

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of Ohio)	
Edison Company, The Cleveland Electric)	
Illuminating Company, and The Toledo)	Case No. 12-2190-EL-POR
Edison Company For Approval of Their)	Case No. 12-2191-EL-POR
Energy Efficiency and Peak Demand)	Case No. 12-2192-EL-POR
Reduction Program Portfolio Plans for)	
2013 through 2015.)	

**MEMORANDUM CONTRA FIRSTENERGY’S REQUEST FOR WAIVER
BY
THE OFFICE OF THE OHIO CONSUMERS’ COUNSEL**

I. INTRODUCTION

On September 24, 2014, Ohio Edison Company, the Cleveland Electric Illuminating Company, and the Toledo Edison Company (“FirstEnergy” or “Utility”) filed an Application for Approval of Amended Energy Efficiency and Peak Demand Reduction (“EE/PDR”) Plans for 2015 through 2016 (“Application”) under uncoded Section 6 of Senate Bill 310.¹ In its Application, the Utility seeks the Public Utilities Commission of Ohio’s (“PUCO”) approval to suspend 60 percent² of its energy efficiency and peak demand reduction programs for 2015 and 2016. The Utility also seeks approval for two new programs.³

Customers are tasked with paying for energy efficiency programs. But FirstEnergy’s Application provides no information specifying the potential costs of its

¹ *In the Matter of the 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 2015 to 2015*, Case No. 12-2190-EL-POR, et al., Application (September 24, 2014).

² FirstEnergy seeks to suspend nine out of sixteen programs.

³ Application at 2.

amended energy efficiency/peak demand reduction (“EE/PDR”) plan to customers, as required per the PUCO’s rules.⁴ Instead, the Utility states that it “anticipate[s] that the costs of implementing the Amended Plan (with an extra year of compliance) will be less than they would have been under the Existing Plan.”⁵ FirstEnergy’s Application lacks support for this statement and the Utility fails to provide a projection of what the costs to customers will be for its amended plan for 2015 and 2016.

Uncodified Section 6(B)(1) of Senate Bill 310 requires the PUCO to review an application to amend an EE/PDR portfolio “in accordance with its rules *as if the application were for a new portfolio plan*.”⁶ Ohio Adm. Code 4901:1-39-04 contains the PUCO’s EE/PDR program portfolio plan filing requirements. Under Ohio Adm. Code 4901:1-39-04(B), a utility is required to *demonstrate* that its program portfolio is cost-effective on a portfolio basis. And Ohio Adm. Code 4901:1-39-04(C)(5)(i) requires a utility to include “a program budget with projected expenditures, identifying costs to be borne by the electric utility and collected from its customers, with customer class allocation, if appropriate.” The Utility did not adhere to either of these requirements.

The Utility requested a waiver, per Ohio Adm. Code 4901:1-39-02(B), of the PUCO’s rules “if necessary”⁷ – placing the onus on the PUCO to determine which rules should be waived for the Utility. The Office of the Ohio Consumers’ Counsel (“OCC”), on behalf of FirstEnergy’s 1.9 million residential utility consumers, requests that the PUCO deny FirstEnergy’s request for waiver of the PUCO’s rules and require

⁴ Ohio Adm. Code 4901:1-39-04(B).

⁵ Application at 8.

⁶ Uncodified Section 6(B)(1) of Senate Bill 310. Emphasis added.

⁷ Application at 10.

FirstEnergy to 1) demonstrate that its amended portfolio is cost-effective, and 2) identify the costs to be borne by customers.

II. ARGUMENT

A. **The PUCO Should Not Approve Firstenergy's Amended Application Without First Requiring Firstenergy To Meet Its Burden Of Proof By Demonstrating What The Costs To Be Borne By Customers Will Be And That Its Amended Portfolio Is Cost-Effective, As Required Under The PUCO's Rules.**

Uncodified Section 6(B)(1) of Senate Bill 310 requires the PUCO to review an application to amend an EE/PDR portfolio “in accordance with its rules *as if the application were for a new portfolio plan*.”⁸ Ohio Adm. Code 4901:39-04 contains the PUCO's EE/PDR filing requirements. Under its rules, the PUCO requires that each utility “demonstrate that its program portfolio plan is cost-effective on a portfolio basis.”⁹ FirstEnergy did not adhere to this requirement. Instead, the Utility states that it “anticipate[s] that the costs of implementing the Amended Plan (with an extra year of compliance) will be less than they would have been under the Existing Plan.” But this statement does not meet the requirement that FirstEnergy's modified portfolio must still be cost-effective on a portfolio basis.

In addition, Ohio Adm. Code 4901:1-39-04(C)(5)(i) requires that a utility include “[a] program budget with projected expenditures, identifying program costs to be borne by the electric utility and collected from its customers, with customer class allocation, if appropriate” in its portfolio application. FirstEnergy did not meet this requirement. Even though the Utility expects the costs to customers to decrease as a result of implementing its Application, the Utility fails to substantiate this claim by including a program budget

⁸ Uncodified Section 6(B)(1) of Senate Bill 310. Emphasis added.

⁹ Ohio Adm. Code 4901:1-39-04(B).

and identifying the costs to be borne by its customers. Under uncodified Section 6(B)(1) of Senate Bill 310, the PUCO shall “review” an application filed under Section 6 (A)(2) and then either “approve” the application, or “modify and approve” the application. The PUCO should not approve FirstEnergy’s Application without knowing details as critical as how much FirstEnergy will charge customers in 2015 and 2016 for FirstEnergy’s amended portfolio and whether or not the program, as a whole, is cost-effective.

FirstEnergy is not only seeking to suspend several of its existing programs, but it is also seeking approval for a new program called the “Customer Action Program.”¹⁰ Under the Customer Action Program, the Utility proposes to “capture” energy savings and peak demand reductions through actions taken by customers *outside* of utility-administered programs.¹¹ But it is unclear from FirstEnergy’s Application what costs, if any, will be borne by customers that result from this proposed program. Similarly, FirstEnergy proposed a new “Smart Grid Modernization Program.” Through this Program, FirstEnergy will “study” the impacts of “producing an integrated system of protection, performance, efficiency and economy on the energy delivery system for multiple stakeholder benefits.”¹² But again, it is unclear if the Utility plans to charge customers so that it can “study” the impacts of Smart Grid modernization.

It is also unclear if FirstEnergy is seeking to charge customers for a shared savings incentive. The Utility makes no mention of an incentive mechanism in its Application, but FirstEnergy’s plans in that regard should be disclosed prior to the PUCO

¹⁰ Application at 2.

¹¹ Id. at 8.

¹² Id. at 7-8.

approving or modifying the Utility's Application so that the PUCO has accurate information on which to base its decision.

It would be unjust and unreasonable for the PUCO to approve FirstEnergy's Application in this proceeding with so much uncertainty surrounding the details of what the Utility is proposing. FirstEnergy's remedy for this uncertainty is to seek a waiver from the rules that require the Utility to provide the missing details of its Amended Plan. Therefore, the PUCO should deny FirstEnergy's waiver request.

B. FirstEnergy Did Not Show "Good Cause" To Waive The PUCO's Filing Requirements, As Required By Ohio Adm. Code 4901:39-02(B).

FirstEnergy states: "to the extent the Commission determines that a waiver of any provision of its rules is necessary, [FirstEnergy] hereby request such waiver under [Ohio Adm. Code] 4901:1-39-02(B)."¹³ But Ohio Adm. Code 4901:1-39-02(B) requires that "good cause" be shown in order for the PUCO to waive the requirements contained in Chapter 4901:1-39. FirstEnergy did not show good cause to waive Ohio Adm. Code 4901:1-39-04(B) and Ohio Adm. Code 4901:1-39-04(C)(5)(I).

The Utility relies "upon [its] approved Existing Plan budget by sector to achieve benchmark compliance through December 31, 2016."¹⁴ But the PUCO approved the Existing Plan budget for sixteen EE/PDR programs, nine of which FirstEnergy has elected to suspend as a result of its Application. And FirstEnergy has included two new programs in its Application which have not been reviewed and approved by the PUCO. Thus, the Application FirstEnergy proposed under Senate Bill 310 is significantly different than the original portfolio the PUCO approved in its March 20, 2013 Opinion

¹³ Id. at 10.

¹⁴ Id. at 8.

and Order. Given these proposed changes, it is critical to understand what customers will be charged for FirstEnergy's modified Application for 2015 and 2016.

The PUCO has previously held that requests for waiver must be specific, and that blanket waiver requests are improper. To this end, in Case No. 11-4393-EL-RDR, Duke Energy Ohio ("Duke") sought PUCO approval of an incentive mechanism and three new portfolio programs. But Duke's filing requesting approval of the new programs did not contain all of the content prescribed in Ohio Adm. Rule 4901:1-39-04(C). The PUCO held that Duke was required to request a waiver of the applicable rules, and that request was to include a memorandum supporting the request for waiver that explained, in detail, why the application warranted a waiver.¹⁵

And the PUCO has previously denied a general waiver requested by FirstEnergy.¹⁶ Similar to the Utility's request in the present case, FirstEnergy requested "an extension of the waiver for anything in the corporate separation plan that conflicts with any rule, order or tariff."¹⁷ The PUCO held that "[t]he breadth of this waiver request and the lack of any specificity as to the areas of non-compliance make it impossible for the Commission to find good cause for granting the extension of the general waiver."¹⁸

Finally, the PUCO has found that onus is on the Utility to attempt to mitigate the need for waiver. In denying a blanket waiver request for a company that claimed

¹⁵ *In the Matter of the Application of Duke Energy Ohio, Inc. for an Energy Efficiency Cost Recovery Mechanism and for Approval of Additional Programs for Inclusion in its Existing Portfolio*, Case No. 11-4393-EL-RDR Entry at 3 (March 21, 2012).

¹⁶ *In the Matter of the Applications of Ohio Edison Company, The Cleveland Electric Company and The Toledo Edison Company for Authority to Continue and Modify Certain Regulatory Accounting Practices and Procedures, for Tariff Approvals and to Establish Rates and Other Charges Including Regulatory Transition Charges Following the Market Development Period*, Pub. Util. Comm. No. 03-2144-EL-ATA, 2004 Ohio PUC LEXIS 176 at 112-13 (June 9, 2004).

¹⁷ *Id.* at 112.

¹⁸ *Id.*

hardship with the implementation of new PUCO rules, the PUCO stated that “[a] company seeking a waiver must attempt to mitigate as best it can the circumstances of its waiver request to ensure that the intent of the rule from which waiver is sought would nonetheless be carried out to the greatest possible extent.”¹⁹ The PUCO has said that the intent of Ohio Adm. Code 4901:1-39-04(C) is “to allow the {PUCO} to properly review [a utility’s] proposed programs.”²⁰

FirstEnergy did not adhere to the PUCO’s filing requirements and the Utility did not explain, in detail, why its Application warrants a waiver, nor show good cause for the waiver request. The PUCO should not approve FirstEnergy’s Application without requiring the Utility to disclose this information that is required under the rules that FirstEnergy requests be waived.

III. CONCLUSION

FirstEnergy did not meet the PUCO’s filing requirements (specifically, Ohio Adm. Code 4901:1-39-04(B) and Ohio Adm. Code 4901:1-39-04(C)(5)(i)) as it did not demonstrate that its Application, as a whole, is cost-effective, and it did not include the costs to be borne by customers. In addition, FirstEnergy did not show good cause for the PUCO to waive its EE/PDR filing requirements. Therefore, the PUCO should deny FirstEnergy’s waiver request, and should not approve FirstEnergy’s Application without requiring the Utility to demonstrate its Application is cost-effective and requiring the Utility to disclose the costs to be borne by customers.

¹⁹ *In the Matter of the Amendment of the Minimum Telephone Service Standards as Set Forth in Chapter 4901:1-5 of the Ohio Administrative Code*, Pub. Util. Comm. No. 05-1102-TP-ORD, Entry at 10 (May 14, 2014).

²⁰ Case No. 11-4393-EL-RDR, Entry at 3 (March 21, 2012).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this Memorandum Contra was served on the persons stated below via electronic service this 9th day of October 2014.

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Case No(s). 12-2190-EL-POR, 12-2191-EL-POR, 12-2192-EL-POR

Summary: Memorandum Memorandum Contra FirstEnergy's Request for Waiver by the Office of the Ohio Consumers' Counsel electronically filed by Ms. Deb J. Bingham on behalf of Kern, Kyle L.