

**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)	Case Nos.12-2190-EL-POR
Edison Company For Approval of Their)	12-2191-EL-POR
Energy Efficiency and Peak Demand)	12-2192-EL-POR
Reduction Program Portfolio Plans for 2013)	
through 2015)	

**MEMO CONTRA FIRSTENERGY APPLICATION FOR REHEARING
BY THE
THE SIERRA CLUB**

Christopher J. Allwein, Counsel of Record
Williams, Allwein and Moser, LLC
1373 Grandview Ave., Suite 212
Columbus, Ohio 43212
Telephone: (614) 429-3092
Fax: (614) 670-8896
E-mail: callwein@wamenergylaw.com

Attorney for the Sierra Club

I. Introduction

The Public Utilities Commission of Ohio's ("PUCO" or "Commission") March 20, 2013, Opinion and Order ("Order"), with respect to the bidding of energy efficiency resources into the PJM capacity market, is an appropriate decision that benefits utility customers by lowering capacity auction prices and reducing rider DSE costs. Further, it protects the Ohio Edison Company, the Cleveland Electric Illuminating Company and the Toledo Edison Company ("FirstEnergy" or "Companies") through the incorporation of FirstEnergy's own cost recovery as described in Section 7.1 of its energy efficiency/peak demand reduction Portfolio Plans ("POR" or "Plans").

This portion of the Order is well within the statutory authority of the Commission, and maintains voluntary participation for customers. Some of FirstEnergy's objections to the Order are directly addressed in an approved portion of its own plans; these must be rejected by the Commission. The other arguments have no merit and should also be rejected. The Sierra Club respectfully submits this Memorandum Contra to the Applications for Rehearing of both FirstEnergy and the Industrial Energy Users of Ohio, and requests that these Applications should be denied by the Commission for the reasons stated below.

II. Argument

Bidding expected energy efficiency savings into the PJM auctions has the potential to significantly benefit customers, as described below. The only effect granting FirstEnergy's Application for Rehearing would have would be to harm customers by denying them the potential benefits of lower program costs and lower capacity prices. These benefits were noted

by the Commission in the Opinion and Order¹ and in the Concurring Opinion. This attempt to limit the bid amounts should be rejected by the Commission.

A. The Commission Cannot Order FirstEnergy to Bid Non-Eligible Resources into the PJM Capacity Auction and the Order Does not require that Result.

The Commission's Order does not require FirstEnergy to bid 75% of its non-eligible and eligible resources into the upcoming PJM capacity auction as the Companies argue in their Application sections on risk and Commission authority.² Sierra Club agrees with FirstEnergy that the Companies cannot be ordered to bid into the auction *non-eligible* resources. But this is not what the Commission ordered. In the broad and long history of this capacity auction issue, the Commission has consistently reaffirmed its support for bidding only eligible resources into these auctions. The Commission has so ruled in cases 12-814-EL-UNC, 12-1230-EL-SSO, and most recently 12-2190-EL-POR, et al. At no point in any order has the Commission directed the Companies bid *non-eligible* resources into the auction.

In a recent order that in part implemented the Commission's directives in case No. 12-814-EL-UNC, the Commission directed FirstEnergy to "continue to take the necessary steps to verify the energy savings to *qualify for participation* in the base residual auctions [...]."³ (Emphasis added) The Commission's guidance to FirstEnergy directed the Companies to take this action as part of these POR cases; accordingly it is clear that as the Commission ruled earlier

¹ Opinion and Order at 20 (March 20, 2013).

² FirstEnergy Application for Rehearing at 3

³ *In the Matter of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Authority to Provide for a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan*. Case No. 12-1230-EL-SSO, Opinion and Order (July 18th 2012) at 38.

that FirstEnergy is only responsible for bidding 75% of its supply of savings that “*qualify for participation*” in the auction. (Emphasis added).

FirstEnergy spends much of its Application for Rehearing focusing on a litany of risks, almost entirely associated with the concept that the Commission places undue burden on the Companies because of the lack of overlap between the savings measures FirstEnergy has committed to employ over the next three years and the range of eligible resources in the auction.⁴ FirstEnergy is reading language into the Order and the previous orders that does not exist. It is unreasonable to contend that the Commission, a state regulatory agent, is requiring FirstEnergy to ignore the federally regulated bidding requirements of PJM. The Commission does not have the authority to order FirstEnergy to ignore PJM bidding requirements. Plainly and clearly, the Commission references Staff recommendations, and the bidding requirement is solely imposed on eligible resources.

The Commission’s Order leaves no room for doubt. In addressing the PJM BRA issue the Commission adopted the Staff recommendation in part.⁵ Staff expert witness Greg Scheck discussed this recommendation during the presentation of evidence, and specifically referred to 75% of savings that can be “qualified.”⁶ Other witnesses before the Commission also routinely referred to “qualifying” savings in discussion of the PJM BRA resources. It is universally understood that the bidding requirement applies only to qualifying resources, just as it is universally understood that the Commission lacks the authority to require a utility to bid both qualifying and non-qualifying resources into a PJM auction. FirstEnergy’s lengthy discussion of

⁴ FirstEnergy Application for Rehearing at 3.

⁵ Opinion and Order at 20.

⁶ Volume IV of the POR Transcript p. 810.

the “risks” absorbed by the Companies as part of this common sense requirement from the Commission is therefore groundless. In fact, the Companies’ own plans - which were approved by the Order with modifications - clearly references only qualifying resources.⁷

In a Memorandum Contra to the Ohio Energy Group’s request for clarification, FirstEnergy seemed to possess a certainty that is absent in their Application for Rehearing. There, the Companies stated:

Further, the Commission would not direct the Companies to bid resources that do not qualify under PJM guidelines for bidding.⁸

A mere four days prior to filing the Application for Rehearing, FirstEnergy was certain that the Commission was referring only to qualifying resources. It was not an issue for the Companies at that time, and should not, for the sake of the Companies’ argument here, be an issue at this time. The argument should be rejected.

The Commission’s Order refers to eligible resources. Any other reading of the Order is an attempt to foment controversy that does not exist. FirstEnergy must bid into the 2016-2017 BRA 75% of all planned qualifying resources. The Commission has never ruled, argued or suggested that FirstEnergy be required to bid non-eligible resources into the auction, nor can the Commission order FirstEnergy to bid non-eligible resources into the auction. The Commission should deny FirstEnergy’s Application for Rehearing because the risks discussed at length are manufactured upon a faulty premise. FirstEnergy’s concerns are unfounded and should be rejected.

⁷ Ohio Edison EE&PDR Plan at p. 87

⁸ FirstEnergy Memorandum Contra at 3 (April 15, 2013).

B. FirstEnergy's Arguments A and C in its Application for Rehearing Are at Odds with the Plans Filed by FirstEnergy and which Were Adopted with Modifications by the Commission.

In its Opinion and Order the Commission approved the submitted plans of the FirstEnergy Companies in finding (4): "The Companies' energy efficiency and peak demand reduction program portfolio plans are reasonable and should be approved as modified by this opinion and order."⁹ The Opinion and Order made only one modification to the original PJM bidding plans submitted by the Companies. It adopted the Staff recommendation the Companies bid 75% of eligible resources into the upcoming PJM auction.¹⁰

FirstEnergy spends most of its Application for Rehearing discussing what it contends are the many unresolved questions associated with the Order; stating that the Order "poses a significant risk" to the Companies and because it "did not authorize the Companies to recover through Rider DSE or any other mechanism any penalties or costs that the Companies could incur as a result of the Commission's mandate that the Companies bid planned energy efficiency resources into the PJM BRA."¹¹ These concerns are completely unfounded, as they are addressed in detail in the approved plans filed by the Companies.

As mentioned above, the Commission's Order approved the plans with few changes. The only modification to the plans was the 75% bidding requirement. There is no uncertainty about FirstEnergy's ability to recover costs associated with bidding in energy efficiency resources as part of its execution of the Commission's Order. That was proposed in the original plans, which were not modified by the Order:

⁹ Opinion and Order at 43

¹⁰ Opinion and Order at 20

¹¹ Company Application for Rehearing at 1

The costs included for recovery through Rider DSE will be offset by any revenues received from PJM for Demand Resources (Energy Efficiency Resources or Demand Response Resources) bid into the Reliability Pricing Model Auctions for the ATSI zone, reduced by recovery of all PJM costs associated with participation in such Auctions including but not limited to the cost of interest for credit associated with such Demand Resources and any applicable penalties.¹² (Emphasis added)

Accordingly, FirstEnergy is incorrect to assert that the Commission did “not authorize the Companies to recover through Rider DSE or any other mechanism any penalties or costs that the Companies could incur as a result of the Commission’s mandate that the Companies bid planned energy efficiency resources into the PJM BRA.”¹³ Nor are the Companies exposed to any undue risk. On these points *the Commission approved FirstEnergy’s own preferred method for dealing with these questions*. Any uncertainty that remains is due to FirstEnergy’s own failure to read or remember the substance of its submitted plans. FirstEnergy may recover all costs associated with bidding resources into the auction through Rider DSE; and must credit revenues from both demand response bidding and energy efficiency resource bids into the auction.

Any “applicable penalties” for failure to adequately deliver energy efficiency resources may be recovered through Rider DSE. The Sierra Club is not opposed to the Companies recovering through the rider costs that were prudently incurred or penalties that FirstEnergy took every diligent step to mitigate. Quite literally, *there is no risk to FirstEnergy* – all arguments to the contrary simply ignore the plain language of the approved plans.

Likewise, FirstEnergy’s and IEU’s worries about ownership are also completely unfounded; these worries were addressed in FirstEnergy’s most recent ESP case and they too are

¹² Ohio Edison EE&PDR Plan at p.87

¹³ FirstEnergy Application for Rehearing at 1

addressed in the submitted and approved plans in this proceeding. IEU's Application for Rehearing is an attempt to re-litigate a decided issue and should be denied.

C. The Commission's Order Requiring FirstEnergy to Bid Energy Efficiency Resources into the PJM Capacity Auction is Lawful, Reasonable, and Consistent with its Statutory Authority and a Substantial Foundation of Previous Rulings.

1. The Commission has the Clear Authority to Order Changes to Elements of an Efficiency Plan and Accept the Proposals of Stakeholders Upon the Presentation of Evidence at a Hearing.

The Commission's Order that FirstEnergy bid 75% of its planned qualifying energy efficiency resources into the upcoming PJM auction is lawful, reasonable, and consistent with statutory authority and founded on a series of rulings which FirstEnergy did not contest. At the most basic level, the Commission has the clear authority to order changes that improve the elements of portfolio plans upon a presentation of evidence by parties to a portfolio case.¹⁴ Accordingly, it is important to note that bidding qualifying resources, although a limited amount, into the upcoming capacity auction was included in FirstEnergy's original plan filings; and subsequent to the presentation of extensive evidence by all the parties, the Commission determined that the recommendations of one party to modify the plans should be adopted.¹⁵

This action is entirely within the Commission's authority. FirstEnergy proposed bidding a limited amount of energy efficiency into the upcoming auction. Staff produced a recommendation, and many other parties presented evidence arguing that customers would see much more benefit if more resources were bid into the auction. The Commission exercised its

¹⁴ Ohio Administrative Code 4901:1-39-04 (E).

¹⁵ Ohio Edison EE&PDR Plan at p.87

authority under 4901:1-39-04 (D) and accepted Staff's recommended modification to FirstEnergy's original bidding strategy included in the plans.

2. The Commission has Statutory Authority to Ensure Low Cost Capacity for Customers and Low Cost Energy Efficiency Programs.

The Commission has broad authority to ensure that customers are protected and receive the savings promised through the bidding of resources into the PJM auction. Ohio law requires the PUCO to "initiate programs that will promote and encourage conservation of energy and a reduction in the growth rate of energy consumption, promote economic efficiencies, and take into account long-run incremental costs."¹⁶ The Commission's Order is entirely in keeping with this statute; it ensures that the full "economic efficiency" of the peak demand benefits of energy efficiency programs will be directly experienced by all customers.

This authority reinforces the Commission's original impetus of exploring the PJM bidding opportunities as a partial solution to the peak demand price hikes expected as a result of the suspiciously timed closing of FirstEnergy generation facilities across Ohio; as the Commission discussed in Case No.12-814-EL-UNC. FirstEnergy did not appeal this case. The Commission issued the following findings:

(2) The retirement of this generation (Units 2-4 at the Bay Shore Plant, the Eastlake Plant, the Ashtabula Plant, and the Lake Shore Plant) in one area of the transmission system could impact the ability to maintain voltage support and result in transmission constraints during peak periods. (p.1)

(4) Given their obligation to provide adequate service and reasonable and adequate facilities and instrumentalities, and consistent with state policy, the FirstEnergy electric distribution utilities in the ATSI zone, The Cleveland Electric Illuminating Company, the Ohio Edison Company, and The Toledo Edison Company (collectively, the Companies), have an obligation to take all reasonable

¹⁶ R.C. 4905.70

and cost-effective steps to avoid unnecessary RPM price increases for their customers. Sections 4905.22, 4905.70, and 4928.02, Revised Code. (P. 1-2)

(5) By definition cost-effective energy efficiency and peak demand reduction programs will reduce total costs to customers. (P.2)

(10) In order to encourage that all cost-effective steps are implemented promptly to offset generation retirements, the Companies are hereby directed under Rule 4901:1-39-04(A), Ohio Administrative Code, to file no later than July 31, 2012, interim energy efficiency and peak demand reduction program portfolio plans, specifically those programs that in the aggregate would have a mitigating impact on the generation retirements.¹⁷

Finding 8 of the Entry contained the Order which the Commission subsequently implemented in Case No. 12-1230-EL-SSO. In that case the Commission stated the following:

However, the Commission notes that additional steps may be taken to mitigate the impact of the transmission constraint in the ATSI zone for future base residual auctions. Specifically, the Companies should take steps to amend their energy efficiency programs to ensure that customers, knowingly and as a condition of participation in the programs, tender ownership of the energy efficiency resources to the Companies. Further, **the Companies should continue to take the necessary steps to verify the energy savings to qualify for participation in the base residual auctions, and the Companies should bid qualifying energy resources into the auction.**

The record demonstrates that there has been tremendous growth in the use of energy efficiency resources in the capacity auctions, and **the Companies are well positioned to substantially increase the amount of energy efficiency resources they can bid into the auction, which will assist in mitigating the impact of the transmission constraint in the ATSI zone. Further, the Commission will continue to review the Companies' participation in future base residual auctions** until such time as the transmission constraint in the ATSI zone is resolved.¹⁸ (Emphasis Added).

¹⁷ *In the Matter of the Commission's Review of the Participation of The Cleveland Electric Illuminating Company, the Ohio Edison Company, and The Toledo Edison Company in the May 2012 PJM Reliability Pricing Model Auction.* Case No. 12-814-EL-UNC, Entry (February 29th 2012) p. 1-3.

¹⁸ *In the Matter of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Authority to Provide for a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan.* Case No. 12-1230-EL-SSO, Opinion and Order (July 18th 2012) at 38

These orders are entirely consistent with the statutory authority of the Commission. FirstEnergy's and IEU's general case citations regarding the Commission's authority do not supersede the authority cited above and are, for the most part, irrelevant.¹⁹ The Commission possesses broad authority to ensure that customers are protected from high capacity prices. The PUCO is given the further authority and responsibility to ensure reliable and cost effective service for customers.²⁰ These are precisely the goals and objectives advanced by the Order modifying the bidding requirement.

Finally, the Commission outlined its obligations and authority in a November 30, 2011 submission to the Federal Energy Regulatory Commission (FERC) for a Reliability Technical conference. In those comments, the PUCO made number of important statements regarding its statutory authority, including that the PUCO has the responsibility and expansive authority to forecast Ohio's energy needs and to ensure that each electric distribution company is able to meet the forecast needs of the customers within its certified territory.²¹ The Commission has the authority and duty to pursue customer interests; these interests include lower-priced capacity through the bidding of eligible energy efficiency resources into the PJM BRA, and lower energy efficiency riders through the application of these resources in the broader marketplace.

¹⁹ See FirstEnergy Application for Rehearing at 13; IEU-Ohio Application for Rehearing at 11-12.

²⁰ "Every public utility shall furnish necessary and adequate service and facilities, and every public utility shall furnish and provide with respect to its business such instrumentalities and facilities, as are adequate and in all respects just and reasonable." R.C. 4905.22; "It is the policy of this state to do the following throughout this state: (A) Ensure the availability to consumers of adequate, reliable, safe, efficient, nondiscriminatory, and *reasonably priced* retail electric service; [...] (I) Ensure retail electric service consumers protection against unreasonable sales practices, *market deficiencies*, and *market power*; (J) Provide coherent, transparent means of giving appropriate incentives to technologies that can adapt successfully to potential environmental mandates; [...] (N) Facilitate the state's effectiveness in the global economy. In carrying out this policy, the commission shall consider rules as they apply to the costs of electric distribution infrastructure [...] (Emphasis Added)." R.C. 4928.02

²¹ *Reliability Technical Conference*, FERC Docket No. AD12-1-100, Comments Submitted on Behalf of the PUCO at 13-21 (November 22, 2011)

Therefore, there is no question that the Commission has the authority, on behalf of Ohio utility customers, to require the bidding of energy efficiency resources into PJM.

D. The Commission's Order Requiring the Bidding of Resources into the PJM Capacity Auction Creates Substantial Customer Savings and Benefits to Customers.

The evidence clearly demonstrates that FirstEnergy's consistent effort to avoid bidding energy efficiency resources into the PJM capacity market will produce only two results, both of them adverse to customers. Failure to bid these resources into the market will mean that FirstEnergy and its customers will forgo a potential substantial revenue stream from an investment for which customers are already committed to pay. In addition, FirstEnergy's customers will likely pay much more for capacity than they would otherwise need to pay because they will have to acquire capacity that will be redundant with the capacity savings produced by FirstEnergy's efficiency programs. Most importantly; because the failure to bid efficiency resources into the market on a "price-taking basis" may cause the market price for capacity – i.e. the price that will be paid to all capacity that clears the market – to be significantly higher than it otherwise would have been.

Importantly, FirstEnergy's customers currently benefit from efficiency programs offered by the Companies. One of the benefits of those programs, now and in the future, is reduction in peak demand. But if FirstEnergy successfully avoids bidding these resources into the auction the full value of the peak demand reduction benefit, and the potentially significant savings to customers, will not be realized.

Regarding customer risks, the Commission, in its order, addresses this concern:

However, the Commission also finds that 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. In order to create

a reasonable balance between the uncertainty and potentially substantial benefits, the Commission finds it appropriate to adopt a portion of Staff's recommendation.²²

The portion adopted is a percentage of eligible resources (75%) rather than all eligible resources. The Portfolio Plan and the programs contained within are not comparable to wagers made in a casino. Ohio law and the accompanying rules regarding POR plans require detailed planning and presentation, studies, collaborative input and an annual review of each program's effectiveness. Changes may be recommended and approved by the Commission. As long as the Companies are diligent in their efforts to employ competent and effective personnel, research and marketing, FirstEnergy should have an accurate idea, rather than a wild hunch, about what types of savings will be generated by their portfolio plans. Requiring a portion of expected savings is sufficient to address the risks accompanying such efforts. Therefore, the concerns about risk have been addressed and no application for rehearing should be granted based on these concerns.

E. FirstEnergy's Attempt to Avoid its Bidding Obligations Based on Legislative Debate is Unreasonable and any Commission Action on this Basis is Unlawful and such Argument Must be Ignored by the Commission.

The law is the law, and the Commission has an unavoidable obligation to follow and administer it regardless of discussions at the legislature. This is particularly true when the entity suggesting that the Commission ignore the law is directly responsible for creating the question as to whether or not it will be altered. FirstEnergy's argument is a dangerous one; if the Commission can escape its duty to regulate according to the law simply because the law may at some point change, then the law would be meaningless. Any stakeholder with relationships in the

²² Opinion and Order at 20.

legislature could secure the introduction of some legislation potentially impacting a regulatory matter; and through this means consistently escape decision or obligation. The Commission should ignore this argument for the dangerous precedent it attempts to set. The Commission and FirstEnergy have an obligation to implement the law as long as it is the law.

This is especially true because of the commonly known fact that the legislative goal of FirstEnergy at the moment is elimination of required energy efficiency programs and benchmarks. Bidding all of the resources that the Commission recommends into the capacity market will potentially deliver substantial savings to customers. The Commission should not sanction these political games; which only result in customers paying more for energy.

Additionally, FirstEnergy argues that the concurrence of Commissioners Slaby and Porter states that legislative uncertainty could be cause for review of the bidding requirement.²³ It doesn't. It simply and reasonably states that the bidding requirement may need to be re-evaluated if costs for energy efficiency become too high.²⁴ This is not an issue for the current plans, as the concurrence indicates. The costs of the energy efficiency programs that will create the resources that will be bid into the 2016/2017 BRA are already established; in fact FirstEnergy put on extensive testimony and evidence in an effort to demonstrate that its programs were cost effective, and would save customers hundreds of millions of dollars.

The concern expressed by Commissioners Slaby and Porter are directed at energy efficiency plans that are hypothetically more costly than the current one. The concurrence serves as a warning that the cost of efficiency could at some point climb; and could require a future course correction regarding the bidding requirement. This is not applicable in the present case.

²³ Company Application for Rehearing at 1

²⁴ Order, Concurring Opinion

The costs are known, and FirstEnergy itself claims that its programs are cost effective tools for providing customers with low-cost energy. Finally, we note that Ohio rules would effectively prohibit any non-cost effective energy efficiency plans from being approved; and that the Commission has recognized that by definition approved plans are cost effective.²⁵

F. The Commission’s Order Does Not Create a Forcible Conveyance of PJM Resources from Any Customer to FirstEnergy.

FirstEnergy’s original plan which was approved by the Commission in no way creates a forced conveyance. As noted above, the Commission approved the original plans of the Company with the modifications outlined in the Order. FirstEnergy stated in its originally filed plan that: “The Companies, as a condition of participating in EE&PDR Programs, will require participating customers to tender ownership of any energy credits owned by the customers [...]”²⁶ The plain language of the plan indicates that the tender of credits is not a forcible conveyance. No customer is required to hand over energy efficiency credits to utilities; a customer that elects to participate in a FirstEnergy program must tender those credits. The customer retains the choice.

FirstEnergy cannot require a customer to relinquish these rights. The plans merely condition program participation on a tender. No customer has a “property right” to any energy efficiency program participation; the programs themselves are voluntary savings opportunities for customers, not property of any customer or any entity. The plain language of the statute is instructive. In applicable part it states that:

²⁵ A.C. 4901:1-39-04 (A) and *In the Matter of the Commission’s Review of the Participation of The Cleveland Electric Illuminating Company, the Ohio Edison Company, and The Toledo Edison Company in the May 2012 PJM Reliability Pricing Model Auction*. Case No. 12-814-EL-UNC, Entry (February 29th 2012) finding 5 at 2

²⁶ Ohio Edison EE&PDR Plan at p. 87

Any mechanism designed to recover the cost of energy efficiency, including waste energy recovery and combined heat and power, and peak demand reduction programs under divisions (A)(1)(a) and (b) of this section may exempt mercantile customers that commit [...] ²⁷ (capabilities to a utility) (Emphasis added)

May is a permissive word, and words have meaning. Any argument that suggests that customers have a right to an exemption simply ignores the plain language of the statute. Customers may be exempted; this in no way creates a property right to exemption. The Commission retains the right to build a balanced mercantile program.

Under the clear language of the Code it is the customer's discretion to "commit their demand-response or other customer-sited capabilities....for integration into the electric distribution utility's demand-response, energy efficiency Or peak demand programs." ²⁸ The design and operation of utility energy efficiency programs is a matter of Commission oversight and review, as discussed above. There is not a requirement in the code that any customer be compelled to commit these resources to a utility. If a customer wishes to bid these resources into the PJM marketplace itself; it may do so. If any customers wish to retain PJM bidding rights nothing compels them to participate in the FirstEnergy mercantile program; they can go their own way, develop their own projects, and attempt to finance them by bidding the savings into the PJM marketplace.

This is clearly a choice and not a requirement. Mercantile customers may retain their own right to bid resources in. The code is also clear with regard to what must be committed to utilities to potentially receive rider exemption. The codes states that customers who

²⁷ R.C. 4928.66 (A)(2)(c)

²⁸ R.C. 4928.66 (A)(2)(c)

“commit...capabilities” may be exempted from the rider.²⁹ The plain interpretation of this language leads one to the position that “capabilities” means all capabilities; the full countable attributes of the savings. The Code does not state and does not contemplate a mercantile customer offering savings to a utility in part; i.e. offering savings for POR plans, but holding back capabilities to bid into the auction. The Commission should ignore any contention otherwise and look to the plain and clear language of the statute which states “commit...capabilities.” A customer is not compelled to participate in a utility mercantile program, participation is entirely voluntary; nor does a customer have a property right to participation in a program.

It is also important to note that electric distribution utility statutory energy efficiency obligations are not apart from PJM’s energy efficiency bidding opportunities. The Commission has rightfully ruled in these cases that FirstEnergy’s plans fail to adequately serve customers when these plans do not take advantage of the substantial customer savings associated with the bidding in of these resources. Furthermore, this bidding requirement it is explicitly part of the plans; not a separate concept. FirstEnergy included the bidding concept in the original efficiency plans. The Commission has merely exercised its statutory authority to order changes to the plans upon a presentation of the evidence.

III. Conclusion.

For the reasons stated above, the Sierra Club respectfully request the Commission deny in all parts the Application for Rehearing submitted by FirstEnergy and the Industrial Energy Users of Ohio. The Public Utilities Commission of Ohio’s ruling with respect to the bidding of energy

²⁹ R.C. 4928.66 (A)(2)(c)

efficiency resources into the PJM capacity market is beneficial to customers, protects FirstEnergy through the incorporation of FirstEnergy's own cost allocations in Section 7.1 of its energy efficiency plan, is well within the statutory authority of the Commission, and creates entirely voluntary participation for customers.

It is important to also note that the Initial M&V report was due to PJM by April 13, 2013. The Commission should, as it stated in 12-1230-EL-SSO, "...Review the Companies' participation in future base residual auctions..."³⁰ As a part of this review, the Commission should require FirstEnergy to submit its M&V reports to the Commission and the Consumers' Counsel for review.

Respectfully Submitted,

/s/ Christopher J. Allwein

Christopher J. Allwein, Counsel of Record
Williams, Allwein and Moser, LLC
1373 Grandview Ave., Suite 212
Columbus, Ohio 43212
Telephone: (614) 429-3092
Fax: (614) 670-8896
E-mail: callwein@wamenergylaw.com

Attorney for the Sierra Club

³⁰ Case No. 12-1230-EL-SSO, Opinion and Order at 38 (July 18th 2012).

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing *Memorandum Contra* has been served upon the following parties via electronic mail on April 29th, 2013.

/s/ Christopher Allwein

Christopher J. Allwein

Devin Parram
Attorney General's Office
Public Utilities Commission of Ohio
180 East Broad St., 6th Fl.
Columbus, OH 43215
Devin.parram@puc.state.oh.us

Kathy J. Kolich
Carrie M. Dunn
FirstEnergy Service Company
76 South Main Street
Akron, OH 44308
kjkolich@firstenergycorp.com
cdunn@firstenergycorp.com

Attorneys for FirstEnergy Service
Company

Cathryn N. Loucas
Trent Dougherty
The Ohio Environmental Council
1207 Grandview Avenue, Suite 201
Columbus, OH 43212-3449
Cathy@theOEC.org
Trent@theOEC.org

Colleen L. Mooney
Ohio Partners for Affordable Energy
231 West Lima Street
Findlay, OH 45839-1793
cmooney2@columbus.rr.com

Attorneys for the Ohio Environmental
Council

Robert Kelter
Justin M. Vickers
Nicholas McDaniel
Environmental Law & Policy Center
35 East Wacker Drive, Suite 1600
Chicago, IL 60601
jvickers@elpc.org
rkelter@elpc.org
NMcDaniel@elpc.org

Kyle L. Kern
Assistant Consumers' Counsel
Office of the Ohio Consumers'
Counsel
10 West Broad Street, Suite 1800
Columbus, OH 43216
kern@occ.state.oh.us

Attorneys for the Environmental Law
& Policy Center

Jody M. Kyler
David F. Boehm
Michael L. Kurtz
Boehm, Kurtz & Lowry
36 East Seventh Street, Suite 1510
Cincinnati, OH 45202
jkyler@bkllawfirm.com
dboehm@bkllawfirm.com
mkurtz@bkllawfirm.com

Attorneys for Ohio Energy Group

Richard L. Sites
General Counsel & Senior Director of
Healthy Policy
Ohio Hospital Association
155 East Broad Street, 15th Floor
Columbus, Ohio 43215
ricks@ohanet.org

Michael K. Lavanga
Brickfield, Burchette, Ritts & Stone,
P.C.
1025 Thomas Jefferson Street, N.W.
8th Floor, West Tower
Washington, D.C. 20007
mkl@bbrslaw.com

Attorney for Nucor Steel Marion, Inc.

Gregory Price
Mandy Willey
Attorney Examiners
Public Utilities Commission of Ohio
180 East Broad Street
Columbus, OH 43215
gregory.price@puc.state.oh.us
mandy.willey@puc.state.oh.us

Thomas J. O'Brien
Bricker & Eckler LLP
100 South Third Street
Columbus, Ohio 43215
tobrien@bricker.com

Attorney for Ohio Hospital
Association

Samuel C. Randazzo
Frank P. Darr
Joseph E. Olikier
Matthew R. Pritchard
McNees Wallace & Nurick LLC
21 East State Street, 17th Floor
Columbus, OH 43215
sam@mwncmh.com
fdarr@mwncmh.com
joliker@mwncmh.com
mpritchard@mwncmh.com

Attorneys for Industrial Energy
Users-Ohio

Glenn S. Krassen
Bricker & Eckler LLP
1001 Lakeside Avenue East, Suite 1350
Cleveland, Ohio 44114
gkrassen@bricker.com

Matthew W. Warnock
Bricker & Eckler LLP
100 South Third Street
Columbus, Ohio 43215
mwarnock@bricker.com

Attorneys for Northeast Ohio Public
Energy Council

J. Thomas Siwo
Thomas J. O'Brien
Bricker & Eckler LLP
100 South Third Street
Columbus, OH 43215-4291
tsiwo@bricker.com
tobrien@bricker.com

Attorneys for Ohio Manufacturers'
Association

Theodore Robinson
Citizen Power
2121 Murray Avenue
Pittsburgh, PA 15217
robinson@citizenpower.org

Todd M. Williams
Williams Allwein & Moser, LLC
Two Maritime Plaza, 3rd Floor
Toledo, OH 43604
toddm@wamenergylaw.com

Gregory Poulos
EnerNOC, Inc.
471 East Broad Street, Suite 1520
Columbus, OH 43215
gpoulos@enernoc.com

This foregoing document was electronically filed with the Public Utilities

Commission of Ohio Docketing Information System on

4/29/2013 5:23:12 PM

in

Case No(s). 12-2190-EL-POR, 12-2191-EL-POR, 12-2192-EL-POR

Summary: Memorandum Contra FirstEnergy and IEU Applications for Rehearing electronically filed by Mr. Christopher J Allwein on behalf of THE SIERRA CLUB