

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

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

ENTRY ON REHEARING

The Commission finds:

- (1) Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company (FirstEnergy or the Companies) are public utilities as defined in Section 4905.02, Revised Code, and, as such, are subject to the jurisdiction of this Commission.
- (2) Section 4928.66, Revised Code, requires electric utilities, beginning in calendar year 2009, to meet certain annual energy efficiency and peak demand reduction (EE/PDR) benchmarks specified in the statute.
- (3) On October 14, 2009, as supplemented on April 7, 2010, FirstEnergy filed an application, pursuant to Section 4928.66(A)(2)(d), Revised Code, for approval of certain transmission and distribution (T&D) projects completed during calendar year 2009 for inclusion as part of its compliance with the energy efficiency benchmarks set forth in Section 4928.66(A)(1)(a), Revised Code.
- (4) On June 8, 2011, the Commission granted motions to intervene in this proceeding filed by the Natural Resources Defense Council (NRDC), Ohio Consumers' Counsel (OCC), Ohio Environmental Council (OEC), Ohio Partners for Affordable Energy (OPAE), Industrial Energy Users-Ohio (IEU-Ohio), and Citizen Power, Inc. (Citizen Power).
- (5) Further, on June 8, 2011, the Commission issued its Finding and Order in this proceeding, approving the application filed by FirstEnergy.

- (6) Section 4903.10, Revised Code, states that any party to a Commission proceeding may apply for rehearing with respect to any matters determined by the Commission within 30 days of the entry of the order upon the Commission's journal.
- (7) On July 8, 2011, NRDC, OEC, OCC, and Citizen Power (collectively, Environmental Advocates) filed an application for rehearing, alleging that the Commission's Finding and Order was unlawful and unreasonable on four grounds.
- (8) On July 18, 2011, the Companies filed a memorandum contra the application for rehearing.
- (9) In their first assignment of error, the Environmental Advocates claim that the Commission erred by including projects conducted by the Companies' affiliate in concluding that the standard in Section 4928.66, Revised Code, was met when the General Assembly limited consideration of energy savings to those achieved by an electric distribution utility. The Environmental Advocates contend that actions undertaken to comply with Section 4928.66(A)(1)(a), Revised Code, must be undertaken by an "electric distribution utility."

In its memorandum contra, FirstEnergy argues that the Commission properly determined that the transmission projects conducted by the Companies' affiliate may be included towards compliance with the Companies' statutory benchmarks. The Companies note that Section 4928.55(A)(2)(d), Revised Code, states that "[p]rograms implemented by a utility may include demand-response programs, customer-sited programs, and *[T&D] infrastructure improvements that reduce line losses* [emphasis added by FirstEnergy]." The Companies claim that the Environmental Advocates do not dispute that: its affiliate, America Transmission Systems, Inc. (ATSI), is a utility and owns the transmission systems that provide transmission service to the Companies and their retail customers; the transmission projects implemented by ATSI were for system improvements and resulted in a reduction in line losses; and the Companies included a program in their EE/PDR program portfolio plan to accumulate savings from T&D projects and the program portfolio plan was approved by the Commission.

The Commission thoroughly considered and addressed this issue in the Finding and Order, where we held that:

The Commission finds that there is no basis to justify a difference in treatment between T&D infrastructure improvements to facilities owned by an electric utility and identical improvements made to facilities owned by an electric utility affiliate. Section 4928.66(A)(2)(d), Revised Code, states that programs implemented by a utility may include T&D infrastructure improvements that reduce line losses, and the Commission is also cognizant of the fact that most energy efficiency projects are completed by parties other than the electric utility on non-electric utility property.

In Section 4928.66(A)(2)(d), Revised Code, the General Assembly specifically enumerated T&D infrastructure improvements that reduce line losses as an energy efficiency measure. The plain language of the statute authorizes T&D infrastructure improvements by a “utility.” There is no reason to believe that the General Assembly intended to preclude T&D projects when those projects are implemented by an affiliate of the electric distribution utility and the affiliate is also a public utility subject to the jurisdiction of the Commission. The Commission further notes that, under Section 4928.66(A)(2)(d), Revised Code, demand-response programs and customer-sited programs may be used to comply with the EE/PDR benchmarks even though these programs do not fall under a electric utility’s direct ownership or control. Finally, the Environmental Advocates do not explain how excluding T&D projects implemented by an affiliate rather than the electric utility promotes the implementation of cost-effective energy efficiency programs or otherwise advances the policy goals set forth by the General Assembly in Section 4928.02, Revised Code. Accordingly, the Commission finds that rehearing on this assignment of error should be denied.

- (10) In their second assignment of error, the Environmental Advocates allege that the Commission erred in failing to hold the required hearing to develop a record, despite the numerous

disputed issues in these cases. The Environmental Advocates claim that Section 4928.66(C), Revised Code, requires the Commission to determine whether electric utilities meet their requirements after notice and an opportunity for a hearing and that this statutory requirement is violated where the Commission approves claimed energy efficiency improvements without a hearing.

FirstEnergy responds that Section 4928.66(C), Revised Code is irrelevant for the purpose of determining whether a hearing is necessary for this proceeding. According to the Companies, Section 4928.66(C), Revised Code, is limited to adjudication of benchmark violations and provides due process protections for the electric utility. FirstEnergy contends that there is no hearing requirement for applications submitted under Section 4928.66(A)(2)(d), Revised Code.

The Commission finds that rehearing on this assignment of error should be denied. Section 4928.66(C), Revised Code, provides, in relevant part,

If the commission determines, after notice and opportunity for hearing and based upon its report under division (B) of this section, that an electric distribution utility has failed to comply with an energy efficiency or peak demand reduction requirement of division (A) of this section, the commission shall assess a forfeiture on the utility as provided under sections 4905.55 to 4905.60 and 4905.64 of the Revised Code....

This hearing requirement clearly applies only to those instances where the Commission believes that an electric utility may have failed to comply with a statutory benchmark and the Commission is considering a civil forfeiture. The requirement does not apply to Commission approval of an electric utilities' EE/PDR programs to be used to meet those statutory benchmarks.

- (11) In their third assignment of error, the Environmental Advocates claim that the Commission erred by failing to address numerous disputed issues based upon the

Commission's failure to finalize an Ohio technical reference manual (TRM).

In its memorandum contra, FirstEnergy argues that the fact that the Commission has not yet approved the draft TRM is not a matter on which the Commission can grant rehearing in this proceeding. Further, the Companies allege that, despite the fact that the Companies' application did not utilize the draft TRM in determining the T&D line losses, the calculation for those line losses was appropriate, correct, and reasonable. The Companies note that Staff reviewed those calculations and concluded that the calculations were correct and that, in the Finding and Order, the Commission concurred with Staff.

The Commission notes that FirstEnergy filed its application in this proceeding prior to the release of the draft TRM. Further, as we noted in the Finding and Order, the final version of the TRM has not yet been approved. *In the Matter of Protocols for the Measurement and Verification of Energy Efficiency and Peak Demand Reduction Measures*, Case No. 09-512-GE-UNC (TRM Case). The Environmental Advocates do not explain how the Commission can require electric utilities to comply with a draft guidance document, particularly since there are numerous issues which still need to be resolved in the TRM Case. Accordingly, rehearing on this assignment of error should be denied.

- (12) In their fourth assignment of error, the Environmental Advocates argue that the Commission erred by failing to address important issues and failing to state reasons prompting decisions based upon findings of fact as required by Section 4903.09, Revised Code. The Environmental Advocates claim that approval of the application in this proceeding without addressing the issue of an appropriate baseline for energy efficiency projects was unjust, unreasonable and unlawful. The Environmental Advocates claim that this issue was extensively commented upon in the TRM proceeding and argue that the Commission should quantify energy savings in a manner which is consistent with the draft TRM. Moreover, the Environmental Advocates claim that the Commission's failure to evaluate conflicting views regarding the Companies' proposed use of a system-wide loss factor in measuring

efficiencies was unjust, unreasonable and unlawful. The Environmental Advocates argue that the “loss factor” approach used by the Companies is inconsistent with the approach taken by the Commission’s consultant in the development of the draft TRM.

FirstEnergy argues that the Finding and Order explicitly denied both motions for hearings and a motion to dismiss, which included the arguments raised by the Environmental Advocates, and that the Finding and Order included an explanation by the Commission for the denying the motions. The Companies argue that the Finding and Order satisfies Section 4903.09, Revised Code, because the Finding and Order: explains the reasoning behind the Commission’s approval of the Companies’ application; cites to Section 4928.66(A)(2)(d), Revised Code, and explains why projects implemented by ATSI count towards the Companies’ compliance with the EE/PDR benchmarks; explains the Commission’s agreement with Staff’s assessment that the energy savings were calculated appropriately; and notes that the TRM is a draft document and that filings must conform with it only after the TRM has been adopted by the Commission.

As the Commission noted above, the draft TRM had not been released prior to the filing of the Companies’ application in this proceeding and has not been finalized by the Commission. In the absence of a final decision by the Commission in the TRM Case, the Companies were free to propose an appropriate method for the calculation of energy savings for purposes of this proceeding, subject to review and approval by the Commission. As we noted in the Finding and Order, Staff filed its review and recommendations in this matter on September 1, 2010. In its review, Staff specifically confirmed that FirstEnergy properly determined the energy savings claimed in the application (Finding and Order at 3-4), and the Commission concurred with the Staff’s recommendation (Id. at 7). Further, in the Finding and Order, the Commission thoroughly considered the arguments raised by the Environmental Advocates and rejected those arguments. Accordingly, rehearing on this assignment of error should be denied.

It is, therefore,

ORDERED, That the application for rehearing filed by NRDC, OEC, OCC, and Citizen Power be denied. It is, further,

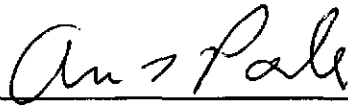
ORDERED, That a copy of this Entry on rehearing be served upon all parties of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO

  
Todd A. Snitchler, Chairman

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Paul A. Centolella

  
Steven D. Lesser  
Andre T. Porter

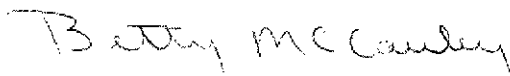
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Cheryl L. Roberto

GAP/sc

Entered in the Journal

**AUG 03 2011**

  
Betty McCauley

Betty McCauley  
Secretary