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 Program Portfolio Plans for 2010 Through 2012 and Associated Cost Recovery Mechanisms.	))))))))	Case Nos. 09-1947-EL-POR 09-1948-EL-POR 09-1949-EL-POR
In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company For Approval of Their Initial Benchmark Reports.	)))))	Case Nos. 09-1942-EL-EEC 09-1943-EL-EEC 09-1944-EL-EEC
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 Nos. 09-580-EL-EEC 09-581-EL-EEC 09-582-EL-EEC

ENVIRONMENTAL LAW & POLICY CENTER'S INITIAL POST HEARING BRIEF

Michael E. Heintz (0076264)
Environmental Law & Policy Center
1207 Grandview Ave.
Suite 201
Columbus, Ohio 43212
Telephone: 614-488-3301
Fax: 614-487-7510
E-mail: mheintz@elpc.org

Attorney for the Environmental Law & Policy Center

Submitted: March 29, 2010

Table of Contents

I. Introduction

In these consolidated actions, the Cleveland Electric Illuminating Company, the Ohio Edison Company, and the Toledo Edison Company (together, "FirstEnergy" or "the Companies") request approval for each company's energy efficiency and peak demand reduction program portfolio plans for 2010-2012 ("EE/PDR Plan" or "Plans"), initial benchmark report, and associated cost recovery mechanisms. The Environmental Law and Policy Center ("ELPC") respectfully asks the Public Utilities Commission of Ohio ("PUCO" or "Commission") to deny FirstEnergy's EE/PDR Plan, and require the Companies to revise and resubmit the Plans.

FirstEnergy puts the intervening parties and the Commission in a difficult position. FirstEnergy's EE/PDR Plan does not comply with Ohio Revised Code ("O.R.C.") §4928.66 and the individual programs are not a serious attempt to meet the spirit of Ohio law. Either the PUCO rewards FirstEnergy for submitting a legally deficient and weak proposal, undermining Ohio's efforts to establish meaningful energy efficiency and peak demand reduction programs, or it denies FirstEnergy's Plan, and FirstEnergy customers lose the benefits of energy efficiency programs for at least 2010, possibly longer.

In the final analysis, the FirstEnergy Plan does not meet legal requirements and the PUCO should reject it. Delayed efficiency in favor of long-term, effective efficiency programs is the better option. For the reasons below, ELPC respectfully asks the Commission to deny FirstEnergy's Application and require the Companies to revise and resubmit for further consideration.

II. Applicable Law

On May 1, 2008, Governor Ted Strickland signed into law a sweeping new energy policy for the state of Ohio, Amended Substitute Senate Bill 221 ("SB 221"), embodied in part at

O.R.C. §4928.66. The legislation became effective on July 31, 2008. FirstEnergy's Application serves as an important test case concerning the application of this law and the future of energy efficiency in Ohio.

The statute requires steady energy efficiency achievements by utilities over the next several years.

> Beginning in 2009, an electric distribution utility shall implement energy efficiency programs that achieve energy savings equivalent to at least three-tenths of one per cent of the total, annual average, and normalized kilowatt-hour sales of the electric distribution utility during the preceding three calendar years to customers in this state. The savings requirement, using such a three-year average, shall increase to an additional five-tenths of one per cent in 2010, seven-tenths of one per cent in 2011, eight-tenths of one per cent in 2012, nine-tenths of one per cent in 2013, one per cent from 2014 to 2018, and two per cent each year thereafter, achieving a cumulative, annual energy savings in excess of twenty-two per cent by the end of 2025.[1]

Utilities must reduce electricity consumption by 0.3% in 2009, 0.8% in 2010, 1.5% in 2011, and 2.3% in 2012.[2] The baseline for the energy efficiency benchmarks "shall be the average of the total kilowatt hours the electric distribution utility sold in the preceding three calendar years…."[3] Also beginning in 2009, electric distribution utilities are to "Implement peak demand reduction programs designed to achieve a one per cent reduction in peak demand in 2009 and an additional seventy-five hundredths of one per cent reduction each year through 2018."[4] The baseline "for a peak demand reduction…shall be the average peak demand on the utility in the preceding three calendar years…."[5] Overall, utilities are under a statutory obligation to reduce energy

[1] O.R.C. §4928.66(A)(1)(a).
[2] *Id.*
[3] O.R.C. §4928.66(A)(2)(a).
[4] O.R.C. §4928.66(A)(1)(b).
[5] O.R.C. §4928.66(A)(2)(a).

consumption over 22% by 2025, and reduce peak demand reduction 7.75% by 2018.[6] To achieve these reductions, utilities may count efficiency achievements from a variety of sources including their own energy efficiency programs, transmission and distribution projects, demand response, and mercantile, self-directed (i.e. customer-sited) programs.[7]

Should a utility not meet its benchmark in a given year, it may apply to the Commission for a waiver of the requirement. "The commission may amend the benchmarks set forth in division (A)(1)(a) or (b) of this section if, after application by the electric distribution utility, 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."[8]

The Commission's rules, approved in Case No. 08-888-EL-ORD and effective on December 10, 2009, require electric distribution utilities to submit three-year EE/PDR program portfolios for PUCO approval:

> Each electric utility shall design and propose a comprehensive energy efficiency and peak-demand reduction program portfolio, including a range of programs that encourage innovation and market access for cost-effective energy efficiency and peak-demand reduction for all customer classes, which will achieve the statutory benchmarks for peak-demand reduction, and meet or exceed the statutory benchmarks for energy efficiency.[9]

Moreover, the utility has "the burden to prove that the proposed program portfolio plan is consistent with the policy of the state of Ohio as set forth in section 4928.02 of the Revised Code, and meets the requirements of section 4928.66 of the Revised Code."[10]

---

[6] O.R.C. §4928.66(A)(1).
[7] O.R.C. §4928.66(A)(2)(d).
[8] O.R.C. §4928.66(A)(2)(b).
[9] O.A.C. §4901:1-39-04(A), as approved in Entry, Case No. 08-888-EL-ORD (October 28, 2009).
[10] O.A.C. §4901:1-39-04(E).

The rules also provide one additional restriction applicable to FirstEnergy's Plan. Ohio Administrative Code ("O.A.C.") §4901:1-39-03(C) requires electric utilities to

> [I]dentify measures considered but not found to be cost-effective or achievable but show promise for future deployment. The electric utility shall identify potential actions that it could undertake to improve the measure's technical potential, economic potential, and achievable potential to enhance the likelihood that the measure would become cost-effective and reasonably achievable.[11]

FirstEnergy's EE/PDR Plan and Application is its proposal to achieve the mandated benchmarks from 2010-2012.[12]

III. Applicable Facts

Following nearly four days of hearing, the facts in this case are largely undisputed. Notably, FirstEnergy Witness George Fitzpatrick states that SB 221 contains "reasonable goals. I think they're goals that are important for the state to reach. I think that it's a good thing to promote energy efficiency, cost-effective energy efficiency."[13]

The Companies must meet the following energy efficiency and peak demand reduction benchmarks during the period from 2010-2012:

[11] O.A.C. §4901:1-39-03(C).
[12] *Application*, Case Nos. 09-1947-EL-POR, 09-1948-EL-POR, 09-1949-EL-POR, 09-1942-EL-EEC, 09-1943-EL-EEC, 09-1944-EL-EEC, 09-580-EL-EEC, 09-581-EL-EEC, and 09-582-EL-EEC (December 15, 2009).
[13] Tr. Vol. 2, at page 220:10-15 (March 3, 2010).

Year	Energy Efficiency Benchmarks	Peak Demand Reduction Benchmarks	Required Energy Efficiency Savings, (CEI)[14]	Required Peak Demand Reductions, (CEI)[15]	Required Energy Efficiency Savings, (OE)[16]	Required Peak Demand Reductions (OE)[17]	Required Energy Efficiency Savings, (TE)[18]	Required Peak Demand Reductions (TE)[19]
	Percent Reduction from Baseline	**Percent Reduction from Baseline**	**KWh**	**KW**	**KWh**	**KW**	**KWh**	**KW**
2009	0.30%	1.0%	58,162	41.6	76,796	53	31,352	20.1
2010	0.80%	1.75%	151,829	71.5	200,126	91	81,123	34.4
2011	1.50%	2.50%	280,437	102.7	368,873	130	148,622	49.4
2012	2.30%	3.25%	432,993	137.8	570,852	174	229,935	65.9

Although the benchmarks are cumulative goals, they are to be counted on a pro rata, rather than annual, basis starting on the date the individual programs launch.[20] Each Company proposes a similar suite of programs to meet the 2010-2012 EE/PDR benchmarks.

Notwithstanding Witness Fitzpatrick's statements, FirstEnergy admits that it will not be able to meet the 2010 energy efficiency benchmarks without special treatment from the Commission. FirstEnergy Witness John Paganie states in his direct testimony that "[W]ithout [allowing annual counting], or an expedited ruling on at least some of the programs…the Companies *will not be able to comply with the 2010 energy efficiency benchmarks* and will be

[14] Cleveland Electric S.B. 221 Benchmarks for the Period 2009-2012, *The Cleveland Electric Illuminating Company Energy Efficiency & Peak Demand Program Portfolio and Initial Benchmark Report*, Case Nos., 09-1947-EL-POR, 09-1942-EL-EEC, and 09-580-EL-EEC ("CE Plan") (December 15, 2009), Table CE 4.
[15] *Id.*
[16] Ohio Edison S.B. 221 Benchmarks for the Period 2009-2012, *The Ohio Edison Company Energy Efficiency & Peak Demand Program Portfolio and Initial Benchmark Report*, Case Nos., 09-1948-EL-POR, 09-1943-EL-EEC, and 09-581-EL-EEC ("OE Plan") (December 15, 2009), Table OE 4.
[17] *Id.*
[18] Toledo Edison S.B. 221 Benchmarks for the Period 2009-2012, *The Toledo Edison Company Energy Efficiency & Peak Demand Program Portfolio and Initial Benchmark Report*, Case Nos., 09-1949-EL-POR, 09-1944-EL-EEC, and 09-582-EL-EEC ("TE Plan") (December 15, 2009), Table TE 4.
[19] *Id.*
[20] *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, Entry on Rehearing, at ¶17 (June, 17, 2009).

compelled to seek a waiver of those benchmarks."[21] (emphasis added) He confirmed this statement twice at the hearing.[22] Witness Fitzpatrick makes the same claim in his direct testimony,[23] but then contradicted this statement at the hearing by testifying that FirstEnergy is attempting to overachieve its short-term benchmarks,[24] and will "scale down [programs] over time" to "ultimately come close to those goal levels by 2012."[25] In addition, FirstEnergy may not achieve the overall 22% benchmark by 2025.[26] Appendix D to FirstEnergy's Plans reads:

> The Base Case results from the study reveal an achievable potential for energy reductions over forecasted sales in [sic] 12.6% for OE, 11.9% for TE and 13.5% for CEI by 2025. The High Case results from the study reveal an achievable potential for energy reductions of 19.2% for OE, 17.9% for TE and 19.9% for CEI.[27]

As detailed below, in order to comply with the 2010 benchmark, FirstEnergy requests one of two extraordinary decisions from the Commission. Additionally, it relies heavily on mercantile projects that depend on commercial customers to create efficiency. Without the PUCO granting at least one of the requests, plus approval of the mercantile applications as discussed below, FirstEnergy cannot meet its 2010 benchmark.

In one option, FirstEnergy proposes launching four programs early.[28] On February, 23, 2010, FirstEnergy and other interveners filed an unopposed motion requesting Commission approval to launch four "Fast Track" programs—compact fluorescent light ("CFL") bulb, commercial and industrial lighting, commercial and industrial equipment (i.e., motors), and

---

[21] Direct Testimony of John E. Paganie, December 15, 2009 ("Paganie Direct), at page 13:7-10.
[22] Tr. Vol. 1, at page 110:4-18; 143:7-17 (March 2, 2010).
[23] Direct Testimony of George Fitzpatrick, December 15, 2009 ("Fitzpatrick Direct"), at pages 9:14-11.
[24] Tr. Vol. 2, at pages 222:15-223:12 (March 3, 2010).
[25] Tr. Vol. 2, at page 222:15-22 (March 3, 2010).
[26] *Appendix D to 3-Year Energy Efficiency and Peak Demand Reduction Plan and Initial Benchmark Report,* Case Nos. 09-1947-EL-POR, 09-1948-EL-POR, 09-1949-EL-POR, 09-1942, EL-EEC, 09-1943, EL-EEC, 09-1944, EL-EEC, 09-580-EL-EEC, 09-581-EL-EEC, 09-582-EL-EEC ("Appendix D") (December 15, 2009), at 1.
[27] *Id.*
[28] Paganie Direct at page 14:6-8; Fitzpatrick Direct at page 10:22-11:2.

appliance recycling.[29] Witness Paganie,[30] Witness Fitzpatrick,[31] and the Fast Track Motion[32] all request Commission approval by mid-March in order to launch programs by April 1 to have a chance at meeting 2010 energy efficiency benchmarks. As of March 29, 2010, the Commission has not ruled on the Fast Track Motion. ELPC did not oppose the Fast Track Motion because it does not want to create a barrier to efficiency programs should the Commission approve FirstEnergy's Plans. If the PUCO approves the Plan, ELPC agrees that the Fast Track programs should be launched as soon as possible. However, because of the overarching legal concerns as discussed below, ELPC maintains the Plan should be revised before PUCO approval.

FirstEnergy's alternative request would allow it to count efficiency achievements on an annual, rather than pro rata, basis.[33] FirstEnergy needs annualized accounting "[B]ecause of pro rata savings requirements and practical launch considerations, no more than a half year of savings could be generated in 2010. As Witness Fitzpatrick explains in his testimony, *the Companies cannot meet their 2010 energy efficiency benchmarks under this scenario.*"[34] (emphasis added) FirstEnergy also explains that annualized accounting is a more cost effective option for efficiency programs in 2010.[35] While FirstEnergy admits that the Commission requires pro rata accounting of efficiency achievements,[36] and "the prorated goals would reflect

[29] *Corrected Joint motion and memorandum in support for approval of fast track programs and expedited ruling*, Case Nos. 09-1947-EL-POR, 09-1948-EL-POR, 09-1949-EL-POR, 09-1942, EL-EEC, 09-1943, EL-EEC, 09-1944, EL-EEC, 09-580-EL-EEC, 09-581-EL-EEC, 09-582-EL-EEC ("Fast Track Motion") (February 25, 2010).
[30] Paganie Direct, at page 14:3-8.
[31] Fitzpatrick Direct, at page 10:19-22.
[32] Fast Track Motion at 4.
[33] Paganie Direct at page 14:14-16; Tr. Vol. 1, at page 109:9-21 (March 2, 2010).
[34] Paganie Direct at page 13: 18-22.
[35] Paganie Direct at page 13: 7-10; Fitzpatrick Direct, at page 11:16-12:2; Tr. Vol. 2, at page 259:16-24 (March 3, 2010).
[36] Tr. Vol. 1, at pages 144:18-145:15 (March 2, 2010); Tr. Vol. 2, at page 258:12-16 (March 3, 2010).

the actual energy savings in that year,"[37] the Companies nonetheless ask for special considerations to meet the 2010 benchmarks.

In addition to these alternative requests, FirstEnergy proposes to obtain nearly half of each Company's 2010 efficiency savings from historic mercantile[38] projects rather than through new efficiency programs.[39] Self-directed mercantile projects, those energy efficiency efforts that mercantile customers completed without FirstEnergy assistance, will account for 48.6% of Ohio Edison's, 50.1% of Cleveland Electric Illuminating Company's, and 52.9% of Toledo Edison's efficiency gains in 2010.[40] FirstEnergy submitted over 40 applications for self-directed mercantile projects to count towards EE/PDR benchmarks.[41]

Prior to submitting the Plan, FirstEnergy entered into a stipulation requiring it to start a stakeholder Collaborative process.[42] While there is no dispute that FirstEnergy convened the Collaborative, members question its effectiveness.[43]

Finally, regarding individual portions of the Portfolio, there are notable details in the Companies' Plans. FirstEnergy's modeling for the commercial and industrial lighting program indicated the program is not cost effective by resulting in a Total Resource Cost ("TRC") test less than 1.0. Additionally, FirstEnergy will directly hire evaluation, measurement, and verification ("EMV") personnel under contract,[44] and FirstEnergy's Plan only minimally

---

[37] Tr. Vol. 2, at page 259:20-21 (March 3, 2010).
[38] Mercantile customer means, "a commercial or industrial customer if the electricity consumed is for nonresidential use and the customer consumes more than seven hundred thousand kilowatt hours per year or is part of a national account involving multiple facilities in one or more states." O.R.C. 4928.01(A)(19).
[39] OEC-Exhibit 1, OEC-Set 1, DR-5, "Responses to Data Requests."
[40] *Id.*
[41] Tr. Vol. 1, at page 122:6-12 (March 2, 2010).
[42] Stipulation and Recommendation, Case No. 08-935-EL-SSO ("ESP Stipulation") at ¶14 (February 29, 2009) (approved March 25, 2009).
[43] Direct Testimony of Daniel J. Sawmiller ("Sawmiller Direct"), February 17, 2010, at page 19:10-14.
[44] Tr. Vol. 1, at pages 116:22-117:12 (March 2, 2010).

addresses customer behavior towards "plug load" and "phantom load,"[45] but FirstEnergy does include "smart strips" in its Plan.[46] Conversely, FirstEnergy's Plan does not address program details such as CFL disposal,[47] recapturing customers who change their mind on appliance recycling,[48] and developing Ohio-specific cost and operational information for use in modeling future EE/PDR plans.[49]

Altogether, these facts lead to one conclusion—FirstEnergy's three-year EE/PDR Plan is deficient. For the reasons more fully set forth below, ELPC respectfully asks the Commission to deny FirstEnergy's Application.

IV. Argument

A. FirstEnergy's EE/PDR Plan Should Be Rejected Because it Violates Ohio Law.

FirstEnergy shows minimal effort in developing and submitting a legally acceptable EE/PDR Plan. FirstEnergy knew no later than May 1, 2008 that it would need energy efficiency programs to meet the statutory benchmarks. Further, FirstEnergy's 2010 EE/PDR requirements are set forth in statute.[50] However, FirstEnergy unequivocally states that without special treatment, its EE/PDR plan will not meet the 2010 energy efficiency benchmarks. In both his pre-filed direct testimony and under cross-examination, Witness Paganie states that the Companies' EE/PDR Plans will not meet 2010 benchmarks. He first said, "[W]ithout [annualized accounting], or an expedited ruling on at least some of the programs…the Companies will not be able to comply with the 2010 energy efficiency benchmarks, and will be

[45] Direct Testimony of Geoffrey C. Crandall ("Crandall Direct"), February 17, 2010 at pages 6:15-7:3.
[46] CE Plan at CE Table 14: Portfolio Rebate Schedule; OE Plan at OE Table 14: Portfolio Rebate Schedule; CE Plan at CE Table 14: Portfolio Rebate Schedule.
[47] Crandall Direct, at page 17:16-18.
[48] Crandall Direct, at page 19:14-17.
[49] Crandall Direct, at page 21:3-16.
[50] O.R.C. §4966.28(a)(1)(A).

compelled to seek a waiver for those benchmarks."[51] He repeated this concern at the hearing, agreeing, "[T]hat without fast-track approval or annualized accounting, the plan does not meet the statutory requirements for 2010."[52] Furthermore, the Companies claim they may not achieve the cumulative 22% benchmark in 2025.[53] Despite nearly 18 months to plan, FirstEnergy submitted a plan it knew would not meet legal requirements. Instead of submitting a plan that meets the 2010 benchmark, and is on track to meet the 2025 benchmark, FirstEnergy instead submitted a plan that seeks special conditions and suggests FirstEnergy may file a waiver for 2010.[54] FirstEnergy is not taking its energy efficiency obligations seriously.

Especially in its first three-year EE/PDR Plan, FirstEnergy should not need preferential treatment. No other Ohio utility asked for such deference. While their EE/PDR compliance reports are being evaluated, the other Ohio utilities claim to meet their 2009 requirements while banking significant reductions into 2010.[55] Conversely, FirstEnergy received a waiver for the 2009 benchmarks,[56] and now requests annualized accounting or approval for the Fast Track programs by March 10, 2010 to meet the 2010 benchmark or it may file a waiver request for 2010.[57]

---

[51] Paganie Direct, at page 13:7-10.
[52] Tr. Vol. 1, at page 110:4-18 (March 2, 2010).
[53] Appendix D at 1. This statement conflicts with the ACEEE report that FirstEnergy itself cites in Appendix D, specifically that "Maximum technical potential is considered to be 33% of projected electricity consumption in 2025 as based upon a recent study by the ACEEE Study conducted in March 2009." *Id.*
[54] The Commission should note that the standard for issuing a waiver under O.R.C. §4928.66(a)(2)(B) is if FirstEnergy fails to meet a benchmark "due to regulatory, economic, or technological reasons beyond its reasonable control." Question whether a missed 2010 benchmark, under these circumstances, is beyond FirstEnergy's reasonable control.
[55] *In the matter of the report of Energy Efficiency and Peak Demand Reduction Portfolio Plan Status Report filing pursuant to section 4901:1-39-05(C),* Case No. 10-0303-EL-POR (March 12, 2010); *In the matter of the First Annual Energy Efficiency Status Report of Duke Energy Ohio, Inc.*, Case No 10-317-EL-POR (March 15, 2010); *In the matter of the Status Report of American Electric Power Company*, Case No. 10-318-EL-POR (March 15, 2010).
[56] *In the matter of the application of Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company to amend their energy efficiency benchmarks,* Case Nos. 09-1004-EL-EEC, 09-1005-EL-EEC, 09-1006-EL-EEC, Finding and Order (January 7, 2010).
[57] Fitzpatrick Direct, at pages 10:19-22, 13:7-10. FirstEnergy seeks a "mid-March" approval for its Fast Track programs in order to launch by April 1. The PUCO did not approve the programs by mid-March, making an April 1 launch seem unlikely.

Yet, FirstEnergy does not explain how its situation is different from the three other Ohio utilities that purportedly met their benchmarks. FirstEnergy had no reason to expect the Commission would approve the Fast Track programs under the Companies' schedule. Nor does FirstEnergy have guarantees that the Commission will allow annualized accounting in time for a July 1 launch.[58] In addition, FirstEnergy's compliance shortfall in 2010 may cause similar problems in the future. In the likely event that FirstEnergy does not meet its 2010 benchmark, FirstEnergy may have difficulty meeting the cumulative energy efficiency standards in 2011 and 2012. As the other Ohio utilities did, FirstEnergy could have submitted its energy efficiency programs and strategy with enough time to meet the 2010 benchmarks.[59] Instead, FirstEnergy submitted a plan that does not meet 2010 benchmark without Commission help.

The Commission should not approve an EE/PDR Plan that does not meet Ohio's standards. FirstEnergy had a clear energy efficiency requirement for 2010 as early as May 2008. The Commission should deny FirstEnergy's EE/PDR Plan and require the Companies to submit a Portfolio that makes a serious attempt at meeting the requirements.

B. FirstEnergy's Plan Should Be Rejected Because it Relies Too Much on Historical Mercantile Programs.

The Companies seek to obtain at least 48% of their 2010 benchmarks from mercantile self-directed programs instead of expending the effort to launch new efficiency programs.[60] In fact, Staff Witness Gregory Scheck testified, "The Staff is concerned that the Companies may

---

[58] Paganie Direct, at page 14:13-16.

[59] *See, In the matter of the report of Duke Energy Ohio, Inc. concerning its energy efficiency and peak- demand reduction programs and portfolio planning*, 09-1999-EL-POR (December 29, 2009), at 2; *In the matter of the application of Columbus Southern Power for approval of its program portfolio plan and request for expedited consideration*, 09-1089-EL-POR (November 11, 2009), at ¶5; *In the matter of the application of Ohio Power Company for approval of its program portfolio plan and request for expedited consideration*, 09-1090-EL-POR (November 11, 2009), at ¶5; *In the matter of the report of Energy Efficiency and Peak Demand Reduction Portfolio Plan Status Report filing pursuant to section 4901:1-39-05(C)*, 10-0303-EL-POR (March 12, 2010) at ¶8.

[60] Ohio Environmental Council Exhibit 1, OEC-Set 1, DR-5, "Responses to Data Requests."

rely solely on the mercantile self-directed projects to reach their annual benchmarks."[61] At hearing, Witness Scheck explained this position:

> [Y]ou want to make sure you have energy efficiency offered to all customers, so that's the reason for the statement is that you don't want a company to rely entirely on self-invested customer funds just to reach their goals. They need to have a broad set of measures for both the residential class as well as the small and large commercial class and governmental, and that's the reason for the statement.[62]

Apart from needing the mercantile activities to obtain the 2010 benchmark, FirstEnergy's excessive reliance on mercantile programs may affect the Companies' incentive to launch other efficiency programs. While legally permissible, FirstEnergy's substantial reliance on mercantile projects is more evidence that it is not taking energy efficiency responsibilities seriously.

Including mercantile programs in the statute was intended as an incentive program for customers to conduct energy efficiency projects that would not have otherwise occurred, but not to the extent that mercantile programs would overwhelm efficiency efforts. As Commissioner Centolella noted earlier in 2010 in a concurring opinion:

> To the extent that a historical efficiency investment is one that would have occurred in the absence of receiving an incentive, the added efficiency produced by providing such an incentive could be minimal. We need to allocate efficiency incentives in an overall manner which is reasonable. Moreover, the reasonable allocation of costs for electric utility programs that are designed to mitigate the market failures related to energy efficiency should not be based entirely on the efficiency measure which individual consumers would implement on their own.[63]

FirstEnergy is trying to meet its benchmarks in 2010 with nearly 50% of its efficiency gains from historic mercantile actions—this is not what S.B. 221 intended.

---

[61] Direct Testimony of Gregory Scheck ("Scheck Direct"), February 23, 2010, at Question 7, lines 6-8.
[62] Tr. Vol. 2, at page 382:3-11 (March 2, 2010).
[63] *In the Matter of the Application of PolyChem Corporation and the Cleveland Electric Illuminating Company For*

Beyond the statute's intent concerning mercantile applications, this excessive reliance raises a potential problem for benchmark compliance. If the Commission denies a significant number of the 40-plus pending mercantile applications, or the mercantile customers over-estimate efficiency savings, FirstEnergy will have even more difficulty achieving its 2010 energy efficiency benchmarks. Witness Paganie admitted that, to date, the PUCO approved only six of the approximately 40 applications submitted.[64] Moreover, some of the six are being challenged for rehearing.[65] The Commission, then, is considering over thirty applications to approve mercantile efficiency projects. At least one of these is being challenged.[66] Given FirstEnergy's significant reliance on these projects, any shortfall from the mercantile programs puts the Companies at more risk of missing their 2010 benchmark.

FirstEnergy's excessive reliance on mercantile programs, coupled with its inability to meet 2010 benchmarks, raises questions about FirstEnergy's commitment to energy efficiency programs for all customers. While utilities may use mercantile programs to meet efficiency benchmarks,[67] the PUCO should reject FirstEnergy's Plan in favor of a program portfolio that spreads the efficiency efforts among all customers and does not run the risk of missing a benchmark due to mercantile shortfalls.

C. FirstEnergy Should Not Exclude Interested Stakeholders from The Collaborative Process.

As explained above, FirstEnergy convened a stakeholder Collaborative following the ESP Stipulation.[68] Although ELPC has not participated in FirstEnergy Collaborative meetings,

---

Approval of a Special Arrangement with a Mercantile Customer, Case No. 09-1102-EL-EEC, Finding and Order at page 2, (February 11, 2010) (Centolella, Comm'r concurring).

[64] Tr. Vol. 1, at page 122:6-12 (March 2, 2010)

[65] *See Application for Rehearing* in Case Nos. 09-0595-EL-EEC (March 15, 2010), 09-1100-EL-EEC (March 15, 2010), 09-1200-EL-EEC (March 15, 2010), 09-1201-EL-EEC (March 15, 2010).

[66] *Motion to Dismiss*, Case No. 09-1226-EL-EEC (March 16, 2010).

[67] Tr. Vol. 2, at page 383:7-15 (March 3, 2010).

[68] ESP Stipulation, at ¶14 (February 29, 2009) (approved March 25, 2009).

and therefore cannot comment as to the effectiveness of past meetings, ELPC did request to join the Collaborative process. FirstEnergy denied ELPC's request.[69] FirstEnergy maintains that only the signatories to the ESP Stipulation, or administrators, may participate in the Collaborative. As Witness Paganie testified, "It's our intention to follow the stipulation which provides that the company's collaborative be, the membership of the collaborative be [sic] signatory parties or administrators and we will comply with that stipulation."[70] Despite this restriction, Witness Paganie testified that Summa Health Systems and Summit County participate in the Collaborative without being direct signatories because they are members of trade organization signatories.[71] Under this theory, any member of the Ohio Energy Group, Ohio Environmental Council, Natural Resources Defense Council, Ohio Manufacturers' Association, Industrial Energy Users, or other membership-based organization who signed the Stipulation may participate in the Collaborative. FirstEnergy then bars all *other* interested parties from participation. What is more, if FirstEnergy follows through on Witness Paganie's testimony to "tighten [the membership list] up and keep it defined specifically to the parties that should be on it who are either administrators or signatory parties," FirstEnergy will shrink Collaborative participation further.[72] Limiting who may participate in the stakeholder Collaborative conflicts with the very nature of a "collaborative" process.

Despite denying ELPC's request, FirstEnergy seems to agree with some of ELPC's recommendations. Witness Paganie stated that ELPC Witness Geoff Crandall has "important" ideas for consumer appliance marketing materials. The Companies have "talked about it and we think it's very important to do that, and certainly we're going to have to work with the vendors

---

[69] Sawmiller Direct, at page 18:7.
[70] Tr. Vol. 1, at page 141:6-9 (March 2, 2010).
[71] Tr. Vol. 1, at page 138:8-19 (March 2, 2010); OCC Exhibit 6, "FirstEnergy's Ohio Energy Efficiency Collaborative, 12/10/09 Meeting Minutes."

and *work with our partners in the collaborative* to see if we can develop some educational material like that. I think it's really important that we come up with that."[73] (emphasis added) Witness Paganie also agreed that Witness Crandall's idea about recapturing appliances from customers who change their minds on recycling is one that FirstEnergy "ought to pursue."[74]

FirstEnergy is purposefully limiting discussion and input from interested parties. The Collaborative is there to assist utilities in producing the best possible program portfolio for customers and to avoid litigation where possible. Limiting membership to only Stipulation signatories, thereby excluding those parties who come to Ohio later in time or are newly formed, creates hurdles where none should exist. ELPC has members in Ohio, an Ohio board member, and valuable expertise.[75] Nevertheless, under FirstEnergy's interpretation of the ESP Stipulation, ELPC will not have the opportunity to make suggestions to the Company outside of a litigation context. There is no credible reason to exclude an organization like ELPC from the collaborative process. Consequently, ELPC asks that any decision related to this proceeding include an order from the Commission opening FirstEnergy's Collaborative to all interested parties.

D. The Commission Should Require FirstEnergy to Learn the Details of Its Own Portfolio

In order to implement its programs effectively, FirstEnergy needs to learn the details and nuances of its programs. Company witnesses repeatedly exhibited a lack of knowledge concerning the details or operations of the Plan. For example, Witness Paganie, FirstEnergy's Sponsor of the EE/PDR Plan and the person ultimately responsible for the Plan's administration

[72] Tr. Vol. 1, at pages 139:24-140:1 (March 2, 2010).
[73] Tr. Vol. 1, at page 115:5-17 (March 2, 2010).
[74] Tr. Vol. 1, at 118:1-8 (March 2, 2010).

and effectiveness, demonstrated an alarming lack of knowledge regarding the programs he has ultimate responsibility to implement.[76] At the time of his deposition, Mr. Paganie was unable to define the CFL program "management services" that FirstEnergy paid for.[77] In fact, Mr. Paganie did not learn what "management services" meant until March 1, 2010—the day before this hearing.[78] While the specific activities included in "management services" may not be critically important, the Portfolio Sponsor should be able to generally define what is included in "management services" at the time of contracting, not the day before the hearing. Similarly, when asked what the employees hired to distribute the CFLs "[did] all day" when the program was suspended, Witness Paganie responded, "I'm not sure."[79] Additionally, he was only able to approximate number of employees FirstEnergy hired for CFL bulb distribution within an order of magnitude:[80]

> EXAMINER BOJKO: Do you know how many people were hired?
>
> THE WITNESS: Your Honor, I don't remember the exact number.
>
> EXAMINER BOJKO: Do you have a ballpark? Are we talking ten employees or hundreds?
>
> THE WITNESS: No; I believe it was several hundred.
>
> EXAMINER BOJKO: Several hundred?

---

[75] *See ELPC's Reply to FirstEnergy's memorandum contra to motion to intervene*, Case Nos. 09-1947-EL-POR, 09-1948-EL-POR, 09-1949-EL-POR, 09-1942-EL-EEC, 09-1943-EL-EEC, 09-1944-EL-EEC, 09-580-EL-EEC, 09-581-EL-EEC, and 09-582-EL-EEC (January 14, 2010).
[76] Tr. Vol. 1, at page 18:14-19 (March, 2, 2010).
[77] Tr. Vol. 1, at page 56:20-24 (March 2, 2010).
[78] Tr. Vol. 1, at page 57:2-7 (March 2, 2010). Witness Paganie then broadly defined "management services" as "My understanding of management services is that applies to the vendor from an administrative standpoint of ordering the material, having the material shipped to the warehouse -- the two warehouses, having it staged in the warehouses which means putting it on pallets, putting it in boxes or bags, getting it ready for delivery, arranging for the vehicles for the pickup by employees, schedules; those would be what would be included as part of management services." Tr. Vol. 1, at page 57:10-19 (March 2, 2010).
[79] Tr. Vol. 1, at page 60:16-20 (March 2, 2010).
[80] Tr. Vol. 1, at page 61:5-21 (March 2, 2010).

THE WITNESS: But I, again, don't have the exact number.[81]

This theme was repeated when he was unable to provide substantive answers to questions regarding whether FirstEnergy created consumer education materials,[82] how FirstEnergy determined the amount in its shared savings request,[83] or what services were provided for from $315,000 spent on "warehousing facilities and services."[84] Mr. Paganie is even unsure if FirstEnergy's consultant, Black and Veatch, could provide specific cost data associated with the CFL program.[85] While it is reasonable for top-level supervisors to not know project details, Witness Paganie was unable to answer even the most general questions. Ignorance on these basic questions is a reflection on FirstEnergy's efforts concerning its Plan and will only inhibit FirstEnergy's ability to administer its own Portfolio. Unfortunately, lacking portfolio or program knowledge is not limited to Witness Paganie, which seems to be a systemic problem at FirstEnergy.

Throughout a long cross-examination, Rebuttal Witness Greg Toth, FirstEnergy's CFL program administrator, admitted to not having specific details concerning "management supervision and personnel costs" for the approved CFL program.[86] In fact, when discussing the $225,000 FirstEnergy spent for these services, Witness Toth did not request an itemized invoice from FirstEnergy's vendor. Instead, FirstEnergy "never questioned the vendor" because Witness Toth was "very comfortable with the number…[and] comfortable with [the vendor]."[87] However, he could not define the calculation of invoiced amounts in Company Exhibit 12—

[81] Tr. Vol. 1, at page 61:11-21 (March 2, 2010).
[82] Tr. Vol. 1, at page 115:5-17 (March 2, 2010).
[83] Tr. Vol. 1, at pages 19:22-20:13; 21:13-24:7 (March 2, 2010).
[84] Tr. Vol. 1, at page 62:20-63:4 (March 2, 2010).
[85] Tr. Vol. 1, at page 65:2-7 (March 2, 2010).
[86] Tr. Vol. 4, at pages 587:23-588:13 (March 8, 2010).
[87] Tr. Vol. 4, at page 588:12-13 (March 8, 2010).

Witness Toth's own testimony.[88] While he allowed for rounding of quantities in the invoice from Power Direct, he testified that

> [T]hese are all very round numbers and we may have had a trueup or something else to make -- because I know we don't have exactly 1.875 million households and we were sending two to everybody plus the small business customers. So to say we were going to be at 3.75, I think what this is is probably just some estimations on total.[89]

Witness Toth was even unsure as to the final average CFL bulb cost reported on the invoice, "So the 9/17 invoice is showing some approximate numbers. I am questioning a little bit just the $3 rate. I think that might be $3.15. I'll have to do the math on that."[90] FirstEnergy did not obtain information on CFL bulb cost, instead choosing to deal with a total cost reported from Power Direct: "I don't have documentation, I just have us having conversations with manufacturers saying this bulb's going to cost you a little more than the next bulb because it's out of a wholesale environment and not from a manufacturer, and there were other details that kind of went into that."[91] Notwithstanding the rounding or potential misprints on the invoice, Witness Toth testified, "I think the amount due is very reliable. I think when you come down to quantity of 1.5 million or the rate, the 4,725,000 is very reliable."[92] FirstEnergy trusts a final invoice number despite questionable figures that contribute to the total.

FirstEnergy was negotiating on a total cost basis with its CFL vendor, but did not have knowledge of line-item costs. "The total cost was just that to us, a total cost. So that's how we negotiated with them. *I didn't ask them to break those items out.* We knew what our mailing costs were going to be going forward. We knew some of the other costs from working with

[88] Tr. Vol. 4, at pages 596:25-598:10 (March 8, 2010).
[89] Tr. Vol. 4, at page 598:3-10 (March 8, 2010).
[90] Tr. Vol. 4, at page 622:17-20 (March 8, 2010).
[91] Tr. Vol. 4, at page 616:12-17 (March 8, 2010).
[92] Tr. Vol. 4, at page 598:13-16 (March 8, 2010).

them."[93] (emphasis added) Similarly, when discussing OCC Exhibits 14 and 17 with the Bench, concerning documentation for a $244,000 fee reduction, Witness Toth explained,

> There is not a separate line item now if you look in the redesigned program. There's not a separate line item anymore where we're saying, okay, management costs, I took that old -- the original program, rolled it into the new one, negotiated with them to be under the amount, and that at the end of the day that's the number we came up with. I don't know where they cut back their cost.[94]

FirstEnergy did not pay attention to program details. Witness Toth was similarly unable to answer questions concerning the number of print advertisements for the approved CFL program,[95] when the approved CFL program advertisements were to start and stop,[96] the date the radio advertisements stopped airing,[97] or how many radio advertisements aired.[98] Given that FirstEnergy is seeking to recover program costs from ratepayers, FirstEnergy's day-to-day program administrator should be able to provide specific information concerning costs and tasks ratepayers pay for.[99] FirstEnergy cannot provide those details because it does not know them. Witness Toth's statements on these details are further evidence of FirstEnergy's commitment concerning its Portfolio, which will ultimately hinder FirstEnergy's ability to administer cost-effective programs.

In a final example, Witness Steven Ouellette was unable to provide information on FirstEnergy's calculation and determination of its shared savings request. Witness Ouellette's testimony on how 15% shared savings is appropriate did not address details of calculations, caps, or restrictions. In fact, Witness Ouellette did not "perform [his] own analysis of this issue or

---

[93] Tr. Vol. 4, at page 609:13-18 (March 8, 2010).
[94] Tr. Vol. 4, at page 608:15-24 (March 8, 2010).
[95] Tr. Vol. 4, at pages 644:3-645:25 (March 8, 2010).
[96] Tr. Vol. 4, at page 647:10-12 (March 8, 2010).
[97] Tr. Vol. 4, at pages 647:20-648:18 (March 8, 2010).
[98] Tr. Vol. 4, at page 648:20-22 (March 8, 2010)
[99] Tr. Vol. 4, at page 631:4-12 (March 8, 2010).

obtain any independent research."[100] Regarding the 15% shared savings level, FirstEnergy "did not do internal calculations associated with that. We did have discussions internal on that percentage. And we did look at AEP's stipulation and Duke Energy's shared savings program."[101] FirstEnergy's primary source for "calculations and other evidence or documentation supporting the choice of a 15 percent shared savings" is the "testimony of Jon F. Williams and David M. Roush in Case No. 09-1089-EL-POR [and the] testimony of Theodore E. Schultz in Case No. 08-920-EL-SSO."[102] Despite basing FirstEnergy's shared savings on the AEP and Duke requests, Witness Ouellette was not aware of the Duke's shared savings cap and scale, or the details of the AEP stipulation allowing shared savings.[103] Witness Ouellette even admitted that he does not "know how much the reduction in the market price for generation will be if [FirstEnergy] get[s] this incentive."[104] Even more troublesome is Witness Ouellette's testimony that FirstEnergy will not "strive to exceed the statutory benchmarks" without a 15% shared savings level and agreed that FirstEnergy will "pack up and go home" should it approach its annual benchmark before the end of the year without a significant shared savings level.[105] FirstEnergy is proposing incentives without fully understanding the reasons for doing so. Nevertheless, will not exert its best efforts without those incentives. Witness Ouellette's statements concerning the development of FirstEnergy's shared savings request, and his statement concerning FirstEnergy's action should it not get the incentive it deems appropriate, further highlights FirstEnergy's lack of commitment to and understanding of its own programs.

[100] Tr. Vol. 1, at page 160:19-23 (March 2, 2010).
[101] Tr. Vol. 1, at page 161:3-7 (March 2, 2010).
[102] OCC-Exhibit 9, "NUCOR-Set 1, DR-17"; *see also* Tr. Vol. 1, at pages 164:25-165:10 (March 2, 2010).
[103] Tr. Vol. 1, at pages 167:16-168:25; 169:17-170:16 (March 2, 2010).
[104] Tr. Vol. 1, at page 181:5-16 (March 2, 2010).
[105] Tr. Vol. 1, at pages 184:9-13; 186:13-17 (March 2, 2010). However, Witness Ouellette's testimony conflicts with Witness Fitzpatrick's who states FirstEnergy would not "pack up and go home" once the Companies hit statutory benchmarks, but rather FirstEnergy "would need to have some lag time to make sure that we're getting the

FirstEnergy's lack of knowledge on basic Portfolio concepts, may lead to program and overall Portfolio failures. Administrator knowledge is particularly important to avoid continuity problems with programs. As Witness Crandall testified, "I am concerned that no accommodation has been made to avoid starting and stopping incentives and programs."[106] Program interruption can lead to costly delays, customer frustration, and diminished program participation.[107] Program administrators will need to decide, sometimes quickly, how to address program over- or under-subscription and how best to reallocate incentive funds.[108] Without an understanding of the Plan and individual programs, FirstEnergy will be unable to react to changed circumstances.

FirstEnergy's lack of knowledge of its own Plans is evidence that it is expending only minimal effort to create effective programs. This low commitment may negatively affect energy efficiency programs throughout FirstEnergy's service territory. The Commission should not approve the Plan until FirstEnergy demonstrates a higher dedication to efficiency responsibilities.

E. FirstEnergy Should Incorporate the Following Specific Plan Recommendations Into a Redesigned Portfolio Program.

Regardless of the Commission's ultimate decision regarding FirstEnergy's EE/PDR Plan, the PUCO should require the Companies to consider and incorporate the following recommendations concerning program details. Should the Commission deny FirstEnergy's EE/PDR Plan, the following recommendations should be part of the revised plan. If the Commission approves the Companies' Plans, in full or Fast Track only, and allows immediate

---

traction we think, because EM and V results are not instantaneous, we have to kind of measure that after the fact. We have to close the books on the year, if you will." Tr. Vol. 2, at page 224:13-28 (March 3, 2010).

[106] Crandall Direct, at page 16:16-17.

[107] Crandall Direct, at pages 15:16-17; 16:19-20.

[108] Crandall Direct, at pages 15:20-16:5.

program launch as designed by the Companies, the Commission should require prospective revisions following launch.

1. <u>FirstEnergy Should Include More Customer Education Efforts In Its Programs.</u>

FirstEnergy needs to be aware of the potential for its customers to increase energy usage despite its energy efficiency efforts. As Witness Crandall testified, phantom and plug loads resulting from increased use of high-energy appliances, such as plasma televisions and gaming systems, have the potential to "unravel and negate energy savings resulting from implementation of FirstEnergy's EE/PDR plan."[109] FirstEnergy does not dispute this claim, but neither does it address customer education programs that could change customer behavior and save electricity. "FirstEnergy has not included aggressive customer information and consumer awareness efforts to ensure that their customers are aware of phantom load and the means to reduce unintentional use."[110] Although Ohio has its unique challenges in relation to other states, Witness Crandall includes Mid-American Energy's, an Iowa company's, customer education tools in his testimony as a model for FirstEnergy.[111] In addition, Witness Crandall explains how California is addressing television power consumption.[112] Although FirstEnergy need not design final publicity materials at this stage, but for one paragraph in the Companies' individual plans, FirstEnergy has not included any customer education programs in its portfolio.[113] Understandably, FirstEnergy's customer education materials would need to be tailored to Ohio's specific needs. That said, education efforts aimed specifically at television inefficiencies, such as those discussed by Witness Crandall, can create efficiency savings and lower customer

---

[109] Crandall Direct, at page 6:11-12.
[110] Crandall Direct, at pages 6:22-7:1.
[111] Crandall Direct, at Exhibit GCC-4.
[112] Crandall Direct, at page 5:17-23.
[113] Tr. Vol. 1, at page 111:9-18 (March 2, 2010).

bills.[114] These examples highlight the need for customers to be aware of power management concerns and the benefits of changed behavior.

The Commission should require FirstEnergy to conduct aggressive customer education programs as part of its EE/PDR Plan. ELPC recommends FirstEnergy institute customer education programs such as speaker bureaus, bill inserts, public service announcements and commercials, and website revisions.[115] FirstEnergy needs to make its customers aware of the consumer goods that use significant electricity or risk losing energy efficiency achievements.

2. FirstEnergy Should Include Its Solid-State Lighting Pilot Program in Its Portfolio.

Although FirstEnergy has one solid-state lighting (SSL) pilot program, with plans for a second, the Companies have not included such projects in their Portfolios.[116] O.A.C. §4901:1-39-03(C) requires FirstEnergy to identify and detail the SSL pilot in its Plan as a "measure considered but not found to be cost-effective or achievable." ELPC strongly supports FirstEnergy's use of an SSL pilot program to understand the costs and benefits of this emerging technology for use in future plans. FirstEnergy acknowledges that LED technology "holds great promise."[117] However, FirstEnergy should follow the Commission's rules and explain the specifics of the pilot programs to allow comment and recommendations from interested stakeholders. For example, FirstEnergy states that SSL technology is too expensive to include in the current EE/PDR Plan.[118] However, DTE Energy, ComEd, and the Public Service Commission of Wisconsin all offer SSL programs.[119] Additionally, Witness Crandall testified that including SSL technologies has a "de minimis impact" on overall Plan TRC.[120] While

[114] Crandall Direct, at pages 5:17-6:2.
[115] Crandall Direct, at pages 7:4-22.
[116] Tr. Vol. 2, at pages 246:20-247:2 (March 3, 2010).
[117] Tr. Vol. 2, at page 245:6-16 (March 3, 2010).
[118] Tr. Vol. 2, at page 247:3-22 (March 3, 2010).
[119] Crandall Direct, at Exhibits 6, 7, and 8.
[120] Tr. Vol. 3, at page 471:10-13 (March 4, 2010).

conditions in Ohio are unique, other utilities are conducting similar pilot programs, and FirstEnergy can learn from those.[121]

Similarly, FirstEnergy should release the details of such SSL pilot programs in order for the PUCO and interested parties to learn from the results.[122] Hence, the Commission should require FirstEnergy to conduct additional pilot programs within the EE/PDR Plan and disclose the results to help with further cost and participation evaluation.

3. The Commission Should Ensure FirstEnergy's Accounting and Evaluation, Monitoring, and Verification Programs are Auditable and Independent.

The Commission should provide guidance to the Companies on how to best manage, track, and verify incentive funds. As Witness Crandall testified,

> Having worked for the Commission staff in Michigan, we found it to be very important -- we found it to be important to identify the accounts and subaccounts within the uniform system so that when we looked at the cost recovery, we could audit expenses, we could allocate costs by functionality, and that should be done through a memo or through some instructions from the accounting staff to the utility.[123]

Accordingly, the Commission should provide guidance and instruction to FirstEnergy concerning the preferred management and audit of program incentives and related funds. The Commission should ensure that managed funds are properly used and available for the stated purpose. While there is no indication that FirstEnergy will mismanage funds, proper audit channels are an effective means to prevent future problems. Witness Crandall recommends "guidance through written correspondence [from the PUCO] that describes the proper accounts and subaccounts for recording and tracking of qualified costs attributable to the EE&PDR

[121] Crandall Direct, at pages 9:17-10:21; Crandall Direct, at Exhibit GCC-9; Tr. Vol. 3, at pages 466:2-14 (March 4, 2010).
[122] While he was unsure of specific enrollment, Witness Crandall did testify that the ComEd SSL program is currently "oversubscribed." Tr. Vol. 3, at pages 468:21-469:4 (March 4, 2010).
[123] Tr. Vol. 3 at page 473:6-19 (March 4, 2010); Crandall Direct, at page 11:2-23.

programs. This will ensure that should a financial audit be conducted on these activities, the audit team will have a clear disaggregation of the relevant costs and revenues."[124] Reliable bookkeeping is reasonable for a portfolio managing over $214 million in program costs over the next three years.[125]

As to EMV concerns, and although FirstEnergy will hire its EMV contractors pursuant to a contract, presumably FirstEnergy will have the ability to dismiss its contractors. Contractors should not be subject to contract terms that allow unilateral termination. The PUCO should ensure that FirstEnergy's EMV contractors have the necessary independence and autonomy to conduct audits of Company programs without concern for termination. While FirstEnergy points to the contractual relationship it will have with EMV contractors, Witness Crandall testified that more may be needed to ensure the independence and impartiality of such contractors.[126] The PUCO should prohibit First Energy from unilaterally dismissing EMV contractors following poor reports. Contractors must have the freedom to conduct their evaluations without fear of being fired.[127] Witness Crandall recommends safeguards such as PUCO or Collaborative approval of EMV contractor dismissal.[128] FirstEnergy should not dismiss contractors because of a truthful, but poor, EMV report issued to the Companies. ELPC recommends the Commission create safeguards to ensure EMV contractor independence.

4. The Commission Should Require Revisions to FirstEnergy's Appliance Recycling Program.

FirstEnergy should include disposal procedures, plans to recover additional appliances, and revised incentive levels in its recycling program. In its Plan, FirstEnergy does not include

[124] Crandall Direct, at page 11:19-23.
[125] Fitzpatrick Direct, at page 11:18-21.
[126] Crandall Direct, at page 13:7-23.
[127] Crandall Direct, at page 13:12-18.
[128] Crandall Direct, at page 13:18-23; Tr. Vol. 2, at pages 475:23-476:11 (March 4, 2010).

disposal procedures of the appliances it collects. While it is proper for FirstEnergy's contractors to conduct the collection and recycling, the Commission should require FirstEnergy to identify how it will ensure contractors are disposing recycled appliances properly. The Commission should require FirstEnergy to conduct "spot checks" or other evaluations of its vendors to ensure proper handling of appliances collected, and to detail those procedures in its Plan.

Additionally, FirstEnergy has not explained if, or how, it will attempt to recover appliances from those customers who change their mind about disposal at the time of pick-up. As Witness Crandall explains, the Companies should expect some customers to change their minds at or shortly before pick-up, sometimes for unknown reasons.[129] FirstEnergy should explain how it will make a second attempt to recover appliances from those customers who change their minds. Witness Crandall recommends calling those customers a second time to suggest appliance pickup when the utility "is going to be in the neighborhood anyway."[130] There is potential for additional efficiency achievements should FirstEnergy make a second effort to recover appliances from customers who change their minds. FirstEnergy seems to agree, as Witness Paganie stated this is an idea the Companies "ought to pursue."[131] The Commission should require FirstEnergy to identify ways it will make this effort.

Finally, the Commission should revise the appliance recycling incentives as recommended by Witness Crandall.[132] Lower incentive levels are appropriate for the appliance recycling program. FirstEnergy agrees with this revision based on the Fast Track Motion.[133] By lowering these incentives to $50 for the first six months, and $35 thereafter, FirstEnergy has

[129] Crandall Direct, at page 19:14-17; Tr. Vol. 3, at page: 485:10-20 (March 4, 2010).
[130] Tr. Vol. 3, at pages 485:21-482:2 (March 4, 2010).
[131] Tr. Vol. 1, at pages 115:5-17; 118:1-8 (March 2, 2010).
[132] Crandall Direct, at pages 18:21-19:7.
[133] Fast Track Motion at page 7.

funds available for other programs. The Commission should mandate revised incentive levels as suggested by Witness Crandall and FirstEnergy's Fast Track Motion.

5. The Commission Should Require Revisions to FirstEnergy's CFL Program.

The Commission should ensure that CFLs, which have the ability for significant efficiency achievements, are properly disposed when no longer needed. While the CFLs are expected to last for several years, FirstEnergy makes no plan for bulb disposal. Because these bulbs contain mercury, proper disposal is essential for environmental and human health safety.[134] Witness Crandall recommends a simple program where customers dispose of CFLs at point-of-purchase vendors as a convenient solution for consumers.

6. FirstEnergy Should Revise Its Modeling Procedures.

FirstEnergy's cost-effectiveness model has two shortcomings. FirstEnergy's modeling shows the commercial and industrial lighting program is not cost-effective. Additionally, FirstEnergy's model lacks Ohio-specific information concerning costs, labor, and other inputs.

FirstEnergy's commercial and industrial lighting program fails the TRC test. Specifically concerning the commercial and industrial lighting program, Witnesses Scheck, Crandall, and Sullivan testified that FirstEnergy's labor assumptions for the C&I lighting program are high or inaccurate.[135] These witnesses agreed that similar programs offered by other utilities pass the TRC test, and all expressed concern with the modeling methodology provided by FirstEnergy.[136] Witness Scheck also questioned the participation rates among customers FirstEnergy assumed would use occupancy lighting programs.[137] Witness Scheck recommended the Company revise its modeling to include a range of assumptions to look at a "whole probability of outcomes and

[134] Crandall Direct, at page 17:16-18.
[135] Direct Testimony of Dylan Sullivan ("Sullivan Direct"), February 16, 2010, at page 17; Scheck Direct, at Question 7, lines 5-11; Tr. Vol. 3, at page 494:2-25 (March 4, 2010).
[136] Crandall Direct, at page 20:13-16; Sullivan Direct, at page 16; Scheck Direct, at Question 6, lines 20-23.

look at that expected range and see what is the risk analysis associated with the company by proceeding forward."[138] An additional reason for the TRC failure could be FirstEnergy's testimony that labor savings associated with the remaining useful life of lighting replacements were not included in the TRC test for the lighting program.[139] FirstEnergy's assumptions left Staff Witness Scheck to testify, "The only reasoning the Staff can think as to why the Company used these type of assumptions in their commercial lighting analysis is that *the Company may not be interested in putting forth their best efforts in terms of administering their own commercial and industrial programs* under their supervision."[140] (emphasis added) The Commission should require FirstEnergy to remodel its Plan to account for labor savings and the wider range of assumptions to account for the "whole probability of outcomes" as Witness Scheck suggests.

In addition, FirstEnergy relies heavily on cost and related data from other states, such as California's DEER database, Michigan's DSMore Database, and Black and Veatch's DSM/EE database, when modeling the Plan's cost effectiveness.[141] These databases ignore unique Ohio conditions that do not appear in other states.[142] Witness Crandall recommends FirstEnergy coordinate with other Ohio utilities to create an Ohio-specific database for use in future three-year EE/PDR plans.[143] In this way, Ohio utilities will have Ohio-specific information when creating future EE/PDR programs.[144] FirstEnergy may then avoid future disagreements concerning program modeling, such as its calculation of the commercial lighting TRC figure. The Commission should require FirstEnergy to accumulate necessary data on a prospective basis for use in future plans in order to avoid using assumptions that may not apply in Ohio.

---

[137] Scheck Direct, at Question 7, lines 12-24.
[138] Tr. Vol. 2, at page 386:10-13 (March 2, 2010).
[139] Tr. Vol. 2, at page 248:4-7 (March 3, 2010).
[140] Scheck Direct, at Question 7, lines 1-5 (unmarked page 4).
[141] Fitzpatrick Direct, at page 13:15-18.
[142] Crandall Direct, at page 21:9-16; Tr. Vol. 3, at pages 488:20-489:20 (March 4, 2010).
[143] Crandall Direct, at page 21:9-16.

7. <u>If the Fast Track Programs are Approved for Early Release, Any Changes Should be Prospective.</u>

ELPC believes that the four Fast Track programs are standard programs that will likely result in significant efficiency achievements. However, because of ELPC's overarching concerns with the Plan and FirstEnergy's overall commitment, many of which were revealed at the hearing, ELPC asks the Commission to deny the Plan in its entirety and require FirstEnergy to revise and resubmit. Should the Commission permit FirstEnergy to launch its Fast Track programs in advance of a final decision on the full EE/PDR Plan, ELPC's applicable recommendations should be made prospectively.

8. <u>Summary of Recommendations.</u>

In sum, ELPC is asking the Commission to deny FirstEnergy's EE/PDR Plan in its entirety due to the legal violations in the Plan and FirstEnergy's overall weak effort to meet efficiency goals. Following a waiver of its 2009 benchmark, FirstEnergy will not be able to meet its 2010 benchmark without special treatment from the Commission. Moreover, FirstEnergy's overall effort is lacking, evidenced by its reliance on mercantile applications, its pessimistic view towards 2025, its failure to understand its own Portfolio details, and its modeling procedures. FirstEnergy should revise and resubmit its Plan. Should the Commission deny FirstEnergy's Plan, or alternatively should the Commission approve the Plan with modifications, ELPC recommends the following:

- FirstEnergy should revise its Plan in order to address the 2010 benchmark shortfall and full 22% by 2025 benchmark;
- FirstEnergy should not rely on mercantile projects for 50% of its efficiency benchmarks;

[144] Tr. Vol. 3, at page 495:7-22 (March 4, 2010).

- FirstEnergy should open its Collaborative to all interested stakeholders;
- FirstEnergy's Plan and program administrators should have more day-to-day knowledge of the proposed programs;
- FirstEnergy should include more customer education materials in the Plan, and detail those it intends to use;
- FirstEnergy should detail technologies considered but not selected, as required by O.A.C. §4901:1-39-03(C), such as SSL technologies;
- FirstEnergy should include the details of its SSL pilot programs in the Plan;
- FirstEnergy should abide by Commission recommended accounting procedures;
- FirstEnergy should ensure that EMV contractors will have the necessary independence for program evaluation;
- FirstEnergy should revise it appliance recycling incentive amounts;
- FirstEnergy should detail a method for recapturing appliance from customers who elect to recycle, but later change their minds;
- FirstEnergy should ensure the proper disposal of hazardous materials collected or distributed through its programs; and
- FirstEnergy should revise its modeling procedures and develop a database of Ohio specific cost and related information for future EE/PDR plans.

In these ways, the Commission can ensure that FirstEnergy is proposing a serious EE/PDR Plan that has a high likelihood of success for efficiency achievements.

V. Conclusion

For all of the above reasons, ELPC respectfully asks the PUCO to deny FirstEnergy's EE/PDR Plan. FirstEnergy submitted a legally deficient Plan devoid of serious effort, and the

Commission should require revisions consistent with legal requirements. ELPC also asks the Commission require FirstEnergy include the above listed recommendations in either a fully revised EE/PDR Plan or as prospective changes to any approved Plan. Finally, ELPC asks the Commission to open FirstEnergy's collaborative process to all interested stakeholders.

Respectfully Submitted,

/s Michael E. Heintz

Michael E. Heintz
Staff Attorney
Environmental Law & Policy Center
1207 Grandview Ave.
Suite 201
Columbus, Ohio 43212
614-488-3301—telephone
614-487-7510—fax
mheintz@elpc.org

CERTIFICATE OF SERVICE

It is hereby certified that a true copy of the foregoing Environmental Law & Policy Center's Initial Post-Hearing Brief, was served upon the persons listed below via electronic mail on this 29th day of March, 2010.

_/s Michael E. Heintz____
Michael E. Heintz

SERVICE LIST

Kathy J. Kolich
Ebony L. Miller
Arthur E. Korkosz
FirstEnergy Service Company
76 South Main St.
Akron, Ohio 44308
kjkolich@firstenergycorp.com
elmiller@firstenergycorp.com
korkosza@firstenergycorp.com

James F. Lang
Laura C. McBride
N. Trevor Alexander
Kevin P. Shannon
Calfee, Halter, & Griswold, LLP
1400 Key Bank Center
800 Superior Ave.
Cleveland, Ohio 44114
jlang@calfee.com
lmcbride@calfee.com
talexander@calfee.com
kshannon@calfee.com

Counsel for Ohio Edison Company, the Cleveland Illuminating Company, and the Toledo Edison Company

Gregory J. Poulos
Christopher J. Allwein
Jeffrey L. Small
Assistant Consumers' Counsel
10 West Broad Street, Suite 1800
Columbus, OH 43215-3485
small@occ.state.oh.us
poulos@occ.state.oh.us
allwein@occ.state.oh.us

Duane Luckey
Attorney General's Office
Public Utilities Commission of Ohio
180 E. Broad St., 6th Fl.
Columbus, OH 43216
duane.luckey@puc.state.oh.us

Michael K. Lavanga
Garrett A. Stone
Brickfield, Burchette, Ritts & Stone, P.C.
1025 Thomas Jefferson Street, N.W.
8th Floor, West Tower
Washington, D.C. 20007
mkl@bbrslaw.com
gas@bbrslaw.com

Attorneys for Nucor Steel Marion, Inc.

Matthew W. Warnock
Bricker & Eckler LLP
100 South Third Street
Columbus, OH 43215
mwarnock@bricker.com

Attorney for Ohio Schools Council

Thomas Lindgren
Attorney General's Office
Public Utilities Section
180 East Broad Street 6th Floor
Columbus, OH 43215
Thomas.lindgren@puc.state.oh.us

Will Reisinger
Trent Doughtery
Nolan Moser
1207 Grandview Avenue, Ste. 201
Columbus, OH 43212-3449
will@theOEC.org
trent@theOEC.org
nolan@theOEC.org

Attorneys for Staff the Ohio Environmental Council

Todd Jones
Christopher Miller
Andre Porter
Gregory Dunn
Schottenstein Zox & Dunn Co., LPA
250 West Street
Columbus, OH 43215
cmiller@szd.com
aporter@szd.com
gdunn@szd.com

Attorneys for the AICUO

David C. Rinebolt
Colleen L. Mooney
Ohio Partners for Affordable Energy
231 West Lima Street
Findlay, OH 45839-1793
cmooney2@columbus.rr.com
drinebolt@ohiopartners.org

Jacqueline Lake Roberts
101 Federal Street, Suite 1100
Boston, MA 02110
jroberts@enernoc.com

Attorney for EnerNOC, Inc.

Samuel C. Randazzo
Lisa G. McAlister
Joseph M. Clark
McNees Wallace & Nurick LLC
21 East State Street, 17th Floor
Columbus, OH 43215
sam@mwncmh.com
lmcalister@mwncmh.com
jclark@mwncmh.com

Attorneys for Industrial Users Energy-Ohio

David F. Boehm, Esq.
Michael L. Kurtz, Esq.
Boehm, Kurtz & Lowry
36 East Seventh St., Ste. 1510
Cincinnati, OH 45202
dboehm@BKLlawfirm.com
mkurtz@BKLlawfirm.com

Attorneys for the Ohio Energy Group

Joseph P. Meissner
Matthew D. Vincel
The Legal Aid Society of Cleveland
1223 West 6th St.
Cleveland, OH 44113
jpmessin@lasclev.org
mvincel@lasclev.org

Attorney for: Neighborhood Environmental Coalition, Consumers for Fair Utility Rates, The Empowerment Center of Greater Cleveland and Cleveland Housing Network

Theodore Robinson
Staff Attorney and Counsel
Citizen Power
2121 Murray Ave.
Pittsburgh, PA 15217
robinson@citizenpower.com

Henry W. Eckhart
50 West Broad Street, #2117
Columbus, OH 43215
henryeckhart@aol.com

Attorney for the Natural Resources Defense Council

Richard L. Sites
General Counsel & Senior Director of Health Policy
155 East Broad St., 15th Fl.
Columbus, OH 43215-3620
ricks@ohanet.org

Attorney for the Ohio Hospital Association

Eric D. Weldele
Tucker Ellis & West LLP
1225 Huntington Center
41 South High Street
Columbus, Ohio 43215-6197
eric.weldele@tuckerellis.com

Attorney for COSE

Craig I. Smith
2824 Coventry Road
Cleveland, Ohio 44120
wis29@yahoo.com

Attorney for Material Sciences Corporation

Thomas J. O'Brien
Bricker & Eckler LLP
100 South Third Street
tobrien@bricker.com

Attorney for the Ohio Manufacturers' Association and the Ohio Hospital Association

Glenn S. Krassen
Bricker & Eckler LLP
1375 East Ninth St., Ste. 1500
Cleveland, OH 44114
gkrassen@bricker.com

Attorney for Ohio Schools Council

Robert J. Triozzi, Director of Law
Steven L. Beeler
Cleveland City Hall
601 Lakeside Avenue, Room 106
Cleveland, Ohio 44114-1077
RTriozzi@city.cleveland.oh.us
SBeeler@city.cleveland.oh.us

Attorneys for the City of Cleveland