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BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

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PUCO

In the Matter of the Energy Efficiency and)
Peak Demand Reduction Program Portfolio) Case Nos. 09-580-EL-EEC
of Ohio Edison Company, The Cleveland) 09-581-EL-EEC
Electric Illuminating Company, and) 09-582-EL-EEC
The Toledo Edison Company.)

Prepared Statement ("Oral Argument") of Sam Randazzo
General Counsel, Industrial Energy Users-Ohio
October 28, 2009

From what I can tell, we are here today, at least in part, because of the October 7, 2009 letter¹ from Governor Strickland to Chairman Schriber and a related press release. Today's session can also be traced to an Entry issued on October 15, 2009 which scheduled an "oral argument". I believe that the Industrial Energy Users-Ohio ("IEU-Ohio") received an invitation to "argue" at this meeting because we filed a request to intervene back when it looked like the FirstEnergy compact fluorescent light bulb ("CFL") proposal might affect some commercial customers.

¹ Governor Strickland called on the Commission to stop the program from going forward because "Ohioans are confused and angry and are looking for answers". Governor Strickland's October 7, 2009 letter stated:

Dear Commissioner Schriber,

I am proud of the work you and your fellow commissioners and staff have accomplished since the passage of S.B. 221, Ohio's comprehensive energy reform bill that ensures predictability of affordable energy prices and serves as a catalyst to enhance energy industries in Ohio. The energy efficiency mandate in this bill is set to reduce our energy consumption and to create jobs in the process.

However, since Tuesday, October 6, my office has received a very high volume of calls as a result of media reports regarding a conservation program to be implemented by First Energy. According to the articles, the PUCO approved a program wherein the First Energy operating companies are to supply customers with two compact florescent light bulbs at a cost of sixty cents per month over three years for a total of \$21.60.

Ohioans are confused and angry and are looking for answers. First, the bulb program has been thrust upon them without their approval or prior knowledge. Second, it is my understanding that two bulbs will be provided at a cost in excess of \$21.00. It is common knowledge that the efficient bulbs can be purchased for significantly less at popular retail outlets. Third, I am interested to know if there are any U.S. suppliers of these bulbs, or if First Energy had considered the use of bulbs manufactured in the United States.

Since First Energy's program is under the purview of the PUCO, I am asking that you provide to me and members of the General Assembly answers to these questions and more details as to how these programs were developed.

In the mean time, I am asking you to postpone this program until these questions are answered.

I look forward to your immediate response.

Sincerely,
Ted Strickland

<http://www.governor.ohio.gov/News/PressReleases/2009/October2009/News10709/tabid/1269/Default.aspx>
(last visited October 27, 2009).

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IEU-Ohio Background²

IEU-Ohio is a membership organization that advocates on behalf of commercial and industrial consumers interested in issues that affect the price and availability of energy here in Ohio. Within IEU-Ohio's membership ranks, there are 88 companies or other entities that consume about 10 billion kWh per year to operate their offices, facilities and plants throughout the State of Ohio. IEU-Ohio has been and is actively involved in local, state and federal venues to try to protect and advance the interests of the membership. My work in this area now spans four decades and, as many of you know, I got my start here at the Public Utilities Commission of Ohio ("PUCO" or "Commission") a long time ago.

Oral Argument?

As indicated above, this session is the result of a residential CFL program that was approved by the Commission in Case Nos. 09-580 through 09-582-EL-EEC. As you know, the CFL program was proposed by FirstEnergy, modified as a result of stakeholder input and approved, as modified, by the Commission. The modified application which the Commission approved specifically addressed cost recovery and the estimated amount of costs that would be passed onto customers in 2009. While I know this is supposed to be an oral argument, I really don't know what issues have not been resolved by the Commission and remain open or contested.

Since I am here, I will take the opportunity to mention a few things that we have already said through the stack of papers and pleadings that we have submitted in the various cases that the Commission has pending in conjunction with its efforts to comply with the portfolio mandate sections of SB 221. I will use the CFL "argument" as an example of what can and will go wrong as Ohio moves into the implementation/compliance phase of its law which requires investor-owned electric utilities to meet specified alternative energy, energy efficiency and peak demand reduction targets or risk civil and criminal penalties.

SB 221 became law on July 31, 2008. Since then, we have been trying to help the Commission **sensibly** complete the rules that are supposed to guide compliance with Ohio's portfolio requirements. The latest rules were issued (with additional changes) by the Commission on October 15, 2009 and it is not clear when the rulemaking process will be completed. The pace of the rulemaking and other considerations have inspired some of us stakeholders to recommend that the Commission use its authority under SB 221 to modify the 2009 compliance requirements because of the precarious condition of the economy, the inability of consumers to absorb extra charges for portfolio requirements (or

² <http://www.ieu-ohio.org>. For the record, IEU-Ohio was one of the few stakeholders to urge Ohio's policy makers to be careful about mandatory portfolio requirements during the SB 221 debates. During the SB 221 process, I testified that portfolio requirements did not make good sense and that there was no need for government to intervene further to stimulate the energy efficiency, renewable or "green" sector of the economy. I will readily acknowledge that we failed to capture the hearts and minds of Ohio's elected officials with our cautionary advice. The lure and the popularity of faith-based energy policies were too strong and their power was enhanced by strong editorial support from Ohio's major newspapers.

anything else) and the resource limitations that make it difficult to cram all the work that is required into the available time window.

These requests remain before the Commission and I will come back to this subject in my conclusion.

The CFL program was not the only thing that FirstEnergy suggested to comply with the portfolio requirements for 2009. Indeed, I think it is fair to say that many of the plans that FirstEnergy identified early on indicated that it thought that compliance for 2009 could be secured less expensively and more quickly by relying on the ample opportunities which SB 221 provides to harvest the capabilities of "mercantile customers" and to use renewable energy certificates ("RECs"). Either through rules issued, pulled back and reissued by the Commission or its failure to act on specific applications, the Commission effectively closed the door on compliance for 2009 through these mercantile customer capabilities and the use of RECs or sent signals that made the route risky for the utilities. It is also worth noting that the Ohio Consumers' Counsel ("OCC") has intervened in select mercantile customer applications to commit capabilities or obtain certification as a renewable energy resource, which has had the effect of causing further delay and increasing the overall compliance costs for Ohio's commercial and industrial businesses despite the fact that the bills of residential customers are not impacted in any way by such applications.³ There are between 300 and 400 open cases pending at the Commission involving energy efficiency-related issues or REC applications as we move into the eleventh month of 2009.

In FirstEnergy's case, its plan to harvest the capabilities of mercantile customers relied on – again with PUCO approval supplied in FirstEnergy's electric security plan ("ESP") case earlier this year – the use of "administrators" like IEU-Ohio, the Ohio Manufacturers' Association, the Ohio Hospital Association, the Ohio Schools Council, the County Commissioners' Association, the Council of Smaller Enterprises and others to bring these mercantile capabilities up into the compliance portfolio. And as we unfortunately know from the Commission's recent meetings, the efforts undertaken to get the PUCO to act on the proposed administrator agreements and the first scope of work associated with this approach has been stymied by what I will diplomatically describe as the regulatory process.

From what I can tell, the residential CFL program was FirstEnergy's last best hope for hitting the compliance benchmarks for 2009. By October 2009, the stage was set for something to go wrong and you know the rest of the story.

³ See, for example, *In the Matter of the Joint Application of The Dayton Power and Light Company and Airgas, Inc. for Approval of a Reasonable Arrangement to Incorporate Customer Participation in PJM's Demand Response Programs into DP&L's Demand Reduction Program*, Case Nos. 09-702-EL-AEC and 09-1700-EL-EEC; *In the Matter of the Application for P.H. Glatfelter Co. for Certification as an Eligible Ohio Renewable Energy Resource Generating Facility*, Case No. 09-0730-EL-REN. It appears that OCC has opposed only applications that do not involve wind or solar resources regardless of the quality and quantity of the information provided or the merit of the project, revealing OCC's bias in spite of the letter and spirit of SB 221.

Now let's turn to CFLs.

Casual observation of worldwide compliance plans by utilities to meet portfolio mandates will quickly show that the deployment of CFLs is a frequent component of plans to comply with energy efficiency mandates. Indeed, all you have to do is look at OCC's website⁴ to see the degree to which OCC favors the use of CFLs for residential customers.

Message from the Consumers' Counsel:

10 ways to prepare your home for cooling season

2. Switch to compact fluorescent light bulbs – CFL bulbs last up to 10 times longer than incandescent bulbs. A single CFL bulb can save you \$30 or more over its lifespan.

Best regards,

*Janine L. Migden-Ostrander*⁵

FirstEnergy was not the first Ohio electric utility to implement a lighting program focused on residential customers and it will not be the last where states impose portfolio mandates on utilities. Duke-Energy Ohio did so months ago and it has been charging customers for the "cost" (including lost revenues) for months.

Since the FirstEnergy CFL flap has featured regular references to so-called "lost revenues", it might be helpful to review the bidding on how "lost revenue" got into the cost recovery equation in the first place. For this I will rely on the actual statements of other stakeholders who pushed the General Assembly to adopt the mandatory portfolio requirements.

Mr. Richard T. Stuebi was actively involved in discussions about the portfolio mandates during the SB 221 process in his capacity with The Cleveland Foundation. Here is what Mr. Stuebi had to say recently in an Internet article.⁶

⁴ <http://www.pickocc.org/>.

⁵ <http://www.pickocc.org/mediacenter/migden-ostrander/message/2008/april.shtml> (last visited October 27, 2009).

⁶ <http://seekingalpha.com/article/165992-first-energy-offers-a-case-study-of-how-not-to-implement-energy-efficiency?source=yahoo> (last visited October 27, 2009). For additional information on Mr. Stuebi, see http://www.nextwave-energy.com/bios_stuebi.htm (last visited October 27, 2009).

Although seemingly shocking to Ohio readers, the provisions of SB 221 do in fact allow for utilities to recover lost revenues associated with energy efficiency implementation, in recognition of some basic utility economic realities.

In traditional regulatory approaches, utilities earn more profits by selling more electricity. As is the case with most businesses, the company succeeds by selling higher volumes of its product. Thus, if we agree that we want to encourage less electricity consumption, we have to eliminate the financial motivations that utilities have against that desirable goal. In other words, we have to make it equally attractive for utilities to promote saving energy instead of consuming energy; we have to "decouple" electricity volumes from utility profitability.

Recovery of lost revenues from energy efficiency is by no means a novel concept. Indeed, California pioneered such "decoupling" ratemaking treatment all the way back in 1982 with the adoption of its Electric Revenue Adjustment Mechanism. But, in Ohio, it is very new – only now being adopted in the wake of SB 221. And, neither First Energy nor the PUCO made significant effort to educate the public that ratemaking practices of this type have been employed for decades, and are being increasingly employed around the country, for very sensible reasons.

And, Mr. Stuebi's policy perspective on "lost revenue" recovery seems to be shared by Ohio's Consumers' Counsel:

Upon hearing about revenue decoupling, a typical—and understandable—customer reaction is, "You mean I am going to pay the utility for *not* using gas?" Yes, but that decoupling creates a "win-win" solution because the customer still saves money and the utility still has the opportunity to recoup its revenue requirements. Striking a balance between customers and the natural-gas companies is important in making these programs sustainable, and is the best way to ensure customer savings in the long run.⁷

And, finally, we come to the commitments that Ohio has made in conjunction with obtaining the so-called stimulus dollars from the American Recovery and Reinvestment Act.

⁷ *A Consumer Advocate's View: Decoupling and Energy Efficiency Two Sides of the Same Coin*, Janine Migden-Ostrander, Public Utilities Fortnightly, June 2006 at 20.

As you may recall, Title IV of the American Recovery and Reinvestment Act conditioned Ohio's receipt of certain stimulus dollars on the Governor providing assurance to the Secretary of Energy that Ohio is doing certain things. On March 23, 2009, Governor Strickland sent a written statement⁸ to the Department of Energy as a result of conditions related to the receipt of stimulus dollars. Among other things, the Governor's written assurance statement says:

I, Ted Strickland, Governor of the State of Ohio, provide written notice to the Secretary of Energy of the following:

(1) The applicable State regulatory authority will seek to implement, in appropriate proceedings for each electric and gas utility, under its rate-making authority, a general policy that ensures that utility financial incentives are aligned with helping their customers use energy more efficiently and that provides timely cost recovery and a timely earnings opportunity for utilities associated with cost-effective measurable and verifiable efficiency savings, in a way that sustains or enhances utility customers' incentives to use energy more efficiently.

As Mr. Stuebi's above quoted article explains, "...ensuring that utility financial incentives are aligned with helping customers use energy more efficiently..." generally involves a mechanism to address "lost revenues". Regardless of what may be in SB 221, Ohio's receipt of stimulus dollars seems to be tied to a commitment, right or wrong, to provide utilities with "...timely cost recovery...".

Conclusion

As I indicated earlier, I am not sure what has been left in this case to argue over, at least with regard to the contested issues. I think the real question presented by this proceeding is whether we can be smarter going forward⁹ about how to meet the portfolio requirements in SB 221 without hardening negative public attitudes that generally attach to government mandates implemented through public utilities. In my opinion, the CFL "argument" is a symptom of a larger problem and I urge the Commission to use this case as a prod to get after the larger problem.

⁸ The Governor's written statement is attached as Appendix A. Page 2 of the letter states:

The applicable State regulatory authority with rate-making authority for electric and gas utilities is the Public Utilities Commission of Ohio, an independent authority operating under the requirements of the Ohio Revised Code. Recent changes in state law clearly give the Commission authority to examine, analyze and implement methods by which to align utility financial incentives with the goal of increased energy efficiency. I have asked the chair of the Public Utilities Commission of Ohio to take measured but timely action to achieve this goal.

⁹ The wheels came off in this case, in part, because of FirstEnergy's choices regardless of who approved or signed off on the modified program presented by FirstEnergy. This was not the first CFL program to produce a strong negative public reaction. (See the apology of Allegheny Energy to its Maryland customers at <http://www.apwattwatchers.com/Inserts/PE/MD/MD%20Apology-bw.pdf> – last visited October 27, 2009.)

More specifically, I urge the Commission to:

- Use the authority it was given in SB 221 to waive the portfolio compliance benchmarks for 2009 so that we can get the rules right and be thoughtful about how to achieve compliance without making customers "angry and confused".
- Use the extra time that is created by the waiver recommendation and an informal workshop process to systematically develop rules that will work in the real world, avoid unnecessary regulation and comply with SB 221.
- Approve the form of FirstEnergy administrator agreement in keeping with the FirstEnergy ESP settlement which the Commission approved and let the administrators get to work harvesting opportunities to reduce the energy intensity of Ohio's economy.
- Break the "log jam" in portfolio-related applications that have been filed with the Commission.
- Proactively coordinate your efforts to implement SB 221's portfolio requirements with the efforts of the Governor and other state agencies to apply stimulus dollars. According to Monday's (October 26, 2009) edition of the Columbus Dispatch at page A 10, Ohio is distributing \$260 million in stimulus dollars to insulate homes. Rather than raising electric rates to fund compliance with the SB 221 portfolio mandates, it sure seems like we have a unique opportunity to leverage the federal stimulus dollars to satisfy the commitments made by Governor Strickland to secure the stimulus funds and count the results against the portfolio compliance required by SB 221. I think I know where there are about 3.5 million CFLs that are available if Ohio is interested.
- Leverage the portfolio related work that has been done in other neighboring states where possible to streamline the portfolio mandate compliance effort in Ohio and act on opportunities where there may be scale and scope economies. For example, Pennsylvania recently approved compliance plans for its electric utilities.

Thank you again for the opportunity to participate in this "argument".

I will now try to answer any questions you may have.



TED STRICKLAND
GOVERNOR
STATE OF OHIO

GOVERNOR'S ASSURANCE Under ARRA Title IV, Section 410

Pursuant to Title IV, section 410 of the American Recovery and Reinvestment Act (Pub. L. 11-5 (Feb. 17, 2009) and the U. S. Department of Energy's Announcement "Recovery Act - State Energy Program Formula Grants Funding Opportunity Number: DE-FOA-0000052 Announcement Type: Amendment 001" (March 19, 2009),

I, Ted Strickland, Governor of the State of Ohio, provide written notice to the Secretary of Energy of the following:

- (1) The applicable State regulatory authority will seek to implement, in appropriate proceedings for each electric and gas utility, under its rate-making authority, a general policy that ensures that utility financial incentives are aligned with helping their customers use energy more efficiently and that provides timely cost recovery and a timely earnings opportunity for utilities associated with cost-effective measurable and verifiable efficiency savings, in a way that sustains or enhances utility customers' incentives to use energy more efficiently.
- (2) The State, or the applicable units of local government that have authority to adopt building codes, will implement the following:
 - (A) A residential building energy code (or codes) that meets or exceeds the most recent International Energy Conservation Code, or achieves equivalent or greater energy savings.
 - (B) A commercial building energy code (or codes) throughout the State that meets or exceeds the ANSI/ASHRAE/IESNA Standard 90.1-2007, or achieves equivalent or greater energy savings.
 - (C) A plan to achieve 90 percent compliance with the above energy codes within eight years. This plan will include active training and enforcement programs and annual measurement of the rate of compliance.
- (3) The State will, to the extent practicable, prioritize the grants toward funding energy efficiency and renewable energy programs, including—
 - (A) the expansion of existing energy efficiency programs approved by the State or the appropriate regulatory authority, including energy efficiency retrofits of buildings and industrial facilities, that are funded by the State or through rates under the oversight of the applicable regulatory authority, to the extent applicable;
 - (B) the expansion of existing programs, approved by the State or the appropriate regulatory authority, to support renewable energy projects and deployment activities, including programs operated by entities which have the authority and capability to manage and distribute grants, loans, performance incentives, and other forms of financial assistance; and

(C) cooperation and joint activities between States to advance more efficient and effective use of this funding to support the priorities described in this section.

This notice is based upon the following additional considerations:

- The applicable State regulatory authority with rate-making authority for electric and gas utilities is the Public Utilities Commission of Ohio, an independent authority operating under the requirements of the Ohio Revised Code. Recent changes in state law clearly give the Commission authority to examine, analyze and implement methods by which to align utility financial incentives with the goal of increased energy efficiency. I have asked the chair of the Public Utilities Commission of Ohio to take measured but timely action to achieve this goal.
- The applicable State regulatory authority for establishing residential and commercial building codes is the Ohio Board of Building Standards, an independent authority operating under the requirements of the Ohio Revised Code; municipal corporations may adopt their own standards that may not conflict with those adopted by the Ohio Board of Building Standards. I have requested and am supporting legislation currently pending in the Ohio General Assembly that would mandate that the Ohio Board of Building Standards adopt codes and practices identical to those in certification 2 above. I have asked the chair of the Ohio Board of Building Standards to take all possible actions to develop an effective eight year plan to achieve the goals as certified.
- I have directed the Ohio Energy Office to develop its initial application and its full application to build upon its existing program in order achieve the expansion, cooperation and joint activities described in the above certification. Expenditure of the State Energy Program funds will be subject to legislative review and this certification assumes the Ohio General Assembly will approve expenditure of federal funds in a manner consistent with the applications submitted.

3-23-09

Date

Ted Strickland

Ted Strickland, Governor
State of Ohio