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PUCO

Ms. Renee J. Jenkins
Director, Administration Department
Secretary to the Commission, Docketing Division
The Public Utilities Commission of Ohio
180 East Broad Street
Columbus, OH 43215-3793

Re: 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 No. 09-535-EL-EEC, et al.

Dear Ms. Jenkins:

Enclosed for filing, please find the original and twelve (12) copies of an Amended Application. Please file the enclosed in the above-referenced docket, time-stamping the two extras and returning them to the undersigned in the enclosed envelope.

Thank you for your assistance in this matter. Please contact me if you have any questions concerning this matter.

Very truly yours,

Arthur E. Korkosz

AEK:dka

Enclosures

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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, The Cleveland Electric Illuminating Company, and The Toledo Edison Company	**Case No. 09-535-EL-EEC** **09-536-EL-EEC** **09-537-EL-EEC**

AMENDED APPLICATION[1]

Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company (collectively, "Companies") request a Commission waiver of the applicability of the requirements of its newly adopted rules with respect to the achievement of peak demand reduction benchmarks under R.C. 4928.66(A)(1)(b) for 2009 (specifically, O.A.C. 4901:1-39-01(R) and 4901:1-39-05(C)). The Companies further request the Commission's approval of the availability of interruptible load under the Companies' approved OLR (Optional Load Response) and ELR (Economic Load Response) Riders as programs under R.C. 4928.66(A)(1)(b) which satisfy the requirement for compliance with each of the Companies' peak demand reduction benchmark for 2009. Since the Commission only very recently adopted[2] its new rules in Case No. 08-888-EL-ORD, on the virtual eve of the peak season, prompt approval of this Application is requested in order to resolve uncertainty with respect to the Companies' statutory compliance, to mitigate adverse economic impacts on the Companies' customers, and to avoid substantial penalties which attach to noncompliance with the statutory requirements.[3] In the alternative, the

[1] The instant Amended Application, which requests an alternative form of relief as an addition to that originally sought, is intended to supersede the original Application filed in this docket on June 26, 2009.

[2] After modification on rehearing on June 17, 2009.

[3] This Application addresses only the issue with respect to peak demand reduction compliance. To the extent that issues may arise with respect to energy efficiency or other requirements under the Commission's rules, the Companies reserve the right to file additional requests for waiver or other appropriate relief as may be necessary.

Companies request, pursuant to R.C. 4928.66(A)(2)(b), an amendment to their respective 2009 peak load reduction benchmarks under R.C. 4928.66(A)(1)(b). In support of this Application, the Companies state:

1. Each of the Companies is an electric distribution utility ("EDU") as that term is defined in R.C. 4928.01(A)(6).
2. R.C. 4928.66(A)(1)(b) requires an EDU, in 2009, to "implement peak demand reduction programs designed to achieve a one per cent reduction in peak demand. . . ."[4] Substantial penalties may be assessed for noncompliance with this statutory directive. R.C. 4928.66(C).
3. As an integral component of their overall compliance strategy for 2009, the Companies intended to utilize the anticipated interruptible load to be available under the OLR and ELR Riders. Both Riders were initially proposed in the Companies' Electric Security Plan (ESP) filing on July 31, 2008 (Case No. 08-935-EL-SSO) and were approved, as proposed, in the Commission's Opinion and Order of March 25, 2009. These Riders became effective June 1, 2009.
4. Under both the OLR and ELR Riders customers must reduce or interrupt their load under specified system conditions.[5] Thus, the ELR and OLR Riders by their intrinsic nature represent a curtailable load designed to achieve a mitigation of or reduction in the need for capacity that would otherwise be required. The need for capacity is

[4] Additional reductions are required in subsequent years, which are irrelevant for purposes of this application.

[5] This Application is unrelated the issue of economic buy through. Both Riders ELR and OLR provide for absolute interruption of load under particular system conditions. It is that interruptible load which comprises the subject matter of this Application. Rider ELR does have certain other provisions which trigger curtailing customer load under particular market *price* conditions, but nonetheless allow the customers to "buy through" if they are able to do so. These latter provisions and conditions are not relevant to the discussion here.

driven by the Companies' peak demand and to the extent that these Riders allow for avoiding the costs of added facilities that may only be used for a few hours in a year, the objectives sought to be attained by the statutory requirements to reduce peak demand are achieved.[6] As such, the Riders fall within the scope of programs required to be implemented under R.C. 4928.66(A)(1)(b) and the availability of this real, triggerable demand resource should be counted for purposes of compliance with the statute's requirements.[7]

5. Despite the Companies' expectations, however, the Commission's rules in Case No. 08-888-EL-ORD (Opinion and Order, April 15, 2009, *aff'd in part*, Entry on Rehearing, June 17, 2009) made interruptible load unavailable as a compliance mechanism in the absence of *actual* interruption of customers at the peak.[8]

[6] In this regard, it is important to distinguish the objectives of energy efficiency from those of peak demand reduction. Energy efficiency programs are intended to advance the policy goal of conserving fuel resources (or reducing adverse environmental effects of their consumption). Such programs reflect actions which can produce energy savings during a given period in time. For any such period, the energy savings must be *achieved* or they are lost.
This "use it or lose it" characteristic of energy efficiency programs does not apply to programs which address reducing demand. The policy goal advanced by developing peak demand reduction resources is avoidance of the need to acquire additional (and higher cost) facilities – which can include the construction of additional generation to meet increased load. That objective is served regardless whether those resources are needed immediately or available when utilized at some future time, which is why such resources are recognized for purposes of long term resource planning. The critical point is that at any time demand reduction programs are *available* to be used to achieve that objective and thus, in the words of the statute, are "designed to achieve" it.

[7] Interruptible load is recognized by MISO as offsetting the capacity that would otherwise be required as a result of the peak demand. Thus the availability of a quantity of interruptible load reduces required capacity, actually reducing the operational and economic impact of the peak. The Commission also acknowledged the value of interruptible load as an important demand resource in the rules related to long term forecasting and integrated resource planning. O.A.C. § 4905:5-5-01(R).

[8] This approach follows the Commission's decision in the ESP proceedings involving (and directly applicable only to) the AEP companies (Ohio Power Company and Columbus Southern Power Company, Case No. 08-917-EL-SSO et al, Opinion and Order, March 18, 2009) where the Commission stated (p. 46) "[I]nterruptible load should not be counted in [OP's and CSP's] determination of its EE/PDR compliance requirements *unless and until the load is actually interrupted.*" (Emphasis supplied) That decision is before the Commission on rehearing.

Specifically, the Commission adopted OAC §4901:1-39-01(R) and §4901:1-39-05(C)(1) which provide, respectively, that:

> "Peak-demand benchmark" means the *reduction in peak demand an electric utility's system must achieve* as provided in division (A)(1)(b) of section 4928.66 of the Revised Code. (emphasis supplied)

and

> Each electric utility shall include a section in its portfolio status report detailing its achieved energy savings and demand reductions relative to its corresponding baselines. At a minimum, this section of the portfolio status report shall include each of the following: . . . (b) A comparison with the applicable benchmark of actual energy savings *and peak-demand reductions achieved* by electric utility programs. (emphasis supplied)

6. The Commission's rules, despite the contemplation of their prompt promulgation pursuant to S.B. 221, nonetheless are being finalized only now, some 13 months after the enactment of the statute, 11 months after its effective date, and, importantly, from the standpoint of compliance with the statute's 2009 benchmark requirements, nearly halfway into the 2009 annual period for which compliance will be required. Moreover, the rules are not even now effective as they are contingent upon review by JCARR and, even taking an optimistic view of the schedule, will likely remain in JCARR's jurisdiction for several weeks, if not months. Important especially with respect to demand reduction objectives, we have already entered the summer period in which the Companies' peak will likely occur and JCARR review is not likely to be complete until the summer – and the occurrence of the likely peak – are behind us. The logical consequence of the Commission's interpretation (requiring actual interruption at the peak to count for compliance) is that *any* compliance strategy depending on the availability of interruptible load will, necessarily, require

commencing actual customer interruptions with accompanying adverse economic effects on customers (as described below).

7. Moreover, there is uncertainty whether the rules will ultimately survive JCARR review in their current form. Parties in the 08-888-EL-ORD rulemaking proceedings have maintained that the Commission's view is an unlawful interpretation of the statute.[9] Although resolution of that legal issue is not the focus of the instant Application, it is important to recognize that a serious question exists regarding whether the Commission's interpretation is lawful and if it will be accepted by JCARR upon its review, or sustained upon some other subsequent judicial review.[10] Meanwhile, however, if interruptible load is to play any role in a utility's compliance strategy, the existence of the Commission's rule places the Companies at jeopardy to incur substantial penalties for failure to comply with their 2009 benchmarks and/or places customers at jeopardy of incurring adverse economic consequences either of unnecessary curtailment of their interruptible load when capacity is available or

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[9]The Companies, as they indicated in their Application for Rehearing in Case No. 08-888-EL-ORD, are among the parties (which include the AEP companies and the Ohio Energy Group (OEG)) that believe that the Commission erred in its interpretation of the statute. The problem with the Commission's approach is that it attributes the *same* compliance standard – *actual achievement* – to both energy efficiency and peak demand reduction. But Revised Code 4928.66, in separate subdivisions, expressly establishes *different* requirements for compliance with the applicable benchmarks as between energy efficiency and peak demand reduction. With respect to energy efficiency, EDUs are required to implement programs "to achieve" the benchmarks. In distinction, as evident because of the use of a different phrase, EDUs are required to implement programs "designed to achieve" the peak demand reduction benchmarks. The Commission's interpretation ignores this distinction and in doing so fails to follow the fundamental principle of statutory construction requiring that significance be given to the words actually used by the legislature. In both its Entry on Rehearing in Case No. 08-888-EL-ORD and its Opinion and Order in the AEP ESP proceeding the Commission acknowledges the parties raise the point, but in neither of those orders does it analyze or resolve this legal issue of statutory construction.

[10] This pivotal legal issue remains pending before the Commission on rehearing of the AEP companies' ESP case. On May 13, 2009 the Commission granted rehearing for the purpose of further consideration of the matters raised by the several parties in that case. Additionally, as to the 08-888-EL-ORD rulemaking docket, even apart from proceedings before JCARR, the Commission's Opinion and Order and Entry on Rehearing may be subject to further applications for rehearing or review before the Supreme Court of Ohio.

bearing the additional costs associated with embarking on alternative compliance programs.

8. The significance of these adverse economic hardships on customers cannot be overlooked. From the perspective of the customer who benefits from lower rates under an interruptible rate or other arrangement, the natural consequence of the Commission's interpretation is to force the actual interruption of that customer irrespective of whether capacity is available to serve its load. Moreover, the requirement that the interruption occur at the time of the annual peak further exacerbates the matter since, by its intrinsic nature, the occurrence of the annual peak can only be known in retrospect, after the annual period has passed.[11] Thus, to assure interruption is captured at the time of the annual peak, multiple interruptions, made whenever there is the potential for reaching the peak condition, will be required.

9. Interruption of service has a real and negative impact on customer operations, and the Companies do not wish to be required to interrupt customers if there is no operational need to do so. It is economically wasteful to require the unnecessary interruption of customers when capacity is plentiful, especially in the current extraordinarily challenging economic circumstances (which, inherently, have already mitigated the need for added capacity resources). Speaking precisely to the point in its Application for Rehearing in Case No. 08-888-EL-ORD, OEG, representing customers likely to take service on and benefit from interruptible tariffs, stated (Memorandum in Support, p. 6):

> "It would be economically wasteful to require manufacturers to actually shut down for a period of time to

[11] The annual peak is anticipated, but cannot be guaranteed, to occur in the summer.

> prove that they can, so that the interruptible load will count as demand response. It would be more reasonable to simply require a demonstration of the ability to interrupt, if needed. There is no reason to unnecessarily disrupt a manufacturing operation which will tend to hurt Ohio's economic competitiveness."

Such negative impact on Ohio's economic competitiveness is contrary to the statutory state policy goal to "[f]acilitate the state's effectiveness in the global economy." R.C. 4928.02(N).

10. If the Commission's objective is to induce utilities away from reliance on interruptible load and instead to other mechanisms in order to satisfy the requirements of statutory compliance, it should be readily apparent that such other mechanisms, unlike the reliance on available interruptible load, bring with them additional, potentially substantial, compliance costs which, under S.B. 221, must be borne by all customers.[12] Such an approach is, of course, a complete about face from decades of the Commission pursuing "least cost" regulatory approaches and turning instead to promoting higher costs for all customers. By imposing more expensive peak demand reduction programs than the General Assembly required, the Commission unnecessarily burdens customers with additional costs and undermines the State's efforts to retain business and attract new employers to Ohio.

11. As the summer has already begun and with the Commission's rules only recently issued, still not yet effective, and subject to further potential uncertainty, time is of the essence for the Commission's resolution of the issues raised here. We cannot know in advance precisely when the annual peak will occur, but it will almost

[12] Although the Companies have considered other potential compliance mechanisms such as direct thermostat control of residential air conditioning load, alternatives such as these are extraordinarily costly, cannot be reasonably expected to deliver the magnitude of reduction needed for full compliance with the benchmarks, and cannot be effected in time for 2009 compliance.

certainly happen during the summer months and it could occur very shortly. The Companies submit that, as requested, the Commission's granting the Companies a waiver of these rules[13] and recognizing the availability of interruptible load under Riders OLR and ELR as complying with the statute's demand reduction requirements for 2009 is the most effective way – and from the perspective of customers, the least cost way since there are no incremental costs – for the Companies to comply with the statute.

12. In the alternative to the relief requested above, the Companies request that the Commission, pursuant to R.C. 4928.66(A)(2)(b), amend each of the Companies' 2009 peak demand reduction benchmarks because the Companies "cannot reasonably achieve the benchmarks due to regulatory, economic, or technological reasons beyond their reasonable control." In this regard, the Companies request that each of their respective 2009 benchmarks be reset to zero. As discussed above, there *is* uncertainty regarding the timing and ultimate content of the rules which will define – with precision and legal force – the Companies' compliance requirements. There is *no* uncertainty, however, that statutory compliance in 2009 is mandatory and that the Companies will face substantial penalties for noncompliance. There is also *no* uncertainty that we are already in the summer period in which the 2009 peak is most likely to occur. There is *no* uncertainty, either, regarding the fact that given the present extraordinary state of the economy, the actual load on each of the Companies' systems is already significantly depressed[14] and that the Companies' customers face

[13] Insofar as they would require actual interruption of customers in order to recognize the contribution of interruptible load as contributing to the peak demand reduction benchmarks under the statute.

[14] For example, the June 2009 aggregate Ohio retail load for the Companies (10,336 mW) is a *more than 10% reduction* from the June 2008 level (11,503 mW). It is unlikely that the severity of the economic adversity in which Ohio presently finds itself could have been foreseen at the time S.B. 221 was considered

considerable challenges simply in economic survival, even without the increased burdens that they would bear due to unnecessary interruptions (when capacity is plentiful) or as a result of the added costs of alternative compliance mechanisms.[15] The convergence of all these factors comprise circumstances in which the Companies "cannot reasonably achieve the benchmarks due to regulatory, economic, or technical reasons beyond [their] reasonable control" and, accordingly, amendment of their 2009 benchmarks for peak demand reduction to zero is both warranted and required.

WHEREFORE, based upon the foregoing, the Companies respectfully request that the Commission approve the instant Application at its next scheduled meeting, either (1) by waiving the requirement under the rules for actual curtailment of interruptible load and approving that the interruptible load that can be made available under Riders ELR and OLR for each of the Companies will be recognized as compliance programs for purposes of the 2009 peak demand reduction benchmarks required under R.C. 4928.66(A)(1)(b) or, (2) in the alternative, by amending each of Companies' 2009 compliance benchmarks to zero.

(continued…)

and enacted. The dramatically reduced level of the Companies' load, however, surely reflects the toll that has already been taken on Ohio customers – both businesses and individuals – and must be viewed as evidence of economic circumstances beyond the control of the Companies which would justify reconsideration and amendment of benchmarks that were anticipated being achieved under considerably more prosperous conditions than currently exist. Indeed, this reduced load and the considerable decrease in the (now) anticipated 2009 peak demand as compared to prior years could be argued to be achievement of the statutory objectives.

[15] The statement regarding alternative compliance mechanisms assumes by a leap of faith that such alternative mechanisms would be available in sufficient amount to satisfy the benchmarks, that they could be implemented in time to capture a peak that could now take place on virtually any day, or that such alternative mechanisms could be relied upon to comply with the statutory requirements. The Companies suggest that the validity of these assumptions is, at best, speculative.

Respectfully submitted,

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