

**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
Case No. 09-536-EL-EEC
Case No. 09-537-EL-EEC

**MOTION TO INTERVENE AND OPPOSITION TO FIRST ENERGY'S
APPLICATION REGARDING PEAK DEMAND REDUCTION BENCHMARKS
BY
THE OHIO ENVIRONMENTAL COUNCIL**

This case concerns the proper calculation of the of the peak demand reduction benchmarks established by S.B. 221. As more fully discussed in the accompanying memorandum, the Ohio Environmental Council (“OEC”) has a real and substantial interest in this proceeding, and the disposition of this case may impede its ability to protect that interest. The interests of OEC, Ohio’s largest non-profit environmental advocacy organization, are not currently represented by any existing party, and its participation in this proceeding will contribute to a just and expeditious resolution of the issues involved. OEC’s participation will not unduly delay the proceeding or unjustly prejudice any existing party. Accordingly, OEC hereby moves to intervene in this proceeding pursuant to R.C. 4903.221 and O.A.C. 4901-1-11.

WHEREFORE, OEC respectfully requests that the Commission grant its motion to intervene.

Respectfully Submitted,

s/Will Reisinger

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MEMORANDUM IN SUPPORT

I. MOTION TO INTERVENE

R.C. Section 4903.221 provides that any “person who may be adversely affected by a public utilities commission proceeding may intervene in such proceeding.” The OEC is a non-profit, charitable organization comprised of a network of over 100 affiliated group members whose mission is to secure a healthier environment for all Ohioans. Throughout its 40-year history, OEC has been a leading advocate for fresh air, clean water, and sustainable land and energy use. OEC was an active participant in the effort that led to the inclusion of demand reduction and energy efficiency requirements in S.B. 221. OEC has a real and substantial interest in assuring that the demand reduction benchmarks established by R.C. 4928.66(A)(1)(b) are properly calculated. Thus, there can be no question that OEC has an interest in and may be adversely affected by the disposition of this case.

R.C. 4903.221(B) outlines four factors that the Commission shall consider when ruling on a motion to intervene in a proceeding. First, pursuant to R.C. 4903.221(B)(1), the Commission shall consider “The nature and extent of the prospective intervenor’s interest.” OEC is interested in the proper calculation of demand reduction benchmarks to ensure that those calculations comport with the letter and intent of S.B. 221. OEC, as an

environmental advocacy organization, has a special interest in the outcome of this case because of the direct impact that decisions on the calculation of these benchmarks will have on the implementation and effectiveness of S.B. 221.

Second, pursuant to R.C. 4903.221(B)(2), the Commission shall consider “The legal position advanced by the prospective intervenor and its probable relation to the merits of the case.” Although OEC does not outline its full legal argument in this section, OEC maintains that FirstEnergy’s request to avoid required peak demand reduction benchmarks for 2009 is based on an improper interpretation of R.C. 4928.66. OEC strongly opposes FirstEnergy’s request to avoid peak demand reduction benchmarks for 2009.

Third, pursuant to R.C. 4903.221(B)(3), the Commission shall consider “Whether the intervention by the prospective intervenor will unduly prolong or delay the proceedings.” OEC has significant experience dealing with electric utilities questions before the Commission and will not seek to delay the proceeding. OEC’s intervention will not unduly prolong or delay these proceedings.

Fourth, pursuant to R.C. 4903.221(B)(4), the Commission shall consider “Whether the prospective intervenor will significantly contribute to full development and equitable resolution of the factual issues.” OEC has actively participated in the implementation of the efficiency and peak demand reduction benchmarks established by S.B. 221. As an active participant in cases before the Commission, the OEC has developed expertise that will contribute to the full development of the legal questions involved in this proceeding. Finally, as Ohio’s leading environmental advocate, OEC

will be able to assure that the environmental impacts of benchmark calculations are fully developed in this proceeding.

OEC also satisfies the intervention requirements outlined in the Commission's rules. The criteria for intervention established by O.A.C. 4901-1-11(A) are identical to those provided by R.C. 4903.221, with the exception that the rules add a fifth factor that the Commission shall consider when ruling on a motion to intervene. Pursuant to O.A.C. 4901-1-11(A)(5), the Commission shall consider "The extent to which the [intervenor's] interest is represented by existing parties." OEC's interest is not fully represented by the existing parties. OEC is the leading advocate for Ohio's environment. No other party to this proceeding has the mission of securing healthy air for all Ohioans, and no other party has been a continuous participant in cases before the Commission for the purpose of furthering this mission.

Finally, it is the Commission's stated policy "to encourage the broadest possible participation in its proceedings" (*see, e.g., Cleveland Elec. Illum. Co.*, Case No. 85-675-EL-AIR, Entry dated January 14, 2986, at 2). The Commission should not apply its intervention criteria in a manner that would favor one environmental or consumer advocate to the exclusion of others.

OEC meets all the criteria established by R.C. 4903.221 and O.A.C. 4901-1-11(A)(5) and therefore should be granted intervenor status in this proceeding.

II. MOTION IN OPPOSITION

FirstEnergy's Amended Application requests that the Commission determine that FirstEnergy's demand reduction obligations have already been satisfied for 2009, or in the alternative, that the Commission reduce FirstEnergy's 2009 benchmark obligations to

zero.¹ As explained below, both of FirstEnergy's arguments are based on improper interpretations of the statute and the Commission's authority to adjust demand reduction benchmarks. Accordingly, FirstEnergy's requests should be denied.

FirstEnergy requests that the Commission determine that it has complied with the 2009 benchmarks based upon existing interruptible load programs, not on actual demand reductions from implemented programs.² This argument should be rejected. R.C. 4928.66(A)(1)(b), effective July 31, 2008, provides that "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" (emphasis added). By using the commanding "shall," the statute clearly mandates that utilities implement demand reduction programs in 2009 and that the programs themselves must be designed to achieve reductions in 2009. As the Commission demanded in the Case 08-888 Order, peak demand programs must achieve actual peak demand savings.³ Unless a demand reduction program reduces demand, such a program cannot be used to satisfy the statutory benchmarks.

The Commission should reject FirstEnergy's attempt to avoid its demand reduction obligations under R.C. 4928.66(A)(1)(a) because of the economic downturn and other factors. FirstEnergy should be required to implement programs that will achieve peak demand savings consistent with statutory targets.

¹ Amended Application at 9.

² Id.

³ Case No. 08-888-EL-ORD, Entry on Rehearing at 5 (June 17, 2009).

In the alternative, FirstEnergy requests that the Commission amend the 2009 demand reduction benchmarks due to “the convergence of” several economic and regulatory factors beyond FirstEnergy’s control. FirstEnergy asks that the Commission use its authority under R.C. 4928.66(A)(2)(b) to amend the benchmarks. This request should also be denied.

R.C. 4928.66(A)(2)(b) gives the Commission the authority to amend the benchmarks if a utility “cannot reasonably achieve the benchmarks.” FirstEnergy, however, does not claim that it “cannot reasonably achieve the benchmarks.” Instead, FirstEnergy’s Amended Application seeks to avoid the statutory requirements by making a premature claim of hardship. If FirstEnergy wishes to claim that economic factors, like reduced demand in manufacturing circles due to global economic conditions have fundamentally altered capacity needs, then this claim should be made after the 2009 peak demand target period in a penalty or noncompliance review proceeding. In such a hearing, FirstEnergy could explain to the Commission why compliance was not possible, and why penalties should not be incurred. R.C. 4928.66(A)(2)(b), and the associated rules, allow the commission to determine that compliance with peak demand targets was not possible for a particular reporting period.

FirstEnergy has not shown that compliance for the 2009 period is not feasible. Therefore, the Commission should deny FirstEnergy’s request to avoid its requirements to meet the demand reduction benchmarks for 2009.

WHEREFORE, OEC respectfully requests that the Commission grant its motion to intervene.

Respectfully Submitted,

s/Will Reisinger

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing has been served upon the following parties by electronic mail, this 17th day of August, 2009.

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