

**BEFORE THE
PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of Ohio)	
Edison Company, The Cleveland)	
Electric Illuminating Company and The)	Case No. 11-126-EL-EEC
Toledo Edison Company to Amend)	11-127-EL-EEC
Their 2010 Energy Efficiency and Peak)	11-128-EL-EEC
Demand Reduction Benchmarks)	

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


Pursuant to R.C. § 4903.10 and Rule 4901-1-35, O.A.C., The Cleveland Electric Illuminating Company (“CEI”), and The Toledo Edison Company (“Toledo Edison”) (collectively, the “Companies”) hereby apply for a rehearing from the Commission’s May 19, 2011 Finding and Order (“Order”) issued in the above-captioned case, because said Order is unreasonable and unlawful in the following respect:

The Commission’s determination that the request of CEI and Toledo Edison for an amendment to their respective 2010 statutory energy efficiency and/or peak demand reduction benchmarks was moot is contrary to law and ignores relevant facts.

For the reasons set forth in greater detail in the Companies’ Memorandum in Support, which is attached hereto and incorporated herein by reference, the Companies

respectfully request that the Commission grant the Companies' application for rehearing and issue an Entry on Rehearing consistent with this filing.

Respectfully submitted,



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ATTORNEYS FOR APPLICANTS, THE
CLEVELAND ELECTRIC ILLUMINATING
COMPANY AND THE TOLEDO EDISON
COMPANY

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**MEMORANDUM IN SUPPORT OF THE APPLICATION
FOR REHEARING**

I. Introduction

As will be explained in more detail below, this Application for Rehearing of the Cleveland Electric Illuminating Company (“CEI”) and The Toledo Edison Company (“Toledo Edison”) (collectively, “Companies”)¹ is being filed because the Commission’s ruling in this proceeding, when coupled with future Commission rulings, may cause either or both of the Companies to be found in non-compliance with 2010 statutory energy efficiency (“EE”) and/or peak demand reduction (“PDR”) benchmarks as set forth in R.C. § 4928.66(A)(1) (“2010 Benchmarks”). Without a modification of the Commission’s May 19, 2011 Finding and Order issued in this proceeding (“Order”), the Companies may be subject to penalties, without any opportunity to challenge such a finding or seek remedies afforded them by law. While the issue raised by the Application for Rehearing is dependent on future events unfolding in a certain way, without a modification to the Order consistent with this memorandum, the Commission’s finding is unlawful. Accordingly, the Companies

¹ Inasmuch as the assignment of error does not affect Ohio Edison Company, unless otherwise expressly stated, this Application for Rehearing focuses only on CEI and Toledo Edison.

respectfully ask that the Order be modified to automatically amend the Companies' 2010 Benchmarks to levels actually achieved during 2010 should future Commission rulings cause the Companies to fall below the 2010 benchmarks as set forth in R.C. § 4928.66² or, alternatively, at a minimum, to provide the Companies with an opportunity to submit another request for an amendment to their 2010 benchmarks should such a situation arise.

II. Background

On December 15, 2009, pursuant to Rule 4901:1-39-04(A), O.A.C., the Companies, along with Ohio Edison Company ("Ohio Edison"), submitted their respective Three Year Energy Efficiency and Peak Demand Reduction Program Portfolio Plans ("EEPDR Plans") in Case No. 09-1947-EL-POR ("Portfolio Case").³ These plans were designed to achieve the statutory EE and PDR benchmarks set forth in R.C. § 4928.66(A)(1) for the period January 1, 2010 through December 31, 2012.

On January 11, 2011, Ohio Edison and the Companies submitted in this docket an Application for Amendment of their 2010 Benchmarks ("2010 Application"). In the 2010 Application, the Companies indicated that they both would achieve their 2010 Benchmarks, based upon estimated results from approved programs *and* anticipated results from applications then pending before the Commission.⁴ These results were summarized on Exhibits A and B attached to the 2010 Application, which for the convenience of the Commission are also attached as Exhibits A and B to this

² In light of the delays in ruling on many of these pending applications, the due process violations alone should be sufficient grounds to warrant an automatic amendment to the 2010 Benchmarks.

³ See generally, *In re, 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 Mechanism*, Case No. 09-1947-EL-POR *et al.*, (hereinafter "Portfolio Case"), Application and Related Reports (Dec. 15, 2009).

⁴ 2010 Application, p. 1.

Application for Rehearing. Because the Commission indicated in a January 7, 2010 Finding and Order in Case No. 09-1004-EL-EEC that it would modify each of the Companies' 2010 EE benchmarks when addressing the Companies' EEPDR Plans in the Portfolio Case,⁵ and no order had been issued in the Portfolio Case as of the end of 2010, the Companies could not be certain of their compliance with 2010 EE requirements. Therefore, in an abundance of caution, the Companies requested an amendment to their 2010 Benchmarks *if and only to the degree* one was necessary to comply with their as-of-then, yet-to-be-defined, 2010 EE benchmarks.⁶

On March 23, 2011, the Commission issued its ruling in the Portfolio Case, indicating that it found it "unnecessary to further revise the specific statutory benchmarks for 2010, 2011 and 2012, provided that [Ohio Edison and the Companies] meet the cumulative energy efficiency savings for the three years implicit in Section 4928.66(A)(1)(a), Revised Code."⁷

Pursuant to Rule 4901:1-39-05, O.A.C., the Companies must submit an annual status report in which their compliance with annual EE and PDR benchmarks is addressed. Because the above quote from the Portfolio Order only addressed the statutory EE benchmarks, and not the request for amendments to PDR benchmarks, and the Companies' deadline for submitting their status report was quickly approaching, the Companies, on May 16, 2011, filed a motion in this proceeding for an extension of time in which to file their status report.⁸ In their memorandum in support of this motion for an extension, the Companies interpreted the above quote

⁵ *In re Application to Amend Energy Efficiency Benchmarks*, Case No. 09-1004-EL-EEC, *et al* ("2009 Amendment Case"), Finding and Order at 4 (Jan. 7, 2010).

⁶ 2010 Application, p. 2.

⁷ Portfolio Case, Case No. 09-1947-EL-POR, *et al*, Opinion and Order, p. 6 (Mar. 23, 2011).

⁸ In a March 9, 2011 Finding and Order in this proceeding, the Commission extended the deadline for filing the Status Report from March 15, 2011 to Sunday, May 15, 2011.

from the Portfolio Case as allowing any shortfall in any of the three years to be made up by the end of 2012, thus concluding that their request for an amendment to their respective 2010 EE benchmarks had been mooted by the Commission's findings in the Portfolio Case.⁹ While the Commission also found the Companies' request for amendments to their 2010 EE benchmarks to be moot, it did not agree with the Companies' rationale, instead concluding that the mooting of the issue was due to the fact that the Commission found in the Portfolio Case that it was unnecessary to modify the Companies' 2010 EE benchmarks.¹⁰

As more fully discussed below, the Commission erred as a matter of law when it rendered moot the Companies' request for amendments to their 2010 Benchmarks. It also ignored several significant facts.

III. Argument

As a preliminary matter, Toledo Edison exceeded its 2010 PDR benchmark based on actual results and therefore Toledo Edison's compliance with PDR benchmarks is not an issue. However, its compliance with its 2010 EE benchmark and CEI's compliance with both its 2010 EE benchmark and 2010 PDR benchmark are based on both actual results and projected results included in applications *still pending* approval before the Commission. If the Commission issues adverse rulings in any or all of the cases involving the pending applications submitted in 2009 and 2010 ("Pending Cases") that negatively affect the energy savings and PDR results that the Companies can count toward 2010 compliance, then there is a possibility that, without amendment, Toledo Edison may be found non-compliant with its 2010 EE benchmark and/or CEI may be found non-compliant with either or both its 2010 EE

⁹ Motion for Extension, p. 3 (May 16, 2011).

¹⁰ Id. at 4-5.

benchmark and its 2010 PDR benchmark.¹¹ Because the Companies cannot know the outcome of these pending cases, they respectfully ask the Commission to modify the Order either to automatically adjust the Companies' 2010 Benchmarks to actual levels achieved in 2010 should future Commission rulings negatively impact the Companies' actual EE and PDR results to levels that make either of them no longer in compliance with 2010 EE and PDR requirements, or, alternatively, at a minimum, to allow the Companies to submit another request for amendments to their 2010 EE and/or PDR benchmarks should the need arise. As more fully discussed below, without such a modification, the Companies would have no recourse to challenge the Commission's findings vis-à-vis benchmark compliance.

Moreover, while both the Companies and the Commission concluded that the Companies' request for an amendment to their 2010 EE benchmarks had been rendered moot, it is the difference in rationale that causes the need for this application for rehearing. Under the Companies' interpretation, there was no need to be concerned with a 2010 EE shortfall arising from subsequent Commission rulings because, as they interpreted the Commission's March 23, 2011 Portfolio Order, they had until 2012 to make up any such shortfall. However with the Commission's clarification of the order in the Portfolio Case through the May 19, 2011 Order in this proceeding, in which it indicated that the statutory benchmarks were not amended in the Portfolio Case, and that "the Companies were required to achieve those benchmarks or to seek an amendment from the Commission,"¹² the issue of whether to grant the Companies' request for amendment is not moot. Under the

¹¹ As indicated on attached Exhibit C, which is Exhibit 2 that was filed in the 2010 Status Report Case (Case Nos. 11-2956-EL-EEC, 11-2958-EL-EEC and 11-2959-EL-EEC), and includes projected results from applications still pending before the Commission, CEI exceeded its PDR benchmark by only .03 MW.

¹² Finding and Order, p. 4 (May 19, 2010).

Commission's interpretation, the Companies must request an amendment if they cannot achieve their 2010 statutory benchmarks. Because the Companies have already sought such an amendment and the Commission ruled that no amendment was necessary, absent a revision in the Order that either automatically adjusts their benchmarks to actual levels achieved in 2010, or, alternatively, allows this issue to be revisited should subsequent Commission rulings render the Companies non-compliant with statutory mandates, the Companies would have no recourse in which to address the matter.

A. The Commission erred when it rendered moot the Companies' request for amendments to their respective EE and/or PDR benchmarks.

In the Order, the Commission rendered moot the Companies' request for amendments to their 2010 Benchmarks because, as the Commission noted, the Companies represented that they would meet the benchmarks and that "the application for an amendment was only necessary if the Commission amended [the Companies'] statutory 2010 energy efficiency benchmarks." Because the Commission did not amend those benchmarks, the Commission concluded that it was unnecessary to grant the application for amendments.¹³ The above analysis, however, ignores a significant fact. While the Companies represented that they would meet their 2010 EE and PDR benchmarks, as part of that representation the Companies also indicated that these results were based partly on an assumption that pending applications and associated results ("Pending Cases") would be approved as filed.

¹³ Finding and Order, pp. 4-5 (May 19, 2010).

An issue is moot “when it presents no actual controversy or where the issues have ceased to exist.”¹⁴ In this instance, the issue of whether the Companies require an amendment and whether they can meet the prerequisites set forth in R.C. 4928.66(A)(2)(b) for such an amendment continues to exist because certain events that could affect the Companies’ compliance with 2010 Benchmarks have yet to unfold.¹⁵ If any or all of the Pending Cases ultimately are not approved as filed, without a modification to the Order as requested herein, the Companies are either left as potentially non-compliant with 2010 statutory EE and PDR requirements, or with a Commission ruling that indicates that no amendment is necessary, even though the Companies may no longer be in compliance with their 2010 Benchmarks. Moreover, because none of the Pending Cases involve the issue of whether the Companies complied with their 2010 Benchmarks, there would be no procedure through the Pending Cases that would allow the Companies to seek further consideration of the Companies’ need for an amendment to their 2010 Benchmarks, absent the relief being requested in this filing.¹⁶

IV. Conclusion

In light of the above, the issue of whether the Companies are in need of an amendment to their 2010 EE and PDR benchmarks is not moot. However, until the Commission rules on all of the Pending Cases, the Companies cannot determine if an

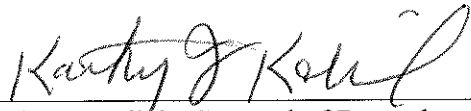
¹⁴ Black’s Law Dictionary, Sixth Ed., p. 1008 (citing *In re Lawson’s Estate*, 353 N.E. 2d 345, 347 (Ill. App); see also *Leonhart v. McCormick*, D.C. Pa., 395 F.Supp. 1073,1076 (A case is moot when a determination is sought on a matter which, when rendered , cannot have any practical effect on the existing controversy.)

¹⁵ R.C. 4928.66(A)(2)(b) allows the Commission to amend the statutory EE and PDR benchmarks if it can be demonstrated that the Companies could not reasonably achieve their benchmarks due to among other things, regulatory reasons beyond its reasonable control. Clearly a delay in ruling on applications that have remained pending for more than a year in some instances, would qualify either as such a regulatory reason, or as a violation of the Companies’ substantive due process rights.

¹⁶ Depending on how the future events unfold, the Companies, should they try to seek an amendment after rulings are issued in pending cases, could be subject to challenges on the grounds of *collateral estoppel* or *res judicata*.

amendment will be necessary. Therefore, the Companies ask that the Commission's Order be modified to either automatically adjust the Companies' 2010 EE and/or PDR benchmarks to actual levels achieved in 2010 should future Commission rulings cause either or both to be non-compliant, or, alternatively, to allow the Companies to file a second application for an amendment should they deem it necessary after all Pending Cases have been ruled upon.

Respectfully submitted,



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ATTORNEYS FOR APPLICANTS, THE
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2010 Summary of Cumulative Energy Efficiency Savings

Exhibit A

Case No. 11-126-EL-EEC et al

	(in GWhs)			
	OE	CEI	TE	Total
Benchmarks as filed in EEPDR Plans	200.1	151.8	81.1	433.1
Home Energy Analyzer (a)	4.6	3.1	1.3	9.0
Community Connections (b)	2.6	1.8	0.9	5.3
Transmission and Distribution Projects - As Filed (c)	12.9	3.8	6.1	22.8
Mercantile Projects - Approved	42.0	13.1	10.8	65.9
Mercantile Projects - As Filed (c)	107.3	252.4	117.3	476.9
Total Anticipated Energy Efficiency Savings Achieved (d)	169.4	274.2	136.4	579.9
Anticipated Results from Additional Programs Included in EEPDR Plans	69.3	54.7	18.6	142.6
Projected Cumulative Total with EEPDR Plan Approval	238.7	328.9	155.0	722.6

- (a) Values based on 300 KWh per participant as filed in the EEPDR Plans.
- (b) Community Connections savings are based on filed savings in EEPDR Plans, and may vary based on completed Evaluation, Measurement & Verification (EM&V) for this program.
- (c) Savings based on annualized values as filed.
- (d) Achieved values are preliminary, may not be all inclusive, include adjustments by appropriate loss factors, and are subject to EM&V. Verified results will be included in the Annual Program Portfolio Status Report.

2010 Summary of Cumulative Peak Demand Reduction

Case No. 11-126-EL-EEC et al

Exhibit B

	(in MWs)			
	OE	CEI	TE	Total
Benchmarks as filed in EEPDR Plans	91.0	71.5	34.4	196.9
Interruption Demand	66.0	48.0	144.0	258.0
Home Energy Analyzer (a)	1.1	0.7	0.3	2.1
Community Connections (b)	0.8	0.5	0.3	1.5
Transmission and Distribution Projects - As Filed	3.5	1.0	1.9	6.5
Mercantile Projects - As Filed	2.6	1.3	1.6	5.4
Mercantile Projects - As Filed	10.1	22.9	25.1	58.2
Total Anticipated Peak Demand Reduction Achieved (c)	84.1	74.5	173.2	331.7
Anticipated Results from Additional Programs Included in EEPDR Plans	33.3	31.1	7.6	72.0
Projected Cumulative Total with EEPDR Plan Approval	117.4	105.5	180.8	403.7

- (a) Values based on 0.0456 KW per participant as filed in the EEPDR Plans.
- (b) Community Connections savings are based on filed savings in EEPDR Plans, and may vary based on completed Evaluation, Measurement & Verification (EM&V) for this program.
- (c) Achieved values are preliminary, may not be all inclusive, include adjustments by appropriate loss factors, and are subject to EM&V. Verified results will be included in the Annual Program Portfolio Status Report.

EXHIBIT-C

Comparison of 2010 Partial Year Results to Benchmarks

Utility	Energy Efficiency Benchmarks and Results (MWH)				Peak Demand Benchmarks and Results (MW)				
	2009 Statutory Benchmark	Updated 2010 Compliance Benchmark	Savings from Approved Programs	Savings from Pending Programs	2009 Statutory Benchmark	Updated 2010 Compliance Benchmark	Savings from Approved Programs	Savings from Pending Programs	Savings from Approved and Pending Programs
OE	76,783	197,959	59,854	164,365	52.78	90.20	64.82	8.44	73.26
CEI	58,155	150,576	17,938	273,076	41.59	71.70	48.84	22.89	71.73
TE	31,349	81,204	13,355	129,964	20.07	35.20	123.94	24.97	148.91
Total	166,287	429,739	91,147	567,405	114.44	197.10	237.60	56.30	293.90

Notes:

- (A): The derivation of the Companies' updated EE benchmarks is set forth in Exhibit 7.
- (B): The Companies' *ex ante* EE partial year savings reflect the expected savings for the 2010 Programs, including the Approved Mercantile Projects.
- (C): The Companies' potential *ex ante* EE partial year savings reflect the projected savings from the 2009 and 2010 T&D and mercantile applications still pending before the Commission.
- (D): The Companies' sum total *ex ante* EE partial year savings from approved 2010 Programs as well as the projected savings from the T&D and mercantile applications still pending before the Commission.
- (E): The derivation of the Companies' updated PDR benchmarks is set forth in Exhibit 8.
- (F): The Companies' *ex ante* PDR partial year savings reflect capabilities/results expected for the 2010 Programs, including the Approved Mercantile Projects.
- (G): The Companies' potential *ex ante* PDR partial year savings reflect projected capabilities/results from the pending mercantile applications.
- (H): The Companies' sum total *ex ante* PDR partial year savings from approved 2010 Programs as well as the projected savings from the mercantile applications still pending before the Commission.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the Application for Rehearing of The Cleveland Electric Illuminating Company and The Toledo Edison Company and corresponding Memorandum in Support was served this 2d day of June, 2011, on the persons set forth below via electronic mail and electronic filing through the docketing system of the Public Utilities Commission of Ohio.


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Summary: Application for Rehearing and Memorandum in Support electronically filed by Ms. Kathy J Kolich on behalf of The Cleveland Electric Illuminating Company and The Toledo Edison Company