

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

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

ENTRY ON REHEARING

The Commission finds:

- (1) Ohio Power Company (OP) and Columbus Southern Power Company (CSP) (jointly, AEP Ohio)¹; The Toledo Edison Company, Ohio Edison Company, and The Cleveland Electric Illuminating Company (jointly, FirstEnergy); The Dayton Power and Light Company (DP&L); and Duke Energy of Ohio, Inc. (Duke) (collectively, electric utilities) are public utilities, as defined in Section 4905.02, Revised Code, and, as such, are subject to the jurisdiction and general supervision of the Commission, in accordance with Sections 4905.04, 4905.05, and 4905.06, Revised Code.
- (2) Columbia Gas of Ohio, Inc., The East Ohio Gas Company d/b/a Dominion East Ohio, Vectren Energy Delivery of Ohio, Inc., and Duke (collectively, gas utilities) are public utilities, as defined in Section 4905.02, Revised Code, and, as such, are subject to the jurisdiction and general supervision of the Commission, in accordance with Sections 4905.04, 4905.05, and 4905.06, Revised Code.
- (3) On April 23, 2008, the 127th General Assembly adopted Amended Substitute Senate Bill No. 221, 2008 Ohio Laws S221 (SB 221), which became effective on July 31, 2008. Among the provisions of SB 221 was the requirement in Section 4928.66, Revised Code, for the Commission to take certain actions related to the implementation of energy efficiency, peak demand reduction, and demand response (EEDR) programs by the electric utilities. Section 4928.66(B), Revised Code, requires the Commission to verify the annual levels of EEDR

¹ By entry issued on March 7, 2012, the Commission approved and confirmed the merger of CSP into OP, effective December 31, 2011. *In the Matter of the Application of Ohio Power Company and Columbus Southern Power Company for Authority to Merge and Related Approvals*, Case No. 10-2376-EL-UNC.

achieved by each of the electric utilities. Further, Section 4928.66(A)(2)(c), Revised Code, specifically provides that mercantile customers of the electric utilities may be exempted from payment of a mechanism that recovers the cost of EEDR programs, if the Commission determines that such an exemption reasonably encourages those customers to commit their demand response or other customer-sited capabilities for integration into the electric utility's EEDR programs.

- (4) On June 24, 2009, the Commission issued an entry in this proceeding, establishing a procedure for the development of protocols for the evaluation, measurement, and verification of EEDR measures to be embodied in a Technical Reference Manual (TRM). In Appendix A of the entry, the Commission identified five major issues where policy guidance was needed in order to proceed with the development of the TRM and the determination of energy savings and demand reductions. In Appendix B, the Commission provided categories of data that should be included in the TRM for deemed measures and deemed calculated measures for determining energy savings, demand reductions, and cost-effectiveness per the total resource cost (TRC) test. The Commission provided interested parties an opportunity to submit comments on the information set forth in Appendices A and B. Finally, the Commission indicated that it would issue a request for proposal (RFP) for engineering consulting services to assist the Commission with the evaluation and initial determination of values and protocols for the TRM developed in this proceeding. The entry noted that the cost of engineering consulting services would be shared by the electric utilities and gas utilities.
- (5) On July 15, 2009, comments on Appendix B were filed by the gas utilities; Ohio Department of Development; AEP Ohio; Duke; Industrial Energy Users-Ohio (IEU-Ohio); Ohio Manufacturers' Association (OMA) and Ohio Hospital Association (OHA); DP&L; Ohio Environmental Council (OEC); Ohio Consumers' Counsel (OCC); and FirstEnergy.
- (6) On July 24, 2009, the following entities filed comments on Appendix A: the gas utilities; IEU-Ohio; FirstEnergy; AEP Ohio; OMA and OHA; Duke; DP&L; Ohio Partners for Affordable Energy (OPAE); and OCC, Natural Resources

Defense Council, Citizen Power, OEC, Environment Ohio, and Sierra Club (collectively, Ohio Consumer and Environmental Advocates or OCEA). Additionally, on various dates, proposed measures, values, and protocols were filed by the electric utilities and gas utilities.

- (7) On September 30, 2009, Vermont Energy Investment Corporation (VEIC) was selected by the Commission, following the RFP process, to proceed with the TRM project.
- (8) On October 15, 2009, having taken the comments under advisement, the Commission issued a finding and order, addressing the issues in Appendix A and setting policies related to the development of the TRM and the determination of energy savings and demand reductions. The Commission also identified and described policy questions arising from the implementation of the TRC test in Ohio and proposed provisional policy recommendations for the manner in which those questions should be resolved in the context of the development of the TRM. The policy questions and series of recommendations were attached to the finding and order as Appendix C. The Commission solicited comments on the issues identified in Appendix C and other policy considerations that should be addressed that relate to implementation of the TRC test in Ohio.
- (9) On November 10, 2009, comments on Appendix C were filed by IEU-Ohio, DP&L, OCEA,² AEP Ohio, OMA, Duke, and FirstEnergy.
- (10) On August 6, 2010, Staff filed the draft TRM that was developed by VEIC.
- (11) By entry issued October 4, 2010, the Commission afforded interested stakeholders an opportunity to formally file objections to VEIC's draft TRM. Each stakeholder group, e.g., electric utilities, gas utilities, consumer groups, and environmental groups, was directed to make a consensus filing, which was to include a single composite list for the group setting forth all measures upon which the group was able to reach consensus. To the extent a stakeholder group

² Environmental Law & Policy Center (ELPC) joined OCEA in filing comments on Appendix C.

was unable to reach consensus, the consensus filing was to note such. Individual stakeholders within the group were then directed to file their objections on those issues separate from the consensus filing. In accordance with the entry, consensus filings and objections were filed by interested stakeholders on November 3, 2010. Replies to the consensus filings and objections were filed on November 15, 2010.

- (12) On November 15, 2010, VEIC filed a reply to the consensus filings and objections of various stakeholders. VEIC's reply included a table summarizing its response to each comment or objection, followed by detailed support and explanation. Attachments were included to provide additional information as requested by various stakeholders.

Pending Applications for Rehearing

- (13) Section 4903.10, Revised Code, states that any party who has entered an appearance in a Commission proceeding may apply for a rehearing with respect to any matters determined therein by filing an application within 30 days after the entry of the order upon the Commission's journal.
- (14) On November 13, 2009, FirstEnergy filed an application for rehearing, alleging that the October 15, 2009, finding and order is unreasonable and unlawful on the grounds that the Commission's prohibition against the development of incentives for projects with a payback of one year or less is contrary to Section 4928.66, Revised Code, inconsistent with other Commission findings, arbitrary and unsupported by any evidence, and unnecessarily costly.
- (15) On November 16, 2009, IEU-Ohio filed an application for rehearing, asserting that the definitions of baseline efficiency and market penetration for determining energy savings and demand reductions, as set forth in the October 15, 2009, finding and order, are unlawful and unreasonable.
- (16) Additionally, on November 16, 2009, OCC filed an application for rehearing, alleging that the October 15, 2009, finding and order is unreasonable and unlawful because the Commission was unclear and erred when it stated that the baseline for measuring energy efficiency that involves situations other

than the early retirement of existing equipment “should be set at the higher of federal or state minimum efficiency standards, or, if data is readily available for the measures at issue on the Department of Energy’s Energy Information Administrator (DOE EIA) website, efficiency levels for current market practices for those measures.” OCC argued that the Commission should modify its finding and order to clearly state that the baseline should be set at the highest standard provided by any of the three sources of information. On November 25, 2009, IEU-Ohio filed a memorandum contra OCC’s application for rehearing.

- (17) On December 11, 2009, the Commission granted rehearing in order to further consider the matters specified in the applications for rehearing. On June 16, 2010, the Commission issued an entry on rehearing, denying the applications for rehearing submitted by FirstEnergy, IEU-Ohio, and OCC.
- (18) On July 2, 2010, IEU-Ohio filed an application for rehearing, stating that it was submitted in response to the June 16, 2010, entry on rehearing. FirstEnergy filed an application for rehearing on July 16, 2010. Like IEU-Ohio, FirstEnergy asserts that its application for rehearing was filed in response to the entry on rehearing. On July 12, 2010 and July 26, 2010, OCC filed memoranda contra IEU-Ohio’s and FirstEnergy’s applications for rehearing, respectively.
- (19) On July 29, 2010, the Commission granted the applications for rehearing filed by IEU-Ohio and FirstEnergy to allow the Commission additional time to consider the two applications in the same entry.
- (20) In its application for rehearing, IEU-Ohio contends that the Commission’s June 16, 2010, entry on rehearing violates Sections 4928.64 and 4928.66, Revised Code. IEU-Ohio further argues that the Commission’s blanket prohibition on the use of incentives associated with EEDR programs with a payback period of one year or less is unlawful and unreasonable. With respect to its first assignment of error, IEU-Ohio maintains that the Commission’s entry on rehearing places restrictions on what mercantile customer-sited resources may count towards the EEDR mandates in violation of Sections 4928.64 and 4928.66, Revised Code. Regarding its second assignment

of error, IEU-Ohio asserts that the Commission should reconsider its prohibition on the use of incentives associated with EEDR programs with a payback period of one year or less. IEU-Ohio contends that the Commission has been less than clear about what it means by "incentive," and that the Commission is without jurisdiction to impose a blanket prohibition on the use of incentives associated with mercantile customer-sited EEDR programs.

- (21) In its memorandum contra IEU-Ohio's application for rehearing, OCC asserts that IEU's arguments are essentially the same as those raised in IEU-Ohio's earlier application for rehearing of the Commission's finding and order, and that those arguments should, therefore, be rejected by the Commission.
- (22) With respect to IEU-Ohio's first assignment of error, that the Commission has placed unlawful restrictions on what mercantile customer-sited resources may count towards the EEDR mandates, we find that IEU-Ohio has already raised this argument in its earlier application for rehearing of the Commission's finding and order. Rehearing was already denied by the Commission in the entry on rehearing (June 16, 2010, entry on rehearing at 4-5). Section 4903.10, Revised Code, does not allow parties to repeat, in a second application for rehearing, arguments that have already been considered and rejected by the Commission.³ Our June 16, 2010, entry on rehearing denied rehearing on all assignments of error and modified no substantive aspect of our finding and order. IEU-Ohio's claimed error did not arise for the first time in the entry on rehearing, but rather relates back to the finding and order. Therefore, IEU-Ohio's first assignment of error should be denied as procedurally improper.
- (23) In regard to IEU-Ohio's second assignment of error, that the Commission's prohibition on the development of incentives for projects with a payback period of one year or less is unlawful and unreasonable, we find that this argument has already been raised in FirstEnergy's earlier application for

³ *In the Matter of the Applications of The East Ohio Gas Company d.b.a. Dominion East Ohio and Columbia Gas of Ohio Inc. for Adjustment of their Interim Emergency and Temporary Percentage of Income Payment Plan Riders*, Case No. 05-1421-GA-PIP, *et al.*, Second Entry on Rehearing, at 4 (May 3, 2006).

rehearing of the Commission's finding and order. This is not a new issue. The Commission denied rehearing in the entry on rehearing (June 16, 2010, entry on rehearing at 3-4). By raising this assignment of error again, IEU-Ohio is merely attempting to reargue an issue that was already addressed in our finding and order, as well as our June 16, 2010, entry on rehearing. Therefore, IEU-Ohio's second assignment of error should be denied as procedurally improper.

- (24) FirstEnergy contends in its application for rehearing that the Commission's decision to tie savings for equipment that has 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 standards, federal standards, or current market practices, violates Section 4928.66, Revised Code, and is unconstitutionally vague. Specifically, FirstEnergy argues that the constraints imposed by the Commission on the counting of customer-sited measures are contrary to the inclusive language of Section 4928.66(A)(2)(c), Revised Code, regarding measurement of the effects of all EEDR programs. Additionally, FirstEnergy maintains that the standards to be used to determine the total effect of such programs 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. FirstEnergy contends that the Commission's June 16, 2010, entry on rehearing violates the void-for-vagueness doctrine, as it provides that the baseline should be determined based on the highest standard provided by federal regulations, state regulations, or market practices, as reflected on the DOE EIA website, and precludes activities derived from "business as usual" practices. FirstEnergy asserts that the Commission essentially admitted that further clarification of these standards is necessary, by stating that it would continue to provide guidance on the application of current market practices through the development of the TRM, and that Staff would develop a standard mercantile application and related instructions in the near future.
- (25) In its memorandum contra, OCC argues that FirstEnergy's application for rehearing simply repeats arguments that the Commission has already addressed. OCC contends,

therefore, that FirstEnergy's arguments are not permitted by Ohio law. With respect to FirstEnergy's void-for-vagueness argument, OCC maintains that the Commission may not hear constitutional arguments.

- (26) We find that FirstEnergy's first argument, that constraints imposed by the Commission on the counting of customer-sited measures violate Section 4928.66, Revised Code, has already been raised in IEU-Ohio's prior application for rehearing. Again, this is not a new issue. The Commission denied rehearing in the entry on rehearing (June 16, 2010, entry on rehearing at 4-5). FirstEnergy's argument merely reiterates a prior argument rejected by the Commission in our finding and order, as well as our June 16, 2010, entry on rehearing. Therefore, it should be denied today as procedurally improper.
- (27) With respect to FirstEnergy's void-for-vagueness argument, the Commission finds that FirstEnergy's argument is untimely and should have been raised in FirstEnergy's earlier application for rehearing in accordance with Section 4903.10, Revised Code. Again, the entry on rehearing modified no substantive aspect of our finding and order. Although we find that FirstEnergy's application for rehearing should be denied, we also note that, by its very nature, the TRM must be subject to prospective changes as new technologies are developed. While such prospective flexibility is necessary, we are also mindful of FirstEnergy's concerns that any future changes to the TRM not be implemented on a retroactive basis. Section 4928.66(A)(2)(c), Revised Code, states that:

Any mechanism designed to recover the cost of energy efficiency, including waste energy recovery and combined heat and power, and peak demand reduction programs under divisions (A)(1)(a) and (b) of this section may exempt mercantile customers that commit their demand-response or other customer-sited capabilities, whether existing or new, for integration into the electric distribution utility's demand-response, energy efficiency, including waste energy recovery and combined heat and power, or peak demand reduction programs, if the [C]ommission determines that that

exemption reasonably encourages such customers to commit those capabilities to those programs.

This statutory provision requires the Commission to determine whether a customer should be granted an exemption from paying the applicable rider, as an incentive granted to a mercantile customer will reasonably encourage the customer to commit the savings from the customer's own EEDR program to an electric utility so that such savings can be counted by the utility in reaching its statutory EEDR benchmarks. Our June 16, 2010, entry on rehearing directed that for programs, other than those targeting the early retirement of functioning equipment, the baseline be set at the highest standard provided by federal regulations, state regulations, or market practices. As discussed below, we now find that the TRM, which we will be adopting through the process outlined in this entry on rehearing, will establish a safe harbor for EEDR programs such that customers and utilities can determine whether a particular measure can be included in a program, as well as the costs and benefits of such measure before making any investment in a particular EEDR program.

- (28) Accordingly, the Commission finds that the applications for rehearing filed by IEU-Ohio and FirstEnergy on July 2, 2010, and July 16, 2010, respectively, should be denied in their entirety.

Pending Motions

- (29) On July 15, 2009, OCC filed a motion to intervene in this proceeding. No memoranda contra were filed. The Commission finds that OCC's motion to intervene is reasonable and should be granted.
- (30) On January 15, 2010, People Working Cooperatively, Inc. (PWC) filed a proposal for the Commission's consideration in developing the TRM, along with a motion for leave to submit the proposal and memorandum in support. Specifically, PWC proposes, among other matters, to encourage expanded installation of energy efficiency measures through incremental leveraged funds achieved through a partnership between the utilities and PWC or other similar organizations.

In its memorandum in support of its motion, PWC notes that its participation in this proceeding will not prejudice any other party to this proceeding, will not unduly prolong or delay the proceeding, is not duplicative of any other party's participation, and will contribute to the fuller development of the facts in support of the TRM. On February 1, 2010, OCC filed a memorandum contra PWC's motion for leave to file its proposal. OCC contends that PWC's motion is untimely and that PWC offered no reason for the untimely submission of its proposal, which, according to OCC, seeks to change matters decided by the Commission in the October 15, 2009, finding and order. OCC adds that, if the untimely proposal is considered by the Commission, it should nevertheless be rejected as contrary to SB 221. On February 9, 2010, PWC filed a reply to OCC's memorandum contra. Upon review of PWC's motion and the responsive pleadings, the Commission finds that there is no prejudice to any other party in allowing PWC to submit its proposal for our consideration along with the other comments that have been filed at our request. As PWC notes, the Commission has actively solicited comments from all interested stakeholders throughout the course of this proceeding. PWC's motion should, therefore, be granted.

- (31) On March 12, 2010, OPAE filed a motion for leave to amend its July 24, 2009, comments, along with its amended comments. OPAE asserts that its amended comments are necessary in response to an important policy issue related to the interpretation of SB 221 raised by other stakeholders in this proceeding. The Commission finds that OPAE's motion is reasonable and should be granted.
- (32) On August 26, 2010, a motion for admission *pro hac vice* was filed on behalf of Robert Kelter, representing ELPC. The Commission finds that the motion for admission *pro hac vice* is reasonable and should be granted.

Conclusion on Draft TRM

- (33) Initially, the Commission notes our appreciation for the contributions of the stakeholders that have participated in the various stages of development of Ohio's TRM. Upon review of the comments, reply comments, consensus filings, objections, and other pleadings filed by the various

stakeholders in this proceeding, the Commission finds that the TRM developed by VEIC, including any changes recommended by the stakeholders with which VEIC expressly agreed in its November 15, 2010, reply to the joint objections and comments, should be adopted and approved for use by the electric utilities and gas utilities to determine their energy savings and demand reductions.

We note that most commenters, including the electric utilities, have generally been in favor of the concept of the TRM, although opinions have differed widely with respect to implementation. The Commission recognizes that such differences of opinion will continue to exist, despite any further efforts that could be undertaken in an endeavor to perfect the TRM. Therefore, rather than attempt to modify or further refine VEIC's draft TRM, the Commission finds that it should be approved and regarded as a set of guidelines rather than a mandate. Under this approach, the Commission will consider prescriptive compliance with the TRM to be a safe harbor. Any utility that elects to adhere to the guidance in the TRM will benefit from a presumption of reasonableness, which any other party not in agreement would have the burden to rebut in any applicable proceeding. To the extent that a utility seeks to utilize the "as-found" method recently adopted by the Commission with respect to mercantile customer applications,⁴ or any other method of determining energy savings and demand reductions, the Commission will review the utility's request on a case-by-case basis, and the utility will bear the burden of demonstrating that its alternative method is just and reasonable.

The Commission believes that this approach has the benefit of administrative simplicity, while maintaining considerable flexibility. It enables each utility to determine whether to follow the guidelines in the TRM or to submit its own proposal tailored to a particular program or portfolio. As several stakeholders noted, the methods employed to value the EEDR programs must be flexible, in light of such factors as differences in the service characteristics among the utilities' service territories, and because each utility offers different

⁴ *In the Matter of the Mercantile Customer Pilot Program for Integration of Customer Energy Efficiency or Peak-Demand Reduction Programs*, Case No. 10-834-EL-POR, Finding and Order, at 4-5 (July 17, 2013).

EEDR programs. In finding that the TRM will offer a safe harbor with respect to the EEDR requirements of SB 221, we believe that the TRM will prove a valuable resource in determining compliance, and will fulfill the Commission's intent that the TRM should provide predictability and consistency for the benefit of the electric utilities, gas utilities, customers, and the Commission. Although we strongly encourage the electric utilities and gas utilities to utilize the TRM, we emphasize again that no provision within the TRM shall be considered binding on any party, including Staff, in any Commission proceeding.

- (34) Additionally, the Commission notes that, in Appendix D to VEIC's draft TRM, VEIC outlines recommendations as to the process to be used for updating and maintaining the TRM. The Commission agrees with VEIC that the TRM should be an evolving document that is updated and maintained in a timely and effective manner. We, therefore, direct Staff to update the TRM, in coordination with the Independent Program Evaluator, to incorporate the above changes and to develop a process by which to update the TRM on a regular basis, which may incorporate, to the extent feasible, the recommendations set forth by VEIC in Appendix D. Staff's proposal and the updated TRM should be filed for our approval in a new docket.

It is, therefore,

ORDERED, That the applications for rehearing filed by IEU-Ohio and FirstEnergy on July 2, 2010, and July 16, 2010, respectively, be denied in their entirety. It is, further,

ORDERED, That OCC's motion to intervene in this proceeding be granted. It is, further,

ORDERED, That PWC's motion for leave to file its TRM proposal be granted. It is, further,

ORDERED, That OPAC's motion for leave to amend its July 24, 2009, comments be granted. It is, further,

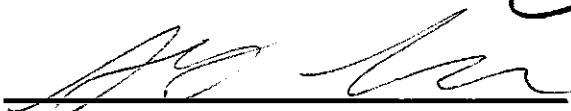
ORDERED, That ELPC's motion for the *pro hac vice* admission of Robert Kelter be granted. It is, further,

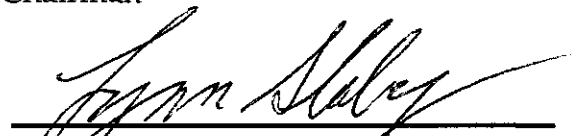
ORDERED, That the TRM filed by VEIC be updated by Staff and the Independent Program Evaluator, as set forth above, and filed for Commission approval in a new docket. It is, further,

ORDERED, That notice or a copy of this entry on rehearing be served via the electric-energy and gas-pipeline industry service lists and upon all interested persons and parties of record.

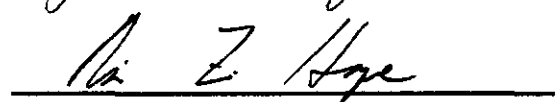
THE PUBLIC UTILITIES COMMISSION OF OHIO


Todd A. Snitchler, Chairman


Steven D. Lesser


Lynn Slaby

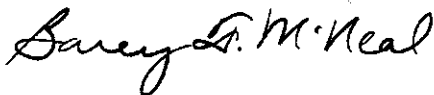

M. Beth Trombold


Asim Z. Haque

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JUL 31 2013



Barcy F. McNeal
Secretary