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

REPLY BRIEF
by the
SIERRA CLUB

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I. INTRODUCTION

On April 13, 2012, the Ohio Edison Company, Cleveland Electric Illuminating Company and the Toledo Edison Company (collectively "FirstEnergy" or "Companies") filed a proposed Electric Security Plan ("ESP") application and stipulation. Initial Post-Hearing Briefs were filed by the Sierra Club and various parties on June 22, 2012. The contents of this Reply Brief by the Sierra Club are offered in addition to, and not as a substitution of, the Sierra Club's Initial Brief.

The focus of the Sierra Club in this proceeding is FirstEnergy's bid of 36 MW of Energy Efficiency Resources into the 2015/2016 PJM Base Residual Auction ("2015/2016 BRA"). This bid is approximately one-tenth of the energy efficiency resources that Sierra Club estimates the Companies could have bid into the auction, based on information from other FirstEnergy filings.[1] This potentially cost FirstEnergy customers hundreds of millions of dollars in real savings and in revenue from capacity payments.[2] In addition to the lost opportunity to provide

[1] Sierra Club Initial Brief at 15-16.
[2] Sierra Club Initial Brief at 17.

their customers with a substantial economic benefit, the Companies also denied customers the ability to realize the full potential of the environmental benefits of energy efficiency programs.

FirstEnergy attempts to justify the nominal bid by stating there is no profit motive in it for the Companies.[3] This justification is contrary to Ohio law, Ohio policy, and FirstEnergy's statutory obligations to its customers as a public utility. Sierra Club recommends that the Commission find that the Companies failed to meet their statutory responsibility to their customers and that they should be held accountable for the costs that could have been avoided by participating in the auction with its full potential of current and future energy efficiency resources. The final amount can be calculated when information requested from PJM becomes available, either in this proceeding or a subsequent proceeding.

In addition, the Sierra Club makes the additional recommendations of making no recommendation on the cost deferral of renewable resources until the pending audit is complete,[4] and deferring any lost revenue recovery to the Companies' upcoming Energy Efficiency Portfolio filing, as described below.

II. ARGUMENT:

A. FirstEnergy Failed to Fulfill its Statutory Obligations as a Public Utility to Provide Reasonably Priced Electric Service, Encourage Energy Conservation, Reduce the Growth Rate of Energy Consumption, Promote Economic Efficiencies, and Failed to Fully Engage in a Process That Would Ensure Ohio Customers Just and Reasonable Rates.

1. FirstEnergy's Bid of Only One Tenth of its Energy Efficiency Resources into the 2015/2016 BRA Violates Ohio Revised Code Section 4982.02(A).

[3] Company Post-Hearing Brief at 72.
[4] See PUCO Case No. 11-5201-EL-RDR.

The assertions made by FirstEnergy in its initial brief regarding the 2015/2016 BRA contradict Ohio Law. Ohio Revised Code States that "It is the policy of this state to do the following throughout this state: Ensure the availability to consumers of adequate, reliable, safe, efficient, nondiscriminatory, and reasonably priced retail electric service."[5] FirstEnergy's assertion that "The Companies have acted reasonably in bidding EE into the BRA"[6] is not supported by any evidence in the record, and is in fact, directly contradicted by evidence offered by the Sierra Club.

Despite FirstEnergy's largely irrelevant criticisms of Sierra Club witness Neme's analysis,[7] it is the *only* analysis in the record of FirstEnergy's energy efficiency potential, and is based on FirstEnergy's own filings and data.[8] Mr. Neme's analysis demonstrates that the inadequate bid by FirstEnergy into the 2015/2016 BRA was a missed opportunity for FirstEnergy customers to experience "reasonably priced retail electric service" as envisioned by State Policy. By bidding in only one-tenth of its potential energy efficiency savings, FirstEnergy likely prevented its customers from earning significant revenue, experiencing a lower capacity price[9] and further reducing the DSE Rider.[10] These items add up to potentially hundreds of millions of dollars in lost revenues and wholly avoidable costs to customers.[11] This is not only unreasonable from a utility customer standpoint, but it is also a claim with substantial merit that addresses a prominent feature of the Companies' application.

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[5] R.C. 4928.02(A).
[6] FirstEnergy Brief at 69.
[7] FirstEnergy Brief at 69-71
[8] FirstEnergy Brief at 71.
[9] Sierra Club Initial Brief at 16-17.
[10] Id.
[11] Sierra Club Initial Brief at 17__.

2. Ohio Revised Code 4928.143 Places the Burden of Proof on the Utlity; FirstEnergy Offered No Evidence that their Bid Strategy Regarding the PJM BRA was "Reasonable."

The burden of proof in an ESP proceeding lies with the utility.[12] An ESP filing may include provisions for energy efficiency programs.[13] FirstEnergy chose to include its bid of energy efficiency resources into the 2015/2016 BRA as a part of this proceeding. Therefore, scrutiny of the Companies' actions, in light of applicable Ohio statutes is warranted. In its brief, FirstEnergy does not counter any of Chris Neme's estimates with any estimates of its own. In fact, FirstEnergy's strategy to avoid doing any analysis or planning for the 2015/2016 BRA was apparent in February when the Companies refused to provide an estimate of resource potential to the Commission in Case No. 12-814-EL-UNC.[14] FirstEnergy provided no comprehensive assessment in that case, and they do not provide it here. Sierra Club's claims, as presented by expert witness Chris Neme, have merit, are carefully calculated and presented, and should be examined and further considered by the Commission. Sierra Club repeats its recommendation that the Commission review the Companies' conduct, review the material requested from PJM,[15] and take appropriate steps to hold FirstEnergy accountable for any increase in costs to customers caused by its nonfeasance.

3. FirstEnergy's Stance that It Owes No Duty to Save Customers Money Without a Profit for Its Shareholders is Contrary to its Obligations as a Public Utility via Ohio Revised Code Sections 4905.22 and 4905.70.

[12] R.C. 4928.143(C)(1).
[13] R.C. 4928.143(B)(2)(i).
[14] PUCO Case No. 12-814, Entry at ¶8 (February 29, 2012).
[15] Sierra Club Initial Brief at 18.

FirstEnergy is a public utility with specific obligations to its customers as presented in Ohio law. Ohio Revised Code 4905.22 states that "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. All charges made or demanded for any service rendered, or to be rendered, shall be just, reasonable…."[16] More specifically, Ohio law obligates the Commission, presumably through electric utilities, 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."[17] These statutory obligations are not confined to a specific list of actions. Referring to these statutes, and as applicable in this case, the Commission noted that the Companies "have an obligation to take all reasonable and cost effective steps to avoid unnecessary RPM price increases for their customers."[18]

Taking "all reasonable steps" is certainly doing more than bidding in a mere 10 percent of potential energy efficiency resources into an auction when the likely consequences for customers are significant energy savings. As the Commission also noted, the Companies have a statutory obligation to create efficiency savings under the mandates of Senate Bill 221.[19] No analysis was performed by FirstEnergy weighing the costs versus the benefits. No analysis was done to weigh risks versus reward. No presentation of the penalties that might actually be incurred by failing to supply bid resources was presented. According to FirstEnergy witness Ridmann, the Companies relied on information that can only be found in the "minds of its

[16] R.C. 4905.22
[17] R.C. 4905.70
[18] Case No. 12-814, Entry at 4 (February 29, 2012).
[19] Case No. 12-814, Entry at ¶4.

employees."[20] Thus, the Companies' rationalization of "not being inclined to take on unnecessary risk"[21] on behalf of its customers fails on its face, because the Companies have not assessed any risks, let alone "unnecessary" risks. Without an analysis or quantification of risk, the Companies' statement is wholly inadequate. This cannot be interpreted as taking reasonable steps. It should not be condoned by the Commission as an acceptable business practice on behalf of FirstEnergy's millions of customers.

B. FirstEnergy's Attempts to Marginalize Sierra Club's Expert Testimony Are Meritless

Having failed to meet their statutory burden to prove that their inaction was reasonable for customers, FirstEnergy tries to discredit the only analysis in the record, that of Sierra Club expert Chris Neme. The Companies' critiques of Mr. Neme and his analysis are meritless – but perhaps when compared to the prospect of producing an analysis of their own, the Companies felt they had no choice but to "shoot the messenger." This section addresses and defuses the irrelevant critiques offered by FirstEnergy. First, we address the Companies' argument that somehow Mr. Neme does not think the Commission should address the 2015/2016 BRA in this ESP proceeding. Second, this section addresses the Companies' attempt to avoid responsibility for their failure to save customers hundreds of millions of dollars solely because Mr. Neme could not pinpoint, *ex ante*, the exact amount of damages resulting from FirstEnergy's failure. Finally, FirstEnergy's attempt to undermine Mr. Neme's analysis because he doesn't work at FirstEnergy or have access to all of the Companies' data actually highlights the fact that FirstEnergy was in a better position to do an analysis, *ex ante,* and save customers money. But alas, the Companies

[20] Cross Examination of William R. Ridmann, Hearing Transcript Volume I, pp. 329-330.
[21] FirstEnergy Post-Hearing Brief at 72.

believe that they have no duty to their customers as they readily admitted in their post-hearing brief.[22]

1. The Commission Should Address the Companies' Failure to Prepare for the 2015/2016 BRA in this Proceeding

In their post-hearing briefs, both Commission Staff[23] and FirstEnergy mistakenly assert that Mr. Neme admitted that "the Companies' accountability on the most recent BRA" is not at issue in this ESP.[24] Unfortunately for FirstEnergy, the Companies cannot simply walk away from their failure to save customers potentially hundreds of millions of dollars.

First and foremost, the Companies made the 2015/2016 BRA a part of the electric service plan before the Commission. FirstEnergy used the potential to save customers money as enticement to expedite the Commission's decision on the ESP.[25] FirstEnergy thus made the prudence or reasonability of its 2015/2016 BRA bid part of the ESP and under the scope of the Commission's assessment of their ESP. The Commission must evaluate the reasonability of the Companies' bid and determine if Ohio electricity customers will have to foot the bill.

Second, Mr. Neme was clear that he evaluated FirstEnergy's decision to bid only a small portion of its energy efficiency resources into the 2015/2016 BRA and concluded that the Commission should find the Companies' decision imprudent.[26] Mr. Neme's conclusion is based on his assessment of the benefits that energy efficiency resources could provide in terms of

[22] Company Post-Hearing Brief, p.72.
[23] Staff Post-Hearing Brief, p.10.
[24] Company Post-Hearing Brief, p.70.
[25] Company Exhibit 4, Supplemental Testimony of William R. Ridmann, p.3, lines 12-23.
[26] Cross Examination of Chris Neme, Hearing Transcript Volume I, p. 360, lines 15-22; and Sierra Club Exhibit 5, Direct Testimony of Chris Neme, p.3, lines 4-8.

revenue to customers and in lowering the auction-clearing price,[27] which he compared to potential risks. Mr. Neme's conclusion is that the Companies acted imprudently, because they should have bid significantly more than 10% of their resources into the auction.[28] This conclusion is directly relevant to whether the ESP provides "reasonably priced electric service" to FirstEnergy customers as required by law. Based on this conclusion, Sierra Club opposes the ESP and recommends that the Commission modify the stipulation to hold FirstEnergy accountable for the costs of its failure to participate reasonably in the 2015/2016 BRA.

2. FirstEnergy's Imprudence is Apparent Now, Regardless of the Final Amount it Will Cost Customers

In response to questioning by Attorney Examiner Price, Mr. Neme acknowledged that he cannot point to a specific dollar amount—at this time, with the information currently available—that the Companies' decision will cost customers. Instead, he produced a ballpark estimate in order to show the magnitude of the imprudence and recommends that the Commission take advantage of information it has requested from PJM, "when it becomes available, … to make a better determination than is possible with the information I currently have[.]"[29] FirstEnergy argues that, because Mr. Neme produced a ballpark estimate, it should be discredited completely

[27] The same benefits Mr. Ridmann cited in his supplemental testimony to the Commission urging expedited approval of the ESP in order to participate in the 2015/2016 BRA. Company Exhibit 4, Supplemental Testimony of William R. Ridmann, p.3, lines 12-23.

[28] The Staff's brief vaguely refers to eight pages of OCC witness James Wilson's testimony as somehow contradicting Mr. Neme's conclusion that the Companies should have bid in future resources required by Senate Bill 221 because the Companies do not own those resources. See Staff Post-Hearing Brief, p. 10. The eight pages fail to back-up Staff's assertion. Mr. Wilson evaluated whether the limited bid that FirstEnergy made to the BRA had significant impact on the BRA. Mr. Wilson did not assess the ownership issue at all. In fact, Mr. Wilson asserted in cross that he did not evaluate the benefits of bidding any resources beyond the 65 megawatts that the Companies proposed bidding in their M&V plan. Cross Examination of James Wilson, Hearing Transcript Volume II, p.108, lines 14-25.

[29] Cross Examination of Chris Neme, Hearing Transcript Volume I, p.356, lines 1-4.

and the Commission should simply ignore the Companies' approach to the 2015/2016 BRA.[30] This argument is fundamentally flawed for two reasons.

First, the ESP must be evaluated *ex ante* for the prudence and reasonability of the approach proposed by FirstEnergy. The imprudence of FirstEnergy's decision not to save customers potentially hundreds of millions of dollars in the 2015/2016 BRA can be assessed without knowing the exact amount it will cost customers. To argue otherwise would be to ignore the entire ESP approval process, in which the Companies ask this Commission to certify their proposed approach as reasonable for a three year period without knowing the exact energy prices that will be charged throughout the tenure of the ESP. That is, the ESP process requires that the Commission assess the prudence and reasonability of the Companies' strategy for providing electricity for three future years on the rates to customers. This is necessarily a prospective determination in which the Commission assesses reasonability without knowing the exact results.

Second, FirstEnergy's line of reasoning turns the burden of proof on its head. As discussed above, it is FirstEnergy's burden to prove that its approach to the 2015/2016 BRA was prudent.[31] The Companies admittedly did nothing in this regard. They produced no analysis of benefits or risks *ex ante* and even now they attack the only assessment of prudence in the record. Despite the Commission's request in Case No. 12-814-EL-UNC to bid all their energy efficiency resources into the 2015/2016 BRA, FirstEnergy bid only 10% and provided no analysis of the prudence of that bid. The Companies must therefore stand on their only affirmative assertion regarding their approach to the 2015/2016 BRA; that they didn't need to do anything to save customers money without a profit motive for their shareholders. FirstEnergy thus asks the

[30] Company Post-Hearing Brief, p.72.
[31] See Section A.2, *Supra*.

Commission to ignore Mr. Neme's conclusion that the Companies acted imprudently solely because he did not produce an exact dollar amount, while simultaneously asking the Commission to find that their actions were prudent without offering any analysis or support at all. This is akin to a defendant in a bank robbery admitting that he robbed the bank, but arguing to be set free because the prosecutor did not know the exact amount, to the penny, that he stole.

3. FirstEnergy's Attempts to Undermine the Data Mr. Neme Utilized and His Lack of Direct Experience with Investor Owned Utilities Highlights FirstEnergy's Failure to Satisfy the Burden of Proof by Producing its Own Analysis

Finally, FirstEnergy attempts to undermine Mr. Neme's analysis because he lacked full access to FirstEnergy's data and has not previously worked for an investor owned utility ("IOU").[32] This line of argument again fails to acknowledge that the burden is on FirstEnergy and merely highlights FirstEnergy's failure to do the analysis on its own.

Mr. Neme acknowledged that he had to make some assumptions on the data, primarily because he only had access to public information provided by FirstEnergy.[33] He readily admitted that he trusted FirstEnergy's data to be accurate, but to the extent the data are incomplete, FirstEnergy was in a better position to produce a more robust analysis. Unfortunately, FirstEnergy did not do its own analysis, despite having full access to all relevant data and being aware of any necessary corrections.

Similarly, FirstEnergy insinuates that Mr. Neme's lack of direct experience working for an IOU somehow discredits his analysis.[34] This again highlights that the Companies, because they are part of an IOU, were in a better position to produce an exact analysis. Instead, they did

[32] See Company Post-Hearing Brief, pp.71-72.
[33] Cross Examination of Chris Neme, Hearing Transcript Volume I, pp.350-354.
[34] See Company Post-Hearing Brief, pp.71-72.

nothing and the Commission is told only that FirstEnergy's employees "know in their minds" and decided no real assessment was necessary.[35] Without becoming mind readers to assess the thoughts of the Companies' employees, FirstEnergy would have the Commission trust that no analysis is better than a ballpark analysis.

FirstEnergy also asserts that Mr. Neme did not know the "level of penalties" that might face the Companies should they fail to deliver all their resources.[36] But Mr. Neme provided testimony that the penalties are unlikely to result in risk to the Companies because of the ability to secure replacement capacity at lower prices in incremental auctions.[37] Again, if FirstEnergy had a better understanding of these penalties, it should have done the analysis on its own and presented it to the Commission. The burden was on the Companies to prove that their approach to the 2015/2016 BRA was reasonable for their customers. They failed to produce any analysis and thus failed to meet their burden. The Commission should, as information from PJM becomes available, make a final determination of what this imprudence cost customers and ensure that these customers do not have to pay for FirstEnergy's failure. But for now, the Companies offer no defense of their actions and thus the Commission should modify the stipulation to ensure that the Companies are not allowed to collect these dollars from customers. Sierra Club recommends that the Commission order FirstEnergy to use Shareholder dollars to employ its recommendations of reimbursement for customers or increased energy efficiency programs.

C. The Commission Should Stay the Discussion of Rider AER Cost Deferral Until the Audit is Complete in Case No. 11-5201-EL-RDR.

[35] Cross Examination of William R. Ridmann, Hearing Transcript Volume I, pp. 329-330.
[36] See Company Post-Hearing Brief, pp.71-72.
[37] Sierra Club Exhibit 5, Direct Testimony of Chris Neme, pp.5-9.

FirstEnergy also presents the extension for the recovery of the prices associated with renewable energy credits as a benefit of this stipulation.[38] The Companies claim that this will mitigate the "rate impacts" for customers, ignoring that the real result of this deferral is increased costs for its customers.[39] But the record contains no explanation for the need to defer these costs in the first place. The analysis of the Companies' costs of renewable compliance is being currently being conducted by an independent auditor in PUCO Case number 11-5201-EL-RDR. The Commission should first review the findings of that audit in that case and make any appropriate modifications to Rider AER rather than increasing even further the Companies' cost of compliance with the renewable provisions of SB 221.

1. Consideration of Approval for any Recovery of Lost Distribution Revenue Should be Deferred to the Companies' Upcoming Portfolio Cases.

Sierra Club agrees with OCC Witness Gonzalez that the issue of lost distribution revenue should be deferred to the Companies' energy efficiency portfolio filings.[40] FirstEnergy's attempt to address witness Gonzalez' position regarding lost revenues[41] in this case does not address the main issue, which is the fact that lost revenue will reduce the benefits of energy efficiency to customers and the total costs are unknown.[42] Whether the Commission approves Lost Revenue or some other form of recovery, the issue is best suited to a Portfolio Proceeding. Thus, the Sierra Club recommends the Commission modify the stipulation and defer the issue of lost revenue recovery to the Portfolio Cases.

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[38] Stipulation at 2-3.
[39] Id.
[40] OCC Exhibit 11, page 40, lines 14-17, page 41, lines 1-4
[41] Company Post-Hearing Brief at 57-58.
[42] OCC Exhibit 11, page 40, lines 12-13.

III. CONCLUSION

For the foregoing reasons, the Sierra Club respectfully request that the Commission consider and adopt the Sierra Club's recommendations as submitted.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

It is hereby certified that a true copy of the foregoing *Reply Brief by the Sierra Club* was served upon the persons listed below via electronic transmission this 29TH day of June, 2012.

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