

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of Ohio)
Edison Company, The Cleveland Electric) Case Nos. 09-1947-EL-POR
Illuminating Company, and The Toledo) 09-1948-EL-POR
Edison Company For Approval of Their) 09-1949-EL-POR
Energy Efficiency and Peak Demand)
Reduction Program Portfolio Plans for)
2010 Through 2012 and Associated Cost)
Recovery Mechanisms.)

In the Matter of the Application of Ohio)
Edison Company, The Cleveland Electric) Case Nos. 09-1942-EL-EEC
Illuminating Company, and The Toledo) 09-1943-EL-EEC
Edison Company For Approval of Their) 09-1944-EL-EEC
Initial Benchmark Reports.)

In the Matter of the Energy Efficiency and)
Peak Demand Reduction Program) Case Nos. 09-580-EL-EEC
Portfolio of Ohio Edison Company, The) 09-581-EL-EEC
Cleveland Electric Illuminating Company,) 09-582-EL-EEC
and The Toledo Edison Company.)

ENVIRONMENTAL LAW & POLICY CENTER'S REPLY BRIEF

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Table of Contents

I.	Introduction.....	1
II.	Argument	1
	A. <i>FirstEnergy Has the Burden To Show The Plan is Consistent with Law.</i>	1
	B. <i>Regardless of Design, FirstEnergy’s Plan Will Likely Not Meet The 2010 Benchmarks...</i>	3
	C. <i>FirstEnergy Requested Annualized Efficiency To Meet Its Benchmarks.....</i>	5
	D. <i>FirstEnergy Omits Necessary Portions from Its Plan.</i>	6
III.	Conclusion	8

I. Introduction

In these consolidated actions, the Cleveland Electric Illuminating Company, the Ohio Edison Company, and the Toledo Edison Company (together, “FirstEnergy” or “the Companies”) request approval for each company’s energy efficiency and peak demand reduction program portfolio plans for 2010-2012 (“EE/PDR Plan” or “Plans”), initial benchmark reports, and associated cost recovery mechanisms. The Public Utilities Commission of Ohio’s (“PUCO” or “Commission”) Attorney Examiners conducted a hearing March 2-4 and 8, 2010. On March 29, 2010, the parties filed initial, post-hearing briefs. The Environmental Law and Policy Center (“ELPC”) hereby replies to FirstEnergy’s brief. For the reasons below and in ELPC’s brief, ELPC asks the Commission to deny FirstEnergy’s EE/PDR Plan and require the Companies to revise and resubmit the Plans.

II. Argument

A. FirstEnergy Has the Burden To Show The Plan is Consistent with Law.

FirstEnergy, and no one else, has the burden to show the EE/PDR plan complies with law. Ohio Administrative Code (O.A.C.) §4901:1-39-04(E) states, “the electric utility shall have the burden to prove that the proposed program portfolio plan is consistent with the policy of the state of Ohio as set forth in section 4928.02 of the Revised Code, and meets the requirements of section 4928.66 of the Revised Code.”¹ However, in its Brief, FirstEnergy states that neither Staff nor intervenors proposed alternatives to FirstEnergy’s Plan.² Only FirstEnergy is responsible for submitting a Plan that is consistent with law.

¹ O.A.C. §4901:1-39-04(E).

² *Post-Hearing Brief of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company in Support of Their Energy Efficiency and Peak Demand Reduction Program Portfolio Plans for 2010 Through 2012 and Initial Benchmark Reports*, Case Nos. 09-1947-EL-POR, 09-1948-EL-POR, 09-1949-EL-

FirstEnergy tries to put responsibility for the Plan on other parties by claiming the intervenors' recommendations "typically lacked details and TRC justification," and "none of the criticisms made by intervenors or Staff create a reasonable basis for the Commission to alter the Plans or to deny their approval."³ FirstEnergy's attempt to shift its burden to Staff or intervenors culminates with FirstEnergy suggesting that other parties should have proposed an alternative Plan if the Commission is to reject the Companies' Application: "The Companies' Plans meet the requirements of R.C. 4928.66 and the Commission Rules and *are the only comprehensive plans supported by the evidentiary record.*"⁴ (emphasis added) Notwithstanding several specific recommendations from other parties as highlighted below and explained in detail in initial briefs, it is not Staff's or the intervenors' responsibility to propose an alternative portfolio if FirstEnergy's is inadequate. The Commission should not permit FirstEnergy to shift its burden to the other parties in this case. It is FirstEnergy's responsibility alone to submit a legally adequate Plan.

Despite FirstEnergy's attempt to shift its burden to other parties and its claims that no one questions the Plan, many parties show how FirstEnergy's Plan fails to meet necessary requirements, including likely not meeting 2010 benchmarks, and also suggest changes.⁵

POR, 09-1942-EL-EEC, 09-1943-EL-EEC, 09-1944-EL-EEC, 09-580-EL-EEC, 09-581-EL-EEC, and 09-582-EL-EEC (March 29, 2010), ("FirstEnergy Brief") at 4-5.

³ *Id.*

⁴ *Id.* at 5.

⁵ See *Initial Post-Hearing Brief Submitted by the Staff of the Public Utilities Commission of Ohio, The Ohio Environmental Council's Initial Post Hearing Brief; Initial Post-Hearing Brief by the Office of the Ohio Consumer's Counsel, Citizen's Power, Natural Resources Defense Counsel, and the Citizens Coalition; The Environmental Law and Policy Center's Initial Post-Hearing Brief; Initial Brief of the Ohio Energy Group; Initial Brief Submitted by Nucor Steel Marion, Inc.*, 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, and 09-582-EL-EEC (March 29, 2010).

Specific recommendations include revisions to the Companies' TRC modeling,⁶ individual program revisions or additions,⁷ and a lengthy discussion of FirstEnergy's shared savings proposal.⁸ FirstEnergy ignores these recommendations and instead suggests the burden is on Staff and the intervenors to propose an alternative Plan. The PUCO should judge FirstEnergy's Plan and not a plan it suggests the intervenors should propose. Many parties show how the Plan is inconsistent with law. FirstEnergy has the burden to show the Plan is adequate, and it has not done so. The PUCO should reject FirstEnergy's Plan as inconsistent with Ohio law and policy.

B. Regardless of Design, FirstEnergy's Plan Will Likely Not Meet The 2010 Benchmarks.

Despite claiming that "Each Company's Plan is designed to achieve its respective benchmarks for energy efficiency and peak demand reduction set forth in R.C. §4928.66," FirstEnergy makes no attempt to resolve the inherent conflict with its statements that the Plans *will likely not achieve* the 2010 benchmarks without PUCO help.⁹ Moreover, FirstEnergy submitted this Plan *knowing* it was unlikely it would meet the 2010 benchmark.

Throughout Witness John Paganie's and Witness George Fitzpatrick's testimony and cross-examination, FirstEnergy repeats that it cannot meet its 2010 benchmark without special treatment from the Commission.¹⁰ Even in its Post-Hearing Brief, FirstEnergy reiterates that the Companies will not meet the 2010 energy efficiency benchmarks absent special findings from

⁶ Direct Testimony of Geoffrey C. Crandall, February 17, 2010 ("Crandall Direct"), at pages 19-20; Direct Testimony of Gregory Scheck, February 23, 2010 ("Scheck Direct"), at Question 8; Direct Testimony of Dylan Sullivan, February 17, 2010 ("Sullivan Direct"), at page 17.

⁷ Crandall Direct, at pages 23-25; Direct Testimony of Daniel Sawmiller, February 17, 2010 ("Sawmiller Direct"), at pages 12-13.

⁸ Sullivan Direct, at pages 8-9; Sawmiller Direct, at pages 6-10;

⁹ FirstEnergy Brief at 5.

¹⁰ Direct Testimony of John Paganie, December 15 2009 ("Paganie Direct"), at page 13:7-10; Direct Testimony of George Fitzpatrick, December 15, 2009 ("Fitzpatrick Direct"), at pages 9:14-11; Tr. Vol. 1, at page 110:4-18 (March 2, 2010).

the PUCO. “If Commission approval is delayed beyond the dates specified, or the Commission maintains its current position on pro rated savings calculations, *it is unlikely the Companies will be able to achieve the 2010 benchmarks.*”¹¹ (emphasis added) FirstEnergy explains that it assumed “the Commission will approve the Companies’ Application following one of two time lines: (1) approval of all programs as filed prior to April 1, 2010; or (2) approval of designated Fast Track Programs for launch no later than April 1, 2010, and approval of all remaining programs for launch no later than July 1, 2010.”¹² April 1, 2010 passed without a decision from the Commission. This leaves only annualized accounting of efficiency as the way for FirstEnergy to meet its benchmarks. Even then, the PUCO needs to approve the Plan by July 1, 2010, or FirstEnergy will miss the 2010 benchmarks.¹³ Moreover, FirstEnergy has not explained why it made the assumptions it did, or why it believes the Commission would act on those timelines. If the PUCO does not grant annualized accounting, the actual results conflict with FirstEnergy’s claim that the Plan is “designed to achieve” the 2010 benchmarks.

FirstEnergy then states that despite this inconsistency, “no intervenor has argued” the Plan does not meet the requirements of O.R.C. §4928.66.¹⁴ Ignoring FirstEnergy’s continued attempt at burden-shifting and other parties’ prior statements concerning benchmark compliance,¹⁵ no intervenor needs to argue the Plan will not meet the 2010 benchmarks because, as shown above, the Companies’ own witnesses and Brief state it repeatedly.¹⁶ FirstEnergy’s

¹¹ FirstEnergy Brief at 9.

¹² FirstEnergy Brief at 9.

¹³ Paganie Direct, at page 14: 13-16.

¹⁴ FirstEnergy Brief at 5.

¹⁵ See *Objections by the Ohio Consumer and Environmental Advocates*, 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, and 09-582-EL-EEC (February 17, 2010).

¹⁶ Paganie Direct, at page 14: 13-16; Tr. Vol. 1, at page 110:4-18 (March 2, 2010).

Plan was not designed to achieve the 2010 benchmarks absent extra-ordinary circumstances. FirstEnergy's delayed submission and hurried timeline assumptions are inherent design flaws likely to result in the Plan failing to meet 2010 benchmarks. While FirstEnergy's may have designed its Plan to meet the benchmarks under special treatment and unsupported assumptions, the Commission's standard for approval should not be limited to what appears on paper, regardless of the results. The Commission should not approve a Portfolio that on April 1, 2010 the Companies could declare the 2010 benchmarks lost.

C. FirstEnergy Requested Annualized Efficiency To Meet Its Benchmarks.

FirstEnergy agrees that the PUCO requires pro-rata counting for benchmark compliance.¹⁷ Despite that requirement, the Companies make a special request for annualized accounting. However, FirstEnergy's reason for requesting annualized accounting of efficiency achievements, to "reduce by approximately \$51 million the Plans' cost to customers," tells only half the story.¹⁸

FirstEnergy's Portfolio sponsor repeatedly stated that without annualized accounting, the Companies will not be able to meet the 2010 benchmarks. Witness Paganie first testified, "[W]ithout [annualized accounting], 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 for those benchmarks."¹⁹ He then agreed on cross-examination "[T]hat without fast-track approval or annualized accounting, the plan does

¹⁷ *In the matter of the adoption of rules for alternative and renewable energy technologies and resources, and emission control reporting requirements, and amendment of Chapters 4901:5-1, 4901:5-3, 4901:5-5, and 4901:5-7 of the Ohio Administrative Code, pursuant to Chapter 4928, Revised Code, to implement Senate Bill No. 221, Case No. 08-888-EL-ORD, Entry on Rehearing, at ¶17 (June, 17, 2009).*

¹⁸ FirstEnergy Brief at 8.

¹⁹ Paganie Direct, at page 13:7-10.

not meet the statutory requirements for 2010.”²⁰ Witness Paganie explained that “[B]ecause of pro rata savings requirements and practical launch considerations, no more than a half year of savings could be generated in 2010...the Companies cannot meet their 2010 energy efficiency benchmarks under this scenario.”²¹ While FirstEnergy may reduce the costs of its programs, such reductions are not the sole reason for FirstEnergy’s request, as the Companies contend.²²

The Commission should understand FirstEnergy’s dual purpose of requesting annualized accounting. FirstEnergy is seeking special treatment from the PUCO to meet its 2010 benchmark requirements when it knew at the time of submitting its Plan for approval that the Commission requires pro-rata accounting. The Commission should deny FirstEnergy special treatment and should instead require pro-rata accounting as previously determined.

D. FirstEnergy Omits Necessary Portions from Its Plan.

Although FirstEnergy shows the portions of the Plan meant to comply with O.A.C. §4901:1-39-04(C), the Companies do not mention the requirements in O.A.C. §4901:1-39-03(C).²³ That section requires FirstEnergy to

[I]dentify measures considered but not found to be cost-effective or achievable *but show promise* for future deployment. The electric utility *shall identify potential actions that it could undertake* to improve the measure's technical potential, economic potential, and achievable potential to enhance the likelihood that the measure would become cost-effective and reasonably achievable.²⁴
(emphasis added)

²⁰ Tr. Vol. 1, at page 110:4-18 (March 2, 2010).

²¹ Paganie Direct at page 13:18-22.

²² Paganie Direct at page 13:7-22; Fitzpatrick Direct, at page 11:16-12:2; Tr. Vol. 2, at page 259:16-24 (March 3, 2010).

²³ FirstEnergy Brief at 15-17.

²⁴ O.A.C. §4901:1-39-03(C).

FirstEnergy states that Black and Veatch “prescreened over 110 EE&PDR measures, along with additional energy efficiency measures based on stakeholder input, and ultimately included 93 measures at various levels of participation.”²⁵ FirstEnergy does not identify any of the measures not selected as ones that “show promise for future deployment.” However, FirstEnergy has measures it believes may be useful in the future, including lighting measures and customer education programs.

Although FirstEnergy did not include a solid-state lighting (SSL) program in its Plan due to cost,²⁶ Witness Fitzpatrick testified at the hearing that the Companies are conducting at least one pilot program for the technology.²⁷ FirstEnergy acknowledges that SSL technology “holds great promise,”²⁸ and has plans for a second pilot program.²⁹ Additionally, FirstEnergy includes only one paragraph in its Plan concerning customer education materials.³⁰ Specifically regarding educational materials for consumer electronics, the Companies have “talked about it and we think it's very important to do that, and certainly we're going to have to work with the vendors and work with our partners in the collaborative to see if we can develop some educational material like that. I think it's really important that we come up with that.”³¹ Despite these statements, FirstEnergy does not include information on either SSL technology or educational efforts in its Plan.

There are 17 technologies Black and Veatch considered but did not include in FirstEnergy’s Plan. FirstEnergy’s Plan does not include all of the portions required by this

²⁵ FirstEnergy Brief at 6.

²⁶ Tr. Vol. 2, at page 247:3-22 (March 3, 2010).

²⁷ Tr. Vol. 2, at pages 246:20-247:2 (March 3, 2010).

²⁸ Tr. Vol. 2, at page 245:6-16 (March 3, 2010).

²⁹ Tr. Vol. 2, at pages 246:20-247:2 (March 3, 2010).

³⁰ Tr. Vol. 1, at page 111:9-18 (March 2, 2010).

Commission's rules. It is possible that FirstEnergy is continuing to evaluate some of those, like SSL technologies and educational materials. However, without a list or description in the Plan, as contemplated by O.A.C. §3901:1-39-03(C), it is impossible to know what FirstEnergy is considering for the future. The PUCO should require FirstEnergy to include such measures and potential actions in a revised Portfolio.

III. Conclusion

For all of the above reasons, and those contained in ELPC's Initial Post-Hearing Brief, ELPC respectfully asks the PUCO to rule that FirstEnergy has not met its burden to show its Plan is consistent with the statute or rules. FirstEnergy submitted a legally deficient Plan and now attempts to shift the burden to Staff or another intervenor to propose a legally adequate Portfolio. The Commission should require revisions consistent with legal requirements before approving FirstEnergy's EE/PDR Plan.

Respectfully Submitted,

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³¹ Tr. Vol. 1, at page 115:5-17 (March 2, 2010).

CERTIFICATE OF SERVICE

It is hereby certified that a true copy of the foregoing Environmental Law & Policy Center's Reply Brief, was served upon the persons listed below via electronic mail on this 12th day of April, 2010.

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