BEFORE THE
PUBLIC UTILITIES COMMISSION OF OHIO

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 No. 09-951-EL-EEC** **09-952-EL-EEC** **09-953-EL-EEC**

OHIO EDISON COMPANY, THE CLEVELAND ELECTRIC ILLUMINATING COMPANY AND THE TOLEDO EDISON COMPANY'S MEMORANDUM CONTRA APPLICATION FOR REHEARING OF THE OFFICE OF THE OHIO CONSUMERS' COUNSEL, CITIZEN POWER, INC., THE OHIO ENVIRONMENTAL COUNCIL AND THE NATURAL RESOURCES DEFENSE COUNCIL

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I. INTRODUCTION

Pursuant to Rule 4901-1-35(B), Ohio Administrative Code, Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company (collectively, "Companies") submit their Memorandum Contra the Application for Rehearing ("AFR") filed on July 8, 2011 by The Office of The Ohio Consumer's Counsel, Citizen Power, Inc., The Ohio Environmental Council and the National Resources Defense Council (collectively, "Applicants"). As more fully discussed below, Applicants raise nothing new in the AFR, repeating the same arguments made in the two motions for a hearing and the motion to dismiss submitted by Applicants earlier in this proceeding.[1] Moreover, even if the Commission desires to revisit these arguments, they are without merit and should once again be rejected and the AFR be denied.

II. ARGUMENT

Applicants raise nothing new in the AFR that has not already been addressed by the Commission. Once again they claim that R.C. § 4928.66(A)(1)(a) does not permit the Companies to receive credit towards their statutory energy efficiency and peak demand reduction ("EEPDR") benchmarks for certain 2009 transmission projects implemented through their transmission affiliate, American Transmission Systems, Inc. ("ATSI"), because ATSI is not the utility subject to the energy efficiency and peak demand ("EEPDR") benchmarks set forth in R.C. § 4928.66.[2] As the Commission already explained in Case No. 08-888-EL-ORD, and already confirmed in this proceeding, "[t]ransmission infrastructure improvements count."[3]

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[1] *In re Applications of [the Companies] for the Energy Efficiency and Peak Demand Reduction Program Portfolio*, Case Nos. 09-951, 09-952, 09-953 ("2009 T&D Case"), Motion for Hearing and Memorandum in Support (November 23, 2009); 2009 T&D Case, Motion to Dismiss and Memorandum in Support (May 28, 2010); and 2009 T&D Case, Second Motion for Hearing and Memorandum in Support (January 6, 2011).

[2] AFR Memorandum in Support (hereinafter "AFR Memo"), p. 4.

[3] *In re the Adoption of Rules for Alternative and Renewable Energy Technology, Resources, and Climate Regulations, and Review of Chapters 4901:5-1,4901:5-3,4901:5-5, and 4901:5-7 of the Ohio Administrative Code,*

Moreover, ATSI is a utility and the projects it did in 2009 are part of a program implemented by the Companies through its three year EEPDR compliance plan that was approved by the Commission in Case No. 09-1942-EL-EEC et al. Therefore, based on the plain meaning of R.C. § 4928.66 (A)(2)(d), the transmission projects implemented by ATSI come within the scope of the statute. Applicants also argue (again) that the methodologies used by the Companies to measure the energy savings resulting from the 2009 Transmission and Distribution ("T&D") projects ("Projects") are incorrect because they allegedly do not conform to a Technical Reference Manual ("TRM") – a TRM that did not exist when the Companies initially filed their 2009 Application to include the Projects for purposes of complying with the EEPDR requirements ("T&D Application"), and that still is not approved by the Commission.[4] Lastly, Applicants challenge the Commission's findings on procedural grounds, arguing that the Commission erred by not conducting an evidentiary hearing and by not specifying the reasoning behind its decision to approve the T&D Application in the June 8, 2011 Finding and Order ("Finding & Order"). As will be explained below, these alleged procedural errors, along with the other alleged errors are without merit and, accordingly, the Companies ask that the AFR be denied.

A. The Commission properly determined that the transmission projects conducted by ATSI, a public utility and the Companies' affiliate, may be included towards compliance with the Companies' statutory energy efficiency and peak demand reduction benchmarks.

Applicants argue that the Commission erred when it approved the transmission projects implemented by ATSI towards compliance with the Companies' EEPDR requirements because R.C. § 4928.66(A)(1)(a) does not mention the affiliate of an electric distribution utility when it

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Pursuant to Amended Substitute Senate Bill No. 221, Case No. 08-888-EL-ORD, Opinion and Order at p. 8 (April 15, 2009) (hereinafter "April 15 Order"). T&D Case, Finding and Order, p.7 (June 8, 2011).

[4] T&D Case, Finding and Order, pp. 6-7 (June 8, 2011).

discusses the implementation of energy efficiency programs.[5] As a preliminary matter, this argument has already been made by Applicants in prior filings in this proceeding and raises nothing new. The Commission has repeatedly confirmed that parties may not use an application for rehearing to rehash arguments that the Commission has already considered and rejected. *See, e.g., In the Matter of the Application of Columbus Southern Power Company to Update its gridSMART Rider,* Case No. 10-164-EL-RDR, Order dated Oct. 22, 2010, p. 3 (declining rehearing where the Commission "find[s] OCC has not presented any new arguments for the Commission's consideration that were not previously considered and rejected"); *In the Matter of the Adoption of Rules to Implement Substitute Senate Bill 162*, Case No. 10-1010-TP-ORD, Order dated Dec. 15, 2010, pp. 4-5 ("OPTC has raised no new arguments that would compel the Commission to modify the language of paragraph (C)(5) of the adopted rule. Rehearing is, accordingly, denied.") While this should be dispositive of this issue, should the Commission desire to entertain this assignment of error again, it must be rejected because Applicants misinterpret the requirements set forth in R.C. § 4928.66.

R.C. § 4928.66(A)(2)(d) states:

> Programs *implemented by a utility* may include demand-response programs, customer-sited programs, and [*T&D] infrastructure improvements that reduce line losses.* [Italics added.]

While Applicants challenge the calculation of the savings amount, they do not dispute the fact that (i) ATSI is a utility and owns the transmission system that provides transmission service to the Companies and their retail customers[6] (ii) the transmission projects done by ATSI were for system improvements and resulted in a reduction in line losses; and (iii) the Companies included

[5] AFR Memo, pp. 4-6.
[6] *In re the Application of the FirstEnergy Companies (Ohio Edison Company, The Cleveland Electric Illuminating Company, and Toledo Edison Company) for Approval of the Transfer of Their Transmission Assets to ATSI,* Case No. 98-1633-EL-UNC, Finding and Order at p. 6 (February 17, 2000).

a program within their three year EEPDR plans that were going to accumulate savings from T&D projects as part of their comprehensive compliance plan, which was approved by the Commission.[7] Therefore, based on the plain meaning of the above provision, ATSI's transmission projects may be counted towards the Companies' compliance with the statutory EEPDR requirements. First, the Companies implemented a program to accumulate the energy savings from T&D system improvement projects that resulted in reduced line losses. Second, ATSI is a utility and the transmission projects that are included in the T&D Application reduced line losses. Therefore, the projects should count towards the Companies' EEPDR compliance.

As this Commission recognized in the case of *WorldCom, et al. v. Toledo*, Case No. 02-3210-EL-PWC (Opinion & Order, May 14, 2003), "determining the intention of the legislative branch [is] of primary importance." *Id.* at 12. The Commission in *WorldCom*, relying on a litany of Ohio Supreme Court cases, concluded that if this intent "is discernable from the face of the statute, using the words either based on their ordinary meaning or based on their technical or statutory meaning, [the Commission] need go no farther." *Id.* at 11. Only if the language of the statute is deemed to be ambiguous should the Commission then look to other informational sources, such as purpose, background and legislative history, to determine the meaning and intent of the statute. *Id.* There is nothing ambiguous about R.C. § 4928.66(A)(2)(d). The Companies implemented a program to accumulate savings from T&D system improvement projects that resulted in a reduction of line losses that were done by their affiliate, ATSI, which is also a utility. Therefore, the Commission was correct to approve these projects towards compliance with the Companies' EEPDR requirements.

[7] *In re the Report of [the Companies] for 3 Year Energy Efficiency and Peak Demand Reduction Plan and Initial Benchmark Report*, Case Nos. 09-1942-EL-EEC, 09-1943-EL-EEC, 09-1944-EL-EEC, Application at p. 21 (December 15, 2009).

Applicants argue that the above provision is limited by R.C. §4928.66(A)(1)(a) that states: "[b]eginning in 2009, an electric distribution utility shall implement energy efficiency programs that achieve [the EEPDR requirements set forth therein]."[8] Review of other sections of a statute in order to determine the meaning of a specific provision included within the statute is only necessary if the provision in question is ambiguous. In this instance, as explained above, there is no ambiguity and, therefore, as the Commission explained in *WorldCom, supra*, the Commission "need go no farther." However, even if it is assumed for the sake of argument that R.C. § 4928.66(A)(2)(d) was ambiguous, the rules of statutory interpretation would lead the Commission to the same result.

When a court is called on to interpret a statute, it must "breathe sense and meaning into it; [ ] give effect to all of its terms and provisions; and [ ] render it compatible with other and related enactments whenever and wherever possible." *Commonwealth Loan Co. v. Downtown Lincoln Mercury Co.* (1st Dist. 1964), 4 Ohio App. 2d 4, 6. It should not insert words not included by the legislature, *State ex rel. Cassels v. Dayton City Sch. Dist. Bd. of Educ.* (1994), 69 Ohio St. 3d 217, 220, nor should it presume that the General Assembly intended to enact a law that produces an unreasonable or absurd result. *State ex rel. Webb v. Bliss*, 99 Ohio St. 3d 166, 170, 2003-Ohio-3049, ¶ 22. Statutes, when possible, should be construed based on their plain meaning, *State ex rel. Plain Dealer Publishing Co. v. Cleveland*, 106 Ohio St. 3d 70, 76-77, 2005-Ohio-3807, ¶ 38, consistent with legislative intent. *Dircksen v. Greene County. Bd. of Revision*, 109 Ohio St. 3d 470, 472, 2006-Ohio-2990, ¶ 16. Applying these principles, R.C. § 4928.66(A)(2)(d) allows inclusion of ATSI transmission projects for purposes of the Companies' compliance with their statutory EEPDR requirements.

[8] AFR Memo, p. 4.

Clearly the purpose underlying the enactment of R.C. § 4928.66 is to reduce energy consumption and lower peak demand. R.C. § 4928.66(A)(1) and (2) establish the requirements, making electric distribution utilities responsible for achieving the statutory benchmarks. The nature of the projects that can count towards compliance is not addressed in R.C. § 4928.66(A)(1) and (2). Rather, as expressly indicated in R.C. § 4928.66(A)(2), the subsections set forth thereunder were included "[f]or purposes of divisions (A)(1)(a) and (b)." Subsections (A)(2)(c) and (A)(2)(d) describe the types of programs and projects that can be counted towards compliance with the EEPDR requirements set forth in R.C. § 4928.66(A)(1)(a) and (b). R.C. § 4928.66(A)(2)(c) allows inclusion of "the effects of all demand-response programs for mercantile customers of the subject electric distribution utility ["EDU"] and all such mercantile customer-sited energy efficiency and peak demand reduction programs. …"Similarly, R.C. 4928.66(A)(2)(d) allows for the inclusion of programs implemented by a utility that involve infrastructure improvements that reduce line losses. Therefore, as discussed above, the ATSI projects must count based on the fact that the Companies implemented a program (that has been approved by the Commission)[9] to accumulate savings resulting from T&D system improvement projects. This interpretation of (A)(2)(d) makes this section compatible with R.C. § 4928.66(A)(1)(a) and (b) and does not create a nonsensical result.

Indeed, to interpret this provision in a manner that disallows inclusion of the ATSI projects renders this provision nonsensical by excluding projects virtually identical to those that could be counted by other utilities within the state, based upon the entity that performed the work rather than upon whether energy efficiency savings were achieved under an approved program. This distinction runs counter to legislative intent and the plain statutory language – a distinction

[9] All parties submitting the AFR participated in the proceeding in which the plan was approved. *In re the Report of [the Companies] for 3 Year Energy Efficiency and Peak Demand Reduction Plan and Initial Benchmark Report*, Case Nos. 09-1942, 09-1943, 09-1944.

that will raise the costs of compliance for the Companies' customers compared to those of other EDU customers in the state.[10] ATSI is a transmission owner and member of the regional transmission operator, PJM, Inc. ("PJM"), as are other EDUs within Ohio.[11] As a function of its membership in PJM, each member is governed by the PJM operating agreement. These agreements do not distinguish membership based on whether the transmission owner is an electric distribution utility. All members are treated the same, as are their transmission assets. Since PJM does not distinguish based on ownership structure neither should the Commission in this context related to energy efficiency savings arising from transmission projects, because the General Assembly expressly allows non-electric distribution utility-owned projects to be included for purposes of EEPDR compliance. As noted above, the Companies are permitted to include EEPDR savings resulting from projects implemented by mercantile customers. Therefore, it is clear that the General Assembly did not intend to limit programs and projects to only those owned by EDUs where the EDU performs the work.

In sum, R.C. § 4928.66(A)(2)(d) is not ambiguous and allows the results from the Companies' program that accumulates EEPDR savings from transmission projects implemented by their affiliate, ATSI, to count towards their R.C. § 4928.66 EEPDR compliance. However, even if assuming *arguendo* that there was ambiguity within (A)(2)(d), then the rules of statutory interpretation support a similar conclusion. Accordingly the Commission did not err by including the savings generated by the reduction in line losses contributed by the transmission system improvements implemented by ATSI.

[10] For every program where actual savings are disallowed, the Companies are required to incur additional costs in order to make up for the shortfall created by the disallowance. In this instance, costs of the T&D project are not included for recovery though the approved rider. Instead, as indicated in the Companies' three year plans, any such costs will be dealt with in a future proceeding. T&D Case, Finding and Order, pp. 7-8.

[11] To the extend necessary, the Companies would ask the Commission to take administrative notice of the various FERC orders that identify PJM members, and the operating agreements that govern these members.

B. R.C. § 4928.66(C) did not require the Commission to hold a hearing before approving the Application.

In their second assignment of error, Applicants argue that the Commission erred by not holding a hearing in this proceeding allegedly in violation of R.C. § 4928.66(C).[12] The provision relied upon by Applicants states, in pertinent part:

> If the Commission *determines*, after notice and opportunity for hearing and based upon its report under division (B) of the section, *that an electric distribution utility has failed to comply with an energy efficiency or peak demand reduction requirement* of Division (A) of the section, the Commission shall assess a forfeiture on the utility as provided under sections 4905.55 to 4905.60. [emphasis added.]

Based on the plain language of this statute, it is irrelevant for purposes of determining whether a hearing is necessary. The above provision is limited to adjudication of benchmark violations and provides due process protections for the EDU. There is no hearing requirement for applications submitted under R.C. § 4928.66(A)(2)(d). To read this subsection any other way would be illogical and contrary to the rules of statutory interpretation set forth in *WorldCom, supra*. Because Applicants' second assignment of error is based on the Commission's failure to satisfy a hearing requirement that does not exist, there is no error and this assignment of error should be rejected.

Notwithstanding the above, a hearing in this case is unnecessary as the Commission has properly granted the Companies' T&D Application based on undisputed facts regarding ATSI's purpose and structure, the T&D program already approved by the Commission when addressing the Companies' three year EEPDR plans, and Staff's independent investigation of the facts contained in the Companies' T&D Application. First, Applicants have not and do not dispute that ATSI is a utility, an affiliate of the Companies, and required to provide transmission service

[12] AFR Memo, pp. 6-7.

to the Companies for the benefit of retail customers. Moreover, it does not appear that Applicants request a hearing on this issue. Even if they did dispute this fact, the Commission could have appropriately taken administrative notice of these facts through its previous orders approving ATSI's structure.[13]

Second, a hearing was not necessary to confirm the Companies' calculations of their line loss savings because the Commission appropriately concurred with the Staff's independent assessment of the energy savings claimed in the T&D Application.[14] When a statute does not prescribe a particular formula, the Commission is vested with broad discretion. *Payphone Ass'n v. Public Utilities Comm'n of* Ohio, 109 Ohio St. 3d 453, 460 (2006). Neither R.C. § 4928.66 nor the Commission's Rules provide a method for calculating energy efficiency savings resulting from transmission projects. As Staff specifically indicated in their report in support of their findings:

> During the course of its review, the Staff issued multiple data requests to the Companies in order to provide additional information and justification of the energy savings claimed in the filings, as well as to address certain technical issues raised by interveners. Staff reviewed the transmission facilities reinforcement projects, consisting of transmission line re-conductoring, a new transmission substation transformer, and a new capacitor bank. Staff also reviewed the distribution facilities reinforcement projects, consisting of feeder line re-conductors, a modular substation, and transformer replacement. Engineering studies and evaluations reviewed by the Staff confirmed the energy savings claimed by the Companies in their application and supplemental filing were properly determined. Staff verified computer output of the transmission and distribution losses and savings, both with and without the specific projects in operation.
>
> Staff also reviewed the calculation and supporting data for the Total Resource Cost (TRC) test, and found that the TRC test results show that the transmission and distribution projects successfully pass the test. Staff further assured that all

[13] *In re the Application of the FirstEnergy Companies (Ohio Edison Company, The Cleveland Electric Illuminating Company, and Toledo Edison Company) for Approval of the Transfer of Their Transmission Assets to ATSI,* Case No. 98-1633-EL-UNC, Finding and Order at p. 6 (February 17, 2000).
[14] T&D Case, Finding and Order, p. 7.

> projects have been installed and are in operation by reviewing copies of facility installation data and company specific project completion reports.[15]

It is within the Commission's broad discretion to accept Staff's recommendation and reject Applicants' recommendation on how to calculate the Companies' energy savings from the T&D Projects. Moreover, it was reasonable given the fact that the TRM had yet to be adopted and given that there are further opportunities for energy measurement and verification through the annual reporting process. Rules 4901:1-39-05, 4901:1-39-06, Ohio Administrative Code. Therefore, in approving the Companies' T&D Application, a hearing was not necessary. The Commission should reject the Applicant's second assignment of error.

C. The fact that the Commission has not yet approved the draft TRM is not a matter on which the Commission can grant rehearing in this proceeding.

In their third assignment of error, Applicants essentially argue that the Commission erred by approving the Companies' Application before it approved the draft TRM. As a preliminary matter, this assignment of error is not a proper subject for rehearing in this proceeding. R.C. § 4903.10 allows a party to "apply for a rehearing in respect to any matters determined in the proceeding." Applicants argue that the Commission's "failure to timely act in the *TRM Case* to finalize an Ohio TRM cannot justify approval of the Application ..." and that "an effective process for handling T&D projects regarding compliance with Ohio's legal requirements would have been the timely completion of an Ohio TRM and use of that TRM by the Commission to evaluate applications such as [this] one."[16] In essence, Applicants argue that the Commission erred in this proceeding because they did not approve the TRM in another proceeding. Applicants' argument is misplaced. It does not involve matters determined in this proceeding and could only have been brought, if at all, in the case in which the TRM is being addressed.

[15] T&D Case, Staff Review and Recommendation, p. 2 (September 1, 2010).
[16] AFR Memo, pp. 7-8.

(Case No. 09-512-GE-UNC.) The TRM is not the subject of this proceeding despite Applicants' efforts to make it so. Accordingly Applicant's third assignment of error should be rejected on this basis alone.

Notwithstanding the procedural flaws in the Applicants' third assignment of error, their arguments also fail because, despite the fact that the Companies' Application did not utilize the draft TRM in determining the value of the T&D line losses, the calculation for those line losses was appropriate, correct and reasonable. As discussed above, Staff reviewed those calculations and concluded that they were correct.[17] Concurring with Staff, the Commission stated:

> The Commission also concurs with Staff's assessment that the energy savings claimed in the application and supplemental filing were appropriately determined. The Commission notes that, in future applications, the Companies will be required to verify that reduction in line losses in one segment will not result in higher line losses in any other segment. Moreover, the Commission will provide further guidance to electric utilities in the future regarding additional information to facilitate consideration of transmission and distribution infrastructure improvements.[18]

Therefore, the Commission correctly noted these facts in finding that it could require conformity with the TRM only after it has been adopted.[19] Applicants' suggestion that simply because the Companies' Application did not conform to the draft TRM -- a document that did not even exist prior to the Companies' filing of the Application and a document that has not yet been approved -- is simply unreasonable and incorrect. The Commission should reject Applicants' third assignment of error.

D. In granting the Companies' T&D Application, the Commission considered and rejected all of the issues identified by Applicants.

The Applicants' fourth assignment of error argues that the Commission erred because the Commission allegedly failed to provide the reasoning in support of its decision and failed to

[17] T&D Case, Staff Review and Recommendation, p. 2 (September 1, 2010).
[18] T&D Case, Finding and Order, p. 7 (June 8, 2011).
[19] *Id.*

specifically address Applicants' arguments regarding the appropriate baseline for T&D projects and use of a system-wide loss factor.[20] The Applicants are wrong. The Finding & Order explicitly denied both motions for a hearing and the motion to dismiss which included these arguments, and an explanation by the Commission for doing so.

R.C. § 4903.09 requires the Commission to set forth findings of fact and written opinions explaining the reasoning behind its decision in all contested cases.[21] However, as the Ohio Supreme Court has explained, the purpose of R.C. § 4903.09 is to "inform interested parties of the reasons for the commission's action and to provide [the Ohio Supreme Court] with an adequate record in order to determine whether the decision is lawful and reasonable."[22] A Commission order "must provide 'in sufficient detail, the facts in the record upon which the order is based, and the reasoning followed by the PUCO in reaching its conclusion.'"[23] In order to satisfy the statute, "[a]ll that is required is that the commission set forth 'some factual basis and reasoning based thereon in reaching its conclusion.'"[24] Here, the Finding & Order easily satisfies the statutory criteria. The Finding & Order explains the reasoning behind the Commission's approval of the Application. It cites to R.C. § 4928.66(A)(2)(d) and explains why the projects implemented by ATSI count toward the Companies' compliance with their statutory benchmarks.[25] It explains its agreement with Staff's assessment that the energy savings were calculated appropriately.[26] It also notes that the TRM is a draft document and that filings must conform with it only after it has been adopted by the Commission.[27] The Finding & Order

[20] AFR Memo, pp. 9-14.
[21] *Id*., pp. 6-8.
[22] *Migden-Ostrander v. Pub. Util. Comm.*, 102 Ohio St.3d 451, 455 (2004).
[23] *Id*. (citing *Tongren v. Pub. Util. Comm.*, 85 Ohio St.3d 87, 89 (1999)).
[24] *Id.* (citing *Allnet Commc'ns. Serv., Inc. v. Pub. Util. Comm.*, 70 Ohio St.3d 202, 209 (1994)).
[25] T&D Case, Finding and Order, p. 7
[26] *Id.*
[27] *Id.*

addresses, and rejects, each of the arguments Applicants have offered in this proceeding. Accordingly, the fourth assignment of error is without merit and must be rejected.

III. CONCLUSION

For the reasons set forth above, the Commission should deny the Application for Rehearing.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this *Memorandum Contra to Application for Rehearing* was served on the persons stated below by both the Commission's docketing system as well as electronic mail on July 18, 2011.

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Summary: Memorandum Contra Application for Rehearing of The Ohio Consumers' Counsel, Citizen Power, Inc., The Ohio Environmental Council, The Natural Resources Defense Council electronically filed by Ms. Carrie M Dunn on behalf of The Cleveland Electric Illuminating Company and Ohio Edison Company and The Toledo Edison Company