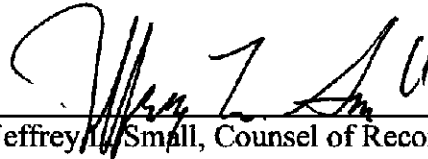




Respectfully submitted,

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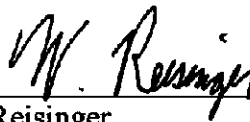
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**BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Energy Efficiency	)	
and Peak Demand Reduction Program	)	
Portfolio of Ohio Edison Company,	)	Case No. 09-384-EL-EEC
The Cleveland Electric Illuminating	)	09-385-EL-EEC
Company, and The Toledo Edison	)	09-386-EL-EEC
Company.	)	

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**MEMORANDUM IN SUPPORT**

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**I. INTRODUCTION**

This case involves the review of the lawfulness and the reasonableness of the Companies' proposal to satisfy certain energy efficiency requirements that resulted from enactment of S.B. 221. These requirements in S.B. 221, being new to Ohio and to the Commission regarding approval of utility compliance under the law, should be carefully considered since the case law is a matter of first impression. The FirstEnergy EDU's proposal for hasty Commission decision (i.e. by July 1, 2009<sup>1</sup>) on matters that involve both legal and practical controversies is, in this setting, particularly inappropriate.

From a legal perspective, the FirstEnergy EDU's proposal to satisfy a major portion of their energy efficiency requirements by counting actions taken before S.B. 221 was enacted does not satisfy Ohio law. Furthermore, counting transmission upgrades taken by another company that is not the subject of S.B. 221 compliance activities does not satisfy Ohio law. Even those matters addressed by the Companies are not, as a practical matter, properly analyzed for purposes of measuring their contributions to

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<sup>1</sup> Application at 3 (May 11, 2009).

energy savings in Ohio. The Commission should seriously review the Application and, in the end, reject the FirstEnergy EDU's approach to satisfying the requirements set out in S.B. 221.

## **II. ARGUMENT**

### **A. The Companies' Proposal Violates Ohio Law, and the Application Should be Dismissed.**

The Companies' Application sets out the requirements stated in R.C. 4928.66(A)(1)(a),<sup>2</sup> and then ignores the statutory requirements that are fundamental to the Companies' proposal to satisfy the requirements. R.C. 4928.66(A)(1)(a) states:

Beginning in 2009, an electric distribution utility shall implement energy efficiency programs that achieve energy savings equivalent to at least three-tenths of one percent 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.

Key elements to these requirements are that the required compliance actions are taken "beginning in 2009" and that the entity taking the action is the "electric distribution utility." The FirstEnergy EDUs ignored these key elements in their Application.

#### **1. The Companies Propose to Rely Upon Projects Completed Before 2009, in Violation of Ohio Law.**

The above-quoted statutory section enacted by S.B. 221 states that the electric distribution utility's implementation of energy efficiency programs must "[b]egin[ ] in 2009," the year after S.B. 221 was enacted and became law. The Application states that the FirstEnergy EDUs propose to satisfy their requirements using "[p]rojects completed

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<sup>2</sup> Id. at 1, ¶2.

through December 31, 2008.”<sup>3</sup> The Companies’ proposal should be rejected as non-compliant with the requirements stated in R.C. 4928.66(A)(1)(a), and the Application should be rejected.

The Companies cite R.C. 4928.66(A)(2)(d) for allowing a utility to include “transmission and distribution infrastructure improvements that reduce line losses” for compliance with that sub-section.<sup>4</sup> R.C. 4928.66, however, makes no reference to past improvements of the kind the FirstEnergy EDUs propose for compliance with the requirements stated in R.C. 4928.66. The statute expressly states the single instance where past improvements may be included in energy savings calculations: R.C. 4928(A)(2)(c) states that “existing or new” energy efficiency measures that are customer-sited by mercantile customers may be included in the energy savings calculation for purposes of complying with R.C. 4928.66. Importantly, transmission and distribution improvements undertaken by an eligible utility are mentioned in R.C. 4928.66(A)(2)(d), but *existing* projects are *not* mentioned.

The Commission should conclude that in the absence of an express statement that past transmission and distribution improvements may be included in an energy savings calculation, the legislature did *not* intend such improvements to be creditable for purposes of complying with R.C. 4928.66. Basic rules of statutory interpretation reinforce this conclusion. The fundamental canon of statutory construction, *expressio unius est exclusio alterius*, provides that the express inclusion of one thing in one place in

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<sup>3</sup> Id. at 2, ¶4.

<sup>4</sup> Id. at 2, ¶3.

a statute necessarily implies its exclusion in another place.<sup>5</sup> In this instance, projects existing before 2009 may be included for some customer-sited demand response measures but the General Assembly did not intend to permit electric distribution utilities to count existing distribution and transmission projects.

The Companies explain their obvious non-compliance with the statutory requirement by stating that past projects “have virtually no incremental compliance costs associated with [them].”<sup>6</sup> Non-compliance with new legal requirements by non-action is costless, but it also deprives Ohioans of the benefits intended by the General Assembly when S.B. 221 introduced energy efficiency requirements into Ohio law. The Application should be rejected, and the case should be dismissed.

**2. The Companies Appear to Rely Upon Projects Completed by Another Company, in Violation of Ohio Law.**

The Application also states in a variety of places that the FirstEnergy EDUs propose to satisfy energy efficiency requirements by means of past transmission projects that are not identified as projects undertaken by the FirstEnergy EDUs. R.C. 4928.66(A)(1)(a) requires the implementation of energy efficiency programs by the “electric distribution utility.” The distribution utility may use the demand-response programs from mercantile customers served by the distribution utility. However no provision in Ohio law permits an electric distribution utility to count the activities of

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<sup>5</sup> See, e.g., *Myers v. Toledo*, 110 Ohio St. 3d 218, 222 (2006) (“the express inclusion of one thing implies the exclusion of the other”).

<sup>6</sup> *Id.* at 2, ¶6.

other companies that provide services in the electric services industry -- whether affiliated with the electric distribution utility or otherwise.

The Application appears purposely vague regarding the entity that has taken the projects mentioned, stating that the programs and analysis were performed by the “FE Companies”<sup>7</sup> and “FE-Ohio.”<sup>8</sup> Some projects listed in Exhibit C to the Application are high voltage in nature, and appear to have been conducted on facilities owned by the Companies’ affiliated transmission provider. In all filings by the FirstEnergy EDUs regarding compliance with R.C. 4928.66, the Companies should be required to identify which projects they are responsible for so that the Commission may determine which projects count towards the requirements. The Application in the above-captioned cases fails to provide this information. The Commission should reject the Application under such circumstances.

**B. The Companies’ Proposal Suffers Technical Deficiencies.**

The process relied upon by the Companies to calculate line losses is problematic and approval of the Application would set poor precedent for determining line loss reductions. In Exhibit B, the Companies state that they calculated line losses:

by modeling both before and after scenarios, with the former representing conditions on the system prior to the identified project being implemented, and the latter representing conditions on the system after the project was complete.<sup>9</sup>

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<sup>7</sup> Id., Exhibit B at 1-2.

<sup>8</sup> Id., Exhibit C and D (“FE-Ohio Transmission Level Projects”).

<sup>9</sup> Id., Exhibit B at 1.

Looking at the “conditions on the system”<sup>10</sup> produces less accurate results than looking at pre-project and post-project losses at the precise location of the change.

The Companies could have used project-specific measurements or estimates. The Companies correctly point out that load losses “vary with the amount of current being carried on the system.”<sup>11</sup> Specifically, line losses rise and fall as a square of current: for example, a doubling of current increases line losses by four times.<sup>12</sup> This means that line losses are highly dependent on local conditions around the transmission line, distribution line, substation, capacitor bank, or regulator being considered for replacement. Proper measurement of efficiencies should recognize these local conditions.

The Companies decision to use system-wide averages to estimate project-specific conditions leads to unreliable results. For example, to calculate line loss reductions from capacitor bank additions, the Companies:

sampled 48 of their 161 existing capacitor banks and found that loss savings benefits ranged from a negligible change to as much as 8 kW/100 kVAR.<sup>13</sup>

The Companies then inexplicably took an average of these results to quantify the benefit of capacitor bank additions.<sup>14</sup> The circuits “sampled” by the Companies do not appear to be representative of the system: rather, the circuits were selected by the FirstEnergy EDUs in a manner that is not described in the Application. Such unexplained and

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<sup>10</sup> Id.

<sup>11</sup> Id.

<sup>12</sup> See *id.*, Exhibit B at 2.

<sup>13</sup> Application, Exhibit B at 3.

<sup>14</sup> Id.



apparently inappropriate engineering analyses pervade the Application. As another example, the Companies “averaged the loss factor on each of the [98] sample circuits” to determine losses on the distribution system.<sup>15</sup> Efficiencies based upon a system-wide, average for existing facilities (i.e. rather than project-specific results) should be rejected in any evaluation of measures taken to satisfy the requirements stated in R.C. 4928.66.

The Commission should not allow the Companies to use such methods to account for line loss reductions because they produce an inaccurate view of the benefits of these projects. Projects should be prioritized based on expected benefits to the system. Using average results for existing facilities instead of actual values obscures the benefits of particular projects. Instead of the Companies’ method, the Commission should require that losses be calculated based on pre-project and post-project measurement of losses or by comparing power flow study results from before and after the upgrade project along the same flowpath where the upgrades were made. Both methods would produce savings estimates that are reasonably accurate and specific to the project studied.

The Application should be rejected on legal grounds. In any application that deals with the new projects conducted by the electric distribution utilities, proper measurement of efficiencies should recognize local conditions. The Companies’ method fails to properly measure energy efficiencies.

**C. In the Alternative, These Cases Should be Set for Hearing.**

The above-stated failings of the Application should result in dismissal of the Companies’ Application. In the event that the Commission seeks additional information from the FirstEnergy EDUs without dismissing the Application, Movants ask (in the alternative) that the PUCO set this matter for hearing. The problems with the Application

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<sup>15</sup> Id.

analyzed in the instant pleading strongly argue that the PUCO needs additional information from the Companies, including additional argument from Movants and any other interested parties regarding the legality and appropriateness of the Companies' proposals.


### III. CONCLUSION

The FirstEnergy EDU's propose to satisfy a major portion of their energy efficiency requirements for 2009 based upon past actions, including upgrades to the facilities of other companies. Both aspects of the proposals violate Ohio law. Furthermore, the proposals suffer from technical deficiencies. The Application should be dismissed.

In the alternative, the energy efficiency matters raised by the Application should be set for hearing. The Commission should not approve such a controversial proposal, from both a legal and empirical standpoint, without careful consideration of issues developed by Movants.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of this *Motion to Dismiss* was served on the persons stated below by regular U.S. Mail, postage prepaid, on this 24<sup>th</sup> day of June 2009.

  
\_\_\_\_\_  
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