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 Portfolio Plans for 2013 through 2015	)	Case Nos. 12-2190-EL-POR 12-2191-EL-POR 12-2192-EL-POR

ENVIRONMENTAL LAW AND POLICY CENTER AND OHIO ENVIRONMENTAL COUNCIL MEMORANDUM CONTRA THE APPLICATION FOR REHEARING OF OHIO EDISON COMPANY, THE CLEVELAND ELECTRIC ILLUMINATING COMPANY, AND THE TOLEDO EDISON COMPANY

I. INTRODUCTION

Pursuant to Ohio Administrative Code Chapter 4901:1-35(B), the Environmental Law and Policy Center and Ohio Environmental Council hereby file their memorandum contra the Application for Rehearing of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company (collectively, "FirstEnergy" or "Companies). FirstEnergy is seeking rehearing of the Public Utilities Commission of Ohio's ("PUCO" or "Commission") Opinion and Order issued in the above-captioned cases on March 20, 2013 ("Order"). The Order approved the Companies' respective updated Energy Efficiency and Peak Demand Reduction Plans (the "Plans"), and required the Companies to bid 75% of their planned eligible energy efficiency resources into the upcoming May 13, 2013 PJM Base Residual Auction ("BRA").[1] FirstEnergy argues that the Order is unlawful and unreasonable because it requires the Companies to bid planned energy efficiency resources into the BRA.

For the reasons explained below, the Commission should reject FirstEnergy's

[1] [1] Case No. 12-2190-EL-POR et al., Order and Opinion, at page 20 (March 20, 2013).

Application. As the Commission concluded, "requiring the Companies to bid all planned savings into future PJM BRAs could substantially benefit ratepayers by lowering capacity auction prices and reducing Rider DSE costs."[2] The Commission's requirement that FirstEnergy bid 75% of its planned energy efficiency resources effectively balances the minimal risk with the substantial benefits. Furthermore, contrary to FirstEnergy's claims, the Commission has the authority to require the bidding of resources as part of the Companies' energy efficiency compliance activities.

II. ARGUMENT

A. The Commission's mandate is supported by the record.

FirstEnergy argues that the Commission's requirement that FirstEnergy bid 75% of anticipated eligible resources into the upcoming May 13, 2013 BRA for the 2016/2017 delivery year is not supported by the record. The Companies claim that (1) the requirements under PJM for "planned" resources are not met by the Order and (2) energy efficiency portfolio programs are inherently uncertain and therefore the risks associated with bidding anticipated eligible resources outweigh the benefits. These are both arguments that the Commission properly evaluated prior to issuing its Order. Therefore, the Commission should deny FirstEnergy's Application.

1. The Commission's Order meets the standard required by PJM for "planned" resources.

The Commission's Order requires the Companies to "bid into the upcoming May 2013 PJM BRA 75 percent of the planned energy efficiency resources for the 2016/2017 planning year under their program portfolio."[3] FirstEnergy claims that because PJM defines "planned" resources in part as resources that are "scheduled for completion prior to the Delivery Year," the

[2] Id.
[3] Id.

Commission's Order is somehow deficient.[4] Yet FirstEnergy has not put forward any evidence that it cannot meet this PJM requirement.

PJM does not require the Companies to identify specific locations or individual resources in order to bid planned resources into the market. As stated in the criteria for "planned" resources, PJM requires that the efficiency measure be "scheduled."[5] In addition to being scheduled, PJM requires FirstEnergy to get a measurement and verification ("M&V") plan approved by PJM to properly evaluate whether or not those resources are installed in time.[6] FirstEnergy has not claimed that PJM has rejected the Companies' M&V plans, nor that PJM has given any indication that an approved portfolio plan specifying estimates for the creation of specific kinds of BRA-eligible resources is insufficient for meeting the requirement that resources be "scheduled for completion prior to the Delivery Year."

FirstEnergy claims that it is a "near impossibility" for it to estimate which eligible resources will be installed by the delivery year.[7] Yet this is precisely why the Commission limited the bids to 75% of the planned eligible resources. By limiting the bid amount to 75%, the Commission has given the Companies significant room to install enough eligible resources to meet their requirements in the delivery year.

FirstEnergy's concern that it is uncertain about which resources it will have ownership rights of during the delivery year is also misplaced. The Companies now require customers to surrender ownership rights of the savings for the purposes of bidding into the BRA as a precondition to participating in FirstEnergy efficiency programs.[8] There is, therefore, no

[4] Case No. 12-2190-EL-POR et al., Application for Rehearing of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company, at page 6 (April 19, 2013).
[5] IEU-Ohio Ex. 2, PJM Manual 18 Section 4.4.
[6] IEU-Ohio Ex. 3, PJM Manual 18B Section 2.1.
[7] Case No. 12-2190-EL-POR et al., Application for Rehearing of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company, at page 7 (April 19, 2013).
[8] See Company Exhibit 1, Direct Testimony of John C. Dargie, at page 15.

confusion about whether or not FirstEnergy will have ownership rights for savings during the delivery year.

2. FirstEnergy has not demonstrated that the risks of bidding anticipated eligible resources into the BRA outweigh the benefits.

FirstEnergy argues that energy efficiency programs, "by their very nature, have inherent multiple layers of uncertainty" that make it impossible for FirstEnergy to prudently bid those resources into the BRA.[9] Yet the Commission has already addressed this concern. The Commission has given the Companies significant flexibility to meet their obligations in the 2016/2017 delivery year by requiring the Companies to bid only 75% of planned resources into the BRA. While the Companies' witness Mikkelsen expressed doubt about exactly how the Companies will meet their statutory goals, it is clear that they have a very good estimate based on the details in their approved Plans. The 75% requirement gives substantial buffer should certain BRA ineligible programs provide more savings than anticipated, and any additional shortfall can be mitigated through purchases in incremental auctions.

FirstEnergy claims that "the evidence submitted at hearing overwhelmingly establishes that risks associated with bidding planned resources greatly outweigh any potential benefit."[10] This claim is contrary to the evidence presented at the hearing and in briefs. While there are some risks inherent in any forward-looking activity, the risks are minimal. Staff Witnesses Scheck testified that FirstEnergy could "mitigate both the price and performance risk" by bidding a proportion rather than all anticipated resources and with prudent purchases in the PJM incremental auctions to make up for any shortfall in the delivery year.[11] Similarly, Ohio Consumers' Counsel Witness Gonzalez testified that FirstEnergy could mitigate its risk by

[9] Case No. 12-2190-EL-POR et al., Application for Rehearing of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company, at page 9 (April 19, 2013).
[10] Id., at page 7.
[11] Staff Exhibit 5, Direct Testimony of Gregory C. Scheck, at page 12.

bidding resources in at a minimum price and participating in incremental auctions if necessary.[12] Witness Gonzalez was confident in these risk mitigation measures, going so far as to recommend that "customers assume FirstEnergy's risk of PJM penalties."[13] The risks are minimal and FirstEnergy overstates the threat of large penalties.

As the Environmental Law and Policy Center and the Ohio Environmental Council demonstrated through hypothetical examples in their Initial Brief, the Companies could have earned upwards of $20 million just from bidding 75% of the savings from their lighting program into the 2012 BRA.[14] This is in addition to the savings that would come from reductions in capacity prices. The risks, on the other hand, are comparatively small. FirstEnergy points to the penalties imposed by PJM should the Companies fail to deliver on their bids as evidence that there is too much risk. Yet FirstEnergy has not quantified those penalties. In reality, the potential penalties are relatively minor compared to the benefits.

PJM Manual 18 section 9.1.3 provides the rules for calculating the Capacity Resource Deficiency Charge if FirstEnergy fails to deliver some portion of its cleared capacity resources. This penalty is defined as

Penalty = DailyDeficiancyCharge x DailyRPMCommitmentShortage

Assume a DailyDeficiancyCharge based on the 2012 BRA of

($357/MW-day) + (0.2 x $357/MW-day) = $428.4/MW-day

Assume also that FirstEnergy fails to deliver 10MW of its committed EE savings, resulting in

DailyRPMCommitmentShortage = 10MW.

PJM would assess the Companies a penalty of approximately

[12] OCC Exhibit 1, Direct Testimony of Wilson Gonzalez at page 23-24.
[13] Id., at page 22.
[14] Case No. 12-2190-EL-POR, Initial Brief of Environmental Law & Policy Center and Ohio Environmental Council, at page 13 (November 20, 2012).

(10MW)($428.4/MW-day)(365 days) = $1.6 million.

Even if the Companies had bid only 75% of the savings from installed lighting, under this example FirstEnergy would only provide 170 MW in the 2015/2016 delivery year rather than the 180 MW that it would have bid. The revenue earned from PJM would be reduced to $22 million. Subtracting the penalty from the new revenue amount means that FirstEnergy would still earn $22 million - $1.6million = $20.4 million, which would flow back to ratepayers (minus any M&V and administrative costs incurred by FirstEnergy).

In this example, the Companies would have to miss their anticipated savings by approximately 45% before the penalties would begin to outweigh the revenue from the auction. Given that the Companies have a statutory obligation under ORC § 4928.66(A)(1)(a) to install energy efficiency resources, the likelihood of a monumental failure to deliver resources is extremely small and does not outweigh the substantial benefits identified by the Commission, Witnesses Scheck and Gonzalez, and other parties in this case.

B. The Order complies with Ohio Revised Code § 4903.09.

The Commission should reject FirstEnergy's claims that the Order is contrary to Ohio Revised Code § 4903.09, which requires the Commission to point to record support for its decision. Section 4903.09 merely requires that the Commission "set forth 'some factual basis and reasoning based thereon in reaching its conclusion.'"[15] The Commission's determination complies with this requirement.

The Order discusses at length the significant benefits, as well as the potential risks and uncertainties of utility participation in the BRA. The Commission explained that it was persuaded by Staff's recommendation that FirstEnergy bid "75% of its projected capacity

[15] Payphone Ass'n v. Pub. Util. Comm., 109 Ohio St. 3d 453, 461 (2006) (quoting Allnet Communications Serv., Inc. v. Pub. Util. Comm., 70 Ohio St. 3d. 202, 209 (1994)).

reduction into the auction."[16] As explained above, the record contains overwhelming evidence that this approach appropriately mitigates any potential risks of bidding energy efficiency into the BRA. In addition to bidding only 75% of projected savings, the Commission recognized that FirstEnergy can mitigate risk by bidding into the auction at a price of zero, as recommended by Staff witness Scheck.[17] Witnesses Scheck noted also that risks can be mitigated by covering any shortfall with additional capacity purchases in incremental auctions, which have traditionally cleared at prices below the corresponding BRA.[18]

The Commission's discussion and analysis of the record evidence on this issue provides sufficient "factual basis and reasoning" to support its decision to require the Companies to bid planned resources into the BRA.[19] Therefore, the Order complies with Ohio Revised Code § 4903.09.

C. Senate Bill 58 should not prevent the Commission from requiring FirstEnergy participation in the BRA.

FirstEnergy argues that because there is draft legislation in the form of Senate Bill 58 that could "*possibly* modify" the energy efficiency standards,[20] the Commission should not take any steps that rely on the standards to be in place going forward. This argument has no merit. Legislation that would have a range of implications gets introduced regularly at the Statehouse. The Commission has a duty to execute the law as it exists, not as it might exist someday. The Commission should disregard FirstEnergy's attempt to create ambiguity and uncertainty where none exists.

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[16] Case No. 12-2190-EL-POR et al., Order and Opinion, at page 19 (March 20, 2013).
[17] Staff Ex. 1, Scheck Testimony, at pages 11-12.
18 Tr. Vol. 4, at page 891, lines 16-23 (October 25, 2012).
[19] See Payphone Ass'n, 109 Ohio St. 3d at 461.
[20] Case No. 12-2190-EL-POR et al., Application for Rehearing of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company, at page 11 (April 19, 2013) (emphasis added).

D. The Commission's comments in Demand Response Coalition v. PJM Interconnection, L.L.C., FERC Docket No. EL13-57-000 are irrelevant to this case.

FirstEnergy points to comments filed by the Commission[21] in a case involving bidding into the BRA demand response by curtailment service providers ("CSPs") as evidence that the Order in this case is contrary to the Commission's recommendations elsewhere. The Commission's comments and the case in which they appeared are irrelevant to the issues in this case. While the Commission expressed concern in EL13-57 that CSPs should be required to attest that the demand response they are bidding as capacity will be deliverable to a specific zone, that issue has no bearing on whether FirstEnergy should bid planned energy efficiency resources into the BRA.

Unlike the demand response resources bid by the CSPs in the FERC case, all of the customers in the Companies' territories are located in the ATSI zone, so there is no confusion about exactly where the peak demand reduction from energy efficiency resources will be located. Nor is there any confusion about ownership in this case as there is in the Commission's comments in EL13-57. In its EL13-57 comments, the Commission argues that a CSP should attest to its ownership of capacity rights of a demand response resource.[22] Ownership is not at issue in this case. FirstEnergy's approved plans require customers taking advantage of energy efficiency programs to assign ownership of savings for the purposes of BRA bidding to the Companies.[23]

The Commission should disregard FirstEnergy's attempt to confuse matters in this case by introducing comments from an unrelated case about a different kind of capacity resource.

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[21] Demand Response Coalition v. PJM Interconnection, L.L.C., FERC Docket No. EL-13-57-000, Comments Submitted on Behalf of the Public Utilities Commission of Ohio (April 11, 2013).
[22] Id., at pages 6-7.
[23] See Company Exhibit 1, Direct Testimony of John C. Dargie, at page 15.

E. The Order is within the Commission's statutory authority to regulate FirstEnergy's electric service and energy efficiency activities.

The Commission should reject FirstEnergy's argument that the Commission lacks statutory authority to require the bidding of resources into the BRA. "The General Assembly has created a broad and comprehensive statutory scheme for regulating the business activities of public utilities. . . . As part of that scheme, the legislature created the Public Utilities Commission and empowered it with broad authority to administer and enforce the provisions of Title 49."[24] As FirstEnergy concedes in its Application for Rehearing, the legislature has conferred upon the Commission broad and exclusive jurisdiction to "determine whether any service provided by a public utility is in any respect unjust, unreasonable, or in violation of the law."[25] The Commission's Order is well within this broad grant of authority to regulate FirstEnergy's service and energy efficiency activities.

FirstEnergy cites Elyria Tel. Co. v. Pub. Util. Comm., 158 Ohio St. 441 (1953), as support for the proposition that the Commission does not have authority to require FirstEnergy to bid resources into the BRA. In Elyria, the Court found that the Commission had a specific "duty…. to set just and reasonable rates," and that it must allow a telephone rate adjustment once it determines that current rates are inadequate. Elyria, 158 Ohio St. at 445. The Court found that, by failing to immediately allow for that rate adjustment, the Commission violated the statutory requirements. The Commission's Order in this case, however, does not violate any statutory duty on the part of the Commission. In fact, by recognizing the significant benefits to customers from utility participation in the BRA, the Order is entirely consistent with the Commission's duty to "[e]nsure the availability to consumers of . . . reasonably priced retail electric service."[26]

[24] Kazmaier Supermarket, Inc. v. Toledo Edison Co., 61 Ohio St. 3d 147, 150 (1991).
[25] Ayers-Sterret, Inc. v. American Telecomm. Sys., Inc., 162 Ohio App. 3d. 285, 289 (3d Dist. 2005).
[26] Ohio Rev. Code § 4928.02(A).

The Commission should also dismiss FirstEnergy's argument that "[t]he PJM BRA is not a utility service and, thus, is not subject to the Commission's authority."[27] This claim is beside the point and irrelevant–the Commission is not regulating PJM by requiring FirstEnergy to participate in the BRA. Instead, it is regulating FirstEnergy, over which it has "extensive control,"[28] and "broad authority."[29] The benefits from bidding energy efficiency resources are directly related to FirstEnergy's Plans and its provision of electric service to customers. Given that ratepayers are ultimately footing the bill for FirstEnergy's energy efficiency programs, the Order reasonably requires that ratepayers receive all possible benefits from those programs. The Commission should conclude that the Order is well within the Commission's broad authority over public utilities and deny FirstEnergy's Application.

CONCLUSION

The Commission's requirement that the Companies bid 75% of the planned energy efficiency resources into the May 2013 BRA will help ratepayers realize the full benefits of the energy efficiency plans that they finance. FirstEnergy's claims that bidding planned resources is too risky and that the Commission lacks the authority to force the Companies to bid are without merit. The Commission should reject FirstEnergy's Application for Rehearing.

Respectfully submitted,

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[27] Case No. 12-2190-EL-POR et al., Application for Rehearing of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company, at page 15 (April 19, 2013).
[28] Elyria, 158 Ohio St. at 447.
[29] Kazmaier, 61 Ohio St. 3d at 150.

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing *Memorandum Contra the Application for Rehearing of Ohio Edison Company, the Cleveland Electric Illuminating Company, and the Toledo Edison Company,* submitted on behalf of the Environmental Law & Policy Center and Ohio Environmental Council, was served by electronic mail upon the following Parties of Record this 29th day of April, 2013.

/s/ Robert Kelter

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Summary: Memorandum Contra the Application for Rehearing of Ohio Edison Company, the Cleveland Electric Illuminating Company, and the Toledo Edison Company electronically filed by Mr. Nicholas A. McDaniel on behalf of Environmental Law and Policy Center and Ohio Environmental Council