BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company To Amend Their Energy Efficiency Benchmarks	))))))))	Case No. 09-1004-EL-EEC 09-1005-EL-EEC 09-1006-EL-EEC

MEMORANDUM CONTRA TO FIRST ENERGY'S APPLICATION
BY THE
OHIO ENVIRONMENTAL COUNCIL

FirstEnergy requests that the Commission use its authority to reduce its 2009 energy efficiency benchmarks to zero. As explained more fully below, FirstEnergy's arguments are based on improper interpretations of the waiver provisions of S.B. 221. The Commission should reject this request.

FirstEnergy argues that the Commission's failure to resolve the already filed applications for alternative programs and the postponement of its CFL distribution program leaves FirstEnergy with only one approved reduction program—Aclara—which represents approximately 1/167th of FirstEnergy's statutory benchmark for 2009. The Ohio Revised Code Section 4928.66(A)(2)(b) gives the Commission the authority to amend the benchmarks if a utility "cannot reasonably achieve the benchmarks." Thus, FirstEnergy argues that it cannot reasonably reach these benchmarks without approval of more of its applications.

Application approval is not a perquisite to energy efficiency program deployment or savings. Other Ohio investor owned utilities outlined and secured approval for basic efficiency plans as part of their electric security plans, allowing them to proceed with program development and compliance.

Additionally, some of FirstEnergy's applications, such as 09-384-EL-EEC, and 09-951-EL-EEC, attempt to characterize existing transmission and distribution improvements as efficiency, which is not a credible argument under any circumstances. FirstEnergy should not expect to be able to capture efficiency from these questionable applications, especially since in the cases of 09-384-EL-EEC and 09-951-EL-EEC existing transmission improvements (i.e. transmission improvements made before the passage of S.B. 221) were characterized as qualifying. FirstEnergy should know, as legislative language and intent are clear, that existing transmission and distribution improvements can never count towards S.B. 221 compliance goals. No amount of applications to the Commission will expand the statute enough to allow these improvements to be counted towards compliance.

By FirstEnergy's logic, no utility with an application for program approval before the Commission should ever be penalized for non-compliance if the savings contemplated by the application was intended to contribute to compliance. This is not a valid concept, for if it were, then FirstEnergy would be able to meet their statutory requirements merely be filing applications for program approval, no matter the merit or viability of the programs. The intent of the statute was the achievement of concrete energy efficiency and demand reduction savings, not there mere implication that some savings may be created. FirstEnergy's reliance on pending applications is therefore misplaced and invalid as grounds for a 2009 target waiver.

FirstEnergy has also failed to put in place, as other Ohio investor owned utilities have, mainstream, effective programs proven in other jurisdictions. This was always an option for the company, regardless of the state of the pending rule package or applications to the commission.

FirstEnergy deliberately chose not to take this route, and as a result, is in a position to incur a penalty. That noted, FirstEnergy has failed to demonstrate that it “cannot reasonably achieve the benchmarks.”

FirstEnergy futher suggests as grounds for its waiver application that the Commission has not provided finalized energy efficiency rules and that until FirstEnergy receives such information, it is unable to determine how to meet the reduction benchmarks required by S.B. 221. While FirstEnergy may not have applications approved from the Commission or a finalized version of the energy efficiency rules, FirstEnergy has been aware of the benchmarks since at least since May 31, 2008, the date on which the bill was signed into law, and should have been planning their compliance accordingly. Again, as mentioned above, FirstEnergy could have planned for compliance in the absent of final rules by implementing mainstream energy efficiency programs proven in other jurisdictions. FirstEnergy’s delay and unwillingness to advance proven programs cannot be the basis of a waiver by the commission. Furthermore, no other investor-owned utility in our state has filed or from our standpoint plans to file a similar waiver. These utilities have faced the same uncertainty with regards to Commission rules as FirstEnergy. In response, they developed common sense programs, well-tested and deployed in other jurisdictions. The vast majority of these programs are functioning and accepted by customers and are putting utilities on the path to compliance. FirstEnergy failed to follow this model. Their recalcitrance is not a sufficient basis for waiver.

Senate Bill 221’s penalty provisions were designed for precisely this purpose: to punish and discourage incompetence or failure to meet targets through gaming. This central intent would be violated if a waiver was granted under the scant circumstances claimed by First Energy.

FirstEnergy's failure to develop a workable CFL program is not a viable justification for wavier receipt either. FirstEnergy produced a CFL initiative that several parties familiar with successful programs in other jurisdictions determined even before its roll out would most likely prove a failure. Both NRDC and OCC filed objections to the program, expressing in clear technical language its deficiencies. Irrespective these early objections, FirstEnergy chose to deploy its program and the public and important policy makers from across the state rejected it. Subsequently, the Commission acted to review this program in hearing format. The Commission did offer approval of this program, but FirstEnergy, and FirstEnergy alone, is responsible for their failure to properly introduce the program to the public and deliver success. The failure of this program is a liability that FirstEnergy must absorb; Commission approval of a program design does not indemnify a utility against penalties for S.B. 221 non-compliance.

FirstEnergy's application does not demonstrate that it "cannot reasonably achieve the benchmarks" required by statute, and the Commission should deny this request to reduce energy efficient benchmarks to zero.

Respectfully Submitted,

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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 first class and electronic mail this 19th day of November, 2009.

/s/ Will Reisinger

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Summary: Memorandum Memorandum Contra by the Ohio Environmental Council electronically filed by Mr. Will Reisinger on behalf of Ohio Environmental Council