BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of Cleveland Electric Illuminating Company and Charter Manufacturing Company, Inc., For Approval of a Special Arrangement Agreement With a Mercantile Customer	)))))	Case No. 09-1117-EL-EEC

RESPONSE TO REPLY OF FIRSTENERGY
BY
THE OHIO ENVIRONMENTAL COUNCIL AND THE OFFICE OF THE OHIO CONSUMERS' COUNSEL

INTRODUCTION

On May 4, 2010, the Ohio Environmental Council ("OEC") and the Office of the Ohio Consumers' Counsel ("OCC") (collectively "OEC/OCC" or "intervenors") filed Comments regarding the above-captioned application by the Cleveland Electric Illuminating Company ("FirstEnergy") and the Charter Manufacturing Company ("Charter"). The Comments included a Request for a Workshop regarding the mercantile opt-out agreements authorized under R.C. 4928.66 and O.A.C. 4901:1-39-05. On May 19, 2010, FirstEnergy filed a Reply to the OEC/OCC Comments. FirstEnergy's Reply spends significant time arguing that intervenors have no right to comment on pending mercantile opt-out applications. Next, the Reply explains why the Joint Application complies with all applicable laws and rules. However, the Applicants' Reply misapplies the rules and misunderstands the nature of the intervenors' participation in these cases.

The OEC and the OCC file this response to clarify some of the issues raised by FirstEnergy.[1]

I. Intervenors Have The Right To Comment On Pending Mercantile Opt-Out Applications.

The Applicants argue that "OEC/OCC's attempt to comment on this Application more than four months after its filing is out-of-rule and should be ignored."[2] The Applicants justify this conclusion by arguing that the rules governing mercantile customer exemptions, O.A.C. 4901:1-3905, et seq., do not allow intervenor comments on such applications. The Applicants suggest that the rules only allow comment on an annual status report filed pursuant to O.A.C. 4901:1-39-06(A).[3] FirstEnergy also takes issue with the fact that OEC/OCC waited "more than four months" after the application was filed to submit comments.[4] FirstEnergy has made clear that it wants to ensure a "streamlined process" for quick approval of its applications with minimal scrutiny from interested parties.[5] Unfortunately for FirstEnergy, there is simply no law or rule that will accommodate its ideal process to the exclusion of intervenor participation on this public docket. It is the Commission's stated policy "to encourage the broadest possible participation in its proceedings," and FirstEnergy offers no reason to depart from this policy now.[6]

A. Intervenors Have Been Granted Leave To Intervene In Other Mercantile Opt-Out Applications.

FirstEnergy argues that there is no basis in law for interested party intervention or participation in these dockets. This is untrue. FirstEnergy cannot cite any law or regulation

[1] FirstEnergy's "Reply" to the OEC/OCC Comments was filed essentially as a memorandum contra those comments; therefore, this "Response" is being filed within the seven day time period allowed for replies to memoranda contra pursuant to O.A.C. 4901-1-12.
[2] Reply at 2.
[3] Id.
[4] Id.
[5] Id.
[6] ***Cleveland Elec. Illum. Co.***, Case No. 85-675-EL-AIR, Entry dated January 14, 1986, at 2.

which prevents interested parties from intervening in or filing comments on this public docket. OEC/OCC have filed motions to intervene in dozens of mercantile opt-out applications, and have been granted leave to intervene in at least five.[7] The Commission has never denied a request for leave to intervene in a mercantile opt-out docket. The Company also argues that OEC/OCC should not be allowed to offer comment because the motions to intervene have not yet been ruled upon.[8] FirstEnergy should know that by rule, parties with pending motions to intervene before the Commission will be treated as parties to that case.[9] Finally, as FirstEnergy certainly knows, requests for leave to intervene would likely be granted in a Commission entry approving the application or otherwise disposing of the case, at which point intervenor comments would be moot.

B. OEC And OCC Have Taken An Active Role On Mercantile Issues, And FirstEnergy Has Never Before Objected To Intervenor Participation In Mercantile Dockets.

For many months, the OEC and the OCC have taken an active role in commenting on the mercantile exemption statute. The OEC and the OCC have participated in hearings and oral arguments on this issue[10] and filed dozens of motions to intervene, motions to dismiss, comments, discovery requests, applications for rehearing, and post-hearing briefs regarding mercantile exemption applications.[11] Both the OEC and the OCC were invited to participate in oral arguments before the full Commission on FirstEnergy's mercantile administrative

[7] See Case Nos. 09-595-EL-EEC; 09-1100-EL-EEC; 09-1200-EL-EEC; 09-1201-EL-EEC; 09-553-EL-EEC.
[8] Reply at 2.
[9] See O.A.C. 4901-1-05(D) ('"party'" includes all persons who have filed motions to intervene which are pending."); O.A.C. 4901-1-12(E); 4901-1-16(H).
[10] The OEC and the OCC granted permission to participate in oral arguments before the full Commission in Case No. 09-553-EL-EEC and provided substantive comment, including discovery responses and the introduction of evidence, in the hearing and post-hearing briefs in FirstEnergy's portfolio plan application, 09-1947-EL-POR, et. al.
[11] Over the last several months, the OEC and the OEC have filed motions to intervene in dozens of mercantile exemption applications that it views as potentially suspect. In one such case, 09-1226-EL-EEC, the OEC served discovery and ultimately filed a Motion to Dismiss the Application, which is still outstanding. The OEC and the OCC have filed comments in numerous other applications.

agreements.[12] The OEC and the OCC have consistently argued that FirstEnergy's heavy use of historic mercantile savings as its primary means of compliance with the initial energy efficiency benchmarks makes Commission and intervenor scrutiny critical.[13] Intervenors believe that close scrutiny of the mercantile exemption process is essential to protect the viability of Ohio's energy efficiency standards enacted by Senate Bill 221 ("S.B. 221").

Considering this history, FirstEnergy's most recent filing is especially disappointing. FirstEnergy has filed numerous responses to OEC's and OCC's briefs, motions, and comments, always challenging intervenors' substantive arguments and interpretation of the law applicable to mercantile applications. But the Company has never before challenged the OEC's and the OCC's ***right*** to make those arguments. FirstEnergy is apparently trying out this new strategy, late in the game, as a way to limit comment on their energy efficiency compliance efforts. This new strategy should be ignored by the Commission.

C. Scrutiny Of Mercantile Exemption Applications Is Appropriate Because The FirstEnergy Companies Intend To Use This And Other Historic Mercantile Savings To Satisfy A Majority Of Their 2010-2012 Energy Efficiency Benchmarks.

Intervenors have questioned FirstEnergy's reliance on historic mercantile savings applications, at least one of which is facially unlawful,[14] as a primary means of compliance with the EE/PDR benchmarks. The OEC made this point a focus of its Initial Brief in FirstEnergy's Portfolio Plan case, 09-1947-EL-EEC:

> "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-

[12] Case No. 09-553-EL-EEC.
[13] See, e.g., Case No. 09-1947-EL-POR, et. al., Post Hearing Brief of the OEC at pp. 8-13.
[14] The OEC filed a Motion to Dismiss in Case No. 09-1226-EL-EEC, an application that is contrary to law and facially ineligible for inclusion into FirstEnergy's EE/PDR portfolio. The Motion to Dismiss has yet to be ruled upon.

> 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]

R.C. 4928.66(A)(2)(c) permits a utility to take credit for past projects implemented by its customers. But the statute was not intended to be used as a primary means of achieving the energy savings mandated by S.B. 221. Nonetheless, FirstEnergy has begun a policy of seeking out mercantile savings for inclusion into its EE/PDR compliance plan, **even paying a finder's fee for third parties to locate historic savings projects for which it could take credit**.[19]

The mercantile exemption is the centerpiece of FirstEnergy's 2010-2012 EE/PDR compliance strategy, and therefore review of and comment on FirstEnergy's applications are appropriate.

II. The Application Does Not Comply With The Commission's Rules

The OEC/OCC Comments pointed out that the Joint Application was deficient because it lacked necessary information regarding measurement and verification methodologies, "remaining useful life," "avoided incremental cost," and cost effectiveness. We will not repeat the arguments from our Comments on these points. FirstEnergy, while not disputing that these issues must be addressed prior to approval of its application, suggests that this information must only be provided to Staff and not in its application.[20] However, the Ohio Administrative Code

[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.
[19] See Case No. 09-553-EL-EEC.
[20] Reply at 3.

states that an application must provide this information.[21] Information that is statutorily required to be included in the application must be included in the application. That it is submitted upon request to the Staff is not enough. There is no basis for the furtive, alternate process that FirstEnergy favors, and it is anathema to the legislative intent behind S.B. 221 to foster greater transparency.

A. FirstEnergy Misinterprets O.A.C. 4901:1-39-05(G)(4) In Arguing That It Does Not Have To Provide Certain Statutorily Required Information In Its Application.

FirstEnergy argues that intervenors "[lack] understanding concerning the realities of the competitive steel industry" and do not realize that certain relevant information must remain confidential.[22] The Company points out that O.A.C. 4901:1-39-05(G)(4) alludes to a procedure allowing mercantile customers to protect confidential information.[23] While this is true, FirstEnergy misinterprets this rule section. The relevant rule section regarding confidentially is excerpted below:

> "Such [mercantile exemption] application shall: Include a copy of the formal declaration or agreement that commits the mercantile customer's programs for integration, including any requirement that the electric utility will treat the customer's information as confidential and will not disclose such information except under an appropriate protective agreement or a protective order issued by the commission pursuant to rule 4901-1-24 of the Administrative Code."[24]

4901:1-39-05(G)(4) provides that the application must include a copy of any protective agreement that the utility may have with the mercantile customer. This section does not mean, as

[21] O.A.C. 4901:1-39-05(G)(5) requires descriptions of "methodologies, protocols, and practices" used to verify energy savings. O.A.C. 4901:1-39-05(F) describes when a project will be presumed to be the effect of an EE/PDR project, and thus eligible for a mercantile exemption. Among other requirements, an eligible project should include the early retirement of functioning equipment, or the installation of equipment that is more efficient than the industry standard. O.A.C. 4901:1-39-08(A) mandates that mercantile projects must meet the total resource cost test, and R.C. 4928.66(A)(2)(c) discusses cost-effectiveness as part of the Commission's "reasonableness" analysis.
[22] Reply at 3.
[23] Id.
[24] O.A.C. 4901:1-39-05(G)(4).

FirstEnergy suggests, that the applicants do not have to include the statutorily required information in their application. According to the rule cited above, if FirstEnergy so chooses it may file the statutorily required information with its application under seal, and only release that information to intervenors upon the execution of a protective agreement. The burden is on the applicants to demonstrate that the application complies with the law. The question of how to efficiently handle confidential information that must be disclosed prior to approval could be discussed in the workshop requested by intervenors or perhaps through the collaborative process. But FirstEnergy's argument, that 4901:1-39-05(G)(4) precludes its applications from having to meet the legal requirements for approval, does not make any sense.

B. Eligible Energy Efficiency Projects Must Meet The Total Resources Cost Test.

FirstEnergy argues that it is only required to make a cost-effectiveness showing in its annual report, and not in its exemption applications.[25] This is incorrect. FirstEnergy does not dispute that it must demonstrate that the "energy savings and peak-demand reductions associated with the mercantile customer's program are the result of investments that meet the total resource cost test, or that the electric utility's avoided costs exceeds the cost to the electric utility for the mercantile customer's program."[26] However, FirstEnergy suggests that this demonstration is not a pre-requisite to approval of an application, but can be provided subsequently in an annual report. First, we note that cost-effectiveness is an essential element of the "reasonableness" evaluation that must be completed by the Commission, pursuant to R.C. 4928.66(A)(2)(c), prior to approval.[27]

[25] Reply at 5.
[26] O.A.C. 4901:1-39-08.
[27] The Commission may authorize an exemption "if the commission determines that that exemption reasonably encourages such customers to commit those capabilities to those programs." This requires a demonstration of cost-effectiveness, which must be evaluated prior to application approval.

Second, there are fundamental questions regarding the cost-effectiveness of this project and others offered by FirstEnergy. FirstEnergy contends that the "Applicants demonstrated in their responses to Staff data requests that CEI's avoided costs greatly exceed the cost of the project to CEI."[28] However, if CEI paid a 1 cent per kwh "administrator fee" for the "discovery" of the historic mercantile savings,[29] and if CEI then offers an exemption from the EE/PDR rider, then it is very possible that the cost to CEI of granting the exemption actually ***exceeds*** the cost of new energy efficiency in the mercantile and industrial sector.

In its Portfolio Plan filing, FirstEnergy relies upon an ACEEE report, released in 2009, entitled "Shaping Ohio's Energy Future: Energy Efficiency Works."[30] 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.[31] Additionally, this will be low-cost energy efficiency; 10 separate categories of initiatives will cost on average 2.3 cents per kwh.[32]

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.[33] As a result, it is entirely possible that once all applicable costs are compared to the cost of creating new savings in the mercantile sector that ***CEI's avoided costs may actually be lower*** than the cost of the

[28] Reply at 5.
[29] An administrator fee in accordance with its proposed administrative agreements in Case No. 09-553-EL-EEC.
[30] See, e.g., Appendix D of FirstEnergy's Portfolio Plan, Case No. 1947-EL-POR, et. al.
[31] "Shaping Ohio's Energy Future: Energy Efficiency Works." American Council for an Energy Efficient Economy, ACEEE Report No. E092, March, 2009, p.17.
[32] Id.
[33] Id.

exemption, the finder's-fee for historic mercantile savings, and the administrative costs associated with contracting, application submission, and verification.

Accordingly, even if FirstEnergy's preferred method of evaluating the "reasonableness" of an exemption were accepted, that reasonableness, on cost grounds alone, would be seriously tested. The Commission is within its right to consider the cost-effectiveness of these projects prior to approval.

III. Intervenors Are Pleased That FirstEnergy Is Willing To Participate In A Workshop As Requested By The OEC, OCC, And Commissioner Roberto.

Despite FirstEnergy's objections to the Comments filed by OEC/OCC, the Company says that it is willing to participate in a workshop that could help streamline the mercantile application process by, among other things, developing a standard application form.[34] The OEC, OCC, and Commissioner Roberto[35] have all suggested such a workshop to streamline the application process, and the OEC/OCC Comments suggested that such a workshop take place as soon as possible. FirstEnergy also states that a workshop "could benefit all parties, [but that] CEI would support such efforts only if they did not further delay rulings on [pending applications]."[36] We understand FirstEnergy's interest in having its applications reviewed quickly, and we believe that such a workshop would work towards this end. The OEC and the OCC do not support FirstEnergy's request to have all of its applications approved ***prior to*** such a workshop. However, OEC/OCC requested that a workshop be convened in the very near term, which could alleviate FirstEnergy's concerns that a workshop would significantly delay approval of its applications. Accordingly, with regard to the workshop concept, there appears to be much common ground and little difference between FirstEnergy's position and OEC's/OCC's. The

[34] Reply at 8.
[35] Case No. 09-1102-EL-EEC, Finding and Order (Roberto, dissenting).
[36] Reply at 8.

Commission, therefore, should convene a workshop, as requested in the OEC's/OCC's Comments, as soon as possible.

CONCLUSION

In conclusion, much of FirstEnergy's Reply to the Comments filed by the OEC and the OCC should be disregarded. FirstEnergy's newly minted argument that the OEC and the OCC do not have a right to comment on mercantile exemption applications is baseless and should be ignored. The Company's Reply does not make any showing of why its mercantile exemption applications should not be required to comply with all applicable rules. Therefore, intervenors' Comments are still valid and have not been rebutted by the Company. The Commission should convene a workshop to address these questions and the make the mercantile exemption application process more efficient.

Respectfully Submitted,

/s/ Will Reisinger

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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing Comments has been served upon the following parties, via electronic and/or U.S. Mail, this 26th day of May, 2010.

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Summary: Response Response to FirstEnergy's Reply by the Ohio Environmental Council and the Ohio Consumers' Counsel electronically filed by Mr. Will Reisinger on behalf of Ohio Environmental Council