

**BEFORE THE
PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Commission's Review)	
of Chapter 4901:1-41, Ohio)	Case No. 12-3160-EL-ORD
Administrative Code, Regarding)	
Greenhouse Gas Reporting and Carbon)	
Dioxide Control Planning.)	

COMMENTS OF FIRSTENERGY SOLUTIONS CORP.

FirstEnergy Solutions Corp. ("FES") submits these Comments in response to the Commission's March 20, 2013 Entry in this proceeding, inviting interested parties to comment on the Commission's proposed changes, or lack thereof, to the rules found in O.A.C. 4901:1-41. FES submits, as it did in its earlier correspondence filed in this docket, that the Commission's rules in O.A.C. 4901:1-41, which establish reporting and planning requirements for greenhouse gas emissions (the "GHG Rules"), are redundant, unnecessary, and should be eliminated. At a minimum, the GHG Rules should be revised to reflect that compliance with the comprehensive (and overlapping) federal reporting requirements will comply with the Commission's GHG Rules. FES also submits that, as a preliminary matter, the Commission must acknowledge that the GHG Rules are *only applicable* to Ohio electric generating facilities that are owned or operated by a public utility that is subject to the Commission's jurisdiction.

A. The GHG Rules Do Not Apply To Electric Generating Facilities That Are Not Owned Or Operated By A Public Utility.

The enabling statute and the GHG Rules themselves explicitly provide that the GHG Rules impose reporting and planning requirements on any "electric generating facility that is located in this state, [and] is owned or operated by a public utility that is subject to the

commission's jurisdiction.”¹ Staff confirmed this limitation in its Business Impact Analysis for the GHG Rules, in that it noted that the “intent of the rule” is to establish reporting and planning requirements “for each electric generating facility that (a) is located in Ohio, (b) is owned or operated by a public utility that is subject to the Commission's jurisdiction, and (c) emits greenhouse gases.”² Accordingly, in order to fall under the authority granted the Commission by R.C. § 4928.68 and, thus, the GHG Rules, the generating facilities must be owned or operated by a public utility that is subject to the Commission's jurisdiction. Electric generating facilities that are not owned or operated by a public utility subject to the Commission's jurisdiction have no obligation to comply with the GHG Rules.

While the language of R.C. § 4928.68 and O.A.C. 4901:1-41-03 is explicit and unambiguous, the Commission previously has suggested that all electric generating facilities located in Ohio must abide by the GHG Rules – whether or not owned by a public utility subject to the Commission's jurisdiction. Such a construction would encompass facilities owned and operated by FES or its subsidiaries because neither FES nor any of its subsidiaries is a “public utility that is subject to the commission's jurisdiction.” But, the Commission has no authority over – and the GHG Rules do not apply to – such facilities. The Commission is a creature of statute and has no authority beyond that given it by the General Assembly.³ As noted above, the enabling statute (R.C. § 4928.68) directs that the Commission “shall adopt rules” for greenhouse gas reporting and planning for only those electric generating facilities that are owned or operated by a public utility that is already under the Commission's authority. Thus, the Commission has

¹ R.C. § 4928.68. *See also* O.A.C. 4901:1-41-03 (“any public utility owning or operating an electric generating facility within Ohio” shall join the climate registry and annually file an environmental control plan).

² *See* March 20, 2013 Entry, Attachment F, at p. 2 (emphasis added).

³ *Discount Cellular, Inc. v. Pub. Util. Comm.*, 112 Ohio St.3d 360, 2007-Ohio-53, ¶ 51 (“The PUCO, as a creature of statute, has no authority to act beyond its statutory powers.”) *citing Reading v. Pub. Util. Comm.*, 109 Ohio St.3d 193, 2006-Ohio-2181, ¶ 13.

no authority to extend the resulting GHG Rules to all generating facilities regardless of their ownership.

To the extent the Commission would base its suggestion that non-public utility generating facilities must abide by the GHG Rules on the broader language found in O.A.C. 4901:1-41-02(A), that Rule should be amended. O.A.C. 4901:1-41-02(A) broadly references that the GHG Rules relate to reporting and planning “for electric generating facilities within Ohio.”⁴ However, that language conflicts with R.C. § 4928.68 and the more specific language of O.A.C. 4901:1-41-03. While O.A.C. 4901:1-41-02(A) is not binding on the Commission and does not impose any obligations on electric generating facilities in and of itself, O.A.C. 4901:1-41-02(A) should be amended as follows to properly reflect the scope of the GHG Rules:

(A) This chapter provides rules for the reporting of greenhouse gas emissions and carbon dioxide control planning for electric generating facilities ~~within Ohio that are located in this state, are owned or operated by a public utility that is subject to the commission’s jurisdiction, and emit greenhouse gases, pursuant to section 4928.68 of the Revised Code.~~

B. The GHG Rules Should Be Amended To Incorporate The Existing Comprehensive Federal Requirements.

As noted in the Commission’s Entry, FES and others provided specific feedback as to why the GHG Rules’ requirements for membership in and reporting as required by The Climate Registry (O.A.C. 4901:1-41-03(A)) is unnecessary and provides little to no value to the Commission’s oversight of Ohio electric generating facilities owned or operated by public utilities subject to the Commission’s jurisdiction. First, the United States Environmental Protection Agency (the “USEPA”) issued federal mandatory reporting rules for electric

⁴ O.A.C. 4901:1-1-41-02(A) states in full: “This chapter provides rules for the reporting of greenhouse gas emissions and carbon dioxide control planning for electric generating facilities within Ohio, pursuant to section 4928.68 of the Revised Code.”

generating facilities that emit greenhouse gases after the GHG Rules were promulgated (the “Federal Rules”).⁵ The Federal Rules are largely duplicative of the reporting requirements required by the GHG Rules through the Climate Registry. Further, the Ohio Utility Group noted that the Climate Registry’s membership is declining and their reporting is inconsistent. Thus, the Commission would be well served to rely on the data compiled through the Federal Rules. Public utilities also could avoid the costs of membership in the Climate Registry and additional costs in compiling the somewhat inconsistent data required by the Climate Registry. The USEPA also has available significant enforcement mechanisms to ensure proper reporting and is better situated to compile a consolidated and consistent set of emissions data. The Ohio Utility Group further noted that the “environmental control plan” required by O.A.C. 4901:1-41-03(B) and (C) is duplicative of utilities’ requirements for long-term forecast reports, as set forth in O.A.C. 4901:5-5-06.

The Business Impact Analysis failed to provide any justification for the GHG Rules that would overcome the issues identified above. The Business Impact Analysis simply identified the Commission’s obligations to institute rules, in general, as a result of R.C. § 4928.68.⁶ Staff’s explanation for declining to propose any changes to the GHG Rules is similarly empty.⁷ No substantive justification for duplicative reporting requirements has – or can be – provided. As the Commission noted in approving the waivers of the GHG Rules sought by a number of parties, it is “reasonable” to have public utility generating facilities submit data provided under the Federal Rules to the Commission in lieu of the GHG Rules’ requirements, and avoid the

⁵ See 40 C.F.R. Part 98

⁶ See, e.g., March 20, 2013 Entry, Attachment F, pp. 4, 6.

duplicative and time/cost requirements for the Climate Registry. Accordingly, the GHG Rules should be amended at O.A.C. 4901:1-41-03, as follows:

(A) Unless otherwise directed by the commission, any public utility subject to the commission's jurisdiction owning or operating an electric generating facility within Ohio shall report greenhouse gas emissions to the commission by either of the following procedures:

- (1) ~~B~~becoming a participating member in the climate registry and ~~shall—reporting~~ greenhouse gas emissions according to the protocols approved by the climate registry; or,
- (2) Filing the greenhouse gas emissions reports required by the U.S. Environmental Protection Agency.

The reports required under (1) and (2) shall be filed annually in a separate docket to be opened by the commission.

(B) Any public utility that owns or operates an electric generating facility within Ohio and that is subject to the commission's jurisdiction shall file with the commission an environmental control plan that meets either of the following criteria:

- (1) ~~b~~By April fifteenth of each calendar year, filing an environmental control plan, including carbon dioxide control planning. A copy of such plan shall also be provided to the director of the Ohio environmental protection agency, or his designee.
- ~~(C)~~ The environmental control plan shall include all relevant technical information on the current conditions, goals, and potential actions for resource planning or environmental compliance. Any technology included in this plan, including clean coal, shall be based upon the most current scientific and engineering design capability of any facility or that has been designed to have the capability to control the emissions of criteria pollutants and carbon dioxide within the parameters of economically feasible best technology; or,

⁷ March 20, 2013 Entry, ¶ 5 (“In sum, given the non-permissive language in Section 4928.68, Revised Code, . . . staff concludes that the language of Rule 4901:1-41-03(A) and (B), O.A.C., should remain unchanged.”).

(2) By filing a long-term forecast report that meets the requirements of O.A.C. 4901:5-5-06.

These amendments to the GHG Rules will provide public utilities that are subject to the Commission's jurisdiction and that own electric generating facilities with regulatory flexibility, while maintaining the Commission's interest in compiling greenhouse gas emissions data for Ohio.

Respectfully submitted,

/s/ Mark A. Hayden

Mark A. Hayden (0081077)

Associate General Counsel

Scott J. Casto (0085756)

Attorney

FIRSTENERGY SERVICE COMPANY

76 South Main Street

Akron, OH 44308

(330) 761-7735

(330) 384-3875 (fax)

haydenm@firstenergycorp.com

scasto@firstenergycorp.com

Attorneys for FirstEnergy Solutions Corp.

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Summary: Comments of FirstEnergy Solutions Corp. electronically filed by Ms. Laura C. McBride on behalf of FirstEnergy Solutions Corp.