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 Approval of Their Energy Efficiency and Peak Demand Reduction Program Portfolio Plans for 2013 through 2015	)))))))	Case Nos.	12-2190-EL-POR 12-2191-EL-POR 12-2192-EL-POR

MEMORANDUM OF OHIO EDISON COMPANY,
THE CLEVELAND ELECTRIC ILLUMINATING COMPANY,
AND THE TOLEDO EDISON COMPANY
CONTRA TO APPLICATIONS FOR REHEARING

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INTRODUCTION

Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company (collectively, "Companies") submit their memorandum contra to the Applications for Rehearing ("AFRs") filed by the Office of the Ohio Consumers' Counsel ("OCC") and Environmental Law and Policy Center ("ELPC") on the sole issue as to whether the Commission, in its Entry on Rehearing ("Entry") reasonably and lawfully determined that the Companies can receive 20 percent of revenues received from bidding energy efficiency and demand response resources into PJM auctions. The Companies also respond to EMC Development Company, Inc.'s ("EMC") Application for Rehearing and/or Motion for Clarification which was filed on August 16, 2013, and is out of time and, thus, improperly before the Commission.

The Companies do not believe that rehearing is appropriate on the Commission's finding that the Companies can receive revenues from bidding into PJM auctions. Despite the risks associated with PJM bidding,[1] the Commission has decided that state policy is furthered by the Companies bidding planned energy efficiency resources into PJM auctions.[2] Because the Commission mandated that the Companies bid into the PJM Base Residual Auction ("PJM BRA"), the Commission reasonably and lawfully found that as a risk mitigation strategy and an incentive for the Companies to bid additional resources into the PJM auctions, they should

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[1] As discussed in the Companies' Application for Rehearing filed on April 19, 2013, those risks include such unknowns as: 1) the type and amount of energy efficiency resources for which the Companies will have ownership rights that actually will be installed and qualify as capacity resources during the 2016/17 Delivery Year under PJM rules; 2) the price of capacity in the PJM BRA and the three incremental auctions that may occur between the PJM BRA and the 2016/17 delivery year; and 3) whether energy efficiency mandates will continue in their current form and at their current level, as is currently being investigated by the General Assembly through Senate Bill 58.

[2] Nothing herein should be interpreted as the Companies waiving any of the arguments made in their April 19, 2013 AFR on this issue.

implement a pilot program through which the Companies may receive a portion of the revenue associated with bidding resources into the PJM auctions. It is reasonable and lawful for the Commission to establish the revenue treatment associated with the Commission decision on bidding these resources into PJM. This decision is permitted under Section 4903.10, Revised Code and supported by record evidence. Accordingly, the AFRs of OCC and ELPC should be rejected in their entirety.

As for EMC's AFR, the Companies respond that it is out of time and improperly before the Commission. In its AFR, EMC raises issues involving the ownership of resource credits from mercantile customers participating in the Companies' rebate programs. Any issues related to this issue should have been raised within 30 days of the issuance of the Commission's Opinion and Order. EMC has raised issues beyond the scope of the Commission's Entry on Rehearing and therefore, it should be rejected as untimely. However, should the Commission grant EMC's request for leave, its AFR seeking a Commission ruling in this proceeding to change a term of the Companies' ESP 3 Stipulation as approved by the Commission should be denied. If the Companies do not know ultimately how much of the planned energy efficiency resources they will own, then it will be difficult, if not impossible, for the Companies to bid the planned resources into the PJM BRA.

PROCEDURAL HISTORY/STATEMENT OF FACTS

On March 20, 2013, the Commission issued its Order approving, with minor modifications, the Companies' Application for approval of their 2013 – 2015 Energy Efficiency and Peak Demand Reduction Program Portfolio Plans ("Portfolio Plans). As part of the Companies' Portfolio Plans, the Companies advised the Commission that they intended "to bid eligible *installed* energy efficiency credits for which they had ownership rights at the time of the

PJM auctions, provided that these credits are of scale, will meet PJM Measurement and Verification ("M&V") standards and are included in an M&V plan approved by PJM."[3] The requirements that the Companies set forth were appropriate and essential prerequisites to ensure that the Companies would actually have the energy efficiency resources they would commit to provide PJM in the form of capacity to support the reliability of the electric grid in PJM's footprint, thus managing potential regulatory and market risks. Notwithstanding, Staff recommended that the Companies be required to bid any capacity reductions obtained from their *planned* energy efficiency and peak demand reduction programs into the PJM BRA to be held in May 2013 and also future BRAs.[4]

In recognition of Staff's position, the Commission's March 20 Order partially adopted Staff's recommendation and ordered the Companies to bid 75% of all planned energy efficiency resources in the PJM BRA to be conducted in May 2013 for the 2016/2017 delivery year:

> The Commission is mindful of the uncertainty of future PJM BRAs, including resources planned, but not yet installed, unknown clearing prices for capacity in incremental auctions, risk of PJM penalties for obligations cleared, but not delivered, and uncertainty whether Riders ELR and OLR will expire. However, the Commission also finds 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. In order to create a reasonable balance between the uncertainty and potentially substantial benefits, the Commission finds it appropriate to adopt a portion of Staff's recommendation. The Commission will require the Companies to bid into the upcoming May 2013 PJM BRA 75 percent of the planned energy efficiency resources for the 2016/2017 planning year under their program portfolio. Thereafter, the Commission may issue an order addressing the Companies' bids for the remaining two planning years. The Commission finds that this balance will appropriately mitigate the Companies' risk while befitting ratepayers.[5]

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[3] Company Exh. 1, Direct Testimony of John C. Dargie ("Dargie Testimony"), p. 15 (emphasis added).

[4] Staff Exh. 1, Prefiled Testimony of Gregory C. Scheck ("Scheck Testimony"), p. 12.

[5] March 20 Order at pp. 20-21.

On April 19, 2013, the Companies filed an AFR on three issues: 1) that the Commission's mandate 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 Companies; 2) that the Commission's mandate is unlawful because it is beyond the statutory authority of the Commission; and 3) that the Commission's mandate is unlawful and unreasonable because it did not authorize the Companies to recover through Rider DSE or any other mechanism any penalties or costs that the Companies could incur as a result of the Commission's mandate. OCC also filed an AFR arguing that the Commission should have required the Companies to bid into the PJM BRA 100% of their planned energy efficiency resources, rather than the 75% ordered by the Commission. Only OCC and the Companies initially raised issues related to PJM bidding requirements. Industrial Energy Users-Ohio ("IEU-Ohio"), Nucor Steel Marion, Inc., and ELPC, jointly with the Ohio Environmental Council, also filed AFRs on issues not relevant to those discussed herein.

On May 15, 2013, the Commission granted all AFRs for further consideration. On July 17, 2013, the Commission issued its Entry on Rehearing ("Entry"). In addition to addressing the other issues raised by the other parties, the Commission granted in part and denied in part the Companies' and OCC's AFRs. The Commission found that "rehearing on the basis that its requirement that the Companies bid 75 percent of planned energy efficiency resources into the PJM BRA is unjust and unreasonable should be denied."[6] The Commission also denied the Companies' AFR finding that it is not beyond the Commission's statutory authority to require the Companies to bid into the PJM BRA.[7] However, the Commission did grant rehearing "to

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[6] Entry at 4.

[7] *Id.* at 5.

better align the interests of the electric distribution utility and the interests of its customers in support of the implementation of energy efficiency and peak demand reduction programs."[8] Citing to Staff Witness Scheck's testimony and Commission precedent, the Commission authorized the Companies to implement a pilot program to share 80/20 percent in any revenues received in the PJM auctions in "order to reasonably balance the risks and potential benefits of auction participation for the Companies and ratepayers and to ensure that the interests of FirstEnergy and its customers are properly aligned."[9] The Commission committed to review this pilot program in the next program portfolio proceeding.[10] It is these findings upon which OCC and ELPC now base their AFRs.[11]

ARGUMENT

I. THE COMMISSION SHOULD DENY OCC AND ELPC'S APPLICATIONS FOR REHEARING.

In their AFRs, OCC and ELPC argue that the Commission's finding that the Companies can receive a share of the revenues received from bidding into PJM auctions is unreasonable and unlawful. First, ignoring the clear language of Section 4903.10, Revised Code, they argue that the Commission lacked authority to make this decision.[12] However, as Section 4903.10, Revised Code, indicates: "If, after such rehearing, the commission is of the opinion that the original order or any part thereof is in any respect unjust or unwarranted, or should be changed, the commission may abrogate or modify the same; otherwise such order shall be affirmed."

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[8] *Id.* at 4.

[9] *Id.* at 4-5.

[10] *Id.*

[11] As more fully discussed, infra, because the Entry on Rehearing did not discuss issues involving mercantile customer's ownership of resource credits, EMC's AFR is beyond the scope, out of time and should be denied.

[12] OCC AFR, p. 2; ELPC AFR. P. 1.

Moreover, both the Companies and OCC in their respective AFRs discussed at length the balance of the risks and benefits associated with PJM bidding, opening the door for the Commission to issue this finding.

Second, OCC and ELPC argue that the Commission unreasonably and unlawfully allowed the Companies to share in the revenue from PJM bidding and failed to set forth its reasoning for that decision.[13] As will be more fully explained below, through its March 20 Order and Entry, the Commission outlined its position as it relates to the balancing of the risks and benefits of the Companies' bidding energy efficiency resources into the PJM auctions. The Entry further outlines the Commission precedent and record evidence supporting the Commission's decision. In addition, the testimony supporting shared savings incentives, which is conceptually similar to revenue sharing, demonstrates that incentives can be a mechanism to better align a customer and utility's interests in energy efficiency. Section 4903.09, Revised Code does not require anything further. Accordingly, for the reasons more fully discussed below, the AFRs of OCC and ELPC should be denied.

A. The Commission Had Authority to Find that the Companies Should Share in the Revenues Associated with PJM Bidding.

The Commission should reject OCC's and ELPC's AFRs because it had the requisite statutory authority to find that the Companies should share in the revenues associated with PJM bidding – a finding made in response to issues that were, in fact, raised in the AFRs. In its AFR, OCC correctly asserts that the Commission is a "creature of statute" and that Section 4903.10, Revised Code "governs applications for rehearing."[14] However, both OCC and ELPC fail to

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[13] OCC AFR, p. 2; ELPC AFR at 4.

[14] OCC AFR at 5.

recognize that the Commission's finding is indeed consistent with Section 4903.10(B), Revised Code, which clearly states:

> "Such application shall be in writing and shall set forth specifically the ground or grounds on which the applicant considers the order to be unreasonable or unlawful...
>
> Where such application for rehearing has been filed, the commission may grant and hold such rehearing on the matter specified in such application, if in its judgment sufficient reason therefor is made to appear....
>
> If, after such rehearing, the commission is of the opinion that the original order or any part thereof is in any respect unjust or unwarranted, or should be changed, the commission may abrogate or modify the same; otherwise such order shall be affirmed.

In their initial AFRs, both the Companies and OCC asserted as assignments of error that the Commission's mandate that the Companies bid 75 percent of energy efficiency resources into the PJM BRA was unreasonable and unlawful including the Commission's weighing of the risks and benefits of PJM bidding. Moreover, the Companies specifically listed in their first assignment of error that "the Commission's mandate 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 Companies*" (emphasis added); and in their third assignment of error that the Commission "did not authorize the Companies to recover through Rider DSE or any other mechanism any penalties or costs that the Companies could incur as a result of the Commission's mandate." The assignments of error alleged by both the Companies and the OCC raise an issue in need of the Commission's reassessment of the totality of circumstances and a rebalancing of interests. The Commission's Entry authorizing the Companies to share in the revenues associated with PJM bidding is clearly in response to this need through its attempt to "more reasonably balance the risk and potential benefits of auction participation"[15] and "better align the interests of the electric distribution utility and the interests of its customers in support of the implementation of energy efficiency and peak demand reduction programs."[16] Here the Commission merely modified its opinion and order, as it has the right to do under Section 4309.10, Revised Code, based on the Companies' and OCC's assignments of error.

Other than its citation to *Discount Cellular Inc. v. PUCO*,[17] the OCC's citation to a litany of cases related to a party's preservation of claims for appeal is not relevant to this issue as the Companies are not attempting to assert something on appeal that they did not previously assert in an application for rehearing.[18] And, in *Discount Cellular*, Discount filed an application for rehearing asserting that the Commission erred in dismissing its complaint for lack of jurisdiction. The Commission denied rehearing reiterating its finding that it lacked jurisdiction, but also noted, for the first time, that there were not reasonable grounds for the complaint.[19] The Supreme Court of Ohio recognized that the Commission, under Section 4903.10, Revised Code, may modify its orders if, after rehearing, the Commission is of the opinion that its original order should be changed.[20] However, the Court held that the Commission must first grant an application for rehearing prior to changing its order and for that reason alone, the Court found that the Commission in *Discount Cellular*, acted beyond its statutory authority when it cited an additional, new reason for dismissing its complaint without first granting rehearing.[21] Here, the

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[15] Entry at 4.

[16] Entry at 4.

[17] (2007) 112 Ohio St. 3d 360.

[18] OCC AFR at 6.

[19] *Discount Cellular*, 112 Ohio St. 3d at 363.

[20] *Id.* at 375.

[21] *Id.*

Commission clearly granted rehearing on OCC's and the Companies' AFRs, in part, and clearly modified its opinion after granting that rehearing -- something expressly within its statutory authority to do.

B. The Commission Specifically Outlined the Facts and Reasoning Behind Its Decision to Allow the Companies to Share in the Revenues Associated with PJM Bidding.

OCC and ELPC allege that the Commission failed to base its decision on findings of fact in the record as required by Section 4903.09, Revised Code.[22] However, in a case cited by the OCC, the Supreme Court of Ohio has held that the Commission only must provide the court "with sufficient details to enable [it] to determine, upon appeal, how the commission reached its decision" and "enough evidence and discussion in order to enable the PUCO's reasoning to be readily discerned."[23] In other words, the Commission only has to provide the court "with an adequate record to understand the commission's rationale underlying its decision on appeal."[24] The Commission did so here.

The Commission provided specific facts and reasoning in support of its decision to allow the Companies to share in the revenues associated with PJM Bidding. Moreover, there is ample evidence in the record supporting incentive mechanisms as a way to "align the interests of the electric distribution utility and the interests of its customers in support of the implementation of energy efficiency and peak demand reduction programs." First, in its March 20, 2013 Order, citing to Staff's recommendation, the Commission indicated its desire to reasonably "balance between the uncertainty and potentially substantial benefits of PJM bidding."[25] Second, as

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[22] ELPC AFR, p. 1; OCC AFR, p. 2.

[23] Cleveland Electric Illuminating CO. v. PUC, (1983) 4 Ohio St. 3d 107, 110.

[24] *Elyria Foundry Co. v. PUCO* (2008) 118 Ohio St. 3d 269, 276.

[25] March 20, 2013 Opinion

indicated in the Entry, part and parcel of Staff's recommendation to further this balance was to potentially allow the Companies to share in the revenue from the bidding. In his pre-filed testimony, Staff Witness Scheck opined that "FE could share in any revenues received from the PJM auctions so long as the amount cleared and delivered into PJM exceeded the annual peak demand reduction benchmark for an FE Operating Company."[26] Staff Witness Scheck also testified that:

> Well, I think in order to help mitigate some risk then you could identify some percentage number of the revenues received, I don't have a prescribed amount, you could pick 10 percent, something similar to whatever the amount of the shared savings mechanism is in terms of the top number, obviously, but you have to look at the total dollar amount and that would vary based on forced to clearing price, so you might have a cap associated with that...[27]

When asked by the Attorney Examiner why the Companies should receive this incentive in addition to shared savings, Staff Witness Scheck explained that the Companies could bid in other resources in addition to energy efficiency such as direct load control or compete in the market with other providers such as EnerNOC for capacity resources and analogized those relationships.[28] Furthermore, Staff Witness Scheck testified that the Companies, by bidding into the PJM auctions, are essentially competing with other Curtailment Service Providers (like EnerNOC) for the same finite amount of resources that can be bid into PJM auctions.[29] Therefore, if the Companies are going to take on this responsibility or be ordered to take on this responsibility, they should be compensated accordingly. The Commission considered this evidence, in conjunction with prior precedent, and found that an 80/20 split would better align

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[26] Scheck Testimony at 12.

[27] Tr. Vol. IV at 811.

[28] Tr. Vol. IV at 813.

[29] Tr. Vol. IV at 822-823.

the interests of the Companies and its customers and provide additional risk mitigation and incentives should the Companies desire to bid more resources than otherwise ordered by the Commission.

Second, at hearing, the Attorney Examiner questioned Company Witness Demiray as to what the estimate would be in revenues received from PJM Auctions based on how many megawatts the Companies bid into the 2015-2016 PJM BRA Auction.[30] Witness Demiray testified that the estimate was approximately $4.7 million that would be collected by the Companies for revenue for the 2015-2016 PJM BRA.[31] Witness Demiray also testified to the large financial risk that the Companies take in bidding into the PJM BRA.[32]

Third, as discussed in their briefing and AFR in this proceeding, the Companies identified the severe risks associated with PJM bidding that the Commission had to balance in making its mandate that the Companies bid into the PJM BRA. The Companies demonstrated that the more prudent approach to this issue was voluntarily committing to bid into the upcoming PJM BRA all eligible, installed energy efficiency resources for which they have ownership rights at the time of the auction, provided that these resources are of sufficient scale, will meet PJM Measurement and Verification ("M&V") standards and are included in an M&V plan approved by PJM.[33] As the Companies' witness Mikkelsen testified:

> I think there is an element, as I say here in my testimony, particularly with respect to bidding energy efficiency resources that don't exist, to the extent that those are bid into the market and they are, in fact, not installed downstream, that does not provide for, you know, certainty with respect to the system reliability.

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[30] Tr. Vol. III at 517-518.

[31] Tr. Vol. III at 531.

[32] Tr. Vol. III at 523-525.

[33] Dargie Testimony, p. 15; Mikkelsen Rebuttal, p. 3.

* * *

> I think it would be incumbent upon any bidder to have a great degree of certainty that the planned resources they are bidding into a base residual auction will be delivered in advance of the delivery year.[34]

This bidding strategy has the associated risk level most appropriate to an electric distribution utility. As Ms. Mikkelsen further testified:

> I do not believe it is appropriate for regulated electric utilities to take speculative future positions that could subject either the utility or its customers to severe financial harm. This is especially true given that there is not a statewide directive providing consistent requirements for electric utilities. There also is no risk protection mechanism in place to insulate each of the Companies (or their customers) from such financial harm.[35]

Ms. Mikkelsen also testified that

> Third, given that the PJM BRAs are for delivery years three years into the future, there are too many unknowns and uncertainties associated with attempting to guess what future energy efficiency or load management resources will be installed, which of those will qualify to meet the projected commitments and meet M&V standards, and which of those resources the Companies will have ownership rights to.[36]

In their AFR, the Companies reiterated this evidence to the Commission, which it weighed in its attempt to balance the interests of the Companies and their ratepayers.

Fourth, many of the parties in this case presented evidence indicating that incentive mechanisms, for example, shared savings, are useful in incenting the behavior of utilities to undertake risks that they would otherwise not take but are beneficial to customers. For example, Company Witness Demiray testified that an incentive mechanism such as shared savings

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[34] Tr. Col. VI, p. 1129:7-21.

[35] Mikkelsen Rebuttal, p. 4.

[36] Mikkelsen Rebuttal, pp. 4-5.

"provides added encouragement for the Companies to exceed the EE&PDR benchmarks" -- a behavior that many parties in this case urged the Commission to incent.[37] Like shared savings, revenue sharing is simply another risk-reward mechanism.

Furthermore, the Commission cited to *In the Matter of the Application of Duke Energy Ohio, Inc. for an Increase in Rates*, Case No. 07-589-GA-AIR ("Duke Case") and *In the Matter of the Long-Term Forecast Report of Vectren Energy Delivery of Ohio and Related Matters*, Case No. 00-120-GA-FOR ("DP&L Case") to support its finding that an 80/20 percent share of revenue is appropriate to promote fairness for ratepayers while encouraging companies to maximize the value of assets managed on behalf of ratepayers.[38] In the Duke Case, the Commission approved a mechanism for sharing of net revenues from off-system transactions that Duke manages itself.[39] The Commission found that the Stipulation, which called for an 80/20 split of revenues, was a product of serious bargaining among capable, knowledgeable parties, advances the public interest and does not violate any important regulatory principle or practice.[40] In the DP&L Case, an independent auditor found that "although it would be reasonable for [gas] customers to be credited for all such revenues received [from unused capacity sales], such an approach would not provide [sic] gas utilities with any incentive to enter into such innovative arrangements."[41] Therefore, the auditor recommended a revenue sharing mechanism of an 80/20 split.[42] Although those two cases involved unused capacity sales for gas, they are nevertheless instructive. Here, the Commission has determined, as policy, that the Companies bid into the

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[37] Direct Testimony of Eren Demiray at 4.

[38] Entry at 4.

[39] Case No. 07-589, Opinion and Order at 11 (May 28, 2008).

[40] Id.

[41] Case No. 00-120-GA-FOR, Opinion and Order at 8-9 (September 25, 2001).

[42] *Id.*

PJM BRA. The Commission has also determined that the "energy efficiency resources generated by the Companies' energy efficiency resources are a valuable asset managed by the Companies on behalf of ratepayers."[43] Given the Commission's determinations, ones of first impression, it is not unreasonable for the Commission to treat these assets similar to assets it has encountered in previous cases where utilities were expected to manage valuable assets on behalf of their ratepayers. Consequently, the Commission has supported its decision on sound precedent.

OCC discounts the Commission's citations to the Duke Case and the DP&L Case as support for the percentage of revenue sharing the Companies should receive. However, each of OCC's arguments in support of its position is flawed. First, OCC contends that the Commission's reliance on the Duke Case is misplaced because it involved the approval of a stipulation.[44] OCC, however, fails to acknowledge that before a stipulation can be approved, the Commission must first find all of its terms to be reasonable, including the 80/20 shared revenue split included in the Duke stipulation.

Second, OCC claims that the terms of a stipulation preclude it from being used as precedent in future cases.[45] As the Commission has recently noted, it is not bound by any limitation in using stipulations as precedent for future cases. In a proceeding in which it adopted a procedure for AEP Ohio which had originally been adopted for Duke Energy Ohio, the Commission stated:

> [w]e find no error in having noted that our decision in this case is consistent with our treatment of Duke. We have consistently held that,

[43] Entry at 6.

[44] OCC AFR, p. 10.

[45] Id.

> although parties may agree not to be bound by the provisions contained within a stipulation, these limitations do not extend to the Commission.[46]

Third, OCC disingenuously contends that the Duke Case was limited to only gas-related sales transactions and that the Commission held that the case cannot be used in "similar electric cases."[47] The plain language of that case clearly states that it "shall not have precedential value in establishing sharing percentages for <u>similar electric sales transactions *by Duke*</u>" (emphasis added) – a utility that owns both electric and natural gas assets. Nothing in the Duke Case limits the Commission's rationale solely to gas-related sales transactions. Rather, it simply warns Duke that any similar arrangement with regard to its electric assets should be separately justified. Notwithstanding, the Commission's underlying rationale in support of its decision in the Duke Case is still instructive when dealing with other similar situations such as that presented herein.

Fourth, OCC contends that the Commission only granted the Stipulation in the DP&L Case because it would otherwise cause harm to the public.[48] After noting its opposition to DP&L's self-determination of the split of revenues from capacity sales without Commission approval, the Commission put all gas utilities on notice, including DP&L, that, in the future, only the Commission should determine what is a fair and reasonable apportionment.[49] And, although the Commission concluded that the re-opening of the DP&L Case would create delays and therefore approved the revenue sharing split included in the DP&L Stipulation, it clearly would not have done so had it not found this split to be reasonable. This is further supported by the

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[46] *In the Matter of the Application of Ohio Power Company for Approval of an Amendment to its Corporate Separation Plan*, Case No. 12-1126-EL-UNC, Entry on Rehearing, p. 3 (April 24, 2013).

[47] OCC AFR, p. 10.

[48] Id. at 11.

[49] Case No. 00-120-GA-FOR at 12.

facts that an independent auditor suggested the percentage split in the DP&L case, and the Commission approved a similar split in the Duke Case (and now this case) several years later.

ELPC's argument that "intervenors...did not have the opportunity to present their own witnesses or evidence in opposition or their own arguments as to why this arrangement is unlawful and unreasonable"[50] is equally without merit and is belied by the direct testimony and cross examination testimony of Staff Witness Scheck. If ELPC or any other party wanted to further the record on this issue, it could have done so. Moreover, the Commission has indicated that it will re-evaluate the pilot and address the revenue sharing mechanism in the next portfolio plan case giving parties another opportunity to address this issue.[51]

In sum, the Commission's authorization of an 80/20 percent sharing of revenues received through the PJM BRA is in response to issues raised in the Companies' and OCC's initial AFRs and is adequately supported by the record and explained by the Commission. Accordingly, the AFRs of OCC and ELPC should be denied.

III. EMC's AFR IS OUT OF TIME AND SHOULD BE DENIED

EMC moved for leave to file an application for rehearing[52] and requested rehearing and/or clarification on the issue related to mercantile customers transferring ownership of the customers' energy efficiency attributes to the Companies when those customers participate in the Companies' portfolio plan programs, other than the mercantile self-direct program. The Commission determined on rehearing that mercantile customers "may seek exemption from Rider DSE2 or other rebates in lieu of exemption from Rider DSE2 pursuant to Section

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[50] ELPC AFR at 5.

[51] Entry at 5.

[52] EMC must request leave from this Commission to file an application for rehearing because it did not enter an appearance prior to the entry upon the journal of the commission of the order complained of.

4928.66(A)(2)(c), Revised Code, without being required to transfer ownership of energy attributes to FirstEnergy."[53] The Commission went on to find that "Mercantile customers who participate in the other utility programs set forth in the program portfolio plans may be required to transfer ownership of the energy attributes to the Companies for bidding into the PJM auctions."[54] EMC challenges this second finding. However, as discussed below, EMC is too late.

In the Companies' ESP 3 case, Case No. 12-1230-EL-SSO, the Commission specifically ordered the Companies to "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."[55] In response to that Order, the Companies changed their application process to require the ownership of those energy efficiency attributes for all energy efficiency program including the mercantile self-direct program (otherwise known as the Mercantile Customer Program). During the hearing in this matter, Staff Witness Scheck opined, however, that mercantile customers with self-directed energy efficiency projects for which the Commission has granted an exemption from the DSE2 charge are not required to transfer rights to the associated demand resources to the Companies. IEU-Ohio and AEEO similarly objected to the Companies requiring transfer of ownership as a condition of the DSE2 charge exemption application. They recommended that the commitment of these resources to the Companies under the Mercantile Customer Program be distinguished from a transfer of ownership for purposes of PJM participation. The Companies indicated that they would not object to distinguishing in their self-directed mercantile contracts between commitment and

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[53] Entry on Rehearing, p. 11.

[54] *Id.*

[55] Case No. 12-1230, Opinion and Order at 38 (July 18, 2012).

ownership of resources, should the Commission make clear that obtaining ownership of these resources is not required.[56]

In its Entry, as stated above, the Commission made it clear that customers participating in the mercantile self-direct program would not be required to transfer ownership of the energy efficiency attributes associated with those projects but that mercantile customers may have to transfer ownership of the energy attributes if they participate in the other utility programs set forth in the Companies' Portfolio Plans.[57] The Companies have responded by changing their mercantile self-direct program applications to give this option, but, in accordance with the Commission's approval of the ESP 3 Stipulation, still require transfer of ownership of mercantile customers who participate in the other utility program set forth in the Companies' portfolio plans.

The ownership of the energy efficiency attributes associated with the Companies' portfolio plan programs, other than the mercantile self-direct program, was not raised as an issue before the Commission in this proceeding. That issue was decided in the Companies' ESP 3 proceeding on July 18, 2012 and was not challenged on rehearing in that case, therefore, there is no need for record evidence on that issue in this proceeding. The Commission simply reaffirmed in this proceeding its determination from the ESP 3 case. Further, the rationale relied upon by the Commission for determining that mercantile self-direct program participants may not be required to transfer ownership of energy efficiency attributes to the Companies, as explained on page 11 of the Order, is simply inapplicable to customers taking advantage of the Companies' portfolio plan programs. Because the issue raised by EMC was not changed from the

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[56] Entry at 11.

[57] *Id.*

Commission's March 20, 2013 Order, which simply reiterated its position set forth in its Order in the Companies' ESP 3 case, and no party challenged the Commission's findings on this issue in either the evidentiary hearing or in an AFR from the Commission's Opinion and Order in this case (or the ESP 3 case), EMC's chance to seek rehearing on the issue of ownership of energy efficiency attributes generated through projects done through participation in one of the Companies' rebate programs expired on or before April 19, 2013. EMC's AFR is beyond the scope of the Commission's Entry on Rehearing and, therefore, it is improperly before the Commission. Accordingly, EMD'S AFR must be denied.

However, should the Commission grant EMC's request for leave and grant EMC's application for rehearing, and mandate that the Companies are no longer required to obtain ownership of energy efficiency attributes of mercantile customers to bid into PJM, the Companies request that the Commission acknowledge that if the Companies do not know ultimately how much of the planned energy efficiency resources they will own, then it will be difficult, if not impossible, for the Companies to bid the planned resources into the PJM BRA.

CONCLUSION

For the reasons set forth above, the Companies respectfully ask that the Commission deny OCC's, ELPC's, and EMC's Applications for Rehearing in their entirety and provide , if necessary, clarification of the Commission's directive with regard to the energy efficiency attributes of mercantile customers consistent with the Companies' comments herein, should it grant the request of EMC.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *Memorandum of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company Contra to Applications for Rehearing* was served this 26th day of August 2013, via e-mail, upon the parties below.

Kathy J. Kolich

One of the Attorneys for Ohio Edison Company, the Cleveland Electric Illuminating Company, and the Toledo Edison Company

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