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FILE

BEFORE THE
PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Energy Efficiency and Peak Demand Reduction Program Portfolio of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company	)	**Case No. 09-580-EL-EEC 09-581-EL-EEC 09-582-EL-EEC**

OHIO EDISON COMPANY, THE CLEVELAND ELECTRIC ILLUMINATING COMPANY AND THE TOLEDO EDISON COMPANY'S MEMORANDUM CONTRA TO THE APPLICATION FOR REHEARING AND MOTION FOR PROCEDURAL SCHEDULE FILED BY THE OFFICE OF THE OHIO CONSUMERS' COUNSEL

I. Introduction

It's time for a reality check. The Commission's September 23, 2009 Finding and Order (the "Order") approving the two residential energy savings and peak demand reduction programs proposed in this proceeding was reasonable and lawful as to both of those programs – the High Efficiency Light Bulb Program (the "CFL program") and the Online Home Energy Education Tool Program. In its order, the Commission made two findings: (1) the programs are reasonable and approved; and (2) the request by Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company (the "Companies") to recover their costs associated with the programs was reasonable and approved. In making these findings, the Commission relied in part on support for the CFL program from several key stakeholders, including certain environmental groups and the OCC. That support was the end result of a lengthy, detailed, open collaborative process involving Commission Staff, multiple employees and attorneys of OCC, and other representatives of consumer and environmental groups. Nevertheless, media criticism (partly in response to OCC's criticism of the program) and limited, but vocal, negative public reaction resulted in the Commission asking the Companies to postpone the CFL program pending a further review of the program's costs.[1] The Companies agreed to do so and will continue to work with the Commission to satisfy its requests for additional information.

However, the OCC's effort – in the form of an Application for Rehearing and Motion for Procedural Schedule – to shield itself from media scrutiny by claiming ignorance and requesting additional "process" does not merit serious consideration and should be summarily denied. Remarkably, OCC seeks rehearing of an Order with which it substantively agreed and which is essential in order for the Companies to satisfy the energy efficiency and peak demand reduction benchmarks which OCC actively lobbied the General Assembly to include in S.B. 221. Even more remarkable, OCC's Application fails, as required by R.C. § 4903.10, to state the ground upon which OCC believes the Order to be unreasonable or unlawful, thus making its Application for Rehearing fundamentally flawed. OCC does not challenge the substance of the Order, but seeks only more process. Not so remarkably, OCC's Application fails to describe the extensive and transparent process in which it fully participated prior to reaching agreement with the Companies on the terms of the CFL program. Because OCC has not stated grounds for rehearing of the Order, its Application should be denied.[2]

The General Assembly has mandated that all consumers in Ohio make substantial changes in the amount of energy they consume – starting with energy savings of 0.3% in 2009 that steadily increases to more than 22% by the end of 2025 – and change is difficult for everyone. It is not surprising that some consumers reacted adversely to the CFL program once it was announced. Because the General Assembly has mandated that electric distribution

[1] A copy of the Commission's October 8, 2009 announcement of that request is attached as Attachment 1.

[2] The Online Home Energy Education Tool Program, which is also known as the Aclara Tool Program, is not the subject of OCC's Application and has not been suspended by the Companies.

companies adopt programs specifically intended to change customer behavior, the reaction is completely understandable. Not all consumers will support the state's policy, and, in particular, not all consumers will be in favor of the costs of these programs. Yet the costs to be incurred in 2009 and future years should not be a surprise. Indeed, the OCC and other parties that have promoted these programs have encouraged program spending exceeding $40 million in 2009 alone and then increasing each year thereafter.[3] The fact that the benefits of these programs more than offset those costs, as required by the Commission's Total Resource Cost test, will always be ignored by some. For these programs to succeed and the policy objectives to be attained, state officials and the Commission must set a steady course that does not waiver in the face of objections from a strident minority. If state officials are unwilling to put their support behind the rollout of energy efficiency and peak demand reduction projects that will occur over the next fifteen years, then none should be permitted to feign surprise when the state fails to attain the energy savings goals clearly stated in R.C. § 4928.66.

II. Discussion

The Ohio General Assembly and Governor Strickland made a clear policy choice in enacting the energy efficiency and peak demand reduction mandates in S.B. 221. The burden of satisfying those mandates, or facing potentially severe penalties, was placed squarely on the electric distribution utilities, including the Companies. Under R.C. § 4928.66(A)(1), the Companies *must* implement energy efficiency programs that achieve energy savings *in 2009* of at least 0.3% of the total, annual average, and normalized kilowatt-hour sales of the electric distribution utility during the preceding three calendar years. The Companies also must achieve peak demand reduction of 1% in 2009. For the Companies, this means achieving energy savings

[3] Direct Testimony of Wilson Gonzalez at p. 7, Case No. 08-935-EL-SSO (Sept. 29, 2008); Direct Testimony of Dylan Sullivan at p. 9, Case No. 08-935-EL-SSO (Sept. 29, 2008).

of at least 167 GWh and peak demand reduction of at least 118 MW by the end of 2009. Failure to comply, according to R.C. § 4928.66(C), results in the Commission assessing a forfeiture on the Companies unless the Commission determines that amendment of the benchmarks is necessary because they cannot reasonably be achieved due to reasons beyond the Companies' control.

A. OCC Has Failed to State Grounds for Rehearing.

While OCC's Application seeks further opportunity to discuss and review the CFL program, OCC fails to state a basis recognized by Ohio law for further review of a program that already has been reviewed and approved by the Commission. OCC has failed to submit any proof, indeed has failed to present even an argument, to the Commission that its decision to approve the CFL program was unreasonable or unlawful, as required by R.C. § 4903.10. As described below, OCC lacks such proof because it participated fully in reviewing the CFL program and had no objection to the final costs of the program as approved by the Commission.

No party can now challenge the costs the Companies have incurred to date in implementing the program because no party filed its application for rehearing or sought a stay of the Commission's Order in a timely manner following its entry on September 23, 2009. A Commission order is immediately effective upon entry. R.C. § 4903.15. Thus, the Companies acted under Commission authority in purchasing all supplies needed to implement the CFL program and in incurring related administrative costs. Under R.C. § 4903.10, an application for rehearing, even if granted, "shall not affect any right or the enforcement of any right arising from or by virtue of the original order prior to the receipt of notice by the affected party of the filing of the application for rehearing." Meaning, OCC's Application cannot in any way affect or challenge the reasonableness of, or the recovery of, the costs incurred by the Companies prior to the Companies' receipt of OCC's Application. Similarly, because OCC did not seek a stay of the

Commission's Order, any challenge to the events which took place pursuant to that Order is moot and not justiciable. *See, e.g., Am. Energy Corp. v. Datkuliak*, 174 Ohio App. 3d 398, 407-09, 2007-Ohio-7199, ¶¶ 24-33.

OCC's Application must be viewed as nothing more than a media stunt intended to deflect criticism of those who object to the state's policy mandating energy efficiency and peak demand reduction programs. The answer to OCC's Application is simple: the state's policy has been set by the General Assembly in terms that are crystal clear, and the CFL program is a necessary tool to satisfy the benchmarks mandated by state law. Thus, the Commission should deny OCC's Application.

B. The CFL Program Is Necessary for the Companies to Achieve the State's Mandated Energy Efficiency and Peak Demand Reduction Benchmarks.

The CFL program approved by the Commission in this proceeding on September 23, 2009 is an essential element of the Companies' overall program portfolio designed to achieve the energy efficiency savings and peak demand reduction mandated for 2009. The program was designed to have an immediate impact in 2009 by putting CFL bulbs directly in the hands of customers. As was explained to OCC and others during the collaborative process, coupon programs have a very low "take rate." Less than ten percent of customers who receive coupons take the necessary steps to purchase CFL bulbs, and this limited success occurs over an extended period of time. Yet, the R.C. § 4928.66 mandate to achieve energy savings and peak demand reduction requires compliance during 2009, which means that a program approved by the Commission in late September of 2009[4] must be designed to have an immediate and direct

[4] The Companies sought approval of the CFL program and the Online Home Energy Education Tool Program by application filed July 9, 2009. The filing was made once stakeholders had reviewed and approved these programs in the collaborative. Indeed, subsequent to filing the Application, the Companies engaged in additional negotiations with Commission Staff, OCC, NRDC and others to address additional requested modifications and to

impact. As designed, the CFL program would achieve energy savings of 100 GWhs and peak demand reduction of 8.4 MW in 2009 alone.[5]

C. The Companies Followed an Open, Transparent, Collaborative Process in Developing the CFL Program With the Input of All Interested Stakeholders.

Although Ohio law does not obligate the Companies to follow any particular process in designing or implementing energy efficiency programs, the Companies agreed earlier this year in their Electric Security Plan ("ESP") proceeding to use an open, transparent, collaborative process to ensure that all programs "are based on sound program evaluation, garner general support from stakeholders, and are pre-approved for statutory compliance and cost recovery from the Commission." Stipulation and Recommendation at p. 23, *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Authority to Establish a Standard Service Offer Pursuant to R.C. § 4928.143 in the Form of an Electric Security Plan*, PUCO Case No. 08-935-EL-SSO (Feb. 19, 2009) ("ESP Stipulation"). The collaborative process was strongly supported by Staff[6] and OCC[7] as well as others who participated in the ESP proceeding.

(continued...)

reflect the lower price at which the Companies were able to implement the program. The consensus on these modifications was accomplished on September 15, 2009.

[5] *See* July 9, 2009 Application, Attachment A.

[6] Direct Testimony of G. Scheck at p. 14, Case No. 08-935-EL-SSO (Oct. 6, 2008) ("The Staff would recommend that the Companies form a collaborative process with respect to the selection and development of energy efficiency and peak demand reduction programs. *It is clear that ratepayers will be substantially funding these efforts for quite some time in the future*, and therefore they should have some input as to what programs get selected, designed, and deployed. Since the goals for the Companies' energy efficiency and demand reduction benchmarks are quite aggressive, the Staff recommends that the Companies establish an energy efficiency collaborative with the purpose of meeting the Companies' annual energy efficiency and peak demand reduction benchmarks." (emphasis added)).

[7] Direct Testimony of Wilson Gonzalez at p. 7, Case No. 08-935-EL-SSO (Sept. 29, 2008).

On numerous occasions this year the Companies have met in the collaborative with all interested stakeholders to review energy efficiency and peak demand reduction programs, including the CFL program. The CFL program was one of several programs discussed on May 26, 2009, during a meeting of the collaborative's Residential and Low Income Subcommittee. Attendees included four representatives from OCC, two from Staff, two from the Sierra Club, two from Ohio Partners for Affordable Energy ("OPAE"), and three representing local governments. The program was presented to the full collaborative on June 15, 2009, which referred it to the aforementioned subcommittee. The CFL program's business plan and the Total Resource Cost Test were presented and discussed in detail during a meeting of this collaborative subcommittee on June 24, 2009, and the attendees expressed support for the program. This meeting also was widely attended and included three representatives from OCC, two from Staff, two from OPAE, two from the Sierra Club, three from COSE, one from Citizen Power, and three representing local governments. Two additional teleconferences were held on September 10 and 15, 2009, during which representatives from the Companies, OCC, Staff and the Natural Resources Defense Council ("NRDC") agreed to modifications of the CFL program, including a reduction in its costs. That agreement was memorialized in a letter from William R. Ridmann to Staff that was docketed in this proceeding on September 16, 2009. Not a single objection or dissent was filed in response to that letter by any party.

The collaborative procedure implemented by the Companies afforded all interested stakeholders an open and transparent public process to review and comment upon the details of the CFL program, including its costs. OCC fully participated in this process on behalf of, as it repeatedly states, the Companies' 2.1 million residential electric customers.

D. OCC Is Fully Aware of the CFL Program's Design and Cost Recovery As a Result of Its Consent to the ESP Stipulation and Its Participation in the Collaborative.

OCC's expressed desire to obtain more information regarding the CFL program's costs, and how those costs will be recovered from customers, is puzzling. OCC no doubt is aware that the ESP Stipulation[8] specifically states that "it is essential that any programs . . . are pre-approved for statutory compliance *and cost recovery* from the Commission." ESP Stipulation at p. 23 (emphasis added). The ESP Stipulation further states that "[c]osts incurred associated with programs recommended by the collaborative process and approved by the Commission shall be deemed to be reasonable." *Id.* at p. 21. It further states that all reasonably incurred costs associated with the Companies' energy efficiency and peak demand reduction programs "shall be fully recovered." *Id.* at p. 26. The mechanism for recovering these costs is the Demand Side Management and Energy Efficiency Rider (the "DSE Rider"). *Id.* at 21. The DSE Rider also is the mechanism by which the Companies were authorized in the ESP proceeding to recover "lost distribution revenues as permitted by the Commission rules, resulting from implementation of such programs." *Id.* at 21. Thus, once a specific program and its costs are recommended by the collaborative and approved by the Commission, cost recovery is effected through the DSE Rider.

The Commission's September 23, 2009 Order was the result of just such a process. The collaborative reviewed and approved the business plan and cost design of the CFL program, and the Commission approved it on that basis. Indeed, the Order specifically referenced the "stakeholder's agreement to the application as modified by the September 16, 2009 filing." The

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[8] OCC agreed to the terms of the ESP Stipulation on February 26, 2009, with certain modifications not of relevance here.

Order approved the Companies' request for cost recovery, and, by doing so, approved recovery of these costs via the DSE Rider.[9]

OCC cannot be surprised by the costs as detailed to its representatives in more than one collaborative meeting. OCC has been aware for some time that the energy efficiency mandates will result in significant costs being passed on to the Companies' customers. Indeed, OCC has argued that the Companies should spend at least $49 million in each of the years 2009, 2010 and 2011 on energy efficiency programs in order to satisfy the state's mandates, which OCC calculated would result in an additional charge to each customer of $24.25 per year.[10] Likewise, NRDC opined that the Companies would have to incur program costs of between $32.5 million and $49.8 million in 2009 alone to achieve the mandated 0.3% target, with expenditures necessarily increasing each following year.[11] The Companies have endeavored to design programs that will achieve the required energy savings in 2009 at a lower cost to its customers than forecast by OCC and NRDC. In fact, as a result of the collaborative process and OCC's and Staff's input, the cost of the CFL program was reduced from $21.6 million to $13.1 million.

E. The Costs of the CFL Program, As Originally Approved or as Modified, Will Be Fully Recovered As Authorized In the Companies' ESP Proceeding.

The Companies to date have spent approximately $10 million on the CFL program. Millions of CFL bulbs, packed for distribution by Goodwill Industries, sit in a warehouse awaiting distribution. That expense has been approved by the Commission. It is "deemed to be

[9] As set forth in the DSE Rider, costs initially deferred by the Companies and subsequently fully recovered through the DSE2 charge of the DSE Rider include lost distribution revenues resulting from the implementation of energy efficiency and peak demand reduction programs. The DSE2 charges will be updated semi-annually. No later than December 1, 2009, the Companies shall file with the Commission a request for approval of the DSE2 charges which, unless otherwise ordered by the Commission, shall become effective on a service rendered basis on January 1, 2010. The deferred balance at April 30th and at October 31st of each year, utilizing a three-year amortization schedule, will be used to calculate the semi-annual charges.

[10] Direct Testimony of Wilson Gonzalez at p. 7, Case No. 08-935-EL-SSO (Sept. 29, 2008).

[11] Direct Testimony of Dylan Sullivan at p. 9, Case No. 08-935-EL-SSO (Sept. 29, 2008).

reasonable" and, thus, shall be fully recovered through the DSE Rider as provided in the Commission-approved ESP Stipulation, taking into account any mitigation accomplished by the Companies.

Should the Commission reverse course and prevent the Companies from implementing the CFL program, the Companies nevertheless will be required by state law to undertake other programs designed to meet the state-mandated benchmarks. Of course, the costs of those other programs would also be fully recoverable through the DSE Rider.

III. Conclusion

OCC has failed to state reasonable grounds for rehearing of that part of the Commission's September 23, 2009 Order that approved the Companies' CFL program and authorized cost recovery. Thus, the Commission should deny OCC's Application.

Respectfully submitted,

James F. Lang /N.T.A. (0080713)

Arthur E. Korkosz
FIRSTENERGY SERVICE COMPANY
76 South Main Street
Akron, OH 44308
Telephone: (330)384-5849
Facsimile: (330) 384-3875
korkosza@firstenergycorp.com

James F. Lang
Laura C. McBride
CALFEE, HALTER & GRISWOLD LLP
1400 KeyBank Center
800 Superior Ave.
Cleveland, OH 44114
Telephone: (216) 622-8200
Facsimile: (216) 241-0816
jlang@calfee.com
lmcbride@calfee.com

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

CERTIFICATE OF SERVICE

Copies of the foregoing were served by first class United States Mail, postage prepaid, to the persons upon the parties of record identified below on this 19th day of October, 2009.

David C. Rinebolt
Ohio Partners for Affordable Energy
231 West Lima Street
P.O. Box 1793
Findlay, OH 45839

Duane W. Luckey
Attorney General's Office
Public Utilities Commission Section
180 E. Broad Street, 9th Floor
Columbus, OH 43215-3793

Samuel Randazzo
McNees, Wallace & Nurick
21 East State Street, 17th Floor
Columbus, OH 43215-4228

Jeffrey L. Small
Richard C. Reese
Gregory J. Poulos
Office of the Consumers' Counsel
10 W. Broad Street, 18th Floor
Columbus, OH 43215-3485

Henry W. Eckhart
50 West Broad Street, #2117
Columbus, OH 43215

N. Tr Alger

One of Attorneys for Applicants

Attachment 1

Ohio | Public Utilities Commission

Ted Strickland, Governor
Alan R. Schriber, Chairman

News Release
For Immediate Release
Contact: Shana Eiselstein
614 | 466 7750

Statement from PUCO Chairman on FirstEnergy's compact fluorescent light bulb program

COLUMBUS, OHIO (Oct. 7, 2009) – Public Utilities Commission of Ohio Chairman Alan R. Schriber issued the following statement regarding FirstEnergy's compact fluorescent light bulb program.

"The PUCO has received a large volume of calls and emails in response to the compact fluorescent light bulb program approved last month for FirstEnergy. Today, I received a letter from Gov. Strickland asking that the PUCO postpone the program until such time as we can address several questions raised by the governor, members of the Ohio General Assembly and FirstEnergy customers related to program details and costs.

As a result, I have asked FirstEnergy to postpone deployment of its compact fluorescent light bulb program until the Commission can thoroughly assess the costs associated with this program. The PUCO approved the program following consensus reached during discussions among the company and other organizations including the Office of the Ohio Consumers' Counsel and the Natural Resources Defense Council.

Although the PUCO allowed FirstEnergy to implement its program, we did not approve the charge that will appear on monthly bills as a result. Reports in the media place the cost to customers at sixty cents per month for three years, which equates to $21.60 over the life of the program. The PUCO has not approved these additional dollars nor have we received a request by the company to do so.

The PUCO will gather additional information regarding the program and its related costs. Until the PUCO has specific details regarding the program costs, FirstEnergy should not deploy its compact fluorescent light bulb program."

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The Public Utilities Commission of Ohio (PUCO) is the sole agency charged with regulating public utility service. The role of the PUCO is to assure all residential, business, and industrial consumers have access to adequate, safe, and reliable utility services at fair prices while facilitating an environment that provides competitive choices. Consumers with utility-related questions or concerns can call the PUCO hotline at (800) 686-PUCO (7826) and speak with a representative.

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