BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Energy Efficiency and Peak Demand Reduction Program Portfolio of Ohio Edison Company.	)))	Case No. 09-535-EL-EEC
In the Matter of the Energy Efficiency and Peak Demand Reduction Program Portfolio of The Cleveland Electric Illuminating Company.	))))	Case No. 09-536-EL-EEC
In the Matter of the Energy Efficiency and Peak Demand Reduction Program Portfolio of The Toledo Edison Company.	)))	Case No. 09-537-EL-EEC

FINDING AND ORDER

The Commission finds:

(1) Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company (FirstEnergy or the Companies) are public utilities as defined in Section 4905.02, Revised Code, and, as such, are subject to the jurisdiction of this Commission.

(2) On June 26, 2009, FirstEnergy filed an application for a waiver of the Commission's rules regarding peak demand benchmarks, specifically Rules 4901:1-39-01(R) and 4901:1-39-05(C), Ohio Administrative Code (O.A.C.). FirstEnergy claimed that these rules, as adopted by the Commission in Case No. 08-888-EL-ORD, initially precluded FirstEnergy from using the Companies' OLR Rider (Optional Load Response) and ELR Rider (Economic Load Response) as a compliance mechanism to meet its peak demand reduction benchmarks under Section 4928.66(A)(1)(b), Revised Code, in the absence of actual interruption of customers at peak. *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, 4901:5-2, 4901:5-5, and 4901:5-7 of the Ohio Administrative Code, Pursuant to Amended Substitute Senate Bill 221*, Case No. 08-888-EL-ORD, Opinion and Order (April 15, 2009), Entry on Rehearing (June 17, 2009). Therefore, FirstEnergy requested that the Commission waive its rules and approve the availability of

interruptible load under the Companies' OLR Rider and ELR Rider as programs under Section 4928.66(A)(1)(b), Revised Code, which satisfy the requirement for compliance with the Companies' peak demand reduction benchmarks for 2009.

On July 6, 2009, FirstEnergy filed an amended application requesting that, in the alternative, the Commission approve an amendment to the Companies' peak demand reduction benchmarks, pursuant to Section 4928.66(A)(2)(b), Revised Code, reducing the 2009 benchmark to zero. In support of its application for an amendment of its peak demand reduction benchmarks, FirstEnergy claimed that there was uncertainty regarding the timing and content of the Commission's rules implementing Section 4928.66(A), Revised Code, and that its customers faced extraordinary economic circumstances which have significantly depressed the actual load on each of the Companies systems. Thus, FirstEnergy claimed that the convergence of these factors comprise circumstances in which FirstEnergy cannot reasonably achieve its benchmarks due to regulatory, economic or technical reasons beyond its control.

(3) On July 13, 2009, Ohio Energy Group (OEG) filed a motion to intervene in this proceeding and comments regarding the amended application. On July 16, 2009, Ohio Partners for Affordable Energy (OPAE) filed a motion to intervene and a motion for admission *pro hac vice* on behalf of David C. Rinebolt. Industrial Energy Users-Ohio (IEU-Ohio) filed a motion to intervene on July 22, 2009. Further, on July 27, 2009, Nucor Steel Marion, Inc., (Nucor) filed a motion to intervene and a motion for admission *pro hac vice* on behalf of Garett A. Stone and Michael K. Lavanga. The Office of the Ohio Consumers' Counsel (OCC) filed a motion to intervene and comments regarding the amended application on August 11, 2009. Finally, on August 17, 2009, the Ohio Environmental Council (OEC) filed a motion to intervene.

(4) Upon consideration, the Commission finds that the motions to intervene filed by OEG, OPAE, IEU-Ohio, Nucor, OCC, and OEC are reasonable and should be granted. Further, the Commission finds that the motions for admission *pro hac vice* filed on behalf of David C. Rinebolt, Garett A. Stone, and Michael K. Lavanga are reasonable and should be granted.

(5) In its comments in support of the amended application, OEG urges the Commission to recognize the value of having the ability to interrupt certain industrial load as a legitimate demand response program without the necessity of actually requiring the industrial customers to curtail their manufacturing process. OEG argues that FirstEnergy's current interruptible rate program is precisely the type of demand response program that the United States Department of Energy believes should be encouraged. *Benefits of Demand Response in Electricity Markets and Recommendations for Achieving Them,* United States Department of Energy (February 2006) at ix, xxi. OEG claims that incentive-based demand response programs such as interruptible/curtailable load are valuable and are to be encouraged, even if interruptions or curtailments are not called at the time of the system peak.

(6) In its comments, OCC argues that the provisions of Am. Sub. Senate Bill 221 were intended to create new, cost-effective peak demand reductions and that nothing in Am. Sub. Senate Bill 221 supports FirstEnergy's proposal to meet peak demand reduction requirements by providing existing, discounted interruptible rates to large customers whose loads are not interrupted and where no peak demand reduction program is ever implemented by FirstEnergy. OCC also contends that FirstEnergy has not provided sufficient reasons for a waiver of the 2009 peak demand reduction benchmark. OCC notes that waivers of the benchmarks set forth in Section 4928.66, Revised Code, must be based upon regulatory, economic, or technical reasons beyond the electric utility's control. Finally, OCC recommends that, if the Commission approves a waiver of the 2009 peak demand reduction benchmark, the Commission should require FirstEnergy to implement a peak demand reduction program for 2010 which reduces peak demand by the cumulative benchmarks for 2009 and 2010.

(7) OEC argues that peak demand programs must achieve actual peak demand savings; thus, unless a demand reduction program reduces demand, such a program cannot be used to satisfy the statutory benchmarks. OEC recommends that the Commission reject FirstEnergy's attempt to avoid its peak demand reduction obligations under Section 4928.66(A)(1)(b), Revised Code, because of the economic downturn and other factors. OEC alleges that FirstEnergy has not claimed that it cannot reasonably achieve the peak demand reduction benchmarks; instead, the amended application seeks to avoid the statutory requirements by making a

premature claim of hardship. OEC argues that, if FirstEnergy wishes to claim that economic factors have fundamentally altered capacity needs, then FirstEnergy should make those arguments in a noncompliance review proceeding after the 2009 peak demand reduction period.

(8) On September 1, 2009, FirstEnergy filed a response to the comments submitted by OCC and OEC. FirstEnergy argues that the claim that Section 4928.66(A)(1)(b), Revised Code, requires electric utilities to provide programs that will achieve a peak demand reduction is not supported by the language of the statute. Instead, FirstEnergy contends that the statute requires programs *designed to achieve* such a reduction, which is a difference both in the express language used and in meaning. Moreover, FirstEnergy disputes the claims by OCC and OEC that FirstEnergy failed to allege that it cannot achieve the peak demand reduction benchmarks, noting that the amended application expressly asserted that FirstEnergy was unable to reasonably achieve its 2009 benchmarks due to regulatory, economic, or technological reasons beyond its control.

(9) Further, on December 8, 2009, FirstEnergy filed a letter in the docket to address the impact of the adoption, by the Commission, of additional modifications to Chapter 4901:1-39, O.A.C. In its letter, FirstEnergy requests that the Commission clarify whether the Companies' ELR and OLR tariffs are considered by the Commission to be programs which may be used to satisfy its peak demand reduction benchmark pursuant to Rule 4901:1-39-05(E), O.A.C. FirstEnergy represents that, if the Commission determines that the ELR and OLR tariffs satisfy Rule 4901:1-39-05(E), O.A.C., then its request for a waiver of its 2009 peak demand reduction benchmarks is unnecessary.

(10) In this proceeding, FirstEnergy seeks three alternative forms of relief: (1) a waiver of Rules 4901:1-39-01(R) and 4901:1-39-05(C), O.A.C.; (2) a clarification regarding Rule 4901:1-05(E), O.A.C.; and (3) a waiver of its peak demand reduction benchmarks for 2009. Regarding the waiver of Rules 4901:1-39-01(R) and 4901:1-39-05(C), O.A.C., the Commission finds that the request for a waiver is moot. Subsequent to FirstEnergy's filing of its request for a waiver, the Commission amended Rule 4901:1-39-05(C), O.A.C. In this amendment, the Commission removed the requirement that interruptible loads be actually interrupted in order to be used to

comply with the peak demand reduction benchmark. Case No. 08-888-EL-ORD, Entry on Rehearing (October 15, 2009) at 4. As amended, Rule 4901:1-39-05(E)(2), O.A.C., now provides that:

> For demand response programs, an electric utility may count demand reductions towards satisfying some or all of the peak-demand reduction benchmarks by demonstrating that either the electric utility has reduced its actual peak demand, or has the capability to reduce its peak demand and such capability is created under either of the following circumstances:
>
> (a) A peak-demand reduction program meets the requirements to be counted as a capacity resource under the tariff of a regional transmission organization approved by the Federal Energy Regulatory Commission.
>
> (b) A peak-demand reduction program equivalent to a regional transmission organization program, which has been approved by this commission.

This amendment addressed the substance of FirstEnergy's request for a waiver, and FirstEnergy has not renewed its request for a waiver since the Commission amended the rules. Accordingly, we find that the request for a waiver is moot.

(11) With respect to FirstEnergy's request for a clarification of Rule 4901:1-39-05(E), O.A.C., the Commission notes that OCC and OEC argue that FirstEnergy's programs cannot be used to comply with the peak demand reduction benchmarks because the interruptible tariffs do not achieve actual peak demand savings. However, we have already determined that no actual interruption must occur for a program to be counted towards compliance with the peak demand reduction benchmark. Case No. 08-888-EL-ORD, Entry on Rehearing (October 15, 2009) at 4. Thus, the Commission will clarify that FirstEnergy's ELR and OLR tariffs meet the requirements for a peak demand response program, under Rule 4901:1-39-05(E), O.A.C., because the ELR and OLR tariffs provide FirstEnergy with the capability to reduce peak demand and the ELR and OLR tariffs are recognized as a capacity resource by its

regional transmission organization, the Midwest Independent System Operator, LLC.

(12) Further, the Commission finds that FirstEnergy's request for modification of its 2009 peak demand reduction benchmark should be denied. FirstEnergy did not demonstrate in its amended application that it was unable to meet its peak demand reduction benchmarks due to regulatory, economic or technical reasons beyond its control as required by Section 4928.66(A)(2)(b), Revised Code. Having provided clarification regarding Rule 4901:1-39-05(E), O.A.C., as requested by FirstEnergy, the Commission lacks sufficient information in the record regarding the incremental peak demand reductions that the companies' qualifying 2009 programs were designed to achieve, compared to the reductions that the programs in place in the preceding year had been designed to achieve. Therefore, the Commission declines to grant FirstEnergy's request for a waiver of its 2009 peak demand reduction benchmarks at this time.

(13) Finally, the Commission finds that it is unnecessary to hold a hearing in this matter.

It is, therefore,

ORDERED, That the application filed by FirstEnergy, as amended on July 6, 2009, be denied. It is, further,

ORDERED, That the motions to intervene filed by OEG, OPAE, IEU-Ohio, Nucor, OCC, and OEC be granted. It is, further,

ORDERED, That the motions for admission *pro hac vice* submitted on behalf of David C. Rinebolt, Garett A. Stone, and Michael K. Lavanga be granted. It is, further,

ORDERED, That nothing in this Finding and Order shall be binding upon this Commission in any future proceeding or investigation involving the justness or reasonableness of any rate, charge, rule, or regulation. It is, further, ORDERED, That a copy of this Finding and Order be served upon all parties of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO

Alan R. Schriber, Chairman

Paul A. Centolella

Ronda Hartman Fergus

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Reneé J. Jenkins
Secretary