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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

ENVIRONMENTAL LAW & POLICY CENTER'S AND SIERRA CLUB'S MEMORANDUM CONTRA APPLICATION FOR REHEARING OF OHIO EDISON COMPANY, THE CLEVELAND ELECTRIC ILLUMINATING COMPANY, AND THE TOLEDO EDISON COMPANY

I. INTRODUCTION

Pursuant to Ohio Admin. Code 4901-1-35(B), the Environmental Law & Policy Center ("ELPC") and Sierra Club hereby file this memorandum contra the application for rehearing of Ohio Edison Company, the Cleveland Electric Illuminating Company, and the Toledo Edison Company (collectively, "FirstEnergy" or "Companies"). FirstEnergy's application seeks rehearing on two aspects of the November 20, 2014 Finding and Order ("Order") of the Public Utilities Commission of Ohio ("Commission") in this case: first, the Commission's treatment of energy savings achieved by customers that have opted out from FirstEnergy's portfolio plan and therefore been excluded from its compliance baseline under Ohio Revised Code ("R.C.") 4928.66; and second, the Commission's decision to defer consideration of whether Senate Bill ("S.B.") 310 permits FirstEnergy to further amend its portfolio plan program mix or adjust its program budgets until FirstEnergy presents a specific request to do so. In both instances, the Commission's ruling is reasonable and consistent with the relevant statutory language, and therefore a grant of rehearing is inappropriate.

II. STANDARD OF REVIEW

Under R.C. 4903.10 and Ohio Admin. Code 4901-1-35, an application for rehearing must set forth specific grounds on which the applicant contends the Commission's order is unlawful or unreasonable. With respect to issues of interpretation of law, the Commission has discretion to implement a statute based on a "reasonable construction of the statutory scheme."[1] The Commission's expertise in addressing "highly specialized issues" within its areas of competence carries particular weight.[2]

III. ARGUMENT

A. The Commission Lawfully and Reasonably Decided to Bar FirstEnergy from Counting Prospective Energy Savings of Opt-Out Customers Toward Compliance with R.C. 4928.66.

In response to the arguments of Commission Staff and others, the Commission's Order held that, where a customer opts out of an amended energy efficiency ("EE") and peak demand reduction ("PDR") portfolio plan pursuant to Section 8 of S.B. 310, "FirstEnergy should not be permitted to count savings from customers who have elected to opt out toward meeting the statutory [EE and PDR] benchmarks" under R.C. 4928.66.[3] The Commission lawfully and reasonably rested this decision on the fact that R.C. 4928.66(A)(2)(a) excludes the load and usage of such opt-out customers from the calculation of a utility's compliance baseline under R.C. 4928.66, and thus the provision as a whole "indicates that customers who elect to opt out are essentiallyexcluded from consideration for purposes of EE/PDR programs and benchmarks."[4]

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[1] *Northwestern Ohio Bldg. & Constr. Trades Council v. Conrad*, 92 Ohio St. 3d 282, 287, 750 N.E.2d 130 (Ohio 2001).
[2] *Office of Consumers' Counsel v. Pub. Util. Comm.*, 58 Ohio St. 2d 108, 110, 120, 388 N.E.2d 1370 (1979).
[3] Order at 10.
[4] *Id.* at 9-10.

In its rehearing application, FirstEnergy asserts that the Commission's ruling excluding the prospective energy savings of opt-out customers from compliance under R.C. 4928.66 was unlawful because it conflicts with R.C. 4928.662 and with S.B. 310's purpose of achieving "affordable energy" for Ohio customers.[5] However, FirstEnergy's reliance on these general provisions and purposes fails to recognize that the General Assembly provided a specific mechanism for dealing with opt-out customers through calculation of a utility's compliance baselines, and the Commission's ruling is consistent with that mechanism and the General Assembly's underlying intent.

R.C. 4928.66(A)(1)(a) and (A)(1)(b) provide that a utility's EE and PDR targets for each year must be set equal to a percentage of the total baseline kilowatt hours and peak demand usage of that utility's customers. In other words, a utility's compliance with R.C. 4928.66 must be measured based on its ability to reduce the baseline energy usage of its customers by a set proportion. R.C. 4928.66(A)(2)(a) requires the exclusion of the load and usage of opt-out customers from those baseline figures, with the result that the utility's quantitative EE and PDR benchmarks are lowered because the utility does not have to achieve the proportional energy savings from opt-out customers. R.C. 4928.66 thus creates a specific mechanism for lowering a utility's EE and PDR compliance targets – and its associated costs of compliance – with respect to opt-out customers: excluding their load and usage from the baselines used to calculate those targets on the front end.

Having so specifically addressed the issue of opt-out customers with respect to compliance benchmarks under R.C. 4928.66, it is notable that the General Assembly included no similar language regarding opt-out customers in R.C. 4928.662. That provision directs the

[5] FirstEnergy Rehearing App. at 2, 5-7.

PUCO to count customer actions resulting in energy savings toward utility compliance with R.C. 4928.66 where those actions "comply with federal standards for either or both energy efficiency and peak demand reduction requirements." However, R.C. 4928.662 does not say anything about the treatment of customer energy savings where the load and usage of the customers at issue has been excluded from the utility's compliance baseline.[6] Most likely, this silence in R.C. 4928.662 shows that the General Assembly dealt with the issue of opt-out customers completely in R.C. 4928.66, by excluding them from consideration with respect to the EE and PDR benchmarks altogether. That reading of the statute is faithful to the well-established principle of statutory interpretation holding that a specific provision applies over a general provision absent "manifest legislative intent that the general provision prevail."[7]

Alternatively, the silence in R.C. 4928.662 regarding opt-out customers represents an ambiguity as to how to reasonably implement the statute with respect to those customers. The Ohio Supreme Court has held that in such instances of legislative silence regarding details of implementation, "the agency is to perform the act in a reasonable manner based upon a reasonable construction of the statutory scheme."[8] That "reasonable interpretation of the legislative scheme" then merits deference by a reviewing court.[9] As explained by the Commission in its Order, it is eminently reasonable to treat opt-out customers the same with

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[6] *Id.* at 10.

[7] *Meyer v. United Parcel Serv., Inc.*, 122 Ohio St. 3d 104, 2009-Ohio-2463, 909 N.E.2d 106, ¶ 21.

[8] *Northwestern Ohio Bldg. & Constr. Trades Council*, 92 Ohio St. 3d 282, 287, 750 N.E.2d 130; *see also State ex rel. Gill v. Sch. Employees Retirement Sys. of Ohio*, 121 Ohio St. 3d 567, 572, 906 N.E.2d 415 (2009) ("Insofar as the applicable statutes are silent on the issue of the School Employees Retirement System (SERS) declining to consider an application for combined disability retirement benefits under SERS and the Public Employees Retirement System (PERS) when a member is already receiving independent benefits under PERS, SERS must be accorded the deference to which it is entitled in interpreting the pertinent legislation.").

[9] *Northwestern Ohio Bldg. & Constr.* at 287.

respect to the calculation of compliance baselines and the determination of achievement of those baselines: as if they do not exist.[10]

FirstEnergy asserts that one particular problem with the Commission's approach is that its ratepayers will lose the advantage of the participation of opt-out customers in interruptible load contracts under Rider ELR if the load reductions from those contracts are not applied toward compliance with R.C. 4928.66.[11] However, as long as FirstEnergy bids any resulting demand resources into the PJM Base Residual Auction, its customers will still receive the benefits of lower wholesale capacity prices and revenues resulting from those PJM bids. Moreover, it is not clear that FirstEnergy's contention that opt-out customers will still be eligible to participate in Rider ELR is true. Section 10 of S.B. 310 mandates that no opt-out customer shall be "eligible to participate in, or directly benefit from, programs arising from the amended portfolio plan" – which, for FirstEnergy, includes Rider ELR.[12] At the least, this seems to be an ambiguous issue under S.B. 310, which the Commission resolved reasonably and within its legal discretion by holding that once opt-out customers are excluded from calculation of the R.C. 4928.66 baselines, their energy savings cannot be added back in for compliance on the back end.

B. The Commission Lawfully and Reasonably Deferred Any Decision Regarding FirstEnergy's Ability to Amend Its Portfolio Plan Program Mix or Budgets.

FirstEnergy contends that the Commission erred by declining to prospectively authorize FirstEnergy to undertake unspecified amendments of its portfolio plan program mix and program budgets.[13] Not only was the Commission well within its legal authority to do so, but its decision

[10] Order at 9.
[11] FirstEnergy Rehearing App. at 6-7.
[12] FirstEnergy App. at 7 (Sept. 24, 2014).
[13] *See* Order at 20.

represents a reasonable approach to an issue that will require fact-specific consideration of the details of any changes proposed by FirstEnergy.

S.B. 310 relevantly provides that "Prior to January 1, 2017, the Commission shall not take any action with regard to any portfolio plan or application regarding a portfolio plan, except those actions expressly authorized or required by Section 6 of this act and actions necessary to administer the implementation of existing portfolio plans."[14] According to FirstEnergy, this provision means that the Commission may not take any action to restrict its implementation of its portfolio plans over the next two years, while FirstEnergy may rely on provisions of its amended portfolio plan and Commission rules predating S.B. 310 to take any action relating to adjustment of its portfolio plan program mix or program budgets.[15]

Section 7(B) of S.B. 310 restricts the Commission to taking only two specific types of actions with respect to portfolio plans in 2015 and 2016: those "expressly authorized or required by Section 6" and those "necessary to administer the implementation of existing portfolio plans." FirstEnergy's approach would obviate these restrictions by allowing for free-ranging amendments of portfolio plans that the General Assembly intended to put on pause over the next two years. As outlined in Section 6, S.B. 310 allows a utility to propose amendment of its portfolio plan only in the limited 30-day window after the effective date of that provision; otherwise the utility must "[c]ontinue to implement the portfolio plan with no amendments to the plan."[16] However, if the Commission were to allow FirstEnergy to change its program mix and program budgets, FirstEnergy could effectively amend its portfolio plan outside the time period

[14] S.B. 310, Section 7(B).
[15] FirstEnergy Rehearing App. at 8-9.
[16] S.B. 310, Section 6(A)(1).

provided by the General Assembly.[17] Nor can such significant changes as altering the programs included within a portfolio plan qualify as "implementation" of the plan, otherwise that word would lose all meaning and FirstEnergy's novel interpretation of "implementation" would allow the Commission to approve any action it wished with respect to a portfolio plan as "plan implementation" over the next two years. In sum, allowing the Commission to approve a plan that can then be changed at any time before 2017 – either with or without Commission approval – renders Section 7(B) a nullity by providing for actions that are neither permissible plan amendments under section 6 nor merely implementation of an approved plan.

The Commission appropriately chose to avoid this dilemma by reserving the issue of the application of Section 7(B) until FirstEnergy makes some specific proposal to alter its portfolio plan. FirstEnergy identifies no legal mandate requiring that the Commission rule on this issue now. Moreover, it is reasonable for the Commission to defer consideration of FirstEnergy's arguments because so much depends on the details of what FirstEnergy proposes to do. As outlined above, FirstEnergy could seek program or budget changes that would effectively amend its portfolio plan in contravention of Sections 6 and 7(B) of S.B. 310. Conversely, FirstEnergy might seek minor adjustments to specific budget line items in response to changing circumstances that would truly constitute implementation of the portfolio plan in accordance with its original intentions as approved by the Commission. It is impossible for the Commission to offer a blanket prospective approval for all such changes knowing that some of them might be impermissible under S.B. 310. Accordingly, the Commission should adhere to its well-considered original ruling on this issue.

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[17] FirstEnergy's proposal that it be able to change its program mix in ways that would alter the overall cost-effectiveness of its portfolio plan is particularly troubling given the Commission's determination that FirstEnergy had failed to satisfactorily demonstrate the overall cost-effectiveness of even its original proposed plan or new proposed programs. Order at 12-13.

IV. CONCLUSION

For the reasons set forth above, ELPC and Sierra Club respectfully request that the Commission deny FirstEnergy's Application for Rehearing.

Dated: January 2, 2015

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Memorandum Contra has been filed via facsimile with the Public Utilities Commission of Ohio and has been served upon the following parties via electronic mail on January 2, 2015.

/s/ Robert Kelter
Robert Kelter

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FirstEnergy contends that the Commission erred by declining to prospectively authorize FirstEnergy to undertake unspecified amendments of its portfolio plan program mix and program budgets.[13] Not only was the Commission well within its legal authority to do so, but its decision

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[17] FirstEnergy's proposal that it be able to change its program mix in ways that would alter the overall cost-effectiveness of its portfolio plan is particularly troubling given the Commission's determination that FirstEnergy had failed to satisfactorily demonstrate the overall cost-effectiveness of even its original proposed plan or new proposed programs. Order at 12-13.

IV. CONCLUSION

For the reasons set forth above, ELPC and Sierra Club respectfully request that the Commission deny FirstEnergy's Application for Rehearing.

Dated: January 2, 2015

Respectfully submitted,

/s/ Robert Kelter
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Memorandum Contra has been filed via facsimile with the Public Utilities Commission of Ohio and has been served upon the following parties via electronic mail on January 2, 2015.

/s/ Robert Kelter
Robert Kelter

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[3] Order at 10.
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In its rehearing application, FirstEnergy asserts that the Commission's ruling excluding the prospective energy savings of opt-out customers from compliance under R.C. 4928.66 was unlawful because it conflicts with R.C. 4928.662 and with S.B. 310's purpose of achieving "affordable energy" for Ohio customers.[5] However, FirstEnergy's reliance on these general provisions and purposes fails to recognize that the General Assembly provided a specific mechanism for dealing with opt-out customers through calculation of a utility's compliance baselines, and the Commission's ruling is consistent with that mechanism and the General Assembly's underlying intent.

R.C. 4928.66(A)(1)(a) and (A)(1)(b) provide that a utility's EE and PDR targets for each year must be set equal to a percentage of the total baseline kilowatt hours and peak demand usage of that utility's customers. In other words, a utility's compliance with R.C. 4928.66 must be measured based on its ability to reduce the baseline energy usage of its customers by a set proportion. R.C. 4928.66(A)(2)(a) requires the exclusion of the load and usage of opt-out customers from those baseline figures, with the result that the utility's quantitative EE and PDR benchmarks are lowered because the utility does not have to achieve the proportional energy savings from opt-out customers. R.C. 4928.66 thus creates a specific mechanism for lowering a utility's EE and PDR compliance targets – and its associated costs of compliance – with respect to opt-out customers: excluding their load and usage from the baselines used to calculate those targets on the front end.

Having so specifically addressed the issue of opt-out customers with respect to compliance benchmarks under R.C. 4928.66, it is notable that the General Assembly included no similar language regarding opt-out customers in R.C. 4928.662. That provision directs the

[5] FirstEnergy Rehearing App. at 2, 5-7.

PUCO to count customer actions resulting in energy savings toward utility compliance with R.C. 4928.66 where those actions "comply with federal standards for either or both energy efficiency and peak demand reduction requirements." However, R.C. 4928.662 does not say anything about the treatment of customer energy savings where the load and usage of the customers at issue has been excluded from the utility's compliance baseline.[6] Most likely, this silence in R.C. 4928.662 shows that the General Assembly dealt with the issue of opt-out customers completely in R.C. 4928.66, by excluding them from consideration with respect to the EE and PDR benchmarks altogether. That reading of the statute is faithful to the well-established principle of statutory interpretation holding that a specific provision applies over a general provision absent "manifest legislative intent that the general provision prevail."[7]

Alternatively, the silence in R.C. 4928.662 regarding opt-out customers represents an ambiguity as to how to reasonably implement the statute with respect to those customers. The Ohio Supreme Court has held that in such instances of legislative silence regarding details of implementation, "the agency is to perform the act in a reasonable manner based upon a reasonable construction of the statutory scheme."[8] That "reasonable interpretation of the legislative scheme" then merits deference by a reviewing court.[9] As explained by the Commission in its Order, it is eminently reasonable to treat opt-out customers the same with

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[6] *Id.* at 10.
[7] *Meyer v. United Parcel Serv., Inc.*, 122 Ohio St. 3d 104, 2009-Ohio-2463, 909 N.E.2d 106, ¶ 21.
[8] *Northwestern Ohio Bldg. & Constr. Trades Council*, 92 Ohio St. 3d 282, 287, 750 N.E.2d 130; *see also State ex rel. Gill v. Sch. Employees Retirement Sys. of Ohio*, 121 Ohio St. 3d 567, 572, 906 N.E.2d 415 (2009) ("Insofar as the applicable statutes are silent on the issue of the School Employees Retirement System (SERS) declining to consider an application for combined disability retirement benefits under SERS and the Public Employees Retirement System (PERS) when a member is already receiving independent benefits under PERS, SERS must be accorded the deference to which it is entitled in interpreting the pertinent legislation.").
[9] *Northwestern Ohio Bldg. & Constr.* at 287.

respect to the calculation of compliance baselines and the determination of achievement of those baselines: as if they do not exist.[10]

FirstEnergy asserts that one particular problem with the Commission's approach is that its ratepayers will lose the advantage of the participation of opt-out customers in interruptible load contracts under Rider ELR if the load reductions from those contracts are not applied toward compliance with R.C. 4928.66.[11] However, as long as FirstEnergy bids any resulting demand resources into the PJM Base Residual Auction, its customers will still receive the benefits of lower wholesale capacity prices and revenues resulting from those PJM bids. Moreover, it is not clear that FirstEnergy's contention that opt-out customers will still be eligible to participate in Rider ELR is true. Section 10 of S.B. 310 mandates that no opt-out customer shall be "eligible to participate in, or directly benefit from, programs arising from the amended portfolio plan" – which, for FirstEnergy, includes Rider ELR.[12] At the least, this seems to be an ambiguous issue under S.B. 310, which the Commission resolved reasonably and within its legal discretion by holding that once opt-out customers are excluded from calculation of the R.C. 4928.66 baselines, their energy savings cannot be added back in for compliance on the back end.

B. The Commission Lawfully and Reasonably Deferred Any Decision Regarding FirstEnergy's Ability to Amend Its Portfolio Plan Program Mix or Budgets.

FirstEnergy contends that the Commission erred by declining to prospectively authorize FirstEnergy to undertake unspecified amendments of its portfolio plan program mix and program budgets.[13] Not only was the Commission well within its legal authority to do so, but its decision

[10] Order at 9.
[11] FirstEnergy Rehearing App. at 6-7.
[12] FirstEnergy App. at 7 (Sept. 24, 2014).
[13] *See* Order at 20.

represents a reasonable approach to an issue that will require fact-specific consideration of the details of any changes proposed by FirstEnergy.

S.B. 310 relevantly provides that "Prior to January 1, 2017, the Commission shall not take any action with regard to any portfolio plan or application regarding a portfolio plan, except those actions expressly authorized or required by Section 6 of this act and actions necessary to administer the implementation of existing portfolio plans."[14] According to FirstEnergy, this provision means that the Commission may not take any action to restrict its implementation of its portfolio plans over the next two years, while FirstEnergy may rely on provisions of its amended portfolio plan and Commission rules predating S.B. 310 to take any action relating to adjustment of its portfolio plan program mix or program budgets.[15]

Section 7(B) of S.B. 310 restricts the Commission to taking only two specific types of actions with respect to portfolio plans in 2015 and 2016: those "expressly authorized or required by Section 6" and those "necessary to administer the implementation of existing portfolio plans." FirstEnergy's approach would obviate these restrictions by allowing for free-ranging amendments of portfolio plans that the General Assembly intended to put on pause over the next two years. As outlined in Section 6, S.B. 310 allows a utility to propose amendment of its portfolio plan only in the limited 30-day window after the effective date of that provision; otherwise the utility must "[c]ontinue to implement the portfolio plan with no amendments to the plan."[16] However, if the Commission were to allow FirstEnergy to change its program mix and program budgets, FirstEnergy could effectively amend its portfolio plan outside the time period

[14] S.B. 310, Section 7(B).
[15] FirstEnergy Rehearing App. at 8-9.
[16] S.B. 310, Section 6(A)(1).

provided by the General Assembly.[17] Nor can such significant changes as altering the programs included within a portfolio plan qualify as "implementation" of the plan, otherwise that word would lose all meaning and FirstEnergy's novel interpretation of "implementation" would allow the Commission to approve any action it wished with respect to a portfolio plan as "plan implementation" over the next two years. In sum, allowing the Commission to approve a plan that can then be changed at any time before 2017 – either with or without Commission approval – renders Section 7(B) a nullity by providing for actions that are neither permissible plan amendments under section 6 nor merely implementation of an approved plan.

The Commission appropriately chose to avoid this dilemma by reserving the issue of the application of Section 7(B) until FirstEnergy makes some specific proposal to alter its portfolio plan. FirstEnergy identifies no legal mandate requiring that the Commission rule on this issue now. Moreover, it is reasonable for the Commission to defer consideration of FirstEnergy's arguments because so much depends on the details of what FirstEnergy proposes to do. As outlined above, FirstEnergy could seek program or budget changes that would effectively amend its portfolio plan in contravention of Sections 6 and 7(B) of S.B. 310. Conversely, FirstEnergy might seek minor adjustments to specific budget line items in response to changing circumstances that would truly constitute implementation of the portfolio plan in accordance with its original intentions as approved by the Commission. It is impossible for the Commission to offer a blanket prospective approval for all such changes knowing that some of them might be impermissible under S.B. 310. Accordingly, the Commission should adhere to its well-considered original ruling on this issue.

[17] FirstEnergy's proposal that it be able to change its program mix in ways that would alter the overall cost-effectiveness of its portfolio plan is particularly troubling given the Commission's determination that FirstEnergy had failed to satisfactorily demonstrate the overall cost-effectiveness of even its original proposed plan or new proposed programs. Order at 12-13.

IV. CONCLUSION

For the reasons set forth above, ELPC and Sierra Club respectfully request that the Commission deny FirstEnergy's Application for Rehearing.

Dated: January 2, 2015

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Memorandum Contra has been filed via facsimile with the Public Utilities Commission of Ohio and has been served upon the following parties via electronic mail on January 2, 2015.

/s/ Robert Kelter
Robert Kelter

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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

ENVIRONMENTAL LAW & POLICY CENTER'S AND SIERRA CLUB'S MEMORANDUM CONTRA APPLICATION FOR REHEARING OF OHIO EDISON COMPANY, THE CLEVELAND ELECTRIC ILLUMINATING COMPANY, AND THE TOLEDO EDISON COMPANY

I. INTRODUCTION

Pursuant to Ohio Admin. Code 4901-1-35(B), the Environmental Law & Policy Center ("ELPC") and Sierra Club hereby file this memorandum contra the application for rehearing of Ohio Edison Company, the Cleveland Electric Illuminating Company, and the Toledo Edison Company (collectively, "FirstEnergy" or "Companies"). FirstEnergy's application seeks rehearing on two aspects of the November 20, 2014 Finding and Order ("Order") of the Public Utilities Commission of Ohio ("Commission") in this case: first, the Commission's treatment of energy savings achieved by customers that have opted out from FirstEnergy's portfolio plan and therefore been excluded from its compliance baseline under Ohio Revised Code ("R.C.") 4928.66; and second, the Commission's decision to defer consideration of whether Senate Bill ("S.B.") 310 permits FirstEnergy to further amend its portfolio plan program mix or adjust its program budgets until FirstEnergy presents a specific request to do so. In both instances, the Commission's ruling is reasonable and consistent with the relevant statutory language, and therefore a grant of rehearing is inappropriate.

II. STANDARD OF REVIEW

Under R.C. 4903.10 and Ohio Admin. Code 4901-1-35, an application for rehearing must set forth specific grounds on which the applicant contends the Commission's order is unlawful or unreasonable. With respect to issues of interpretation of law, the Commission has discretion to implement a statute based on a "reasonable construction of the statutory scheme."[1] The Commission's expertise in addressing "highly specialized issues" within its areas of competence carries particular weight.[2]

III. ARGUMENT

A. The Commission Lawfully and Reasonably Decided to Bar FirstEnergy from Counting Prospective Energy Savings of Opt-Out Customers Toward Compliance with R.C. 4928.66.

In response to the arguments of Commission Staff and others, the Commission's Order held that, where a customer opts out of an amended energy efficiency ("EE") and peak demand reduction ("PDR") portfolio plan pursuant to Section 8 of S.B. 310, "FirstEnergy should not be permitted to count savings from customers who have elected to opt out toward meeting the statutory [EE and PDR] benchmarks" under R.C. 4928.66.[3] The Commission lawfully and reasonably rested this decision on the fact that R.C. 4928.66(A)(2)(a) excludes the load and usage of such opt-out customers from the calculation of a utility's compliance baseline under R.C. 4928.66, and thus the provision as a whole "indicates that customers who elect to opt out are essentiallyexcluded from consideration for purposes of EE/PDR programs and benchmarks."[4]

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[1] *Northwestern Ohio Bldg. & Constr. Trades Council v. Conrad*, 92 Ohio St. 3d 282, 287, 750 N.E.2d 130 (Ohio 2001).
[2] *Office of Consumers' Counsel v. Pub. Util. Comm.*, 58 Ohio St. 2d 108, 110, 120, 388 N.E.2d 1370 (1979).
[3] Order at 10.
[4] *Id.* at 9-10.

In its rehearing application, FirstEnergy asserts that the Commission's ruling excluding the prospective energy savings of opt-out customers from compliance under R.C. 4928.66 was unlawful because it conflicts with R.C. 4928.662 and with S.B. 310's purpose of achieving "affordable energy" for Ohio customers.[5] However, FirstEnergy's reliance on these general provisions and purposes fails to recognize that the General Assembly provided a specific mechanism for dealing with opt-out customers through calculation of a utility's compliance baselines, and the Commission's ruling is consistent with that mechanism and the General Assembly's underlying intent.

R.C. 4928.66(A)(1)(a) and (A)(1)(b) provide that a utility's EE and PDR targets for each year must be set equal to a percentage of the total baseline kilowatt hours and peak demand usage of that utility's customers. In other words, a utility's compliance with R.C. 4928.66 must be measured based on its ability to reduce the baseline energy usage of its customers by a set proportion. R.C. 4928.66(A)(2)(a) requires the exclusion of the load and usage of opt-out customers from those baseline figures, with the result that the utility's quantitative EE and PDR benchmarks are lowered because the utility does not have to achieve the proportional energy savings from opt-out customers. R.C. 4928.66 thus creates a specific mechanism for lowering a utility's EE and PDR compliance targets – and its associated costs of compliance – with respect to opt-out customers: excluding their load and usage from the baselines used to calculate those targets on the front end.

Having so specifically addressed the issue of opt-out customers with respect to compliance benchmarks under R.C. 4928.66, it is notable that the General Assembly included no similar language regarding opt-out customers in R.C. 4928.662. That provision directs the

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PUCO to count customer actions resulting in energy savings toward utility compliance with R.C. 4928.66 where those actions "comply with federal standards for either or both energy efficiency and peak demand reduction requirements." However, R.C. 4928.662 does not say anything about the treatment of customer energy savings where the load and usage of the customers at issue has been excluded from the utility's compliance baseline.[6] Most likely, this silence in R.C. 4928.662 shows that the General Assembly dealt with the issue of opt-out customers completely in R.C. 4928.66, by excluding them from consideration with respect to the EE and PDR benchmarks altogether. That reading of the statute is faithful to the well-established principle of statutory interpretation holding that a specific provision applies over a general provision absent "manifest legislative intent that the general provision prevail."[7]

Alternatively, the silence in R.C. 4928.662 regarding opt-out customers represents an ambiguity as to how to reasonably implement the statute with respect to those customers. The Ohio Supreme Court has held that in such instances of legislative silence regarding details of implementation, "the agency is to perform the act in a reasonable manner based upon a reasonable construction of the statutory scheme."[8] That "reasonable interpretation of the legislative scheme" then merits deference by a reviewing court.[9] As explained by the Commission in its Order, it is eminently reasonable to treat opt-out customers the same with

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[8] *Northwestern Ohio Bldg. & Constr. Trades Council*, 92 Ohio St. 3d 282, 287, 750 N.E.2d 130; *see also State ex rel. Gill v. Sch. Employees Retirement Sys. of Ohio*, 121 Ohio St. 3d 567, 572, 906 N.E.2d 415 (2009) ("Insofar as the applicable statutes are silent on the issue of the School Employees Retirement System (SERS) declining to consider an application for combined disability retirement benefits under SERS and the Public Employees Retirement System (PERS) when a member is already receiving independent benefits under PERS, SERS must be accorded the deference to which it is entitled in interpreting the pertinent legislation.").

[9] *Northwestern Ohio Bldg. & Constr.* at 287.

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FirstEnergy asserts that one particular problem with the Commission's approach is that its ratepayers will lose the advantage of the participation of opt-out customers in interruptible load contracts under Rider ELR if the load reductions from those contracts are not applied toward compliance with R.C. 4928.66.[11] However, as long as FirstEnergy bids any resulting demand resources into the PJM Base Residual Auction, its customers will still receive the benefits of lower wholesale capacity prices and revenues resulting from those PJM bids. Moreover, it is not clear that FirstEnergy's contention that opt-out customers will still be eligible to participate in Rider ELR is true. Section 10 of S.B. 310 mandates that no opt-out customer shall be "eligible to participate in, or directly benefit from, programs arising from the amended portfolio plan" – which, for FirstEnergy, includes Rider ELR.[12] At the least, this seems to be an ambiguous issue under S.B. 310, which the Commission resolved reasonably and within its legal discretion by holding that once opt-out customers are excluded from calculation of the R.C. 4928.66 baselines, their energy savings cannot be added back in for compliance on the back end.

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FirstEnergy contends that the Commission erred by declining to prospectively authorize FirstEnergy to undertake unspecified amendments of its portfolio plan program mix and program budgets.[13] Not only was the Commission well within its legal authority to do so, but its decision

[10] Order at 9.
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represents a reasonable approach to an issue that will require fact-specific consideration of the details of any changes proposed by FirstEnergy.

S.B. 310 relevantly provides that "Prior to January 1, 2017, the Commission shall not take any action with regard to any portfolio plan or application regarding a portfolio plan, except those actions expressly authorized or required by Section 6 of this act and actions necessary to administer the implementation of existing portfolio plans."[14] According to FirstEnergy, this provision means that the Commission may not take any action to restrict its implementation of its portfolio plans over the next two years, while FirstEnergy may rely on provisions of its amended portfolio plan and Commission rules predating S.B. 310 to take any action relating to adjustment of its portfolio plan program mix or program budgets.[15]

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[14] S.B. 310, Section 7(B).
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provided by the General Assembly.[17] Nor can such significant changes as altering the programs included within a portfolio plan qualify as "implementation" of the plan, otherwise that word would lose all meaning and FirstEnergy's novel interpretation of "implementation" would allow the Commission to approve any action it wished with respect to a portfolio plan as "plan implementation" over the next two years. In sum, allowing the Commission to approve a plan that can then be changed at any time before 2017 – either with or without Commission approval – renders Section 7(B) a nullity by providing for actions that are neither permissible plan amendments under section 6 nor merely implementation of an approved plan.

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[17] FirstEnergy's proposal that it be able to change its program mix in ways that would alter the overall cost-effectiveness of its portfolio plan is particularly troubling given the Commission's determination that FirstEnergy had failed to satisfactorily demonstrate the overall cost-effectiveness of even its original proposed plan or new proposed programs. Order at 12-13.

IV. CONCLUSION

For the reasons set forth above, ELPC and Sierra Club respectfully request that the Commission deny FirstEnergy's Application for Rehearing.

Dated: January 2, 2015

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Memorandum Contra has been filed via facsimile with the Public Utilities Commission of Ohio and has been served upon the following parties via electronic mail on January 2, 2015.

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