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FirstEnergy

FILE

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May 27, 2009

Ms. Renee J. Jenkins
Director, Administration Department
Secretary to the Commission
Docketing Division
The Public Utilities Commission of Ohio
180 East Broad Street
Columbus, OH 43215-3793

Dear Ms. Jenkins:

Re: ***Case No. 08-888-EL-ORD***
FirstEnergy Companies' Memorandum Contra the Application for Rehearing

Enclosed for filing, please find the original and twelve (12) copies of FirstEnergy Companies' Memorandum Contra the Application for Rehearing. Please file the enclosed in the above-referenced docket, time-stamping the two extras and returning them to the undersigned.

Thank you for your assistance in this matter. Please contact me if you have any questions concerning this matter.

Very truly yours,

Kathy J. Kolich/JMS

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Enclosures

cc: Parties of Record

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BEFORE THE
PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Adoption of Rules for Alternative and Renewable Energy Technologies and Resources, and Emission Control Reporting Requirements, and Amendment of Chapters 4901:5-1, 4901:5-3, 4901:5-5, and 4901:5-7 of the Ohio Administrative Code, Pursuant to Chapter 4928, Revised Code, to Implement Senate Bill No. 221.	))))))))))	**Case No. 08-888-EL-ORD**

OHIO EDISON COMPANY, THE CLEVELAND ELECTRIC ILLUMINATING COMPANY, AND THE TOLEDO EDISON COMPANY'S MEMORANDUM CONTRA THE APPLICATIONS FOR REHEARING

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I. INTRODUCTION

Pursuant to Section 4901-1-35(B) of the Ohio Administrative Code and the Attorney Examiner's May 21, 2009 Entry, Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company (collectively, "Companies") submit their Memorandum Contra Applications for Rehearing submitted by the Ohio Consumer and Environmental Advocates ("OCEA"), the Industrial Energy Users – Ohio ("IEU"), The Kroger Co. ("Kroger") and Duke Energy – Ohio ("Duke"). Numerous other parties submitted requests for rehearing, many of which suggest proposals consistent with the arguments set forth in the Companies' Application for Rehearing that was filed on May 15, 2009. The Companies support those proposals that are consistent with such arguments. However, the Companies respectfully submit that several other proposals, which are more fully addressed below, would result in unlawful, unreasonable and/or unnecessary mandates that are beyond the letter and spirit of Am. Sub. 221 ("S.B. 221") and, accordingly, the Commission should reject them.

II. ARGUMENTS

A. New Chapter 4901:1-39: Energy Efficiency/Demand Reduction Issues

1. OCEA's suggested modifications to Rule 4901:1-39-06(B) are unnecessary and/or contrary to R.C. 4928.66.

OCEA suggests modifications to Rule 4901:1-33-06(B), claiming that the "rule does not adequately reflect the requirements of R.C. § 4928.66, which requires that forfeitures be made and that they be deposited to the Advanced Energy Fund." (OCEA Application for Rehearing ("AFR"), p. 12.) It then suggests a change that would mandate the Staff to recommend the assessment of a forfeiture if Staff finds that an electric utility has not demonstrated compliance with the approved program portfolio plan or annual sales or peak-demand reductions required by R.C. § 4928.66. (Id. at 13.) The first suggested change is unnecessary and is redundant with that which is already required by statute. *See* R.C. § 4928.66. It is not error simply because a Commission rule does not reiterate a statutory provision and, in this instance, OCEA cites no provision of the rule that contradicts the statute in question. The statute controls regardless of whether provision of the same are included in the rule.

The Companies also oppose OCEA's second suggestion as being contrary to statute.

Revised Code Section 4928.66, states:

> (C) If the commission determines, *after notice and opportunity for hearing* and *based upon its report under division (B) of this section*, that an electric distribution utility has failed to comply with an energy efficiency or peak demand reduction requirement of division (A) of this section, the commission shall assess a forfeiture on the utility as provided under sections 4905.55 to 4905.60 and 4905.64 of the Revised Code ....

As evidenced by the above statute, the legislature intended for the *Commission* to determine whether an assessment of a forfeiture is necessary and then only after the electric distribution utility has had the opportunity to be heard on the matter. A Staff review is not a comprehensive fact finding proceeding and, therefore, to mandate such a recommendation during a Staff investigation is premature. Moreover, there may be circumstances that require additional investigation or litigation before a proper conclusion can be reached by Staff. Indeed, R.C. § 4928.66(A)(2)(b) allows the Commission to amend the benchmark requirements set forth in R.C. 4928.66(A)(1)(a) or (b) "if, after application by the EDU, the commission determines that the amendment is necessary because the utility cannot reasonably achieve the benchmarks due to regulatory, economic, or technological reasons beyond its reasonable control." Therefore, while the Staff may find non-compliance during its investigation, there may be circumstances that would support an amendment thereby negating any Staff finding of non-compliance, thus avoiding any assessment of a forfeiture. Staff may even agree that such circumstances exist. Yet, if OCEA's suggested change is adopted, Staff would be precluded from making a recommendation based on the totality of the circumstances. Such a mandate serves no useful purpose and is contrary to the unambiguous framework established in R.C. § 4928.66.

While it is Staff's role to investigate compliance, it is the Commission's role to determine actual compliance. Accordingly, the mandatory assessment of any forfeiture lies with the Commission and not its Staff. OCEA's suggested modification to Rule 4901:1-39-06(B) that requires the Staff to recommend an assessment of a forfeiture is unnecessary and contrary to statute and should, therefore, be rejected.

2. **OCEA's suggestion to incorporate the Societal Test into the definition of "non-energy" benefits, as set forth in Rule 4901:1-39-01(O) should be rejected.**

OCEA suggests that the "Commission should incorporate a standard way of calculating the nonenergy benefits, such as the Societal Test, into the definition of "nonenergy benefits." (OCEA AFR, pp. 9-10.) It claims that "[t]he Societal Test should become the standard method of calculating 'nonenergy benefits' because it evaluates parameters that will not be evaluated by the Total Resource Cost ["TRC"] Test." (Id. at 10.) As a preliminary matter, some of the measures that the OCEA considers to be societal benefits, such as air emissions, SO2, and NOx, are factors that are inherent in the market price forecast. Inasmuch as the market price forecast is a critical component in the TRC Test, applying a societal benefits test would "double count" the effects of these environmental factors, thus distorting the results. In light of this, OCEA's initial premise underlying its recommendation, at least as it pertains to certain of the factors included in the Societal Test, is wrong. The remainder of the factors in the Societal Test should also be excluded. Not only are they highly subjective and/or subject to personal preference, but if factored into the analysis, they could distort the decision making process to a point that results in the selection of projects, when assessed under objective criteria, that are either too costly or are less attractive than other options. Finally, it would be irresponsible for the Commission to make such a critical decision through the rehearing process. Before any decisions regarding changes to the TRC Test are made, the issue should be thoroughly vetted with all interested parties having the opportunity to address the matter. Simply because OCEA wants it does not make it right.

3. The OCEA's suggested changes to Rule 4901:1-39-07(A)(2) should be rejected as being contrary to statute.

OCEA suggests that the Commission should "clarify that under 4901:1-39-07(A)(2) mercantile customers must still contribute to lost distribution revenues because mercantile customers contribute to the utility's lost distribution revenues in the same way that other customers do even if they commit their advanced energy programs to the utility's programs." [1] (OCEA AFR, p. 13.) OCEA's suggestion is contrary to R.C. 4928.66(A)(2)(c) which provides in pertinent part:

> *Any mechanism designed to recover the cost of energy efficiency and peak demand reduction programs* under divisions (A)(1)(a) and (b) of this section *may exempt mercantile customers* that commit their demand response or other customer-sited capabilities, whether existing or new, for integration into the electric distribution utility's demand-response, energy efficiency, or peak demand reduction programs, *if the commission determines that that exemption reasonably encourages such customers to commit those capabilities to those programs.*

As indicated above, the statute provides for exemption from *any* mechanism that is designed to recover the costs of compliance programs. Lost revenues will be included in the Companies' rider for recovery of program costs. Moreover, the above statute provides the Commission with discretion to determine what may be necessary as an incentive for mercantile customers to participate in customer directed energy efficiency/demand reduction programs. By incorporating OCEA's blanket requirement to require mercantile customers to pay for lost distribution revenues, OCEA strips part of this discretion from the Commission, thereby eliminating part of the statutory authority conferred upon the Commission by statute.

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[1] In Case No. 08-935-EL-SSO, the Companies entered into a stipulation in which it agreed to allocate costs on a rate schedule/class specific basis or as otherwise recommended as part of the energy efficiency collaborative. [Case No. 08-935-EL-SSO, Para. E(2), Stipulation and Recommendation (Feb. 18, 2009)] Therefore, at least with regard to the Companies, OCEA's apparent concerns surrounding the subsidization of lost revenues created by another customer class appear to be moot.

Moreover, if OCEA's suggestion is adopted, it will create unnecessary rigidity in a process that is in its infancy. With all of the uncertainty surrounding compliance with S.B. 221 mandates, OCEA should recognize the need for flexibility as did Ohio's General Assembly when it provided the Commission with the discretion to evaluate exactly what is necessary to incent a mercantile customer to participate in energy efficiency and demand reduction programs. OCEA should trust the Commission's judgment. The Commission should reject OCEA's suggested modifications to Rule 4901:1-39-07(A)(2).

4. There appears to be confusion surrounding Rule 4901:1-39-08(B) which *must either* be clarified or, alternatively, modified to reflect the concerns raised by IEU and Kroger.

Both IEU and Kroger challenge the requirement set forth in Rule 4901:1-39-08(B) on the grounds that the joint filing for approval of a *special arrangement* is contrary to the statute that allows a mercantile customer to separately seek approval of a *reasonable arrangement*. As is more fully discussed below, if the Commission uses these two terms interchangeably, then the Companies agree with the arguments presented by IEU and Kroger and join in their recommendation for changes to Rule 4901:1-39-08(B). If, on the other hand, the Commission makes a distinction between the two terms as do the Companies, then, given the confusion surrounding this provision, the Companies urge the Commission to clarify the meaning of this rule.

Rule 4901:1-39-08(B) requires:

> The electric utility and mercantile customer shall file a joint application for approval of a *special arrangement* under this rule, which may include a request for an exemption from the cost recovery mechanism set forth in rule 4901:1-39-[07]. [Emphasis added.]

Revised Code Section 4905.31 provides:

> Chapters ... 4928 ... of the Revised Code do not prohibit a public utility from filing a schedule or establishing or entering into any *reasonable arrangement* with another public utility or with one or more of its customers ... and do not prohibit a mercantile customer of an electric distribution utility ... or a group of those customers from establishing a *reasonable arrangement* with that utility .... [Emphasis added.]

Both IEU and Kroger claim that the joint filing requirement set forth above is contrary to Ohio law. IEU argues that this aspect of the rule is unlawful because "the Commission cannot require a mercantile customer to make a joint application with an [electric distribution utility ("EDU")] for approval of a *reasonable arrangement.*" (IEU AFR, p. 19)(emphasis added.) It goes on to state that "the section of the law regarding *reasonable arrangement* application was changed to specifically permit mercantile customers to bring *reasonable arrangements* before the Commission on their own. (Id.) Kroger argues that "RC 4905.31 sets forth the process to file an application for *special arrangements* with the Commission. The statute allows the Commission to approve a *special arrangement* 'pursuant to an application that is submitted by the public utility *or* the mercantile customer.'" (Emphasis added, except for "or".)

Clearly Rule 4901:1-39-08(B) refers to "special arrangements", while R.C. § 4905.31 refers to "reasonable arrangements." If the Commission, in Rule 4901:1-39-08(B) is using the two terms interchangeably as does IEU and Kroger, then the Companies agree with the observations and arguments made by both of these parties. The Companies interpret the rule differently, however, distinguishing between the two terms. From the Companies' perspective, a "special arrangement" is an arrangement between the Companies and mercantile customers in which the mercantile customer dedicates its energy efficiency and/or demand reduction programs to the Companies for inclusion in their respective R.C. § 4928.66 compliance plans, while a "reasonable arrangement" is a financial device for a non-tariff arrangement with which the Companies may or may not agree. If the Commission makes a similar distinction, then the Companies see no inconsistency between the rule and the statute.

In light of the foregoing, however, it may behoove the Commission to clarify Rule 4901:1-39-08(B) so as to avoid such confusion on a going forward basis. Further, regardless of the Commission's intention, it must make clear that a mercantile customer is exempt from paying through the EDU's recovery mechanism *only if* its project qualifies for inclusion in the EDU's benchmark compliance requirements.

5. Kroger's suggestion to create a new mechanism for the recovery of costs associated with transmission and distribution upgrades should be rejected.

Kroger argues that an EDU "has a strong incentive" to fund only transmission and distribution ("T&D") energy efficiency programs that it implements to the detriment of customer energy efficiency initiatives. (Kroger, AFR, p. 3.) It therefore suggests that a separate recovery mechanism be created to recover costs incurred for EDU sponsored T&D projects and those sponsored by mercantile customers. (Id. at 5.)

As a preliminary matter, Kroger assumes that an EDU only designs T&D programs for energy efficiency purposes – an assumption that has never been proven to be correct. And as Rule 4901:1-39-07(A) currently provides, recovery under the mechanism contemplated in the rules is limited to only those costs "that are attributable to and undertaken primarily for energy efficiency or demand reduction purposes," with any such recovery contingent upon approval by the Commission. Revised Code Section 4928.66(A)(2)(d) states that an electric utility *may* include a variety of types of energy efficiency programs, including transmission and distribution infrastructure improvements that reduce line losses. The statute doesn't specify which programs must be used or require a specific allocation between types of programs. The statute does not split the programs into two types of categories and does not contemplate separate recovery mechanisms for each. Therefore, in light of the foregoing, Kroger presents no basis consistent with the statute to modify the rules. There are controls in place through the current rules that address the concerns raised by Kroger and, accordingly, its recommendation to create yet another recovery mechanism is unwarranted and should be rejected.

B. New Chapter 4901:1-40, "Alternative Energy Portfolio Standard."

1. OCEA's proposed revision to the baseline calculation is contrary to the statute and overly expansive.

A key element of S.B. 221 is its requirement that each EDU achieve specific benchmarks in the EDU's use of alternative energy resources in providing a standard service offer ("SSO"). *See* R.C. § 4928.64(B). For an EDU, the General Assembly tied the alternative energy requirement specifically to the EDU's SSO: "an electric distribution utility shall provide from alternative energy resources . . . *a portion of the electricity supply required for its standard service offer under section 4928.141 of the Revised Code* . . . ." *Id.* (emphasis added). Having established the SSO as the target for compliance, the General Assembly then provided later in the same paragraph that the baseline for this compliance "shall be the average of such total kilowatt hours it sold in the preceding three calendar years." *Id.* The Rules as proposed by the Commission's Order correctly mirror the General Assembly's directive for the baseline: the average of the total kilowatt hours sold in the preceding three years under the utility's SSO. Rule

4901:1-40-03(B); R.C. § 4928.64(B). Thus, this particular provision of the Rules is reasonable and lawful.

OCEA improperly seeks to expand the baseline by tying it to all of an EDU's sales, not just sales under an SSO. (OCEA AFR, pp. 16-17.) OCEA's mistake results from reading out of context the fourth sentence of R.C. § 4928.64(B) while ignoring the General Assembly's intent as expressed in Division (B) as a whole. The paramount concern in construing a statute is the legislature's intent. *State ex rel. Herman v. Klopfleisch* (1995), 72 Ohio St. 3d 581, 584. "In determining legislative intent, the court first looks to the language in the statute and the purpose to be accomplished." *State v. S.R.* (1992), 63 Ohio St. 3d 590, 594-595. The first sentence of R.C. § 4928.64(B) makes clear that the General Assembly's intent is to specify alternative energy requirements for that "portion of the electricity supply required for [an EDU's] standard service offer." Because the fourth sentence of Division (B) simply describes how the baseline for compliance with these requirements is to be calculated, OCEA's objection is unfounded.

OCEA also mistakenly complains that, if the baseline calculation is limited to an EDU's SSO, the baseline will not include load provided under special contracts and reasonable arrangements and would more quickly trigger the 3% cost cap. (OCEA AFR, pp. 16-17.) However, the SSO baseline does account for special contracts and reasonable arrangements to the extent those customers do not shop. Of course, the load of shopping customers cannot be included in an EDU's baseline as that load is the responsibility of, and subject to the alternative energy requirements applicable to, the electric services company servicing those shopping customers. An EDU's benchmarks relate to generation purchases for its SSO and, in order for the benchmarks to operate properly, the associated baseline must also track this same generation supply. OCEA's proposed revision, on the other hand, would include the load associated with all shopping customers, special contracts or otherwise. OCEA's proposal conflicts with R.C. § 4928.64 and, thus, must be denied.

2. OCEA's proposed revision to the definition of "co-firing" is unlawful and improperly shifts the General Assembly's focus away from increasing the use of renewable fuel sources.

OCEA's proposal to amend the definition of "co-firing" as set forth in its Application for Rehearing at pages 14 and 15 also runs counter to S.B. 221. Senate Bill 221's alternative energy provisions reflect the General Assembly's goal of increasing the use of "alternative energy *resources*" in "the electricity *supply* required" by Ohio consumers. R.C. § 4928.64(B) (emphasis added). The alternative energy provisions set parameters on the types of advanced and renewable fuel sources that qualify for compliance and also impose requirements on EDUs to account for their use of these fuel sources. OCEA, however, requests that the Commission add a layer of requirements beyond the nature of the fuel source that is completely unanticipated by S.B. 221 and unintended by the General Assembly. In addition to being unlawful, OCEA's proposal unreasonably would impose unnecessary costs on consumers.

OCEA improperly asks that the Commission add to the definition of "co-firing" in Rule 4901:1-40-01(G) a requirement that the energy output deemed a "renewable energy resource" include consideration of the "efficiency of the unit [used] in combusting the renewable fuel." (OCEA AFR, pp. 14-15.) This added language is wholly unanticipated by S.B. 221; it does not include any suggestion that the efficiency of the unit be considered in calculating output compliance. The unit efficiency is not determinative of whether the resources are renewable and, thus, it is inappropriate to incorporate that collateral efficiency into an assessment of the resources used.

OCEA's proposal also likely would expose customers to significant increases in rates as generation entities would be forced to expend further capital to make upgrades and/or construct wholly new facilities. S.B. 221 commits Ohio EDUs to achieve significant advances in the use of renewable energy resources while controlling the costs that customers will be asked to bear. OCEA's proposed amendment to the definition of "co-firing" serves only to place a significant barrier on EDUs seeking to carry out those advances in a cost effective and efficient manner. OCEA's request should be denied.

3. Duke improperly seeks to alter the statutory term for the life of eligible RECs.

Senate Bill 221 explicitly established that EDUs may use RECs to comply with the statute's renewable energy requirements "any time in the five calendar years following the date of their purchase or acquisition from any entity." R.C. § 4928.65. However, Duke asks the Commission to go against the statute's express terms and revise the Rules, specifically Rule 4901:1-40-04(D)(3), to shorten the useful life of RECs. Duke asks that the five-year term begin on the date the RECs were generated. *Compare* Duke AFR, pp. 8-9 *with* R.C. § 4928.65. In doing so, Duke does not even acknowledge the General Assembly's explicit language requiring the five-year period to begin on "the date [the REC] was purchased." *Id.*; R.C. § 4928.65. Duke provides no basis for its request beyond the complaint that RECs "would seem [otherwise] to have an infinite lifespan until the point at which it is sold." (Duke AFR, p. 9.) Duke's proposed change, however, is unlawful because it directly contradicts S.B. 221's unambiguous language. Further, such a change would be unreasonable as it would only lead to the waste of RECs that would expire under Duke's term before purchase. Duke's request for rehearing on Rule 4901:1-40-04(D)(3) should be denied.

C. Chapter 4901:5 – Long Term Forecast Reporting

1. OCEA's Proposed Additions to the Commission's Unlawful Integrated Resource Planning ("IRP") Rules Should Be Rejected.

OCEA suggests a number of additional requirements to make the already unlawful and burdensome IRP rules even more so, with the primary focus being on rules related to generation and generating capacity.[2] Most expressly exceed the statutory language cited in support. Because the suggested changes are proposed to be made to the Commission's IRP rules, all such changes should be rejected as part of the deletion of the IRP rules themselves. As the Companies laid out in detail in their Application for Rehearing, the Commission's adoption of IRP rules is unreasonable and unlawful, exceeds the Commission's statutory authority, directly violates legislative intent set forth in S.B. 3, which was not modified by S.B. 221, and contradicts the Commission's own Order in Case No. 99-1614-EL-ORD. Rather than reiterate herein the arguments in support of these observations, the Companies hereby incorporate by reference their Application for Rehearing at pages 30-32 and page 34 with reference to changes to the Long Term Forecast Report rules. Because the proposed IRP rules are unlawful, so too are OCEA's proposed changes to those rules. Accordingly, like the rules themselves, all of OCEA's suggested changes thereto must be rejected as exceeding the scope of the Commission's statutory authority.

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[2] The limited exceptions being to try to add provisions to the IRP rules based upon Long Term Forecast Report ("LTFR") statutes. The requirements of the LTFR statutes are already addressed in existing LTFR rules, which because they were not part of S.B. 221, should have no place in this rulemaking. Order, pp. 4, 41.

III. CONCLUSION

Based upon the foregoing, the Companies respectfully ask the Commission to deny rehearing on, or clarify as appropriate, the issues addressed above.

Respectfully submitted,

Kathy J. Kolich / JTS

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ATTORNEYS FOR APPLICANTS, OHIO EDISON COMPANY, THE CLEVELAND ELECTRIC ILLUMINATING COMPANY, AND THE TOLEDO EDISON COMPANY

CERTIFICATE OF SERVICE

Copies of the foregoing *Memorandum Contra the Applications for Rehearing of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company* were served by electronic mail to the persons on the attached Service List on this 27th day of May, 2009.

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