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BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Adoption of Rules for Alternative and Renewable Energy Technology, Resources, and Climate Regulations, and Review of Chapters 4901:5-1, 4901:5-3, 4901:5-5, and 4901:5-7 of the Ohio Administrative Code, Pursuant to Chapter 4928.66, Revised Code, as Amended by Amended Substitute Senate Bill No. 221.	)	Case No. 08-888-EL-ORD

MEMORANDUM CONTRA APPLICATIONS FOR REHEARING OF DUKE, FIRSTENERGY AND IEU BY THE OHIO CONSUMER AND ENVIRONMENTAL ADVOCATES

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I. INTRODUCTION

The undersigned members of the Ohio Consumer and Environmental Advocates (collectively "OCEA")[1] jointly submit this Memorandum Contra regarding three Applications for Rehearing filed on November 13 and 16, 2009 with the Public Utilities Commission of Ohio ("PUCO" or "Commission"). Duke Energy Ohio ("Duke"), the FirstEnergy Companies ("FirstEnergy" or "Companies") and the Industrial Energy Users – Ohio ("IEU") made a number of rehearing requests that would weaken the energy efficiency and renewable energy requirements that the General Assembly enacted in Senate Bill 221 ("S.B. 221") for the benefit of Ohioans.

The rules as proposed by the Commission contain certain provisions that already are problematic for Ohioans (as presented in the OCEA Application for Rehearing filed on November 13, 2009, by the respective OCEA members). But several of the

[1] The undersigned members of OCEA include the Office of the Ohio Consumers' Counsel, Citizen Power, and the Natural Resources Defense Council and Sierra Club.

modifications proposed in these three applications for rehearing stray even further from the intent of the legislation for advancing Ohio's progress towards an energy future that emphasizes energy efficiency and renewable energy as part of effective resource planning. OCEA again urges the Commission to keep in the forefront the public interest and the utilities' duty to serve that interest in a fair and reasonable manner that establishes energy efficiency and renewable energy requirements that are forward thinking while protecting utility consumers.[2]

II. ARGUMENT

A. The FirstEnergy And IEU Applications For Rehearing Failed To Establish That The Commission's Order Approving Rules For Energy Efficiency And Demand Reduction Benchmarks (Ohio Adm. Code Chapter 4901:1-39) Was Unreasonable Or Unlawful. The Commission Should Not Adopt The Changes To Rules 4901:1-39-05(F) And 4901:1-39-05(H) That Are Recommended By FirstEnergy And IEU.

FirstEnergy and IEU incorrectly argue that all restrictions placed on mercantile customer-sited activities by rule 4901:1-39-05(F) are unreasonable and unlawful.[3] FirstEnergy complains that all PUCO prerequisites for mercantile customer projects are "contrary to the plain meaning of the statute"[4] and comments that the statutory language states "all" efficiency gains are to be included, noting that the legislature "placed no restrictions on the nature of such programs to be included."[5] IEU's focus is similar. IEU declares that the "gross effects of <u>all</u> mercantile customer-sited programs <u>must</u> count

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[2] The absence of argument by the undersigned members of OCEA to any sections of the applications for rehearing should not be taken as a concession regarding those arguments.

[3] *See* IEU Application for Rehearing at 6. (Nov. 16, 2009).

[4] FirstEnergy Application for Rehearing at 11 (Nov. 13, 2009).

[5] Id.

towards an EDU's benchmark compliance effort and the Commission cannot legally constrain this opportunity by rule or otherwise."[6]

However, both of these arguments ignore the qualifying language of the statute. R.C. 4928.66(A)(2)(c) allows the "effects of all demand-response *programs* for mercantile customers"[7] to be counted. The word "programs" provides a qualifier as to what may be counted towards energy efficiency and peak demand benchmarks. Both FirstEnergy and IEU read the statute as though *any* effort by a mercantile customer should count. However, "programs" is a qualifier, and rule 4901:1-39-05(F) is the Commission's attempt to provide clarification regarding what will be considered a program, and what will not.

Similarly, Duke, FirstEnergy and IEU contest rule 4901:1-35-05(H), which prohibits a utility from counting toward statutory benchmark compliance "measures that are required to comply with energy performance standards set by law or regulation…."[8] Here, IEU states that any "action that results in energy efficiency" cannot be prohibited from being applied to the benchmarks by the Commission.[9] This is an overbroad interpretation of a rule containing limiting language as to what may be counted. Duke and FirstEnergy also ask the Commission to reconsider all of their previous arguments, including the argument that this provision exceeds the scope of the PUCO's authority.[10]

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[6] IEU Application for Rehearing at 6 (Nov. 16, 2009) (*Emphasis in the Original*).

[7] R.C. 4928.66(A)(2)(c).

[8] Entry on Rehearing at proposed rule 4901:1-39-05(H) (Oct. 15, 2009).

[9] IEU Application for Rehearing at 8 (Nov. 16, 2009).

[10] *See* FirstEnergy Application for Rehearing at 6-7; *see also* Duke Application for Rehearing at 4 (Nov. 13, 2009).

Finally, IEU and FirstEnergy request further clarification of rule 4901:1-35-05(H) by recommending additional language that allows a utility to submit efficiency gains from measures taken now that will become part of a code in the future.[11] These recommendations only serve as an attempt to broaden what would be allowed under the rule, and the result of adopting these recommendations would be further confusion for all parties and the Commission upon rule implementation.

In R.C. 4928.02(D), the General Assembly specifically identified that one clear policy of Ohio was to do the following throughout the state:

> Encourage innovation and market access for cost-effective supply and demand-side retail electric service including, but not limited to, demand-side management, time-differentiated pricing, and implementation of advanced metering infrastructure.

Moreover, to underline the commitment and to effectuate that policy the General Assembly directed utilities to implement energy efficiency programs that achieve very specific amounts of energy savings and demand reductions under R.C. 4928.66(A) and (B).

As noted previously by OCEA, nothing in R.C. 4928.66 states that the Commission must allow utilities to count all energy savings achieved through any programs listed under R.C. 4928.66(A)(2)(c). In fact the presence of the baseline calculation under R.C. 4928.66(A)(2)(a), which will not permit the utility to count most of the energy savings achieved before 2009, shows that the General Assembly did not intend utilities to count energy savings the utility or supplier may have achieved through previous requirements or commitments. The legislature did not pass the energy efficiency portions of S.B. 221 in order to initiate an elaborate accounting exercise whereby utilities

[11] *See* FirstEnergy Application for Rehearing at 7 (Nov. 13, 2009); *See also* IEU Application for Rehearing at 10 (Nov. 16, 2009).

measure the effects of equipment changes that would have happened without the bill. Instead, the legislature created an energy efficiency resource standard in order to increase energy efficiency beyond what would have occurred absent legislative action.

Moreover, the Commission should only allow the utilities and suppliers to apply energy savings they achieve that are above the amounts that not just electric providers but also other persons and/or organizations must achieve under other laws, regulations or codes addressing other types of energy savings. The Commission should ensure that energy savings are achieved by utilities and electric suppliers above and beyond those amounts already required by law, regulation or practices external to S.B. 221, except those specific and narrow exceptions where customers commit specific savings also above codes, minimum standards or laws independent of S.B. 221.

The provisions of R.C. 4928.66 apply only to energy savings specific to electric providers. The statute does not address energy savings that are required of non-electric providers. The reference to "new or existing" under R.C. 4928.66(A)(2)(c) applies only to demand-response and customer-sited energy efficiency that "the commission determines that exemption reasonably encourages such customers to commit those capabilities to those programs." If a mercantile customer is already required to purchase equipment or assets that meet certain energy-efficiency standards, the exemption does not subsidize the customer to commit the capability to the program. The exemption from paying the energy efficiency/ peak reduction rider is not needed to encourage the mercantile customer to purchase energy efficient assets that are already required by law – essentially subsidizing compliance with the law. S.B. 221 was never intended to replicate laws and energy efficiency requirements that are applied to not just energy providers but everyone.

B. The Commission Should Not Modify Rule 4901:1-39-05(J) As Recommended By FirstEnergy And IEU. Rather, The Rule Should Remain As Proposed, And Retain The Requirement That Electric Providers Include Only *Actual* Peak Demand Reductions In Each Utilities Effort To Meet Its Benchmark.

In its Application for Rehearing, FirstEnergy requests that the Commission modify the rule to permit amending the benchmarks rather than granting a waiver.[12] FirstEnergy also asks for clarification on how peak pricing would affect a request for a waiver.[13] IEU contends that various definitions in the rules regarding peak-demand and demand-response are confusing. It recommends various changes to the rules and requests clarification. The undersigned members of OCEA would like to reiterate their positions on these issues.

S.B. 221(R.C.4928.02(D)) included a policy that is to:

> Encourage innovation and market access for cost-effective supply and demand-side retail electric service including, but not limited to, demand-side management, time-differentiated pricing, and implementation of advanced metering infrastructure.

The provisions of S.B. 221 were intended to create cost-effective peak reductions under the R.C. 4928.66 benchmarks. In other words, if a project does not actually reduce demand, it was not designed to meet the demand reductions that are required under R.C. 4928.66.

Utilities cannot know whether a program is correctly designed to meet demand reductions unless the program *actually* reduces demand. An electric provider cannot

[12] *See* FirstEnergy Application for Rehearing at 14 (Nov. 13, 2009).

[13] *See* FirstEnergy Application for Rehearing at 14 (Nov. 13, 2009).

accurately design an interruptible program or project that will meet certain demand reduction goals, because its customers may have alternative motives and/or sources of power during interruptions. If the electric provider interrupts such a customer during peak, the customers may "buy through" or draw and consume electric generation from another source and thus the interruption will not produce the demand reduction the utility depended upon. For this reason, the electric providers should apply only actual peak reductions to meet their requirements.

In previous filings, utilities argued that requiring actual demand reductions would force utilities to curtail customers when not necessary from a system perspective, simply to prove that demand reductions are actual. This is absurd. There are many types of programs that electric providers can rely on to reduce peak demand. For example, peak time rebates, time of use rates, including critical peak pricing. The solution to the utilities' supposed problem is obviously procuring additional cost-effective demand resources, not capriciously shutting down industrial facilities critical to Ohio's economy.

C. The Applications For Rehearing Failed To Establish That The Adopted Definition Of "Double Counting" (Ohio Adm. Code 4901:1-40-01(M)) Is Unlawful Or Unreasonable.

FirstEnergy and IEU complain about rule 4901:1-40-01(M), which prohibits a utility from counting renewable energy, renewable energy credits, or energy efficiency gains (as an alternative energy resource and as an energy efficiency or peak demand reduction measure) to satisfy both an Ohio state renewable energy requirement AND a federal regulatory requirement for a different regulated attribute of energy production. FirstEnergy states that the rule contradicts R.C.4928.64 "because the definition of "advanced energy resource" in R.C. 4928.01(A)(34)(g) specifically includes "demand-side management *and* energy efficiency improvements [...] which clearly demonstrates a statutory intent to include energy efficiency savings for both energy efficiency and advanced energy benchmarks."[14] IEU presents the same argument in their Application.[15] In addition, FirstEnergy repeats arguments made in past filings on the rules that R.C. 4928.66(A)(2)(c) requires that the measure of benchmark compliance must include the "effects of all peak demand reduction and energy efficiency programs."[16] These arguments incorrectly attempt to make a connection between two different parts of S.B. 221 where none exists.

The General Assembly does not allow overlap between the two benchmark requirements. The requirements for advanced energy benchmarks and energy efficiency/peak demand reductions are separate. It is important to note that while the definition of "advanced energy resource" lists energy efficiency and peak demand reduction improvements, this does not automatically mean that one measure is counted for both requirements. If this was the intention, S.B. 221 would have had one set of requirements in one section, rather than having them listed in separate sections. The legislature could have added a single sentence or phrase in one of these two sections expressly permitting or acknowledging overlap and thus double-counting. There is none.

As previously stated, the Commission has very broad authority to establish rules: "the public utilities commission has general supervision over all public utilities within its jurisdiction as defined in section 4905.05."[17] Under R.C. 4905.06, the Commission has the authority to "prescribe any rule or order that the commission finds necessary for

[14] FirstEnergy Application for Rehearing at 15 (Nov. 13, 2009).

[15] *See* IEU Application for Rehearing at 16 (Nov. 16, 2009).

[16] FirstEnergy Application for Rehearing at 15-16 (Nov. 13, 2009).

[17] R.C. 4905.06.

protection of the public safety." OCEA opposes double counting. Double counting would result if customers are allowed to count savings in more than one state (meaning that a facility in another state can be used for that state's requirements and that of Ohio.) An outcome such as that would thwart the legislative intent of spurring the development of renewable energy in this state. The statutory interpretations of IEU and FirstEnergy should be rejected.

D. Duke's Applications For Rehearing Failed To Establish That Rule 4901:5-5-06 For The Filing Of Integrated Resource Planning By Electric Utilities Is Unreasonable Or Unlawful.

Duke contends that Senate Bill 3 "eliminated the Commission's regulatory authority over generation, except for certain very limited exceptions."[18] Duke asserts that S.B. 221 did not allow the PUCO to require integrated resource planning except when an electric distribution utility wants to "own or operate new generation facilities and recover those costs through a non-bypassable charge."[19] Duke further contends that this rule would allow parties to gain access to information that "must be kept confidential in a competitive market."[20] Duke requests that resource plans should only be required under these circumstances.

However, the Commission has clear authority to require persons owning or operating a major utility facility or furnishing natural gas to more than fifteen thousand customers in the state to comply with the Long-term Forecast Report ("LTFR") requirements as issued. Accordingly, the requirements in rule 4901:5-5-06, which reflect the intent of R.C. 4935.04(C), are lawful and reasonable.

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[18] Duke Application for Rehearing at 5 (Nov. 13, 2009).

[19] Id. at 6 (Nov. 13, 2009).

[20] Id. at 6 (Nov. 13, 2009).

Duke's arguments also ignore the PUCO's broad statutory power to promulgate rules under R.C. 111.15, the general supervision power over all public utilities pursuant to R.C. 4905.06, and the PUCO's authority to promulgate rules to implement S.B. 221 under R.C. 4928.06(A), which states:

> Beginning on the starting date of competitive retail electric service, the public utilities commission shall ensure that the policy specified in Section 4928.02 of the Revised Code is effectuated. To the extent necessary, the commission shall adopt rules to carry out this chapter.[21]

The policy justification for resource planning is explained in the Commission's April 15, 2009 Opinion and Order, which states:

> * * * [W]e are now convinced that each electric utility should include a resource plan with its annual LTFR in order for this Commission to make informed decisions dependent upon the status of Ohio's energy industries and markets.

While the ESP or the market-based option are the two methods established by S.B. 221 for the Commission to set generation rates, resource plans, as part of the LFTRs, will be the tool used by the Commission to assess the reasonableness of the demand and supply forecasts based on anticipated population and economic growth in the state in accordance with R.C. 4935.04(F)(5).

As noted in the OCEA Application for Rehearing, the undersigned members of OCEA recommend that a resource plan be included with *all* annual forecast reports. OCEA, for reasons stated in its application, believes that it is essential that each electric utility file a Resource Plan with its annual forecast report in order for this Commission to develop an accurate view of Ohio's energy industries and markets, particularly in light of the efficiency and alternative

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[21] R.C. 4928.06(A).

energy requirements imposed by S.B. 221.[22] Duke's requests regarding rule 4901:5-5-06 should be rejected.

III. CONCLUSION

The undersigned members of OCEA request that the Commission deny portions of the Duke, FirstEnergy and IEU Applications for Rehearing as stated above. The Commission should, however, make changes to the rules stated in its October 15 and 28, 2009 Entries, as set out in OCEA's Application for Rehearing. OCEA's recommendations serve the public interest in bringing the benefits of energy efficiency and renewable energy to Ohioans, as intended in S.B. 221.

Respectfully submitted,

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[22] *See* Opinion and Order (April 15, 2009) at 42-43.

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing Memorandum Contra Applications for Rehearing has been served via First Class U.S. Mail, postage prepaid, to the following persons this 23rd day of November, 2009.

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