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 Program Portfolio Plans for 2013 through 2015	))))))	Case No. 12-2190-EL-RDR Case No. 12-2191-EL-RDR Case No. 12-2192-EL-RDR

REPLY COMMENTS OF OHIO PARTNERS FOR AFFORDABLE ENERGY

Background

On September 24, 2014, FirstEnergy Corp. ("FirstEnergy") filed a 'bare bones' application pursuant to Sec. 6 of Amended Senate Bill 310 ("SB 310") to modify its current energy efficiency portfolio. The application included several new programs and eliminated a host of existing programs from the portfolio. Per the Attorney Examiner's Entry of September 29, 2014, parties filed comments on October 20, 2014. Ohio Partners for Affordable Energy ("OPAE") hereby submits its reply comments to the Public Utilities Commission of Ohio ("Commission").

I. Customer Action Plan Is Not a Plan.

A number of parties commented on FirstEnergy's proposed Customer Action Plan, as did OPAE.[1] The Office of the Ohio Consumers' Counsel ("OCC") contends that FirstEnergy bears the burden of proving that the program is cost-effective and has not done so in the application.[2] The Ohio Manufacturers Association Energy Group ("OMAEG") shares OPAE's concerns that the application offers no detail on the design

[1] *Comments of The Office of the Ohio Consumers' Counsel* at 13; *Initial Comments Submitted on Behalf of the Staff of the Public Utilities Commission of Ohio* at 3; and, *Comments of the Ohio Manufacturers Association Energy Group at* 2-4.
[2] OCC at 13.

of the Customer Action Plan and provides no budget.[3] OCC, the Staff of the Public Utilities Commission of Ohio ("Staff"), and OMAEG all agree that the Customer Action Plan should not be eligible for shared savings incentives.

OPAE concurs with the analysis provided by the various parties. The Customer Action Plan is not a program, is not defined, and no budget is provided. It is difficult, if not impossible, to see how a few words on a page can constitute a program. The Customer Action Plan cannot be approved as submitted.

II. Share Savings Incentives Should Not be Provided for Activities Included in the Revised Portfolio Plan.

FirstEnergy's proposal fails to demonstrate that the programs included will meet or exceed the statutory benchmarks beyond the bland statement that since it is meeting the requirements currently it does so during the two years the requirements are frozen. However, as the Commission has ruled, shared savings is an incentive to exceed annual benchmarks, not simply to meet them. Thus, the use of banked savings from prior years to trigger shared savings is not permissible. The parties which submitted comments on behalf of consumer interests agree on this point. [4]

The Staff agrees, arguing that FirstEnergy "should not be financially rewarded if they are not actively influencing retail customers to invest in and implement energy efficiency programs…."[5] OCC supports this position as well, citing previous Commission orders.[6] OPAE concurs.

[3] OMAEG at 3.
[4] OCC at 9;
[5] Staff at 3.
[6] OCC at 7.

III. FirstEnergy Should Not be Permitted to Collect Lost Distribution Revenues for Savings Which do not Result From Actions Taken by FirstEnergy.

The Ohio Hospital Association ("OHA") raises an interesting issue when it points out that because the Commission has not approved FirstEnergy's Long Term Forecasting Report ("LTFR"), it is impossible to conclude what level of efficiency and demand response is necessary to meet the benchmarks.[7] Likewise, it is also difficult to determine what level of lost distribution revenues, if any, FirstEnergy will suffer as a result of the revised plan. For instance, while FirstEnergy wants to count savings that are completely funded by individual customers, and potentially savings that result from government standards, these are savings that would occur anyway. While these savings would reduce the amount of funds recovered through distribution rates, the impact would occur regardless of whether or not FirstEnergy chose to count them. Counting savings for the purpose of compliance and counting savings for the purpose of calculation lost distribution revenues are not the same thing. The statute only speaks to compliance, and does not qualify these savings for lost distribution revenues. The various consumer parties agree that permitting recovery of distribution revenues that are not lost as a result of programs is inappropriate.

As OCC points out, FirstEnergy is charging customers $19 million per year for lost distribution revenues resulting from its portfolio. OCC further argues that the previous decisions of the Commission eliminate recovery of lost distribution revenues as of May 31, 2016.[8] OCC also argues that the Commission should revisit the issue of recovery, which is tied to the term of the current Electric Security Plan.[9]

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[7] *Comments of the Ohio Hospital Association* at 5-6.
[8] OCC at 13-14.
[9] Id.

OPAE contends that there is no justification for permitting the recovery of lost distribution revenues for any programs that do not continue and those that do not result from the affirmative actions of FirstEnergy. If FirstEnergy does nothing, it should get nothing. Customers should not be charged for lost revenues from customers' own actions.

IV. Permitting Recovery of Any Costs Associated with Proposed Programs Which do not Involve any Actions by FirstEnergy Violates the Fifth Amendment Prohibition Against Takings.

Several parties point out that efficiency and demand response activities taken by individual customers have value. As this area of law has evolved, the Commission has recognized these rights, and utilities have taken steps to secure the right through contract provisions that explicitly transfer those rights to the utility. Because these are property interests of individuals or businesses, they cannot be taken by a utility without just compensation.

The Fifth Amendment to the United States Constitution makes clear that a takings occurs when the property of a person is used for the benefit of another. See *Andrus v. Allard*, 444 U.S. 51, 65 (1979). The property in this case is the energy efficiency and demand response of individuals and other persons as defined by the Supreme Court. If the Commission were to permit a categorical taking, in which value is taken by regulatory imposition, the Fifth Amendment is violated. See *Palm Beach Isles Assoc. v. United States,* 231 F.3d 1354, 1357 (Fed. Cir. 2000), and *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 528 (2005). The takings occur when FirstEnergy uses the property interest of customers to comply with statutory benchmarks, increase the

amount of banked savings, and potentially recover lost distribution revenues and shared savings. See *Penn Central Transp. Co. v. City of New York,* 438 U.S. 104 (1978).

It is absurd that FirstEnergy should require a ratepayer to pay FirstEnergy for energy efficiency and demand response that the ratepayer has paid for with his or her or its own money. The statute, if interpreted incorrectly by the Commission, could authorize a taking by FirstEnergy that violates the Fifth Amendment. The Commission should act now to comply with the supreme law of the land by interpreting the statute in a way that does not run afoul of the Fifth Amendment, and prohibit FirstEnergy from counting the uncompensated property interests of another for its own gain.

V. Consumers Should not be Responsible for any Penalties Resulting From FirstEnergy's Modification of Its Portfolio.

Both OCC and the environmental organization in their joint comments, express concerns about potential consumer liability for penalties that could be incurred if FirstEnergy fails to meet its capacity obligations in PJM.[10] OPAE agrees with this concern. PJM determines the amount of capacity that must be acquired in the Base Residual Auction ("BRA") based on projections of future demand. Federal requirements that require increased efficiency, such as appliance efficiency standards, are factored into these projections. Thus, the types of efficiency and demand response FirstEnergy wants to count through its Customer Action Plan are already a part of the PJM load projections. In fact, PJM will not permit many of these types of measures to be bid into the BRA. This buttresses the position of the environmental organizations and OCC.

[10] OCC at 16; *Comments of the Sierra Club, Environmental Law and Policy Center, Natural Resources Defense Council, and Ohio Environmental Council on FirstEnergy's Application for Approval of Amendment Energy Efficiency and Peak Demand Reduction Plans for 2015 Through 2016* at 9.

Consumers should not be required to insure FirstEnergy against noncompliance with its auction commitments when FirstEnergy is solely responsible for the program modifications that give rise to the shortfall.

Conclusion

As noted by OPAE and others, it is impossible for intervenors to make determinations about whether or not the portfolio complies with the law and how shared savings will be determined given the lack of detail provided by FirstEnergy's application. In addition, R.C. 4928.662 violates the Fifth Amendment because it authorizes the taking of property without just compensation. The timetable established by SB 310 should be extended so that FirstEnergy can file an application that complies with the statute, or the Commission should modify the proposed portfolio so it complies with the law.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Reply Comments were served electronically upon the following parties identified below in this case on this 27th day of October 2014.

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Summary: Reply Comments of Ohio Partners for Affordable Energy electronically filed by Colleen L Mooney on behalf of Ohio Partners for Affordable Energy