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BEFORE THE
PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of Protocols for the Measurement and Verification of Energy Efficiency and Peak Demand Reduction Measures	))))	**Case No. 09-512-GE-UNC**

APPLICATION OF OHIO EDISON COMPANY, THE CLEVELAND ELECTRIC ILLUMINATING COMPANY, AND THE TOLEDO EDISON COMPANY FOR REHEARING

Pursuant to R.C. § 4903.10 and Rule 4901-1-35, O.A.C., and based upon the Commission's attempt to clarify its October 15, 2009 Finding and Order, Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company (collectively, "Companies") hereby apply for a rehearing arising from the Commission's June 16, 2010 Entry on Rehearing ("Entry") in the above captioned case on the basis that:

A. **The Commission's requirement to tie savings for equipment that has either reached the end of its useful life or involves programs other than those targeting the early retirement of functioning equipment to the highest of state or federal standards, or current market practices, *is unlawful both as a violation of R.C. 4928.66 and as being* unconstitutionally vague in violation of the due process clauses of both the Ohio and United States Constitutions.**

Accordingly, for the reasons more fully discussed in the attached Memorandum in Support, the Companies respectfully ask the Commission to grant the Companies' application for rehearing and issue an Entry on Rehearing consistent with this filing.

Respectfully submitted,

Kathy J. Kolich (M.T.A. 0080713)

Kathy J. Kolich (Reg. No. 0038855)
FIRSTENERGY SERVICE COMPANY
76 South Main Street
Akron, OH 44308
T: 330-384-4580
F: 330-384-3875
Email: kjkolich@firstenergycorp.com

On behalf of Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company

BEFORE THE
PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of Protocols for the Measurement and Verification of Energy Efficiency and Peak Demand Reduction Measures	))))	**Case No. 09-512-GE-UNC**

MEMORANDUM IN SUPPORT OF THE APPLICATION FOR REHEARING

I. INTRODUCTION

On June 24, 2009, the Commission issued an entry in the instant proceeding, seeking comments on various issues related to measurement and verification of energy efficiency/demand reduction ("EEDR") programs. Based on comments from various parties, including Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company (collectively, the "Companies"), the Commission, in its October 15, 2009 Finding and Order ("Order"), issued certain policy statements related to (among other things) issues involving measurement and verification and the technical resource manual -- which were set forth in "Appendix A." of the Commission's June 24th Entry. The Industrial Energy Users – Ohio filed an application for rehearing challenging the lawfulness of the Commission's ruling, highlighting the fact that the Commission failed to address any of the legal challenges raised by IEU and others.[1] (IEU AFR II, p. 5.) In its June 16, 2010 Entry, the Commission attempted to clarify its position on the use of "the highest standard provided by federal regulations, state regulations, or market practices, explaining that the baseline for calculating savings toward statutory

[1] The Companies also challenged the Commission's finding that projects with less than a one year payback would not be considered for any type of incentive. *See generally*, Companies' Nov. 13, 2009 AFR. Inasmuch as the Companies have already preserved this issue for appeal, the Companies will not reiterate those arguments in this application.

benchmarks should be "the highest of state or federal standards, or current market practices" based on a Department of Energy website, and that energy savings derived from "business as usual" practices should not be counted. (Entry, pp. 5-6.) The Commission also indicated in its Entry that it will continue to provide guidance through "the development of the [Technical Resource Manual ("TRM")]" and through the development of a standard application template and instructions. (Entry, fn1, p. 5, p. 6.) It is this attempt by the Commission to create and then attempt to clarify the standards that gives rise to the Companies' application for rehearing set forth herein.

As more fully explained below, the Commission's limitations on the nature of projects that it will allow to be included for purposes of counting towards statutory energy efficiency benchmarks are a violation of R.C. 4928.66. Moreover, assuming for the sake of argument that the Commission's proposed limitations are permitted (which they are not), the standards, guidelines and practices which are continuing to be developed, are unconstitutionally vague in violation of the Companies' due process rights.

II. ARGUMENTS

4928.66(A)(2)(c) states:

> Compliance with [the energy efficiency and demand reduction benchmarks] shall be measured by including the effects of *all* demand response programs for mercantile customers of the subject electric distribution utility and *all* such mercantile *customer-sited energy efficiency and peak demand reduction programs*.... [Emphasis added.]

As the Companies have argued in several other dockets, which are incorporated herein by reference[2], the Commission must include the effects of ALL energy efficiency projects committed through their mercantile customer project program. Constraints imposed by the Commission that reduce those effects violate the express provision set forth above.

Even if it is assumed for the sake of argument that the Commission can place such constraints on the aforesaid effects (which it cannot), the standards to be used to determine the total effect of such programs and projects are unconstitutionally vague because they provide neither fair notice of what is required or clear standards as to how the requirement is to be enforced.[3]

The Due Process Clauses of the Fifth and Fourteenth Amendment give rise to the void-for-vagueness doctrine. The doctrine has two primary goals. The first goal is to ensure "fair notice" to the subject of the law as to what the law requires; the second is to provide standards to guide the discretion of those charged with enforcing the law. *Columbia, Natural Resources, Inc. v. Tatum*, 58 F.3d 1101, 1104 (6th Cir. 1995). The United States Supreme Court has defined the first goal with greater specificity by holding that "[a] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess as to its meaning and differ as to its application, violates the first essential of due process of law." *Id.* at 1105 (citing *Connally v. General Constr. Co.*, 269 U.S. 385, 391, 46 S. Ct. 126, 70 L.Ed 322 (1926)).

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[2] *See In re 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, Companies' AFR I, pp. 7-12 (May 15, 2009).

[3] The Companies have made similar challenges in other dockets. Rather than reiterating these arguments in their entirety in this filing, the Companies incorporate them herein by reference. *See In re 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, Companies' AFR II, pp. 6-16 (July 17, 2009).

The second goal "relates to notice to those who must enforce the law . . . [t]he standards of enforcement must be precise enough to avoid 'involving so many factors of varying effect that neither the person to decide in advance nor the jury after the fact can safely and certainly judge the result.'" *Id.* (citing *Cline v. Frink Dairy Co.*, 274 U.S. 445, 465, 47 S.Ct. 681, 71 L.Ed. 1146 (1927)).

Although the vagueness doctrine arises most often in the context of criminal laws that implicate First Amendment values, "vague laws *in any area* suffer a constitutional infirmity." *Ashton v. Kentucky*, 384 U.S. 195, 200, 86 S.Ct. 1407, 16 L.Ed.2d 469 (1966) (collecting cases at n. 1) (emphasis added). *See also, Cline*, 274 U.S. at 463 ("The principle of due process of law requiring reasonable certainty of description in fixing a standard for exacting obedience from a person in advance has application as well in civil as in criminal legislation.") Laws that impose criminal penalties or sanctions or reach a substantial amount of constitutionally protected conduct, however, must satisfy a "higher level of definiteness." *Belle Maer Harbor v. Charter Township of Harrison*, 170 F.3d 553, 557 (6th Cir. 1999).

The Ohio Supreme Court re-affirmed and clarified the void-for-vagueness doctrine in its recent decision in *Norwood v. Horney*, 110 Ohio St.3d 353, 2006-Ohio-3799. The court struck down a municipal ordinance that allowed private property in a "deteriorating area" to be taken by eminent domain, even though the municipal code set forth "a fairly comprehensive array of conditions that purport to describe a 'deteriorating area,' including . . . incompatible land uses, nonconforming uses, lack of adequate parking facilities, faulty street arrangement, obsolete platting, and diversity of ownership." *Id.* at ¶ 93. The Court held:

> In the cases before us, we cannot say that the appellants had fair notice of what conditions constitute a deteriorating area, even in

> light of the evidence adduced against them at trial. The evidence is a morass of conflicting opinions on the condition of the neighborhood. Though the Norwood Code's definition of 'deteriorating area' provides a litany of conditions, it offers so little guidance in application that it is almost barren of any practical meaning.
>
> In essence, deteriorating area is a standardless standard. Rather than affording fair notice to the property owner, the Norwood Code merely recites a host of subjective factors that invite ad hoc and selective enforcement – a danger made more real by the malleable nature of the public-benefit requirement.

Id. at ¶¶ 97-98.

The void-for-vagueness doctrine, as illustrated by the foregoing cases, is clearly violated by the Commission's Entry in which it sets standards based on "the highest standard provided by federal regulations, state regulations, or market practices, as reflected on the Department of Energy's Energy Information Administrator website," and precludes activities derived from "business as usual practices." The Commission, in essence, admitted that further clarification of these standards is necessary, saying that "[t]hrough the development of the TRM in this docket, we continue to provide guidance on the application of current market practices." (Entry, p. 5, fn.1) Given that the TRM has yet to be completed, the Commission's continuous guidance on what it means by "current market practices" is non-existent. Further, the Commission indicated the need for a standard application and related instructions that would be developed by its staff "in the near future." (Entry, p. 6.) Both of these statements indicate the Commission's belief that additional guidance on the meaning of its standards is necessary. Ironically, while the statute itself is relatively clear and precise in articulating that the effects of *all* energy efficiency programs should be included for purposes of complying with statutory energy efficiency benchmarks, the Commission's Entry so muddles the requirements that it drives the regulatory scheme over the constitutional brink. R.C. 4928.66(C) imposes a

forfeiture, payable to the state, on a utility that fails to comply with the requirements of R.C. 4928.66(A). The statute is a penal statute, see *Cleveland Mobile Radio Sales, Inc. v. Verizon Wireless*, 113 Ohio St. 3d 394, 2007-Ohio-2203, and as such, it, and any rules promulgated to carry it into effect, must provide a "high level of definiteness." *Belle Maer Harbor*, 170 F.3d at 557; *Norwood v. Horney*, at ¶¶ 84-85. The Commission's pronouncement in its Entry, however, does not even cross the threshold for satisfying a minimal level of definiteness.

III. CONCLUSION

In light of the foregoing, the Companies ask the Commission to grant rehearing to eliminate any constraints on determining the effects of energy efficiency programs. Alternatively, assuming such constraints are permitted by law, the standards, guidelines and practices set forth in the Commission's Entry are unconstitutionally vague and, accordingly are unlawful and would have to be further clarified consistent with Ohio law. Accordingly, the Companies respectfully ask that its request for rehearing be granted.

Respectfully submitted,

Kathy J. Kolich (0038855)

Kathy J. Kolich (Reg. No.0038855)
FIRSTENERGY SERVICE COMPANY
76 South Main Street
Akron, OH 44308
T: 330-384-4580
F: 330-84-3875
Email: kjkolich@firstenergycorp.com

ATTORNEY FOR APPLICANTS, OHIO EDISON COMPANY, THE CLEVELAND ELECTRIC ILLUMINATING COMPANY, AND THE TOLEDO EDISON COMPANY

CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that a copy of the foregoing Application for Rehearing has been served via first class mail, postage prepaid, this 16th day of July, 2010, upon the individuals or companies set forth in the service list below:

Kathy J. Kolich (per T.A. 0080713)
Kathy J. Kolich, Esquire

Elizabeth H. Watts
Duke Energy Ohio, Inc.
155 East Broad Street, Suite 2100
Columbus, OH 43215

Samuel C. Randazzo / Lisa G. McAlister
McNees, Wallace & Nurick LLC
Fifth Third Center, 17th Floor
21 East State Street
Columbus, OH 43215

Jeffrey Small
Ohio Consumers' Council
10 West Broad Street, Suite 1800
Columbus, OH 43215-3485

Steven T. Nourse
American Electric Power Service Corp.
1 Riverside Plaza, 29th Floor
Columbus, OH 43215

Randall V. Griffin
The Dayton Power & Light Company
1065 Woodman Drive
Dayton, OH 45432

Eric B. Gallon
Porter Wright Morris & Arthur LLP
Huntington Center, Suite 3000
41 South High Street
Columbus, OH 43215

Vectren Energy Delivery of Ohio, Inc.
Ronald E. Christian
One Vectren Square
Evansville, IN 47708

Columbus Southern Power
Ohio Power Company
Selwyn J. Dias
Suite 800
88 East Broad Street
Columbus, OH 43215-3550

Mark A. Whitt
Carpenter, Lipps & Leland LLP
280 Plaza, Suite 1300
280 North High Street
Columbus, OH 43215

Paul A. Colbert
Jones Day
325 John H. McConnell Boulevard, Suite 600
P.O. Box 165017
Columbus, OH 43216-5017

David C. Rinebolt
Ohio Partners for Affordable Energy
231 West Lima Street
P.O. Box 1793
Findlay, OH 45840-1793

Candace Jones
Ohio Department of Development
77 South High Street
P.O. Box 1001
Columbus, OH 43216-1001

Nolan M. Moser
The Ohio Environmental Council
1207 Grandview Avenue
Columbus, OH 43212-3449

Joe Clark
McNees Wallace & Nurick LLC
21 East State Street, 17th Floor
Columbus, OH 432315

Amy Spiller
Duke Energy Business Services, Inc.
221 East Fourth Street, 25 at II
Cincinnati, OH 45202

Carolyn S. Flahive
Thompson Hine LLP
10 West Broad Street, Suite 700
Columbus, OH 43215

Theodore Robinson
Citizen Power
2121 Murray Avenue
Pittsburgh, PA 15217

Environment Ohio
Amanda Moore
203 East Broad Street, Suite 3
Columbus, OH 43215

Kenneth D. Schisler
EnerNOC, Inc.
75 Federal Street, Suite 300
Boston, MA 02110

Mary W. Christensen
Christensen Christensen Donchatz
Kettlewell & Owen
100 East Campus View Blvd., Suite 360
Columbus, OH 43235

Teresa Orahood
Bricker & Eckler LLP
100 South Third Street
Columbus, OH 43215-4291

Marvin I. Resnik (Retired)
American Electric Power
1 Riverside Plaza, 29th Floor
Columbus, OH 43215

Richard M. Bulgrin
Public Utilities Commission of Ohio
180 East Broad Street
Columbus, OH 43215

Carys Cochern
Duke Energy
155 East Broad Street, 21st Floor
Columbus, OH 43215

Dayton Power & Light Company
Dona Seger-Lawson
1065 Woodman Drive
Dayton, OH 45432

Michael E. Heintz
Environmental Law & Policy Center
1207 Grandview Avenue, Suite 201
Columbus, OH 43212

Henry Eckhart
50 West Broad Street, Suite 2117
Columbus, OH 43215

Thomas J. O'Brien
Bricker & Eckler, LLP
100 South Third Street
Columbus, OH 43215