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 for Approval of Their Energy Efficiency and Peak Demand Reduction Program Portfolio Plans for 2010through 2012 and Associated Cost Recovery Mechanisms.	)	Case Nos. 09-1947-EL-POR 09-1948-EL-POR 09-1949-EL-POR
In the Matter of the Application of Ohio Edison Company, the Cleveland Electric Illuminating Company, and the Toledo Edison Company for Approval of Their Initial Benchmark Reports.	)	Case Nos. 09-1942-EL-EEC 09-1943-EL-EEC 09-1944-EL-EEC
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 Nos. 09-580-EL-EEC 09-581-EL-EEC 09-582-EL-EEC

AMENDED
COMMENTS REGARDING FIRSTENERGY'S REQUEST FOR WAIVER OF RULE 4901:1-39-04(D)
BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL AND THE NATURAL RESOURCES DEFENSE COUNCIL

I. INTRODUCTION

On December 15, 2009, the Ohio Edison Company, the Cleveland Electric Illuminating Company, and the Toledo Edison Company (collectively, "FirstEnergy" or "Companies") filed an application ("Application") with the Public Utilities Commission of Ohio ("Commission" or "PUCO") for approval of proposed energy efficiency and peak demand reduction portfolio plans to comply with the requirements of Amended Substitute

Senate Bill 221 ("S.B. 221"). The Application includes a general request for a waiver of "any Commission rule which would result in a contrary and lengthier procedural schedule."[1] The Application also specifically requests the PUCO waive the sixty-day provision presented in Ohio Adm. Code 4901:1-39-04(D). FirstEnergy presents an alternative schedule for adoption in this case that significantly reduces the time period provided by the Commission's rule.[2]

The Office of the Ohio Consumers' Counsel ("OCC") and the Natural Resources Defense Council ("NRDC") oppose FirstEnergy's proposed schedule. Ohio Adm. Code 4901:1-40-02(B) states that the "Commission may…waive any requirement of this chapter…for good cause shown." The reasons proffered by the Companies for their request do not justify a shortened timeframe for providing interested stakeholders an opportunity to comment upon the full slate of programs proposed by FirstEnergy. Moreover, it is inappropriate for FirstEnergy to seek a general waiver of unspecified rules instead of providing the Commission with specific requests for consideration and the exercise of the Commission's informed judgment. Finally, the Revised Code requires that parties "shall be granted ample rights of discovery."[3] The Commission should not grant FirstEnergy's request, and should provide a period for comment consistent with Ohio Adm. Code 4901:1-39-04.

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[1] *In the Matter of the Application of Ohio Edison Company, the Cleveland Electric Illuminating Company, and the Toledo Edison Company for Approval of Their Energy Efficiency and Peak Demand Reduction Portfolio Plans for 2010 and Associated Cost Recovery Mechanisms*, Case No. 09-1947-EL-POR, et al, Application at 11 (December 15, 2009).

[2] Id.

[3] R.C.4903.082

II. ARGUMENT

A. Contrary to FirstEnergy's claim, the collaborative process has not provided the means for the meaningful exchange of information on programs, and does not provide "good cause" for an abbreviated procedural schedule.

FirstEnergy's interaction with the Collaborative does not justify an abbreviated program portfolio review. FirstEnergy claims that a shortened procedural schedule is sufficient because Collaborative members "should be familiar with the Plans' terms and effects."[4] This would be true if the collaborative process was effective. It was not. The Companies have not provided the Collaborative with requested information on a timely basis. As noted in other recent filings, FirstEnergy has consistently refused to provide substantive program information to Collaborative participants. For example, OCC has repeatedly requested a breakdown of costs assigned to the revised Compact Fluorescent Light bulb ("CFL") program, receiving limited information only after several requests.[5] The data provided by FirstEnergy was inadequate and vague regarding more than nine million dollars worth of charges that FirstEnergy proposes to collect from its customers.[6]

Little information was provided to the Collaborative regarding the other proposed programs presented in the portfolio. The brief summaries provided offered little substantive information. If the information contained in the filing had been provided ahead of time, the Collaborative would have been able to discuss potential problems with the proposals. A good example of this is the fact that the commercial lighting programs

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[4] Id., Application at 12.

[5] *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 Nos. 09-580-EL-EEC, et al, OCC and NRDC Memorandum Contra at 5 (November 27, 2009).

[6] Id., OCEA Response to FirstEnergy's Revised CFL Filing at 5 (December 23, 2009).

do not meet the total resource cost test.[7] This would have been a concern that would have certainly been discussed by the Collaborative if FirstEnergy had indeed chosen to present it.

Thus, the collaborative process, as employed by the Companies, did not sufficiently familiarize the collaborative members with the portfolio proposals and is not a reason to reduce the opportunity for the Commission and interested parties to review the portfolio plans. Rather, the Companies' performance to date requires further review by even those stakeholders that have attempted to keep fully informed by their participation in the Collaborative.

The Companies have consistently attempted to limit the time for stakeholders to review their proposals, which now includes an effort in the above-captioned cases to limit the time provided to review and comment on FirstEnergy's proposals. The decision by FirstEnergy to combine the CFL program with other proposed programs and to ask the PUCO for an extension for filing the revised CFL program description (from November 30, 2009, to December 31, 2009) was relayed to the collaborative with little time for consideration of the potential impacts of this proposal, and in such a way as to create confusion on the part of some of the Collaborative participants.[8] Thus, the collaborative process was not employed by the Companies in such a way as to garner support ahead of its filings, nor was the process used to discover or consider potential impacts of proposed

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[7] *In the Matter of the Application of Ohio Edison Company, the Cleveland Electric Illuminating Company, and the Toledo Edison Company for Approval of Their Energy Efficiency and Peak Demand Reduction Portfolio Plans for 2010 and Associated Cost Recovery Mechanisms*, Case No. 09-1947-EL-POR, et al, Application at Table 7c (page 144) and 7e (page 145) (December 15, 2009).

[8] *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 Nos. 09-580-EL-EEC, et al, OCC and NRDC Memorandum Contra at 2 and 6 (November 27, 2009).

program alterations. Therefore, the collaborative process cannot provide "good cause" to shorten the review process of its program proposals.

The Companies' waiver request is an additional example of the inability of the Companies to effectively communicate with other stakeholders in this process. FirstEnergy's request is not a motion for an expedited schedule, which would have been presented prominently in the Application and required the accompaniment of a memorandum in support. It is a waiver request buried within the Application, for which FirstEnergy offers no introduction or substantive concomitant.

The Companies' interactions with Collaborative members do not justify a shortened proceeding schedule. Rather, FirstEnergy's inconsiderable cooperation with the Collaborative necessitate the implementation of the full proceeding schedule as provided in Ohio Adm. Code 4901:1-39-04. The request for an abbreviated schedule as presented in FirstEnergy's filing should not be granted.

B. FirstEnergy was made aware of the potential delay in program implementation prior to this filing, and thus should not now claim that shortening the length of the evaluation process presented in the rule is "critical" to FirstEnergy's successful compliance with the benchmarks presented in S.B. 221.

No doubt aware of the potential delay that would result from combining programs, FirstEnergy now seeks approval from the Commission for a shortened proceeding schedule based on a situation of its own making. The peril of combining the CFL program with the proposed portfolio was presented by OCC and NRDC in a previous filing.[9] In that document, it was estimated that the process of review and

[9] *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 Nos. 09-580-EL-EEC, et al, OCC and NRDC Memorandum Contra at 5-6 (November 27, 2009).

approval would take at least three months.[10] FirstEnergy now asserts that the delay *it requested* should be considered good cause to modify the rules governing this proceeding. Knowing the probable consequences of its previous request, the Companies should not be allowed to claim the outcome as a hardship which substantiates a significant procedural modification. The Commission should not approve FirstEnergy's proposed shortened schedule.

C. While the settlement and technical conferences offer opportunities to resolve outstanding issues, these meetings offer no certainty that agreement will be reached on programs based upon the Companies' previous interactions under similar circumstances.

Finally, FirstEnergy states that the procedural schedule should be shortened because there is a scheduled settlement conference and a proposed technical conference. The Commission should not approve FirstEnergy's proposed schedule based on these meetings. While the settlement conference offers an opportunity to reduce the amount of time needed to explore the programs, this is not a certainty based on the Companies' interactions with the Collaborative to date (as documented above). In addition, although it is mentioned in the filing, the technical conference has not been scheduled as of the date of the instant pleading. Thus, the timing of the conferences and their outcome are uncertain, and do not justify a shortened schedule.

[10] Id.

D. The PUCO should proceed with the schedule in its rules to allow a reasonable process, which includes discovery, for stakeholders to provide important information to the PUCO for its exercise of informed judgment under R.C. 4903.09.

The Ohio Revised Code states that "All parties and intervenors should be granted ample rights of discovery."[11] Ohio Adm. Code 4901-1-16(B) states that "any party to a commission proceeding may obtain discovery of any matter, not privileged, which is relevant to the subject matter of the proceeding." This case will require the full procedural schedule as presented in the Commission rules, in order for OCC, NRDC and other parties to properly exercise those discovery rights. The exercise of the discovery process by various parties will assist the PUCO in creating a record upon which to make the appropriate determinations in this case, as presented in R.C. 4903.09. The Commission should not grant the Companies' request for a shortened procedural schedule.

III. CONCLUSION

The Commission should not approve the procedural schedule proposed by FirstEnergy in these proceedings. The requirement for the Commission to waive applicable administrative rules is that FirstEnergy demonstrate "good cause."[12] The Companies have frustrated the collaborative process, and thus cannot now offer it as substantiation for their proposed modification. FirstEnergy was fully aware of the probable consequences of combining the programs into the portfolio proposal. This self-inflicted delay should not be a reason for approval of a shortened time frame.

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[11] R.C.4903.082.

[12] Ohio Adm. Code 4901:1-40-02(B).

Finally, representatives of OCC and NRDC will participate in the settlement conference (and technical conference, if one is scheduled) with the intention of resolving outstanding issues. But a technical conference does not offer the certainty necessary to significantly alter the procedural schedule. FirstEnergy's proposed schedule for Commission review, as presented in its filing on December 15, 2009, should not be approved.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of these Amended Comments were served on the persons stated below *via* regular U.S. Mail Service, postage prepaid, this 8th day of January 2010.

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Summary: Comments Amended Comments Regarding FirstEnergy's Request for Waiver of Rule 4901:1-39-04(D) by the Office of the Ohio Consumers' Counsel and the Natural Resources Defense Council electronically filed by Ms. Deb J. Bingham on behalf of Allwein, Christopher J. Mr.