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 2010 Through 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

THE OHIO ENVIRONMENTAL COUNCIL'S INITIAL POST HEARING BRIEF

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I. INTRODUCTION

FirstEnergy has failed to take its statutory energy efficiency program requirements seriously. If the Commission approves FirstEnergy's Portfolio Plan ("Plan"), the residential, industrial and commercial electricity customers of FirstEnergy will experience energy efficiency programs that are poorly designed, expensive, and inadequate. The flaws of FirstEnergy's Plan are so significant, and FirstEnergy's clear lack of commitment to well-designed and functioning programs so profound, that the Commission should reject the Plan in its entirety. The Commission should require FirstEnergy to return to the Commission with a plan that is designed to meet statutory benchmarks, utilizes legal compliance options, and includes programs that will pass the total resource cost test and benefit customers. The new plan must include good-faith efforts to comply with the statute and protections to ensure that qualified professionals manage, oversee, and implement the new program portfolio.

II. STANDARD OF REVIEW

While the precedent for the standard used to review portfolio cases will be set by the disposition of this case, FirstEnergy must still comport with Ohio energy law as provided in Amended Substitute Senate Bill 221 ("S.B. 221"), effective on July 31, 2008. The Commission's Rules implementing the energy efficiency and peak demand reduction requirements of S.B. 221 require all Electric Distribution Utilities ("EDUs") to file an initial program portfolio plan, and that plan must be designed to meet or exceed the statutory benchmarks for energy efficiency and peak demand reductions:

> "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."[1] FirstEnergy must reduce its electricity sales by .03% in 2009, 0.8% in 2010, 1.5% in 2011, and 2.3% in 2012.[2] Also beginning in 2009, electric distribution utilities are to "Implement peak demand reduction programs designed to achieve a one per cent reduction in peak demand in 2009 and an additional seventy-five hundredths of one per cent reduction each year through 2018."[3]

Consequently, FirstEnergy is under a statutory obligation to reduce energy consumption 22% by 2025, and reduce peak demand reduction 7.75% by 2018.[4] To achieve these reductions, utilities may count efficiency achievements from a variety of sources including its own energy efficiency programs, transmission and distribution projects, demand response, and mercantile self-directed programs.[5]

O.A.C. 4901:1-39-03 requires a utility to do an energy efficiency assessment study of potential energy savings and peak-demand reduction from adoption of energy efficiency and demand-response measures within its certified territory.[6] Such assessment shall include, but not be limited to: Analysis of technical potential; Analysis of economic potential; and Analysis of achievable potential. FirstEnergy contracted with Black & Veatch to conduct such a study. However, as this brief explains, the study is technically deficient and inadequate as it, for example, relies upon a credible ACEEE report yet its conclusions demonstrably contradict the conclusions of that same report.

Of the many stated and codified policy goals of S.B. 221, it is the policy of this state to encourage innovation and market access for cost-effective supply-side and demand-side retail

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[1] O.R.C. §4928.66(A)(1)(a).
[2] ***Id.***
[3] O.R.C. §4928.66(A)(1)(b).
[4] O.R.C. §4928.66(A)(1).
[5] O.R.C. §4928.66(A)(2)(d).
[6] O.A.C. §4901:1-39-03.

electric service.[7] That policy is reinforced in the Commission's rules stating the elements required in a Portfolio Plan:

> **Each electric utility shall design and propose a comprehensive energy efficiency and peak-demand reduction program portfolio,** including a range of programs that encourage innovation and market access for cost-effective energy efficiency and peak-demand reduction for all customer classes, which will achieve the statutory benchmarks for peak-demand reduction, and meet or exceed the statutory benchmarks for energy efficiency. An electric utility's first program portfolio plan filed pursuant to this rule shall be filed with supporting testimony prior to January 1, 2010. Each electric utility shall file an updated program portfolio plan by April 15, 2013, and by the fifteenth of April every third year thereafter, unless otherwise directed by the commission.[8]

By FirstEnergy's own statements during direct testimony and reiterated during the hearing itself, the Plan will not achieve the 2010 benchmarks without concessions, unique treatment by the Commission, and heavy reliance on scores of other cases.[9] For example, FirstEnergy is requesting Commission approval to launch four "Fast Track" incentive programs: compact fluorescent light ("CFL") bulb, commercial and industrial lighting, commercial and industrial equipment (i.e., motors), and appliance recycling.[10] Additionally, FirstEnergy is asking the Commission to alter, specifically for them only, the approved and required accounting methodology for counting efficiency achievements on an annual, rather than pro rata, basis.[11] Finally, FirstEnergy proposes to obtain nearly half of its 2010 efficiency savings from historic

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[7] O.R.C. §4928.02 (D) (emphasis added).
[8] O.A.C. §4901:1-39-02 (A).
[9] Direct Testimony of John E. Paganie, December 15, 2009 ("Paganie Direct), at page 13:7-10. "[W]ithout [allowing full savings in the year in which a program is launched], or an expedited ruling on at least some of the programs…the Companies ***will not be able to comply with the 2010 energy efficiency benchmarks*** and will be compelled to seek a waiver of those benchmarks."
[10] ***Corrected Joint motion and memorandum in support for approval of fast track programs and expedited ruling***, Case Nos. 09-1947-EL-POR, 09-1948-EL-POR, 09-1949-EL-POR, 09-1942, EL-EEC, 09-1943, EL-EEC, 09-1944, EL-EEC, 09-580-EL-EEC, 09-581-EL-EEC, 09-582-EL-EEC ("Fast Track Motion") (February 25, 2010).
[11] Paganie Direct at page 14:14-16; Tr. Vol. 1, at page 109:9-21 (March 2, 2010).

mercantile projects, rather than through new efficiency programs.[12] Such a portfolio plan does not meet the clear intent of standard, and does nothing to further innovation or encourage market access for all customer classes.

O.R.C. § 4928.66(A)(2)(c) allows an electric utility to include, for purposes of compliance with the efficiency benchmarks, "mercantile customer-sited energy efficiency and peak demand reduction programs." O.A.C. 4901:1-39-05 sets out the procedures a mercantile customer must follow when filing, either individually or jointly with an electric utility, an application to commit the customer's demand reduction or energy efficiency programs for integration with the electric utility's demand reduction, demand response, and energy efficiency programs, pursuant to R.C. § 4928.66(A)(2)(d). These mercantile provisions are written from the mercantile customer's perspective, and not as a compliance mechanism for the utility. Further, the rules put an important caveat on the use of self-directed programs, in that "an electric utility shall not count in meeting any statutory benchmark the adoption of measures that are required to comply with energy performance standards set by law or regulation."[13]

The criteria that utilities ***must*** consider in developing its portfolio programs are outlined in both the statute and Commission's rules. As the applicant, FirstEnergy holds the burden of proving that it has met the foregoing requirements of Ohio law and Commission rules, and most importantly that the portfolio plan meets or exceeds the required benchmarks.[14] If FirstEnergy cannot meet this burden of proof, the Commission must reject the application and require refilling, or require amendments to the Plan.

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[12] Ohio Environmental Council Exhibit 1, OEC-Set 1, DR-5, "Responses to Data Requests."
[13] O.A.C. 4901:1-39-05 (H).
[14] O.A.C. §4901:1-39-04(E).

III. ARGUMENT

A. FirstEnergy's Plan Over Relies on Historic Mercantile Programs

FirstEnergy's reliance on historic mercantile programs as the Company's primary means of compliance with the code's efficiency benchmarks is inappropriate. FirstEnergy submitted over 40 applications for self-directed mercantile projects to count towards its EE/PDR benchmarks.[15] FirstEnergy intends to obtain nearly half of each Company's 2010 efficiency savings from historic mercantile projects rather than through new efficiency programs.[16] These historic projects will account for 48.6% of OE's, 50.1% of CEI's, and 52.9% of TE's compliance in 2010.[17] Staff Witness Scheck testified that "[t]he Staff is concerned that the Companies may rely solely on the mercantile self-directed projects to reach their annual benchmarks."[18]

1. A Strategy of Compliance Through the Historic Self Direct Program Violates the Intent of the Statute.

FirstEnergy's strategy of using mercantile exceptions instead of implementing new energy efficiency programs to meet the annual benchmarks represents a substantial deviation from the letter and intent of S.B. 221. Mercantile exemptions are governed and permitted by R.C. 4928.66(A)(2)(c), which was not intended to be a statutory compliance mechanism. This section was intended to be a tool for mercantile customers that had made significant investments in energy efficiency technology prior to the passage of S.B. 221 and were unlikely to find new cost-effective savings on-site because of these prior investments.

Accordingly, R.C. 4928.66(A)(2)(c) is written as it was intended to apply: from the mercantile customers' perspective. The language of R.C. 4928.66(A)(2)(c) is permissive for the mercantile customer, allowing the customer to commit energy savings and peak-demand

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[15] Tr. Vol. 1, at page 122:6-12 (March 2, 2010).
[16] Ohio Environmental Council Exhibit 1, OEC-Set 1, DR-5, "Responses to Data Requests."
[17] Ohio Environmental Council Exhibit 1, OEC-Set 1, DR-5, "Responses to Data Requests."
[18] Scheck Direct, at Question 7, lines 6-8.

reductions associated with their previously implemented energy efficiency projects to a utility ***if the customer*** chooses to do so.[19] However, the language of R.C. 4928.66(A)(2)(c) is mandatory for the utility, requiring the utility's baseline "be adjusted to exclude the effects of all such demand-response, energy efficiency, or peak demand reduction programs that may have existed during the period used to establish the baseline."[20] This section was not intended to act as a primary means of compliance for utilities, which is how FirstEnergy now intends to exploit it.

2. The Cost of FirstEnergy's Historic Self Direct Program is Excessive and Unjustifiable.

The high cost of FirstEnergy's historic mercantile program is also inappropriate. As was made clear in testimony during the hearing for this case, FirstEnergy intends to achieve roughly 50% of its compliance with the 2010 efficiency benchmarks through historic savings.[21] This means that FirstEnergy will reduce its new energy efficiency program investment in 2010 by 50 percent, leaving a massive amount of new savings undeveloped in the FirstEnergy service territory. This reliance comes with costs; and in return for these costs, FirstEnergy customers will receive none of the benefits traditionally associated with investments in energy efficiency.

Some of these excessive costs are discussed at length in Case no. 09-553-EL-EEC. In that case, FirstEnergy planned to offer a finder's fee—a per kwh incentive—to administrators who, in working with their membership, were able to locate historic savings opportunities. The finder's fee would be paid to administrators in exchange for finding and cataloging savings that occurred in conjunction with past projects. This finder's fee would in some cases be as high as a

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[19] See: R.C. 4928.66(A)(2)(c) "If a mercantile customer makes such existing or new demand-response, energy efficiency, or peak demand reduction capability available to an electric distribution utility pursuant to division (A)(2)(c) of this section, the electric utility's baseline under division (A)(2)(a) of this section shall be adjusted to exclude the effects of all such demand-response, energy efficiency, or peak demand reduction programs that may have existed during the period used to establish the baseline."
[20] ***Id***.
[21] Cross Examination of FirstEnergy Witness John E. Paganie, Hearing Transcript Volume 1, pp. 121-122.

1 cent per kwh.[22] Coupled with this incentive are FirstEnergy's internal costs associated with management of the third party administration program. Accordingly, in the majority of cases, historic mercantile savings collection will cost in excess of 1 cent per kwh.

Importantly, this is a large fraction of the cost of new energy efficiency investments in the mercantile or industrial sector. In its filing, FirstEnergy relies upon an ACEEE report, released in 2009, entitled: "Shaping Ohio's Energy Future: Energy Efficiency Works." This study reviews a variety of initiatives and energy savings strategies. As part of its review, the ACEEE study examines industrial electricity efficiency potential, and costs per measure. The study demonstrates that the industrial sector in Ohio has the cost effective potential to provide 10,191 Gwhs of savings, or a cumulative savings of 16% of statewide load by the year 2025.[23] Additionally, this will be low-cost energy efficiency; 10 separate categories of initiatives will cost on average 2.3 cents per kwh.[24]

Of those 10 initiatives, 5, accounting for a total of 46% of the savings achievable in the industrial sector, will cost no more than 1.4 cents per kwh. These initiatives include: Sensors & Controls, Electricity Supply, Compressed Air, Pumps, and Refrigeration.[25] Remarkably, FirstEnergy plans to spend nearly as much on historic mercantile programs on a per kwh basis as it would be required to spend to achieve new efficiency savings. It is extraordinarily bad public policy to allow FirstEnergy to catalog old savings, which produce none of the benefits associated with new energy efficiency investment, benefits including the deferral of construction of new generation, job creation, on sight energy cost savings, etc., at a cost nearly equal to the

[22] See Case No. 09-553-EL-EEC, "Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Approval of Administrator Agreements and Statements of Work." Filed June 30th, 2009.

[23] "Shaping Ohio's Energy Future: Energy Efficiency Works." American Council for an Energy Efficient Economy, ACEEE Report No. E092, March, 2009, p.17.

[24] Id.

[25] Id.

investment necessary to create those new savings. Ohio electricity customers cannot afford to allow FirstEnergy to expend valuable resources cataloging "phantom efficiency" while low cost opportunities exist in the very sector FirstEnergy intends to utilize that "phantom efficiency" to avoid compliance.

3. FirstEnergy's Plan Includes Reductions for Programs that Do Not Qualify as Historic Mercantile Programs.

FirstEnergy's Plan relies on historic mercantile savings applications to achieve a bulk of its EE/PDR compliance, and some of those applications may ultimately be rejected by the Commission as unlawful. FirstEnergy submitted over 40 applications for self-directed mercantile projects to apply towards meeting EE/PDR benchmarks.[26] Included in these 40-plus applications is Case No. 09-1226-EL-EEC, a joint filing between FirstEnergy and Johnny Appleseed Broadcasting.[27] As stated in the application, FirstEnergy is seeking efficiency credit for Johnny Appleseed's digital television signal conversion.[28] However, the digital television transition was mandated by Congress in 47 U.S.C. § 309(j)(14)(A).[29] Thus, FirstEnergy intends to receive credit (and the customer intends to receive an exemption from the Company's efficiency rider) for an action that was untaken to comply with federal law.[30] The Commission's rules specifically exclude "the adoption of measures that are required to comply with energy performance standards set by law or regulation" from counting towards meeting statutory

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[26] Tr. Vol. 1, at 122:6-12 (March 2, 2010).

[27] ***See*** Ohio Environmental Council Exhibit 2, ***Joint Application for Approval of a Special Arrangement with a Mercantile Customer and Exemption from Payment of Costs Included in Ride DSE2,*** Case No. 09-1226-EL-EEC (December 8, 2009).

[28] OEC Exhibit 2 at Exhibit A.

[29] 47 U.S.C. § 309(j)(14)(A).

[30] More specifically, the project was mandatory. If it had not undertaken the DTV transition, Johnny Appleseed would have lost its broadcasting license or faced penalties from the Federal Communications Commission. Accordingly, the equipment replaced was necessarily at the end of its useful life, since federal law mandated its replacement.

benchmarks.[31] Johnny Appleseed's digital signal transition was not undertaken by the company for the purposes of energy efficiency. This kind of activity is not what the General Assembly envisioned in its passage of S.B. 221.

With over 40 mercantile applications submitted by FirstEnergy, the actual savings achieved by FirstEnergy's Plan are speculative at best.[32] Additionally, if the Commission denies a significant number of the 40-plus mercantile applications, or the mercantile customers' over-estimate efficiency savings, FirstEnergy will have no opportunity, according to its current Plan, to meet its 2010 energy efficiency benchmarks. Witness Paganie admitted that, to date, the PUCO approved only six of the applications submitted.[33] Given FirstEnergy's excessive reliance on these projects, any deficiency in the mercantile programs puts the FirstEnergy in serious risk of missing their benchmarks. Because FirstEnergy is not seriously pursuing a sufficient quantity of new, cost effective energy efficiency programs of its own, the Commission should deny FirstEnergy's EE/PDR Plan.

4. Other Utilities Have Based Compliance on the Development of New Energy Efficiency Investments.

FirstEnergy's excessive reliance on mercantile exemptions as its primary mode of statutory compliance is unreasonable, inconsistent with statutory intent, and lacks statutory justification. Approval of FirstEnergy's Plan would encourage other energy utilities to adopt similar strategies of exploiting the Historic Mercantile exemption to avoid investment in new energy efficiency programs. Currently, other utilities have based compliance on the development of new investments.[34] Approval of FirstEnergy's Plan would send a clear message

[31] O.A.C. 3901:1-39-05(H).
[32] Tr. Vol. 1, at 122:6-123:4 (March 2, 2010).
[33] ***Id.***
[34] Currently, Duke Energy has no Mercantile applications before the Commission. DP&L has three; see 09-1700-EL-EEC, 09-1701-EL-EEC, and 10-2205-EL-EEC. AEP has many, but has developed an innovative rate mechanism

to other Ohio utilities: A compliance strategy which relies on spending to catalog savings that were created prior to the passage of S.B. 221 is legally permissible. Such a strategy is contrary to the intent of the statute and should not be allowed by this Commission. In order to encourage the full development of non-historical energy efficiency investments, the Commission should reject FirstEnergy's Plan.

B. FirstEnergy has Failed to Produce a Defensible, Accurate, Long-Term Market Potential Study.

FirstEnergy's long-term potential study is not justifiable. It represents a clear underestimation of the potential energy efficiency in the FirstEnergy service territory; is not reconcilable with FirstEnergy stated desire to over comply with statutory requirements to profit from a shared savings mechanism, and contradicts a credible study upon which FirstEnergy relied for much of its savings data.

FirstEnergy's long-term outlook for energy savings indicates that the company will fall woefully short of long-term targets. As stated in executive summary of Appendix D of the filed December 15th Plan, "The Base Case results from the study reveal an achievable potential for energy reductions over forecasted sales in 12.6% for [Ohio Edison], 11.9% for Toledo Edison, and 13.5% for [Cleveland Electric Illuminating Company] by 2025. The High Case results from the study reveal an achievable potential for energy reductions of 19.2% for [Ohio Edison], 17.9% for Toledo Edison, and 19.9% for [Cleveland Electric Illuminating Company].[35] These projections directly contradict a major study upon which FirstEnergy has relied for some of its projections. As mentioned above, the March, 2009 ACEEE report entitled "Shaping Ohio's

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to encourage mercantile customers to invest in new savings; additionally, AEP's shared savings opportunity is not applicable to self-directed programs; see AEP's stipulation in 09-1089-EL-POR, and 09-1090-EL-POR, p. 7-8, 12-13.

[35] See Appendix D – Assessment of Potential (Market Potential Study), executive summary, Case No. 09-1947-EL-POR, et al.

Energy Future: Energy Efficiency Works" includes broad descriptions of energy efficiency opportunities and initiatives that utilities can implement to achieve their S.B. 221 related targets. As part of this study, the ACEEE found that the total cost-effective electric energy efficiency potential in Ohio was 64,284 Gwhs, or 33% of predicted consumption in 2025.[36] Clearly, FirstEnergy's estimates are not consistent with those of the ACEEE, estimates found in a report upon which FirstEnergy relied heavily for important calculations found in its filing.

Additionally, FirstEnergy's stated desire to employ a shared savings mechanism to incentivize over-compliance is inconsistent with FirstEnergy's claims of low energy efficiency market potential. FirstEnergy has explained its requested shared savings mechanism is designed to be "significant enough that the company would, in fact, be incented to overshoot the benchmarks." [37] Furthermore, absent the 15% shared savings, FirstEnergy asserts that it will not strive to exceed the statutory benchmarks set forth in O.R.C. 4928.66.[38] On this point, the following question to FirstEnergy, posed by the Attorney Examiner in the case, and the answer by Mr. Ouellette, testifying on behalf of FirstEnergy is instructive: "EXAMINER PRICE: But Mr. Ouellette, this is not an exact science. Are you telling me that on December 15th if you hit your benchmarks for the year, that you'll just pack up and go home? THE WITNESS: Yes."[39]

These representations by FirstEnergy, that there is extra, economically exploitable energy efficiency in the marketplace should the commission approve a shared savings mechanism for the company, directly contradict with FirstEnergy projections that the company will not be able to meet long-term efficiency targets. As FirstEnergy's representatives indicated in the hearing, extra, exploitable energy efficiency is available; however FirstEnergy is only interested in

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36 "Shaping Ohio's Energy Future: Energy Efficiency Works." American Council for an Energy Efficient Economy, ACEEE Report No. E092, March, 2009, p.12.
37 Tr. Vol. 1, at 162 (March 2, 2010).
38 Id., p. 184.
39 Id., p. 186 :13-186:17.

capturing this efficiency where an incentive is involved. If FirstEnergy anticipates that it is capable of over-compliance, then FirstEnergy is capable of long term compliance. One of FirstEnergy's representations on this point is inaccurate; the credible ACEEE indicates that FirstEnergy's long-term potential study does not accurately assess economically exploitable opportunity.

C. The Shared Savings Mechanism Proposed by FirstEnergy is Completely Improper and Inappropriate and will Lead to Excessive Cost and Unjustifiable Customer Burdens.

FirstEnergy's shared savings proposal is not prudentially justified, and must be rejected by the Commission. It is not reasonable, will lead to excessive costs to consumers, does not effectively incentivize FirstEnergy to produce new energy efficiency savings or investments beyond the statutory mandate. Further, it does not contain any of the prudent customer and ratepayer protections found in the Duke Energy and AEP shared savings mechanisms, upon which FirstEnergy erroneously asserts that it is based.

1. FirstEnergy has Provided no Prudential, Technical, or Legal Justification for its Shared Savings Proposal.

FirstEnergy's shared savings proposal is not supported by any reasonable argument or standard. It is based on a bald assertion on behalf of FirstEnergy that the company is deserving of the level of recovery requested. FirstEnergy admits that it did no study or analysis to determine if the 15% shared savings number that the company selected was reasonable or appropriate.[40] FirstEnergy completed no calculations to establish the 15% number; FirstEnergy simply asserts that their proposal is based on a review of AEP's stipulation and Duke Energy's shared savings program.[41] In particular, FirstEnergy points to filings associated with the AEP stipulation as a justification for its shared savings proposal; and Mr. Ouellette, testifying on

[40] Tr. Vol. 1, at 160 (March 2, 2010).
[41] Id., at p.161.

behalf of FirstEnergy at the hearing, asserted personal knowledge of the details of stipulation with regard to shared savings.[42] This explanation of the rationale behind FirstEnergy's proposed shared savings mechanism is insufficient. This is especially true after one examines the shared savings mechanisms of Duke and AEP, upon which the FirstEnergy proposal is supposedly based.

2. FirstEnergy's Shared Savings Proposal Contains None of the Restrictions, Qualifications, and Consumer Protections Found in the Duke and AEP Shared Savings Proposals.

FirstEnergy claims that the company has knowledge of the AEP and Duke shared savings proposals and based its 15% shared savings request on these proposals.[43] After review of these proposals, it is clear that one of these two assertions is correct: (1) either FirstEnergy lacks knowledge and understanding of these proposals, or (2) FirstEnergy's shared savings request is not based on them, as FirstEnergy's request contains none of the essential consumer protections and restrictions contained in the Duke and AEP mechanisms.

FirstEnergy's proposal is unreasonable, when compared to the mechanisms proposed by AEP and Duke Energy. In the case of over-compliance (i.e. where FirstEnergy exceeds the statutory benchmark requirements), FirstEnergy would receive from its customer base 15% of the net benefits associated with the utility cost test, net of taxes. [44] Importantly, and uniquely, under the FirstEnergy proposal, mercantile self-direct savings would qualify for the shared savings treatment.[45] Additionally, FirstEnergy would receive the shared savings incentive in its entirety for any amount of over compliance.

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[42] Id., at p.164.
[43] Id., at p.161.
[44] See, ***In the matter of the report of the Cleveland Electric Illuminating Company for Report 3Year Energy Efficiency & Peak Demand Reduction Plan and Initial Benchmark Report***, 09-1947-EL-POR et al., p. 139.
[45] See Tr. Vol. 1, at 175 (March 2, 2010). As discussed in Part II.A., supra, such savings are derived from historic and existing projects completed before the effective date of S.B. 221 and include no investment or support from FirstEnergy.

Accordingly, if FirstEnergy were to achieve 50% plus of its savings in the historic mercantile program, and over comply by 1% with the rest of its programs, the company would receive 15% of the net benefits associated with the utility cost test. Importantly, this cost test, unlike the total resources cost test, analyzes the cost of compliance for the utility rather than the total benefits associated with efficiency investments; because of this essential difference, mercantile self direct contributes positively to the calculation. This is important because, as noted above, a historic mercantile program investment can never pass the total resources cost test because it is an investment to catalog savings that have already been bought and paid for without utility support.

FirstEnergy, therefore, has proposed a shared savings mechanism which allows the company to collect an extremely healthy rate of return on its programs, even while the bulk of its programs create no efficiency. The Company's shared savings mechanism will only serve to use customer dollars, at exorbitant expense, to catalog phantom efficiency that in some circumstances occurred years ago and for the development of which FirstEnergy played absolutely no substantive role. Such a proposal flies in the face of reason, is not consistent with the clear goals and intent of S.B. 221, and would reward FirstEnergy for undermining the new savings targets of S.B. 221.

Additionally, such a proposal is entirely inconsistent with the shared savings mechanisms of Duke Energy and AEP, upon which it is falsely asserted that it is based. For AEP, there are important differences from the FirstEnergy proposal. First, the percentage recovered is not an automatic 15%; the recovery is limited to the lesser of 15% or the scaled program investment cost cap; with the following percentages: 100-106% compliance, a return of 6%; 106-115%

compliance, a return of 12%; and greater than 115% compliance, a return of 17%. [46] Though AEP utilizes the utility cost test rather than the total resources cost test, AEP is limited to recovery on investments and programs that actually create new savings. Importantly, mercantile self direct programs are completely excluded from the calculation, so consumers are protected from the possibility, so real in the case of FirstEnergy's proposed mechanism, of paying a rate of return on historic mercantile programs that create no new savings, benefits, or economic development.

Duke's mechanism contains similar restrictions. For Duke Energy, 15% is the maximum recovery; Duke can achieve this return where the company achieves savings equal to 125% of its annual benchmark; 13% is available for savings equal to 116-125% of its annual benchmark, 11% for 111-115% of its annual benchmark, and 6% for 101-110% achievement.[47] Importantly, Duke utilizes the total resources cost test to evaluate its programs, ensuring that historic mercantile programs can never make Duke eligible for a shared savings incentive.

Therefore, FirstEnergy's proposal shares none of the essential characteristics of the Duke Energy and AEP shared savings mechanisms. It includes no scale for shared savings based on the level of over-compliance, does not eliminate the prospect of shared savings based on historic mercantile programs, and it would allow in a variety of circumstances extreme and excessive recovery. Additionally, because of its fundamentally flawed design, it would not incentivize FirstEnergy to make more, cost-effective investments in new efficiency savings; instead it would reward FirstEnergy for its strategy of excessive reliance on historic mercantile cataloged savings

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[46] See ***In the Matter of the Application of Columbus Southern Power Company for Approval of its Program Portfolio Plan and Request for Expedited Consideration*** 09-1089-EL-POR et al., Stipulation p. 7-8.
[47] See ***In the Matter of the Application of Duke Energy Ohio for Approval of an Electric Security Plan*** 08-920-EL-SSO et al., Stipulation at 24.

for S.B. 221 compliance. FirstEnergy asserts that its shared savings mechanism is based upon those of AEP and Duke. This is clearly not the case.

3. FirstEnergy's Shared Savings Proposal will Result in Massive, Unjustified Collection of Fees from Customers, Due to FirstEnergy's Reliance on Mercantile Opt-outs for Compliance.

As discussed and established above, FirstEnergy has made a clear tactical choice to attempt to achieve S.B. 221 energy efficiency targets through historic mercantile programs. This clear strategy, when coupled with FirstEnergy's outrageous shared savings request, if approved, would lead to massive, unjustified collection of fees upon consumers who would get none of the system benefits associated with new energy efficiency investment in return. Historical, self-directed mercantile projects will account for 48.6% of OE's, 50.1% of CEI's, and 52.9% of TE's compliance in 2010. [48] Accordingly, FirstEnergy intends to collect from Customers an incentive or return on investment for its entire portfolio of programs, including the roughly 50% of compliance arising out of the historic mercantile effort, which, at the excessive cost as discussed above, are already far too expensive.

With the proposed shared savings mechanism, these excessively expensive programs with become oppressively expensive. Customers will, after approval of this mechanism, be responsible for paying a wide variety of charges. First, customers will be responsible for the excessive administration incentive and fee as high a 1 cent per kwh, along with the cost of FirstEnergy's oversight of third party administrators.[49] As noted above, this cost will be incurred to catalog old efficiency, not to create new efficiency. Added on to this cost, if the commission approves this proposal, will be FirstEnergy's shared savings benefits, which the Company will

[48] Ohio Environmental Council Exhibit 1, OEC-Set 1, DR-5, "Responses to Data Requests."
[49] See Case No. 09-553-EL-EEC, "Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Approval of Administrator Agreements and Statements of Work." Filed June 30th, 2009.

receive even if by only the barest of margins it "over complies" with the statute. The ACEEE, estimates that the cost of new efficiency in the industrial sector is roughly 2.3 cents per kwh. When all the costs associated with FirstEnergy's historic mercantile proposal are combined, customers will pay over 1 cent per kwh for each historic kwh "cataloged" by FirstEnergy.[50] This cost is excessive and unjustifiable. Not only will FirstEnergy customers suffer the costs to catalog old efficiency, but they will have to offer FirstEnergy an incentive payment to encourage the company to commit more resources to these unproductive and expensive historic programs.

IV. RECOMMENDATIONS

The OEC respectfully requests that the Commission reject FirstEnergy's Portfolio Plan and require the Company to re-file a plan that meets the requirements of Ohio law. The Commission has the authority to require the Company to re-file its Plan and to compel Third Party Administration of FirstEnergy's mercantile self-direct program. The Plan as filed is inadequate, unreasonable, and contrary to law for the following reasons:

- FirstEnergy's Plan relies excessively and unreasonably on historic mercantile as its primary means of compliance with the efficiency benchmarks. Moreover, the cost for these programs, as detailed in the Plain, is inappropriate and unreasonable.
- FirstEnergy has failed to produce a defensible, accurate, long-term market potential study for energy efficiency in the state of Ohio. FirstEnergy's Market Potential Study, while referencing a study finding that Ohio's potential 2025 efficiency savings is 33 percent, concedes that the Company will not to comply with the statutory benchmarks even under a best case scenario.

[50] "Shaping Ohio's Energy Future: Energy Efficiency Works." American Council for an Energy Efficient Economy, ACEEE Report No. E092, March, 2009, p.17.

- The Shared Savings mechanism proposed by FirstEnergy is inappropriate and will lead to excessive cost, over-collection of lost revenues, and an unjustifiable burden on customers. These unreasonable costs, borne by ratepayers, would be used to subsidize FirstEnergy's reliance on historic mercantile savings. Such a scenario would be an abuse of the cost-recovery mechanism permitted by statute, which was intended to allow a utility to recover from customers reasonable costs incurred to implement in new energy efficiency.

The Commission should require the Company to re-file a plan that addresses these deficiencies. In so doing, the Commission can ensure that FirstEnergy makes a good faith, meaningful attempt to undertake new energy efficiency programs and submits a Plan that complies with the letter and intent of S.B. 221.

The OEC further recommends that the Commission compel Third Party administration of all FirstEnergy EE/PDR programs, including the mercantile self-direct program. The Company's Portfolio Plan incorporates numerous incomplete and unlawful self-direct applications. While other Ohio utilities have demonstrated the ability to administer their mercantile programs, those utilities have also not sought to rely on historic mercantile savings as their primary means of compliance with the EE/PDR benchmarks. FirstEnergy has demonstrated that it is not currently able to administer its program. A Third Party Administer should be ordered by the Commission to ensure that applications comply with all applicable code and rule sections and that only qualifying mercantile savings projects are submitted for Commission approval.

V. CONCLUSION

FirstEnergy has fundamentally failed to take its statutory energy efficiency program requirements seriously. If the Plan is approved by the Commission, the residential, industrial and commercial electricity customers of FirstEnergy will experience energy efficiency programs that are poorly designed, expensive, and inadequate. The flaws of FirstEnergy's Plan are so significant, and FirstEnergy's clear lack of commitment to well designed and functioning programs so profound, that the Commission should reject the Plan in its entirety. The Commission should then require FirstEnergy to return to the Commission with a plan that is designed to meet statutory benchmarks, utilizes legal compliance options, and includes programs that will pass the total resource cost test and benefit customers. The new plan must include good faith efforts to comply with the statute and protections to ensure that qualified professionals manage, oversee, and implement the new program portfolio.

Respectfully Submitted,

/s/ Will Reisinger

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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 or electronic mail this 29th day of March, 2010.

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