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September 1, 2009

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

Dear Ms. Jenkins:

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, 09-535-EL-EEC, et al.***

Enclosed for filing, please find the original and ten (10) copies of the *Response to Oppositions Filed by the Ohio Consumers' Counsel and The Ohio Environmental Council* regarding the above-referenced case. Please file the enclosed *Response,* 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/sbs
Enclosures
cc: Parties of Record

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**

RESPONSE TO OPPOSITIONS FILED BY THE OHIO CONSUMERS' COUNSEL AND THE OHIO ENVIRONMENTAL COUNCIL

Both the Ohio Consumers Counsel ("OCC") and the Ohio Environmental Council ("OEC") have filed Motions to Intervene in the above-captioned case. Each Motion is accompanied by an "Opposition" which sets out a statement of position opposed to the relief requested in the Amended Application. Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company (collectively, the "Companies") take no position on the substantive merits of intervention raised in either Motion to Intervene.[1] The Companies file this Response, however, which addresses the statements of position set out in the accompanying OCC and OEC Oppositions.

Before addressing the substance of the OCC and OEC Oppositions to the Amended Application, we should consider the current status of the Amended Application in context. When filed on July 6, the Amended Application[2] requested that, for purposes of compliance with the peak demand reduction requirements of R.C. 4928.66(A)(1)(b), the Commission waive the

[1] The Companies note, however, that OEC utilized the Commission's electronic filing procedures which are not applicable to and are not available to parties in this case. See http://www.puco.ohio.gov/PUCO/Docketing/DocketingInformation.cfm?id=6822. Moreover, the OEC certificate of service asserts that service was made be e-mail, a process which, per the Commission's procedural rules, is also not available in this case. O.A.C. 4901-1-05. No such e-mail was, in fact, received by the Companies; a hard copy of the OEC pleading, however, was received in the regular United States mail delivery on August 20.

[2] The Amended Application superseded the Companies' original Application, filed on June 26, 2009. The Amended Application added new ¶12, the alternative request for an amendment to the Companies' 2009 peak

impact of its (then) newly adopted rules in Case No. 08-888-EL-ORD ("Green Rules") – for 2009 only – and deem the Companies, as a result of the curtailable load represented by their Riders ELR and OLR, to have complied with the statutory requirements. In the alternative, the Companies requested, under R.C. 4928.66(A)(2)(b), that their respective 2009 peak load reduction benchmarks be amended to zero "due to regulatory, economic, or technological reasons beyond their reasonable control." Given the impending summer season and the virtual certainty of a rapidly approaching annual peak load, the Companies requested the Commission's expedited consideration of the Amended Application to resolve uncertainty regarding compliance with the statutory requirements.

Now, however, nearly two months since filing the Amended Application, these issues remain unresolved and, if anything, there is only more uncertainty as to status of 2009 compliance than there was at the time the Amended Application was filed. The Commission withdrew portions of its Green Rules (including those parts relevant to the discussion here) from JCARR consideration in early August[3], and it is unknown when or in what form they may reemerge and become effective.[4] Also, the Commission, on July 23, further deferred its reconsideration of its earlier decision in the AEP ESP proceeding, Case No. 08-917-EL-SSO, regarding its interpretation the statute and applicability of interruptible load as a program

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demand reduction benchmarks. In all other respects, the Amended Application was identical to the initially filed Application.

[3] http://www.registerofohio.state.oh.us/jsps/PublicDisplayRules/processPublicDisplayRules.jsp?MONTH=08&DAY=06&YEAR=2009&agencyNumberString=4901&actionType=all&doWhat=GETBYAGENCYANDFILINGDATE&Submit=Search

[4] As the Amended Application requested, in part, that the then newly adopted Green Rules be waived, and as the Commission has since withdrawn those rules from further proceedings before JCARR, presumably for further consideration by the Commission, the request for a waiver of those rules would appear to be moot. The Amended Application should therefore, in the circumstances, be treated as a request for determination by the Commission that the Companies' ELR and OLR tariffs may be deemed to be compliant with the statutory requirement for 2009, or, in the alternative, for an amendment of the Companies' peak demand reduction benchmarks to zero for 2009.

designed to achieve reduction in peak demand.[5] It is that decision upon which the portions of the Green Rules relevant here appear to have been based. OCC and OEC both rely on the Commission's prior pronouncements in these two proceedings as authority in support of their positions, but, in light of the current status of these cases, any such reliance must necessarily be viewed as problematic. Meanwhile, however, the summer months of July and August, and, importantly, the likely occurrence of the annual peak demand for the Companies, have come and gone. We are past the point where recommendations to implement new, alternative programs designed to achieve reductions in the 2009 peak can have any effect.[6]

OCC summarily asserts the same views it has advanced elsewhere[7] regarding an interpretation of the statutes which would require actual interruption of curtailable load at the time of system peak in order to count toward compliance for purposes of demand reduction under R.C. 4928.66. (Memorandum, p. 5). These arguments are erroneous for the reasons already set out in the Amended Application (p. 5, footnote 9) and the Companies will not burden this Response with detailed repetition. Suffice it to say, however, to the extent both OCC and OEC claim[8] the statute requires utilities to provide programs that will achieve a peak demand reduction, *that is simply not what the statute says*. The statute requires programs "designed to achieve" such a reduction, which is a difference both in the express language used and in meaning.

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[5] Entry on Rehearing, July 23, 2009, p. 30.

[6] The Companies' system maximum 2009 to date demand (10, 256 mW) – their likely 2009 peak – occurred on August 10 and is lower than the 2008 peak (10,870 mW) by more than 5%. That August 10 date, more than a month after the Amended Application was filed, was, interestingly, the day *prior* to the filing of OCC's Opposition which recommended that the Companies "should be required to develop and implement new PDR programs designed to meet the one percent PDR for 2009 " (OCC Memorandum, p. 6). Given its own timing in its intervention and filing of its Opposition, OCC's criticism of a "lack of due diligence" on the part of the Companies rings hollow. (OCC Memorandum, p. 9). The OEC intervention and Opposition was filed later still, on August 17.

[7] Specifically, in its principal briefs and on rehearing in AEP's ESP Case No. 08-917-EL-SSO and in its Memorandum Contra in response to applications for rehearing in the Green Rules docket. As noted above, the earlier Commission views on the matter in both of these cases are now back before the Commission, apparently for additional consideration.

OCC's characterization of the Companies' proposal "to meet peak demand reduction requirements by providing existing discounted, interruptible rates to large customers whose loads are not interrupted . . ." is also off the mark. (Memorandum, p. 5). First, OCC has the wrong focus. The statute requires the Companies to implement programs – which they did through the ELR and OLR tariffs approved in the Companies' ESP case in 2009 – which are designed to achieve, for 2009, a reduction from the historic based benchmarks. Whether the load is new or existing, it is the ability to curtail that load which comprises a program "designed to achieve" reductions when required. Second, contrary to OCC's assertion, when required by system constraints the Companies *have* curtailed their customers taking interruptible service.[9]

Similarly, OCC quotes the Commission's Entry on Rehearing underlying issuance of the Green Rules, *to wit*, "'[i]f utilities cannot rely upon interruptible customers to reduce peak demand, they should seek to implement real peak-demand reductions through other means.'" (Memorandum, p. 6). OCC's reliance on the quotation is misplaced for several reasons. Preliminarily, as noted above, the Commission has since withdrawn the Green Rules from JCARR and they are back at the Commission for further consideration together with, presumably, whatever accompanying rationale may have attached to their earlier issuance. Additionally, as noted, the Companies in fact can rely on being able to interrupt curtailable customers as demonstrated by their having interrupted them.

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[8] OCC Memorandum, pp. 5-6; OEC Memorandum, p. 7.

[9] As pointed out in the Amended Application, the curtailability of load under discussion here is unrelated to the issue of economic buy through. Amended Application, p. 2, fn. 5. 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 the Amended 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 matter at issue here.

Moreover, the Companies *have* pursued such "other means", including, as OCC recommends, a request for Commission approval of proposals for time of use rates and real time pricing[10] (Case No. Case No. 09-541-EL-ATA). The Companies have also requested Commission approval of measures directed to residential and small commercial customers which, while providing energy savings, are also designed to achieve peak demand reduction. (Case No. 09-580-EL-EEC). These other Applications, however, as with the instant case, await approval by the Commission and, given the point in the year we have now reached, do not represent programs which can contribute to compliance *for 2009*. Moreover, some of OCC's alternative recommendations, for example peak time rebates, can carry with them substantial additional costs which will be passed through to and borne by the Companies' customers.

Simply put, both OCC and OEC interpret the statute in a manner inconsistent with the plain language used by the General Assembly. Moreover, their position is completely belied by what OCC itself asserts is the legislative rationale for the peak demand reduction requirement. Specifically, OCC sets out, and apparently concurs in, the "underlying reasons which led the Ohio legislature to impose peak reduction requirements, *such as the postponement of expensive new electric generative capacity and price stability.*" (Memorandum, p. 6, emphasis supplied). The Companies agree with this OCC characterization of the General Assembly's rationale *and it completely supports the Companies', not OCC's, interpretation of the statute.* A compliance program which utilizes the interruption of curtailable load during critical periods surely avoids addition of expensive new generation.[11] And not having to implement more expensive approaches to demand reduction, the costs of which will be passed through to customers, surely

[10] These proposals are among the alternative compliance approaches which OCC's Opposition recommends. (Memorandum, p. 6) The Companies also have implemented another of OCC's proposed alternatives, direct load control. In the Companies' experience, however, the total impact of this alternative is likely to be somewhat limited and effective implementation with customers can take a considerable period of time.

contributes to rate stability rather than rate increases, a factor especially important given the challenging economic times and hardships faced by all Ohioans. The position OCC takes here is indeed a curious turnabout for an agency which for years has championed the cause of utilities pursuing *least cost* approaches and has doggedly challenged the prudence of utility expenditures when it asserts they have not done so.

With respect to the alternative relief requested in the Amended Application, amendment of the 2009 benchmarks as a result of regulatory uncertainty regarding the Green Rules and economic factors[12], OCC acknowledges that "[t]he situations discussed by the Companies *may* have caused some uncertainties in moving forward with PDR compliance. . . ." (Memorandum, p. 7, emphasis supplied). This incredibly understated observation belies completely the implicit OCC suggestion that follows – that, simply because S.B. 221 had been on the books since mid-2008 and the Commission had issued other, earlier interpretations of the statute (which it subsequently withdrew or to which it is now giving renewed consideration), the Companies should have assumed that their 2009 programs would be deemed compliant and their costs would be recoverable. (Memorandum, pp. 7-8). Effectively, OCC first observation undercuts its second.

Both OCC and OEC assert the Companies' request for amended 2009 benchmarks should not be considered because of an alleged pleading deficiency, that the Companies have failed to expressly assert that they are unable to meet the compliance benchmarks for 2009. (OCC Memorandum, p. 8; OEC Memorandum, p. 8). The short answer is that such an assertion was in fact made in the very first sentence of ¶12 of the Amended Application where the Companies

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[11] Both PJM and MISO recognize the demand response value of the availability of curtailable load, without a requirement for actual interruption.

[12] Amended Application, ¶12.

expressly stated that "due to regulatory, economic, or technological reasons beyond their reasonable control", they "cannot reasonably achieve" their 2009 benchmarks. Moreover, now, nearly two months later, the 2009 peak is likely behind us, there is even more uncertainty about the applicable rules, and there has been no resolution of the several applications the Companies have pursued at the Commission to attempt to receive some clarity about their compliance. *A fortiori*, absent the Commission recognition of the Companies' implementation of the ELR and OLR Riders with respect to the affected customers as compliance with the statutory requirements, the benchmarks cannot now be achieved due to regulatory, economic, or technological reasons beyond the control of the Companies.

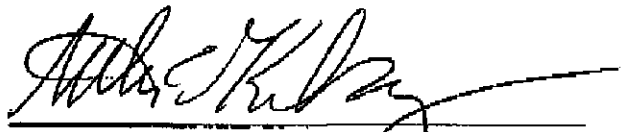
OEC suggests that any consideration of a potential amendment to the Companies' benchmarks should be deferred until some subsequent non-compliance or penalty proceeding. (Memorandum, p. 8) Reminiscent of a carnival game, OEC's cavalier "you pay your money and you take your chance" approach to statutory compliance would place the Companies at jeopardy for penalties for non-compliance or, potentially, at risk of being unable to recover compliance costs as intervenors take "pot shots", in hindsight, at the prudence of the Companies' choice of compliance approaches. Not only is this OEC suggestion grossly unfair, but it is inconsistent with the statute itself. The statute is written in the present tense. R.C. 4928.66(A)(2)(b) provides that upon application, the Commission can determine that an amendment "*is* necessary because the utility *cannot* reasonably achieve the benchmark." (emphasis supplied) It does not state that the Commission can decide an amendment "*was*" necessary because, in some after-the-fact proceeding, the Commission determined that a utility "*could not*" reasonably "*have achieved*" the benchmark.

Finally, OCC recommends that if the Commission does amend the Companies' benchmarks to zero for 2009, it should also determine that the Companies' 2010 benchmarks

under the statute should be inclusive of (i.e. added to) the one per cent reduction applicable to 2009. This issue is premature.[13] The questions before the Commission with respect to 2009 compliance require immediate attention. The Commission need not take on 2010 questions whose resolution is unnecessary to the disposition of the Amended Application.

For the above reasons, the Companies request the Commission disregard the Oppositions filed by OCC and OEC and renew their request that it grant the relief requested in the Amended Application.

Respectfully submitted,



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[13] And OCC's proposal lacks any statutory support.

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was served by regular U.S. Mail upon the parties of record identified below in this case on this 1st day of September, 2009.

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