

**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 Edison Company for Approval of Their Energy Efficiency and Peak Demand Reduction Portfolio Plans for 2013 through 2015)	Case Nos.	12-2190-EL-POR
)		12-2191-EL-POR
)		12-2192-EL-POR

**MEMORANDUM CONTRA
FIRSTENERGY’S APPLICATION FOR APPROVAL OF AMENDED ENERGY
EFFICIENCY AND PEAK DEMAND REDUCTION PLANS FOR 2015
THROUGH 2016
BY
ENVIRONMENTAL LAW AND POLICY CENTER and SIERRA CLUB**

The Environmental Law and Policy Center (“ELPC”) and Sierra Club, as parties to these cases initiated by Cleveland Electric Illuminating Company, the Toledo Edison Company and the Ohio Edison Company (collectively “FirstEnergy”) now respectfully submit this Memorandum Contra FirstEnergy’s application for approval of its amended energy efficiency and peak demand reduction plans for 2015 and 2016. FirstEnergy submitted this application pursuant to S.B. 310, which expressly states in Section 6(B)(1) that the Public Utilities Commission of Ohio (“Commission” or “PUCO”) must review any proposed amended plan “as if the application were for a new portfolio plan.” FirstEnergy’s application is inadequate under this standard because it omits key information about FirstEnergy’s proposed programs that is required under the applicable PUCO rules for new portfolio plans. Therefore, ELPC and Sierra Club move for dismissal of FirstEnergy’s application or, in the alternative, an order requiring

FirstEnergy to submit all of the information required under the applicable PUCO regulations.

I. BACKGROUND

FirstEnergy has submitted its application pursuant to Section 6(A)(2) of Senate Bill 310. The application proposes to eliminate several of the energy efficiency and peak demand reduction programs approved as part of FirstEnergy's existing portfolio plan. In Section 6(B)(1), the Ohio Legislature stated that “[t]he Commission shall review [such an] application in accordance with its rules **as if the application were for a new portfolio plan.**” (Emphasis added.) This provision refers to regulations adopted by the Commission setting out the requirements for an application for a new energy efficiency portfolio plan, primarily Ohio Administrative Code (“OAC”) 4901:1-39-04.

The purpose of these regulations is to ensure that the Commission has sufficient information to understand whether the portfolio will achieve its stated goals and whether cost recovery is justified. Accordingly, OAC 4901:1-39-03 and OAC 4901:1-39-04 requires FirstEnergy to submit, *inter alia*, the following information:

- “An executive summary and its assessment of potential,” OAC 4901:1-39-04(C)(1), including “an assessment of cost-effectiveness using the total resource cost test” for each energy efficiency and peak-demand reduction measure that the utility has identified through a survey of technical potential, a description of “all attributes relevant to assessing [the] value [of each measure considered], including, but not limited to potential energy savings or peak-demand reduction, cost, and nonenergy benefits,” OAC 4901:1-39-03(A);
- “A description of stakeholder participation in program planning efforts and program portfolio development,” OAC 4901:1-39-04(C)(2);
- “A description of attempts to align and coordinate programs with other public utilities' programs,” OAC 4901:1-39-04(C)(3);

- “A description of . . . each [new] program proposed to be included within its program portfolio plan,” explaining “[p]rogram objectives, including projections and basis for calculating energy savings and/or peak-demand reduction resulting from the program,” “[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,” and “[a] description of the plan for preparing reports that document the electric utility's evaluation, measurement, and verification of the energy savings and/or peak-demand reduction resulting from each program and the process evaluations conducted by the electric utility,” OAC 4901:1-39-04(C)(5).

FirstEnergy’s pending application, purportedly filed in accordance with these rules, offers this description of its proposed plan:

The Amended Plan will continue to offer several programs approved in the Existing Plan, as well as in other dockets: the Low-Income Program; Mercantile Customer Program; T&D Improvements Program; Demand Reduction Program; Residential Direct Load Control Program; and the Smart Grid Modernization Initiative. In addition, the Amended Plan will implement (i) the Customer Action Program in accordance with R.C. 4928.662(A) and (B); and (ii) the Experimental Company Owned LED Lighting Program, if approved in Case No. 14-1027-EL-ATA.¹

This paragraph is followed by a cursory narrative description of each of the named programs.² FirstEnergy then offers the blanket assertion that:

By suspending certain programs and extending the budgets (previously approved through 2015) through 2016, the Amended Plan ensures that customers in Ohio have access to affordable energy and should be approved by the Commission consistent with the authority and purposes arising directly from, and the legislative intent underlying S.B. 310, recognizing that certain existing rules are inconsistent with the plain language and meaning of S.B. 310.³

¹ Application at 6.

² *Id.* at 6-8.

³ *Id.* at 9.

Finally, the application states that “[t]o the extent the Commission determines that a waiver of any provision of its rules is necessary [for approval of the application], the Companies hereby request such waiver under OAC 4901:1-39-02(B).”⁴

II. DISCUSSION

The Ohio General Assembly mandated that the Commission review any application to amend a utility’s portfolio plan pursuant to S.B. 310 “in accordance with its rules **as if the application were for a new portfolio plan.**”⁵ However, FirstEnergy’s application falls short of the requirements specified in the Commission’s rules for new plans in numerous respects. The gaps in the application constitute significant deficiencies that preclude the Commission from undertaking consideration of FirstEnergy’s proposal.

First, the application does not include the assessment of efficiency potential required for all technically feasible measures under OAC 4901:1-39-03(A). This portion of the application is key to the Commission’s consideration of the reasonableness of FirstEnergy’s proposal, since it provides important background for evaluating FirstEnergy’s decisions as to which programs to include in its portfolio plan. In particular, since FirstEnergy has made substantive decisions to continue some programs and eliminate others in the wake of S.B. 310, the Commission should examine those decisions in light of information regarding the comparative value – both economic and non-economic – of each of the measures. Likewise, FirstEnergy’s submission with

⁴ *Id.*

⁵ (Emphasis Added) S.B. 310, Section 6(B)(1).

respect to cost recovery omits essential detail necessary to the Commission’s review, merely stating that it expects the cost of implementing the Amended Plan to be less than the costs of implementing the existing plan.⁶ FirstEnergy does not detail the cost-effectiveness screening results for these programs, nor the overall costs and benefits expected throughout their implementation. This does not comport with the requirement in Ohio Administrative Code 4901:1-39-04(B) that “[e]ach utility shall demonstrate that its program portfolio plan is cost-effective on a portfolio basis.”

FirstEnergy also has not included a description of stakeholder participation in program planning efforts and program portfolio development.⁷ In fact, no stakeholder process was conducted despite the passage of S.B. 310 nearly six months ago. The rules also require the applicant to provide a description of attempts to align and coordinate programs with other public utilities’ programs⁸, which FirstEnergy apparently did not do—perhaps because the FirstEnergy Companies are the only public utilities in the state to file an application to eliminate most of its energy efficiency programs. Without this information, the Commission lacks context for determining whether FirstEnergy reached fully informed, reasonable decisions in deciding on the components of its amended portfolio plan.

FirstEnergy also left out required information regarding the *new* programs that it proposes to add to its portfolio—a “Customer Action Plan” and an “Experimental Company Owned LED Lighting Program.” FirstEnergy provides only the barest of descriptions for these programs, rather than the specifics required under OAC 4901:1-39-

⁶ Application at 8.

⁷ OAC 4901:1-39-04(C)(2).

⁸ OAC 4901:1-39-04(C).

04(C)(5).⁹ In particular, the application offers only a vague overview of the Customer Action Program as a measure that will:

capture[...] energy savings and peak demand reductions achieved through actions taken by customers outside of utility-administered programs pursuant to R.C. 4928.662[,] employing a variety of approaches to capture customer and market information, which may include, but are not limited to, surveying efforts; market research; reports from retailers, administrators and trade allies; site verification visits; and other evaluation, measurement and verification activities.¹⁰

This description omits a number of details required by OAC 4901:1-39-04(C)(5), which directs FirstEnergy to include “projections and basis for calculating energy savings and/or peak-demand reduction resulting from the program” and “[a] description of the plan for preparing reports that document the electric utility's evaluation, measurement, and verification of the energy savings and/or peak-demand reduction resulting from” the program. Without this information as to how FirstEnergy has calculated the energy savings and peak demand reduction it may obtain through this program and how it will verify those results, the Commission will not be able to judge whether the program’s design should be modified or even whether it should be approved at all.

To the extent FirstEnergy suggests that the Commission should waive the regulatory requirements described above because they “are not in all cases consistent with the provisions of S.B. 310 and amended plans filed thereunder,” the company gets it exactly wrong. It is precisely because of the expedited timeline mandated by S.B. 310,

⁹ FirstEnergy’s cross-reference to another docket in which this information may or may not be presented, with respect to the LED program, is inadequate considering the expedited nature of this proceeding. The Commission’s rules require that information to be contained in the plan itself, and neither the parties nor the Commission have time to waste in hunting the relevant details down in separate filings.

¹⁰ Application at 8.

which offers the Commission only 60 days to complete its review of FirstEnergy’s proposal, that it is imperative for FirstEnergy to include in its application all of the information that the Commission has deemed, by rule, to be necessary for its evaluation of a utility’s proposed portfolio plan. Likewise, FirstEnergy’s oblique references to the Commission’s approval of its existing plan do not excuse the company from complying with the regulations that S.B. 310 itself directed the Commission to apply in evaluating an amended plan.¹¹ If anything, FirstEnergy should be going above and beyond the Commission’s rules for the information that must be included in its application in order to facilitate appropriate comment and review within the required 60-day period.

Moreover, FirstEnergy has not met its burden for waiver of OAC 4901:1-39-03 and OAC 4901:1-39-04. An applicant may obtain waiver of a particular rule only “for good cause shown.”¹² FirstEnergy offers only the vague suggestion that good cause exists because “certain existing rules are inconsistent with the plain language and meaning of S.B. 310,”¹³ and requests a waiver of any provision of the Commission’s rules that the Commission may determine is necessary.¹⁴ FirstEnergy suggests that OAC 4901:1-39-04(D) and (E) are inapplicable to an amended plan filed under Section 6,¹⁵ but does not state whether these are the only provisions that it considers to be inapplicable,

¹¹ Although OAC 4901:1-39-04(C)(4) states that “[i]f a program has previously been approved and is unchanged, the electric utility may reference the program description currently in effect,” that provision exempts FirstEnergy only from the requirement to provide a “description of existing programs” under subsection (C)(4). The requirements to provide the information described in subsections (C)(1)-(3) and (C)(5) all remain applicable.

¹² OAC 4901:1-39-02(B).

¹³ *Id.* ¶ 30.

¹⁴ *Id.*

¹⁵ *Id.* ¶ 28.

and does not explain why it believes the allocation of the burden of proof to the company in 4901:1-39-04(E) no longer applies. This request for a waiver falls far short of the good cause standard this Commission has made clear must be met when a party requests waiver of these procedural rules.

Consistent with the good cause standard in OAC 4901:1-39-02(B), in Duke Energy Ohio's 2011 energy efficiency portfolio docket, the Commission held that a generic request for a waiver, combined with attempted justification for noncompliance with the procedural rules, was inadequate and amounted to "disdain for the established rules and processes."¹⁶ Likewise, FirstEnergy's failure to submit a complete application, combined with its off-handed request for a waiver from any rules that the Commission might consider necessary in order to complete its review, all in the face of a statutory requirement that significantly constrains the Commission's time for review of FirstEnergy's application, demonstrates a lack of regard for this Commission's procedures. Furthermore, FirstEnergy's unsubstantiated claim of inconsistency does not explain why the company could not – in the months that have passed since S.B. 310 was enacted – assemble and submit to the Commission the information that is plainly required under its rules. FirstEnergy has not shown good cause to waive any part of the Commission's rules for processing new portfolio plans.¹⁷

¹⁶ See, e.g., *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 ¶ 7 (May 9, 2012) (rejecting Duke Energy's request for a waiver and requiring the utility to present the required information at hearing, on the ground that a utility could not implement its portfolio of programs nor "seek recovery pursuant to the mechanism contained in Rule 4901:1-39-07 without its application falling under the requirements of Chapter 4901:1-39").

¹⁷ OAC 4901:1-39-02(B).

The Ohio Legislature made clear that any application to amend energy efficiency programs pursuant to Senate Bill 310 would be governed by the Commission's standard rules for new portfolio plans. FirstEnergy is familiar with those procedures, having submitted two previous portfolio plans, the first in December 2009 and the second in this docket in July 2012. Yet FirstEnergy's application filed on September 24th is incomplete. Without the information omitted by FirstEnergy, the Commission will be unable to determine whether approval of the amended plan is merited. The Commission will also be unable to assess whether the Companies are continuing programs upon which they have relied in submitting bids to PJM's 2013 or 2014 Base Residual Auctions.

S.B. 310 both commands the Commission to follow its existing procedures for review of a new portfolio application and to complete that review with 60 days. The difficulty of satisfying both statutory demands is exacerbated by the skeletal application submitted by FirstEnergy, which leaves the Commissioners, Staff, OCC, and other Intervenors to guess at critical issues presented by this unprecedented rollback of programs deemed beneficial to ratepayers. ELPC and Sierra Club requests that the Commission dismiss FirstEnergy's application based on the inadequacies outlined above. If FirstEnergy thereafter fails to submit a complete application within 30 days of the effective date of S.B. 310 (by October 12, 2014), the company is then precluded from amending its plan as originally approved by the Commission under Section 6 of the statute.

Alternatively, the Commission should rule that its 60-day period to review the Application, pursuant to S.B. 310 Section 6(B)(1), does not begin until the Commission

has received a complete application. The Commission should order the Companies to submit the following:

- Anticipated cost and projected savings information for the programs being continued;
- A complete listing of the programs eliminated in the Amended Plan, along with their forgone projected savings and avoided costs;
- Testimony regarding the impact of cancellation of these programs on FirstEnergy's commitments to PJM through the 2013 and 2014 base residual auctions;
- Complete descriptions of the proposed additions to the Companies' portfolio, including cost, duration, and savings;
- Information concerning any modifications to Rider DSE needed to reflect the lower program costs asserted by the Companies.

III. CONCLUSION

For the reasons described above, the Environmental Law and Policy Center and Sierra Club request Commission to deny the requested waiver of its rules and dismiss or disregard FirstEnergy's application as incomplete. In the alternative, the Commission should order FirstEnergy to supplement its application as described above and restart the 60-day clock for decision in this matter upon filing of that supplemental information.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *Memorandum Contra* has been electronically filed with the Public Utilities Commission of Ohio and has been served upon the following parties via electronic mail on October 9, 2014.

/s/ Christopher J. Allwein
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Summary: Memorandum Contra to FirstEnergy's Application for Amendment of its Portfolio Plan electronically filed by Mr. Christopher J. Allwein on behalf of Environmental Law and Policy Center and SIERRA CLUB