

**BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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

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**REPLY COMMENTS OF THE SIERRA CLUB, ENVIRONMENTAL LAW AND  
POLICY CENTER, NATURAL RESOURCES DEFENSE COUNCIL, AND OHIO  
ENVIRONMENTAL COUNCIL  
ON  
FIRSTENERGY’S APPLICATION FOR APPROVAL OF AMENDED ENERGY  
EFFICIENCY AND PEAK DEMAND REDUCTION PLANS FOR 2015  
THROUGH 2016**

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Pursuant to the September 29, 2014 Entry by the Public Utilities Commission of Ohio (“Commission”) in the above-captioned dockets, the Sierra Club, ELPC, NRDC, and OEC (collectively the “Environmental Advocates”) as parties to these cases initiated by Cleveland Electric Illuminating Company, the Toledo Edison Company and the Ohio Edison Company (collectively “FirstEnergy”) respectfully submit these Reply Comments on FirstEnergy’s application for approval of its amended energy efficiency (“EE”) and peak demand reduction (“PDR”) plans for 2015 and 2016. The Environmental Advocates thank the Commission for this opportunity to provide comments.

In our Initial Comments, filed on October 20, 2014, we made two basic arguments: that FirstEnergy’s application does not meet the requirements for a new portfolio plan application and that FirstEnergy’s plan to suspend most of its EE and PDR programs, including programs generating savings that the utility had previously bid into

the PJM capacity auctions, threatens to saddle ratepayers with penalties or other expenses that were imprudently incurred. We note that the Office of Consumer Counsel (“OCC”) made similar observations, and we incorporate those by reference herein.<sup>1</sup>

In addition, in these Reply Comments we respond to concerns raised by other parties, specifically with respect to FirstEnergy’s cost-recovery and collection of shared savings on the new portfolio, as well as issues concerning the linkage between the proposed new portfolio and FirstEnergy’s obligations under its electric security plan (“ESP”) docket. In the event the Commission declines to reject FirstEnergy’s application, as requested in the Environmental Advocates’ Initial Comments and the Memorandum Contra, it is essential that the Commission nonetheless consider the additional concerns raised by the parties and discussed in these Reply Comments to ensure that the new portfolio incorporates sufficient consumer protections and that maximum energy savings are generated for the 2015 and 2016 program years.

## **I. COMMENTS**

### **A. The Commission should only allow FirstEnergy to collect shared savings consistent with the intent of the incentive mechanism approved for the original portfolio plan.**

FirstEnergy’s most recent filing states that its “Application confirms that all previously approved provisions of Section 7 of the Existing Plan – which includes the incentive mechanism – will continue during the Amended Plan Period,” implying that the shared savings mechanism approved for the previous plan would continue to operate unchanged during the 2015 and 2016 program years.<sup>2</sup> However, the Commission must

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<sup>1</sup> OCC Initial Comments at 14-16.

<sup>2</sup> FirstEnergy Reply at 6.

revisit the shared savings mechanism and modify it to account for FirstEnergy's proposed new portfolio and the new approach to measuring energy efficiency and peak demand reductions enacted as part of S.B. 310.

As a threshold matter, Environmental Advocates concur with OCC's position that it is inappropriate for shared savings to continue at all with such a drastically altered portfolio of programs than was originally approved on this docket. As OCC indicated, FirstEnergy's proposed new plan will create virtually no additional savings in 2015 through 2016, and this *de facto* cancellation of the portfolio is not the kind of "exemplary energy efficiency savings" that the parties to this docket originally discussed and on which this Commission originally ruled.<sup>3</sup> We concur that this lack of savings does not justify the utility charging customers for shared savings in 2015 and 2016. Further, as OCC also noted, FirstEnergy's shared savings mechanism was approved by the Commission under the Senate Bill 221 annual benchmarks.<sup>4</sup> To receive the incentive relative to those requirements, First Energy was required to increase its energy efficiency achievements by one percent in 2015, and an additional one percent in 2016. Environmental Advocates agree that any shared savings that FirstEnergy could claim is limited to achievement of these specific efficiencies. Failing this, the utility should not be permitted to collect shared savings on this portfolio at all.

In the event the Commission elects to extend the shared savings incentive to FirstEnergy's largely cancelled portfolio, it should limit the incentive to only the energy

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<sup>3</sup> OCC Comments at 6 (noting that the amount of MWh FirstEnergy projects it will save in 2015 is 2,266,000 (less than in 2014), and 2,288,000 less in 2016 (slightly more than 2014)).

<sup>4</sup> OCC Comments at 8, citing Case No. 12-2190-El-POR, Opinion and Order at 15-16 (March 20, 2013).

savings specifically tied to the utility's *own performance* in delivering efficiency programs. Thus, the Commission should exclude programs such as the Customer Action Program that only measure and log EE and PDR produced by the independent actions of customers—rather than any affirmative steps by FirstEnergy. As explained in the Initial Comments of Commission Staff and OCC, in order to serve as an effective incentive, a shared savings mechanism should reward only active steps by a utility that actually result in energy savings.<sup>5</sup>

This approach is consistent with the Commission's own orders, which have described shared savings as “an effective means of aligning the utilities' and consumers' interests in implementing energy efficiency programs.”<sup>6</sup> Shared savings accomplishes that goal by offering utilities a direct financial award for implementing these programs, commensurate with the benefits the programs provide to the utilities' customers. By contrast, programs like the Customer Action Program does not in and of itself facilitate energy efficiency savings by customers, but rather simply permit FirstEnergy to measure

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<sup>5</sup> See OCC Comments at 7 (“A utility's energy efficiency incentive mechanism should reward the utility for the savings for customers that the utility *actively* generates through the design and implementation of its programs.”); see also Commission Staff Comments at 3. Although Staff do not explicitly state that the Customer Action Program should not count toward shared savings, in practice their comments would suggest that such an exclusion is necessary. They specifically state that FirstEnergy “should not be financially rewarded if they are not actively influencing retail customers to invest in and implement energy efficiency programs, and incurring no financial risk with respect to these programs.” Nevertheless, Staff recommends that FirstEnergy still be allowed to count that program toward the statutory benchmark each year, provided they are verifiable. We discuss later in these reply comments why counting the Customer Action Program even toward the benchmarks would be inconsistent with prior Commission orders.

<sup>6</sup> *In the Matter of the Application of The Cleveland Electric Illuminating Company, Ohio Edison Company, and The Toledo Edison Company for Approval of Their Energy Efficiency and Peak Demand Reduction Program Portfolio Plans for 2010 through 2012 and Associated Cost Recovery Mechanism*, Pub. Util. Comm. No. 09-1947-EL-POR, 2011 Ohio PUC LEXIS 374, at 33 (Mar. 23, 2011)

and take credit for savings that its customers would have accomplished anyway.

Requiring FirstEnergy's customers to not only pay for the costs of administering such a program, but also to reward FirstEnergy for its implementation through the payment of shared savings, would effectively offer FirstEnergy an incentive for doing nothing. But it would also create a perverse incentive. Rather than encouraging FirstEnergy to innovate and maximize the most cost-effective programs on behalf of its customers, such a broad shared savings mechanism would instead incent the utility to focus on programs that allow it to merely "check a box" for compliance each year. This was not the intent of the shared savings incentive that the Commission originally approved on this docket.

Prior Commission orders are consistent with excluding the Consumer Action Program from counting toward shared savings awards. For example, in other dockets the Commission has approved the exclusion of mercantile self-direct programs authorized under R.C. 4928.66 from the calculation of shared savings awards.<sup>7</sup> And in the original portfolio filed on this docket, FirstEnergy itself proposed the exclusion of mercantile self-direct programs from shared savings—which, as Commission Staff then described, "reflect the independent decisions of these customers to make their facilities more energy efficient."<sup>8</sup> Including only utility-incentivized energy efficiency in determining a shared

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<sup>7</sup> See, e.g., *In the Matter of the Application of Columbus Southern Power Company for Approval of its Program Portfolio Plan and Request for Expedited Consideration In the Matter of the Application of Ohio Power Company for Approval of its Program Portfolio Plan and Request for Expedited Consideration*, Pub. Util. Comm. No. 11-5568-EL-POR, 2012 Ohio PUC LEXIS 274, at 15 (Mar. 21, 2012) (approving stipulation providing that "the Companies will not receive any shared savings for the Self Direct program, which counts retrospective savings by mercantile customers").

<sup>8</sup> *In the Matter of the Application of The Cleveland Electric Illuminating Company, Ohio Edison Company, and The Toledo Edison Company for Approval of Their Energy Efficiency and Peak Demand Reduction Program Plans for 2013 through 2015*, Pub.

savings award for FirstEnergy would be consistent with this existing approach and would ensure that the utility's customers receive the benefit of it taking active steps to maximize energy savings that would not have otherwise been created without the portfolio in place.

**B. The Commission should require FirstEnergy to adjust its baseline to reflect savings measured under the Customer Action Program.**

Among the many details omitted from FirstEnergy's application is any discussion of how to calculate its baseline under the proposed new portfolio plan for purposes of measuring compliance with the statutory benchmarks. FirstEnergy's baseline energy sales are the basis for the quantitative savings benchmarks that the utility must meet in future years under R.C. 4928.66.<sup>9</sup> Baseline calculation is therefore an important issue because counting EE and PDR without adjusting FirstEnergy's baseline upward to reflect savings that customers have created at their own initiative could result in double-counting: FirstEnergy could include customer-initiated savings as part of its compliance with the benchmarks while at the same time reducing its energy and peak demand baseline—and thus the benchmarks themselves—based on those same reductions.

The Commission has previously taken action to avoid double-counting with respect to mercantile self-direct programs by promulgating OAC 4901:1-39-08. This provision requires a utility to subtract mercantile energy savings or demand reduction from its baseline (*i.e.*, increasing the baseline by subtracting a negative) to “avoid[]

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Util. Comm. No. 12-2190-EL-POR, 2013 Ohio PUC LEXIS 63, at 27, 34 (Mar. 20, 2013).

<sup>9</sup> R.C. 4928.66(A)(1)(a) (“Beginning in 2009, an electric distribution utility shall implement energy efficiency programs that achieve energy savings equivalent to at least three-tenths of one per cent of the total, annual average, and normalized kilowatt-hour sales of the electric distribution utility during the preceding three calendar years to customers in this state.”).

double counting the mercantile customer's energy savings or demand reduction, once to the extent the customer's lower usage is already reflected in the utility's baseline and again if the reduction is incorporated into the utility's program.”<sup>10</sup> This approach is equally appropriate for the Customer Action Program, which effectively expands the preexisting mercantile self-direct program to all customer classes. In their witness testimony on FirstEnergy’s original portfolio filing, NRDC and Sierra Club proposed a method for recalculating the baseline which is equally applicable to the Consumer Action Program:

In order to directly tie the Companies’ earnings under the shared savings mechanism to its own performance in delivering proactive energy efficiency programs, the Commission should modify the mechanism so that it is triggered when the Companies exceed an ‘Adjusted Benchmark’ each year. This Adjusted Benchmark would be calculated by subtracting Mercantile Self-Direct customer load from the three-year average sales from which the annual energy efficiency benchmarks are determined, and multiplying the result by the annual energy efficiency benchmarks in Revised Code Section 4928.66(A)(1)(a).”<sup>11</sup>

The Environmental Advocates urge the Commission to order FirstEnergy to adjust its baseline to avoid double-counting any EE and PDR that it intends to apply toward compliance under the Customer Action Program or other programs in its portfolio plan. Although the Commission could reserve this issue for resolution in FirstEnergy’s

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<sup>10</sup> *In the Matter of the Adoption of Rules for Alternative and Renewable Energy Technology, Resources, and Climate Regulations, and Review of Chapters 4901:5-1, 4901:5-3, 4901:5-5, and 4901:5-7 of the Ohio Administrative Code, Pursuant to Chapter 4928.66, Revised Code, as Amended by Amended Substitute Senate Bill No. 221*, Pub. Util. Comm. No. 08-888-EL-ORD, 2009 Ohio PUC LEXIS 282, at 59 (Apr. 15, 2009 (describing this approach as necessary to “avoid[] overstating the impact of mercantile customer reductions and diluting the energy efficiency and peak demand reduction standards”).

<sup>11</sup> NRDC Hearing Ex. No. 4, Direct Testimony of Dylan Sullivan at 18, Line 6.

future cost recovery proceedings, we believe it is relevant to achieving the benchmarks and therefore is appropriate to resolve at this time.

**C. The Commission must address the question of an appropriate budget for any new FirstEnergy portfolio plan, and the corresponding cost-recovery rider.**

OCC's Initial Comments appropriately note that FirstEnergy has failed to provide a new budget to reflect the significantly reduced scope of its new portfolio plan, which could result in the utility over-recovering costs.<sup>12</sup> A cancellation of programs of this scope has never before been proposed by a utility in Ohio. Thus, there is no clear process to ensure that customers are not charged for programs that are no longer being implemented. As a result, the Commission should require FirstEnergy to explain how it will promptly reduce charges to customers related to suspended programs, or provide for repayment of those charges with interest.

This issue is also important to the implementation of R.C. 4928.65, newly enacted as part of S.B. 310, which requires the Commission to promulgate rules providing for electric distribution utilities to list their costs of compliance with R.C. 4928.66 on customer bills. On October 15, 2014, the Commission issued draft rules in Case No. 14-1411-EL-ORD, proposing to base these cost disclosures on the amount of the currently effective EE/PDR rider. If the FirstEnergy rider is based on a budget intended for a broad range of programs that the utility no longer offers, then the costs of the remaining programs could appear inflated once included on customer bills under R.C. 4928.66, misleading customers into thinking they are paying more than they actually will once all costs are reconciled. Although the Commission could address this problem in the design

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<sup>12</sup> OCC Comments at 11.



of its new rules implementing R.C. 4928.65, a far simpler approach would be to require FirstEnergy to provide an amended budget in this proceeding that eliminates projected costs for cancelled programs.

**D. The Commission should not permit FirstEnergy to slash its programs to the extent that it would be inconsistent with FirstEnergy's position in the 2016-2019 ESP docket.**

FirstEnergy's assertion in this docket that substantially cutting EE and PDR programs for 2015 and 2016 will provide its customers "access to affordable energy"<sup>13</sup> stands in stark contrast to the statements it has made in support of its proposed ESP for 2016-2019 in Case No. 14-1297. In that docket, FirstEnergy has proposed an "Economic Stability Program" supported by a "Retail Rate Stability Rider," under which its customers will pay to directly acquire the generation from specific nuclear and coal power plants for fifteen years (from 2016 through 2031). Although the Environmental Advocates disagree with FirstEnergy's explanation of the need for the Economic Stability Program, it is notable that FirstEnergy's discussion of the considerations relevant to its planning includes a number of factors that FirstEnergy has entirely failed to discuss with respect to the role of EE and PDR in meeting its customers' energy needs.

According to FirstEnergy, the Economic Stability Program will preserve resource diversity in service of several goals: to "mitigate price volatility," to "avoid potential catastrophic issues with a single class of generation," to "protect[] against interruptions in fuel supply for a given class of generating assets, to provide capacity that can "withstand extreme events," and, to the extent the generation is from a zero-carbon nuclear source, to "play a significant role in the state's future efforts to meet U.S. Environmental Protection

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<sup>13</sup> FirstEnergy Application at 9, 10.

Agency (“U.S. EPA”) carbon reduction standards.”<sup>14</sup> EE and PDR can serve all of these same purposes by reducing demand and therefore exposure to volatile energy prices or generation shortages, as well as providing an important tool to reduce carbon dioxide emissions from electricity generation. Moreover, EE and PDR could potentially cost far less for FirstEnergy’s customers, without saddling those customers with the financial risk of directly owning generation assets whose profitability is uncertain at best.

Thus, FirstEnergy’s filings here are completely inconsistent with its arguments in the ESP docket, containing no mention of these volatility and resource diversity considerations with respect to EE and PDR. While there is not a significant overlap in timing between the Economic Stability Program and the proposed new portfolio plan, the fact remains that if FirstEnergy truly believes the issues outlined above are so vital, it should have considered them in both contexts. Instead, the glaring lack of any consideration in this application shows that FirstEnergy has failed to substantiate the assertion that eliminating most of its EE and PDR programs will serve customers’ needs by provide them with affordable energy. Accordingly, if the Commission deems FirstEnergy’s application sufficient under S.B. 310 and the Commission rules governing new portfolio plans, the Commission must rule that FirstEnergy’s proposal is unreasonable in light of the statements described above and modify the proposal to restore the programs originally approved by the Commission.

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<sup>14</sup> In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company for Authority to Provide for a Standard Service Offer Pursuant to R.C. 4928.143 in the Form of an Electric Security Plan, Pub. Util. Comm. No. 14-1297-EL-SSO, Direct Testimony of Donald Moul at 7-8.

**E. The Commission should clarify that any approval of FirstEnergy's new portfolio plan does not foreclose future discussion of appropriate cost-recovery.**

FirstEnergy has repeatedly emphasized the Commission's obligation under S.B. 310 to act on its application before January 1, 2015, regardless of whether a thorough review consistent with the Commission rules for new portfolio plans can be conducted on such an expedited timeline.<sup>15</sup> Given the truncated proceedings being conducted by the Commission via the demanding schedule imposed under S.B. 310, the Environmental Advocates respectfully request that the Commission make clear in any order regarding FirstEnergy's application that it is not foreclosing any arguments in future cost-recovery proceedings about the validity or prudence of FirstEnergy's expenditures under its approved portfolio plan, the calculation of cost-recovery for a given year, or the triggering and calculation of the shared savings incentive (if any) for that year.

**II. CONCLUSION**

The Environmental Advocates appreciate the opportunity to submit these Reply Comments, and urge the Commission to require FirstEnergy to demonstrate the reasonableness of all aspects of its application under the Commission regulations regarding new portfolio plans, consistent with the requirements of S.B. 310.

Dated: October 27, 2014

Respectfully submitted,

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<sup>15</sup> See FirstEnergy Reply at 7 (stating that "the Commission's rules in their entirety cannot reasonably be applied to the expedited filing required by S.B. 310").

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## **CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing *Reply Comments of the Sierra Club, Environmental Law and Policy Center, Natural Resources Defense Council, and Ohio Environmental Council on First Energy's Application for Approval of Amended Energy Efficiency and Peak Demand Plans for 2015 through 2016* has been electronically filed with the Public Utilities Commission of Ohio and has been served upon the following parties via electronic mail on October 27, 2014.

/s/ Trent A. Dougherty  
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Summary: Comments Reply Comments of the Sierra Club, Environmental Law and Policy Center, Natural Resources Defense Council, and Ohio Environmental Council on First Energy's Application for Approval of Amended Energy Efficiency and Peak Demand Plans for 2015 through 2016 electronically filed by Mr. Trent A Dougherty on behalf of Ohio Environmental Council and Sierra Club and Environmental Law and Policy Center and Natural Resources Defense Council