

**BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Energy Efficiency	)	
and Peak Demand Reduction Program	)	
Portfolio of Ohio Edison Company,	)	Case No. 09-951-EL-EEC
The Cleveland Electric Illuminating	)	09-952-EL-EEC
Company, and The Toledo Edison	)	09-953-EL-EEC
Company.	)	

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**MOTION TO DISMISS  
BY  
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL, THE NATURAL  
RESOURCES DEFENSE COUNCIL CITIZEN POWER, AND THE OHIO  
ENVIRONMENTAL COUNCIL**

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The Office of the Ohio Consumers' Counsel ("OCC"), the Natural Resources Defense Council ("NRDC"), Citizen Power, and the Ohio Environmental Council ("OEC") (collectively referred to as "Movants") move to dismiss part of the above-captioned cases where the benefits of energy efficiency are supposed to be realized for Ohio customers as intended by Ohio's new energy law. In their Application, the Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company (collectively, "FirstEnergy EDUs" or "Companies") propose a method for implementing the energy efficiency provisions that are part of the recently enacted Amended Senate Bill 221 ("S.B. 221") in a manner that is inconsistent with that law. The energy efficiency provisions that are inconsistent with Ohio law, as documented by the Companies' discovery responses to the OCC, are the subject of this Motion to Dismiss ("Motion") submitted to the Public Utilities Commission of Ohio ("Commission" or the "PUCO").

The reasons for granting the above-stated Motion are further set forth in the attached Memorandum in Support.

Respectfully submitted,

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**MEMORANDUM IN SUPPORT**

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**I. INTRODUCTION AND STATEMENT OF THE CASE**

In their Application filed on October 14, 2009, the FirstEnergy EDUs proposed a method of implementing the energy efficiency provisions of S.B. 221 in connection with improvements in electrical systems.

Stating that the Application is inconsistent with S.B. 221, the Office of the Ohio Consumers' Counsel ("OCC"), the Ohio Environmental Council ("OEC"), and the Natural Resources Defense Council ("NRDC," collectively with OCC and OEC, "Initial Movants") moved for a hearing so that the Commission would have available the facts regarding energy savings that might qualify under S.B. 221.<sup>1</sup>

On December 8, 2009, the FirstEnergy EDUs opposed setting the matter for a hearing,<sup>2</sup> and Initial Movants replied to the Companies' Memo Contra on December 14, 2009.<sup>3</sup> Initial Movants' Reply argued that the pleadings reveal issues of both fact and law

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<sup>1</sup> Motion for Hearing (November 23, 2009).

<sup>2</sup> See, e.g., FirstEnergy's Memorandum Contra at 2 (December 8, 2009) ("Memo Contra" to the "Motion") ("Movants are correct that some of the projects . . . were undertaken by . . . American Transmission Systems, Incorporated").

<sup>3</sup> Reply to FirstEnergy's Memorandum Contra (December 14, 2009) ("Reply").

that should be resolved only after these issues are subject to the greater scrutiny that can be provided in a hearing to ensure that the benefits of energy efficiency are realized for Ohio customers as intended by the Ohio General Assembly.<sup>4</sup>

In related cases before the PUCO in Case Nos. 09-384-EL-EEC, et al. (“*Early T&D Case*”), the FirstEnergy EDUs filed similar pleadings in an effort to count the added efficiency of transmission and distribution projects that were implemented before 2009.<sup>5</sup> Initial Movants moved to intervene in the *Early T&D Case* and filed a Motion to Dismiss, arguing that R.C. 4928.66(A)(1)(a) requires *electric distribution utilities* to implement programs *beginning in 2009*. The projects that were the subject of the Companies’ application in the *Early T&D Cases* did not fit that description. FirstEnergy did not oppose the Motion to Dismiss. On December 16, 2009, the Commission dismissed the *Early T&D Cases*.<sup>6</sup>

## **II. ARGUMENT: The Part of the Companies’ Application that Clearly Violates R.C. 4928.66(A)(1)(a) Should be Dismissed.**

The Companies’ Application sets out the requirements stated in R.C. 4928.66(A)(1)(a) that “an EDU [i.e. electric distribution utility], starting in 2009, [is required] to ‘implement energy efficiency programs . . . ,’”<sup>7</sup> and then ignores the statutory requirements that are fundamental to the Companies’ proposal to satisfy the provisions in S.B. 221. R.C. 4928.66(A)(1)(a), the provision cited by the FirstEnergy EDUs, states:

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<sup>4</sup> Id.

<sup>5</sup> *In re Early T&D Project’s Contribution to Energy Efficiency and Peak Demand Reductions*, Case Nos. 09-384-EL-EEC, et al., Application (May 8, 2009).

<sup>6</sup> *Early T&D Cases*, Case Nos. 09-384-EL-EEC, et al., Entry at 3 (December 16, 2009).

<sup>7</sup> Application at 1.

Beginning in 2009, an electric distribution utility shall implement energy efficiency programs that achieve energy savings equivalent to at least three-tenths of one percent 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.

A key element to these requirements is that the required compliance actions must be taken by “an electric distribution utility.” The FirstEnergy EDUs ignored this key element in parts of their proposal.

The Application states in various places that the projects described are part of “the Companies’” compliance strategy and compliance plan.<sup>8</sup> The Application thereby refers to the electric distribution utilities,<sup>9</sup> which are also the subject of R.C. 4928.66(A)(1)(a) quoted above. Some projects listed in the exhibits to the Application appeared to be high voltage in nature, and therefore not projects conducted or owned by the FirstEnergy EDUs. The Companies’ responses to discovery confirm this status, identifying the Cardington-Tangy line project,<sup>10</sup> the Avon substation project,<sup>11</sup> and the Babb substation project<sup>12</sup> as “ATSI” (i.e. American Transmission Service, Incorporated) facilities. No provision in Ohio law permits an electric distribution utility to count the activities of other companies that provide services in the electric services industry -- whether affiliated with the electric distribution utility or otherwise. The Application should be dismissed regarding the claims associated with these three projects.

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<sup>8</sup> See, e.g., id. at 2, ¶¶4, 5, and 6.

<sup>9</sup> Application at 1, defining “Companies” as “Ohio Edison Company, The Cleveland Electric Illuminating Company (‘CEI’) and The Toledo Edison Company.” Id.

<sup>10</sup> Response to OCC Interrogatory 1 (attached).

<sup>11</sup> Response to OCC Interrogatory 3 (attached).

<sup>12</sup> Response to OCC Interrogatory 4 (attached).

### III. CONCLUSION

The FirstEnergy EDU's propose to satisfy energy efficiency requirements based upon upgrades to the facilities of another company. This proposal violates Ohio law. That part of the Application that claims benefits from facilities owned by another company should be dismissed. The remaining energy efficiency matters raised by the Application should be set for hearing, as originally supported by the Initial Movants.

Respectfully submitted,

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## **CERTIFICATE OF SERVICE**

I hereby certify that a copy of this *Motion to Dismiss* was served on the persons stated below by regular U.S. Mail, postage prepaid, on this 28th day of May 2010.

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Summary: Motion Motion to Dismiss by the Office of the Ohio Consumers' Counsel, the Natural Resources Defense Council, Citizen Power and the Ohio Environmental Council electronically filed by Ms. Deb J. Bingham on behalf of Small, Jeffrey L. Mr.