**BEFORE**
**THE PUBLIC UTILITIES COMMISSION OF OHIO**

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| 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<br>09-1948-EL-POR<br>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<br>09-1943-EL-EEC<br>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<br>09-581-EL-EEC<br>09-582-EL-EEC |

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**REPLY BRIEF OF THE OHIO ENVIRONMENTAL COUNCIL**

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Submitted: April 12, 2010 **Attorneys for the OEC**

## I. INTRODUCTION

In accordance with the schedule established by Attorney Examiners in the above captioned proceeding, the Ohio Environmental Council ("OEC") submits its Reply Brief for consideration by the Public Utilities Commission of Ohio ("Commission").

## II. SUPPLEMENTAL STANDARD OF REVIEW

This reply brief incorporates the standard of review from OEC's post hearing brief, and supplements it as follows.

An important aspect of FirstEnergy's portfolio plan is its proposal for shared savings, which is based purely on the recognition that two other EDUs have asked for such relief. As NUCOR has noted, there is no statutory requirement mandating that an EDU receive shared savings when it out performs the energy efficiency and demand response benchmarks.[1]

The rules implementing Substitute Senate Bill 221 ("S.B. 221) give an EDU the option to request shared savings and gives the Commission the complete discretion to approve or deny such a shared savings mechanism:

> With the filing of its proposed program portfolio plan, the electric utility ***may*** submit a request for recovery of an approved rate adjustment mechanism, commencing after approval of the electric utility's program portfolio plan, of costs due to electric utility peak-demand reduction, demand response, energy efficiency program costs, appropriate lost distribution revenues, and shared savings.[2]

As this brief explains in detail, while there is no regulatory guidance for what must be demonstrated under the rule for an EDU to receive cost recovery, examples have been set with the portfolio plans provided by other EDUs. In fact, FirstEnergy in this case recognizes that the

[1] The Ohio Revised Code in O.R.C. 4928.143(B)(2)(H) does, however, allow in an EDU's Electric Security Plan to include a shared savings provision.
[2] O.A.C. 4901:1-3-07 (A).

Duke Energy and AEP portfolio plans stand as precedent for a shared savings mechanism.[3] Ultimately, the EDU holds the burden of proof that shared savings and any other cost recovery mechanism in its portfolio plan is appropriate.[4] If the EDU does not demonstrate that its mechanism is appropriate, justified, supported by evidence and exemplary of supportable mechanisms adopted in other jurisdictions, then that request for a shared mechanism should be denied.

## III. ARGUMENT

### A. The Plan Is Not Designed To Meet The Benchmarks

The OEC agrees with the conclusions of the Environmental Law and Policy Center ("ELPC") and the Office of the Ohio Consumers' Counsel (OCC) that FirstEnergy's Plan as filed is unlawful because it is not designed to meet the EE/PDR benchmarks contained in R.C. 4928.66. Consequently, the Plan as currently filed cannot be approved. The Company, in its initial post hearing brief, states that "The Plans are designed to meet or exceed the statutory benchmarks for both energy efficiency and peak demand reduction." This statement is plainly contradicted by the numbers contained in FirstEnergy's Plan and in its brief. R.C. 4928.66 requires utilities to meet annual energy efficiency benchmarks, including for the years 2010-2012. The efficiency benchmark culminates in 22 percent savings by the year 2025. FirstEnergy's Plan fails to meet these requirements.

In the short-term, the Plan is not designed to meet the 2010-2012 benchmark, but is made contingent upon a series of exceptional events. First, Company Witness Paganie has stated

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[3] According to Intervenor Nucor's post hearing brief, "In response to a discovery request asking whether a percentage of shared savings less than 15% could provide an incentive to achieve energy efficiency and peak demand reduction savings in excess of the benchmarks, FirstEnergy responded "it might," but that the Companies had not made such calculations, instead choosing to use the same savings percentages used by Duke and AEP."
[4] O.A.C. §4901:1-39-04(E).

that the Plan cannot comply with the 2010-2012 benchmarks unless the Commission approves the "fast track programs" on an expedited basis and unless the Commission approves annualized accounting.[5] The Commission has not yet approved either request, and it is not clear that it will do so. Moreover, the Plan is also contingent upon Commission approval of the majority or all of the outstanding mercantile exemption applications, some of which are plainly unlawful and unlikely to be approved.[6] Therefore, the viability and lawfulness of FirstEnergy's Plan is dependent on each of these decisions being decided in FirstEnergy's favor. Or, in other words, the Company is banking on the unlikely event that it will draw the equivalent of an "inside straight" from the Commission.

Further, the Company's Plan is not designed to meet the benchmarks in the long term. The Company's own Market Potential Study, filed as Appendix D to the Plan, states that the Company does not anticipate meeting the 2025 benchmark. As stated in executive summary of Appendix D, "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]. Therefore, even under a best case scenario, FirstEnergy believes that its Plan will not put it on a course to satisfy the 2025 benchmark.

FirstEnergy's Plan is plainly unlawful because it is not designed to comply with the statutory mandates contained in R.C. 4928.66. The Commission, therefore, should not approve the Plan unless and until FirstEnergy outlines a credible attempt to comply with the law.

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[5] Hearing Vol. 1, at page 110:4-18 (March 2, 2010).

[6] See, e.g., 09-1226-EL-EEC. The OEC has filed a motion to dismiss this application because it plainly violates the Commission's rules.

### B. The Shared Savings Proposal Is Not Reasonable

In its brief, FirstEnergy asserts that its shared savings proposal is reasonable, largely because it is based on the shared savings mechanisms of Duke Energy and AEP.[7] As the OEC noted in its post-hearing brief, evidence suggests the above assertion is inaccurate. Both Duke's and AEP's shared savings proposals contain numerous restrictions and qualifications designed to protect the consumer and incentivize strong utility performance. These restrictions and qualifications are completely absent from the FirstEnergy plan.[8] Importantly, FirstEnergy, other than the above representation, makes no showing or attempt to show that its shared savings proposal is reasonable. As described below, other parties have echoed the OEC's observations.

NUCOR makes several cogent arguments against the FirstEnergy shared savings proposal. As an initial matter, NUCOR notes that the burden is on FirstEnergy to show that shared savings is appropriate for a utility.[9] The OEC agrees with NUCOR's conclusion and discusses the substantive law on this point in the supplemental standard of law section above. NUCOR requests that the shared savings proposal put forward by FirstEnergy be rejected in its entirety. This request is appropriate given FirstEnergy's scant justification for the proposal, and the fact the OEC and others have more than adequately demonstrated that this justification is inaccurate; that in fact the shared savings proposal offered by FirstEnergy is so dramatically different from those of AEP and Duke that it cannot considered to be derived from a study or review of them.

OCC makes several similar arguments against the shared savings proposal. OCC points out that FirstEnergy's proposal would allow the unjustified collection of excessive shared

[7] See FirstEnergy's post hearing brief, p.22-23.
[8] See OEC's post hearing brief, p.16-18.
[9] See NUCOR's post hearing brief, at 35.

savings payments at 15% regardless of whether or not FirstEnergy savings achievement went over the benchmark amount by a small or large margin.[10] The OEC agrees with this conclusion. Other utilities have better margin management for over-compliance. Additionally, the OCC provides several alternative concrete recommendations for improvement to the shared savings proposal. These recommendations are as follows:

> "1. The mechanism should be triggered only when the Companies meet the statutory benchmarks with energy efficiency programs delivered to customers; 2. The mechanism should exclude energy savings from T&D investments; 3. The mechanism must exclude energy savings from mercantile self-direct projects, and 4. The Commission should ensure that "banked" savings are not counted twice in the shared savings mechanism."[11] The OEC agrees with this series of recommendations, and would add one more; that the Commission, if it fails to reject the proposal outright, provide tiers similar to those found in the Duke and AEP proposals."[12]

These recommendations are reasonable, given the lack of protections in the FirstEnergy proposal.

### C. FirstEnergy Should Revise Its Modeling Procedures for TRC Testing.

The OEC is in agreement with OCC's and ELPC's arguments that FirstEnergy's decision that commercial lighting programs would not be cost effective should be re-evaluated. The Commission requires electric utilities to demonstrate that portfolio plans are cost effective, including a demonstration that each program proposed by the portfolio is cost effective.[13] The Commission adopted the Total Resource Cost ("TRC") test to determine cost-effectiveness,[14] and has established detailed rules regarding the execution of TRC tests.

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[10] OCC Brief at 35.
[11] Id. at 39.
[12] Id.
[13] O.A.C. 4901:1-39-04(B)
[14] O.A.C. 4901:1-39-01(F), (Y)

In its EE/PDR portfolio, FirstEnergy performs TRC analysis for proposed commercial lighting programs, and concludes that the programs are not cost efficient.[15] This finding is contrary to the industry-wide consensus that commercial lighting programs are generally the largest and most cost effective programs in energy efficiency portfolios.[16] OEC agrees with OCC and ELPC, and believes that FirstEnergy inaccurately performed the TRC analysis for its commercial lighting programs. Therefore, the OEC respectfully requests that the Commission require the Companies to adjust their TRC analysis, so the analysis will be performed in compliance with industry standards and practices. Once the Companies' cost effectiveness analysis is consistent with industry standards and practices, OEC believes that the commercial lighting programs will qualify as cost effective.

### D. FirstEnergy's Lost Revenues Proposal Violates the Stipulation of 08-935-EL-SSO.

The OEC is in agreement with the arguments by the OCC in their Initial Post-Hearing Brief regarding FirstEnergy's lost revenue proposal.[17] FirstEnergy's EE/PDR portfolio seeks to allow the Companies to collect from customers revenues that it may relinquish by implementing energy efficiency programs, including programs it implements in 2012. However, FirstEnergy entered into a Stipulation and Recommendation in Case No. 08-935-EL-SSO, which does not provide for the Companies' recovery of lost revenues for programs implemented in 2012.[18] If the Commission permits FirstEnergy to extend its lost revenue recovery to include 2012, it will

[15] The Cleveland Electric Illuminating Company EE/PDR Portfolio (December 15, 2009); Ohio Edison Company EE/PDR Portfolio (December 15, 2009); Toledo Edison Company EE/PDR Portfolio (December 15, 2009). Case Nos. 09-1947-EL-POR;09-1948-EL-EEC; 09-1949-EL-EEC.

[16] ELPC Exhibit 1 at 16 (Sullivan).

[17] ***Initial post-hearing brief of the Office of the Ohio Consumers' Counsel, Citizen Power, Natural Resources Defense Council and Citizens Coalition*** at 42 (March 39, 2010). Case Nos. 09-0580-EL-EEC; 09-0581-EL-EEC; 09-0582-EL-EEC; 09-1942-EL-EEC; 09-1943-EL-EEC; 09-1944-EL-EEC; 09-1947-EL-EEC; 09-1948-EL-EEC; 09-1949-EL-EEC.

[18] In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company and the Toledo Edison Company for Authority to Establish a Standard Service Offer Pursuant to R.C. § 4928.143 in the Form of an Electric Security Plan, Case No. 08-935-EL-SSO, (February 26, 2009).

cost customers an estimated $20.5 million.[19] Therefore, the Commission should not authorize FirstEnergy's 2012 lost revenue mechanism.

## IV. IEU-Ohio's Assertions Regarding Mercantile Exemptions Are Without Merit

The Industrial Energy Users of Ohio ("IEU"), which did not file a post hearing brief, uses its reply brief as an opportunity to attack OEC's argument that FirstEnergy over-relies on historic mercantile programs for benchmark compliance. IEU also takes issue with OEC's claim that this compliance strategy is contrary to the clear intent of S.B. 221.[20] IEU claims that OEC is "urging the Commission to disadvantage FirstEnergy compliance efforts because FirstEnergy is spending too much time and money to improve the energy productivity of Ohio's real economy." More accurately, the OEC is instead trying to ensure that FirstEnergy investments that create no electricity savings and none of the attendant benefits of those savings are limited and consistent with the statute.[21]

IEU's reply brief drips irony, simultaneously championing the "real economy" while excusing FirstEnergy's significant and excessive spending on historic mercantile programs. These programs create zero savings, zero jobs, and zero economic development, save for an effective rate-reduction for participating customers that is more appropriately addressed through a rate proceeding.

No credible party can claim that the fundamental purpose of the energy efficiency provisions of S.B. 221 was anything other than the creation of more energy efficiency in Ohio. As demonstrated in the OEC's initial brief, FirstEnergy has embarked upon a conscious effort to avoid this purpose by looking to achieve as much compliance from the historic opportunity. These efforts turning S.B. 221's provisions on their head, making the legislation not a call to

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[19] NRDC Exhibit 1 at 13 (Sullivan)(February 17, 2010).
[20] See IEU reply brief, p. 2-8.
[21] See IEU reply brief at 3.

create new energy efficiency in Ohio, but instead a mandate to catalog—at the ratepayers' expense—the savings efforts of mercantile customers in the three years prior to passage of S.B. 221. The idea that the legislature intended the historic mercantile provisions as anything other than an opportunity for mercantile customers who had already made efficiency investment to eliminate new electricity service charges is simply wrong.

S.B. 221 is clear in this respect: historic mercantile savings may be counted, and mercantile customers may require a utility to offer exemptions in return for savings commitments. Similarly, the utility must allow mercantile customers to avoid the rider upon commitment of savings. But nothing in the statute prevents the Commission from determining that a utility has made a clear effort to avoid new savings in favor of heavy reliance on historic savings. It is entirely within the Commission's power to limit that reliance, not through prohibition, which would be contrary to statute, but by limiting efforts that are explicitly designed to encourage the historic program participation at the expense of new savings.[22] As the OEC recommends in its initial post-hearing brief, the Commission is empowered to appoint a third-party administrator for FirstEnergy programs. Such an administrator would presumably work to comply with S.B. 221 in a manner consistent with its purpose.

Additionally, as the OEC has requested in other cases, the Commission could limit historic mercantile program recovery to only those costs directly attributable to verification of savings and filing with the Commission. The Commission is under absolutely no statutory mandate whatsoever to allow FirstEnergy to recover the costs of marketing the historic program or the provision of an incentive to find historic program applications. In fact, not only does the

[22] The OEC does not, either in its Post-Hearing Brief or in this Reply, recommend that the Commission limit the amount of historic mercantile applications upon which FirstEnergy can claim compliance. Instead, the OEC recommends that the Commission deny approval to FirstEnergy's plan, appoint a third-party administrator, and in this reply recommend that the Commission use its authority to limit wherever statutorily permissible FirstEnergy's consistent attempts to incentivize historic mercantile program spending and savings.

Commission exercise complete discretion over the approval or disapproval of this incentive payment to catalog savings, but the Commission could easily limit the amount of reliance FirstEnergy can effectively place on historic mercantile savings by denying approval of any incentive payment for those savings.

The OEC agrees with IEU's support for "energy productivity," but does not understand how spending utility dollars, ultimately ratepayer dollars, on efforts to catalog historic savings in any way advances the cause of energy productivity.[23] S.B. 221 provides for historic mercantile exemptions. This is the law in Ohio. But it is FirstEnergy's discretionary decision to base the bulk of its compliance on these exemptions; it is FirstEnergy's discretionary decision to incentivize historic mercantile participation; and it is entirely with the discretion of the Commission to deny FirstEnergy cost recovery for those incentive mechanisms, to appoint a third party administrator for mercantile programs, and to deny approval of FirstEnergy's portfolio plan on numerous grounds.

## V. SUPPLEMENTAL RECOMMENDATION

In its initial post-hearing brief, OCC suggests that the FirstEnergy lost revenue proposal violates the stipulation 08-935-EL-ESP in that it seeks recovery for programs implemented in 2012, extending the term beyond the agreed to and approved 2011 period.[24] We agree with this conclusion: the terms proposed by FirstEnergy are clearly contrary to those consensus terms developed through the stipulation settlement in 08-935-EL-ESP. As a recommendation in part intended to rectify the potential for excessive lost revenue collection, OCC requests that the Commission approve and implement a decoupling proposal for the residential rate class in

[23] See Footnote 6, IEU reply brief at 3.
[24] See OCC post-hearing brief at 42.

2012.[25] As explained in testimony submitted in this case, a decoupling pilot will have many positive impacts upon the deployment of large-scale energy efficiency programs in this state, and should be pursued aggressively by the Commission.[26] Accordingly, the OEC supports this recommendation.

## VI. CONCLUSION

In its initial post-hearing brief, the OEC established the gross inadequacy of the FirstEnergy portfolio plan, and made recommendations for substantial revision. Other parties note those same deficiencies, and offer expansive recommendations to improve the content and character of that deficient plan. In contrast, FirstEnergy's post hearing brief offers no insight on the most difficult and vexing question presented by its portfolio plan; in particular FirstEnergy's brief does nothing to bolster the legal, technical, or prudential justification behind its shared savings proposal. Moreover, FirstEnergy does not address in its post-hearing brief its excessive reliance on unproductive and expensive historic mercantile programs. In consideration of the weight of the evidence presented in this case, and given the failure of FirstEnergy to coherently explain and justify central portions of its proposal, the OEC renews the request of its post hearing brief: 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.

[25] Id.
[26] Id.

Respectfully Submitted,

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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 12th day of April, 2010.

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