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 Portfolio Plans for 2013 through 2015	)	Case Nos. 12-2190-EL-POR 12-2191-EL-POR 12-2192-EL-POR

APPLICATION FOR REHEARING BY
THE ENVIRONMENTAL LAW & POLICY CENTER, OHIO ENVIRONMENTAL COUNCIL, SIERRA CLUB, AND NATURAL RESOURCES DEFENSE COUNCIL

I. INTRODUCTION

Pursuant to Ohio Revised Code ("R.C.") 4903.10 and Ohio Admin. Code 4901-1-35, the Environmental Law & Policy Center, Ohio Environmental Council, Sierra Club, and Natural Resources Defense Council hereby file this application for rehearing of the November 20, 2014 Finding and Order ("Order") of the Public Utilities Commission of Ohio ("Commission") in this case. The Commission's order approved with limited modifications an application by the Ohio Edison Company, the Cleveland Electric Illuminating Company, and the Toledo Edison Company (collectively, "FirstEnergy" or "Companies") to amend their energy efficiency and peak demand reduction program portfolio plan by eliminating certain programs and introducing two new programs.

The Order is unlawful and unreasonable for three reasons, as further explained in the accompanying Memorandum in Support:

1. Section 6 of S.B. 310 requires the Commission to review FirstEnergy's application "in accordance with its rules as if the application were for a new portfolio plan ." The Order determined that FirstEnergy's application failed to meet these rules, codified at Ohio Admin. Code 4901:1-39-03 and 4901:1-39-04. on at least two grounds – because it omitted required information regarding the

cost-effectiveness of FirstEnergy's programs and FirstEnergy's plans to evaluate the results of one of the proposed new programs – yet the Commission still approved the application without waiving those rules or otherwise imposing conditions to ensure FirstEnergy's compliance.

2. The Commission changed its position from a previous March 20, 2013 order in the same case regarding FirstEnergy's obligation to bid energy efficiency resources resulting from its programs into the PJM capacity market, without providing any adequate justification for that change.

3. Third, the Commission failed to examine the reasonableness and prudence of FirstEnergy's decision to amend its portfolio plan by weighing the potential costs from eliminating future energy efficiency resources from PJM – in the form of penalties for shortfalls from past FirstEnergy bids, costs of making up those shortfalls, lost revenues from reduced PJM bids, and higher future capacity prices – against the costs of FirstEnergy continuing the programs underlying those resources. As a result, the Commission did not reach the required conclusion under Ohio Admin. Code 4901:1-39-04(E) that FirstEnergy's proposed plan is consistent with the policy of the state of Ohio as set forth in R.C. 4928.02, including the requirement in R.C. 4928.02(A) to ensure "the availability to consumers of . . . reasonably priced retail electric service."

Dated: December 22, 2014

Respectfully submitted,

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MEMORANDUM IN SUPPORT OF APPLICATION FOR REHEARING BY THE ENVIRONMENTAL LAW & POLICY CENTER, OHIO ENVIRONMENTAL COUNCIL, SIERRA CLUB, AND NATURAL RESOURCES DEFENSE COUNCIL

I. INTRODUCTION

The Environmental Law & Policy Center ("ELPC"), Ohio Environmental Council ("OEC"), Sierra Club, and Natural Resources Defense Council (collectively, "Environmental Advocates") seek rehearing of the November 20, 2014 Finding and Order ("Order") of the Public Utilities Commission of Ohio ("Commission") in this case. The Commission's order approved with limited modifications an application by the Ohio Edison Company, the Cleveland Electric Illuminating Company, and the Toledo Edison Company (collectively, "FirstEnergy" or "Companies") to amend their energy efficiency and peak demand reduction program portfolio plan by eliminating certain programs and introducing two new programs.

The Order is unlawful and unreasonable for three reasons. First, the Order determined that FirstEnergy's application failed to meet the Commission rules codified at Ohio Admin. Code 4901:1-39-03 and 4901:1-39-04 on at least two grounds – because the application omitted required information regarding the cost-effectiveness of FirstEnergy's programs and FirstEnergy's plans to evaluate the results of one of the proposed new programs. Yet, although the Commission recognized it was required to apply those rules under section 6 of S.B. 310,

which requires the Commission to review FirstEnergy's application "in accordance with its rules as if the application were for a new portfolio plan," the Commission still approved the application without waiving the rules or otherwise imposing conditions to ensure FirstEnergy's compliance. Second, the Commission changed its position from a previous March 20, 2013 order in the same case regarding FirstEnergy's obligation to bid energy efficiency resources resulting from its programs into the PJM capacity market, without providing any adequate justification for that change. Third, the Commission failed to examine the reasonableness and prudence of FirstEnergy's decision to amend its portfolio plan by weighing the potential costs from eliminating future energy efficiency resources from PJM – in the form of penalties for shortfalls from past FirstEnergy bids, costs of making up those shortfalls, lost revenues from reduced PJM bids, and higher future capacity prices – against the costs of FirstEnergy continuing the programs underlying those resources. As a result, the Commission did not reach the required conclusion under Ohio Admin. Code 4901:1-39-04(E) that FirstEnergy's proposed plan is consistent with the policy of the state of Ohio as set forth in R.C. 4928.02, including the requirement in R.C. 4928.02(A) to ensure "the availability to consumers of . . . reasonably priced retail electric service."

II. BACKGROUND

A. FirstEnergy's Application

FirstEnergy filed an application to amend its portfolio plan on September 24, 2014 pursuant to Senate Bill ("S.B.") 310, which reduced the energy efficiency ("EE") and peak demand reduction ("PDR") benchmarks for 2015 and 2016 under R.C. 4928.66. FirstEnergy's application proposed to amend its program from January 1, 2015 through December 31, 2016, to eliminate all existing programs except: (1) the Low Income Program; (2) the Mercantile

Customer Program; (3) the T&D Improvements Program; (4) the Residential Direct Load Control Program; (5) the Demand Reduction Program; (6) the PJM Revenue Sharing Pilot Program; and (7) the Smart Grid Modernization Initiative.[1] FirstEnergy also sought to add two new programs: a "Customer Action Program" under R.C. 4928.662(A) and (B), and an Experimental Company Owned LED Lighting Program that FirstEnergy had proposed in Case No. 14-1027-EL-ATA. In its application, FirstEnergy stated that "[t]o the extent the Commission determines that a waiver of any provision of its rules is necessary, the Companies hereby request such waiver under O.A.C. 4901:1-39-02(B)."[2]

On October 9, 2014, ELPC and the Sierra Club filed a memorandum contra FirstEnergy's application, which explained that the application did not meet the rules applicable to a new portfolio plan, as required under Section 6 of S.B. 310.[3]

B. The Commission's Order

On November 20, 2014, the Commission issued its Order regarding FirstEnergy's application to amend its portfolio plan, approving FirstEnergy's proposed amended plan with certain modifications.

1. Waiver Ruling

The Commission's Order first addressed FirstEnergy's request to waive any rules as necessary for review and approval of its application. The Commission held that no waiver of its rules would be necessary, "as FirstEnergy has provided further details regarding program budget

[1] FirstEnergy Application at 2 (September 24, 2014).
[2] *Id.* at 10.
[3] ELPC and Sierra Club Memorandum Contra FirstEnergy's Application at 4 (Oct. 9, 2014). The Ohio Consumers' Counsel filed a motion presenting similar arguments. OCC Memorandum Contra FirstEnergy's Request for Waiver (Oct. 9, 2014).

and cost-effectiveness in its reply comments."[4] The Commission explained that FirstEnergy had therefore provided "sufficient information for our review pursuant to Section 6 of S.B. 310."[5]

2. Approval of Program Portfolio

The Commission approved the portfolio of programs proposed by FirstEnergy, both the new Customer Action Program and Experimental Company-Owned LED Lighting Program, and the continuation of seven programs from the Companies' existing portfolio plan.[6] However, the Commission highlighted two areas of concern regarding the sufficiency of FirstEnergy's application.

First, the Commission "note[d] that FirstEnergy has included little information on the EM&V approaches that will be used to verify savings" for the Customer Action Program. [7] In response that deficiency, the Order "directs FirstEnergy to work with its collaborative to develop more detailed information on how the Customer Action Program should be implemented."[8]

Second, the Commission rejected FirstEnergy's assertion that it had sufficiently demonstrated the cost-effectiveness of the proposed amended portfolio plan. Specifically, the Commission held that FirstEnergy had not shown that the amended portfolio plan would be cost-effective using the applicable total resource cost ("TRC") test, since "FirstEnergy's alteration of the program mix may cause a different result."[9] The Commission also determined that FirstEnergy did have to "demonstrate cost-effectiveness for its Customer Action Program," regardless of the fact that S.B. 310 authorized FirstEnergy to count savings from such a program

[4] Order at 5.
[5] *Id.*
[6] *Id.* at 9.
[7] *Id.*
[8] *Id.*
[9] *Id.* at 12.

toward compliance with the benchmarks under R.C. 4928.66.[10] Despite this ruling, the Commission allowed FirstEnergy to include the Customer Action Program as part of its amended portfolio plan, citing "the time constraints of this proceeding."[11] The Commission did note that it was allowing the inclusion of the Customer Action Program "subject to the TRC test as part of future audits," and ordered FirstEnergy to "work with its collaborative to ensure the overall portfolio remains cost-effective" as it develops the details of the Customer Action Program.[12]

3. PJM Bidding Strategy

The Commission's Order reviewed commenters' concerns and FirstEnergy's responses regarding the effect of amendment of the Companies' portfolio plan with respect to FirstEnergy's obligation to provide capacity resources from its portfolio programs that it had previously bid into the PJM Base Residual Auction ("BRA") covering 2015 and 2016. The Commission then stated that:

> in order to account for potential further legislative modifications in the future, going forward, FirstEnergy should bid only installed energy efficiency resources into future PJM capacity auctions. Further, consistent with our ruling in the Opinion and Order issued in this proceeding, the Commission finds that FirstEnergy shall be entitled to recover from ratepayers the prudently incurred costs of any steps taken to eliminate any shortfalls.[13]

The Commission did not indicate that it was making any changes to the PJM Revenue Sharing Pilot Program, which entitles FirstEnergy to a 20 percent share of any revenue from bidding energy efficiency resources into PJM capacity auctions.

[10] Order at 12-13.
[11] *Id.* at 13.
[12] *Id.*
[13] *Id.* at 22.

III. ARGUMENT

A. The Commission's Order is unlawful and unreasonable because it effectively waived applicable PUCO rules without regard to the legislature's directive to treat FirstEnergy's proposal as a new portfolio plan.

1. The Commission stated that it was not waiving the application of any rules to FirstEnergy's application, but did not require FirstEnergy to satisfy all of the requirements under these rules.

The Commission's Order stated that it was not necessary to waive the application of any rules in considering FirstEnergy's proposed amended portfolio plan.[14] Yet the Commission failed to hold FirstEnergy to the requirements for a portfolio plan in two respects: first, the Commission did not require FirstEnergy to demonstrate the overall cost-effectiveness of its overall amended portfolio plan or the individual cost-effectiveness of its Customer Action Program; and second, the Commission did not require FirstEnergy to provide necessary details regarding its EM&V plans for the Customer Action Program.

Section 6 of S.B. 310 directs the Commission to "review the application [for amendment of a utility's portfolio plan] in accordance with its rules as if the application were for a new portfolio plan." Those rules include the requirements that (1) the utility show the "program portfolio plan is cost-effective on a portfolio basis"[15]; (2) "each program proposed within a program portfolio plan must also be cost-effective, although . . . . a program within its program portfolio plan that is not cost-effective when that program provides substantial nonenergy benefits"[16]; and (3) for newly proposed programs, that the utility provide "[a] description of . . . each program describing "[p]rogram objectives, including projections and basis for calculating energy savings and/or peak-demand reduction resulting from the program," "[a] program budget

[14] *Id.* at 5.
[15] Ohio Admin. Code 4901:1-3904(B).
[16] *Id.*

with projected expenditures, identifying program costs to be borne by the electric utility and collected from its customers, with customer class allocation, if appropriate," and "[a] description of the plan for preparing reports that document the electric utility's evaluation, measurement, and verification of the energy savings and/or peak-demand reduction resulting from each program and the process evaluations conducted by the electric utility."[17] The Commission's approval of FirstEnergy's application effectively and unreasonable waived these rules in two respects, despite the Commission's contention that it was evaluating FirstEnergy's application under its rules for a new portfolio plan.

a. Waiver of Public Comment Procedures

First, the Commission ruled that FirstEnergy had provided sufficient information for review of its application based on the fact that FirstEnergy's reply comments asserted that information about the applicable EM&V protocols was contained in Section 6 of its existing portfolio plan,[18] and provided a budget for the program of $1,800,000 for Cleveland Electric Illuminating Company, $3,500,000 for Ohio Edison, and $1,400,000 for Toledo Edison.[19] This total of $6,700,000 would cover "items such as EM&V, administration costs, and commitment payments for project information or to allow site access to facilitate the EM&V process."[20] However, FirstEnergy was aware of the requirement to provide such information at the time it filed its initial application and certainly by the time ELPC and Sierra Club filed a memorandum contra the application on October 9, 2014, well before initial comments were due on October

[17] Ohio Admin. Code 4901:1-39-04(C)(5).
[18] *Id.* at 12.
[19] *Id.* at 13.
[20] *Id.*

20.[21] Thus, even to the extent that information was substantively adequate under the Commission's rules, FirstEnergy complied with those rules in name only: by providing key information only in its reply comments, FirstEnergy deprived interested parties of the opportunity to evaluate and provide input to the Commission about potential flaws in that information or potential adverse consequences resulting from the implementing the programs as proposed.

For example, FirstEnergy disclosed that it plans to spend nearly $7 million dollars on the Customer Action Program, a program that allows FirstEnergy to take credit for energy savings or peak demand reduction achieved by its customers, only on the final day for filing reply comments. At that point, the Environmental Advocates and others had no available procedural mechanism to comment on that information. Had we had such an opportunity, we would have commented on whether such a significant expenditure was appropriate or even permissible under the Commission's rules given FirstEnergy's failure to describe what benefits would result to its customers from spending that money. Additionally, we might have proposed modifications to FirstEnergy's proposal, such as a significantly reduced budget for a pilot version of the Customer Action Program pending FirstEnergy's demonstration that the program does provide benefits to customers that outweigh its costs.

Additionally, since even the information provided by FirstEnergy in its reply comments was inadequate under the Commission's rules, there is no opportunity for Commission consideration of important issues regarding FirstEnergy's proposal, even through applications for

[21] Arguably, the Commission's rules specifically require this information to be included in the utility's initial filing. Ohio Admin. Code 4901:1-39-04(C) describes the utility's "filing requirements," including the mandatory "content of [the] filing," while Ohio Admin. Code 4901:1-39-03 describes information that must "be included in the electric utility's program portfolio filing pursuant to rule 4901:1-39-04."

rehearing. In particular, there has been no adequate opportunity for the parties to address whether FirstEnergy's proposed portfolio plan is consistent with the directives in R.C. 4928.02, including to "[e]nsure the availability to consumers of . . . reasonably priced retail electric service," as required under Ohio Admin. Code 4901:1-39-04(E).[22] Aside from the program cost projections for the Customer Action Program, the only explanation FirstEnergy offered for the amount of resources dedicated to that program was that the savings measured under the program would displace "more costly future programs" otherwise necessary to achieve the statutory EE and PDR benchmarks.[23] It is impossible to evaluate whether that contention is correct based on the information FirstEnergy provided, which lacks any discussion of the benefits stemming from the projected $7 million in costs. FirstEnergy did not explain how much energy savings or peak-demand reduction it expects to result from the Customer Action Program from spending that money.[24] Nor did FirstEnergy address whether it will be able to garner any revenue to pass on to its customers by bidding the resulting resources into the PJM capacity market, as it has been able to do with other programs in its portfolio plan. Absent such information, neither the public nor the Commission can determine whether the Customer Action Program as proposed would constitute "reasonably priced retail electric service." Therefore, the Commission acted unreasonably when it concluded that FirstEnergy had provided "sufficient information for our review pursuant to Section 6 of S.B. 310."[25]

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[22] R.C. 4928.02(A).
[23] FirstEnergy Reply Comments at 14.
[24] There is certainly no reason to automatically believe that the Customer Action Program will necessarily deliver more cost-effective energy savings than other programs that FirstEnergy has now eliminated. For example, EM&V costs might be much lower for a program, such as a lighting or appliance incentive program, where EE and PDR savings are more well-defined than in the Customer Action Program and can therefore be verified without disproportional after-the-fact effort.
[25] *Id.*

The Ohio Supreme Court has recognized in several cases concerning Commission proceedings that "evidence must be introduced at a hearing or otherwise brought to the knowledge of the interested parties prior to decision, with an opportunity to explain and rebut."[26] Consistent with this holding, the Commission's rules specifically provide that the public should have such an opportunity to evaluate and comment on a utility's EE/PDR portfolio plan, stating that "any person may file objections . . . after the filing of an electric utility's program portfolio plan.[27] Even FirstEnergy itself emphasized the importance of the Commission conducting its review "so that parties have the opportunity to comment in an open, transparent proceeding during the sixty-day review period required by S.B. 310."[28] Yet by allowing FirstEnergy to withhold key information about its proposed amended plan that was required under Commission rules until the window for public review and comment had closed, or not to provide it at all, the Commission permitted FirstEnergy to escape the public scrutiny that would ensure its substantive compliance with those rules – effectively granting waiver by another name.

b. Waiver of Substantive Requirements

Second, the Commission unreasonably and unlawfully granted FirstEnergy's application despite holding that it had not in fact met the substantive criteria in the Commission's rules, even as the Commission stated that it did not intend to waive the application of those rules. Although the public did not have the opportunity to fully comment on FirstEnergy's proposed amended plan, the Commission conducted its own review of whether FirstEnergy had met the applicable requirements, and noted two deficiencies: first, that the companies had "included little information on the EM&V approaches that will be used to verify savings" under the Customer

[26] *Allen v. Pub. Util. Comm.*, 40 Ohio St. 3d 184, 185, 532 N.E. 2d 1307 (1988) (citing *Forest Hills Utility Co. v. Pub. Util. Comm.*, 39 Ohio St. 2d 1, 3, 313 N.E. 2d 801 (1974)).
[27] Ohio Admin. Code 4901:1-39-04(D).
[28] FirstEnergy Reply Comments at 22.

Action Program; and second, that FirstEnergy had not met the requirement to demonstrate the cost-effectiveness of the newly proposed Customer Action Program or the amended portfolio plan as a whole.[29] In both instances, however, the Commission did not modify the proposed amended portfolio plan to eliminate programs that did not comply with the law. Instead, with respect to the cost-effectiveness of the Customer Action Program, the Commission left the resolution of the issue to application of the TRC test in "future audits."[30] And with respect to the development of sufficient EM&V procedures and ensuring the overall portfolio is cost-effective, the Commission simply directed FirstEnergy to work with its energy efficiency collaborative on those issues.[31] This deferral of FirstEnergy's compliance with Commission rules is unreasonable both in light of the Commission's waiver decision, and because it relies on inadequate and unreasonable mechanisms for enforcing compliance with the law as a practical matter.

The Commission's rules unequivocally require that a utility's portfolio plan must meet the cost-effectiveness requirements in Ohio Admin. Code 4901:1-39-04(B) and provide information regarding EM&V plans for each program as specified in Ohio Admin. Code 4901:1-39-04(C)(5)(*l*). The Commission's Order stated that these rules would not be waived,[32] yet at the same time the Commission approved FirstEnergy's proposed amendments to its portfolio plan

[29] *Id.* at 9, 12-13.
[30] *Id.* at 13.
[31] *Id.* at 9, 13. Regarding cost-effectiveness, the Commission stated that "FirstEnergy should work with its collaborative to ensure that the overall portfolio remains cost-effective." *Id.* at 13. However, the Commission also held that FirstEnergy must demonstrate cost-effectiveness for the Customer Action Program standing alone. *Id.* at 12-13. Therefore, if the Commission does not grant rehearing regarding the role of the collaborative in ensuring cost-effectiveness, then we ask that the Commission clarify that FirstEnergy must also work with the collaborative to ensure that the Customer Action Program is independently cost-effective under the TRC test.
[32] *Id.*at 5.

while holding that FirstEnergy had not satisfied these requirements. Where an agency order is thus "internally inconsistent and contradictory," it cannot stand.[33]

Nor do prior Commission orders establish the collaborative process as a permissible work-around that FirstEnergy may use to avoid complying with the Commission's rules for approval of a portfolio plan. The Commission explained its view of the purposes of the FirstEnergy collaborative in an earlier order in this case:

> The Commission has encouraged the formation of utility-stakeholder collaboratives because we believe that collaborative investigations may provide valuable insights into new and emerging issues. The collaborative provides an opportunity for technical staff and experts from different stakeholders to establish common vocabulary, identify key issues needing further exploration, gather lessons learned and new ideas from programs in Ohio and other states, discuss the implications of independent research, exchange data and seek to resolve factual questions.[34]

In other words, the collaborative is designed to consider technical issues regarding implementation of an approved plan that meets basic substantive requirements, not as a substitute for the Commission's own thorough review of proposed EE and PDR programs in a public forum.

Even if the Commission had provided adequate logic and legal authority to support its decision, it unreasonably relied on the extra-legal, non-public collaborative process and the after-the-fact review available in the audit process to ensure FirstEnergy complies with Commission rules. Foremost, FirstEnergy has taken the uncompromising position that information shared in its energy efficiency collaborative is confidential and not accessible to the public.[35] The Environmental Advocates believe that position has no merit, and ELPC and OEC have filed a

[33] *State ex rel. Jeffrey v. Industrial Com. of Ohio*, 26 Ohio St. 3d 3, 4, 496 N.E.2d 919 (1986).
[34] Opinion and Order at 43 (March 20, 2013).
[35] *See generally* FirstEnergy Memorandum Contra ELPC/OEC Motion for a Determination that Collaborative Materials Are Not Confidential (July 22, 2014).

motion before the Commission seeking a determination that the collaborative materials cannot automatically be deemed confidential by FirstEnergy.[36] However, that motion is currently unresolved, and therefore the proceedings of the FirstEnergy collaborative remain closed to the public. Accordingly, the Commission's order relegates the resolution of important substantive issues regarding FirstEnergy's portfolio plan to a process that allows for no input from any individual or entity that does not happen to be a member of the FirstEnergy collaborative as approved by the Commission, and is not subject to any established Commission review in a public proceeding – a radical departure from the procedures applicable to all prior portfolio plan filings,.

Additionally, the Commission has failed to establish the procedures that would be necessary to even make the collaborative a viable mechanism for ensuring FirstEnergy's compliance with the applicable rules for its portfolio plan. For example, there is no existing requirement in any Commission rule or order as to what information FirstEnergy must provide to collaborative members, including information about the ongoing cost-effectiveness of its programs. FirstEnergy has even threatened to restrict the information it shares with the collaborative should the Commission grant ELPC's and OEC's motion for a determination that collaborative materials may be shared publicly.[37] Similarly, the Commission does not have any

[36] *See* Motion Requesting a Determination that Collaborative Materials Are Not Confidential and Request for an Expedited Ruling by ELPC and OEC (July 16, 2014); *see also* Renewed Motion And Memorandum Requesting A Determination That Collaborative Materials Are Not Confidential And Request For An Expedited Ruling by ELPC and OEC (Sept. 23, 2014). Pending resolution of this issue, ELPC and OEC have determined that they cannot participate in collaborative meetings, and did not attend the collaborative meeting held on December 16, 2014, as explained in a letter filed in the docket for this case on December 15, 2014.

[37] *See* FirstEnergy Memorandum Contra ELPC/OEC Motion for a Determination that Collaborative Materials Are Not Confidential at 4-5 (stating that if the motion were granted, "then the Companies would be forced to rethink the level of details provided through the Collaborative process").

established process for oversight of the collaborative or resolution of disputes within the collaborative, as illustrated by the fact that ELPC's and OEC's motion regarding their concerns about public access to collaborative proceedings has been pending on the docket for more than five months. Therefore, if FirstEnergy does not agree with the view of a collaborative member that it is not implementing its programs cost-effectively or is using inappropriate EM&V procedures, collaborative members will have to rely on ad-hoc motions or post-implementation review to raise those issues for decision by the Commission. Overall, the collaborative – an entity established by consent of a limited set of parties, and reliant on the consent of those parties to function – is not an appropriate instrument to examine FirstEnergy's compliance with Commission rules and enforce those rules where FirstEnergy has not abided by them.

Given these flaws in the collaborative process, the Commission has left itself and the public with only post-implementation audits in cost recovery proceedings as a way to ensure FirstEnergy's portfolio plan complies with applicable requirements. As a practical matter, relying solely on post-implementation review is flawed in two respects. First, if the utility argues that the Commission's initial approval to implement particular programs cannot be revoked after the fact, the Commission may be unable to recover ratepayer funds that the utility unreasonably expended on programs that were not cost-effective. Second, relying on a cursory pre-approval review process without sufficient information eliminates the possibility of ensuring a utility's EE and PDR programs are appropriately designed from the outset, such that ratepayers receive the maximum benefit for funds invested in energy efficiency programs. Essentially, the Commission has ignored the requirement that a utility meet cost-effectiveness standards and provide implementation information before implementing a proposed portfolio plan.

2. Even if the Commission had decided to waive application of its rules to FirstEnergy, there was no adequate basis for the Commission to do so.

The Commission did offer some explanation of its approval of FirstEnergy's flawed amended portfolio plan despite its legal deficiencies, stating that it would allow FirstEnergy to add the Customer Action Program without meeting applicable requirements for approval of a new plan due to "the time constraints of this proceeding" – *i.e.*, the fact that Section 6 of S.B. 310 allows the Commission only 60 days to review an application to amend a portfolio plan.[38] Neither that rationale, nor any of the arguments offered by FirstEnergy, justify waiver of Ohio Admin. Code 4901:1-39-03 or Ohio Admin. Code 4901:1-39-04.

The timing rationale offered by the Commission is flawed. Although it is true that S.B. 310 allows only 60 days for the review of FirstEnergy's application, this impediment limits the time for Commission review and burdens the parties, but does not affect FirstEnergy's ability to submit an adequate application. FirstEnergy had more than three months from when S.B. 310 was signed into law to prepare an application that would satisfy all of the applicable Commission rules, including the requirements to provide information about cost-effectiveness and EM&V procedures. FirstEnergy never suggested that it did not have sufficient time to examine those issues and prepare the relevant information for Commission review. Indeed, FirstEnergy admitted that it never made any attempt to assess the cost-effectiveness of the Customer Action Program, belying any assertion that it failed to provide such an assessment because of time constraints.[39] Additionally, the fact that FirstEnergy was able to provide a projected budget for the Customer Action Program just a month after filing its initial application suggests that if it had

[38] Order at 13.
[39] *Id.* at 20.

made an effort, it could well have formulated projections regarding the cost-effectiveness of that program in the time available.

The Commission also rightly rejected FirstEnergy's argument that its application should not be required to meet the requirements of Ohio Admin. Code 4901:1-39-03 or Ohio Admin. Code 4901:1-39-04 despite the General Assembly's directive that "the Commission shall review the application in accordance with its rules as if the application were for a new portfolio plan."[40] FirstEnergy's interpretation would read the words "as if the application were for a new portfolio plan" right out of the statute, inconsistent with the canon against construing a statute to render any language superfluous.[41] Moreover, if FirstEnergy's reading were correct, that would mean the General Assembly had ordered the Commission to review a utility's application to amend its portfolio plan without providing any substantive standards for that review – a result that simply makes no sense.

Given the Commission's determination that Ohio Admin. Code 4901:1-39-03 or Ohio Admin. Code 4901:1-39-04 applied to FirstEnergy's application and that the application did not meet the requirements of those rules, the Commission had the obligation to act. And S.B. 310 grants the Commission the authority to do so by "modify[ing] and approv[ing]" a proposed plan, without constraints on what that modification might entail.[42] Therefore, the Commission had the power to modify FirstEnergy's proposal to address any failure to satisfy the applicable rules. For example, as suggested in the Environmental Advocates' initial comments, the Commission could

[40] S.B. 310, Section 6(B)(1). *See* FirstEnergy Reply Comments at 22 (taking the position that S.B. 310's directive for the Commission to review its application "in accordance with its rules as if the application were for a new portfolio plan" should only mean review "in accordance with [the Commission's] procedural rules so that parties have the opportunity to comment in an open, transparent proceeding during the sixty-day review period required by S.B. 310").
[41] *See, e.g., Burkhart v. H.J. Heinz Co.*, 140 Ohio St. 3d 429, 2014-Ohio-3766, 19 N.E.3d 877, ¶ 31.
[42] S.B. 310, Section 6(B)(1).

have deemed FirstEnergy's application an incomplete submission insufficient to trigger review under S.B. 310.[43] Alternatively, the Commission could have approved the continuation of the programs from the existing plan (which FirstEnergy represented were sufficient on their own to meet the statutory EE or PDR benchmarks), but not the Customer Action Program. Or the Commission could have approved the plan but ordered FirstEnergy to submit the required cost-effectiveness and EM&V information by a firm deadline, reserving the right to deem any program costs imprudent if FirstEnergy was unable to show the programs met the applicable criteria. The Commission took none of these lawful steps, an unreasonable decision given its determination that FirstEnergy's application failed to meet the applicable rules.

B. The alteration of FirstEnergy's obligation to bid energy efficiency resources into the PJM Base Residual Auction contradicts the Commission's prior ruling on this issue with no basis in the record.

The Commission's Order makes changes to FirstEnergy's obligations with respect to the PJM capacity markets that lack any basis in the record. In its prior March 20, 2013 order in this case approving FirstEnergy's original EE/PDR portfolio plan, the Commission found that, despite FirstEnergy's complaints about "the uncertainty of future PJM BRAs, ... 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."[44] The Commission therefore "require[d] 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," as a way to "appropriately mitigate the Companies' risk while benefitting ratepayers."[45] On rehearing, the Commission also ordered FirstEnergy to implement

[43] Environmental Advocates' Initial Comments at 2-3.
[44] Opinion and Order at 20 (Mar. 20, 2013).
[45] *Id.* at 20-21.

the PJM Revenue Sharing Pilot Program, under which it would be entitled to receive a 20 percent share of revenue from the PJM auctions, with the remaining 80 percent going to ratepayers.[46] Thus, in response to extensive briefing by the parties on this issue, Commission carefully crafted an approach that balanced the risks associated with bidding energy savings into the PJM BRAs with the significant benefits available to customers from such bids in the form of PJM revenues and lowered capacity prices.

The Commission's Order at issue here drastically changed that approach, requiring FirstEnergy to bid only previously installed EE resources into future BRAs, as opposed to both installed resources and resources that the utility plans to install through its portfolio plan programs in accordance with the projections in its application for Commission approval of those programs. As the Ohio Supreme Court has explained, "[w]hen the commission has made a lawful order, it is bound by certain institutional constraints to justify that change before such order may be changed or modified."[47] In this case, the Commission provided no reasonable justification for the departure from its earlier decision.

In eliminating FirstEnergy's obligation to bid planned (but not installed) EE resources into PJM capacity auctions, the Commission cited the need to "account for potential further legislative modifications in the future."[48] However, that vague rationale is not rooted in any record evidence of actual pending legislation that would affect FirstEnergy's EE and PDR obligations underlying its PJM bids. Moreover, given FirstEnergy's assertion that the revenues

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[46] Entry on Rehearing at 4-5 (July 17, 2013).
[47] *Office of Consumers' Counsel v. Public Utilities Comm.*, 10 Ohio St. 3d 49, 50-51, 461 N.E.2d 303 (1984) (citing *Cleveland Elec. Illuminating Co. v. Pub. Util. Comm.*, 42 Ohio St. 2d 403, 431 330 N.E.2d 1 (1975) ("Although the Commission should be willing to change its position when the need therefor is clear and it is shown that prior decisions are in error, it should also respect its own precedents in its decisions to assure the predictability which is essential in all areas of the law, including administrative law.").
[48] Order at 22.

from its PJM bids would more than cover any shortfalls stemming from failure to meet its existing capacity commitments,[49] the record indicates that the framework established by the Commission in its March 20, 2013 order has worked as designed to accommodate S.B. 310 without the need for further changes. The benefits of requiring FirstEnergy to bid both installed and planned EE resources into the PJM capacity markets has more than outweighed the adverse effects of FirstEnergy's cutback of the programs underlying some of those bids.[50] Fundamentally, the Commission's March 20, 2013 decision rested on significant input from all parties as to the potential risks and rewards of bidding energy savings into the BRA, and no party has offered any evidence that those risks or rewards have changed.[51] Therefore, the Commission's rejection of its previous decision lacks a reasonable basis and the Commission should return to the framework established in its orders approving FirstEnergy's existing portfolio plan.

If the Commission does deny rehearing on this issue, then it must also remedy an important gap in its Order regarding the fate of the PJM Revenue Sharing Pilot Program. The Commission allowed FirstEnergy to retain a significant share of the revenues from its PJM bids "in order to more reasonably balance the risk and potential benefits of auction participation for the Companies and ratepayers and to ensure that the interests of FirstEnergy and its customers

[49] FirstEnergy Reply Comments at 16.
[50] FirstEnergy Reply Comments at 16-17.
[51] Notably, FirstEnergy's own reply comments did not affirmatively seek, or provide any justification for, altering FirstEnergy's obligation to bid planned and installed energy resources into future PJM capacity auctions. FirstEnergy stated on this issue that: "The Amended Plan does not propose to alter any of the provisions of the Existing Plan relating to the bidding of planned energy efficiency resources into the PJM Base Residual Auction ("BRA"). . . . The Companies will continue to follow this bidding strategy despite the risks associated with PJM bidding unless the Commission orders otherwise." *Id.* at 15.

are properly aligned."[52] The Commission stated at the time that it would revisit this decision in "the next program portfolio proceeding," and that reconsideration is now necessary.[53] By removing any obligation for FirstEnergy to bid anything but installed EE resources into the PJM capacity market, the Commission has effectively eliminated the risk FirstEnergy bears in making such bids. Therefore, the incentive that customers pay for FirstEnergy to pursue such bids should likewise be eliminated.

C. The Commission's Order unlawfully and unreasonably allowed FirstEnergy to recover PJM costs incurred voluntarily through FirstEnergy's cutback of its EE and PDR programs without considering whether it would cost less for FirstEnergy to continue those programs.

The Commission's Order states that, "consistent with our ruling in the Opinion and Order issued in this proceeding, . . . FirstEnergy shall be entitled to recover from ratepayers the prudently incurred costs of any steps taken to eliminate any shortfalls."[54] This finding fails to consider whether FirstEnergy acted prudently when it caused the shortfalls in the first place. The Commission's referenced Opinion and Order, issued on March 20, 2013, did recognize the risks of shortfalls if it required FirstEnergy to bid all planned resources into the PJM capacity market given "the uncertainty of future PJM BRAs." However, the shortfalls in this case are not the inevitable result of uncertainty regarding unforeseeable future events; they are the foreseeable consequence of FirstEnergy's *voluntary decision* to amend its portfolio plan. The March 20, 2013 Opinion and Order did not commit the Commission to shield FirstEnergy from the results of risks that it has voluntarily assumed, and the Commission therefore unreasonably failed to consider the prudence of FirstEnergy's decision to eliminate significant portions of its portfolio plan and thereby incur potential penalties and incremental capacity auction costs in PJM.

[52] Entry on Rehearing at 4 (July 17, 2013).
[53] *Id.* at 5.
[54] Order at 22.

Moreover, FirstEnergy's assurance that any such costs will be outweighed by the revenues from its PJM bids does not answer the question of whether FirstEnergy acted prudently in incurring those costs. Rather, the Commission's consideration of that question must focus on the net costs or benefits of FirstEnergy's decision to amend its portfolio plan – that is, whether the amount of PJM penalties or incremental auction costs to make up for any shortfalls is more than it would have cost FirstEnergy to continue its existing programs and avoid those shortfalls in the first place. If so, then FirstEnergy's decision to amend its portfolio plan resulted in greater costs for ratepayers than they would have borne if FirstEnergy had left its existing plan in place, and the Commission should deem that decision to be imprudent and modify FirstEnergy's application accordingly.[55]

Additionally, the Environmental Advocates' reply comments noted that the prudence of FirstEnergy's decision to eliminate a large share of its EE and PDR programs was inconsistent with FirstEnergy's position in its parallel electric security plan filing in Case No. 14-1297-EL-SSO that PJM may soon face significant capacity constraints.[56] The Commission's Order fails to address or even mention this significant inconsistency. Under Ohio Admin. Code 4901:1-39-04(E), FirstEnergy bears the burden to show that its amended portfolio plan is consistent with state policy under R.C. 4928.02, including to "[e]nsure the availability to consumers of adequate, reliable, safe, efficient, nondiscriminatory, and reasonably priced retail electric service."[57] Consistent with this policy, a principle reason for the Commission's original directive for FirstEnergy to supply its EE resources in the BRA was "to benefit ratepayers by lowering

[55] Alternatively, the Commission could clarify that the parties may contest the prudence of FirstEnergy's decision in a subsequent cost recovery proceeding.
[56] Environmental Advocates' Reply Comments at 3-4.
[57] R.C. 4928.02(A).

capacity auction prices."[58] Accordingly, it is not clear that FirstEnergy's proposal to cut back on its EE and PDR programs, and therefore withdraw potential EE resources from the PJM capacity market, will serve state policy – especially in light of the contention of FirstEnergy's own expert that lower availability of demand resources will lead to increases in the capacity prices paid by FirstEnergy's customers.[59] The Commission's order is therefore unreasonable and unlawful to the extent it also failed to consider this factor in approving FirstEnergy's application.

IV. CONCLUSION

For the reasons set forth above, the Environmental Advocates respectfully request that the Commission grant rehearing and reconsider its approval of FirstEnergy's Application.

Dated: December 22, 2014

Respectfully submitted,

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[58] Opinion and Order at 20 (Mar. 20, 2013).
[59] *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 and Electric Security Plan*, Case No. 14-1297-EL-SSO, Rose Testimony at 6 (Aug. 4, 2014).

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Application for Rehearing has been electronically filed with the Public Utilities Commission of Ohio and has been served upon the following parties via electronic mail on December 22, 2014.

/s/ Trent A. Dougherty
Trent A. Dougherty

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Summary: App for Rehearing APPLICATION FOR REHEARING BY THE ENVIRONMENTAL LAW & POLICY CENTER, OHIO ENVIRONMENTAL COUNCIL, SIERRA CLUB, AND NATURAL RESOURCES DEFENSE COUNCIL
electronically filed by Mr. Trent A Dougherty on behalf of Environmental Law and Policy Center and Ohio Environmental Council and Sierra Club and Natural Resources Defense Council