

**BEFORE**  
**THE PUBLIC UTILITIES COMMISSION OF OHIO**

<b>In the Matter of the Commission's</b>	)	
<b>Investigation of Ohio's Retail Electric</b>	)	<b>Case No. 12-3151-EL-COI</b>
<b>Service Market</b>	)	

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**REPLY COMMENTS**  
**BY THE**  
**SIERRA CLUB**  
**And OHIO ENVIRONMENTAL COUNCIL**

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**I. Introduction**

The Sierra Club and Ohio Environmental Council ("OEC") respectfully submit these Reply Comments in response to the filings of several parties on March 1, 2013, in the Public Utilities Commission of Ohio's ("PUCO" or "Commission") investigation of Ohio's retail electric service market. The investigation also includes energy efficiency and renewable issues, smart metering and corporate separation issues. The Sierra Club and OEC submitted initial Comments in response to the Commission Entry filed in the above-captioned case on December 12, 2012.

Sierra Club and OEC expand the scope of their comments in this reply beyond corporate separation in order to address comments from certain groups regarding energy efficiency and renewable energy. Sierra Club and OEC note that the comments regarding the statutory repeal of certain laws governing these topics are beyond the scope of this

examination and should be disregarded by this Commission. However, the primary focus of Sierra Club and OEC in this proceeding continues to be on corporate separation issues and how these affect distributed generation and energy efficiency potential in Ohio.

## **II. Energy Efficiency and Renewable Energy Issues**

### **A. Energy Efficiency Comments**

Sierra Club and OEC disagree with the minority of stakeholders that submitted comments requesting alteration or elimination of Ohio's energy efficiency standards. Energy efficiency remains the lowest cost and cleanest supply option for Ohio. It is in the direct interest of all classes of customers for the state, the Commission, and stakeholders to cooperate on increasing and expanding energy efficiency deployment. To the extent the minority of stakeholders have concerns regarding the operation of Ohio's energy efficiency standards reflected in Ohio Revised Code 4928.66 those issues can be addressed directly through the recently commenced rule review process and are not germane to this docket.<sup>1</sup>

Constellation New Energy/Exelon ("Constellation") demonstrates a basic misunderstanding of how Ohio's energy efficiency resource acquisition law operates in the market with its comment that removal of those laws will "level the playing field" and allow CRES providers to "do more."<sup>2</sup>

In reality, there is plenty of market space for other parties, such as generation utilities or CRES operations to supplement the energy efficiency efforts of Ohio's electric

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<sup>1</sup> 13-651-EL-ORD, *In the Matter of the Commission's Review of its Rules for Energy Efficiency Programs Contained in Chapter 4901:1-39 of the Ohio Administrative Code*.

<sup>2</sup> Constellation New Energy/Exelon at 18 (March 1 2013)

distribution utilities (“EDUs”) with offers of their own. Constellation has failed to demonstrate that competitive retail electricity suppliers (“CRES”) providers do not have a level playing field, or are prohibited by the EDUs from doing more efficiency or renewable energy projects. Sierra Club and OEC agree with the FirstEnergy companies that third party energy efficiency providers have adequate access to the market.<sup>3</sup>

The evidence is clear and undisputable: Ohio’s lowest cost resource is energy efficiency. The Commission has approved multiple cost-saving energy efficiency portfolios in the last 5 years, all of which save customers money. Yet FirstEnergy and the Industrial Energy Users (“IEU”) continue their strange and tiresome effort to convince reasonable people that they too should buy into the debunked, disproved, and thoroughly discredited notion that energy efficiency is not Ohio’s lowest cost resource. Once again, we ask the Commission to take notice of the facts – and ignore the rhetoric and the false claims of FirstEnergy and IEU.

FirstEnergy argues that energy efficiency investments will drive up prices and will be costly, and provide no direct benefit to customers not taking advantage.<sup>4</sup> Contrary to FirstEnergy’s claims, energy efficiency is Ohio’s lowest cost resource – AEP proves the case. AEP will achieve its energy efficiency goals at an estimated program cost of just under 2 cents per kWh for its current energy efficiency portfolio plan; this cost includes incentives to AEP for over-compliance with Ohio’s energy efficiency benchmarks.<sup>5</sup> Energy efficiency is the cheapest resource in Ohio; FirstEnergy’s claim to the contrary is wrong and should be ignored by this Commission.

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<sup>3</sup> FirstEnergy at 19 (March 1 2013)

<sup>4</sup> FirstEnergy at 20.

<sup>5</sup> AEP Portfolio Plan, 2012-2014.

Similarly FirstEnergy's claim that energy efficiency investments in Ohio produce no benefits beyond those provided to program participants is demonstrably false. The non-program participant benefits of energy efficiency include but are not limited to improved reliability, reduced need for transmission and distribution expenses, wholesale price suppression and reduction, local economic development, and market transformations that benefit all market players.

Grid system reliability is a benefit enjoyed by all customers; and energy efficiency improves reliability – particularly in conjunction with smart meter deployment.<sup>6</sup> Energy efficiency extends the life of transmission and distribution systems and reduces the need for expansions and upgrades; less energy on the wires means fewer customer dollars spent on system repairs (and expansion) due to wear and tear. Generation alternatives to energy efficiency are far more costly to customers; and bidding these efficiency resources into regional capacity markets provides price suppression benefits to all. The Sierra Club and OEC agree with Nucor that bidding energy efficiency resources into the PJM base residual auction mitigates capacity prices for all customers.<sup>7</sup> Finally, research has demonstrated that programs like many of those employed in Ohio that work to build market transformation; i.e. long-term changes in the way retailers and auditors provide service – can produce massive benefits to non-program participants.<sup>8</sup>

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<sup>6</sup> Simchak T. et al. *Realizing the Energy Efficiency Potential of Smart Grid*, Washington, D.C. Alliance to Save Energy.

<sup>7</sup> Nucor at 20

<sup>8</sup> See *National Action Plan For Energy Efficiency*, U.S. EPA 2008. Page 6-19: "In addition, particularly for programs that aim to accelerate market adoption of energy efficiency products or services, there is often program 'spillover' to non-program participants. For example, an evaluation of National Grid's Energy Initiative, Design 2000plus, and other small commercial and industrial programs found energy efficient measures were installed by non-participants due to program influences on design professionals and

Costs of energy efficiency programs are borne by all customers, and FirstEnergy's claims that these costs are high are disingenuous. As a threshold issue, FirstEnergy's record on energy efficiency cost allocation is mixed at best. FirstEnergy recently admitted massively over-charging its large customers for energy efficiency; perhaps this is part of the reason why some of FirstEnergy's larger customers have complained about costs.<sup>9</sup> Additionally, FirstEnergy has actively opposed efforts by larger customers to more fairly allocate these costs; it opposed requests by OEG in its energy efficiency portfolio case to restructure them.<sup>10</sup> Accordingly, its protestations about the cost of programs ring hollow. Finally, FirstEnergy is only getting a small fraction of its energy efficiency savings from its non-mercantile industrial customer programs; indicating that the companies are doing very little to help industrial customers take advantage of the programs.<sup>11</sup> Allocation of program costs among customer classes should be reviewed; there will be an opportunity to do so in the upcoming energy efficiency rulemaking.<sup>12</sup>

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vendors. The analysis indicated that 'non-participant' spillover from the programs amounted to 12,323,174 kWh in the 2001 program year..."

<sup>9</sup> 2012 FirstEnergy report to Ohio Collaborative; outlining mistaken charges to GT customers and planned refunds.

<sup>10</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*. Reply Brief 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, at 69.

<sup>11</sup> See Page 11 of the FirstEnergy Program Performance Report to the collaborative; Preliminary results demonstrate that only a small fraction for savings was produced from the industrial sector by FirstEnergy, and was almost entirely centered on lighting programs. Several programs for the industrial sector reported no savings at all; yet these programs also showed considerable spending associated with their implementation.

<sup>12</sup> 13-651-EL-ORD, *In the Matter of the Commission's Review of its Rules for Energy Efficiency Programs Contained in Chapter 4901:1-39 of the Ohio Administrative Code*.

IEU argues that energy efficiency programs present a barrier to the retail electric marketplace, and calls for repeal of the standards.<sup>13</sup> It is impossible to know IEU's reasoning for these comments, because IEU provides no argument or facts. Regardless, energy efficiency programs do not present a barrier to the marketplace; in fact they do the opposite – they resolve the structural barriers in the market to the deployment of energy efficiency – the lowest cost resource for all customers. In fact, much if not most of the energy efficiency opportunities available to customers are not developed due to these market barriers. These barriers include examples such as split incentives, where landlords and builders fail to make simple cost effective energy efficiency investments because benefits accrue to renters and buyers.

For many small to medium size operations in the industrial sector the barrier is simple lack of knowledge or expertise about energy efficiency opportunities; and for larger operations the barriers have much to do with aggressive capital payback requirements that leave massive amounts of cost effective energy savings out of reach. Energy efficiency resource standards, such as those in place in Indiana, Texas, Arizona, Ohio and twenty other states<sup>14</sup> are not a barrier to the marketplace, they are in place to relieve the market barriers to energy efficiency, the lowest cost resource.<sup>15</sup> Without these standards, there is only one guaranteed result: all Ohio individuals or businesses will pay more for energy.

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<sup>13</sup> IEU at 4 and 26.

<sup>14</sup> <http://aceee.org/topics/eers>

<sup>15</sup> Nadel, S. Energy Efficiency Resource Standards, Experience and Recommendations. 2006. American Council for an Energy Efficient Economy Washington D.C.

## **B. Renewable Energy Comments**

Sierra Club and the OEC offer continued support for Ohio's renewable energy standards. IEU states that renewable energy standards represent a regulatory barrier to competition.<sup>16</sup> This simply isn't true; renewable energy standards represent no more market interference than many other statutory provisions, including one which IEU utilizes and praises frequently; the so-called reasonable arrangement or economic development arrangement. Reasonable arrangements allow large industrial operations to get huge rate subsidies from all other customers; cost recovery for these charges is placed on the distribution bill of those other customers.

The rationale for reasonable arrangements is to promote economic development and job retention and expansion in certain parts of Ohio. This is also the rationale for renewable energy – in addition to diversifying Ohio's generation portfolio and providing a clean source of energy. Renewable development, manufacturing and installations have created thousands of skilled jobs in Ohio.

In addition, reasonable arrangement charges are non-bypassable. Renewable energy riders are bypassable. So shopping customers must pay for reasonable arrangements, but may shop for generation and avoid the renewable rider for a specific utility or CRES provider. From this perspective, reasonable arrangements represent a much greater regulatory barrier to competition.

It's unclear how IEU reaches the conclusion that renewable energy charges represent more of a hindrance to competition than reasonable arrangements; which offer direct subsidy to a specific class of customer at the expense of others. IEU's position

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<sup>16</sup> IEU at 4.

represents nothing less than a selective application of tortured and false market theory, and should be ignored – as should IEU’s contention that the standards should be repealed.

### **III. Corporate Separation**

**(a) Whether an electric utility should be required to disclose to the Commission any information regarding the utility’s analysis or the internal decision matrix involving plant retirements, capacity auction, and transmission projects, including correspondence and meetings among affiliates and their representatives?**

Sierra Club and OEC agree with the Utility Workers and Ohio Power in that the Commission possesses the authority to enforce and investigate corporate separation issues. In initial comments, Ohio Power notes that “the existing statutory and regulatory restrictions on EDUs regarding corporate separation and code of conduct are adequate to protect any concerns that may arise....”<sup>17</sup> The Utility Workers state that “Not only should utilities and their affiliates be required to disclose such information, but the Commission should exercise its statutory authority to compel production of this information in appropriate cases.”<sup>18</sup> Both of these statements illustrate the point that Sierra Club and OEC made in their initial comments: The Commission has the broad, statutory authority to “investigate such utility or affiliate operations as may relate to those businesses and investigate the interrelationship of those operations.”<sup>19</sup>

In particular, Sierra Club and OEC urge the Commission to investigate the interrelationships between the FirstEnergy affiliates for the recent plant closings that

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<sup>17</sup> Ohio Power Comments at 22 (March 1, 2013).

<sup>18</sup> Utility Workers comments at 1-2 (March 1, 2013).

<sup>19</sup> R.C. 4928.17



were previously announced. These strategically timed announcements appeared to benefit the transmission and generation affiliates, while subjecting the EDU affiliates' customers to higher prices.

In order to “protect any concerns that may arise” and that in fact, appear to have surfaced in the FirstEnergy territory, the Commission must be diligent and employ the statutes and administrative code rules<sup>20</sup> that enable oversight and investigation of corporate separation issues. Sierra Club and OEC urge the Commission to exercise its authority to examine all records required to discern affiliate conduct. The PUCO may examine business records “that may in *any way* affect or relate to the costs associated with the provision of electric utility service by any public utility operating in this state....”<sup>21</sup> Therefore, the PUCO has not only the obligation as a public agency, but the authority to examine all necessary records to ensure appropriate interaction or reveal any improper communication between an EDU and its affiliates. It is important to fulfill this obligation in order to protect customers from harm due to these potentially improper relationships. That harm may include higher prices, inhibiting competition, and limiting the potential for the continued development of energy efficiency and demand response resources,

Sierra Club and OEC recognize the cautions presented by other parties,<sup>22</sup> but the Commission is not precluded from investigating affiliates. As noted by Ohio Power, the Ohio law allows the Commission to examine the conduct of affiliates. Ohio Revised Code 4928.17 states that “the commission may examine such books, accounts, or other

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<sup>20</sup> As described in detail in Sierra Club and OEC's Initial Comments.

<sup>21</sup> (Emphasis Added) R.C. 4905.05.

<sup>22</sup> See for example, the comments of Ohio Power at 22 and the FirstEnergy EDUs at 21.

records kept by an electric utility or its affiliate as may relate to the businesses for which corporate separation is required under section 4928.17 of the Revised Code, and may investigate such utility or affiliate operations as may relate to those businesses and investigate the interrelationship of those operations.”<sup>23</sup> IEU stated, and we agree, that “Barriers to a properly functioning, robust electric service market can be reduced by enforcing current corporate separation requirements.”<sup>24</sup> Ohio law gives the PUCO the ability to examine affiliate records to ensure that customers are treated fairly and are afforded reasonably priced electric service. The Commission has an obligation and a duty to examine these records whenever the PUCO deems it appropriate. This oversight should be applied to *all* EDUs and their affiliates, including those that appear to be structurally separated. Sierra Club and OEC strongly support the Commission exercising this authority to protect Ohio utility customers and ensure the development of a real competitive market.

**(b) Should a utility’s transmission affiliate be precluded from participating in the projects intended to alleviate the constraint or should competitive bidding be required?**

Several parties, including the Sierra Club and OEC, noted in their submitted comments that a utility’s transmission affiliate should not be precluded from participating in constraint alleviation projects.<sup>25</sup> The Utility Workers note that any participation by the utility’s transmission affiliate “should occur through an open and transparent process with oversight by the Commission or another independent regulator.”<sup>26</sup> Sierra Club and OEC agree with this statement. While transmission affiliates should not be precluded from

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<sup>23</sup> R.C. 4928.18(B).

<sup>24</sup> Industrial Energy Users – Ohio at 24 (March 24, 2013).

<sup>25</sup> See for example, Ohio Consumers’ Counsel at 23, Ohio Energy Group at 5, and Duke Energy Retail at 9.

<sup>26</sup> Utility Workers at 2-3.

bidding, these affiliates should receive no preference over other potential bidders. In addition, they should receive no preference over other alternatives.

In addition to a bidding process that includes the transmission affiliate, Sierra Club and OEC indicated that “projects intended to alleviate constraint should include an opportunity for non-transmission alternatives to participate.”<sup>27</sup> The Ohio Consumers’ Counsel (“OCC”) expressed support for this idea:

Third parties may also propose alternatives to the Utility to meet PJM-identified reliability objectives. Such alternative proposals should be encouraged and should receive a fair and objective evaluation by PJM and the Utility.<sup>28</sup>

Sierra Club and OEC urge the Commission to adopt OCC’s recommendation. In addition to providing a more competitive process, considering alternative proposals to transmission would align with Ohio’s statutory policies of a “diversity of supplies and suppliers”<sup>29</sup> and distributed generation facilities.<sup>30</sup>

**(c) How long should a utility be permitted to retain their injection rights?**

Both Duke Energy and Ohio Power note that PJM’s current tariff allows for the retention of capacity interconnection rights for one year after deactivation of generation capacity resources.<sup>31</sup> Duke further notes that PJM provides an option for extension for new generation investment.<sup>32</sup>

Sierra Club and OEC note that several Ohio plants will be retired in the near future. Sierra Club and the OEC request that the Commission, to the extent possible,<sup>33</sup>

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<sup>27</sup> Sierra Club and OEC initial comments at 8 (March 1, 2013).

<sup>28</sup> OCC Comments at 23-24.

<sup>29</sup> R.C. 4928.02(C)

<sup>30</sup> Id.

<sup>31</sup> Ohio Power at 24, Duke at 11.

<sup>32</sup> Id.

<sup>33</sup> We note the Chairman of the PUCO is also the Chairman of the Ohio Power Siting Board.

should encourage a process that allows different types of generation resources to be considered in the event of plant retirements and the construction of new generation. This would serve multiple purposes, including the maintenance of reliability in Ohio and compliance with the alternative energy portfolio standards. All alternatives should be considered, including combined heat and power and waste energy recovery alternatives recently recognized with the passage of Senate Bill 315.

**(d) As fully separate entities, does a utility’s distribution affiliate have a duty to oppose the incentive rate of return at FERC?**

Sierra Club and OEC note the unanimous and strenuous opposition presented by all six Ohio EDUs. Ohio Power declared that if such a duty were *imposed* by the Commission it would be unconstitutional.<sup>34</sup> Duke Energy noted that any obligation imposed would force the EDU “into an advocacy role that is unrelated to its core business.”<sup>35</sup> The FirstEnergy EDUs<sup>36</sup> stated that any duty created by the PUCO would “constitute an indirect attempt by the Commission to interfere with FERC’s exclusive authority over transmission rates.”<sup>37</sup> In addition, the FirstEnergy EDUs note that the Commission has the opportunity to comment on transmission cases at FERC.<sup>38</sup> Sierra Club and OEC believe that these comments demonstrate the continuing problem with corporate separation issues in Ohio. If an incentive rate of return were requested that would harm an EDU’s customers, it would make sense for an EDU to oppose such an incentive. And the EDU would be in an advantageous position to do so. As fully

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<sup>34</sup> Ohio Power at 24.

<sup>35</sup> Duke Energy at 11.

<sup>36</sup> The “FirstEnergy EDUs “ are Toledo Edison, Cleveland Electric Illuminating, and Ohio Edison.

<sup>37</sup> FirstEnergy at 25.

<sup>38</sup> *Id.* at 26.

separate entities, the EDU should be concerned with costs its customers pay, rather than the incentive received by its affiliate.

Whether or not a utility would be obligated to engage in such advocacy if circumstances required it, Sierra Club and OEC reiterate that the “fully separate entities” portion of the question is one that must be ensured by the Commission. Sierra Club and OEC again advocate for the Commission to employ its statutory authority and oversight to continually prove that the condition of “fully separate entities” exist in Ohio among all EDUs and their affiliates. While Sierra Club and OEC do not recommend that the Commission create some sort of automatic obligation, we do recommend that the Commission exercise its authority to ensure corporate separation is effective and maintained.

**(e) Is there potential for consumers to be misled by a utility’s corporate separation structure?**

Sierra Club and OEC agree with the Ohio Consumers’ Counsel that the potential exists for customer confusion. OCC notes that “the use of a Utility name by an affiliate or other Marketer can suggest a preference or endorsement by a Utility and may result in customers enrolling in Choice without considering other comparable suppliers for the CRES services.”<sup>39</sup>

This confusion and enrollment with a familiar name likely distort the market in favor of the EDU affiliates. Sierra Club and OEC further agree with OCC that “the public interest is not served to the extent that the use of a Utility name by an affiliate provides an unfair competitive advantage to that supplier or the Utility.” We also agree with

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<sup>39</sup> OCC comments at 24.

FirstEnergy Solutions that “Lack of corporate separation [...] confuses customers and limits competition....”<sup>40</sup>

Sierra Club and OEC reiterate their recommendation that the Commission adopt the modifications presented by Ohio Partners for Affordable Energy in Case No. 12-925-GA-ORD and investigate the effect that similar names have on customer shopping in Ohio.<sup>41</sup> We agree with Ohio Power’s recommendation that for any potential violations, “the Commission should address such matters through existing rules.”<sup>42</sup>

**(f) Are shared services within a ‘structural separation’ configuration causing market manipulation and undue preference?**

The comments of several Competitive Retail Electric Service (“CRES”) providers present in detail the potential market distortion issues that may be created or amplified through shared services.<sup>43</sup> Sierra Club and OEC agree with Ohio Power’s recommendation that for any potential violations, “the Commission should address such matters through existing rules,”<sup>44</sup> and with IEU-Ohio that “Barriers to a properly functioning, robust electric service market can be reduced by enforcing current corporate separation requirements.”<sup>45</sup> The Commission possesses broad, statutory authority and should exercise it to enforce, improve and maintain corporate separation, in order to foster real competition and benefit Ohio’s electric utility customers.

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<sup>40</sup> FirstEnergy Solutions Comments at 9 (March 1, 2013).

<sup>41</sup> Sierra Club and OEC initial comments at pages 11-12.

<sup>42</sup> Ohio Power comments at 25.

<sup>43</sup> See for example, the Comments of the Retail Electric Supply Association at 10 and Comments by IGS at 8-9 (March 1, 2013).

<sup>44</sup> Ohio Power at 25.

<sup>45</sup> Industrial Energy Users – Ohio at 24 (March 24, 2013).

The FirstEnergy EDUs imply in their comments that such enforcement is left only to FERC.<sup>46</sup> Sierra Club and OEC disagree with the FirstEnergy EDU's and reiterate that Ohio law<sup>47</sup> and administrative code provisions<sup>48</sup> provide the Commission the ability to investigate affiliate interrelationships on behalf of Ohio customers. Sierra Club and OEC recommend that compensation for shared services be changed to "market rates" in the statute, and that the Ohio Administrative Code be revised to reflect this change. Otherwise, entities sharing facilities and personnel have a clear advantage over competitors.<sup>49</sup>

These advantages may destroy or diminish any real market growth or transformation. While FirstEnergy promotes "economies of scale"<sup>50</sup> as a benefit for customers from having shared services, it also provides a clear market advantage and thus undercuts competition that may result in lower prices for customers. FirstEnergy Solutions states that "the default service model called for by Ohio law does not inherently provide an unfair advantage to the incumbent provider or its generation affiliate."<sup>51</sup> Yet

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<sup>46</sup> FirstEnergy EDUs at 27-29.

<sup>47</sup> R.C. 4928.17 and R.C. 4928.18

<sup>48</sup> Ohio Adm. Code 4901:1-37

<sup>49</sup> See R.C. 4928.17(A)(3): The words "at market rate" should be added after the phrase "fully loaded embedded costs." Even without this legislative change, the PUCO could amend Ohio Adm. Code Provision 4901:1-37-04(D) and add the following: "(12) The utility will not extend any undue preference or advantage to any affiliate, division, or part of its own business engaged in the business of supplying the competitive retail electric service or nonelectric product or service, including, but not limited to, utility resources such as trucks, tools, office equipment, office space, supplies, customer and marketing information, advertising, billing and mailing systems, personnel, and training, without compensation based upon fully loaded embedded costs at market rates charged to the affiliate."

<sup>50</sup> FirstEnergy EDUs at 29.

<sup>51</sup> FirstEnergy Solutions at 11.

the FirstEnergy EDUs and FirstEnergy Solutions<sup>52</sup> point out that the “economies of scale” provide exactly that.

The FirstEnergy EDUs are sharing services with FirstEnergy Solutions, providing them with economies of scale and other advantages not enjoyed by competitors. Structural separation is not enough. If FirstEnergy Solutions were required to purchase and maintain their own facilities, or pay the market rate for such facilities, the competitive playing field would truly be level. It is ironic that FirstEnergy and FirstEnergy solutions advocate for corporate separation – for other Ohio utilities – while pointing out the alleged advantages of shared services for their customers. The Commission must also ensure that corporate separation is created and maintained between *all* EDUs and their affiliates. As stated above, the rules for corporate separation should be modified to require market rates for shared services, in order to create a competitive market in Ohio.

**(g) Should generation and competitive suppliers be required to completely divest from transmission and distribution entities, maintain their own shareholders and, therefore, operate completely separate from an affiliate structure?**

Sierra Club and OEC reiterate their recommendations that: 1. Generation resources should divest from transmission and distribution entities, becoming truly separate entities with separate shareholders; and 2. The Commission employ its statutory authority to investigate the actions of FirstEnergy and FirstEnergy solutions surrounding

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<sup>52</sup> FirstEnergy Solutions at 24.



the announced plant retirements and the refusal to bid sufficient capacity resources into the PJM auction.

FirstEnergy states that “such an action (requiring divestiture) is beyond the jurisdiction of the Commission.”<sup>53</sup> While that may be correct, Ohio law - as noted extensively by FirstEnergy, IEU and the Sierra Club and OEC – provide sufficient authority to investigate the interrelationships of EDUs and their affiliates. This authority should be exercised to investigate the events surrounding the future increase in capacity prices in the ATSI zone. Sierra Club and OEC direct the Commission to consider the initial comments submitted.<sup>54</sup>

Sierra Club and OEC agree with FirstEnergy EDUs that “if corporate separation rules are properly implemented, then nothing would be gained by an approach requiring an electric utility to have no generation or transmission affiliates.”<sup>55</sup> Sierra Club and OEC believe that the rules clearly allow the Commission to investigate conduct and the the interrelationship between an EDU and its affiliate. Sierra Club and OEC noted the advantages to a Commission investigation in their initial comments and urge the Commission to employ these rules to further investigate the conduct of FirstEnergy and FirstEnergy Solutions.<sup>56</sup>

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<sup>53</sup> FirstEnergy EDU comments at 29.

<sup>54</sup> Sierra Club and OEC initial comments at 13-15.

<sup>55</sup> FirstEnergy at 29.

<sup>56</sup> And GenOn, to the extent they were or are a FirstEnergy affiliate.

#### **IV. Conclusion**

The Sierra Club and OEC appreciate the opportunity to submit reply comments regarding the Commission's specific questions in this case and the comments of other parties. Sierra Club and OEC request the Commission use its broad authority to investigate the actions of FirstEnergy EDUs and their affiliates last year, which resulted in record high future capacity prices for customers. The Sierra Club and OEC respectfully request that the Commission consider and adopt the above recommendations.

Respectfully submitted,

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### **CERTIFICATE OF SERVICE**

I hereby certify that a true and accurate copy of the foregoing *Reply Comments by the Sierra Club and Ohio Environmental Council* has been filed with the Public Utilities Commission of Ohio and has been served upon the following parties via electronic mail or regular mail on April 5, 2013.

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Sierra Club