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 Authority to Establish a Standard Service Offer Pursuant to R.C. § 4928.143 in the Form of an Electric Security Plan.	)))))))	Case No. 12-1230-EL-SSO

APPLICATION FOR REHEARING BY THE SIERRA CLUB

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I. INTRODUCTION

The Sierra Club, pursuant to R.C. 4903.10 and Ohio Adm. Code 4901-1-35(A), applies for rehearing of the Opinion and Order ("Order") issued by the Public Utilities Commission of Ohio ("PUCO" or "the Commission") on July 18, 2010 in the above-captioned case. The Sierra Club submits that the Commission's Order, is unreasonable and unlawful in the following particulars:

1. The Commission Erred by Applying the Wrong Standard for Evaluating the Companies' Approach to the 2015/16 Base Residual Auction ("2015/16 BRA");

2. The Record Before the Commission Establishes that FirstEnergy's Approach to the 2015/16 BRA Did Not Serve Customer Interests; and

3. The Commission Erred by Not Addressing FirstEnergy's Conduct with Respect to Customer Interests and Company Profits.

On rehearing, the Commission should correct these errors and reject or modify the electric security plan ("ESP") to ensure that the interest of FirstEnergy's distribution companies (hereinafter "FirstEnergy" or "Companies") and their customers are properly aligned.

II. STANDARD OF REVIEW

Applications for Rehearing are governed by R.C. 4903.10 and Ohio Adm. Code 4901-1-35. This statute provides that, within thirty (30) days after issuance of an order from the Commission, "any party who has entered an appearance in person or by counsel in the proceeding may apply for rehearing in respect to any matters determined in the proceeding."[1] Furthermore, the application for rehearing must be "in writing and shall

[1] R.C. 4903.10.

set forth specifically the ground or grounds on which the applicant considers the order to be unreasonable or unlawful."[2]

In considering an application for rehearing, Ohio law provides that the Commission "may grant and hold such rehearing on the matter specified in such application, if in its judgment sufficient reason therefore is made to appear."[3] Furthermore, if the Commission grants a rehearing and determines that "the original order or any part thereof is in any respect unjust or unwarranted, or should be changed, the Commission may abrogate or modify the same[.]"[4]

Sierra Club meets the statutory conditions applicable to an applicant for rehearing pursuant to R.C. 4903.10. Accordingly, Sierra Club respectfully requests that the Commission grant rehearing on the matters specified below.

III. ASSIGNMENTS OF ERROR

A. The Commission Erred by Applying the Wrong Standard for Evaluating the Companies' Approach to the 2015/16 Base Residual Auction

When evaluating an ESP and proposed Stipulation, the Commission must examine the provisions and "ensure that the customers' and the utility's expectations are aligned and that the [utility] is placing sufficient emphasis on and dedicating sufficient resources to the reliability of its distribution system."[5] But in evaluating Companies' approach the 2015/16 BRA, the Commission abdicated this responsibility and elected instead to require that the Sierra Club and other intervenors prove that FirstEnergy's

[2] *Id.*

[3] *Id.*

[4] *Id.*

[5] R.C. 4928.143(B)(2)(h).

actions "were unreasonable."[6]As the Dissenting Opinion points out, the "unreasonableness" standard is reserved for complaint cases, where the burden is placed on the plaintiff or petitioner to prove that the utility acted unreasonably.[7] The Sierra Club believes the record contains ample evidence that FirstEnergy acted unreasonably and no evidence that its failure to plan for the 2015/16 BRA was reasonable; nonetheless,the Commission should correct its Order by applying the alignment of interests standard and finding that the interests of customers and FirstEnergy did not align with regard to the companies' participation in the 2015/16 BRA.

1. The 2015/16 BRA is a Component of the Stipulation and Cannot be Subjected to a Complaint Standard of Review

The Commission states that the proceeding was not set up to investigate the 2015/16 BRA in a manner that could create a sufficient record to find "unreasonableness."[8] While it's true that the proceeding was not set up to investigate solely the 2015/16 BRA—in which case it would be a complaint case and the "unreasonableness" standard would apply—the proceeding was set up to evaluate the ESP application and Stipulation, which included the Companies' plans for the 2015/16 BRA. The Companiesmade the 2015/16 BRA an essential part of their stipulation and their request to expedite the proceedings.[9] Prior to meeting with stipulating parties, the Companies asserted that they had no plans for participating in the BRA, but in their Stipulation and Application the Companies announced their new plan to bid into the auction and cite the BRA as a reason to expedite the ESP. This is not an ancillary issue

[6] Order, p.38.
[7] Dissent, p.5.
[8] Order, p.38.
[9] SeeCompany Exhibit 4, Supplemental Testimony of William R. Ridmann, p.3, lines 12-23

tacked on by the Sierra Club, it is an issue made central to the ESP by the Companies. As such, the Commission must evaluate the Companies' plan, including the Companies' preparation for the BRA, under the alignment of interests standard, and not under the burden-shifting complaint standard.

2. The "Unreasonableness" Standard Inappropriately Shifts the Burden of Proof

Applying the "unreasonableness" standard to an ESP shifts the burden of proof from the Application to the opposition. The Revised Code clearly states "(t)he burden of proof in the proceeding shall be on the electric distribution utility." [10]Once the record is complete, the Commission must examine whether customers' and the utility's interests are aligned.[11] Thus under the Revised Code's standard of review, the Utility, Commission Staff, intervening opponents and proponents all have equal motivation in producing as comprehensive of a record as possible to bolster their issues. But the burden of proof rests upon the Utility.

Under the "unreasonableness" standard as applied by the Commission here, the burden is placed solely on the opposing parties to create a record with sufficient evidence to find "unreasonableness." The Utility seemingly needs only to avoid a finding of "unreasonableness" and no longer has the burden of proving that its interests are aligned with its customers. Under this decision, it seems the Commission would forgo its analysis of whether interests are aligned and would simply approve all ESPs in which the record did not prove the utility acted "unreasonably." Utility customers would then be forced to trade the promise of a balanced rate plan with the mere assurance that the rate

[10] R.C. 4928.143(C)(1).
[11] R.C. 4928.143(B)(2)(h).

plan was not sufficiently "unreasonable," at least, on the record. Transferring the burden thus significantly decreases consumer protection by improperly limiting the Commission's discretion in evaluating an ESP.

This transfer of the burden from Application to opposition is exacerbated where, as here, the Companies were granted an expedited procedural schedule. Based in part upon assertions by FirstEnergy that an expedited schedule was warranted because the new ESP and Stipulationare merely a continuation of the existing ESP, the Commission approved a shortened schedule that limited the amount of time for reviewing documents, retaining experts, and vetting the new ESP. Together, the expedited schedule and shift in burden of proof does a disservice to the public interest that, if uncorrected, would encourage all utilities to include controversial actions in their ESP and request an expedited schedule so as to limit the record, shift the burden of proof, and immunize the action from potential complaints.

As part of shifting this burden, the Commission's Order adopts the concept of waiver into the ESP proceeding. Specifically, the Commission notes that "no party claimed that it brought these [ownership] concerns to FirstEnergy's attention" in the previous portfolio case or energy efficiency collaborative.[12] Again, this is not a complaint case initiated by the Sierra Club. The plan for bidding into the BRA was explicitly included in the Companies' Application and therefore should be evaluated regardless of whether intervenors raised the issue previously. Moreover, even if the waiver concept were appropriate for an ESP proceeding, it is illogical to allow waiver for failing to anticipate not only the issue itself, but a specific defense before it israised by

[12] Order, p.38.

the utility. Such a standard would require that opponents of an ESP divine the exact excuses a utility will drum up in all future proceedings and rebut them in any tangentially related proceeding before they are raised by the utility. In application, such a standard would have waived all comments, including those of the Sierra Club and the Commission, in Case No. 12-814-EL-UNC for failing to have anticipated and remedied ownership issues in the prior energy efficiency collaborative or portfolio proceedings. This surely cannot be the intent of the Commission.

B. The Record Before the Commission Establishes that FirstEnergy's Approach to the 2015/16 BRA Did Not Serve Customer Interests

Notwithstanding the previous section, the Sierra Club believes the record does sufficiently establish that FirstEnergy's approach to the BRA was "unreasonable"and should have been recognized as such by the Commission. Under the correct standard of alignment of interests, it is clear that the Companies' approach served primarily the utility's interests at the expense of its customers, thus failing the standard that should have been applied by the Commission.

The Companies admit to not taking any steps to prepare for the 2015/16 BRA despite knowledge of the potentially huge benefits to customers and the direct instruction from the Commission to bid.[13] Beyond some *post hoc* excuses citing risks that the Companies never even attempted to quantify and that the Sierra Club thoroughly defused in its Briefs, their sole defense is that they need not even consider any action that may benefit their customers without having a profit motive.[14] Considering that this decision not to plan for the 2015/16 BRA could cost customers up to $600 million, while the

[13]Cross Examination of William R. Ridmann, Hearing Transcript Volume I, pp.305-332.
[14] Id.

beneficiary of those increased capacity payments is FirstEnergy Solutions, the interests of customers and FirstEnergy were not only out of alignment, but were conflicting.

As the Dissent notes, there are disturbing corporate separation issues that arise from FirstEnergy's actions regarding the BRA and reliability in general over the last few months.[15] The closure of generation assets shortly before the 2015/16 BRA and the decision to forgo bidding energy efficiency and demand response resources into the auction exacerbated the perceived capacity shortage in the ATSI zone. This not only drove up payments to FirstEnergy Solutions' generating assets at the expense of FirstEnergy Distribution's customers, but it helpedjustify granting $900 million in transmission upgrades to be performed by FirstEnergy's transmission subsidiary ("ATSI"). Recently, a Staff audit concluded that FirstEnergy paid 15 times more for renewable energy credits than could have been considered reasonable.[16]A cost to FirstEnergy customers that, like the increased capacity payments, benefits FirstEnergy Solutions.The Sierra Club agrees with the Dissent that the Commission should conduct a deliberative review of FirstEnergy corporate separation status.

C. TheCommission Erred by Not Addressing FirstEnergy's Conduct with Respect to Customer Interests and Company Profits

Throughout the evidentiary hearing and its briefs, the Companies repeated their defense that they need not take any action, even if it could save customers hundreds of millions of dollars, without a profit motive. This was their sole reason for not doing any planning prior to constructing a token bid to appease the stipulating parties (and this just days after asserting in response to this Commission's decision in Case No. 12-814-EL-

[15] Dissent, p.6.
[16]Final Report,Case No. 11-5201-EL-RDR.

UNC that they would not bid any resources) despite having knowledge of the benefits that would flow to customers from bidding. The Companies' stance strays completely from the spirit of the Revised Code's alignment of interests test and should be corrected by the Commission.

The alignment of interests test puts the burden on the utility to present and eventually implement a plan wherein its interests are aligned with the interests of its customers. The impetus of utility action is thus to serve customer needs first and foremost, then determine a manner for fair compensation with the Commission. FirstEnergy's alternative philosophy is a threshold test wherein the Companies ignore customer needs or benefits unless they perceive a profit motive. If such profits are not immediately ascertainable, the Companies' inquiry ends, even if customers could save hundreds of millions of dollars, secure better reliability, or receive substantial health and environmental benefits. This is the Companies' defense for not planning for the 2015/16 BRA.

This is especially disturbing to hear from FirstEnergy given the series of discretionary actions taken by its sibling companies that, as discussed above and in the Dissent, led to skyrocketing capacity payments for its generating company and an estimated $900 million in transmission upgrades for ATSI. It seems that when a profit motive is apparent for any of FirstEnergy's Companies, FirstEnergy believes it can pursue that initiative even when it contradicts its customers' interests.

V. CONCLUSION

On rehearing, the Commission should correct its errors in accordance with the arguments set forth above.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this *Application for Rehearing* was served on the persons stated below, electronically this 17th day of August, 2012.

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