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 2013 to 2015	)))))))	Case Nos. 12-2190-EL-POR 12-2191-EL-POR 12-2192-EL-POR

Reply of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company to (1) OCC's Memorandum Contra Request for Waiver, and (2) ELPC's and Sierra Club's Memorandum Contra Application for Approval of Amended Energy Efficiency and Peak Demand Reduction Program Portfolio Plans

The objections filed by the Office of Consumers' Counsel ("OCC"), Environmental Law and Policy Center ("ELPC") and Sierra Club to the Companies' Application are premature, unreasonable and contrary to law. The objections reflect a lack of understanding of the Companies' portfolio plans and of Substitute Senate Bill Number 310 ("S.B. 310"). Accordingly, the Commission should reject all such objections.

I. The Objections Are Procedurally Improper.

The objections are neither authorized by the Commission's procedural entry issued September 29, 2014 nor by any of the Commission's rules and, thus, are a nullity and should be disregarded. An electric distribution utility is authorized by S.B. 310 to seek an amendment to its existing portfolio plan by filing an application with the Commission to amend the plan not later than thirty days after September 12, 2014.[1] The Companies filed amended portfolio plans on September 24, 2014, within the timeframe provided by S.B. 310. S.B. 310 further provides that the Commission shall then review the application in accordance with its rules as if the

[1] S.B. 310, Section 6(A)(2), (B)(1).

application were for a new portfolio plan.[2] S.B. 310 does not establish any minimum filing requirements for an application to amend an existing plan, and it does not establish specific review procedures other than the general reference to the Commission's rules. Thus, the Commission, through its attorney examiner, issued review procedures in an Entry dated September 29, 2014 – comments to be submitted on October 20, 2014, and reply comments on October 27, 2014.

The objections filed by OCC, ELPC and Sierra Club do not appear to be the comments authorized by the September 29, 2014 Entry. Instead, these intervenors have chosen to ignore the Commission's procedural schedule and, therefore, the Commission should disregard these objections as prematurely filed.

II. The Application Complies with S.B. 310's Filing Requirements.

OCC, ELPC and Sierra Club confuse the application requirement in S.B. 310 with the separate review requirement in S.B. 310. In order to initiate the Commission's review of an amended plan, an electric distribution utility must file an application to amend its existing plan on or before October 14, 2014. The Companies satisfied this requirement on September 24, 2014.

The Commission now may review the Companies' Amended Plan during the sixty-day review period authorized by S.B. 310. The Commission has established a process for conducting that review. Any questions the Commission may have regarding elements of the Amended Plan – such as the cost or budget issues raised by OCC, ELPC and Sierra Club in their objections – can be addressed using that process. These intervenors' attacks on the Application are

[2] *Id.*, Section 6(B)(1).

misdirected, as questions regarding the merits of the Amended Plan necessarily are review questions, not application questions.

Contrary to the requests made by ELPC and Sierra Club, the Commission has no authority to "dismiss" the application (as if it were a complaint) or to suspend the sixty-day review period.[3] Under S.B. 310, the General Assembly provided the Commission with only three options in reviewing an application: (1) approve the application as filed within the sixty-day review period; (2) modify and approve the application within the sixty-day review period; or (3) take no action within the sixty-day review period and thereby allow the Amended Plan to take effect as filed on January 1, 2015.[4] Because the Amended Plan proposed by the Companies fully satisfies the statutory benchmarks, the Commission should choose the first option and approve the Application as filed. As a creature of statute,[5] the Commission cannot accept ELPC/Sierra Club's invitation to ignore S.B. 310's mandates.

Indeed, one option proposed by ELPC and Sierra Club would achieve the exact opposite of what it claims. They urge the Commission to dismiss the Application and to then rely upon the thirty-day application period, which expires on October 14, 2014, to bar the Companies from amending their portfolio plans.[6] But the Commission is not authorized to dismiss an application filed pursuant to the express provisions of S.B. 310. If the Commission dismisses the Application, it will not have reviewed and approved, or modified and approved, the Application. Thus, assuming the Commission took no further action, S.B. 310 mandates that the Amended Plan "shall be deemed approved as amended in the application and shall take effect on January 1,

[3] ELPC/Sierra Club Mem. Contra, pp. 9-10.

[4] S.B. 310, Section 6(B)(1).

[5] *Montgomery County Bd. of Commrs. v. Pub. Util. Comm.*, 28 Ohio St.3d 171, 176, 503 N.E.2d 167 (1986).

[6] ELPC/Sierra Club Mem. Contra, p. 9. Ironically, immediately after this suggestion, they urge the Commission to ignore S.B. 310's sixty-day review period.

2015, and expire on December 31, 2016."[7] If the Commission intends to conduct a reasonable review of the Amended Plan, it must reject ELPC/Sierra Club's extra-legal proposals.

III. Intervenor's Objections Ignore that the Amended Plan Is an Amendment to the Commission-Approved Existing Plan, and the Record Supports Approval of the Amended Plan.

OCC, ELPC and Sierra Club rely heavily on language in S.B. 310 directing the Commission to review any proposed application "as if the application were for a new portfolio plan." Of course, the Commission's review must also take into account the 60-day review period required by S.B. 310. As a result, as evidenced by the procedural schedule issued on September 29, 2014, the typical hearing process for new portfolio plans does not apply here.

The Commission's review must also take into account the fact that the amended benchmarks in R.C. 4928.66 were triggered by the Companies' filing of the Application.[8] Because those amended, frozen benchmarks now apply for 2015 and 2016, and because the Companies met all 2014 benchmarks as of August 31, 2014,[9] it is indisputable that the Companies will satisfy R.C. 4928.66's requirements through 2016. As such, the Commission need not consider, as it typically would when reviewing a new portfolio plan, whether the Companies' programs are sufficient to satisfy annually-increasing benchmarks.

The Commission's review also must take into account that the Application does not propose a new portfolio plan but, instead, relies heavily upon the Existing Plan previously approved by the Commission in this docket. Thus, the Commission's review can rely fully upon

[7] S.B. 310, Section 6(B)(1).

[8] *See* S.B. 310, Section 6(B)(2) ("Section 4928.66 of the Revised Code, as amended by this act, shall apply to an electric distribution utility that applies to amend its portfolio plan under Division (B) of this section").

[9] Application, Attachment 1.

the extensive record previously developed in this docket, including the detailed evidence[10] regarding compliance with each of the rules referenced by OCC, ELPC and Sierra Club. The Commission already has determined that the Existing Plan is cost-effective on a portfolio basis[11] and already has approved the portfolio budget.[12] The Companies filed the Application in this docket precisely so that the Commission may, within the sixty-day period established by S.B. 310, review the Amended Plan as if it were for a new portfolio plan.

Criticism regarding the claimed lack of information regarding the two new programs in the Amended Plan – the Customer Action Program and the Experimental Company Owned LED Lighting Program – is unwarranted. The fact that these two new programs have not previously been reviewed and approved by the Commission does not make the Amended Plan "significantly different" than the Existing Plan, as alleged by OCC.[13] The former program merely implements the statutory authorization granted under R.C. 4928.662(A) and (B).[14] The Companies expressly included this program in their filing in the interest of transparency, instead of merely proceeding to implement this new statutory authority without notice. No additional information is necessary, and no detailed Commission review is necessary, for the Companies to do what the statute expressly authorizes them to do. The latter program, as explained in the Application,

[10] Such detailed evidence included fifteen witnesses and six days of hearing.

[11] Notably, the Low-Income Program and the Residential Direct Load Control Program were projected to not be cost-effective as measured by the Total Resource Cost test. *See* Existing Plan, Appendix C-3, PUCO 7A-B. However, in approving these programs as elements of the Existing Plan, the Commission found their funding levels and inclusion in the Existing Plan to be appropriate. Opinion & Order, pp. 26, 43 (Mar. 20, 2013). The Commission's rules also permit utilities to include programs in their plans that are not individually cost effective when the programs provide "substantial nonenergy benefits." O.A.C. 4901:1-39-04(B).

[12] As the Companies indicated in their Application, the Companies will rely upon their approved Existing Plan budget by sector to achieve benchmark compliance through December 31, 2016 and support the programs and activities contemplated by the Amended Plan unless otherwise noted. Application ¶ 26.

[13] OCC Mem. Contra, p. 5.

[14] *See* Application ¶ 3.

awaits approval by the Commission in a separate docket and its charges will not be recovered through Rider DSE.[15] Thus, it is conditioned on Commission review and approval in a separate docket. No additional information is needed regarding these two programs for the Commission to approve the Amended Plan.

OCC also criticizes the Companies' "new" Smart Grid Modernization Program,[16] but this program is not new. As clearly stated in the Application, this program originally was approved in Case No. 09-1820-EL-ATA, is a component of the Existing Plan, and will be continued on the same terms in the Amended Plan.[17] OCC's concern regarding charges to customers is easily answered by reference to Section 2.6 and Appendix C of the Existing Plan – only costs associated with reporting and filing for this program are recovered through Rider DSE. OCC similarly complains that detail is lacking regarding the shared savings incentive, although the Application confirms that all previously approved provisions of Section 7 of the Existing Plan – which includes the incentive mechanism – will continue during the Amended Plan Period.[18] OCC's criticisms simply evidence a lack of understanding of the Commission-approved Existing Plan being amended consistent with S.B. 310. Given as OCC stated "customers are tasked with paying for energy efficiency programs,"[19] and the Companies can fully meet the frozen statutory mandates by "suspend[ing] 60%"[20] of their programs, the Companies' expectation that the costs

[15] *See In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company for Approval of a New Tariff*, Case No. 14-1027-EL-ATA, Application Exhibit B.

[16] OCC Mem. Contra, p. 4.

[17] Application ¶¶ 3, 23; *see* Existing Plan § 3.6.

[18] Application ¶ 6.

[19] OCC Mem. Contra, p. 1.

[20] *Id.*

of implementing the Amended Plan (with an extra year of compliance) will be less than they would have been under the Existing Plan should be welcome news to OCC.

IV. A Waiver of the Commission's Rules Is Unnecessary at this Time.

OCC, ELPC and Sierra Club complain that the Companies have not established good cause to obtain a waiver of the Commission's rules.[21] However, such arguments are again premature. As discussed in the Application, the Commission's rules in their entirety cannot reasonably be applied to the expedited filing required by S.B. 310.[22] The General Assembly understood this, as it did not require that an application to amend an existing plan comply with all existing Commission rules. Instead, S.B. 310 simply directs the Commission to review an application "in accordance with" its rules. It is left to the Commission to decide which rules are applicable to an expedited filing such as required under S.B. 310 to amend an existing plan. And, as the Companies discussed in their Application, several of the rules are not applicable given the intent behind S.B. 310.[23] Indeed, there is no requirement that the Commission apply any of its Energy Efficiency Program Rules in Chapter 4901:1-39, as the General Assembly likely was referring in S.B. 310 to the Commission's Administrative Rules in Chapter 4901-1 given the expedited review period which would have made it virtually impossible for the Commission to amend its rules to comply with the amended plan application process included in SB 310. The General Assembly's interest would be in ensuring a transparent review process consistent with Chapter 4901-1, with interested parties having the right to intervene and comment on the Amended Plan. The Commission's review process established in the September 29, 2014 Entry ensures that the Commission's review will be in accordance with its rules. Thus,

[21] OCC Mem. Contra, pp. 5-7; ELPC/Sierra Club Mem. Contra, 7-8.

[22] Application ¶¶ 28-29.

[23] Application ¶¶ 27-29.

although the Companies requested a waiver out of an abundance of caution, the Commission reasonably can review the Application in accordance with its rules without granting a waiver of its rules.

OCC, ELPC and Sierra Club object that a request for a waiver must relate to a specifically-identified rule. However, the Companies did not identify in their Application a specific rule requiring a waiver for the simple reason that none is apparent. This proceeding is distinguishable from the Duke example cited by these intervenors[24] because it would have been obvious to Duke at the time of filing what rules governed its application. Duke's application was not filed under Section 6 of S.B. 310. If the Commission determines at some future date that the Companies' filing is in conflict with an applicable rule, then the Companies have submitted their request for a waiver of that specific rule for good cause shown – namely to implement the provisions contained in S.B. 310.

V. Conclusion

For the reasons set forth above, the Companies respectfully request that the Commission disregard all objections to the Application filed by OCC, ELPC and Sierra Club on Oct. 9, 2014.

Respectfully submitted,

s/ *Carrie M. Dunn*

Carrie M. Dunn (0076952)
Counsel of Record
FIRSTENERGY SERVICE COMPANY
76 South Main Street
Akron, OH 44308
(330) 761-2352
(330) 384-3875 (fax)
cdunn@firstenergycorp.com

[24] OCC Mem. Contra, p. 6; ELPC/Sierra Club Mem. Contra, p. 8.

James F. Lang (0059668)
CALFEE, HALTER & GRISWOLD LLP
The Calfee Building
1405 East 6th Street
Cleveland, OH 44114
(216) 622-8200
(216) 241-0816 (fax)
jlang@calfee.com

Attorneys for Applicants, Ohio Edison Company,
The Cleveland Electric Illuminating Company, and
The Toledo Edison Company

CERTIFICATE OF SERVICE

I certify that this Memorandum Contra was filed electronically through the Docketing Information System of the Public Utilities Commission of Ohio on this 16th day of October 2014. The PUCO's e-filing system will electronically serve notice of the filing of this document on all parties of record.

s/ *James F. Lang*
One of Attorneys for Applicants

Summary: Reply to
(1) OCC's Memorandum Contra Request for Waiver, and
(2) ELPC's and Sierra Club's Memorandum Contra Application
for Approval of Amended Energy Efficiency and Peak Demand Reduction Program Portfolio Plans electronically filed by Mr. James F Lang on behalf of Ohio Edison Company and The Cleveland Electric Illuminating Company and The Toledo Edison Company