BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of Ohio	)	
Edison Company, the Cleveland Electric	)	Case No. 11-0126-EL-EEC
Illuminating Company, and the Toledo	)	11-127-EL-EEC
Edison Company to Amend Their Energy	)	11-128-EL-EEC
Efficiency and Peak Demand Reduction	)	
Benchmarks.	)	

COMMENTS IN OPPOSITION TO FIRSTENERGY'S APPLICATION TO AMEND OHIO'S ENERGY EFFICIENCY BENCHMARKS BY THE OHIO CONSUMER AND ENVIRONMENTAL ADVOCATES

I. INTRODUCTION

The Ohio Environmental Council ("OEC"), the Environmental Law & Policy Center ("ELPC"), the Office of the Ohio Consumers' Counsel ("OCC"), and the Natural Resources Defense Council ("NRDC") (collectively the "Ohio Consumer and Environmental Advocates" or "OCEA") hereby provide comments regarding the above-captioned Application. In this case, the Ohio Edison Company, the Cleveland Electric Illuminating Company, and the Toledo Edison Company (collectively "FirstEnergy" or "Companies") request that the Public Utilities Commission of Ohio ("PUCO" or "Commission") approve an amendment to the Companies' 2010 energy efficiency and peak demand reduction ("EE/PDR") benchmarks. FirstEnergy sought and received a waiver of its 2009 EE/PDR benchmark.[1] In its Application filed on January 11, 2011, FirstEnergy requests a waiver of its EE/PDR requirements for a second consecutive year.

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[1] *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 No. 09-1004-EL-EEC, et al., Finding at Order at ¶9 (January 7, 2010).

The Commission should deny FirstEnergy's request because the Companies have not demonstrated a good faith effort to comply with the benchmarks. FirstEnergy claims that because the Commission did not approve their portfolio or the so-called "Fast Track" programs, the Companies could not meet the energy efficiency benchmark.[2] FirstEnergy asserts that this "failure" by the Commission constitutes a "regulatory, economic, or technical reason beyond" its control, the standard for a waiver under Ohio law.[3] But FirstEnergy's efforts with regard to energy efficiency undermine this assertion. As discussed below, other electric distribution utilities commenced programs without certainty of cost recovery. FirstEnergy administrators commenced certain mercantile programs that directly benefited FirstEnergy without PUCO approval of variable fee cost recovery. In addition to mercantile programs, the Companies should have commenced certain residential programs that were approved by the FirstEnergy collaborative and pending before the PUCO.[4] Therefore, the undersigned members of OCEA submit that FirstEnergy is not eligible for a waiver of its EE/PDR benchmark pursuant to 4928.66(A)(2)(b).

The PUCO should deny an amendment to the energy efficiency benchmarks as requested by the Companies.[5] Unlike customers within the territories served by other electric distribution utilities ("EDUs" or "utilities"), customers of the Ohio Edison Company, the Toledo Edison Company, and the Cleveland Electric Illuminating Company have been denied the benefits of energy efficiency programs as *required* by Ohio Revised Code 4928.66(A). Customers in the FirstEnergy service territory are still being deprived of significant cost savings and other benefits of efficiency programs, benefits which have been made available to customers of Ohio's three

[2] Application at ¶15 (January 11, 2011).
[3] Id. Application at ¶19.
[4] Id. at ¶13.
[5] Id. at ¶18.

other EDUs since 2009. These benchmarks should not be amended as requested by FirstEnergy. To do so would be to deny FirstEnergy customers the cost savings and other benefits of energy efficiency programs that have been successfully implemented by other Ohio EDUs.[6] The undersigned members of OCEA respectfully request the PUCO to assess a forfeiture from the Companies, pursuant to 4928.66(C), for their 2009 EE/PDR shortfall and require that FirstEnergy's future energy efficiency and peak demand reduction efforts include any benchmark shortfall.

II. APPLICABLE LAW AND FACTS

Amended Substitute Senate Bill 221 ("S.B. 221"), enacted by the General Assembly in 2008, established Ohio's energy efficiency resource standard ("EERS"), which requires all electric distribution utilities to meet gradually increasing annual EE/PDR benchmarks.[7] In 2009, the Companies and other Ohio EDUs were required to meet a benchmark of 0.3 percent of their "total, annual average, and normalized kilowatt-hour sales…during the preceding three calendar years."[8] In 2010, the benchmark percentage increases to 0.5 percent, and continues to gradually increase to 22 percent by 2025.[9] Pursuant to R.C. 4928.66(C), if the Commission determines that a utility has failed to comply with a benchmark, the Commission "shall assess a forfeiture on the utility."

The Commission, however, has the authority pursuant to R.C. 4928.66(A)(2)(b) to amend a utility's benchmark if 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." In 2009, the PUCO granted FirstEnergy's

[6] See the presentation below, footnote 32.
[7] R.C. 4928.66(A)(1)(a).
[8] Id.
[9] Id.

amendment request "contingent upon FirstEnergy meeting revised benchmarks for 2010 through 2012."[10] Thus, while the Companies did receive a waiver from the Commission, that waiver was made conditional upon FirstEnergy making up its benchmark shortfall beginning in 2010.

On January 11, 2011, FirstEnergy filed a second waiver request, this time seeking an amendment of its 2010 EE/PDR benchmark. The Companies provided two justifications to support its waiver request: (1) the Commission's delay in approving the Companies' "Fast Track" programs and portfolio plan filing and (2) the PUCO's failure to approve the Companies' 2010-2012 EE/PDR Portfolio Plan. As presented below, neither justification satisfies the standard for an amendment under R.C. 4928.66(A)(2)(b). FirstEnergy has not demonstrated that it was unable to achieve the benchmarks due to regulatory, economic, or technological reasons beyond its reasonable control and is, therefore, not eligible for a waiver of its 2010 EE/PDR benchmark. Further, by failing to satisfy its 2009 or 2010 benchmark—or to make a good faith effort to comply with the EE/PDR mandates during the past year—FirstEnergy is in breach of the Commission's *conditional* 2009 waiver. Therefore, the PUCO should revisit its order in Case No. 09-1004-EL-EEC, et al, and assess the appropriate forfeiture on the Companies. The Commission should not reduce the Companies' benchmarks or excuse the amount of shortfall. The customers in these territories should receive the full benefit of the statutory energy efficiency mandates in the same proportion as customers in the territories of the other Ohio EDUs have received over the past two years. The General Assembly intended for customers of all Ohio EDUs to receive the full benefits of the energy efficiency standard codified by S.B. 221.

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[10] *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 No. 09-1004-EL-EEC, et al., Finding at Order at ¶9 (January 7, 2010).

III. ARGUMENT AND COMMENTS

FirstEnergy failed to meet its 2009 EE/PDR benchmark due to poor planning and marginal, inconsistent compliance efforts. Now, after failing to diligently work towards compliance, the Companies are seeking a second consecutive waiver of their annual EE/PDR benchmark. FirstEnergy's justifications supporting its waiver request are not credible and do not satisfy the standard for a waiver pursuant to R.C. 4928.66(A)(2)(b). Further, the Companies' poor compliance efforts starkly contrast with the efforts put forth by Ohio's other EDUs. Three of the four other Ohio EDUs fully complied with their 2009 benchmarks.[11] All have made diligent efforts to comply and appear to be on schedule to satisfy their 2010 EE/PDR benchmarks.

A. The PUCO Should Find that FirstEnergy's Failure to Achieve its EE/PDR Benchmark Was Not Due to "Regulatory, Economic, or Technological Issues Beyond its Reasonable Control" and that FirstEnergy is Therefore Ineligible for an Amendment of its Benchmarks Under Ohio Revised Code 4928.66(A)(2)(b).

1. FirstEnergy Chose to Pursue Certain Mercantile Customer Programs that are a Part of the Pending Portfolio Case Prior to PUCO Approval.

FirstEnergy's Application argues that the Commission's failure to address its portfolio filing is a regulatory barrier beyond its reasonable control and excuses the Companies' compliance in 2010 and in future years:

> 16. Because of the Commission's failure to rule on either the joint motion for launch of the Fast Track Programs or the

[11] Dayton Power and Light made significant effort to comply with 2009 EE/PDR benchmarks. The Company requested an amendment to determine their benchmark on a pro-rated basis. They also document an established portfolio of energy efficiency programs for 2009. This request is still pending before the Commission (See *In the Matter of the Application of The Dayton Power and Light Company for a Finding that DP&L'S Energy Efficiency Benchmark has been Met, or in the Alternative, Application to Amend DP&L'S Energy Efficiency Benchmark*, Case No. 09-1988-EL-EEC, Application (December 23, 2009).

> Companies' application for approval of their EEPDR Plan, the Companies cannot be certain that any of the programs included in the Plan will be approved as proposed, thus preventing them from launching these programs prior to receiving approval from the Commission to do so.
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> 17. [This delay has] has caused Ohio Edison to fall short of its 2010 statutory benchmarks [and] jeopardizes *all* of the Companies' abilities to comply with both their EE and PDR benchmark requirements in future years. [12]

However, these statements are misleading and self-serving. In its Application, FirstEnergy attempts to use the Commission's delay in ruling upon its portfolio plan as a justification for failing to launch certain programs that would allow the Companies to satisfy their benchmarks.[13] It is true that FirstEnergy has not yet received Commission approval of the so-called "Fast Track" programs or their EE/PDR program portfolio. However, the lack of Commission approval prior to a program launch appears to be a barrier only when FirstEnergy arbitrarily labels it as such.

FirstEnergy's "full speed ahead" implementation of the mercantile customer programs belies the Companies' arguments described above. The mercantile cases provide numerous examples showing that FirstEnergy forged ahead—without Commission approval or assurances of cost recovery—with programs of a more contentious nature than the "Fast Track" programs. Many aspects of the mercantile program itself, and the Commission's construction of its own rules regarding mercantile agreements, have been taken up by the Commission on rehearing.[14] Ironically, FirstEnergy has chosen not to implement any of the "Fast Track" programs, which

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[12] Application at 6-7 (Emphasis original).
[13] Application at ¶15.
[14] *See In the Matter of the Application for Approval of a Pilot Program Regarding Mercantile Applications for Special Arrangements with Electric Utilities and Exemptions from Energy Efficiency and Peak Demand Reduction Riders*, Case No. 10-834-EL-EEC, Entry Ordering Rehearing (November 10, 2010).

were recognized by the collaborative and all parties to the portfolio proceeding as consistent with energy efficiency industry practice.[15]

FirstEnergy's mercantile customer programs are the subject of considerable litigation. Further, the Companies launched these without Commission approval. According to the stipulation language in the Companies' ESP, FirstEnergy would seek PUCO approval prior to launching any programs:

> Thus, it is essential that any programs pursued to ensure that the Companies meet their statutory requirements, are based on sound program evaluation, garner general support from stakeholders, and are pre-approved for statutory compliance and cost recovery from the Commission.[16]

In addition, the stipulation also declares that programs will be implemented "upon Commission approval."[17] But FirstEnergy's conduct with regard to mercantile programs is inconsistent with the process outlined in the stipulation. Therefore, the Companies have effectively waived the argument that Commission pre-approval is a prerequisite to launching programs. FirstEnergy should not be able to selectively use Commission inaction as a justification for failing to launch programs while at the same time implementing programs without Commission pre-approval.

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[15] See FirstEnergy's Application at ¶12 in which near-unanimous collaborative approval was filed in the FirstEnergy Portfolio cases on February 22, 2010 regarding program designs. Disagreements regarding lost revenue recovery remained and were agreed to be handled at a later time. Actual program cost recovery was not disputed and it is unreasonable for FirstEnergy to assert that the parties filing comments on these programs would dispute cost recovery.

[16] *In the matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company for Authority to Establish a Standard Service Offer pursuant to R.C. 4928.143 in the Form of an Electric Security Plan*, Case No. 08-935-EL-SSO, Stipulation and Recommendation Filed by the Signatory Parties at page 25, Section E.6.a, (February 19, 2009).

[17] Id., PUCO Case No. 08-935-EL-SSO, Stipulation at page 25, Section E.6.f (February 19, 2009).

2. Administrators Acting on Behalf of FirstEnergy Spent Considerable Time and Effort Commencing Unapproved Mercantile Programs Which Served Only a Few Customers and For Which These Administrators Took on Considerable Risk.

FirstEnergy filed an application for the approval of the administrator agreements on June 30, 2009.[18] A Finding and Order approving a modified version of the administrator agreement was not approved until December 2, 2009. Thus, the Companies sought Commission approval of the administrator agreement (and by extension, the program itself) in accord with the terms of the stipulation. However, the historic mercantile program was commenced prior to the December 2, 2009 approval. Program administrators noted on several occasions that the work toward achieving the Companies' benchmarks had already begun *before* any PUCO approval, modified or otherwise, was granted.

For example, a letter was filed in the 09-553-EL-EEC docket by the Ohio Manufacturer's Association ("OMA") requesting PUCO approval of FirstEnergy's application because they had already begun work on the program as an administrator:

> [T]he OMA has begun outreach efforts to alert its members of the opportunity presented by FirstEnergy's program and has engaged Patrick Engineering to provide technical support to the OMA in its role as an administrator. The prompt approval of FirstEnergy's application by the Commission will allow the OMA to continue its very promising work in identifying the efficiency gains targeted by RC 4928.66 to the benefit of FirstEnergy….[19]

Thus, as an agent of the Companies, the OMA hired a consultant and executed an energy efficiency program for FirstEnergy before the PUCO issued any kind of approval.

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[18] *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company for Approval of Administrator Agreements and Statements of Work*, Case No. 09-553-EL-EEC, FirstEnergy Application (June 30, 2009).

[19] Id., Letter to the Commission from the Ohio Manufacturer's Association at 1-2 (September 4, 2009).

After the PUCO entered its December 2, 2009 Finding and Order, administrators described the work they performed *prior to the PUCO's approval* in applications for rehearing. For example, the Industrial Energy Users – Ohio ("IEU") disagreed with the Finding and Order and labeled the decision "harmful" because "of the reliance on the administrators as part of the plan developed by the Applicants to comply with Section 4928.66 […] and the efforts undertaken by the administrators *prior to December 2, 2009*."[20]

A second administrator, the Ohio Schools Council ("OSC"), detailed its efforts for FirstEnergy and that it incurred expenditures in doing so by noting:

> The experience of the OSC, including its costs <u>already incurred</u> in implementing energy efficiency programs in the FirstEnergy service territories, illustrates the problem created by the Commission's Order. OSC has contracted with The Brewer Garrett Company ("Brewer Garrett") based on expectations created by the Commission and FirstEnergy. The services of Brewer Garrett have been integral in helping OSC's participating school districts compile data (e.g. information about existing projects, dates of implementation of energy efficiency measures, calculating energy savings), and complete the paperwork required by the Commission for approval of energy efficiency projects. Real dollars have been spent by OSC to accomplish these tasks.[21]

Similar sentiments were included in Applications for Rehearing filed by the Association of Independent Colleges and Universities[22] and the Ohio Hospitals Association.[23] All of the administrator filings in this case documented that work had commenced, consultants were hired, and that significant expenditures had occurred prior to any PUCO approval.

This was emphasized one more time in oral argument before the Commission on January 20, 2010. During the PUCO meeting, a representative for the Ohio Hospitals Association and

[20] (Emphasis added). PUCO Case No. 09-553-EL-EEC, IEU Application for Rehearing at 3 (December 14, 2009).
[21] (Emphasis original). Id., OSC Motion for Leave to File Application for Rehearing at 3 (December 30, 2009).
[22] Id., Motion for Leave to File Application for Rehearing and Application for Rehearing of The Association of Independent Colleges and Universities of Ohio at 2 (December 23, 2009).
[23] Id., Application for Rehearing of the Ohio Manufacturers' Association and the Ohio Hospitals Association at 3-4 (December 17, 2009).

the Ohio Manufacturers' Association noted how much staff time and effort had gone into finding and documenting historic mercantile projects.[24] All of this time and effort was expended on a FirstEnergy program whose design, fees and cost recovery were still awaiting critical decisions to be made by the PUCO. But, as presented above, these administrators, acting on behalf of the Companies, spent considerable time and effort implementing an energy efficiency program. This energy efficiency program was designed to assist FirstEnergy EDUs in achieving their statutory benchmarks. The cost recovery for this program was uncertain. In fact, the oral argument was a result of the Commission's denial of certain parts of the administrator fee structure.[25]

3. Just Like the "Fast Track" Programs, the Mercantile Programs are a Part of FirstEnergy's Portfolio Which is Still Pending Before the Commission.

FirstEnergy chose to rely on historic mercantile savings as its primary means of compliance with the 2010-2012 EE/PDR benchmarks. In its Portfolio Plan, FirstEnergy outlined its historic mercantile program as part of the program package which included all efficiency efforts, including the so called "Fast Track" programs. These mercantile filings accounted for 48.6% of Ohio Edison's, 50.1% of Cleveland Electric Illuminating Company's, and 52.9% of Toledo Edison's anticipated compliance effort for 2010.[26]

Like the "Fast-Track" programs, FirstEnergy to date has not received Commission authorization to move forward with this mercantile portion of its portfolio in the 09-1947-EL-POR, et al, case, and is not guaranteed administrator cost recovery, lost revenues, or shared savings for these programs.[27] The rider exemptions and cash payment options available to

[24] PUCO Case No. 09-553-EL-EEC, Transcript of January 20, 2010, at 22-25 (February 4, 2010).
[25] Id., Entry on Rehearing at ¶12 (January 13, 2010).
[26] See Ohio Environmental Council Exhibit 1, OEC-Set 1, DR-5, "Responses to Data Requests," PUCO Case No. 09-1947-EL-POR.
[27] In fact, recent modifications to administrator payment structures are still pending before the PUCO: See *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo*

participating mercantile customers represent significant investments on behalf of FirstEnergy. Despite these facts, and in contrast to its inaction with regard to the Fast Track programs, FirstEnergy continues to file, and attempts to count as savings,[28] these mercantile applications. This inconsistency is even more incomprehensible considering the controversial nature of the mercantile program. The OEC, among other parties is actively challenging FirstEnergy mercantile applications, a mercantile pilot program has been suspended and is subject to rehearing, and the Commission still has yet to resolve various issues associated with administrator payments and compensation.[29] The initial finding and order contained a dissent in which the reasonableness and cost-effectiveness of the program was questioned.[30]

Inexplicably, FirstEnergy simultaneously claims that it must have PUCO pre-approval to implement Fast Track programs, yet is willing to act on mercantile programs without Commission pre-approval, without Commission resolution of administrator cost-recovery issues, and without Commission approval of modified administrator payment schedules. In short, Commission approval only provides FirstEnergy with a "regulatory barrier beyond its control" when FirstEnergy chooses to employ these circumstances as a barrier to launching programs.

S.B. 221 is unambiguous. Its efficiency savings requirements are not in any way predicated on PUCO re-approval. Prior commission approval is preferred by FirstEnergy, but, as FirstEnergy has shown by forging ahead with other programs, is not necessary for FirstEnergy to begin implementing them. As demonstrated above, FirstEnergy has moved forward with programs absent Commission approval. Its failure to meet annual benchmarks can in no way be

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Edison Company for Approval of Administrator Agreements and Statements of Work, Case No. 09-553-EL-EEC, Application at ¶¶10-11, 18 and page 7 (September 17, 2010).

[28] See Application at page 9 and Exhibit A.

[29] See footnote 26 above (Case No. 09-553-EL-EEC) and the outstanding Applications for Rehearing in Case No.10-834-EL-EEC respectively.

[30] PUCO Case No. 09-553-EL-EEC, Finding and Order, Dissent of Commissioner Roberto (December 2, 2009).

the result of failure of the Commission to pre-approve programs for cost-recovery, and the inability to meet the benchmarks is certainly not reasonably outside of the Company's control.

B. FirstEnergy Has No Justification For Failing to Launch its Four "Fast Track" Programs.

In light of the fact that FirstEnergy arbitrarily chose to commence the mercantile customer programs prior to Commission approval, there is no reason it could not have taken the same steps with the four "Fast Track" programs. As part of its 2010-2012 EE/PDR Portfolio Plan filing, FirstEnergy requested Commission pre-approval of four "Fast Track" programs. The four programs included the "Appliance Turn-In Program," "CFL (and CFL Low Income) Program," "C/I Equipment Program (Lighting)," and "C/I Equipment Program (Industrial Motors)." All parties to the proceeding agreed that the projects should go forward. All parties except OCC either joined, or did not oppose, a motion filed by the company that requested Commission approval of the programs. OCC also agreed that the Fast Track programs should go forward, but filed its own pleading. [31]

Because all parties expressed support for the Fast Track programs, FirstEnergy could have begun implementing these programs with little risk. FirstEnergy chose not to go forward with those programs while it invested heavily in a dubious mercantile opt-out program, as discussed above. FirstEnergy could have implemented its Fast Track programs with little risk, yet it has chosen to assume significant risk by instead relying on unapproved and contentious mercantile customer programs. Thus, FirstEnergy, since June of 2009, has ventured to benefit a few, select mercantile customers and refused to take any action to serve residential and small business customers. Put another way, the Companies have chosen to focus on work already

[31] OCC filed a separate motion requesting Commission approval of the four fast track programs. OCC requested "near-term implementation" of the programs "in order to provide benefits to Ohioans." PUCO Case No. 09-1947-EL-POR, OCC Memorandum in Response to Joint Motion.

completed by others (and place the financial risks of documentation on others) and launch programs with minimal resulting energy efficiency for the majority of its customers. This inconsistency should not be rewarded with an amendment to any of the Companies' EE/PDR benchmarks. FirstEnergy's efforts stand in stark contrast to the efforts of other utilities, and the Companies' customers are being denied the benefits of energy efficiency programming that are being afforded to customers of Ohio's other EDUs.

C. Uncertainty Regarding Portfolio Approval or Cost-Recovery is not a Regulatory, Economic, or Technological Issue Justifying an Amendment or Waiver of the EE/PDR Benchmark as Contemplated by Ohio Revised Code 4928.66(A)(2)(b).

As described above, R.C. 4928.66(A)(2)(b) grants the PUCO authority to amend an EDU's EE/PDR benchmark requirements if the Commission determines, based on an utility's application, that the amendment is necessary because "the utility cannot reasonably achieve the benchmarks due to regulatory, economic, or technical reasons beyond its reasonable control." The code does not define such "regulatory" barriers that the Commission should deem beyond a utility's control in granting a benchmark amendment. FirstEnergy points to the Commission's inaction on an EE/PDR Plan ruling as a "regulatory" barrier beyond FirstEnergy's reasonable control in order to justify its failure to comply with the 2010 EE/PDR benchmarks. As a preliminary matter, the code does not have a requirement that a utility must halt implementation of its plan if the Commission has not yet approved the plan, nor does the code require plan approval prior to implementing programs. The statutory EE/PDR benchmarks are the controlling law with which FirstEnergy must comply.

The statute and the rules speak to the manner in which a utility shall implement the energy efficiency standards. The law simply authorizes cost recovery; it does not guarantee it. The code certainly does not say that a utility need not comply with the EE/PDR mandates unless and until cost recovery is approved. The Commission's inaction, delaying FirstEnergy's cost recovery, is not a regulatory barrier that excuses the Companies from otherwise meeting their EE/PDR benchmarks. Further, as described above, the fact that FirstEnergy has gone forward with its mercantile opt-out program is evidence that Commission approval is not a prerequisite to launching programs.

Considering these facts, FirstEnergy's argument that it cannot move forward on EE/PDR programs, and should therefore be granted a waiver, is hollow. FirstEnergy's argument does not demonstrate that it was unable to achieve its benchmark "due to regulatory, economic, or technological reasons beyond its reasonable control." FirstEnergy has not satisfied the standard for a benchmark amendment, and the Commission should deny the request and revisit the order in Case Number 09-1004-EL-EEC to assess the appropriate forfeiture.

D. Other Ohio Utilities Have Gone Forward With Programs Prior to Receiving Commission Approval and Met their Statutory EE/PDR Benchmarks.

FirstEnergy's primary justification for its failure to launch EE/PDR programs is that it has not yet received Commission approval for many programs. However, the Commission should note that other Ohio utilities have gone forward with EE/PDR programs prior to Commission approval, which allowed those utilities to satisfy the law's mandates and provide customers with the benefits of efficiency programs. AEP, for example, launched EE/PDR programs before an Order approving its portfolio plan was issued.[32] Although several parties

[32] In the Matter of the Application of Columbus Southern Power for Approval of its Program Portfolio Plan and Request for Expedited Consideration, Case No. 09-1089-EL-POR, et al, Testimony of Jon Williams at page 23 (November 12, 2009): "Q: Has AEP Ohio Started These Programs? A: Yes. AEP Ohio has launched six programs and its general energy efficiency campaign to educate customers on energy efficiency and AEP Ohio programs. They are consumer programs offering appliance recycling, energy efficient lighting and energy efficiency education as well as business programs offering lighting incentives and custom project incentives. A business program offering mercantile customers a prescribed process to commit their already completed energy efficiency and peak demand reduction resources has also been launched. The Companies have also completed two pilot programs focused on low-income customers utilizing Partnership with Ohio funds."

entered into a stipulated agreement that the AEP's plan should be approved, the stipulation was not signed by all parties and the case went to hearing.

Therefore, AEP went forward with several EE/PDR programs before its portfolio plan was approved and has continued to carry out those programs despite legal uncertainty. AEP's plan was not approved until May 26, 2010, and an Application for Rehearing was pending until it was denied by the Commission on July 14, 2010. Further, some aspects of the case, including revenue recovery issues, are still being litigated,[33] and the Industrial Energy Users-Ohio has appealed the Commission's order approving AEP's plan to the Supreme Court of Ohio.[34] This appeal is still pending.

Despite significant uncertainty, AEP went forward with numerous residential and commercial programs in 2009 and the first quarter of 2010, including appliance recycling, home retrofit, and low income programs, and several C&I custom and prescriptive programs.[35] Like FirstEnergy, AEP launched EE/PDR programs prior to obtaining PUCO approval. Unlike the three FirstEnergy EDUs, however, the two AEP EDUs achieved their statutory EE/PDR benchmarks[36] because they launched cost-effective programs that served all customer classes despite the lack of PUCO approval. In addition, in 2009 and 2010, AEP's customers have seen savings of over $630 million from these efficiency programs. FirstEnergy should not be granted any amendments to its statutory benchmarks. It was not bound by the ESP stipulation except when it chose to be. Therefore, the undersigned members of OCEA respectfully request that the PUCO assess the appropriate forfeiture on the Companies.

[33] See, e.g., PUCO Case No. 09-1089-EL-POR, IEU Memorandum Contra, December 3, 2010.
[34] Ohio Supreme Court Case No. 2010-1533.
[35] See AEP Collaborative presentation, DSM 2009-2028 potential estimates, April 7, 2009, slide 57.
[36] See *In the Matter of the Annual Portfolio Status Report Under Rule 4901:1-39-05(C), Ohio Administrative Code, by Columbus Southern Power Company*, Case No. 10-318-EL-EEC (March 15, 2010), and; *In the Matter of the Annual Portfolio Status Report Under Rule 4901:1-39-05(C), Ohio Administrative Code, by Ohio Power Company*, Case No. 10-321-EL-EEC (March 15, 2010).

E. In the Event That the Commission Grants FirstEnergy's Amendment Request, the Commission Should Only Waive the 2010 Shortfall and Should Assess Penalties for the 2009 Shortfall.

In the event that the Commission finds either of the Companies' arguments persuasive, FirstEnergy should only be granted a waiver of its 2010 benchmark shortfall. The Commission, in its Finding and Order granting FirstEnergy's 2009 EE/PDR waiver request, stated that FirstEnergy's benchmark would be revised "contingent upon FirstEnergy meeting revised benchmarks for 2010 through 2012."[37] The Commission further stated that the revised benchmarks would be assigned in the order on FirstEnergy's portfolio plan, 09-1947-EL-POR, et. al. While it is true that, pursuant to the Commission's statements, FirstEnergy does not know the precise benchmarks it will have to achieve in the years up to 2012, this is not a justification for failure to undertake any meaningful efforts to comply with its EE/PDR benchmark . In the absence of a Commission order precisely defining its adjusted benchmarks until 2012, FirstEnergy should have used the statutory benchmarks as a guide. At the very least, the Companies could have been certain that the Commission would require it to satisfy its 2009 shortfall in 2010.

VI. CONCLUSION

The PUCO should deny an amendment to the energy efficiency benchmarks as requested by the Companies. FirstEnergy's choice to await PUCO approval of some of its energy efficiency programs, which would have likely generated significant savings, and arbitrarily commence others, undermines the Companies' reliance on the stipulation language filed as a part of its Electric Security Plan case. The law does not require the Commission to pre-approve any program, and the Commission's failure to pre-approve programs cannot be cited as a regulatory

[37] 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, et al, Finding and Order at ¶9 (January 7, 2010).

barrier to compliance. A lack of approval did not prevent other Ohio EDU's from launching their programs that serve all customer classes and allowed those utilities to achieve their statutory mandates. Customers of the Ohio Edison Company, the Toledo Edison Company and the Cleveland Electric Illuminating Company should be realizing the benefits of energy efficiency and peak demand reduction programs that were mandated by Ohio Revised Code 4928.66(A) and that have been successful in other parts of Ohio. The undersigned members of OCEA respectfully request the PUCO to deny any amendment request by FirstEnergy. OCEA asks the Commission to instead assess a forfeiture from the Companies and require that FirstEnergy's future energy efficiency and peak demand reduction efforts include any benchmark shortfall.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing has been served upon the following parties by first class and/or electronic mail this 25th day of February, 2011.

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