

**BEFORE THE  
PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of Ohio	)	
Edison Company, The Cleveland Electric	)	
Illuminating Company, and The Toledo	)	Case Nos. 12-2190-EL-POR
Edison Company for Approval of Their	)	12-2191-EL-POR
Energy Efficiency and Peak Demand	)	12-2192-EL-POR
Reduction Portfolio Plans for 2013	)	
through 2015	)	

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**MEMO CONTRA EMC DEVELOPMENT COMPANY’S MOTION FOR LEAVE TO  
FILE APPLICATION FOR REHEARING AND APPLICATION FOR REHEARING  
AND/OR MOTION FOR CLARIFICATION BY THE ENVIRONMENTAL LAW AND  
POLICY CENTER**

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**INTRODUCTION**

On August 16, 2013, more than a year after Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company (“FirstEnergy” or “Companies”) filed its application for approval of its energy efficiency and peak demand reduction portfolio plans (“Plan”) and eleven months after the intervention deadline, EMC Development Company, Inc., (“EMC”) made its first appearance in this case. EMC requests leave to file an application for rehearing, taking issue with the Public Utilities Commission of Ohio (“Commission” or “PUCO”) determination regarding utility ownership of energy efficiency capacity resources.

EMC’s belated motion should be summarily denied by the Commission because EMC cannot demonstrate just cause for its failure to enter an appearance in this case. The issue of energy efficiency capacity resource ownership was a fundamental issue in this case from the very beginning; in fact, it was an issue even prior to FirstEnergy’s application, as the Commission

addressed it in FirstEnergy's electric security plan over 13 months ago.<sup>1</sup> The Commission should reject out of hand EMC's unsupportable claim that the Entry on Rehearing was somehow the first instance of this issue being addressed. Moreover, EMC's alleged interest that mercantile customers should retain ownership of energy efficiency capacity resources was adequately considered in the proceeding because various groups representing actual mercantile customers thoroughly addressed this issue. Finally, even if the Commission were to consider EMC's application for rehearing on the merits, the application should be denied because it presents no new arguments to challenge the Commission's sound reasoning in both the Opinion and Order and Entry on Rehearing in this case.

## ARGUMENT

### **I. The Commission should not grant EMC leave to file an application for rehearing because EMC cannot satisfy the requirements of Ohio Revised Code § 4903.10.**

Ohio Revised Code ("R.C.") § 4903.10 states that "any party who has entered an appearance in person or by counsel in the proceeding may apply for a rehearing in respect to any matters determined in the proceeding." Section 4903.10 continues:

Leave to file an application for rehearing shall not be granted to any person, firm, or corporation who did not enter an appearance in the proceeding unless the commission first finds:

(A) The applicant's failure to enter an appearance prior to the entry upon the journal of the commission of the order complained of was due to just cause; and,

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<sup>1</sup> See *In the Matter 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 Section 4928.143, Revised Code, in the Form of an Electric Security Plan*, Case No. 12-1230-EL-SSO, July 18, 2012 Opinion and Order at 36 ("Sierra Club observes that, although questions of ownership of the energy efficiency resources are legitimate, this question could have been addressed by making it a condition of future participation in energy efficiency programs.") and at 38 ("Specifically, the Companies should take steps to amend their energy efficiency programs to ensure that customers, knowingly and as a condition of participation in the programs, tender ownership of the energy efficiency resources to the Companies.").

(B) The interests of the applicant were not adequately considered in the proceeding.

EMC cannot satisfy either requirement for leave to file its application for rehearing. EMC fails the first prong because it has not explained any reason, much less just cause, for why it could not have intervened and participated in this proceeding last year. EMC also does not meet the second requirement because the Commission adequately considered EMC's interests through the arguments of groups representing mercantile customers.

**A. EMC cannot demonstrate just cause because the issue of ownership of energy efficiency capacity resources was a fundamental issue in this case from its inception.**

In its motion for leave to file an application for rehearing, EMC suggests that the Commission's Entry on Rehearing was the first time EMC had notice that the Commission would address the issue of utility ownership of energy efficiency capacity resources in this proceeding.<sup>2</sup> The crux of EMC's only argument to support just cause for its failure to enter an appearance is that the Entry on Rehearing was its first chance to learn about this issue.

The Commission should reject EMC's untenable claim that it "did not enter an appearance in these cases prior to the [Entry on Rehearing] in these matters because its interests were not affected until the issuance of the Entry on Rehearing."<sup>3</sup> Contrary to EMC's claims, the issue of ownership of capacity resources did not pop up for the first time in the Entry on Rehearing; in fact, EMC's alleged interests were at the heart of FirstEnergy's initial application in this case, the hearing, the briefing by the parties, and the Commission's Opinion and Order.

Although EMC claims to be caught by surprise by the Entry on Rehearing, FirstEnergy directly addressed this very issue in its application. FirstEnergy witness Dargie explained the

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<sup>2</sup> See EMC Motion for Leave to File Application for Rehearing at 3.

<sup>3</sup> *Id.*

Companies' intent to "make customers knowingly, as a condition of participation in the Companies' EE programs, tender ownership of the [energy efficiency capacity resources] to the Companies."<sup>4</sup> FirstEnergy published notice of the scheduled hearing, which "should have put [EMC] on, at least, constructive notice of the" Companies' Plan.<sup>5</sup> The issue of ownership of capacity resources continued to be an important issue throughout the proceeding, with parties addressing it at hearing and in briefing. At least eight parties presented arguments regarding utility ownership of energy efficiency capacity resources in their initial or reply briefs.<sup>6</sup>

Perhaps most importantly, the Commission squarely addressed the issue of capacity resource ownership in its March 20, 2013 Opinion and Order.<sup>7</sup> The Commission noted that FirstEnergy had, consistent with the Commission's Order in FirstEnergy's latest ESP, "amended their terms and conditions for programs included in the proposed plans to ensure that customers knowingly *tender to the Companies ownership of energy efficiency resources* as a condition of participation."<sup>8</sup> The Commission also approved FirstEnergy's plan to modify its mercantile customer self-direct commitment agreement to "allow the Companies to obtain ownership of the energy efficiency attributes, as a condition of receiving an exemption from the DSE2 Rider and

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<sup>4</sup> Direct Testimony of FirstEnergy witness Dargie at 17.

<sup>5</sup> See *In the Matter of the Application by Hardin Wind Energy, LLC, for a Certificate of Environmental Compatibility and Public Need for the Hardin Wind Farm*, Case No. 09-479-EL-BGN (July 15, 2010 Entry on Rehearing) (denying party leave to file application for rehearing in part because published notice of proceeding cut against party's claim of just cause).

<sup>6</sup> See, e.g., Initial Brief of ELPC and OEC at 13; Initial Brief of OPAC at 23-25; Initial Brief of FirstEnergy at 21, 28; Initial Brief of AEE Ohio at 3-5; Initial Brief of IEU-Ohio at 1-11; Staff Reply Brief at 3-4; Initial Brief of OCC at 18; Initial Brief of NRDC, Sierra Club, and Citizen Power at 22.

<sup>7</sup> See Opinion and Order at 17, 19-20.

<sup>8</sup> *Id.* at 17 (emphasis added).

bid such savings into the appropriate base residual auction.”<sup>9</sup> EMC did not file an application for rehearing of the Opinion and Order.

Confusingly, EMC claims that the Entry on Rehearing was the first instance when EMC’s supposed interests were affected, when in fact, rather than plow new ground, the Commission backtracked on this issue. In the Entry on Rehearing, the Commission granted in part IEU-Ohio’s application for rehearing and concluded that mercantile customers who opt-out of the energy efficiency rider *should not be required* to transfer ownership of energy efficiency capacity resources to the Companies.<sup>10</sup>

EMC’s argument that its interests were not affected prior to the Entry on Rehearing should be rejected. Therefore, EMC cannot demonstrate just cause for its failure to enter an appearance, and its motion for leave to file an application for rehearing should be denied for this reason.

**B. The Commission adequately considered EMC’s interests in this proceeding.**

According to EMC, it “aggregates smaller [energy efficiency] projects in order to qualify them for participation in PJM capacity auctions.”<sup>11</sup> EMC claims that it is “by extension” affected by the Commission’s determination regarding mercantile customer ownership of energy efficiency capacity resources because EMC hopes to contract with mercantile customers for bidding resources into PJM capacity auctions.<sup>12</sup> EMC’s interests are thus linked to the interests of mercantile customers, who are directly affected by the Commission’s decision.

EMC does not satisfy the requirement of R.C. § 4903.10(B) because the Commission adequately considered EMC’s interests through the participation in this proceeding of several

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<sup>9</sup> *Id.* at 42.

<sup>10</sup> Entry on Rehearing at 11.

<sup>11</sup> EMC Application for Rehearing at 4.

<sup>12</sup> *See* EMC Motion for Leave to File Application for Rehearing at 3.

parties that represent actual mercantile customers. IEU-Ohio, OMA, OEG, and AEE Ohio all represented the interests of mercantile customers with regard to ownership of energy efficiency capacity resources. IEU-Ohio argued in its initial brief that FirstEnergy should be required to “modify its Commitment Agreement so that customers that self-fund energy efficiency measures requesting an exemption from the DSEII Rider may retain the ownership of their capacity attributes,”<sup>13</sup> and was eventually successful in convincing the Commission that mercantile opt-out customers should not be required to transfer ownership to the Companies.

Because its interest is entirely derivative of the interest of mercantile customers, EMC has provided no reason why the Commission did not adequately consider EMC’s interests in this proceeding. The Commission should therefore find that EMC fails to meet either requirement for leave to file an application for rehearing.

**II. Energy efficiency capacity resources, created through the use of ratepayer funds, are owned by the utility and must be prudently-managed on behalf of customers.**

As explained above, the Commission should not grant EMC leave to file an application for rehearing because it does not meet the requirements of R.C. § 4903.10. Even if the Commission was to entertain EMC’s contentions, the application for rehearing should be denied because it fails to present any new arguments to overcome the Commission’s sound reasoning with regard to ownership of energy efficiency capacity resources.

FirstEnergy’s Plan depends on the use of ratepayer funds to implement energy efficiency programs and measures across all customer classes. These programs spur energy efficiency savings that would otherwise not have occurred absent the programs. In other words, ratepayer funds create the energy efficiency capacity resources that are eligible for bidding into PJM capacity auctions. Because ratepayer funds create the capacity resource, the benefits of those

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<sup>13</sup> Initial Brief of IEU Ohio at 11.

resources accrue to ratepayers, which means they are owned and managed by FirstEnergy on behalf of all customers.

EMC argues against this logical justification for utility ownership of capacity resources by claiming that the Commission's determination is somehow "anti-competitive."<sup>14</sup> To the contrary, nothing in the Commission's Opinion and Order or Entry on Rehearing forecloses EMC from competing in this space by aggregating energy efficiency capacity resources that are owned by the customer and bidding those resources into PJM. Any customer who undertakes an efficiency project without receiving money from the utility (funded by ratepayers) retains ownership of its energy efficiency capacity resource. The Commission's decision simply recognizes that the benefits of capacity resource ownership should go to the entity that is creating those resources, namely ratepayers.

### **CONCLUSION**

The Commission should deny EMC's motion for leave to file an application for rehearing because EMC has not met the requirements of R.C. § 4903.10. EMC's failure to enter an appearance is unexplained and unsupported by just cause, and EMC's interests were adequately considered by the Commission.

Respectfully submitted,

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<sup>14</sup> See EMC Application for Rehearing at 5.

## CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing *Memo Contra EMC Development Company's Motion for Leave to File Application for Rehearing and Application for Rehearing and/or Motion for Clarification by the Environmental Law & Policy Center*, was served by electronic mail upon the following Parties of Record this 26<sup>th</sup> day of August, 2013.

/s/ Nicholas McDaniel

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Summary: Memorandum Contra EMC Development Company's Motion for Leave to File Application for Rehearing and Application for Rehearing and/or Motion for Clarification by the Environmental Law & Policy Center electronically filed by Mr. Nicholas A. McDaniel on behalf of Environmental Law and Policy Center