

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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

**COMMENTS IN OPPOSITION TO FIRSTENERGY'S
APPLICATION TO ELIMINATE OR REDUCE OHIO'S ENERGY EFFICIENCY
BENCHMARKS FOR 2009
BY
THE OHIO CONSUMER AND ENVIRONMENTAL ADVOCATES**

I. INTRODUCTION

Pursuant to the Public Utilities Commission of Ohio's ("Commission" or "PUCO") the undersigned members of the Ohio Consumers and Environmental Advocates ("OCEA") hereby submit comments to the Ohio Edison Company, the Cleveland Electric Illuminating Company, and the Toledo Edison Company ("FirstEnergy" or "Companies") Application to eliminate or reduce Ohio's energy efficiency benchmarks for 2009. In its October 27, 2009 Application, FirstEnergy requests that the Commission amend the Companies' 2009 energy savings benchmarks to zero (meaning the elimination of the benchmarks for 2009) because of regulatory circumstances claimed to be beyond its reasonable control.¹ The General Assembly enacted the benchmarks in S.B. 221 to benefit Ohioans through the establishing a major change in the way in which energy is created and distributed in Ohio.

¹ Application at 1.

As an alternative to eliminating the benchmarks for 2009, FirstEnergy requests that the Commission amend its 2009 energy savings benchmarks to a level equal to the amount of the projected energy savings from programs the Commission ultimately approves (which would likely be an amount that provides less energy efficiency for Ohioans than the statutory benchmark in R.C. 4928.66).² In support of its Application, the Companies claim that they made a “conscientious effort to comply with the statutory requirement.”³ FirstEnergy also claims that compliance in 2009 is unlikely because the Commission has not addressed its pending energy-efficiency program applications, because the Commission’s final energy efficiency rules were not in effect at the time of the Application, and because the Commission delayed the Companies’ compact fluorescent light-bulb (“CFL”) program.⁴

For the reasons stated below, the Commission should reject FirstEnergy’s Application. The real reason that FirstEnergy will not likely be in compliance with the 2009 energy savings benchmarks is that it delayed planning and implementing energy efficiency programs, it filed applications for “energy savings” that the law does not recognize, it sought significant changes in the PUCO’s rules, and it changed and then inadequately explained its CFL program to the public and media. Ultimately, FirstEnergy is subject to a statutory requirement to implement energy efficiency programs, and its failure to meet those requirements is the result of its insufficient efforts to comply--and not the result of regulatory reasons beyond its reasonable control.

² Id. at 5.

³ Id. at 2.

⁴ Id. at 2-3.

II. COMMENTS

R.C. 4928.66(A)(1)(a) requires electric distribution utilities, beginning in 2009, to implement programs that achieve energy efficiency savings of at least 0.3 percent of the total, annual average, normalized kilowatt hour (“kWh”) sales of the electric distribution utility to its Ohio customers during the preceding three years. R.C. 4928.66(A)(2)(b) allows the Commission to amend the benchmarks if it determines that the amendment is necessary because “the utility cannot reasonably achieve the benchmarks due to regulatory, economic, or technological reasons beyond its reasonable control.”

FirstEnergy’s insufficient efforts to comply with the energy savings benchmarks have been apparent since at least July 31, 2008, when FirstEnergy filed its Electric Security Plan (“ESP”) application.⁵ As noted in testimony submitted by NRDC and OCC during the FirstEnergy ESP litigation process, FirstEnergy’s ESP application provided almost no detail and little evidence of a plan by the Companies to meet the same 2009 energy savings requirements that all the utilities were required to meet.⁶ PUCO Staff witness Scheck also stated a similar concern, stating that “the Companies need to immediately begin preliminary cost-effectiveness testing of the many other energy efficiency measures/programs for an aggressive deployment schedule starting early in calendar year 2009.”⁷

⁵ *In re FirstEnergy Initial ESP Case*, Case No. 08-935-EL-SSO, Application (July 31, 2008).

⁶ *Id.*, Direct Testimony of Dylan Sullivan and Direct Testimony of Wilson Gonzalez (pre-filed September 29, 2008).

⁷ *Id.*, Prefiled Testimony of Gregory C. Scheck at 12 (pre-filed October 6, 2008). Mr. Scheck stated: “The Company should commence such a market potential study and analysis of program designs immediately.” *Id.*

In contrast, the ESP applications submitted by the Ohio Power and Columbus Southern Power Companies (collectively, “AEP”), Duke Energy-Ohio⁸ (“DE-Ohio”), and the Dayton Power & Light Company⁹ (“DP&L”) all presented energy-efficiency program designs in their respective ESP applications. While aspects of AEP’s, DE-Ohio’s, and DP&L’s energy-efficiency programs, as set forth in their respective ESP applications, may be questioned and/or deficient, those utilities at least initiated some planning activities to comply with R.C. 4928.66, whereas FirstEnergy did not.

FirstEnergy also delayed initiating collaborative activities with stakeholders interested in helping to develop and improve energy efficiency programs. FirstEnergy waited until May 2009, a full year after the S.B. 221 was signed into law, when its ESP was in place, to gather stakeholders for a collaborative process. In addition, FirstEnergy did not hire a consultant to conduct a market-potential study until late April 2009. FirstEnergy repeatedly also waited to begin critical processes to comply with the energy efficiency benchmark.

FirstEnergy should accept responsibility for its own inaction in developing programs and strategies to meet the energy efficiency benchmarks on the Commission’s work to develop rules implementing R.C. 4928.66. Contrary to the Companies’ assertion, the Commission did not create a “continuously moving target” in promulgating its “Green Rules.”¹⁰ The Commission released several statements concerning the status of the rules. The Commission issued an Opinion and Order containing the rules on April

⁸ *In re DE-Ohio Initial ESP Case*, Case No. 08-920-EL-SSO, Direct Testimony of Theodore Schultz (pre-filed July 31, 2008).

⁹ *In re DP&L Initial ESP Case*, Case No. 08-1094-EL-SSO, Application, Book 2 – Customer Conservation and Energy Management Programs (Oct. 10, 2008).

¹⁰ Application at 4.

15, 2009, and modified those rules on several occasions until it issued the final rules on October 28, 2009.¹¹ Earlier, on August 20, 2008, the Commission issued draft rules for comment.¹² These filings contained the Commission's statements regarding how it would interpret energy savings benchmarks and how it would judge an electric distribution utility's actions. FirstEnergy failed to take advantage of the Commission's statements – issued more than a year ago -- to move forward in the planning and implementation of its energy efficiency programs. Moreover, the law is clear as to what is required such that even if the rules were not promulgated, FirstEnergy knew what was required of it by law.

Furthermore, FirstEnergy's complaint about the delay in the process is belied by its full-throated participation in the process of developing the rules to implement R.C. 4928.66. In all, FirstEnergy submitted more than a half-dozen applications for rehearing, memoranda contra, comments, and reply comments to the Commission from September 2008 to July 2009 in Case No. 08-888-EL-ORD. Notwithstanding the delayed release of the rules – that was caused by a number of factors including multiple applications for rehearing by the Companies, FirstEnergy had a well-defined legislative mandate to implement energy efficiency programs that other utilities were able to understand.¹³ Its actions to address the efficiency requirement were simply insufficient.

¹¹ *In re Green Rules*, Case No. 08-888-EL-ORD, Order (October 28, 2009).

¹² *Id.*, Entry (August 20, 2008).

¹³ R.C. 4928.66(A)(1)(a) states: "Beginning in 2009, an electric distribution utility shall implement energy efficiency programs that achieve energy savings equivalent to at least three-tenths of one per cent of the total, annual average, and normalized kilowatt-hour sales of the electric distribution utility during the preceding three calendar years to customers in this state." The prudent action given the requirement to implement energy efficiency programs is to actually plan and implement energy efficiency programs.

FirstEnergy also blames the Commission for not addressing the Companies' applications concerning energy efficiency projects. FirstEnergy filed applications for efficiency projects related to past transmission and distribution system improvements, administrator agreements, and a CFL program. FirstEnergy's argument on the delay of these applications is similarly unpersuasive.

First, the Companies applied to receive credit towards efficiency benchmarks through past transmission and distribution system improvements.¹⁴ A plain reading of R.C. 4928.66 contradicts FirstEnergy's attempt to receive credit for these 2006-2008 improvements. As detailed in the Motion to Dismiss by the Office of the Ohio Consumers' Counsel, the Ohio Environmental Council, and the Natural Resources Defense Council, R.C. 4928.66 does not permit "existing" transmission and distribution investments to be considered an energy efficiency program.¹⁵ FirstEnergy's application for transmission line projects was a desperate attempt to claim savings that relied on a dubious interpretation of R.C. 4928.66.

Second, regarding its application to approve its administrator agreements, provisions in FirstEnergy's ESP stipulation required the Commission to pre-approve programs for cost recovery and for the collaborative to recommend programs.¹⁶ The parties to the ESP stipulation agreed that the Companies would commence a collaborative process with signatory parties and a third party administrator(s) to consider the energy efficiency and peak demand reduction opportunities. In its Application, FirstEnergy

¹⁴ *In re FirstEnergy Initial Application for Savings Related to T&D Improvements*, Case No. 09-384-EL-EEC, Application at 2 (May 8, 2009).

¹⁵ *In re FirstEnergy Initial Application for Savings Related to T&D Improvements*, Case No. 09-384-EL-EEC, Motion to Dismiss at 2-4 (June 24, 2009).

¹⁶ *In re FirstEnergy Initial ESP Case*, Case No. 08-935-EL-SSO, Stipulation and Recommendation at 21 (February 19, 2009).

argues that the Commission's failure to approve these agreements has contributed to its inability to meet the energy savings benchmarks. However, the Companies negotiated and signed the stipulation. If the stipulation's provisions endangered compliance with the law, the Companies should not have signed it. Given that the fact that the Companies did sign the stipulation, the Companies should have factored the stipulation's requirements of its application process for administrator agreements.

Finally, even the one program FirstEnergy was able to release to the public, its CFL distribution plan, had problems of the Companies' own creation. FirstEnergy originally designed a program that the collaborative members generally supported. But, FirstEnergy later replaced the acceptable program with one that was inferior and problematic — culminating in the Commission's widely publicized action to delay CFL distribution and request to the Companies to redesign the program. The resulting controversy and re-design means FirstEnergy will not achieve energy savings that it was expecting in 2009 from CFL distribution. These savings were estimated to be 75 gigawatt hours ("GWh").¹⁷

FirstEnergy's own actions are to blame for releasing a poorly executed program that lacked a reasonable marketing approach and was not supported by collaborative members. FirstEnergy's actions are to blame for the loss of these 75 GWh.

If the Commission is inclined to relieve FirstEnergy of some of its benchmark responsibility, the Commission can look to the Companies' effort to save these 75 GWh for a portion of 2009. However, the Commission should require FirstEnergy to procure

¹⁷ In the Company's Application, the Company mentions that the program would have contributed 300 gigawatt-hours of annualized savings towards the Company's energy saving benchmarks. Application at 1. But, based on earlier Commission decisions, the Company was not anticipating that savings would be annualized. Given that the bulbs would have been distributed in early October, the Company could have anticipated no more than three months of savings.

this amount of relieved energy savings from energy efficiency programs in 2010 and 2011, so customers receive the cumulative amount of energy efficiency they are due and assured by law.

In sum, FirstEnergy's attempt to meet the requirements of R.C. 4928.66 was inadequate. When it finally made a delayed effort, its programs fell well short of the necessary benchmarks. FirstEnergy should be held responsible for its actions and inactions that have led to the need for this Application. FirstEnergy should not be allowed to avoid the blame that it has earned for its failure to meet the 2009 energy efficiency benchmarks. The PUCO should hold FirstEnergy responsible for the missed target.

III. CONCLUSION

Faced with a legislative requirement to achieve 0.3% energy efficiency improvements in 2009, FirstEnergy chose inaction and delay. FirstEnergy failed to effectively plan and implement an energy efficiency portfolio that would help residential, commercial, and industrial customers throughout the state save money and avoid the expense of new power plants. The Companies situation is the result of its inaction, not "regulatory reasons beyond its reasonable control." For these reasons, the Office of the Ohio's Consumers' Counsel, Natural Resources Defense Council, Citizen Power, Sierra Club and the Environmental Law and Policy Center respectfully ask this Commission to reject FirstEnergy's Application for a waiver and hold the Companies responsible for failing to meet the 2009 energy efficiency benchmarks in R.C. 4928.66.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that he has served a copy of the foregoing
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