whether a settlement is a product of serious bargaining among capable, knowledgeable parties under the first prong of the Commission's test, there is no diversity requirement that the residential customers' statutory representative be a signatory party for agreements which may result in increased costs for the residential class. The record here reflects that the hearing dates and filing deadlines were postponed numerous times to accommodate additional settlement discussions at the request of Staff and FirstEnergy, and there is no evidence that OCC was excluded from settlement discussions. Further, the Stipulation in this case is actively supported by OPAE on behalf of low-income residential customers. No single customer class or party, even the residential customers' statutory representative, should have the power to effectively veto a stipulation. *FirstEnergy ESP IV*, Opinion and Order (Mar. 31, 2016) at 43 (citing *Dominion Retail v. Dayton Power & Light Co.*, Case No. 03-2405-EL-CSS, Opinion and Order (Feb. 2, 2005) at 18; Entry on Rehearing (Mar. 23, 2005) at 7.

{¶ 62} Accordingly, we find that the Stipulation, as a package, and as modified by our adoption of the cost cap discussed above, will benefit ratepayers and the public interest, notwithstanding the absence of OCC as a signatory party.

4. Termination of OHA as a Program Administrator

{¶ 63} As noted above, OHA's opposition to the Stipulation is a result of FirstEnergy's decision to terminate OHA as a program administrator. OHA contends that such termination was unjust and without reason, and that approval of the Stipulation and 2017-2019 Revised Portfolio Plans is not in the public interest because OHA's termination would result in less hospital participation in EE/PDR programs in FirstEnergy's territory. OHA requests that the Commission order FirstEnergy to renew OHA as a program administrator.

{¶ 64} We cannot agree with OHA that its termination as a program administrator is sufficient to establish that the Stipulation and 2017-2019 Revised Portfolio Plans, as a package, does not benefit ratepayers and the public interest. We are, however, concerned that such action may reflect poorly on FirstEnergy's management of its EE/PDR programs and customer relations. Accordingly, we direct FirstEnergy to review this issue with Staff, and include a detailed account of its decisions and any impacts with respect to this issue in its next EE/PDR annual report filing.

{¶ 65} After consideration of the foregoing arguments of the parties and the evidence of record, we find that the Stipulation and 2017-2019 Revised Portfolio Plans, as modified by our adoption of the four percent cost cap set forth above, will, as a package, benefit ratepayers and the public interest.

C. *Does the settlement package violate any important regulatory principle or practice?*

{¶ 66} FirstEnergy asserts that the Stipulation and 2017-2019 Revised Portfolio Plans meet all of statutory and regulatory requirements, including the Commission's rules for EE/PDR portfolio plans in Ohio Adm.Code Chapter 4901:1-39. The Companies note the testimony of FirstEnergy witness Mullins that the Companies accurately calculated their EE/PDR requirements for the 2017-2019 period. Further, FirstEnergy notes that no party has claimed that the 2017-2019 Revised Portfolio Plans are not cost-effective on a portfolio plan basis, or has challenged the Companies' projections regarding FirstEnergy's ability to achieve its statutory mandates under the 2017-2019 Revised Portfolio Plans (Co. Ex. 1 at 2, Exhibits DJM-A2 and DJM-3, Tr. II at 185-86).

{¶ 67} As noted above, OCC asserts that the Stipulation should be rejected because it violates regulatory principles and practices, in that the signatory parties are not diverse. As discussed above, the diversity of the signatory parties may be a consideration in determining whether a settlement is a product of serious bargaining among capable, knowledgeable parties under the first prong of the Commission's test. However, there is no diversity requirement that the residential customers' statutory representative be a signatory party for agreements which may result in increased costs for the residential class. Accordingly, we find OCC's argument to be without merit.

{¶ 68} Both Staff and OCC argue that the Amended 2017 Shared Savings Triggers included in the Stipulation violate regulatory principles by potentially allowing FirstEnergy to recover $10 million in shared savings, while still failing to achieve their statutory mandates. While the FirstEnergy witnesses have testified that such a result is not intended, we will take this opportunity to clarify that under no circumstances should a utility be rewarded by collecting shared savings from ratepayers when the utility has failed to meet its statutory mandates, which includes any use of banked energy efficiency savings. With this clarification, we find that the Stipulation and 2017-2019 Revised Portfolio Plans, as modified by our adoption of the four percent cost cap discussed above, does not violate any important regulatory principle or practice.

{¶ 69} OCC also argues that the Commission should not approve the Stipulation because it violates the plain language of ¶325 of the *FirstEnergy ESP IV*, Fifth Entry on Rehearing (Oct. 12, 2016) at 147, which clarified that the goal of 800,000 MWh of energy efficiency savings annually was simply a goal, and that the Companies are expected to set their EE/PDR budgets to meet their annual statutory energy efficiency mandates rather than the 800,000 MWh goal. The *FirstEnergy ESP IV* Fifth Entry on Rehearing went on to explain that the Commission expects the goal to be achieved by efficiently administering the approved programs and achieving energy savings for the least cost rather than by setting the program budget to the stipulated goal.

{¶ 70} OCC calculates that under R.C. 4298.66(A), FirstEnergy's statutory mandated savings for all three Companies over the 2017 to 2019 period is 1,587 GWh (OCC Initial brief at 38-39, Co. Ex. 1, Exhibit DJM-A2, Column 8). OCC notes, however, that the Stipulation and FirstEnergy's 2017-2019 Revised Portfolio Plans provide for EE/PDR budgets totaling 1,782 GWh, which include a cushion of more than 12 percent above the statutory minimums (Jt. Exhibit 1, Exhibit A, Tr. 1 at 71). OCC argues that this cushion violates the *FirstEnergy ESP IV* Fifth Entry on Rehearing and, therefore, the Stipulation fails the third prong of the test.

{¶ 71} While we reaffirm our language in the *FirstEnergy ESP IV* Fifth Entry on Rehearing that we expect utilities to set their EE/PDR budgets to meet their annual statutory energy efficiency mandates, we believe that our adoption of the four percent cost cap on recovery of EE/PDR savings and program expenditures discussed above, will provide reasonable protection for FirstEnergy ratepayers against EE/PDR rider increases over the 2017-2019 Plan period. After consideration of the evidence of record and our analysis of the Stipulation set forth above, we find that the Stipulation and FirstEnergy's 2017-2019 Revised Portfolio Plans, as modified by our adoption of the four percent cost cap above, does not violate any important regulatory principle or practice. Accordingly we find the Stipulation, as modified, passes the three-part test and should be adopted.

{¶ 72} Finally, we note that Staff has identified some inconsistencies that should be resolved to improve the reporting and analysis of EE/PDR savings and program expenditures (Tr. III at 437-438). For future proceedings, FirstEnergy is directed to work collaboratively with its Stakeholders and Staff to develop a uniform system of reporting program savings and expenditures on an annual basis, which shall be included as part of each Company's annual status report.

VII. ORDER

{¶ 73} It is, therefore,

{¶ 74} ORDERED, That the Stipulation and the Companies' Revised 2017-2019 Portfolio Plans be approved, subject to a cost cap on the Companies' recovery of EE/PDR program costs and shared savings not to exceed four percent of the Companies' 2015 total sales to ultimate customers reported on FERC Form 1. It is, further,

{¶ 75} ORDERED, That the Companies' Revised 2017-2019 Portfolio Plans, as modified and approved in this Opinion and Order, continue in effect until otherwise ordered by this Commission. It is, further,

{¶ 76} ORDERED, That the NRDC's motion for protective order be granted for a period of 24 months from the issuance of this Opinion and Order. It is, further,

{¶ 77} ORDERED, That FirstEnergy's motion to strike portions of OHA's briefs be denied. It is, further,

{¶ 78} ORDERED, That FirstEnergy's motion to strike portions of OCC's briefs be granted in part and denied in part, as set forth above. It is, further,

{¶ 79} ORDERED, That joint motion of Staff and OCC to strike portions of the Company's initial and reply briefs be granted. It is, further,

{¶ 80} ORDERED, That the Companies take all actions consistent with the Stipulation and this Opinion and Order. It is, further,

{¶ 81} ORDERED, That a copy of this Opinion and Order be served upon all parties of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO

Asim Z. Haque, Chairman

M. Beth Trombold

Thomas W. Johnson

Lawrence K. Friedeman

Daniel R. Conway

RMB/vrm

Entered in the Journal

NOV 2 1 2017

Barcy F. McNeal
Secretary

Attachment B

THE PUBLIC UTILITIES COMMISSION OF OHIO

IN THE MATTER OF THE APPLICATION OF THE OHIO EDISON COMPANY, THE CLEVELAND ELECTRIC ILLUMINATING COMPANY, AND THE TOLEDO EDISON COMPANY FOR APPROVAL OF THEIR ENERGY EFFICIENCY AND PEAK DEMAND REDUCTION PROGRAM PORTFOLIO PLANS FOR 2017 THROUGH 2019.	CASE NO. 16-743-EL-POR

ENTRY ON REHEARING

Entered in the Journal on January 10, 2018

I. SUMMARY

{¶ 1} The Commission denies the applications for rehearing of the November 21, 2017 Opinion and Order, as the matters raised therein have been fully considered.

II. PROCEDURAL HISTORY

{¶ 2} Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company (collectively, FirstEnergy or the Companies) are electric distribution utilities as defined in R.C. 4928.01(A)(6) and public utilities as defined in R.C. 4905.02, and as such, are subject to the energy efficiency and peak demand reduction (EE/PDR) requirements under R.C. 4928.64 and 4928.66. In this proceeding, the Commission reviewed FirstEnergy's EE/PDR Program Portfolio Plan for 2017 through 2019 (2017-2019 Portfolio Plan), pursuant to Ohio Adm.Code Chapter 4901:1-39, to ensure that the Companies' 2017-2019 Portfolio Plan consists of cost-effective EE/PDR programs that achieve the statutory benchmarks for peak-demand reduction, and meet or exceed the statutory benchmarks for energy efficiency.

{¶ 3} On November 21, 2017, the Commission issued its Opinion and Order approving FirstEnergy's 2017-2019 Portfolio Plan, as modified by the Stipulation filed December 9, 2016, but also imposing an annual cap of approximately $107 million on the Company's recovery of EE/PDR program costs and shared savings from customers, a limit of four percent of the Companies' 2015 operating revenues (4% Cap). *In re Ohio Edison Co.,* *et al., for Approval of Energy Efficiency and Peak Demand Reduction Program Portfolio Plans for 2017 through 2019*, Case No. 16-743-EL-POR, Opinion and Order (Nov. 21, 2017) (Opinion and Order) at ¶¶1, 57, 74-75.

{¶ 4} On December 21, 2017, applications for rehearing of the Opinion and Order were filed jointly by the Environmental Law & Policy Center, the Natural Resources Defense Council, the Ohio Environmental Council, and the Environmental Defense Fund (Environmental Advocates, collectively), and by FirstEnergy.

{¶ 5} On January 2, 2018, the Ohio Consumers' Counsel (OCC) filed memoranda contra both applications for rehearing.

III. APPLICATIONS FOR REHEARING

{¶ 6} R.C. 4903.10 states that any party who has entered an appearance in a Commission proceeding may apply for rehearing with respect to any matters determined therein by filing an application within 30 days after the entry of the order upon the Commission's journal.

A. Environmental Advocates' Application for Rehearing

{¶ 7} As their only ground for rehearing, the Environmental Advocates contend that the Opinion and Order is unlawful and unreasonable because the likely result will be less spending on cost-effective energy efficiency and higher overall bills for FirstEnergy's customers. They concede that the rising rider amounts being billed to customers to pay for EE/PDR programs and shared savings incentives constitute a valid concern but argue that FirstEnergy's EE/PDR rider amounts to only \$2 to \$3 per month for a typical residential customer and that FirstEnergy's EE/PDR programs are subject to budget limits and prudency reviews for any cost overruns (Tr. II at 446-47; Co. Ex. 14). They contend that the Opinion and Order fails to address concerns raised in the record that the 4% Cap may result in higher bills for customers. They cite *MCI Telecommunications Corp. v. Pub. Util. Comm.*, 32 Ohio St.3d 306, 312, 513 N.E.2d 337 (1987) in arguing that the Opinion and Order violates R.C. 4903.09 by failing to set forth, in sufficient detail, the facts in the record upon which the order is based, and the reasoning of the Commission in reaching its conclusion; and *Indus. Energy Users-Ohio v. Pub. Util. Comm.*, 117 Ohio St.3d 486, 2008-Ohio-990, 885 N.E.2d 195 at ¶30, for the proposition that the Commission abuses its discretion if it renders an opinion on an issue without record support.

{¶ 8} The Environmental Advocates note that the 4% Cap approved in the Opinion and Order will limit FirstEnergy's recovery of EE/PDR program costs and shared savings to approximately $107 million and, assuming FirstEnergy is able to earn its maximum shared savings incentive payment of $15.6 million, the resulting annual program budget of $91.4 million will require the Companies to cut about $4.1 million from its projected average annual budget of $95.5 million for 2018 and 2019 (Opinion and Order at ¶¶52-53, 57; Co. Ex. 17, at 8; Env. Int. Ex. 1 at 14). The Environmental Advocates argue that since these programs have been determined to be cost effective, as required by Ohio Adm.Code 4901:1-39-04(B), these programs cost less than the generation they replace, and the 4% Cap will result in higher customer bills overall.

{¶ 9} This argument was fully considered by the Commission. Opinion and Order at ¶¶47-55. As noted by the Commission, the 4% Cap on the potential EE/PDR program costs and shared savings to be borne by ratepayers is a reasonable measure given the rising EE/PDR rider amounts billed to customers, as reported by Staff witness Donlon (Staff Ex. 1 at 5-7; Tr. II at 328; Tr. III at 446-47). Although cost-effective EE/PDR programs may ultimately result in lower bills for ratepayers in the aggregate, this Commission must weigh the potential program benefits against the potential bill impacts to individual customers in the 2017-2019 Portfolio Plan period. Opinion and Order at ¶55. The Commission must balance the current costs of the Companies' EE/PDR riders against the potential future cost savings to customers from the Companies' EE/PDR programs. Accordingly, as the Environmental Advocates have not raised any new issues for the Commission's consideration, their application for rehearing will be denied.

B. *FirstEnergy's Application for Rehearing*

1. THE COMMISSION LACKS AUTHORITY TO ADOPT THE 4% CAP.

{¶ 10} In their application for rehearing, the Companies argue that the Opinion and Order is unlawful and unreasonable on three separate grounds, the first being that the Commission lacks statutory authority to adopt the 4% Cap on the Companies' recovery of EE/PDR program costs and shared savings. FirstEnergy argues that the Commission is a creature of the General Assembly and may exercise no jurisdiction beyond that conferred by statute, citing *Pike Nat. Gas Co. v. Pub. Util. Comm.*, 68 Ohio St. 2d 181, 183, 429 N.E.2d 444 (1981) and *Canton Storage & Transfer Co. v. Pub. Util. Comm.*, 72 Ohio St. 3d 1, 5, 647 N.E.2d 136, 141 (1995). Further, FirstEnergy maintains that R.C. 4928.66 does not authorize the Commission to approve the imposition of an overall cost cap on the efforts of Ohio's electric distribution utilities (EDUs) to meet their respective statutory EE/PDR benchmarks. FirstEnergy notes that both R.C. 4928.64 and 4928.66 were enacted as part of the same legislation in 2008, and that the renewable energy standards include a cost cap under R.C. 4928.64(C)(3), whereas R.C. 4928.66 does not include a similar provision for the EE/PDR standards. This distinction, FirstEnergy argues, clearly demonstrates the General Assembly's intent to treat the provisions differently with respect to the imposition of a cost cap.

{¶ 11} These arguments were considered and rejected by the Commission. Opinion and Order at ¶¶49-51, ¶56. As noted in the Commission's decision, the 4% Cap is a reasonable measure to moderate the bill impacts of rising EE/PDR rider charges on FirstEnergy customers under this Commission's broad authority to administer and enforce the provisions of R.C. Title 49, which has been recognized by the Court. *Kazmaier Supermarket, Inc. v. The Toledo Edison Co.*, 61 Ohio St.3d 147, 150, 573 N.E. 2d 655, 658 (1991).

{¶ 12} The renewable energy cost cap provision cited by FirstEnergy in R.C. 4928.64(C)(3) allows an electric utility or competitive retail electric service (CRES) provider to avoid compliance penalties even if it fails to meet its renewable energy benchmarks, if the reasonably expected cost of compliance would exceed the reasonably expected cost of otherwise producing or acquiring the requisite electricity by three percent or more. This provision is not mandatory and is an option for the utility or CRES provider, participating in a competitive marketplace. Moreover, EE/PDR costs are recovered from all customers on a nonbypassable basis.

{¶ 13} In contrast, the 4% Cap adopted in the Opinion and Order will protect the utility's customers from increasing rider charges, particularly where the utility's EE/PDR program budgets seek to achieve targets beyond the utility's statutory mandates under R.C. 4928.66. Accordingly, and because FirstEnergy raises no new issues for the Commission's consideration, this ground for rehearing will be denied.

2. THE 4% CAP WAS NOT SUBJECTED TO OHIO'S MANDATORY RULE-MAKING PROCEDURES.

{¶ 14} As its second ground for rehearing, FirstEnergy argues that the Opinion and Order is unlawful because our adoption of the 4% Cap constitutes the creation of a legal standard that did not previously exist, and therefore is a rule that has not been adopted under the appropriate rule-making requirements of R.C. 111.15. FirstEnergy cites *Fairfield Cty. Bd. of Comm'rs. v. Nally*, 143 Ohio St. 3d 93, 100, 2015-Ohio-991, 34 N.E.3d 873, in which the Court held that the Ohio Environmental Protection Agency must comply with the similar administrative rule-making procedures in R.C. Chapter 119 in establishing a total maximum daily load water-quality standard. FirstEnergy also references *B&T Express, Inc. v. Pub. Util. Comm. of Ohio*, 145 Ohio App. 3d 656, 665, 763 N.E.2d 1241 (2001) in which the Commission's adoption of federal motor carrier safety regulations were held to constitute rules under R.C. 111.15 because they had a "general and uniform operation" for motor carriers operating in Ohio. FirstEnergy asserts that Ohio's electric utilities have never before had to adjust their proposed EE/PDR plans to comply with an overall cost cap, and that the 4% Cap is being applied in a general and uniform manner to the recovery of EE/PDR program costs and shared savings for all of the Ohio electric utilities. Furthermore, FirstEnergy notes the Commission's adoption of Ohio Adm.Code 4901:1-40-07 for the renewable energy cost cap under R.C. 4928.64(C)(3), suggesting that the 4% Cap for recovery of EE/PDR costs must likewise be codified.

{¶ 15} In its memorandum contra, OCC argues that the lack of an explicit cost cap in R.C. 4928.66 does not strip the Commission of its more general authority to regulate customers' utility rates under R.C. 4905.22 and 4928.02. OCC cites the caps approved for FirstEnergy's delivery capital recovery rider in FirstEnergy's 2010 and 2012 ESP cases, despite there being no explicit mention of a cost cap in R.C. 4928.143. *In re Ohio Edison Co., et al. to Establish a Standard Service Offer under an Elec. Security Plan,* Case No. 10-388-EL-SSO, Opinion & Order (Aug. 25, 2010), and Case No. 12-1230-EL-SSO, Opinion & Order (July 18, 2012).

{¶ 16} This argument was raised and rejected by the Commission. Opinion and Order at ¶¶49-51, 54-57. We disagree that the 4% Cap constitutes the creation of a legal standard that did not previously exist and is, therefore, a rule subject to the rule-making requirements of R.C. 111.15. The 4% Cap adopted in the Opinion and Order is not a "guideline" like the water standard in *Nally, supra,* which applied generally and uniformly to a large segment of the public. And while we have applied a 4% Cap on the recovery of EE/PDR costs for each Ohio electric utility, the Commission has done so on an individual basis, giving each utility an opportunity to litigate its position on this issue. This cost cap provision is not a requirement imposed upon the electric utility. Rather, the 4% Cap is a limitation on the utility's recovery of EE/PDR costs, which balances the impact upon the customer who is required to pay for a program before the full cost savings from such program is realized. The result is that customer bills increase as the EE/PDR rider increases, notwithstanding any future benefits that such program may ultimately produce to lower customer bills at some future date.

{¶ 17} Moreover, the Commission's rule now promulgated as Ohio Adm.Code 4901:1-40-07 was adopted in response to the renewable energy cost cap under R.C. 4928.64(C)(3). There was no similar statutory provision for EE/PDR programs to suggest that the Commission incorporate a cost cap for the rules now codified in Ohio Adm.Code Chapter 4901:1-39. This Commission has broad discretionary authority to make rules in its supervision of electric utilities under R.C. 4905.05, 4905.06, and 4928.06. Moreover, the choice to proceed by rule or by individual, ad hoc litigation is one that lies primarily in the informed discretion of the administrative agency. *Duff Truck Line, Inc. v. Pub. Util. Comm.*, 46 Ohio St.2d 186, 348 N.E.2d 127, 75 O.O.2d 229 (1976), citing *Securities & Exchange Comm. v. Chenery Corp.*, 332 U.S. 194, 203, 67 S.Ct. 1575, 1580, 91 L.Ed. 1995 (1947); *National Labor Relations Board v. Bell Aerospace Co.*, 416 U.S. 267, 94 S.Ct. 1757, 40 L.Ed.2d 134 (1974). Accordingly, and because FirstEnergy fails to raise any new issues for the Commission's consideration, this ground for rehearing will be denied.

3. THERE IS NO EVIDENCE TO SUPPORT THE 4% CAP, WHICH IS INHERENTLY UNFAIR AND LEADS TO SIGNIFICANT INEQUITIES AMONG OHIO'S EDUS.

{¶ 18} As its final ground for rehearing, FirstEnergy argues that there is no evidence to support the adoption of the 4% Cap, which is inherently unfair and leads to significant inequities among Ohio's EDUs.

{¶ 19} These argument were raised and fully considered in the Opinion and Order at ¶¶52-57. As discussed above, the 4% Cap was adopted as a reasonable measure to limit the rate impact on FirstEnergy customers in response to credible Staff testimony regarding the Companies' increasing EE/PDR riders. While the impact of the 4% Cap may affect each of the Ohio EDUs somewhat differently, the application of a four percent cap based on each EDU's reported total sales to ultimate customers should mitigate any unfairness to FirstEnergy shareholders. Accordingly, this ground for rehearing and FirstEnergy's application for rehearing will be denied.

IV. ORDER

{¶ 20} It is, therefore,

{¶ 21} ORDERED, That the applications for rehearing filed by the Environmental Advocates and FirstEnergy be denied. It is, further,

{¶ 22} ORDERED, That a copy of this Entry on Rehearing be served upon all parties of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO

Asim Z. Haque, Chairman

M. Beth Trombold

Thomas W. Johnson

Lawrence K. Friedeman

Daniel R. Conway

RMB/vrm

Entered in the Journal
JAN 1 0 2018

Barcy F. McNeal

Barcy F. McNeal
Secretary

Applications for Rehearing

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

APPLICATION FOR REHEARING BY THE ENVIRONMENTAL LAW & POLICY CENTER, NATURAL RESOURCES DEFENSE COUNCIL, OHIO ENVIRONMENTAL COUNCIL, AND ENVIRONMENTAL DEFENSE FUND

Pursuant to Ohio Revised Code ("R.C.") 4903.10 and Ohio Admin. Code 4901-1-35, the Environmental Law & Policy Center, Natural Resources Defense Council, Ohio Environmental Council, and Environmental Defense Fund file this Application for Rehearing of the November 21, 2017 Opinion and Order ("Order") in this proceeding. The Order approved the Energy Efficiency and Peak Demand Reduction Program Plan proposed by the Ohio Edison Company, the Cleveland Electric Illuminating Company, and the Toledo Edison Company (collectively, "FirstEnergy" or "Companies"), as modified by the December 9, 2016 Stipulation and Recommendation (the "Stipulation"). However, the Order modified this Stipulation in one important way: it imposed an annual cost cap of approximately $107 million on recovery of program costs and shared savings from customers under the Plan. As further explained in the accompanying Memorandum in Support, that limitation on costs is unlawful and unreasonable because the Commission failed to consider the overall impact of the cap on customer bills, focusing solely and exclusively on the amount of FirstEnergy's energy efficiency rider.

December 21, 2017

Respectfully submitted,

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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

MEMORANDUM IN SUPPORT OF APPLICATION FOR REHEARING BY THE ENVIRONMENTAL LAW & POLICY CENTER, NATURAL RESOURCES DEFENSE COUNCIL, OHIO ENVIRONMENTAL COUNCIL, AND ENVIRONMENTAL DEFENSE FUND

The Environmental Law & Policy Center, Natural Resources Defense Council, Ohio Environmental Council, and Environmental Defense Fund (collectively, "Environmental Intervenors") seek rehearing of the November 21, 2017 Opinion and Order ("Order") in this proceeding. The Order approved the Energy Efficiency & Peak Demand Reduction Program Plans ("Plans") proposed by the Ohio Edison Company, the Cleveland Electric Illuminating Company, and the Toledo Edison Company (collectively, "FirstEnergy" or "Companies"), as modified by the December 9, 2016 Stipulation and Recommendation (the "Stipulation"). At the same time, the Order modified this Stipulation to impose an annual cost cap of approximately $107 million on recovery of program costs and shared savings from customers under the Plan as "a reasonable measure given the rising EE/PDR rider amounts billed to customers." Order at 22. The result of this Order is likely to be less spending on cost-effective energy efficiency and higher overall bills for FirstEnergy's customers. The Order is therefore unlawful and unreasonable.

I. STANDARD OF REVIEW

R.C. 4903.10 enables parties to seek rehearing of any aspect of a final order by the Public Utilities Commission of Ohio ("Commission") that is "unreasonable or unlawful." In addition, on rehearing the Commission must be mindful of compliance with R.C. 4903.09, which provides:

> [I]n all contested cases heard by the public utilities commission, a complete record of all of the proceedings shall be made, including a transcript of all testimony and of all exhibits, and the commission shall file, with the records of such cases, findings of fact and written opinions setting forth the reasons prompting the decisions arrived at, based upon said findings of fact.

The Ohio Supreme Court has explained that R.C. 4903.09 means that "the PUCO's order must show, in sufficient detail, the facts in the record upon which the order is based, and the reasoning followed by the PUCO in reaching its conclusion." *MCI Telecommunications Corp. v. Pub. Util. Comm.*, 32 Ohio St.3d 306, 312, 513 N.E.2d 337 (1987). In fact, "[a] legion of cases establish that the commission abuses its discretion if it renders an opinion on an issue without record support." *Indus. Energy Users-Ohio v. PUC*, 117 Ohio St.3d 486, 2008-Ohio-990, 885 N.E.2d 195, ¶ 30 (citations and internal quotation marks omitted).

II. FACTS

In the Order, the Commission approved a cost cap on program spending and shared savings of approximately $107 million, calculated as four percent of FirstEnergy's 2015 operating revenues as reported on FERC Form 1. Order at 23. Assuming FirstEnergy is able to earn its maximum shared savings incentive payment of $15.6 million, this leaves an annual program budget of about $91.4 million. Order at 21; Co. Ex. 17, Miller Rebuttal Test. at 8. That budget requires FirstEnergy to cut approximately $4.1 million from its projected average annual budget of $95.5 million for 2018 and 2019. Env. Int. Ex. 1, Neme Rebuttal Test. at 14. For context, that is approximately the same as the entire three-year budget for residential appliance rebates, and close to the annual budget for residential lighting rebates under the Stipulation. Joint Ex. 1, Stipulation, Ex. A.

III. ARGUMENT

The Commission approved the annual cost cap as "a reasonable measure given the rising EE/PDR rider amounts billed to customers." Order at 22. That is a valid concern, which is why Environmental Intervenors have always supported the establishment of a program budget and prudency review of any costs over that budget limit. However, the cost cap approved in this case is not a reasonable way to address rising rider costs for one simple reason: the Order failed to address concerns raised in the record that the cost cap may have the opposite effect of what the Commission intends – namely, that it may very well result in higher bills for customers.

FirstEnergy's energy efficiency rider, Rider DSE2, is a small part of a customer's electricity bill – around $2-$3 per month for a typical residential customer using 750 kWh per month, or about 2-3% of a bill that is generally between $103 and $106 per month. Tr. II at 446:18-447:9; Co Ex. 14, Ohio Utility Rate Survey (Dec. 1, 2015) (average residential electric bill for Akron, Toledo, Cleveland). A far larger portion of FirstEnergy's customers' bills is driven by the amount that the customer pays per kilowatt hour for generation and distribution service. Yet the Commission, in concluding that an energy efficiency cost cap would be "a reasonable measure given the rising EE/PDR rider amounts billed to customers," overlooked the important impacts that efficiency programs can have on reducing customer usage and volumetric rates.

By law, a utility's energy efficiency plan must be cost effective, which means that it must cost less than the generation it replaces. Ohio Admin. Code 4901:1-39-04(B). When utilities spend more on efficiency, customers spend less on generation and overall costs go down. **It is indisputable that when the Commission caps spending on efficiency it translates to higher customer bills overall because higher cost megawatts replace lower cost "negawatts."**

As an illustration, the energy savings available to participants in FirstEnergy's efficiency programs through steps as simple as purchasing new LED light bulbs significantly outweigh the cost of the energy efficiency rider. Env. Int. Initial Br. at 6 & n.2. However, the Commission has not accounted for such savings in considering the effects of reducing energy savings opportunities by capping energy efficiency spending. Order at 22-23. The sum total of the Order's discussion of this issue is the statement that:

> Although FirstEnergy, OPAE, and the Environmental Intervenors argue that cost-effective EE/PDR programs will ultimately result in lower bills for ratepayers, this Commission must weigh the potential ultimate program benefits against the bill impacts to customers in the 2017-2019 Portfolio Plan period.

Order at 23. But even within the 2017-2019 Plan period, the facts show that customers may lose money to the extent the cost cap results in reduced energy-saving opportunities. For example, as outlined in Environmental Intervenors' brief, a customer installing ten LED lightbulbs through FirstEnergy's residential lighting program would save $50 *per year* – more than the $24-$36 yearly cost of the energy efficiency rider during each of the plan years. Env. Int. Initial Br. at 6 & n.2. The long-term benefits of these measures, which are projected to last for 15 years, only tip the scales even further. *See, e.g.,* Stipulation, Ex. B (Revised Plans), Ohio Edison App. C-1 at 2 of 8. Fundamentally, the Commission cannot reasonably reach any conclusion as to the bill impacts of the cost cap, even within the plan period itself, without assessing whether and how much it may limit direct customer bill savings. But the Order provides no such assessment.

The Order likewise never accounts for the effects of FirstEnergy's energy efficiency programs in reducing energy and capacity prices for all customers, regardless of whether they participate directly in the programs. The Commission *itself* has previously affirmed in a letter to the Ohio legislature that energy efficiency reduces wholesale electricity market prices by lowering overall demand, thus allowing customers to avoid paying for the highest priced sources of power. ELPC Ex.1, Staff Report to Energy Mandate Study Committee at 12; Env. Int. Initial Br. at 6. Nowhere does the Order mention or evaluate the argument that limiting energy efficiency spending may increase all customers' bills by reducing this acknowledged price suppression effect.

In omitting any evaluation of each of these aspects of a cost cap, the Order falls short of the requirements of R.C. 4903.09 to provide "facts in the record upon which the order is based, and the reasoning followed by the PUCO in reaching its conclusion." *MCI Telecommunications Corp. v. Pub. Util. Comm.* (1987), 32 Ohio St.3d 306, 312, 513 N.E.2d 337. Approval of a cost cap without grappling with its likely real-world effects is simply not reasonable.

IV. CONCLUSION

The Order's imposition of an inflexible cost cap, limiting both program spending and shared savings, represents a sea change from the existing efficiency planning process of setting a reasonable budget for cost-effective program offerings to achieve the utilities' statutory energy savings benchmarks. That change in policy requires a careful consideration of the likely effects of this new approach and the appropriate level of a cost cap if one is applied. The Order failed to provide such an evaluation, and is therefore unreasonable and unlawful.

December 21, 2017

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Application for Rehearing has been electronically filed with the Public Utilities Commission of Ohio and has been served upon all parties to the case via electronic mail on December 21, 2017.

/s/ Madeline Fleisher
Madeline Fleisher

This foregoing document was electronically filed with the Public Utilities

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12/21/2017 3:00:51 PM

in

Case No(s). 16-0743-EL-POR

Summary: App for Rehearing Application for Rehearing by the Environmental Law & Policy Center, Natural Resources Defense Council, Ohio Environmental Council, and Environmental Defense Fund electronically filed by Madeline Fleisher on behalf of Natural Resources Defense Council and Environmental Law and Policy Center and Ohio Environmental Council and Environmental Defense Fund

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.

December 21, 2017

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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 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

[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.

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[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]

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[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

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[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,

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[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]

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[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

[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.

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[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.

December 21, 2017

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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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NAI-1503242870v4