

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of Ohio)	
Edison Company, The Cleveland Electric)	Case No. 12-2190-EL-POR
Illuminating Company, and The Toledo)	Case No. 12-2191-EL-POR
Edison Company For Approval of Their)	Case No. 12-2192-EL-POR
Energy Efficiency and Peak Demand)	
Reduction Program Portfolio Plans for)	
2013 through 2015.)	

**MEMORANDUM CONTRA FIRSTENERGY'S
APPLICATION FOR REHEARING
BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL**

I. INTRODUCTION

The Office of the Ohio Consumers' Counsel ("OCC") on behalf of the 1.9 million residential utility consumers of Ohio Edison Company ("Ohio Edison"), the Cleveland Electric Illuminating Company ("CEI"), and the Toledo Edison Company ("Toledo Edison") (collectively, "FirstEnergy" or the "Utilities"), files this Memorandum Contra FirstEnergy's Application for Rehearing. On April 19, 2013, various parties,¹ including OCC and the Utilities, filed Applications for Rehearing of the Public Utilities Commission of Ohio's ("PUCO" or "Commission") March 20, 2013 Opinion and Order ("March 20 Order"). At issue in this proceeding is the Utilities' August 31, 2012 application requesting approval of their Energy Efficiency and Peak Demand Reduction Program Portfolio Plans ("EE/PDR Portfolios") for 2013 through 2015. The EE/PDR

¹ Industrial Energy Users-Ohio, Nucor Steel Marion, Inc., Environmental Law & Policy Center and Ohio Environmental Council filed Applications for Rehearing on April 19, 2013. On April 5, 2013, Ohio Energy Group filed an application for clarification.

Portfolios contain programs that will be offered to all customer classes in FirstEnergy's service territory.

In its March 20 Order the Commission required FirstEnergy to bid in 75% of its planned energy efficiency resources for the 2016/2017 planning year into the May 2013 PJM Base Residual Auction. The Utilities' claim that the Commission's March 20 Order is "is unjust and unreasonable given that the manifest weight of the evidence establishes that bidding planned energy efficiency resources into the PJM BRA poses a significant risk to customers and the [Utilities] especially in light of Senate Bill 58."² The Utilities also contend that the Commission does not have the statutory authority to require the Utilities to bid planned energy efficiency resources into the PJM Base Residual Auction ("BRA").³ The PUCO should reject FirstEnergy's arguments for the reasons discussed below.

II. ARGUMENT

A. The Utilities' Application For Rehearing Should Be Denied As It Improperly Relies On Facts Not In Evidence, Is Contrary To The Evidence Presented Throughout This Proceeding, And Will Not Benefit Customers.

1. FirstEnergy's reliance on Senate Bill 58 is improper.

FirstEnergy argues that the Commission's requirement for the Utilities to bid planned energy efficiency resources into the 2016/2017 PJM BRA is unjust and unreasonable. The Utilities claim the manifest weight of the evidence establishes that

² *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, FirstEnergy Application for Rehearing at 1 (April 19, 2013). Senate Bill 58 is an energy bill to evaluate the state's existing laws regarding energy efficiency, peak demand reduction and alternative energy resources.

³ FirstEnergy Application for Rehearing at 1.

bidding planned energy efficiency resources into the PJM BRA poses a significant risk to customers and to the Companies, especially in light of pending draft legislation — Senate Bill 58.⁴ Specifically, FirstEnergy claims that Senate Bill 58 that could “possibly modify” the energy efficiency standards,⁵ and thus, “[r]equiring the Companies to bid into the PJM BRA planned energy efficiency resources, when statutory requirements may change, is not reasonable.”⁶ This argument should be rejected for several reasons.

First, Senate Bill 58 was not discussed by any witness to this proceeding (including FirstEnergy’s witnesses). In fact, the Bill was not introduced until late March 2013 - well after the evidentiary hearing concluded. Second, Senate Bill 58 is not referenced in the Commission’s March 20 Order, and clearly was not relied upon or considered for purposes of its decision for this proceeding. In this regard, Ohio Admin. Code 4901-1-35(A) specifically states, “[a]n application for rehearing must set forth the specific ground or grounds upon which the applicant considers the commission order to be unreasonable or unlawful.” And, per R.C. 4903.09, the written opinions of the PUCO are to be based upon the evidentiary record for that proceeding. Reference to Senate Bill 58 is merely an attempt by the Utilities to raise issues that are outside the scope of this case. Pending legislation is not authoritative over this proceeding, and the Utilities’ reliance is improper.

2. The Utilities’ reliance on the concurring Opinion should be rejected.

FirstEnergy further cites to the Concurring Opinion of Commissioners Slaby and Porter in support of its Application for Rehearing. In their concurring opinion,

⁴ Id.

⁵ Id. at 11.

⁶ Id.

Commissioners Porter and Slaby recognized that bidding in planned energy efficiency may reduce capacity costs in the future.⁷ However, the Commissioners expressed some reservations about unknown costs that may be borne by customers, the Utilities or both.⁸ It should be noted, that this was a concurring opinion by Commissioners Slaby and Porter—not a dissenting opinion. In addition, Commissioners Slaby and Porter signed onto the majority opinion, while acknowledging that planned energy efficiency can reduce costs for customers.⁹ This argument by the Utilities is not persuasive, and should therefore be rejected.

3. FirstEnergy’s reliance on the Commission’s comments filed in FERC Docket No. EL13-57-000 is improper.

FirstEnergy cites to the Commission’s Comments filed in Federal Energy Regulatory Commission Docket No. EL13-57-000 (*Demand Response Coalition v. PJM Interconnection, L.L.C.*) as support for its argument. But the PUCO’s comments are not relevant to, or authoritative over, the present case. In Docket No. EL13-57, the PUCO expressed the opinion that Curtailment Service Providers should be required to confirm that the demand response they are bidding as capacity will be deliverable to a specific zone. This issue is not applicable to the present case. All of the customers in the Utilities’ territories are located in the ATSI zone, so there is no confusion about where the peak demand reduction from energy efficiency resources will be located.

Further, in Docket No. EL13-57, the Commission argued that a Curtailment Service Provider should confirm its ownership of capacity rights of a demand response

⁷ See Concurring Opinion of Slaby and Porter at 1.

⁸ Id.

⁹ Id.

resource.¹⁰ But ownership is not at issue in this case. FirstEnergy's approved plans require customers taking advantage of energy efficiency programs to assign ownership of savings for the purposes of FirstEnergy bidding into the PJM BRA.

The Commission's March 20 Order is what governs this case - not a pleading filed by the Commission in a FERC proceeding. A legal pleading is not analogous to a ruling by the Commission. The Commission did not rely on these Comments for purposes of its March 20 Order, and thus, the Commission should not consider these comments to be persuasive or authoritative.

4. The Utilities' 'Manifest Weight of the Evidence' argument is unfounded.

The Utilities argue that the manifest weight of the evidence establishes that there is significant risk to customers and to the Utilities from bidding such resources into the upcoming auction. This is wrong. FirstEnergy relies only on the testimony of Utilities' witness Mikkelson while attempting to argue this point. To accept this opinion would be to ignore the testimony of OCC witness Gonzalez, PUCO Staff witness Scheck, Natural Resources Defense Council witness Swisher, Sierra Club witness Loiter, and Ohio Energy Group and Nucor Steel Marion witness Goins.

Bidding only 75 percent of the Utilities planned energy efficiency resources (rather than 100 percent as recommended by OCC and other intervenors) into the BRA serves to reduce the Utilities' risk of not being able to deliver the cleared megawatts.¹¹ And, as pointed out by various intervenors, the fact that there are three incremental

¹⁰ *Demand Response Coalition v. PJM Interconnection, L.L.C.*, FERC Docket No. EL-13-57-000, Comments Submitted on Behalf of the Public Utilities Commission of Ohio, at pages 6-7 (April 11, 2013).

¹¹ OCC filed an Application for Rehearing on April 19, 2013, recommending that the Utilities bid 100% of planned energy efficiency into the PJM BRAs, or at the very least, the Commission require a bid of 85%.

auctions that precede the delivery year also serves as a protection for the Utilities. In reality, it appears that the main risk is posed to the Utilities' affiliate, FirstEnergy Solutions, in that it may receive lower prices for capacity the Utilities bid into the auction.

The standard of the "manifest weight of the evidence" means that, where the manifest weight of the evidence is found to be lacking, a decision is obviously erroneous and unsupported by the evidence and that an opposite conclusion is clearly evident. Various intervening parties (including OCC) acknowledged that requiring the Utilities to bid energy efficiency savings into PJM auctions can substantially benefit customers. In fact, OCC advocated for the Utilities to bid all potential capacity reductions into the PJM BRAs for the benefit of customers, rather than only bidding in the "installed energy efficiency" as proposed by the Utilities.¹² The Utilities failed to establish that the Commission's March 20 Order is against the manifest weight of the evidence, and this argument should be rejected.

B. The Utilities Argument That The Commission Is Without Jurisdiction To Require Bidding Into The PJM Base Residual Auction Is Erroneous And Contradicts The Interest Of Customers.

In its second assignment of error, FirstEnergy argues: "[t]he Commission lacks jurisdiction to order the [Utilities] to bid planned resources into the PJM BRA to be held for the 2016/2017 Delivery Year. This mandate exceeds the statutory authority of the Commission."¹³ FirstEnergy contends that R.C. Chapter 49 was enacted to regulate the business activities of public utilities, and that the PUCO lacks authority to manage

¹² All megawatts that comply with PJM Manual 18B: Energy Efficiency Measurement & Verification, March 1, 2010.

¹³ FirstEnergy Application for Rehearing at 13.

utilities or dictate their policies.¹⁴ FirstEnergy concludes that the Commission cannot mandate the Utilities bid into the PJM BRA because that would be an attempt to “manage” the Utilities. The Utilities also state that the PJM BRA is not a utility service and, thus, is not subject to the Commission’s authority.¹⁵ These arguments should be denied.

First, the Utilities argue that the PJM BRA is not a “utility service” and does not fall within the Commission’s jurisdiction. That the PJM BRA is not a “utility service” is immaterial because the Commission is using its authority to regulate FirstEnergy, not PJM. The Commission is within its jurisdictional rights to order FirstEnergy (a utility) to bid into the PJM BRA as part of its broad authority to interpret its rules and statutes to ensure reasonably priced electric service.¹⁶

Second, FirstEnergy’s argument fails to recognize that the PUCO also has the duty per R.C. 4928.02 to: 1) ensure the availability to customers reasonably priced retail electric service,¹⁷ and 2) to protect at-risk populations.¹⁸ Similarly, R.C. 4905.26 “confers exclusive jurisdiction upon [the Commission] to determine whether any service provided by a public utility is in any respect unjust, unreasonable, or in violation of the law.”¹⁹ In addition, the Utilities’ Energy Efficiency Portfolio Plan is to be implemented to assure that FirstEnergy meets the energy efficiency benchmarks contained in R.C. 4928.66 that are intended to benefit Ohio consumers. The benefits from bidding energy

¹⁴ Id. at 14.

¹⁵ Id. at 15.

¹⁶ R.C. 4928.02.

¹⁷ R.C. 4928.02(A).

¹⁸ R.C. 4928.02(L).

¹⁹ *Ayers-Sterrett, Inc. v. American Telecomm. Sys., Inc.*, 162 Ohio App.3d 285, 2005-Ohio-3606, ¶ 9 (3d Dist.) (citing *State ex rel. Columbus Gas of Ohio v. Henson*, 102 Ohio St.3d 349, 2004-Ohio-3208, at ¶ 16.

efficiency resources are directly related to FirstEnergy's Energy Efficiency portfolio and its provision of electric service to customers. Given that customers are paying for FirstEnergy's energy efficiency programs, customers should receive all possible benefits from those programs.

Third, it is undisputed that the PUCO has broad discretion and authority to administer and enforce Title 49 of the Ohio Revised Code. To this end, the Ohio Supreme Court has held: "[t]he General Assembly has created a broad and comprehensive statutory scheme for regulating the business activities of public utilities. . . . As part of that scheme, the legislature created the Public Utilities Commission and empowered it with broad authority to administer and enforce the provisions of Title 49."²⁰ Certainly it is within the Commission's broad discretion to require the Utilities to bid energy efficiency into the PJM Base Residual Auction.

Finally, the Utilities' reliance on *Elyria Tel. Co. v. Pub. Util. Comm.*, 158 Ohio St. 441 (1953), in support of its argument is unfounded. In *Elyria*, the Ohio Supreme Court held that the Commission had a specific duty to set just and reasonable rates, and that the Commission was required to permit a telephone rate adjustment once it determines that current rates are inadequate.²¹ *Elyria* is not analogous to the present case. The PJM rules permit the Utilities to bid *planned* resources into the PJM BRA (not just owned resources).²² Further, the PUCO Staff and several other intervening parties (including OCC) acknowledged that requiring the Utilities to bid energy efficiency

²⁰ *Kazmaier Supermarket, Inc. v. Toledo Edison Co.*, 61 Ohio St. 3d 147, 150 (1991).

²¹ *Elyria Tel. Co. v. Pub. Util. Comm.*, 158 Ohio St. at 445.

²² Trial Vol. VI (Mikkelson) at 1154.

savings into PJM auctions can “substantially benefit customers.”²³ FirstEnergy’s argument that it should bid only installed energy efficiency and load management (“LM”) is insufficient as it prevents “a substantial amount of customer benefits from being realized.”²⁴ The Commission correctly found in its March 20 Order that “requiring the Companies to bid all planned savings into future PJM BRAs could substantially benefit ratepayers by lowering capacity auction prices and reducing Rider DSE costs.”²⁵ FirstEnergy’s argument that the PUCO is without jurisdiction to require it to bid planned resources into the PJM BRA should be rejected.

III. CONCLUSION

For the reasons articulated herein, the Commission should deny the Utilities’ Application for Rehearing. FirstEnergy relies on facts not in evidence to argue that the Commission’s March 20 Order was unjust and unreasonable. In addition, FirstEnergy’s arguments, if accepted, are not in the best interest of customers. Finally, the Commission has the authority to require FirstEnergy to bid planned energy efficiency into the PJM Base Residual Auction

²³ Initial Post-Hearing Brief of PUCO Staff at 8.

²⁴ OCC Trial Ex. 1, Gonzalez Direct at 19.

²⁵ March 20, 2013 Opinion and Order at 21.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this Memorandum Contra was served on the persons stated below via electronic service this 29th day of April 2013.

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Summary: Memorandum Memorandum Contra FirstEnergy's Application for Rehearing by the Office of the Ohio Consumers' Counsel electronically filed by Ms. Deb J. Bingham on behalf of Kern, Kyle L.