

**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 No. 12-2190-EL-POR
Edison Company For Approval of Their	)	Case No. 12-2191-EL-POR
Energy Efficiency and Peak Demand	)	Case No. 12-2192-EL-POR
Reduction Program Portfolio Plans for	)	
2013 through 2015.	)	

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**COMMENTS  
BY  
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL**

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BRUCE J. WESTON  
OHIO CONSUMERS' COUNSEL

Kyle L. Kern, Counsel of Record  
Assistant Consumers' Counsel

**Office of the Ohio Consumers' Counsel**  
10 West Broad Street, Suite 1800  
Columbus, Ohio 43215-3485  
614-466-9585 (Kern Telephone)  
[Kyle.kern@occ.ohio.gov](mailto:Kyle.kern@occ.ohio.gov)

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**I. INTRODUCTION**

The Office of the Ohio Consumers' Counsel ("OCC") submits these comments on behalf of the 1.9 million residential customers who may lose benefits of energy efficiency for lowering their electric bills as a result of the Application filed by their electric utilities. Those utilities are Ohio Edison Company, Cleveland Electric Illuminating Company, and Toledo Edison Company ("FirstEnergy" or "Utility"). On September 24, FirstEnergy filed an Application ("Application") under Senate Bill 310<sup>1</sup> seeking the approval of the Public Utilities Commission of Ohio ("PUCO") to amend its Existing Energy Efficiency and Peak Demand Reduction ("EE/PDR") Portfolio ("Existing Plan"). Specifically, FirstEnergy seeks to "suspend" the majority of its currently approved EE/PDR programs available to customers for 2015 and 2016.<sup>2</sup>

EE/PDR portfolio programs can result in lower costs for electric energy for Ohioans. To this end, energy efficiency programs are generally designed to help

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<sup>1</sup> Specifically uncodified Section 6 (A)(2) of Senate Bill 310.

<sup>2</sup> FirstEnergy proposes to suspend nine out of sixteen programs.

consumers use less energy to provide the same service, while peak demand reduction programs encourage customers to limit their electricity consumption during times of high electric demand. And customers generally benefit from these programs because they experience savings on their electric bills from using less energy.<sup>3</sup>

Generally, FirstEnergy's Application lacks significant details that the PUCO should have for making decisions. In this regard, FirstEnergy seeks PUCO approval to severely reduce its EE/PDR programs available to customers in 2015 and 2016. And even though the Utility projects that the program costs to customers will be less than they would be under its existing portfolio,<sup>4</sup> the Utility fails to provide any projection on what the costs to customers will actually be<sup>5</sup> or whether its amended Application, on the whole, is cost-effective.<sup>6</sup>

Also absent in the Utility's filing is whether FirstEnergy is seeking to continue to charge customers for a shared savings (i.e., profits) award when it has proposed to eliminate the majority of its energy efficiency programs.<sup>7</sup> If FirstEnergy intends to continue charging customers for energy efficiency profits (shared savings), then another thing missing is a justification of such charges to customers.

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<sup>3</sup> FirstEnergy projected that its Existing Portfolio Plan would save 5.2 percent of its electricity sales. Case No. 12-2190-EL-POR, FirstEnergy Tr. Ex. 2, Bradley D. Eberts Direct Testimony at Exhibit 1.

<sup>4</sup> *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 2013 through 2015*, Case No. 12-2190-EL-POR, et al., Application at 8 (September 24, 2014). (Hereinafter, "Application").

<sup>5</sup> As required by Ohio Adm. Code 4901:1-39-04(C)(5)(i).

<sup>6</sup> As required by Ohio Adm. Code 4901:1-39(04)(B).

<sup>7</sup> First Energy has stated in response to an OCC pleading that its "Application confirms that all previously approved provisions of Section 7 of the Existing Plan-which includes the incentive mechanism – will continue during the Amended Plan Period" thus confirming the Utility is seeking approval for a shared savings incentive for its Amended Plan. See 12-2190-EL-POR, Reply at 6 (October 16, 2014).

In addition, FirstEnergy does not address how its proposal to suspend its programs will affect its ability to bid energy efficiency resources into the PJM Base Residual Auction (“BRA”). When approving the Utility’s Existing Plan, the PUCO found that bidding EE resources into the BRA “could substantially benefit [customers] by lowering capacity auction prices and reducing Rider DSE costs.”<sup>8</sup> But now, in choosing to suspend the majority of its EE/PDR programs, the Utility will not have these resources available to meet its reduction obligations. And customers could potentially be at risk if FirstEnergy is unable to achieve the energy reductions that it already committed to achieving.

## **II. LEGISLATIVE FRAMEWORK**

In 2008, Amended Substitute Senate Bill 221 was enacted to establish statutory benchmarks for energy and peak demand reductions. Under Senate Bill 221, Electric Distribution Utilities (“EDUs”) were required, starting in 2009, to “implement energy efficiency programs that achieve energy savings equivalent to at least three-tenths of one percent of the total, annual average, and normalized kilowatt-hour sales of the [Utility] during the preceding three calendar years to customers in [Ohio].” The energy savings requirement increased to five-tenths of one percent in 2010, seven-tenths of one percent in 2011, and eight-tenths of one percent in 2012, nine-tenths of one percent in 2013, and one percent in 2014 and 2015.<sup>9</sup> In addition, under Senate Bill 221, electric utilities were required, starting in 2009, to “implement peak demand reduction programs designed to

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<sup>8</sup> Case No. 12-2190-EL-POR, Opinion and Order at 20 (March 20, 2013).

<sup>9</sup> Former R.C. 4928.61(A)(1)(a).

achieve a one percent reduction in peak demand in 2009 and an additional seventy-five hundredths of one per cent reduction each year through 2018.”<sup>10</sup>

But in legislation (Senate Bill 310) this year, the General Assembly froze the cumulative benchmark for two years (2015 and 2016) if a utility elected to file an amended EE/PDR plan.<sup>11</sup> Under this legislation, the General Assembly allowed for two different options for energy efficiency programs and charges to consumers for the next two years. In this regard, uncodified Section 6 of Senate Bill 310 states:

- (A) If an electric distribution utility has a portfolio plan that is in effect on the effective date of this section, the utility shall do either of the following, at its sole discretion:
  - (1) Continue to implement the portfolio plan with no amendments to the plan, for the duration that the Public Utilities Commission originally approved, subject to divisions (D) and (E) of this section;
  - (2) Seek an amendment of the portfolio plan under division (B) of this section.

FirstEnergy filed an Application seeking the PUCO’s approval to amend its energy efficiency and peak demand reduction plans for 2015 through 2016 (under option (A)(2) above). The modifications, if approved by the PUCO, will be effective January 1, 2015.

In its Application, FirstEnergy seeks to eliminate, or “suspend,” the majority of its EE/PDR programs (9 programs out of 15) that were to be available to customers for the next two years.<sup>12</sup> In fact, FirstEnergy has only elected to continue a small subset of its originally approved programs. Those are: the Low-Income Program, Mercantile

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<sup>10</sup> Former R.C. 4928.61(A)(1)(a).

<sup>11</sup> R.C. 4928.66(A)(1)(a).

<sup>12</sup> Application at 2.

Customer Program, Transmission and Distribution (T&D) Improvement Program, Residential Direct Load Control Program, Demand Reduction Program, and Smart Grid Modernization Pilot Program.<sup>13</sup>

The Utility also proposes to implement a Customer Action Program and an Experimental Company Owned LED Lighting Program (subject to PUCO approval in Case No. 14-1027-EL-ATA).<sup>14</sup> Under the Customer Action Program, the Utility intends to “capture” energy savings and peak demand reductions through actions taken by customers *outside* of utility-administered programs.<sup>15</sup> The Utility also requests the authority, without a PUCO ruling, to “adjust [its] program mix during the term of the Amended Plan [i.e. 2015 and 2016], including, without limitation, restarting programs suspended in the Amended Plan and requesting [PUCO] approval of programs to augment or modify the Amended Plan.”<sup>16</sup>

Uncodified Section 6 (B)(1) of Senate Bill 310 requires the PUCO to “review and approve, or modify and approve, the application not later than sixty days after the date that the application is filed.” The Attorney Examiner established a procedural schedule seeking comments on FirstEnergy’s Application, in a September 29, 2014 Entry.<sup>17</sup> OCC files these comments in accordance with the Attorney Examiner’s Entry.

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<sup>13</sup> Application at 2. The Utility also seeks to continue the “PJM Revenue Sharing Pilot Program,” but this program resulted from the PUCO’s July 17, 2013 Entry on Rehearing at 4 in Case No. 12-2190-EL-POR, not a proposal by the Utility.

<sup>14</sup> Application at 2.

<sup>15</sup> Application at 8.

<sup>16</sup> Application at 2.

<sup>17</sup> Case No. 12-2190-EL-POR, Entry at 2 (September 29, 2014).

### III. COMMENTS AND RECOMMENDATIONS

#### A. **The PUCO Should Protect Customers Against Paying Profits To FirstEnergy For Little Or No Benefit to Customers. FirstEnergy Should Not Be Permitted To Continue To Charge Customers For Share Savings In 2015 And 2016.**

FirstEnergy's 1.9 million residential customers should not have to pay it for any shared savings for 2015 and 2016. Reasons for protecting customers' electric bills include that the Utility does not propose to keep programs in place in 2015 and 2016 that will generate sufficient energy efficiency savings to exceed the annual performance benchmark upon which the shared-savings performance incentive is based.

This problematic situation for consumers is evidenced by Attachment 1 of the Utility's Application, which shows that the Utility projects it will barely increase the number of MWh that will be saved as a result of its energy efficiency programs. To this end, the Utility projects that it will generate 2,268,000 MWh of savings from energy efficiency programs in 2014.<sup>18</sup> But FirstEnergy projects that the amount of MWh it will save in 2015 is 2,266,000 (less than in 2014), and 2,288,000 less in 2016 (slightly more than 2014).<sup>19</sup> In sum, there are virtually no savings for customers that would justify the Utility charging them for shared savings (profit) in 2015 and 2016.

The PUCO ruled in its March 20, 2013 Opinion and Order that savings emanating from self-direct mercantile projects would be excluded from FirstEnergy's shared savings calculation.<sup>20</sup> That holding is still applicable here as the Utility has proposed to continue these programs in 2015 and 2016. And similar to its ruling on the self-direct mercantile

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<sup>18</sup> Application at Attachment 1.

<sup>19</sup> Application at Attachment 1.

<sup>20</sup> Case No. 12-2190-EL-POR, Opinion and Order at 16 (March 20, 2013).



program, the PUCO should not permit FirstEnergy's proposed Customer Action Program to result in customers paying shared savings (profit) to the Utility. A utility's energy efficiency incentive mechanism should reward the utility for the savings for customers that the utility *actively* generates through the design and implementation of its programs. But savings from FirstEnergy's newly proposed Customer Action Program would be generated by projects customers (not the Utility) initiate and direct.

To this end, the PUCO Staff has clearly stated that,

[o]nly those programs that are under the direct or indirect supervision or management of the Company should be able to count toward those savings that exceed their annual benchmarks. This means that savings from efficiency measures or programs implemented by mercantile customers independent of the Company would not count toward a utility based incentive mechanism even though those savings could count toward their annual benchmarks.<sup>21</sup>

Although the Staff was discussing mercantile self-direct programs in the passage above, the same logic applies to the FirstEnergy's proposed Customer Action Program. These projects should not be included for any incentive mechanism. The savings emanating from these programs reflect the independent decisions and actions of customers – and not the actions of FirstEnergy. And while R.C. 4928.662(A) now permits a utility to count “[e]nergy efficiency savings and peak demand reduction achieved through actions taken by customers,” there is no correlating provision that allows a utility to charge customers for shared savings on these customer-generated energy efficiency activities. The PUCO should not establish a bad precedent of allowing the Utility to profit off of the independent actions of customers.

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<sup>21</sup> Case Nos. 09-1947-EL-POR, et al., Staff Proposal (October 24, 2011) at 1-2.

The PUCO should also not permit FirstEnergy to charge customers for shared savings with respect to its Smart Grid Modernization Initiative. FirstEnergy describes the Smart Grid Modernization Initiative as a program where “the impact of producing an integrated system of protection, performance and economy on the energy delivery system for multiple stakeholder benefits” will be studied.<sup>22</sup> FirstEnergy has not demonstrated that any savings will result from its proposal to “study” the smart grid.

**B. The PUCO Should Limit Any Charges To Customers For Shared Savings (FirstEnergy Profit) To Only Those Charges, If Any, Relating To Efficiencies That Exceed The Annual Statutory Benchmarks As Under Senate Bill 221.**

FirstEnergy’s shared savings mechanism was approved by the PUCO under the Senate Bill 221 annual benchmark construct.<sup>23</sup> This means, in order to receive shared savings, the Utility was required to increase its energy efficiency achievements according to the annual requirements, as set-forth in Senate Bill 221. In this regard, Senate Bill 221 requires that an electric utility increases its energy efficiency achievements by one percent in 2015, and an additional one percent in 2016.<sup>24</sup>

Under R.C. 4928.66 (A)(1)(a), as amended by Senate Bill 310, an electric utility is required to achieve cumulative energy savings. The savings to be achieved are equal to the result of subtracting the cumulative energy savings achieved since 2009 from the product of multiplying the baseline for energy savings by four and two-tenths of one percent. If the result is zero or less for the year for which the calculation is being made,

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<sup>22</sup> Application at 7-8.

<sup>23</sup> Case No. 12-2190-El-POR, Opinion and Order at 15-16 (March 20, 2013).

<sup>24</sup> Former R.C. 4928.66(A)(1)(a).

the utility is not required to achieve additional energy savings for that year.<sup>25</sup> According to Attachment 1 of FirstEnergy's Application, the Utility estimates that its compliance level for cumulative energy efficiency (as per Senate Bill 310) will be 126 percent for 2015 and 125 percent for 2016.<sup>26</sup> OCC recommends that FirstEnergy should not receive any incentive payments from customers for exceeding the cumulative 4.2 benchmark (under Senate Bill 310) unless it also exceeds the annual one percent benchmark (under Senate Bill 2221) under which its shared savings mechanism was approved.

In addition, OCC recommends that customers should not have to pay incentives (shared savings) to utilities for energy efficiency under the annual benchmark. This approach is based upon a regulatory principle. The principle is that giving the utility money (from customers) to exceed the benchmark is beneficial for customers because the utility's exceeding of the statutory benchmark will save customers even more money.

But there is no regulatory principle or science in allowing the Utility to charge customers for merely meeting the expectation of compliance with the law. This is especially true for 2015 and 2016 when the cumulative energy efficiency benchmark under Senate Bill 310 has been frozen at 4.2 percent (a level that FirstEnergy will likely meet in 2014).

The analysis in this section presents an important consumer issue for the PUCO to resolve. But the PUCO should find that there is no intention in Senate Bill 310 to produce a windfall of profit for utilities, at customers' expense. The potential for the windfall exists in this case because of the way FirstEnergy has framed its Application.

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<sup>25</sup> R.C. 4928.66 (A)(1)(a).

<sup>26</sup> Application at Attachment 1.

FirstEnergy's Application, while vague, appears written to allow it to continue its existing charges for shared savings.

FirstEnergy's existing shared savings have been based, to date, on the requirement in Senate Bill 221 to produce higher increments of energy efficiency savings for customers each year. In the freezing of the annual increasing increments of energy efficiency savings under Senate Bill 310, FirstEnergy should be proposing to reduce its shared savings commensurately with the reduction it proposes for energy efficiency, to avoid making its customers pay money for nothing (or for not enough). If energy efficiency savings are reduced, then consumers payment' for shared savings (profit to FirstEnergy) should be correspondingly reduced. The PUCO should prevent a windfall to FirstEnergy at customer expense, by reducing FirstEnergy's receipt of shared savings possibly to zero. One way or another, the PUCO should protect customers by maintaining a match between energy efficiency savings and utility collections of shared savings (profit) from customers.

**C. The PUCO Should Reduce The 10 Million Dollar Cap That It Previously Allowed As The Limit On What FirstEnergy Could Collect From Its Customers for Shared Savings (Profits), Given FirstEnergy's Proposal To Suspend The Majority Of Its Energy Efficiency Programs.**

In FirstEnergy's new Application, there are virtually no residential energy efficiency programs that yield energy savings for customers, remaining in the Utility's amended portfolio.<sup>27</sup> In its Opinion and Order in 12-2190-EL-POR, the PUCO held that FirstEnergy's Existing Plan (for 2012 through 2015) would be subject to a 10 million

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<sup>27</sup> With the exception potentially being the Customer Action Program, which should not qualify for shared savings for the reasons discussed above.

dollar shared savings cap.<sup>28</sup> But this decision was made by the PUCO prior to FirstEnergy's decision to suspend approximately 60 percent of its EE/PDR programs.

A 10 million dollar cap is inappropriate and excessive for the diminutive energy efficiency FirstEnergy will actually achieve in 2015 and 2016. Even if FirstEnergy is permitted to "adjust their program mix"<sup>29</sup> during 2015 and 2016 as it requested permission to do, the shared savings cap of 10 million dollars per year is still too costly for consumers and too lucrative for the Utility. Again, a shared savings incentive should encourage energy efficiency and reward exemplary performance, to provide benefits to customers. FirstEnergy has proposed to suspend the majority of its programs under its Application. And the programs the Utility has proposed in its Application should not earn shared savings. Shared savings, if allowed at all, should be capped at a level to minimize charges to consumers. \$10 million is excessive.

**D. FirstEnergy Should Be Required To Include With Its Application An Estimate Of The Costs To Consumers For Its Amended Plan, And Should Not Be Permitted To Use The 2015 Existing Budget For Its Amended Portfolio.**

FirstEnergy provides no information about the potential costs of its Amended EE/PDR plan to customers. In this regard, the Utility states that it "anticipate[s] that the costs of implementing the Amended Plan (with an extra year of compliance) will be less than they would have been under the Existing Plan."<sup>30</sup> But the Utility provides no

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<sup>28</sup> Case No. 12-2190-El-POR, Opinion and Order at 16 (March 20, 2013).

<sup>29</sup> Application at 2.

<sup>30</sup> Application at 8.

support for this statement, nor does it provide a projection of what the costs to customers will be for its Amended plan for 2015 and 2016.<sup>31</sup>

Section 6(B)(1) of Senate Bill 310 requires the PUCO to review an application to amend an EE/PDR portfolio “in accordance with its rules as if the application were for a new portfolio plan.”<sup>32</sup> Ohio Adm. Code 4901:1-39-04 governs EE/PDR program portfolio plan filing requirements. A utility is required under Ohio Adm. Code 4901:1-39-04(B) to demonstrate that its program portfolio is cost-effective on a portfolio basis. And under Ohio Adm. Code 4901:1-39-04(B)(5)(i) a utility is to include “a program budget with projected expenditures, identifying costs to be borne by the electric utility and collected from its customers, with customer class allocation, if appropriate.”

FirstEnergy did request a waiver, per Ohio Adm. Code 4901:1-39-02(B), of the PUCO’s rules “if necessary.” But the PUCO should not waive its requirement that a utility must show that the EE/PDR programs it will offer are cost effective and what the costs to customers will be. And FirstEnergy certainly has not shown good cause under Ohio Adm. Code Ohio Adm. Code 4901:1-39-02(B) for the PUCO to grant its waiver request.

In addition, the PUCO should not permit the Utility to use the 2015 Existing Portfolio budget through 2016. As the Utility has proposed to suspend the majority of its programs, it is not clear why the Utility would need the full 2015 budget even if it is spread over an additional year. For example, the Utility’s 2015 budgets for the Direct Load Control, Community Connections, Demand Reduction and Mercantile Programs

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<sup>31</sup> This was the subject of OCC’s Memorandum Contra filed in this docket on September 29, 2014.

<sup>32</sup> Section 6(B)(1) of Senate Bill 310.

totals only \$23 million in comparison to the full 2015 budget of nearly \$86 million.<sup>33</sup>

The Utility has the burden to demonstrate what the costs to its customers for 2015 and 2016 will be and the burden to demonstrate that its budget aligns with the programs it is offering. Additionally, the burden is on the Utility to prove that its program portfolio is still cost-effective with the inclusion of any new programs, such as the proposed Customer Action Program.

**E. FirstEnergy Should Be Prohibited From Charging Customers For Lost Distribution Revenues After June 1, 2016.**

FirstEnergy currently charges customers up to \$19 million per year<sup>34</sup> for lost distribution revenues related to its EE/PDR portfolio.<sup>35</sup> Generally, lost distribution revenues are those revenues the Utility does not collect because of the implementation of energy efficiency programs. FirstEnergy's approach is a model where energy efficiency becomes a utility profit center at customer expense, when instead energy efficiency should be saving money on customers' electric bills. And this model is especially flawed given FirstEnergy's proposal to suspend the majority of its EE/PDR programs.

In Case No. 12-1230-EL-SSO, the PUCO approved a settlement (not signed by the Consumers' Counsel) that allows FirstEnergy to charge customers for lost distribution revenues "for all energy efficiency and peak demand reduction approved by the Commission."<sup>36</sup> However, the Stipulation does not address or resolve lost distribution

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<sup>33</sup> Case 12-2190-EL-POR, Application at Appendix B-3 (Budgets By Cost Category) (July 31, 2012).

<sup>34</sup> FirstEnergy charged customers \$18.8 million for lost distribution revenues in 2013. See *In the Matter of the Review of the Demand Side Management and Energy Efficiency Rider (Rider DSE) Report in Support of Staff's 2013 Annual Review of Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company*, Case No. 12-2978-EL-RDR, Report, Exhibit B at 16, Exhibit D at 16 (March 31, 2014).

<sup>35</sup> Case No. 12-1230-EL-SSO, Order at 39-40.

<sup>36</sup> Case No. 12-1230-EL-SSO, Stipulation at 31. OCC opposed this settlement.

revenue charges to customers after May 31, 2016.<sup>37</sup> The PUCO clarified in its Opinion and Order for that case that it will have the opportunity to “revisit the lost distribution revenue collection mechanism” on June 1, 2016.<sup>38</sup>

FirstEnergy now seeks to suspend the majority of its EE/PDR programs under Senate Bill 310. But the Utility made no corresponding request to “suspend” its charges for lost distribution revenues to customers. Lost distribution revenue charges to customers for measures installed through the end of 2014 should cease after May 31, 2016. Lost distribution revenue balances that are charged to customers will continue to grow despite the fact that the Utility is no longer offering the majority of its EE/PDR programs. And, because the Utility is no longer offering the majority of its EE/PDR programs, customers will not benefit from the savings that result. This is a bad outcome for customers.

The PUCO should find that it is unreasonable to permit FirstEnergy to continue to charge customers for lost distribution revenues, especially when customers are not receiving the benefit (i.e. savings) of EE/PDR programs.

**F. FirstEnergy’s Proposal To Suspend The Majority Of Its Energy Efficiency Programs Will Deny To Customers The “Substantial Benefit” That Bidding Resources Into The PJM Base Residual Auction Can Yield.**

The PUCO has found that bidding energy efficiency resources into the PJM BRA can benefit customers: “requiring [FirstEnergy] to bid all planned savings into future PJM BRAs could substantially benefit [customers] by lowering capacity auction prices and reducing Rider DSE [Demand Side Management and Energy Efficiency Rider]

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<sup>37</sup> Id.

<sup>38</sup> Case No. 12-1230-EL-SSO, Order at 40.



costs.”<sup>39</sup> Customers ultimately pay for the capacity auction prices, so lowering the prices benefits customers. And there is a benefit to customers from the revenue payments received by FirstEnergy from PJM for the eligible energy efficiency bid into the BRA are used to reduce the energy efficiency program costs that customers are charged under Rider DSE.<sup>40</sup>

Unfortunately for FirstEnergy’s customers, this benefit is now in jeopardy. FirstEnergy’s proposed suspension of the majority of its EE/PDR programs could deprive customers of the substantial benefit that bidding energy efficiency resources into the PJM BRA can provide. In the PUCO’s March 20, 2013 Order in 12-2190-EL-POR, FirstEnergy was required to bid 75 percent of its planned energy efficiency resources into the May 2013 PJM BRA (for the 2016/2017 planning year).<sup>41</sup>

FirstEnergy has not disclosed the number of MW of energy efficiency that it bid into May 2013 and May 2014 capacity auctions. But PJM reported the following results for the ATSI<sup>42</sup> zone – 196.6 MW at \$114.23 per MW-day for 2016/2017 and 142 MW at \$120 per MW-day for 2017/2018.<sup>43</sup>

But FirstEnergy will no longer be able to bid any planned energy efficiency into the next two capacity auctions, as FirstEnergy is proposing to suspend the programs that

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<sup>39</sup> Case No. 12-2190-EL-POR, Order at 20.

<sup>40</sup> OCC is aware that the status of demand response in PJM markets is currently unclear (*Electric Power Supply Association v. Federal Energy Regulatory Commission*, 753 F.3d 216 (D.C. Cir. 2014)). To this end, PJM’s recent white-paper (“The Evolution of Demand Response in the PJM Wholesale Market”) acknowledges that state-imposed demand reduction programs can continue to participate in the BRA as a demand-side offering. In any event, FERC’s decision on this issue will not affect how these programs administered at the state level.

<sup>41</sup> Case No. 12-2190-EL-POR, Order at 19.

<sup>42</sup> “ATSI” refers to the ATSI transmission zone.

<sup>43</sup> PJM, 2016/2017 Base Residual Auction Report, May 24, 2013, and 2017/2018 Base Residual Auction Report, June 18, 2014. <http://pjm.com/markets-and-operations/rpm/rpm-auction-user-info.aspx>

would have generated those energy savings. Thus, customers will not receive the revenue those MW would have generated in the wholesale market and those same MW will need to be supplied by more expensive resources.

**G. FirstEnergy Should Be Prohibited From Passing Any Costs Or Capacity Penalties That Could Potentially Result From The Utility's Proposal To Suspend The Majority Of Its Programs On To Customers.**

FirstEnergy's proposal to suspend the majority of its programs also poses a risk to customers with respect to the PJM markets. As noted, the PUCO required FirstEnergy to bid 75 percent of its planned resources into the 2013 BRA.<sup>44</sup> To this end, the PUCO's Order granted FirstEnergy the ability to pass the potential risk of bidding planned resources through to customers. But this potential risk to customers was small, especially because the PUCO only required FirstEnergy to bid in 75 percent of its planned resources. Thus, there was a buffer in place for customers if FirstEnergy was unable to realize the full quantity of energy efficiency capacity cleared in the BRA. But at the time the PUCO issued its decision (and at the time the parties litigated this issue) it was not contemplated that FirstEnergy would suspend the majority of its programs from which the energy efficiency savings were to be derived.

Now, FirstEnergy's decision to suspend most of its programs could likely result in FirstEnergy not being able to meet its future BRA obligations. If FirstEnergy does not meet its BRA compliance obligations due to the MW not being available because the programs were suspended, PJM can impose a penalty (in addition to FirstEnergy paying higher prices).

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<sup>44</sup> Case No. 12-2190-EL-POR, Opinion and Order at 20 (March 20, 2013).

But it is not appropriate for FirstEnergy to pass any resulting costs or capacity penalties onto customers. In other words, customers should not be penalized for FirstEnergy's decision to suspend its programs. The PUCO should require that FirstEnergy bear any costs or penalties that result from its decision to suspend its programs because those costs and penalties result from FirstEnergy's decision to suspend the majority of its programs.

**H. FirstEnergy Should Not Have The Discretion To Adjust The Programs Offered To Customers.**

FirstEnergy proposes that it will “adjust [its] program mix during the term of the Amended plan, including, without limitation, restarting programs suspended in the Amended Plan and requesting [PUCO] approval of programs to augment or modify the Amended Plan.”<sup>45</sup> If approved, this proposal to delegate the PUCO's approval authority to FirstEnergy would be bad for customers (as well as unlawful, as we discuss below).

FirstEnergy's proposal would allow it to run the energy efficiency program for maximizing its profits. That's not a good idea. The better idea is maintaining the PUCO's approval authority to ensure that the program provides the cost-saving benefits of energy efficiency to customers' electric bills. And that better idea includes continuing the opportunity for collaborative work and stakeholder input into PUCO processes that have been the hallmark of the PUCO's decision-making for these programs. The Utility should not be given the exemption from regulation that, in essence, it seeks.

In addition, FirstEnergy's request is not consistent with Senate Bill 310. Under Senate Bill 310, uncodified Section 6 (B)(1), the PUCO “shall review and approve, or

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<sup>45</sup> Application at 2.

modify and approve, the application not later than sixty days after the date that the application is filed.”<sup>46</sup> And uncodified section 7(B) of Senate Bill 310 states that “[p]rior to January 1, 2017, the [PUCO] shall not take any action with regard to any portfolio plan or application regarding a portfolio plan, except those actions expressly authorized or required by Section 6 of this act and actions necessary to administer the implementation of existing portfolio plans.”

Thus, the Utility is asking the PUCO to approve an Application with programs (and costs to customers) that might change, without the PUCO having the opportunity for further review. The Utility should not be permitted to adjust its program mix without PUCO processes that include party and stakeholder input for the PUCO’s decision-making.

Finally, stopping and restarting energy efficiency programs could result in increased costs to customers. For example, if FirstEnergy stops an energy efficiency program, but then later decides to restart it and subsequently hires personnel (or contractors) to run the program, purchases marketing materials to inform customers about the program, or incurs other expenses, these are costs FirstEnergy might seek to pass on to customers. This is unjust and unreasonable. Customers should not incur additional costs that result from the Utility’s decision to stop and restart programs.

#### **IV. CONCLUSION**

FirstEnergy’s Application is too vague and lacks too much detail for the PUCO to approve it. In any event, the PUCO should modify FirstEnergy’s proposals to conform

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<sup>46</sup> Senate Bill 310, uncodified Section 6(B)(1).

the approach to one where the benefits of energy efficiency are maximized for Ohioans on their electric bills. In these Comments the Consumers' Counsel has made recommendations to the PUCO for achieving those benefits for Ohio consumers.

Respectfully submitted,

BRUCE J. WESTON  
OHIO CONSUMERS' COUNSEL

/s/ Kyle L. Kern

Kyle L. Kern, Counsel of Record  
Assistant Consumers' Counsel

**Office of the Ohio Consumers' Counsel**

10 West Broad Street, Suite 1800

Columbus, Ohio 43215-3485

614-466-9585 (Kern Telephone)

[Kyle.kern@occ.ohio.gov](mailto:Kyle.kern@occ.ohio.gov)

## **CERTIFICATE OF SERVICE**

I hereby certify that a copy of this Comments were served on the persons stated below via electronic service this 20th day of October 2014.

*/s/ Kyle L. Kern* \_\_\_\_\_

Kyle L. Kern

Assistant Consumers' Counsel

## **SERVICE LIST**

[Devin.parram@puc.state.oh.us](mailto:Devin.parram@puc.state.oh.us)  
[kjkolich@firstenergycorp.com](mailto:kjkolich@firstenergycorp.com)  
[cdunn@firstenergycorp.com](mailto:cdunn@firstenergycorp.com)  
[toddm@wamenergylaw.com](mailto:toddm@wamenergylaw.com)  
[cmooney2@columbus.rr.com](mailto:cmooney2@columbus.rr.com)  
[Cathy@theOEC.org](mailto:Cathy@theOEC.org)  
[Trent@theOEC.org](mailto:Trent@theOEC.org)  
[callwein@wamenergylaw.com](mailto:callwein@wamenergylaw.com)  
[jvickers@elpc.org](mailto:jvickers@elpc.org)  
[rkelter@elpc.org](mailto:rkelter@elpc.org)  
[dboehm@BKLawfirm.com](mailto:dboehm@BKLawfirm.com)  
[mkurtz@BKLawfirm.com](mailto:mkurtz@BKLawfirm.com)  
[jkylercohn@BKLawfirm.com](mailto:jkylercohn@BKLawfirm.com)

[ricks@ohanet.org](mailto:ricks@ohanet.org)  
[tobrien@bricker.com](mailto:tobrien@bricker.com)  
[tsiwo@bricker.com](mailto:tsiwo@bricker.com)  
[gpoulos@enernoc.com](mailto:gpoulos@enernoc.com)  
[sam@mwncmh.com](mailto:sam@mwncmh.com)  
[fdarr@mwncmh.com](mailto:fdarr@mwncmh.com)  
[mpritchard@mwncmh.com](mailto:mpritchard@mwncmh.com)  
[mlavanga@bbrslaw.com](mailto:mlavanga@bbrslaw.com)  
[robinson@citizenpower.com](mailto:robinson@citizenpower.com)  
[mandy.willey@puc.state.oh.us](mailto:mandy.willey@puc.state.oh.us)  
[Gregory.price@puc.state.oh.us](mailto:Gregory.price@puc.state.oh.us)

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Summary: Comments Comments by the Office of the Ohio Consumers' Counsel electronically filed by Ms. Deb J. Bingham on behalf of Kern, Kyle L.