

**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 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

REPLY BRIEF OF INDUSTRIAL ENERGY USERS-OHIO

Samuel C. Randazzo (Counsel of Record)
Lisa G. McAlister
Joseph M. Clark
MCNEES WALLACE & NURICK LLC
21 East State Street, 17TH Floor
Columbus, OH 43215
Telephone: (614) 469-8000
Telecopier: (614) 469-4653
sam@mwncmh.com
lmcalister@mwncmh.com
jclark@mwncmh.com

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Attorneys for Industrial Energy Users-Ohio

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REPLY BRIEF OF INDUSTRIAL ENERGY USERS-OHIO

I. INTRODUCTION

On December 15, 2009, Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company (collectively, “FirstEnergy” or “Companies”) filed an Application for approval of an initial three-year energy efficiency and peak demand reduction (“EE/PDR”) program portfolio plan as well as for approval of their respective initial benchmark compliance reports. Several intervenors and FirstEnergy filed Initial Briefs on March 29, 2010; IEU-Ohio filed a Notice on March 26, 2010 that it would not file an Initial Brief but reserved the right to file a reply brief. In accordance with the procedural schedule established by the Attorney Examiners in this

case and its Notice filed on March 26, 2010, IEU-Ohio respectfully submits its Reply Brief in this proceeding for the Commission's consideration.

II. ARGUMENT

A. FirstEnergy's utilization of historical mercantile customer programs to meet its EE/PDR benchmarks is lawful and reasonable.

Pursuant to Section 4928.66, Revised Code, FirstEnergy's proposed EE/PDR portfolio plan utilizes historical mercantile customer self-directed programs to meet its EE/PDR benchmarks during the three-year term of its portfolio plan. FirstEnergy indicates that, particularly for the first year of its EE/PDR portfolio plan while programs are ramping up, a significant percentage of historical mercantile customer self-directed programs are necessary to achieve compliance with the benchmarks:¹

	2010	2011	2012
OE	48.6%	8.9%	6.1%
CEI	50.1%	9.8%	7.3%
TE	52.9%	12.4%	6.0%

However, the Ohio Environmental Council ("OEC") and the Environmental Law and Policy Center ("ELPC") challenge FirstEnergy's use of historical mercantile customer-sited EE/PDR programs to meet the benchmarks. Specifically, OEC claims that Section 4928.66(A)(2)(c), Revised Code, was not intended to be a statutory compliance mechanism but rather a "tool for mercantile customers that made significant investments in energy efficiency technology prior to the passage of Amended Substitute Senate Bill 221 ("SB 221") and were unlikely to find new cost-effective savings on-site

¹ OEC Exhibit 1 at DR-5. It is worth noting that the projected use of historical mercantile customer-sited projects dramatically drops off after the first year of the portfolio plan. Thus, it appears that OEC's and ELPC's arguments are relevant only to the first year of the plan.

because of the prior investments.”² OEC further criticizes the costs associated with the historical self-directed mercantile customer programs.³ OEC and ELPC also argue that FirstEnergy has included self-directed mercantile customer programs that do not count under the Commission’s rules or that will be denied by the Commission.⁴ Finally, OEC criticizes FirstEnergy’s portfolio plan because the portfolio plans of the other electric distribution utilities (“EDUs”) allegedly do not rely as much upon historical mercantile customer program for compliance with the EE/PDR benchmarks.⁵ In other words, OEC urges the Commission to disadvantage FirstEnergy compliance efforts because FirstEnergy is spending too much time and money to improve the energy productivity of Ohio’s real economy.

Rather than basing their arguments on the entirety of the relevant portions of SB 221, OEC and ELPC selectively cherry pick isolated phrases from Section 4928.66, Revised Code, to push an agenda at the Commission that the General Assembly expressly declined to adopt. OEC’s and ELPC’s arguments should be rejected by the Commission. The arguments rest on claims about the meaning of Section 4928.66, Revised Code, that are polluted with errors and, if adopted, work against Ohio’s efforts to improve its energy productivity.⁶

² OEC Initial Brief at 8; see *also* ELPC Initial Brief at 12.

³ OEC Initial Brief at 9-11.

⁴ OEC Initial Brief at 9-12; ELPC Initial Brief at 13.

⁵ OEC Initial Brief at 12-13.

⁶ According to the McKinsey Global Institute’s report (at page 12) titled, *The Case for Investing in Energy Productivity*, issued in February 2008, “energy productivity”:

...is a useful tool with which to analyze the public-policy aims of demand abatement and energy efficiency because it encapsulates both. By looking merely in terms of shrinking demand, we are in danger of denying the opportunity to consumers ... an increasingly dominant force in global energy demand growth. Rather than seeking explicitly to reduce

First, OEC and ELPC ask the Commission to ignore the plain language of Section 4928.66(A)(2)(c), Revised Code. When interpreting laws passed by the General Assembly, the Commission must first apply the text of a statute according to its express terms. As this Commission previously recognized, “Plain and unambiguous statutory authority leaves no occasion to resort to other rules of construction.”⁷ Indeed, “where the language of an enactment is clear and construction according to its terms does not lead to absurd or impracticable consequences, the words employed are to be taken as the final expression of the meaning intended. And in such cases legislative history may not be used to support a construction that adds to or takes from the significance of the words employed.”⁸ The Commission need look no further than the plain language of Section 4928.66, Revised Code, to determine that mercantile customer-sited capabilities must count towards EE/PDR benchmark compliance.

Specifically, Section 4928.66(A)(2)(c), Revised Code, states:

(c) **Compliance with divisions (A)(1)(a) and (b) of this section shall be measured by including the effects of all demand-response programs for mercantile customers of the subject electric distribution utility and all such mercantile customer-sited energy efficiency and peak demand reduction programs**, adjusted upward by the appropriate loss factors. Any mechanism designed to recover the cost of energy efficiency and peak demand reduction programs under divisions (A)(1)(a) and (b) of this section may exempt mercantile customers that commit their demand-response or other customer-sited capabilities, whether existing or new, for integration into the electric distribution utility’s demand-response, energy efficiency, or peak demand reduction programs, if the commission determines that that exemption reasonably encourages such customers to commit those capabilities to those programs...

end-use demand, we should focus on using the benefits of energy in the most productive way.

⁷ *In the Matter of Agel Cox, dba Cox’s Auction House, Notice of Apparent Violation and Intent to Assess Forfeiture*, Case No. 03-1138-TR-CVF, Finding and Order at 6 (November 6, 2003).

⁸ *Cleveland Trust Co. v. Eaton*, 21 Ohio St.2d 129, 138, 256 N.E.2d 198 (1970), *quoting United States v. Missouri Pacific R. Co.*, 278 U.S. 269, 278, 49 S.Ct. 133, 136, 73 L.Ed. 322 (1929).

As IEU-Ohio noted (multiple times) in the “Green Rules” proceeding (Case No. 08-888-EL-ORD) and the Commission’s measurement and verification docket (Case No. 09-512-EL-UNC), the Commission has no discretion in this regard -- a mercantile customer’s self-directed EE/PDR programs must count towards an EDU’s EE/PDR benchmarks.⁹ There are no provisions of Section 4928.66, Revised Code, or the Commission’s rules that limit the amounts of mercantile customer-sited EE/PDR programs that count towards the benchmarks.¹⁰ As a creature of statute, the Commission may only exercise that jurisdiction conferred upon it by the Ohio Revised Code.¹¹ There is no lawful basis to support OEC’s and ELPC’s argument that FirstEnergy’s reliance upon historical mercantile customer projects must be limited.

Additionally, OEC’s and ELPC’s legislative intent arguments completely ignore the portions of Section 4928.66, Revised Code, that specifically demonstrate the General Assembly’s intent that mercantile customer-sited capabilities play a key role in EDUs’ benchmark compliance efforts. Besides declaring that mercantile customer-sited capabilities must count towards benchmark compliance, the General Assembly also determined that an EDU’s baseline for setting the EE/PDR targets must be adjusted to account for the mercantile customer’s participation in helping an EDU meet its benchmarks. Further, Section 4928.66(A)(2)(d), Revised Code, compels the

⁹ Section 4928.66, Revised Code. *also In the Matter of the Adoption of Rules for Alternative and Renewable Energy Technology, Resources, and Climate Regulations, and Review of Chapters 4901:5-1, 4901:5-3, 4901:5-5, and 4901:5-7 of the Ohio Administrative Code, Pursuant to Amended Substitute Senate Bill 221*, Case No. 08-888-EL-ORD, Application for Rehearing and Memorandum in Support of Industrial Energy Users-Ohio (November 16, 2009). *See also In the Matter of Protocols for the Measurement and Verification of Energy Efficiency and Peak Demand Reduction Measures*, Case No. 09-512-EL-UNC, Application for Rehearing and Memorandum in Support of Industrial Energy Users-Ohio (November 16, 2009).

¹⁰ Tr. Vol II at 383.

¹¹ *Time Warner AxS v. Pub. Util. Comm.*, 75 Ohio St.3d 229, 234 (1999).

Commission to facilitate efforts by a mercantile customer or group of mercantile customers to offer customer-sited demand-response, energy efficiency, or peak demand reduction capabilities to an EDU as part of a reasonable arrangement submitted to the Commission under Section 4905.31, Revised Code. In addition to the unambiguous language employed by the General Assembly in Section 4928.66, Revised Code, the other provisions of this statute reveal an unmistakable legislative desire that all mercantile customer-sited capabilities count towards an EDU's compliance with the EE/PDR mandates.

Moreover, OEC and ELPC mischaracterize or misunderstand FirstEnergy's ability to rely on or block historical mercantile customer-sited projects from counting towards its portfolio obligations. As noted above, mercantile customers have the option of committing customer-sited projects for integration into the EDU's portfolio. Ohio law – not the Commission or the consent of other stakeholders – gives mercantile customers the right to decide whether to commit their customer-sited capabilities to the EDU for integration into the EDU's portfolio. While mercantile customers and an EDU can and are in many cases working towards effective use of the capabilities of mercantile customers, Section 4928.66(A)(2)(d), Revised Code, provides mercantile customers the right to unilaterally make an application at the Commission to commit their customer-sited projects towards an EDU's portfolio obligations.¹² Thus, the extent

¹² *In the Matter of the Application for Establishment of a Reasonable Arrangement Between Eramet Marietta, Inc. and Columbus Southern Power Company*, Case No. 09-516-EL-AEC, Entry on Rehearing (March 24, 2010). In this case, the Commission approved a mercantile customer's request to commit its peak demand reduction capabilities to the EDU's portfolio over the EDU's objection.

to which the capabilities of mercantile customers may be committed to FirstEnergy's portfolio is not a matter within its sole control.¹³

Finally, it is ironic that OEC and ELPC argue against reliance upon historical mercantile customer projects while at the same time requesting the Commission reject FirstEnergy's plan in its entirety inasmuch as, absent Commission approval of FirstEnergy's plans for going forward programs, historical mercantile customer programs would represent FirstEnergy's only option to achieve compliance with the statutory benchmarks. As explained above, the only EE/PDR capabilities that the General Assembly mandated must count towards benchmark compliance are mercantile customer-sited capabilities. Thus, if the Commission were to accept OEC's and ELPC's recommendation to reject the proposed EE/PDR portfolio plan in its entirety and leave FirstEnergy with no EE/PDR programs, FirstEnergy's only option to comply with the EE/PDR mandates would be to rely even more on the very mercantile customer-sited capabilities that OEC and ELPC have so feverishly opposed in this proceeding and in other individual mercantile customer EE/PDR rider exemption proceedings.

Section 4928.66, Revised Code, requires counting of historic mercantile customer-sited EE/PDR measures towards FirstEnergy's EE/PDR mandates. The Commission should see OEC's and ELPC's arguments for what they are – another attempt to get the Commission to illegally rewrite SB 221. The Commission must reject OEC's and ELPC's invitation to exclude the lawful and cost-effective use of historical

¹³ IEU-Ohio recognizes that the Commission's rules require an individual customer application be filed and approved by the Commission before a customer's capabilities can be counted towards an EDU's portfolio obligation.

mercantile customer-sited EE/PDR programs in favor of more expensive alternatives that are unlikely to achieve compliance within the required timeframe.

B. The Commission should approve FirstEnergy's proposal to annualize, rather than prorate, EE/PDR savings for projects completed during a calendar year during the term of FirstEnergy's portfolio plan.

Because the Commission has interpreted its rules to only permit an EDU to count partial year savings from its EE/PDR programs towards its benchmarks,¹⁴ FirstEnergy requested an accelerated timeframe for approval of its EE/PDR portfolio plan to allow FirstEnergy to launch its portfolio plans by March 10, 2010 to meet the 2010 portfolio standards on a partial year basis.¹⁵ Alternatively, in the event that the Commission is unable to issue an order within the FirstEnergy-proposed timeframe, FirstEnergy requested approval of several "fast track" programs by March 10, 2010.¹⁶ If the Commission did not act on the EE/PDR portfolio plan or the "fast track" proposal within the proposed timeframes, FirstEnergy indicated that it will be unable to meet its 2010 portfolio obligations and, thus, FirstEnergy will request a waiver of its 2010 portfolio obligations.¹⁷

FirstEnergy also explained that it was petitioning the Commission to modify its previous partial year findings to permit the use of full year savings in order to mitigate the significantly increased costs caused by the use of partial year savings.¹⁸ FirstEnergy witness George L. Fitzpatrick testified that allowing FirstEnergy to annualize

¹⁴ Tr. Vol I at 144-145. See also *In the Matter of the Adoption of Rules for Alternative and Renewable Energy Technology, Resources, and Climate Regulations, and Review of Chapters 4901:5-1, 4901:5-3, 4901:5-5, and 4901:5-7 of the Ohio Administrative Code, Pursuant to Amended Substitute Senate Bill 221*, Case No. 08-888-EL-ORD, Entry on Rehearing at 9 (June 17, 2009).

¹⁵ Cos. Exhibit 1 at 14 (Direct testimony of John E. Paganie); Tr. Vol. I at 144.

¹⁶ *Id.* at 14.

¹⁷ *Id.* at 13; Cos. Exhibit 4 at 11 (George L. Fitzpatrick Direct Testimony); Tr. Vol I at 143.

¹⁸ Cos. Exhibit 1 at 13; Cos. Exhibit 4 at 11-12.

its savings would save customers approximately \$51.2 million over the three-year portfolio plan period.¹⁹ Additionally, FirstEnergy witness John E. Paganie stated that FirstEnergy could meet its EE/PDR benchmarks for 2010 if the Commission issues an order approving the portfolio plans in time for a July 2010 launch that also permits annualizing EE/PDR savings.²⁰

In their Initial Briefs, no party specifically objected to FirstEnergy's request to count energy savings on an annualized basis.²¹

As the Commission is aware, Ohio remains mired in the worst economic downturn since the great depression.²² The public reaction to increases related to the compact fluorescent light ("CFL") bulb program as well as the all-electric rates in FirstEnergy's service territories demonstrates the sensitivity of FirstEnergy customers to even the potential for rate increases of any kind. The Commission should not forgo the opportunity to save customers approximately \$51.2 million during the three year duration of the portfolio plan proposed by FirstEnergy.

Given the current landscape, the Commission should exercise its discretion in the implementation of Section 4928.66, Revised Code, to minimize the costs of its EE/PDR programs for purposes of compliance with the EE/PDR benchmarks. The Commission can and should achieve this goal by permitting FirstEnergy to annualize the effects of its EE/PDR programs, resulting in a reduction of over \$50 million in the

¹⁹ Cos. Exhibit 4 at 11-12.

²⁰ Cos. Exhibit 1 at 14.

²¹ Both OEC and ELPC urge the Commission to reject FirstEnergy's proposed EE/PDR portfolio plan in its entirety. ELPC Initial Brief at 9-11; OEC Initial Brief at 4.

²² Ohio's unemployment rate jumped again to 10.9% in February 2010; Ohio's unemployment rate is 1.2% higher than the national average. See, for example, <http://jfs.ohio.gov/RELEASES/unemp/201003/UnempPressRelease.asp>. (last visited April 5, 2010).

overall EE/PDR portfolio plan cost. Additionally, doing so would permit FirstEnergy to satisfy the portfolio obligations under Section 4928.66, Revised Code, and could potentially avoid the need for FirstEnergy to seek a waiver of its 2010 portfolio obligations.

Respectfully submitted,

/s/ Joseph M. Clark

Samuel C. Randazzo (Counsel of Record)

Lisa G. McAlister

Joseph M. Clark

MCNEES WALLACE & NURICK LLC

Fifth Third Center

21 East State Street, 17th Floor

Columbus, OH 43215-4228

Telephone: (614) 469-8000

Telecopier: (614) 469-4653

sam@mwncmh.com

lmcalister@mwncmh.com

jclark@mwncmh.com

Attorneys for Industrial Energy Users-Ohio

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *Reply Brief of Industrial Energy Users-Ohio* was served upon the following parties of record this 12th day of April 2010, via first class mail, postage prepaid.

/s/ Joseph M. Clark

Joseph M. Clark

Kathy J. Kolich
Arthur Korkosz
Ebony Miller
FirstEnergy Service Company
76 S. Main Street
Akron, OH 44308
kjkolich@firstenergycorp.com
korkosza@firstenergycorp.com
elmiller@firstenergycorp.com

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

**ON BEHALF OF OHIO EDISON COMPANY,
THE CLEVELAND ELECTRIC ILLUMINATING
COMPANY, AND THE TOLEDO EDISON
COMPANY**

Janine Migden-Ostrander
Ohio Consumers' Counsel
Gregory J. Poulos
Christopher J. Allwein
Jeffrey L. Small
Richard Reese
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
reese@occ.state.oh.us

**ON BEHALF OF THE OFFICE OF THE OHIO
CONSUMERS' COUNSEL**

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

**ON BEHALF OF OHIO PARTNERS FOR
AFFORDABLE ENERGY**

Will Reisinger
Trent Dougherty
Nolan Moser
Megan De Lisi
1207 Grandview Avenue, Suite 201
Columbus, OH 43212-3449
will@theOEC.org
trent@theOEC.org
nolan@theOEC.org
megdelisi@yahoo.com

**ON BEHALF OF OHIO ENVIRONMENTAL
COUNCIL**

Michael Heintz
1207 Grandview Avenue, Suite 201
Columbus, OH 43215
mheintz@elpc.org

**ON BEHALF OF ENVIRONMENTAL LAW AND
POLICY CENTER**

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

ON BEHALF OF AICUO

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

ON BEHALF OF 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

**ON BEHALF OF THE 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

ON BEHALF OF CITIZEN POWER

Thomas J. O'Brien
Bricker & Eckler LLP
100 South Third Street
Columbus, OH 43215
tobrien@bricker.com

**ON BEHALF OF THE OHIO
MANUFACTURERS' ASSOCIATION AND THE
OHIO HOSPITAL ASSOCIATION**

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

**ON BEHALF OF THE NATURAL RESOURCES
DEFENSE COUNSEL**

Richard Sites
Ohio Hospital Assoc.
155 East Broad Street, ,15th Floor
Columbus, OH 43215
ricks@ohanet.org

**ON BEHALF OF THE OHIO HOSPITAL
ASSOCIATION**

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

ON BEHALF OF ENERNOC, INC.

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

Glenn S. Krassen
Bricker & Eckler
1375 East Ninth St, Suite 1500
Cleveland, OH 44114
Gkrassen@bricker.com

ON BEHALF OF OHIO SCHOOLS COUNCIL

Robert J. Triozzi
Steven L. Beeler
City of Cleveland
Cleveland City Hall
601 Lakeside Avenue, Room 106
Cleveland, OH 44114
rtriozzi@city.cleveland.oh.us
sbeeler@city.cleveland.oh.us

ON BEHALF OF THE CITY OF CLEVELAND

John W. Bentine
Mark S. Yurick
Chester, Willcox & Saxbe LLP
65 East State Street, Suite 1000
Columbus, OH 43215
jbentine@cwsllaw.com
myurick@cwsllaw.com

Garrett A. Stone
Michael K. Lavanga
Brickfield, Burchette, Ritts & Stone,
1025 Thomas Jefferson Street, NW
8th Floor, West Tower
Washington, DC 2007
gas@bbrslaw.com
mkl@bbrslaw.com

**ON BEHALF OF NUCOR STEEL MARION,
INC.**

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

ON BEHALF OF MATERIAL SCIENCES

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

**ON BEHALF OF THE COUNCIL OF SMALLER
ENTERPRISES**

Duane Luckey
Thomas Lindgren
Attorney General's Office
180 East State Street, 6th Fl.
Columbus, OH 43216
Duane.luckey@puc.state.oh.us
Thomas.lindgren@puc.state.oh.us

**ON BEHALF OF THE STAFF OF THE PUBLIC
UTILITIES COMMISSION OF OHIO**

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