

FILE

BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Protocols for the)
Measurement and Verification of Energy) Case No. 09-512-GE-UNC
Efficiency and Peak-Demand Reduction)
Measures.)

PUCO

RECEIVED-DOCKETING DIV
2010 JUL 26 PM 4:45

MEMORANDUM CONTRA APPLICATION FOR REHEARING OF THE
FIRSTENERGY COMPANIES
BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL

I. INTRODUCTION AND STATEMENT OF THE CASE

On October 15, 2009, the Public Utilities Commission of Ohio ("Commission") issued a Finding and Order ("Order") in this case dealing with the development and application of a technical reference manual for energy efficiency and peak demand reduction calculations. Applications for rehearing were filed by the FirstEnergy electric distribution utilities on November 13, 2009. Applications for rehearing were filed by the Office of the Ohio Consumers' Counsel ("OCC") and by the Industrial Energy Users – Ohio on November 16, 2009. All three applications were granted for the purpose of providing the Commission additional time to consider them.¹ All three applications were denied by Commission Entry dated June 16, 2010.²

The FirstEnergy electric distribution utilities (collectively, "FirstEnergy") filed an additional application for rehearing on July 19, 2010 ("July Pleading"). FirstEnergy repeats earlier arguments that would deny customers the benefit of *real* energy efficiency

¹ Entry (December 11, 2009).

² Entry on Rehearing at 7 (June 16, 2010).

This is to certify that the images appearing are an
accurate and complete reproduction of a case file
document delivered in the regular course of business.
Technician SB Date Processed 7/26/10

and peak demand reductions that are required by changes in R.C. Chapter 4928 as the result of the enactment of Sub. S.B. 221. The July Pleading states that FirstEnergy seeks rehearing regarding the Commission's June 16, 2010 Entry. The arguments, however, relate to the Commission's October 15, 2009 Order.

II. ARGUMENT

The arguments contained in FirstEnergy's July Pleading raise matters that the Commission has previously addressed, and FirstEnergy's repetitive arguments are not permitted by Ohio law. The July Pleading states that it is filed pursuant to R.C. 4903.10 and Ohio Adm. Code 4901-1-35.³ Neither permits FirstEnergy's July Pleading. R.C. 4903.10 and Ohio Adm. Code 4901-1-35 provide that applications for rehearing must be submitted within thirty days of the Commission order that is the subject of the applications.⁴ However, FirstEnergy's July Pleading contains an assignment of error that relates to the Order issued on October 15, 2009 (and which was the subject of the OCC's application for rehearing filed in November 2009). Also, FirstEnergy raises, as part of its out-of-time application, an argument based upon the U.S. Constitution that the Commission may not hear.

FirstEnergy argues that it has made its "argu[ment] in several other dockets, which are incorporated . . . by reference."⁵ FirstEnergy's arguments relate to the

³ July Pleading at 1 (July 19, 2010).

⁴ Extension beyond thirty days, not applicable to FirstEnergy's July Pleading, is possible if the due date falls on a day when the Commission's offices are not open.

⁵ July Pleading at 5 (July 19, 2010). FirstEnergy cites its arguments in the Commission's rulemaking, Case No. 08-888-EL-ORD. *Id.* The arguments have already been heard.

“baseline for calculating savings toward statutory benchmarks.”⁶ Those benchmarks were set by the October 15, 2009 Order at “the highest of state or federal standards, or current market practices.”⁷ The Commission’s finding regarding such benchmarks in its October 15, 2009 Order was the subject of the OCC’s timely-filed Application for Rehearing related to that Order.⁸ FirstEnergy’s July Pleading repeats its previous argument concerning R.C. 4928.66, but does so in an untimely attack upon the Order. FirstEnergy’s July Pleading is repetitive and untimely (an attack on a Commission order that is nine months old), in contravention of R.C. 4903.10.

FirstEnergy devotes most of its most recent pleading to arguments based upon the U.S. Constitution.⁹ The Commission is not a court, and it is well settled that the Commission (an administrative agency) does not hear constitutional arguments.¹⁰ In the event that the Commission considers FirstEnergy’s untimely attack upon the Order, it may not hear the arguments offered in FirstEnergy’s Application for Rehearing.

FirstEnergy’s untimely and repetitive attacks on the Commission’s Order should be ignored. In the alternative, they should be rejected.

⁶ Id. at 3-4.

⁷ Order at 9 (October 15, 2009).

⁸ OCC Application for Rehearing at 2-3 (November 16, 2009).

⁹ July Pleading at 5-8 (July 19, 2010).

¹⁰ See, e.g., *In re Columbia Gas Infrastructure Replacement Program and Accounting Treatment*, Case Nos. 07-478-GA-UNC, et al., at 23 (April 9, 2008) (“traditional constitutional law questions are beyond our authority to determine”); *In re Residents of Struthers and Customers of Ohio Water Service Company*, Case No. 88-215-WW-CMR, Entry at 4 (March 8, 1988) (“it is not generally the province of the Commission to decide constitutional questions”).

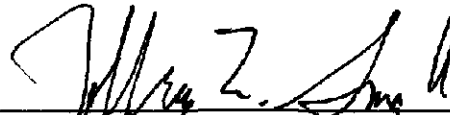
III. CONCLUSION

FirstEnergy's July Pleading re-argues matters already decided in the Commission's Order and rejected in the June 2010 Entry on Rehearing. The July Pleading is an untimely attack on the Commission's Order issued in October 2010. FirstEnergy's July Pleading should be ignored.

In the event that the July Pleading is considered an application for rehearing, its repeated argument on matters that have been rejected by the Commission should again be rejected. FirstEnergy's constitutional arguments may not be heard. FirstEnergy's Application for Rehearing, if even entertained by the Commission, should be denied.

Respectfully submitted,

**JANINE L. MIGDEN-OSTRANDER
CONSUMERS' COUNSEL**

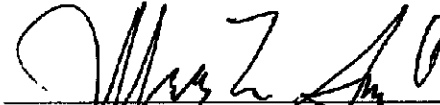


Jeffrey L. Small, Counsel of Record
Richard C. Reese

Assistant Consumers' Counsel
Office of the Ohio Consumers' Counsel
10 West Broad Street, Suite 1800
Columbus, Ohio 43215-3485
Telephone: (614) 466-8574
small@occ.state.oh.us
reese@occ.state.oh.us

CERTIFICATE OF SERVICE

I hereby certify that a copy of this Memorandum Contra was served on the persons stated below by regular U.S. Mail, postage prepaid, on this 26th day of July 2010.



Jeffrey L. Small
Assistant Consumers' Counsel

SERVICE LIST

Duane Luckey
Assistant Attorney General
Public Utilities Commission of Ohio
180 E. Broad St., 6th Fl.
Columbus, Ohio 43215

Samuel C. Randazzo
Lisa McAlister
Joseph Clark
McNees, Wallace & Nurick LLC
21 East State St., 17th Fl.
Columbus, OH 43215

Attorneys for Industrial Energy Users-Ohio

Kathy Kolich
Ebony L. Miller
FirstEnergy Corp.
76 South Main Street
Akron, OH 44308

Nolan Moser
Trent Dougherty
Will Reisinger
Air & Energy Program Manager
The Ohio Environmental Council
1207 Grandview Ave., Ste. 201
Columbus, OH 43212-3449

Attorneys for the FirstEnergy Companies

Attorneys for the Ohio Environmental
Council

Thomas O'Brien
Bricker & Eckler, LLP
100 South Third Street
Columbus, OH 43215-4291

Marvin Resnik
Steve Nourse
American Electric Power Service Corp.
1 Riverside Plaza, 29th Fl.
Columbus, OH 43215

Attorney for Ohio Manufacturers'
Association and Ohio Hospital Association

Attorney for Columbus Southern Power
and Ohio Power Companies

Randall Griffin
Dayton Power & Light Co.
1065 Woodman Dr.
Dayton, OH 45432

Attorney for Dayton Power & Light Co.

Amy Spiller
Duke Energy Ohio
139 East Fourth Street, 2500 AT. II
Cincinnati, OH 45202

Attorney for Duke Energy Ohio

Paul Colbert
Grant Garber
Jones Day
325 John H. McConnell Blvd., Ste. 600
P.O. Box 165017
Columbus, OH 43216-5017

Attorneys for Dominion East Ohio

Steven Seiple
Columbia Gas of Ohio, Inc.
200 Civic Center Dr., P.O. Box 117
Columbus, OH 43215

Attorney for Columbia Gas of Ohio, Inc.

Candace Jones
Janet Stoneking
77 S. High St., P.O. Box 1001
Columbus, OH 43216-1001

Attorneys for the Ohio Department of
Development

Elizabeth Watts
Duke Energy Ohio, Inc.
155 E. Broad St., 21st Floor
Columbus, OH 43215

Attorney for Duke Energy Ohio

David Kutick
Jones Day
North Point
901 Lakeside Ave.
Cleveland, OH 44114

Attorney for Dominion East Ohio

Eric Gallon
Porter, Wright, Morris & Arthur LLP
Huntington Center
41 S. High Street
Columbus, OH 43215

Attorney for Columbia Gas of Ohio, Inc.

Mark Whitt
Carpenter, Lipps & Leland, LLP
280 Plaza, Ste. 1300
280 N. High St.
Columbus, OH 43215

Attorney for Vectren Energy Delivery of
Ohio, Inc.

Mary W. Christensen
Christensen, Christensen & Owens LLP
100 East Campus View Blvd., Suite 360
Columbus OH 43235

Attorney for People Working
Cooperatively, Inc.

Amanda Moore
Environment Ohio
203 E. Broad St., Suite 3
Columbus, OH 43215

Nolan Moser, Esq.
Staff Attorney, Director of Energy and Air
Programs
The Ohio Environmental Council
1207 Grandview Ave. Suite 201
Columbus, OH 43212-3449

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

Michael E. Heintz
Staff Attorney
Environmental Law & Policy Center
1207 Grandview Ave., Suite 201
Columbus, Ohio 43212

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

Attorney for the Sierra Club of Ohio and
the Natural Resources Defense Council