

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of Ohio)
Edison Company, The Cleveland Electric)
Illuminating Company and The Toledo)
Edison Company for Authority to) Case No. 12-1230-EL-SSO
Establish a Standard Service Offer)
Pursuant to R.C. § 4928.143 in the Form)
of an Electric Security Plan.)

**REPLY TO FIRSTENERGY’S MEMORANDUM CONTRA REGARDING THE
JOINT MOTION TO BIFURCATE ISSUES**

**BY
ENVIRONMENTAL LAW AND POLICY CENTER
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NORTHEAST OHIO PUBLIC ENERGY COUNCIL
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I. INTRODUCTION

FirstEnergy’s Memorandum Contra fails to address its failure to comply with critical provisions of the law, and the Company’s arguments to date fail to address a number of critical issues. It is important to clarify several erroneous statements in FirstEnergy’s Memorandum Contra to the Joint Motion to Bifurcate Issues and Reply to Movant’s Memorandum Contra to the Motion for Waiver (the “Memorandum Contra”), filed with the Public Utilities Commission of Ohio (“Commission” or “PUCO”) on April 18, 2012. First, on page 2 of the Memorandum Contra, FirstEnergy claims that the Joint Motion to Bifurcate Issues (the “Joint Motion”), filed with the Commission on April 17, 2012 by the Environmental Law and Policy Center, Natural Resources Defense Council, Northeast Ohio Public Energy Council, Northwest Ohio Aggregation Council, and the

Office of the Ohio Consumers' Counsel (collectively, the "Consumer Advocates"), seeks to "relitigate previously approved provisions that were thoroughly considered by the parties and the Commission – and which led to unquestionably successful results for customers – while jeopardizing new provisions that the Joint Movants, too, recognize will further benefit customers." This is inaccurate.

The purpose of the Joint Motion was twofold: (i) to put the brakes on FirstEnergy's unreasonable attempt to hastily push through a new electric security plan ("ESP") for the 2015-2016 time-period without allowing the Consumer Advocates or any other parties adequate time to analyze the proposal, or for the Commission to give adequate consideration of the Application; and (ii) to recognize and support FirstEnergy's request for expedited review and approval of its proposal to bid eligible demand response and energy efficiency resources into PJM's fast-approaching May 7, 2012 Base Residual Auction for the 2015/2016 Planning Year (the "PJM BRA"). The bifurcation of these proceedings would accomplish both purposes, while also supporting the policy goals of the Commission.

In addition, FirstEnergy's argument on pages 2-4 of the Memorandum Contra that "bifurcation is impossible because the companies need an approved ESP to secure the commitment they propose to bid into the [PJM] BRA" is simply not accurate. As shown herein, the Commission has the authority to extend Riders ELR and OLR through May 31, 2016 without extending the entire ESP for another two years. In reality, FirstEnergy apparently is not willing to bid such resources into the May 7, 2012 PJM BRA auction unless or until its entire ESP plan is approved along with the distribution rate increases for customers and other issues.

II. LEGAL ARGUMENT

A. **FirstEnergy's Memorandum Contra Ignores the Inherent Unreasonableness of FirstEnergy's ESP 3 Proposal and the Inadequate Time-frame Proposed for Commission Review.**

Ohio Adm. Code 4901:1-35-03(C) (1) et seq. requires the Company to file an ESP with testimony and pro forma financial projections that supports each aspect of the ESP.¹ Such a filing would allow parties to conduct adequate discovery, and for the Commission to set a procedural schedule that provides for due process. FirstEnergy's filing of stipulation settling the case, before even filing testimony, does not come close to comporting with the statute. FirstEnergy has the burden of proof to demonstrate that its new ESP filing complies with the statute, and its argument ignores the legislature's intent in the statute.

FirstEnergy's Memorandum Contra ignores the primary purpose of the Joint Motion – ensuring that the Consumer Advocates, the Commission, and interested parties have adequate time to review an ESP proposal with potentially significant ramifications on the electricity rates of the nearly two million customers that the Consumer Advocates seek to protect in the FirstEnergy service territories.

FirstEnergy filed an Application for approval of its third ESP in the form of a Stipulation and Recommendation (the “ESP 3 Stipulation”) on April 13, 2012. Not only did the ESP 3 Stipulation arise from limited and compartmentalized negotiations with certain parties to FirstEnergy's prior ESP Stipulation (in Case No. 10-388-EL-SSO), but it was filed more than two years before the current FirstEnergy ESP expires, and in the

¹ Joint Memorandum Contra Motion for Waivers at 5-15.

middle of an unusually busy time at the Commission (e.g., the current AEP ESP case,² the AEP capacity charge case,³ DP&L ESP case,⁴ and numerous other proceedings).

Importantly, FirstEnergy sought expedited approval of the ESP Stipulation by asking for Commission approval “no later than May 2, 2012.” **This date for a PUCO Order is 19 calendar days after the filing date, hundreds of days before the end of the statutory time period for Commission review of an ESP filing,⁵ and more than two years before FirstEnergy’s current ESP expires.**

FirstEnergy made the decision to wait until the last minute to file its proposed new ESP, and it should not fall on the Consumer Advocates and other interested parties to be substantively denied due process by FirstEnergy’s unreasonable, unattainable and unprecedented timeline.

To justify the proposed and unprecedented 19-day review period (which includes the PUCO issuing an Order within that time), FirstEnergy states on page 2 of the Memorandum Contra that:

The parties and the Commission are well-positioned to review and approve the Stipulated ESP on the expedited basis necessary to allow for the Companies to bid demand response resources into the BRA because of the thorough record developed in the Companies’ previous MRO and ESP proceedings in Case Nos. 09-906-EL-SSO and 10-388-EL-SSO, respectively (collectively, the “2010 ESP”). The Companies have asked the Commission to incorporate the record associated with the 2010 ESP because the Stipulated ESP simply seeks to continue the terms and conditions of the 2010 ESP, with [a] few new provisions.

² *In re AEP ESP Case*, Case No. 11-346-EL-SSO, et al.

³ *In re AEP Capacity Charge Case*, Case No.10-2929-EL-UNC.

⁴ *In re DP&L ESP II Case*, Case No. 12-426-EL-SSO.

⁵ R.C. 4928.143(C)(1).

In essence, FirstEnergy asks the Consumer Advocates to agree to the entirety of the proposed ESP 3 Stipulation because it is similar to the 2010 ESP, but with a “few new provisions.”

Those new provisions, however, include:

- alterations to the proposed competitive bidding schedule;
- modifications to the recovery period of renewable energy credits;
- increases of approximately \$405 million in the amount of distribution improvement costs proposed to be recovered through Rider DCR from June 1, 2014 through 2016;
- elimination of meaningful Commission review over, and application of, the “significantly excessive earnings test”;
- continuation of full recovery treatment for “lost distribution” revenues from energy efficiency efforts of customers through Rider DSE, which no other Ohio electric distribution utility enjoys;
- and the Companies’ agreement to not to seek cost recovery from customers of Regional Transmission Expansion Planning (“RTEP”) charges for the longer of the five year period of June 1, 2011 through May 31, 2016 or when a total of \$360 million of Legacy RTEP costs have been paid for by the Companies but not recovered through retail rates,

which is a benefit already considered as part of the
FirstEnergy ESP 2 (Case No. 10-388-EL-SSO).

These issues, as well as others, require a thorough examination by the Consumer Advocates regarding the proposed impact of the ESP 3 proposal that could result in consumers paying hundreds of million of dollars in additional charges to the Companies.

FirstEnergy has supported its Waiver Motion with the unreasonable solution of incorporating the record associated with the 2010 ESP Case.⁶ However, since 2010 circumstances have changed and electric markets have changed. The federal government announced new air pollution rules. FirstEnergy promptly announced it was closing multiple old, coal-fired plants across Ohio. Other utility companies have made similar announcements. In addition there is additional pressure on electric resources as some economic recovery is ongoing. This creates the potential for high speculative prices in 2015 and 2016—prices that could be unnecessarily locked in by FirstEnergy’s ESP3 for an additional two years potentially strapping consumers with higher generation charges. These issues, as well as others, require thorough examination by the Consumer Advocates regarding the proposed impact on customers.

Trying to push through all of these “new provisions” for the sole reason of allowing FirstEnergy to try to bid a very small amount of energy efficiency and demand response resources into the 2015/2016 PJM BRA is unreasonable.⁷ The Joint Motion was the Consumer Advocates’ attempt to provide the Commission with a mechanism to

⁶ Memorandum Contra at 2.

⁷ The Consumer Advocates understand that the PJM peak day capacity resources in the summer of 2011 were more than 154,000 MW, and the Companies’ demand response and energy efficiency resources proposed to be bid into the May 7, 2012 PJM auction is approximately 265 MW, which is less than one hundredth of one percent of the PJM peak day capacity resources in the summer of 2011.

encourage FirstEnergy's participation in the 2015/2016 PJM BRA, while still allowing the Consumer Advocates, the Commission and other interested parties sufficient time to review and analyze the rest of the ESP 3 proposal.

B. The Consumer Advocates are Willing to Bifurcate the Proceedings to Encourage FirstEnergy's Participation in the 2015/2016 PJM BRA Despite the Lack of Information in the ESP 3 Proposal Regarding this Issue.

The ESP 3 Application and Stipulation filed with the Commission in this proceeding contain very little information about FirstEnergy's attempt to participate in the 2015/2016 PJM BRA, and confirm that such participation is only a possibility, not a guarantee.⁸ The only two sections of the ESP 3 Stipulation that address this issue are Paragraphs D.1 (relating to Riders ELR and OLR) and D.8 (identifying 65 MW of available energy efficiency resources).

Paragraph D.1, however, provides no detail regarding: (i) the reason FirstEnergy waited until less than one (1) month before the scheduled PJM BRA to make its proposal; (ii) the number of MW potentially available through the Riders ELR and OLR

⁸ See FirstEnergy ESP 3 Application at p. 2 (explaining one of the advantages of the ESP 3 as "potentially enabling the Companies to bid demand response resources and energy efficiency resources into the PJM 2015-2016 Base Residual Auction"). See also ESP 3 Stipulation at p. 28 ("Commission approval of the continuation of Rider ELR and OLR will potentially enable the Companies to bid the demand response resources arising from these tariffs into the PJM BRA; ESP Stipulation at p. 33 ("The Companies have identified up to 65 MW of energy efficiency resources that can potentially be bid into the PJM BRA auction on May 7, 2012"). See also *In the Matter of the Commission's Review of the Participation of FirstEnergy in the May 2012 PJM Reliability Pricing Model Auction*, Case No. 12-814-EL-UNC, Report of Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company at 5 (March 29, 2012) ("Speaking to qualification as PJM Capacity Resources, all EE & PDR resources must meet robust PJM measurement and verification (M&V) criteria, meaning that in order to participate in the May 2012 BRA, the Companies would need to submit an Initial Measurement & Verification Plan to PJM for the proposed energy reduction resources no later than 30 days prior the BRA auction, which is April 6, 2012. This is an ambitious task considering the Companies do not have an approved EE & PDR Portfolio Plan for 2015-2016. * * * As discussed above, because the Companies do not have an approved EE & PDR Portfolio Plan that covers the 2015/2016 BRA, combined with the PJM penalties associated with failure to deliver on reduction commitments, the Companies cannot offer any EE & PDR Portfolio Plan reductions into the 2015/2016 BRA, absent Commission assurances that any such penalties would be recoverable through rates.

mechanisms for bidding into the 2015/2016 PJM BRA; (iii) the potential financial benefit to customers by bidding the demand response resources stemming from Riders ELR and OLR into the 2015/2106 PJM BRA; and (iv) the likelihood that FirstEnergy can meet the PJM timeframes for actually bidding these demand response resources into the 2015/2106 PJM BRA.

Paragraph D.8 lacks similar detail, but adds a layer of uncertainty to the equation because FirstEnergy is not asking the Commission to approve anything relating to what it claims to be 65 MW of energy efficiency resources available for participation in the 2015/2016 PJM BRA. In fact, FirstEnergy simply states that it will use “reasonable best efforts and will expend the additional time and resources to alter their energy efficiency plans in an effort to qualify the energy efficiency resources that reduce demand at the PJM coincident peak for the PJM BRA auction on May 7, 2012.”⁹ There is no request for Commission action. Instead, FirstEnergy simply agrees to take actions that it already should be doing as part of the energy efficiency/peak demand response portfolio planning process – namely identifying available energy efficiency resources and taking steps potentially beneficial to customers, such as bidding those resources into the PJM BRA. For this reason, the only issue being bifurcated is the extension of Riders ELR and OLR.

Despite the flaws identified above, the Consumer Advocates proposed a reasonable compromise that would allow the Commission to bifurcate this issue from the ESP 3 proceeding, and authorize FirstEnergy to take the steps necessary to include the demand response resources flowing from Riders ELR and OLR in the 2015/2106 PJM BRA. This is reasonable and does not prejudice FirstEnergy or the other interested parties.

⁹ ESP 3 Stipulation at 33 (April 13, 2012).

C. From a Policy Perspective, the Extension of Riders ELR and OLR as Part of a Bifurcated Proceeding Would Require the Changing of Only One Number in Those Riders.

FirstEnergy's Memorandum Contra also glosses over the fact that the proposed extension of Riders ELR and OLR would require only one change to the language in the riders. In fact, all it would require is changing the expiration date of the riders from May 31, 2014 to May 31, 2016. That is the single change proposed by FirstEnergy, and the single change the Consumer Advocates suggest be approved in a bifurcated proceeding. Nothing more, nothing less. Proposing this change as part of a broad ESP 3 Stipulation that raises a number of new and significant issues is unreasonable and prejudicial to the Consumer Advocates.

D. The Commission has the Authority to Bifurcate the Proceedings Under its General Supervisory Authority.

R.C. 4905.06 sets forth the Commission's general supervisory powers over public utilities. More specifically, R.C. 4905.06 states that the "public utilities commission has general supervision over all public utilities within its jurisdiction." This general supervisory power provides sufficient authority for the Commission to bifurcate the proceedings for the limited purpose of approving the extension of Riders ELR and OLR through May 31, 2016.

E. The Commission has the Authority to Bifurcate the Proceedings Under Ohio's Energy Efficiency Statutes and Regulations.

Contrary to FirstEnergy's assertion, energy efficiency and peak demand reduction programs available through industrial interruptible tariffs do not constitute utility generation¹⁰; instead, they represent the avoidance of generation. As such, they fall

¹⁰ See FirstEnergy Memorandum Contra at p. 2.

within the purview of the Commission's jurisdiction over energy efficiency and peak demand response programs under R.C. 4928.66, and the regulations promulgated there under.

R.C. 4928.66 does not require that FirstEnergy's energy efficiency and peak demand reduction requirements be met through an ESP. In fact, OAC Rule 4901:1-39-07(A) specifies that FirstEnergy and other EDUs can seek recovery for energy efficiency and peak demand reduction program costs (such as the costs of Rider ELR and OLR) separate and apart from an ESP (namely through its energy efficiency and peak demand response portfolio plan. It is simply inaccurate for FirstEnergy to claim that the only way for demand response resources to be included in the PJM BRA is through approval of a new ESP.

III. CONCLUSION

FirstEnergy's ESP is an important filing that deserves appropriate review by the Consumer Advocates and other interested parties through a fair process as contemplated by the General Assembly in R.C. Chapter 4928. The Consumer Advocates have proposed a reasonable interim resolution to FirstEnergy's proposal by moving to bifurcate the proceedings to accommodate FirstEnergy's request to bid certain demand response resources and PJM-qualifying energy efficiency resources into the PJM BRA.

The rest of the ESP 3 proposal, however, deserves the full attention of the Commission, Consumer Advocates and other interested parties to ensure that it satisfies Ohio law, benefits customers by requiring First Energy to make its legal showing that the proposed ESP is more favorable in the aggregate than a MRO, and provides interested parties with due process protections. Rather than approval of the entire ESP 3 proposal,

FirstEnergy only needs immediate Commission approval of the extension of Riders ELR and OLR, which can be accomplished separate and apart from the approval of a new two-year ESP. For these reasons, the Joint Motion should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *Reply* was served upon the persons listed below, electronically, this 23rd day of April 2012.

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