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 through 2012 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

APPLICATION FOR REHEARING OF OHIO EDISON COMPANY, THE CLEVELAND ELECTRIC ILLUMINATING COMPANY AND THE TOLEDO EDISON COMPANY AND RELATED MEMORANDUM IN SUPPORT

Date: October 7, 2011

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APPLICATION FOR REHEARING

Pursuant to R.C. § 4903.10 and Rule 4901-1-35, O.A.C., Ohio Edison Company ("Ohio Edison"), The Cleveland Electric Illuminating Company ("CEI"), and The Toledo Edison Company ("Toledo Edison") (collectively, the "Companies"), hereby apply for rehearing of the Commission's September 7, 2011 Entry on Rehearing ("Entry") issued in the above-captioned case, because it is unreasonable and unlawful in the following respects:

1. The Commission's directive to require an electric distribution utility to provide all available "cost effective" energy efficiency opportunities above and beyond those levels established in R.C. 4928.66(A)(1)(a) violates the statute and exceeds the Commission's statutory authority.

2. The Commission's directive to require an electric distribution utility to provide all available "cost effective" energy efficiency opportunities is unconstitutionally vague and violates the Companies' right to due process.

3. The Commission's directive to require an electric distribution utility to provide all available "cost effective" energy efficiency opportunities creates an impossible task for the Companies and leads to an impractical result.

4. The Commission's directive to require an electric distribution utility to provide all available "cost effective" energy efficiency opportunities is contrary to public policy.

5. The Commission's amendment of the 2010 energy efficiency benchmarks of CEI and Toledo Edison is premature.

For these reasons, and as set forth in greater detail in the Companies' Memorandum in Support, which is attached hereto and incorporated herein by reference, the Companies respectfully request that the Commission grant rehearing and issue an Entry on Rehearng consistent with this filing.

Respectfully submitted,

Kathy J. Kolich, Counsel of Record
Carrie M. Dunn
FIRSTENERGY SERVICE COMPANY
76 South Main Street
Akron, OH 44308
(330) 384-4580
(330) 384-3875 (fax)
kjkolich@firstenergycorp.com
cmdunn@firstenergycorp.com

James F. Lang
Laura C. McBride
N. Trevor Alexander
Kevin P. Shannon
CALFEE, HALTER & GRISWOLD LLP
1400 KeyBank Center
800 Superior Ave.
Cleveland, OH 44114
(216) 622-8200
(216) 241-0816 (fax)
jlang@calfee.com
lmcbride@calfee.com
talexander@calfee.com
kshannon@calfee.com

ATTORNEYS FOR OHIO EDISON COMPANY, THE CLEVELAND ELECTRIC ILLUMINATING COMPANY, AND THE TOLEDO EDISON COMPANY

MEMORANDUM IN SUPPORT

I. INTRODUCTION

Ohio Edison Company ("Ohio Edison"), The Cleveland Electric Illuminating Company ("CEI") and The Toledo Edison Company ("Toledo Edison"), (collectively, the "Companies"), respectfully request a rehearing on the issues discussed herein and ask that the Commission modify its September 7, 2011 Entry on Rehearing ("Entry") issued in this proceeding consistent with the following comments.

II. ARGUMENT

In its Entry, the Commission unlawfully exceeded its statutory authority by ordering that "[i]n the absence of any regulatory, economic, or technological reasons beyond the Companies' reasonable control, the Companies should seek to provide to their customers all available cost effective energy efficiency opportunities."[1] The Commission further expanded the statutory benchmarks included in R.C. § 4928.66(A)(1)(a) by unlawfully including a least cost criterion that does not exist: "When energy efficiency can be delivered for less than the cost of energy, utilities must provide it as a retail electric service option to their customers."[2] As more fully discussed below, the Commission misinterprets R.C. § 4928.66(A)(1)(a) and exceeds its statutory authority by expanding an EDU's statutory energy efficiency obligations beyond those contemplated by the General Assembly. Moreover, even assuming *arguendo* that the Commission was within its power to impose such a requirement, the Commission's directive is unconstitutionally vague, is impractical and is against public policy. Accordingly, as more fully discussed below, the Commission should issue an Entry on Rehearing in which it removes any requirement for an EDU to exceed the statutory energy efficiency

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[1] This Docket, Entry, p. 6.

[2] Id., p. 5

benchmarks as set forth in R.C. § 4928.66. As a separate matter, and as discussed in Section II(E), *infra*, the Commission should also amend its findings with regard to any modification of the 2010 benchmarks of CEI and Toledo Edison consistent with this filing.

A. The Commission's directive that requires an electric distribution utility to provide all available "cost effective" energy efficiency opportunities above and beyond those levels established in R.C. § 4928.66(A)(1)(a) violates the statute and exceeds the Commission's statutory authority.

R.C. § 4928.66(A)(1)(a) provides:

> Beginning in 2009, an electric distribution utility shall implement energy efficiency programs that achieve energy savings equivalent to at least three-tenths of one per cent 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. The savings requirement, using such a three-year average, shall increase to an additional five-tenths of one per cent in 2010, seven-tenths of one per cent in 2011, eight-tenths of one per cent in 2012, nine-tenths of one per cent in 2013, one per cent from 2014 to 2018, and two per cent each year thereafter, achieving a cumulative, annual energy savings in excess of twenty-two per cent by the end of 2025.

The Commission interprets the above statute as setting the floor for the level of energy efficiency to be achieved, but then goes on to require an EDU to provide *all* available cost effective energy efficiency opportunities, regardless of whether the EDU has exceeded the benchmarks established above. Nowhere in the above statute or elsewhere does such a requirement exist and the Commission, as a creature of statute, has no authority to mandate the implementation of energy efficiency opportunities above and beyond the levels established by statute. *Canton Storage and Transfer Co. v. Pub. Util. Comm.*, (1995) 72 Ohio St. 3d 1. When the Court (or Commission) is called on to interpret a statute, it must "breathe sense and meaning into it; [ ] give effect to all of its terms and provisions; and [ ] render it compatible with other and related enactments whenever and wherever possible." *Commonwealth Loan Co. v. Downtown Lincoln*

Mercury Co. (1st Dist. 1964), 4 Ohio App. 2d 4, 6. It should not insert words not included by the legislature, *State ex rel. Cassels v. Dayton City Sch. Dist. Bd. of Educ.* (1994), 69 Ohio St. 3d 217, 220, nor should it presume that the General Assembly intended to enact a law that produces an unreasonable or absurd result. *State ex rel. Webb v. Bliss,* 99 Ohio St. 3d 166, 170, 2003-Ohio-3049, ¶ 22.

The Commission's interpretation of R.C. § 4928.66 (A)(1)(a) (hereinafter "EE Provision") that requires an EDU to provide all available cost effective energy efficiency opportunities violates these fundamental principles. Nowhere in the EE Provision does the General Assembly incorporate a concept of cost effectiveness or mandate a least cost criterion that requires all cost effective energy efficiency opportunities to be implemented by an EDU in lieu of delivering kilowatt hours; and the Commission's insertion of such words not so included by the General Assembly is contrary to fundamental rules of statutory interpretation. Certainly, had the General Assembly intended such an approach, it would simply have required the EDU to implement all cost effective energy efficiency measures in a least cost manner, and would not have established annual benchmarks that increase over time. Indeed, the gradual increase in the benchmarks is further evidence of the General Assembly's intent to avoid "front-loading" energy efficiency programs that immediately would cause significant cost increases to customers. To interpret the EE Provision as the Commission has done, ignores these benchmark requirements, thus failing to give effect to all of the statute's terms and provisions, again violating the rules of statutory interpretation.

Although the statute includes the phrase "at least" before establishing the benchmarks, clearly this phrase establishes a targeted minimum floor and does not include any requirement to include *all* available cost effective energy efficiency opportunities. And, as more fully discussed *infra* in Section II(C)(2), the Commission's interpretation that includes such a requirement would lead to an absurd result.

Finally, the statute should be interpreted in a manner that makes it compatible with other related statutes, such as R.C. § 4928.66 (A)(1)(b), which, in essence, is the sister statute to R.C. § 4928.66 (A)(1)(a) and establishes statutory benchmark targets for peak demand reduction ("PDR") that an EDU is to strive to achieve.[3] The Supreme Court of Ohio recently addressed R.C. 4928.66(A)(1)(b) (hereinafter "PDR Provision") in the case of *In re Application of Columbus S. Power Co.* (hereinafter "CSP I").[4] Like the EE Provision, the PDR Provision makes no mention of a least cost concept. In fact the CSP I Court expressly concluded that the PDR statute "does not require use of the 'least cost' method," noting that when the General Assembly intends to incorporate a least cost concept, it expressly states such intent.[5] And although the Court agreed that "cost is surely a relevant concern to be balanced in evaluating peak-demand-reduction plans, it is not the only concern."[6] As the Court explained, "[a]s a matter of common sense one must evaluate costs *and* benefits. [The EDU's] peak-demand-reduction plan covers multiple years and numerous industries and rate classes to address a highly complex problem, and there are many concerns beyond simple costs that [the EDU] and the commission must account for in structuring these plans."[7] As discussed in more detail *infra*, the Commission's newly articulated statement of policy that all available cost effective energy efficiency opportunities must be offered by the EDU not only fails to

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3 R.C. § 4928.66(A)(1)(b) provides in pertinent part: "Beginning in 2009, an electric distribution utility shall implement peak demand reduction programs designed to achieve a one per cent reduction in peak demand in 2009 and an additional seventy-five hundredths of one per cent reduction each year through 2018."

4 *In re Application of Columbus S. Power Co.*, 129 Ohio St. 3d 46, 2011-Ohio-2383.

5 Id. at ¶ 28. In support of this conclusion, the Court compared R.C. § 4928.142(C), which includes a least cost bid requirement, to R.C. § 4928.66(A)(1)(b), which has no such requirement.

6 CSP Case, at ¶ 29.

7 Id. at 28 (emphasis in original).

factor in these many other concerns and highly complex problems and fails to properly weigh these costs against potential benefits, but it also provides so little guidance on how an EDU is to comply as to violate the Companies' constitutional right to due process.

The Commission obviously believes that its expansion of the EE Provision to require the implementation of energy efficiency opportunities beyond those established by statute is advancing the public policy goals set forth in R.C. § 4928.02.[8] However, the Commission is only empowered to advance such policies within the confines of the laws as established by the General Assembly. Not only does the Commission fail to do this, but its rationale underlying its reliance on the policies set forth in R.C. 4928.02(A) and (D) is misplaced. In support of furthering the policies of the State, the Commission combines the unrelated requirements of R.C. § 4928.02(A) and 4928.02(D) into one policy section in an attempt to support its otherwise unlawful directive.

R.C. § 4928.02 provides in pertinent part:

> It is the policy of this state to do the following throughout this state:
>
> (A) Ensure the availability to consumers of adequate, reliable, safe, efficient, nondiscriminatory, and reasonably priced retail electric service;
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> * * *
>
> (D) Encourage innovation and market access for cost-effective supply- and demand-side retail electric service including, but not limited to, demand-side management, time-differentiated pricing, and implementation of advanced metering infrastructure;

R.C. § 4928.02(A) sets as policy that EDU's will make available reasonably priced retail electric service. It says nothing about energy efficiency programs, or that reasonably priced retail electric service must include energy efficiency programs – an

[8] This Docket, Entry, p. 5.

interpretation that is consistent with the definition of "retail electric service" as set forth in R.C. § 4928.01(A)(27), which also contains no reference to energy efficiency.[9]

Similarly, R.C. § 4928.02(D) in no way mandates that *all* available "cost effective" energy efficiency opportunities be provided at all times by all EDU's. In fact, this policy subsection does not suggest that *any* energy efficiency programs be provided. It simply encourages "market access for cost-effective supply- and demand-side retail electric service." There has been no suggestion in this proceeding, nor should there be, that "market access" has been denied absent an EDU providing all "cost effective" energy efficiency opportunities. In fact, by subsidizing programs in order to enhance the value of energy efficiency programs/measures offered through their EEPDR Plans, the Companies are certainly providing market access to cost effective programs consistent with State policy. They are simply doing so within the parameters, and at the levels, established by the General Assembly in R.C. § 4928.66(A)(1)(a).

In sum, the Commission's interpretation of the EE Provision inserts words not included by the legislature, ignores words that have been included by the legislature and renders the EE Provision incompatible with both its sister provision, the PDR Provision that has already been addressed by the Supreme Court of Ohio, and the State Policy set forth in R.C. § 4928.02 – all of which are violations of the fundamental rules that govern statutory interpretation. It is the role of the Ohio legislature to determine the laws of the State of Ohio; it is the Commission's role to enforce those laws *as written* and not to

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9 "Retail electric service" is defined in R.C. § 4928.01(A)(27) as "any service involved in supplying or arranging for the *supply of electricity* to ultimate consumers in this state, from the point of generation to the point of consumption. For the purposes of this chapter, retail electric service includes one or more of the following "service components" : generation service, aggregation service, power marketing service, power brokerage service, transmission service, distribution service, ancillary service, metering service, and billing and collection service." (Emphasis added.)

expand upon the law as it has done in this instance. Thus, the Commission should grant rehearing and modify its Entry accordingly.

B. The Commission's directive to require an electric distribution utility to provide all available "cost effective" energy efficiency opportunities is unconstitutionally vague and violates the Companies' right to due process.

In its Entry, the Commission mandates that if energy efficiency can be delivered for less than the cost of energy, an EDU must provide it as a retail electric service option to its customers.[10] The Commission goes on to state that EDUs "may not preferentially push electrons over energy savings opportunities on their customers."[11] As has already been established, there is no least cost requirement set forth in the EE Provision. Moreover, the Companies, as distribution companies, do not "push electrons" over energy efficiency. Unlike energy efficiency, the Companies do not subsidize the cost of electricity that they provide. If anything, the Companies are pushing energy efficiency over electrons by subsidizing the cost of the various energy efficiency measures and programs being offered. And finally, as the Supreme Court of Ohio recognized, there are numerous factors that must be considered beyond cost, many of which are included in the Commission's rules governing compliance with the EE Provision.[12] Thus, the Commission erred in expanding the EE Provision and incorporating a least cost concept. Furthermore, the Commission provided minimal guidance as to how an EDU should comply with such a mandate, only indicating that an EDU "should seek to provide to [its] customers all available cost effective energy efficiency opportunities", and "must seek the least cost means to achieve this standard."[13]

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[10] This Docket, Entry, p. 5.
[11] Id. at 6.
[12] See e.g., O. A.C. Section 4901:1-39-03(B).
[13] This Docket, Entry, at 6.

Assuming for the sake of argument that the Commission is within its statutory authority to make such a mandate (which, as discussed above, it is not) such a requirement is unconstitutionally vague.

The Due Process Clauses of the Fifth and Fourteenth Amendment give rise to the void-for-vagueness doctrine. The doctrine has two primary goals. The first goal is to ensure "fair notice" to the subject of the law as to what the law requires; the second is to provide standards to guide the discretion of those charged with enforcing the law. *Columbia, Natural Resources, Inc. v. Tatum*, 58 F.3d 1101, 1104 (6th Cir. 1995). The Supreme Court has defined the first goal with greater specificity by holding that "[a] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess as to its meaning and differ as to its application, violates the first essential of due process of law." *Id.* at 1105 (citing *Connally v. General Constr. Co.*, 269 U.S. 385, 391, 46 S. Ct. 126, 70 L.Ed 322 (1926)). The second goal "relates to notice to those who must enforce the law . . . [t]he standards of enforcement must be precise enough to avoid 'involving so many factors of varying effect that neither the person to decide in advance nor the jury after the fact can safely and certainly judge the result.'" *Id.* (citing *Cline v. Frink Dairy Co.*, 274 U.S. 445, 465, 47 S.Ct. 681, 71 L.Ed. 1146 (1927)).

Although the vagueness doctrine arises most often in the context of criminal laws that implicate First Amendment values, "vague laws *in any area* suffer a constitutional infirmity." *Ashton v. Kentucky*, 384 U.S. 195, 200, 86 S.Ct. 1407, 16 L.Ed.2d 469 (1966) (collecting cases at n. 1) (emphasis added). *See also*, *Cline*, 274 U.S. at 463 ("The principle of due process of law requiring reasonable certainty of description in fixing a standard for exacting obedience from a person in advance has application as well in civil as in criminal legislation.")

The Supreme Court of Ohio re-affirmed and clarified the void-for-vagueness doctrine in its recent decision in *Norwood v. Horney*, 110 Ohio St.3d 353, 2006-Ohio-3799. The court struck down a municipal ordinance that allowed private property in a "deteriorating area" to be taken by eminent domain, even though the municipal code set forth "a fairly comprehensive array of conditions that purport to describe a 'deteriorating area,' including . . . incompatible land uses, nonconforming uses, lack of adequate parking facilities, faulty street arrangement, obsolete platting, and diversity of ownership." *Id.* at ¶ 93. The Court held:

> In the cases before us, we cannot say that the appellants had fair notice of what conditions constitute a deteriorating area, even in light of the evidence adduced against them at trial. The evidence is a morass of conflicting opinions on the condition of the neighborhood. Though the Norwood Code's definition of 'deteriorating area' provides a litany of conditions, it offers so little guidance in application that it is almost barren of any practical meaning.
>
> In essence, deteriorating area is a standardless standard. Rather than affording fair notice to the property owner, the Norwood Code merely recites a host of subjective factors that invite ad hoc and selective enforcement – a danger made more real by the malleable nature of the public-benefit requirement. [*Id.* at ¶¶ 97-98.]

The void-for-vagueness doctrine, as illustrated by the foregoing cases, is clearly violated by the Commission's mandate requiring an EDU to offer "all available cost effective energy efficiency opportunities," especially when coupled with the requirement to do so "[w]hen energy efficiency can be delivered for less than the cost of energy." As a preliminary matter, what constitutes an "energy efficiency opportunity," let alone a cost effective one? And when, and how often, should cost effectiveness be determined? As more fully discussed below, the practical implications of the Commission's directive leaves the Companies to guess as to the meaning of this directive because it involves so many factors of varying effect that neither the Companies nor the Commission can safely and certainly judge the result. In essence, it has created a "standardless standard."

C. The Commission's directive to provide all available "cost effective" energy efficiency opportunities creates an impossible task for the Companies and leads to an impractical result.

The Commission's rules establish a procedure that is to be followed by EDUs when complying with R.C. § 4928.66. These rules require an EDU to consider various criteria, including "(1) relative cost effectiveness, (2) benefit to all members of a customer class, including non-participants, (3) potential for broad participation within the targeted customer class, (4) likely magnitude of aggregate energy savings or peak-demand reduction, (5) non-energy benefits, and (6) equity among customer classes.[14] Once evaluated, the EDUs are required to submit a "comprehensive energy efficiency and peak-demand reduction portfolio, ... which will ... meet or exceed the statutory benchmarks for energy efficiency."[15] These plans are to be updated by April 15, 2013 and every third year thereafter.[16] The program portfolio must be cost effective at the portfolio level, using the Total Resource Cost ("TRC") test.[17] The TRC test is

> an analysis to determine if, for an investment in energy efficiency or peak-demand reduction measure or program, on a life-cycle basis, the present value of the avoided supply costs for the periods of load reduction, valued at marginal cost, are greater than the present value of the monetary costs of the demand-side measure or program borne by both the electric utility and the participants, plus the increase in supply costs

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[14] O.A.C. Section 4901:1-39-03(B).

[15] O.A.C. Section 4901:1-39-04(A). Even the Commission's rules acknowledge that the Companies need only meet the benchmarks included in the EE Provision. The Commission's directive as set forth in the Entry also violates its own rules.

[16] Id.

[17] O.A.C. Section 4901:1-39-04(B); O.A.C. Section 4901:1-39-03(C).

for any periods of increased load resulting directly from the measure or program adoption.[18]

The Companies submitted their respective comprehensive three year energy efficiency and peak demand reduction ("EEPDR") portfolio plans ("EEPDR Plans") in this docket, which the Commission approved in its March 23, 2011 Opinion and Order. The Companies are following these plans and implementing programs consistent with these plans. They have entered into contracts with various vendors who are responsible for administering many of these programs. They hired expert consultants that assisted them in the development of these plans – a process that takes months to complete because the Companies must factor in all of the aforementioned criteria when developing these plans, any significant changes to which will require a rebalancing of the portfolio. The plans were filed in December 2009 and were ultimately approved in March 2011, after a week of evidentiary hearings in which 19 parties participated.

The Commission's rules also establish a process for making changes to the approved plans. Section 4901:1-39-05(C)(2)(c) of the Ohio Administrative Code contemplates recommendations for additions, deletions and modifications to approved plans as part of the annual status report, after "taking into account the overall balance of programming in [the] program portfolio plan."

The Commission's directive included in the Entry, ignores the above process that it so painstakingly developed in the 08-888-EL-ORD docket, turning the entire process on its

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18 O.A.C. Section 4901:1-39-01(Y). Supply costs are defined as "those costs of supplying energy and/or capacity that are avoided by the investment, including generation, transmission, and distribution to customers." Id. Demand side measure or program costs "include, but are not limited to, the costs for equipment, installation, operation and maintenance, removal of replaced equipment, and program administration, net of any residual benefits and avoided expenses such as the comparable costs for devices that would otherwise have been installed, the salvage value of removed equipment, and any tax credits." Id.

head.[19] Per the Entry, an EDU is now required to provide "all available cost effective energy efficiency opportunities" to their customers. Taking this at face value, the Companies are required to offer each and every energy efficiency opportunity that exists, provided that it is cost effective. As has already been demonstrated, not only is such a directive unlawful and contrary to the Commission's own rules, but it is virtually impossible to achieve and impractical to a point that it leads to an absurd result.

1. <u>It is virtually impossible for an EDU to comply with the Commission's directive.</u>

Technology is continuously developing not only in the energy efficiency arena, but also in traditional and renewable energy supplies. Forward price curves for energy change daily and capacity pricing changes annually. Carrying the Commission's directive to its logical conclusion would require the Companies to scour the market in search of every new energy efficient technology; evaluate each of those technologies; evaluate each technology against the various criteria set forth in the Commission's rules (assuming that the rules still apply); incorporate those programs into their EEPDR Plans, rebalancing the portfolios to ensure that they continue to meet the criteria established in the Commission's rules (again, assuming that they apply); submit a request to add any such programs, along with necessary supporting testimony; allow for other parties of record the opportunity to be heard, and wait for a decision from the Commission. In the mean time, conditions may change, potentially making programs thought to be cost effective at the time the Companies submitted them for approval no longer so, or finding other programs cost effective that were originally determined not to be so. Moreover,

[19] The Commission's new standard that requires "all available cost effective energy efficiency opportunities" to be offered also disrupts the banking and shared savings concepts. If the EE Provision is interpreted to require an EDU to immediately offer all cost effective energy efficiency opportunities, then how will an EDU ever exceed its statutory requirement and how can there be a need for an incentive to go beyond the new standard established by the Commission?

scopes of work with contracted vendors would constantly be changing, as would budgets and the riders that recover the costs incurred. With its most recent directive, the Commission has created a moving target for EDUs that will be impossible to hit.

If the Companies are to have any opportunity to achieve the energy efficiency goals and meet both the letter and spirit of the law *as established by Ohio's legislature*, then a specific point of reference and fixed targets at which the Companies should aim must be established and maintained, which the Commission did when it established the process for the development of three year EEPDR plans. Not following the existing process will undermine not only the value of the three year plans, but also the EDU's ability to know or understand what constitutes compliance with energy efficiency mandates.

2. <u>The Commission's directive is impractical and leads to an absurd result.</u>

The other prong of the Commission's test is to require all available energy efficiency opportunities to be cost effective. Under the Commission's rules, cost effectiveness is to be determined at the portfolio level based on the TRC test. While this test may be sufficient for determining the cost effectiveness of the EEPDR Plans, the Commission has now expanded the requirements well beyond those contemplated in these plans. As explained above, the portfolio could constantly be changing, thus making it difficult to evaluate cost effectiveness at the portfolio level, especially as incremental programs are discovered, evaluated and presented to the Commission for approval. Moreover, as the Commission's rules indicate, not all programs within the portfolio must be cost effective on an individual basis.[20] Therefore, it is unclear as to the level at which the Companies should perform the cost effectiveness test – the portfolio level, the program level or the measure level. The United States Environmental Protection Agency

[20] O.A.C. Section 4901:1-39-04(B).

("USEPA") noted in a recent study on the cost effectiveness of energy efficiency programs that whether an energy efficiency opportunity is cost effective changes depending on the level at which it is evaluated:

> The choice of where to apply each cost-effectiveness test has a significant impact on the ultimate set of measures offered to customers. In general, there are three places to evaluate the cost-effectiveness test: at the "measure" level, the "program" level, and the "portfolio" level. Applying cost-effectiveness tests at the program or portfolio levels allows some non-cost-effective measures or programs to be offered as long as their shortfall is more than offset by cost effective measures and programs.[[21]]

Furthermore, it is unclear as to the customer level at which the cost effectiveness test should be applied – individual customer, customer class, or total customer base – or, for that matter, which cost effectiveness test should be used. As will be explained *infra*, while *participants may* be better off by increasing the energy efficiency requirements, many *individual customers* will see immediate increases in their electric bills with no certainty that they will be able to benefit in the future. It is ill advised to make broad and sweeping policy statements without an in depth analysis of how *all* customers will be affected after factoring in all of the potential implications. And the TRC test does not suffice.

There are five key cost effectiveness tests that have been used as the principal approaches for energy efficiency program evaluation: (i) the Participant Cost Test ("PCT"); (ii) the utility/program administrator cost test ("PACT"), (iii) the ratepayer impact measure test ("RIM"); (iv) the TRC test; and (v) the societal cost test ("SCT").[22] The PCT focuses on participants and whether they will benefit over the measure life. The PACT determines whether utility bills will increase, while the RIM focuses on whether

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[21] National Action Plan for Energy Efficiency (2008), *Understanding Cost-Effectiveness of Energy Efficiency Programs: Best Practices, technical Methods, and Emerging Issues for Policy-Makers*, Energy and Environmental Economics, Inc. and Regulatory Assistance Project (hereinafter "USEPA Action Plan"), at ES-2.

[22] Id. at ES-1.

utility rates will increase. The TRC determines whether the total cost of energy decreases over a given time frame, while the SCT addresses whether the utility, state or nation is better off as a whole.[23] Many states use a combination of these tests when determining cost effectiveness of energy efficiency measures/programs/portfolios.[24] The Commission has not indicated whether an EDU should continue to use the TRC test when assessing the potential incremental energy efficiency "opportunities" that were not originally included in the EEPDR plans. Assuming that this is the test to be used, the costs of the program are compared to the net present value of the benefits that accrue over the life of the measure/program/portfolio, which could be fifteen years or more. The TRC test does not include in the calculation program incentive costs offered by the EDU because they are considered a benefit of the same amount to the customer (thus canceling out the cost). As a result, a program, for example, that simply gives away energy efficient refrigerators (or any other appliance) would pass the TRC test. Taking the Commission's directive to offer "all available cost effective energy efficiency opportunities" to its logical conclusion, an EDU should give away energy efficient appliances to all of its customers.

As an example, in the aggregate, the Companies' customer base includes 2.1 million residential customers. If we assume the cost of an energy efficient refrigerator to be $1000, this program alone would cost $ 2.1 billion. Multiplying this by all of the other energy efficient appliances available in the marketplace exponentially increases this cost. Certainly, the Commission could not have intended such an absurd result. As the Court recognized in CSP I, "there are many concerns beyond simple costs that [the EDU] and the commission must account for in structuring these plans."[25] The Entry fails to account

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23 Id. at 2-2.
24 Id. at 1-2.
25 Id. at 28 (emphasis in original).

for any of them beyond cost and, accordingly, the Entry should be modified to remove the Commission's directive.

D. The Commission's directive to provide all available cost effective energy efficiency opportunities is contrary to public policy.

The Commission's directive that requires an EDU to provide "all available cost effective energy efficiency opportunities" will increase costs to many customers in a time that they can least afford to pay. The Companies have three year plans in place that are designed to meet or exceed the statutory benchmarks included in R.C. § 4928.66(A)(1)(a) and (b). The cost of these plans is estimated to be $214.3 million, all of which must be paid by Ohio citizens and businesses located within the Companies' respective service territories. As the Companies have already explained, the Commission's prior ruling that requires savings to be pro-rated based on the point in the year in which the measure is installed accelerated the cost of the Companies' plans by approximately $51.2 million when compared to plans that determined savings on an annual basis.[26] By now requiring EDUs to immediately offer all available cost effective energy efficiency opportunities, instead of phasing in those costs over time as the benchmarks included in the EE Provision are designed to do, compliance costs and the related charges to customers will increase sooner than necessary, thus further accelerating the repayment for these programs. The Commission believes that such an acceleration is a good thing:

> Because these energy savings must be cost effective, by definition, customers in the aggregate save money when the Companies deliver energy savings opportunities to their customers instead of energy. To the extent the Companies accelerate the delivery of cost effective energy savings opportunities to their customers, they will also accelerate the net cost savings which customers enjoy. Thus, every kWh of energy that can be displaced through cost-effective energy efficiency programs, is a savings, not a cost, to the Companies' customers.

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26 This Docket, Companies' Application for Rehearing at pp. 5-7 (April 22, 2011).

The Commission's analysis is flawed in several respects. First, while the Commission's analysis may perhaps be true in macro economic theory, most customers live their lives and run their businesses on micro economic theory – namely their individual budgets *today*. Second, while *participants may* save money, many *customers* will definitely see immediate increases in their electric bills. Assuming the Commission does not want the EDUs to start giving away refrigerators and other energy efficient appliances, virtually all of the energy efficiency measures offered by utilities include some financial contribution by the customer. In these tough economic times, some customers may choose not to make such a contribution to participate in an energy audit or some other energy efficiency measure, even though in the long run it may save them money. By making this choice, these customers' electric bills will certainly increase simply because they must pay for the electricity consumed, as well as the premature increase in the energy efficiency cost recovery rider that occurs by including these energy efficiency programs/measures above and beyond those contemplated and approved in the EEPDR Plans in which they cannot afford to participate. Similarly, businesses generally require a simple payback of two years or less for investments of any significance.[27] Many of these energy efficiency measures are determined to be cost effective by determining the net present value of benefits over the life of the measure, which in many instances could be 15 years or more.[28] For many businesses, such a lengthy payback period may be unacceptable, thus economically precluding them from participating in

[27] USEAP Action Plan at ES-2.

[28] *See e.g., In re Protocols for the Measurement and Verification of Energy Efficiency and Peak Demand Reduction Measures*, Case No. 09-512-GE-UNC, Draft Technical Reference Manual (Aug. 6, 2010)(Residential CFLs – 9.18 years; Attic/Roof/Ceiling Insulation – 25 years; Metal Halide Track Lighting – 15 years).

these programs. As a result, they too would simply incur higher electric bills because of the Commission's directive.

Third, there is no empirical evidence to support the Commission's conclusions that customers are better off financially by simply requiring the implementation of all available "cost effective" energy efficiency opportunities (as defined by the TRC test). Immediate cash out due to cost increases does not equate to theoretical future cash in based on net present value calculations with assumed discount rates over estimated periods of time during which many assumptions may change. These immediate cost increases could have a negative impact on Ohio's businesses, especially in today's economy, which may hurt them in the long run; and residential, as well as business customers, may not be around to reap the future benefits.

The Supreme Court of Ohio recognized this in another Columbus Southern Power Company ("CSP II") case in which the Commission allowed Columbus Southern Power Company and Ohio Power Company to adjust their economic development cost recovery rider.[29] The Industrial Energy Users – Ohio ("IEU") appealed. As part of its appeal, IEU argued that there was immediate harm resulting from the increase in rates, while the potential benefits, should the rates be found to be unreasonable, may not be received by customers for many years.[30] The court agreed noting:

> [It] is uncontested that some of IEU's members are presently paying higher rates as a result of the order. That harm is immediate and concrete, and the direct, financial injury could well cause further consequential harm. For example, less money now means lost opportunities to use that money later, and these lost investment opportunities could result in further financial loss. Reduced cash flows could also have indirect business consequences – such as requiring additional borrowing, payroll reductions, or other unwanted actions. ... All this assumes that customers, who have

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[29] *In re Application of Columbus S. Power Co.* (hereinafter "CSP II"), 129 Ohio St. 3d 271, 2011-Ohio-2638.
[30] Id. at ¶ 10.

> already paid the increased rate, remain on the system to enjoy any curative credits.[[31]]

Although the reason for the increase in rates differed in CSP II from that contemplated in this action, the result is the same. There is no doubt that the electric bill of any customer not participating in an energy efficiency measure/program will increase in the short run upon the implementation of the additional energy efficiency programs, while the benefits, which will accrue over a much longer period of time, may or may not be available to these same customers, depending on whether they can remain in business or remain on the system and whether the assumptions being made ring true over the long benefits period. While cost increases are often necessary, there is no need to create them prematurely, which is exactly what the Commission's directive does. The Commission seems to ignore the fact that even under the EE Provision as written the Companies will eventually have to include many additional energy efficiency programs as the statutory benchmarks included in the EE Provision increase. However, this should be done after careful analysis, which takes into account the many factors (as included in the Commission's rules), and not simply by looking to see if the energy efficiency measure passes the TRC test, or some other cost effectiveness test directed by the Commission. The process established by the rules accomplishes this and the Commission should allow that process to work.

In sum, while macro economic theory may perhaps demonstrate that available energy efficiency opportunities are cost effective when the benefits are present valued back over time, residential customers and Ohio businesses struggling in this economy are more concerned with immediate financial impacts. Unnecessarily increasing costs in the present for benefits that *may* be available in the future creates just one more hurdle for

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[31] Id. at ¶ 11.

these customers -- a hurdle that can be avoided by simply requiring EDUs to comply with the energy efficiency levels established in R.C. 4928.66(A)(1)(a).

E. The Commission's amendment of the 2010 energy efficiency benchmarks of CEI and Toledo Edison is premature.

In its Entry, the Commission noted the impact the lengthy proceeding in this docket has had on the Companies' ability to meet their 2010 energy efficiency benchmarks.[32] The Commission also noted that it had already granted Ohio Edison's request for an amendment to its 2010 benchmark.[33] In 11-126-EL-EEC et al., the Commission found the request for a contingent amendment of CEI and Toledo Edison to be unnecessary.[34] However, in the Entry in this proceeding, the Commission went further, granting an amendment that the Companies did not request: "[T]he Companies are unable to meet their energy efficiency savings due to reasons beyond their control, and the Commission will amend the 2010 energy efficiency benchmarks for CEI and [Toledo Edison] to the total energy savings actually achieved by each company."[35] The Commission made its finding "contingent upon the Companies filing a report in this docket within thirty days which details, by company, the total energy savings required for 2010, the total energy savings for 2010 which would have been achieved according to annualized accounting, and the total energy savings achieved according to pro rata accounting."[36]

As evidenced by the Companies' annual status report that was filed on May 23, 2011 with the Commission in Docket No. 11-256-EL-EEC et al, both CEI and Toledo Edison exceeded their 2010 energy efficiency obligations under both the pro rata and annualized

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[32] This Docket, Entry, p. 7.
[33] Id.
[34] In re *Application of [the Companies] to Amend Their Energy Efficiency and Peak Demand Reduction Benchmarks*, Case No. 11-126-EL-EEC et al., Entry on Rehearing (July 27, 2011).
[35] Id.
[36] Id. at 7-8.

savings methodologies, *provided* that all applications still pending approval before the Commission at the time the report was filed are granted as filed. Until these applications that are pending are ruled upon, the Companies cannot be certain that they will continue to comply with the 2010 energy efficiency benchmarks set forth in R.C. 4928.66. If most or all of these pending applications are approved as filed, CEI and Toledo Edison will continue to exceed the statutory benchmarks included in the EE Provision and will not need any amendment to their 2010 energy efficiency benchmarks. Only if the Commission adversely rules on enough of the pending applications to bring either or both of these companies below their statutory benchmarks will they require such an amendment. Because it is not yet known whether these applications will be approved as filed, the Commission should not yet grant the amendment. By doing so now, the Commission may interfere with these companies' ability to bank savings in excess of the benchmarks, since the Entry amends the benchmarks of CEI and Toledo Edison to levels actually achieved. If after all of the pending applications are ruled upon and it is discovered that the contributions from these applications cause these companies to exceed the statutory benchmarks, they will not be able to bank the excess because their amended benchmarks are now actual levels achieved. If, on the other hand, the rulings on the pending applications cause the Companies to fall below these benchmarks, these companies *may* not have an opportunity to seek an amendment, given the Commission's ruling in Docket 11-126-EL-EEC et al. Based on the above, the Companies are simply requesting that the Commission withdraw the granting of the amendment for CEI and Toledo Edison at this time and clarify in the Entry that these companies may submit an application for consideration of an amendment after all pending applications are ruled upon should the need arise. The Companies also ask the Commission to remove the information request that was also included in the Entry because all such information has already been submitted to the Commission in the Companies' 2010 Annual Status Report.[37]

III. CONCLUSION

Based upon the foregoing, the Companies respectfully ask the Commission to grant rehearing and modify the Order consistent with the comments set forth above, specifically:

- Removing the directive that requires the Companies to offer "all available cost effective energy efficiency opportunities" and, instead, only require the Companies to achieve the energy efficiency levels established in R.C. § 4928.66(A)(1)(a);

- Withdrawing the amendment to the 2010 energy efficiency benchmarks of CEI and Toledo Edison to actual levels achieved, and instead granting these companies leave to plead for an amendment should one become necessary after the Commission issues its ruling on past applications still pending before it for approval; and

- Removing the filing requirement and 30-day contingency included in the Entry, given that the information is already in the possession of the Commission.

[37] Because such information is due on the date of this filing, should the Companies be required to comply with the information request, the Companies direct the Commission to their 2010 Status Report, pending additional direction from the Commission on this issue.

Respectfully submitted,

Kathy J. Kolich

Kathy J. Kolich, Counsel of Record
Carrie M. Dunn
FIRSTENERGY SERVICE COMPANY
76 South Main Street
Akron, OH 44308
(330) 384-4580
(330) 384-3875 (fax)
kjkolich@firstenergycorp.com
cmdunn@firstenergycorp.com

James F. Lang
Laura C. McBride
N. Trevor Alexander
Kevin P. Shannon
CALFEE, HALTER & GRISWOLD LLP
1400 KeyBank Center
800 Superior Ave.
Cleveland, OH 44114
(216) 622-8200
(216) 241-0816 (fax)
jlang@calfee.com
lmcbride@calfee.com
talexander@calfee.com
kshannon@calfee.com

ATTORNEYS FOR APPLICANTS, OHIO EDISON COMPANY, THE CLEVELAND ELECTRIC ILLUMINATING COMPANY, AND THE TOLEDO EDISON COMPANY

CERTIFICATE OF SERVICE

I hereby certify that this Application for Rehearing and related Memorandum in Support submitted by Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company was filed electronically this 7th day of October, 2011, with the Public Utilities Commission of Ohio Docketing Information System. Notice of this filing and a courtesy electronic copy will be sent via e-mail to the parties included on the attached service list.

Kathy J. Kolich

Kathy J. Kolich, Esquire

The Commission acknowledges that because of the order, some "customers do pay slightly more today than they would have."

Craig I. Smith
Attorney at Law
2824 Coventry Road
Cleveland, OH 44120
wis29@yahoo.com

Jeffrey L. Small (Counsel of Record)
Terry L. Etter
Christopher J. Allwein
Office of the Ohio Consumers' Counsel
10 West Broad Street, Suite 1800
Columbus, OH 43215-3485
small@occ.state.oh.us
etter@occ.state.oh.us
allwein@occ.state.oh.us

Samuel Randazzo (Counsel of Record)
MCNEES WALLACE & NURICK LLC
Fifth Third Center
21 East State Street, 17th Floor
Columbus, OH 43215-4228
sam@mwncmh.com

David F. Boehm, Esq.
Michael L. Kurtz, Esq.
BOEHM, KURTZ & LOWRY
36 East Seventh Street
Suite 1510
Cincinnati, OH 45202
dboehm@bkllawfirm.com
mkurtz@bkllawfirm.com

Thomas J. O'Brien
BRICKER & ECKLER LLP
100 South Third Street
Columbus, OH 43215-4291
tobrien@bricker.com

Richard L. Sites
General Counsel & Sr. Director of Health Policy
OHIO HOSPITAL ASSOCIATION
155 East Broad Street, 15th Floor
Columbus, OH 43215-3620
ricks@ohanet.org

Duane Luckey
Attorney General's Office
Public Utilities Section
180 East Broad Street, 9th Floor
Columbus, OH 43215
duane.luckey@puc.state.oh.us

Thomas Lindgren
Attorney General's Office
Public Utilities Section
180 East Broad Street, 6h Floor
Columbus, OH 43215
thomas.lindgren@puc.state.oh.us

David C. Rinebolt
Colleen L. Mooney
Ohio Partners for Affordable Energy
231 West Lima Street
P.O. Box 1793
Findlay, OH 45839-1793
drinebolt@aol.com
cmooney2@columbus.rr.com

Glenn S. Krassen
BRICKER & ECKLER LLP
1001 Lakeside Ave., East
Suite 1350
Cleveland, OH 44114-1142
GKrassen@Bricker.com

Matthew W. Warnock
BRICKER & ECKLER LLP
100 South Third Street
Columbus, OH 43215
MWarnock@Bricker.com

Michael K. Lavanga
mkl@bbrslaw.com
Counsel of Record
Garrett A. Stone
gas@bbrslaw.com
Brickfield, Burchette, Ritts & Stone, P.C.
1025 Thomas Jefferson Street, N.W.
8th Floor, West Tower
Washington, DC 20007

Nolan Moser
Trent. A. Dougherty
The Ohio Environmental Council
1207 Grandview Avenue, Suite 201
Columbus, OH 4321
nmoser@theOEC.org
trent@the OEC.org
Joseph P. Meissner, Esq.
Matthew D. Vincel, Esq.
The Legal Aid Society of Cleveland
1223 W. 6th Street
Cleveland, OH 44113
jpmeissn@lasclev.org
mvincel@lasclev.org

Michael E Heintz
Environmental Law & Policy Center
1207 Grandview Avenue, Suite 201
Columbus, OH 43204
mheintz@elpc.org

Robert Kelter
Environmental Law & Policy Center
35 West Wacker Drive
Suite 1600
Chicago, IL 60601
rkelter@elpc.org

Matthew R. Cox
McDonald Hopkins
6000 Superior Ave., East
Suite 2100
Cleveland, OH 44114
mcox@mcdonaldhopkins.com

Henry W. Eckhart
1200 Chambers Road, Suite 106
Columbus, OH 43212
henryeckhart@aol.com

Theodore J. Robinson
2121 Murray Avenue
Pittsburgh, PA 15217
robinson@citizenpower.com

Christopher L. Miller
Gregory H. Dunn
Schottenstein Zox & Dunn Co. LPA
250 West Broad Street
Columbus, OH 43215
cmiller@szd.com
gdunn@szd.com

Robert J. Triozzi
Director of Law, City of Cleveland, Ohio
Steven Beeler
Assistant Director of Law, City of
Cleveland, Ohio
Cleveland City Hall
601 Lakeside Avenue, Room 106
Cleveland, OH 44114
RTriozzi@city.cleveland.oh.us
SBeeler@city.cleveland.oh.us

Nicolas C. York
Attorney for Council of Smaller Enterprises
Tucker Ellis & West LLP
1150 Huntington Bldg.
925 Euclid Ave.
Cleveland, OH 44115-1414
Nicholas.york@tuckerellis.com