

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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

**MEMORANDUM CONTRA FIRSTENERGY'S
APPLICATION FOR REHEARING
BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL**

BRUCE J. WESTON
OHIO CONSUMERS' COUNSEL

Kyle L. Kern, (0084199) Counsel of Record
Assistant Consumers' Counsel

Office of the Ohio Consumers' Counsel
10 West Broad Street, Suite 1800
Columbus, Ohio 43215-3485
614-466-9585 (Kern Telephone)
Kyle.kern@occ.ohio.gov

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I. INTRODUCTION

With the ink just drying on Senate Bill 310, the utilities in this case are seeking to make proposals that are not consistent with the new law and at a cost to residential utility consumers. That should be disallowed. The Office of the Ohio Consumers’ Counsel (“OCC”) on behalf of the 1.9 million residential utility consumers of Ohio Edison Company, the Cleveland Electric Illuminating Company, and the Toledo Edison Company (collectively, “FirstEnergy” or the “Utility”), files this Memorandum Contra FirstEnergy’s Application for Rehearing.

On December 22, 2014, various parties, including OCC and the Utility,¹ filed Applications for Rehearing of the Public Utilities Commission of Ohio’s (“PUCO”) November 20, 2014 Finding and Order (“Order”). At issue in this proceeding is FirstEnergy’s September 24, 2014 application requesting approval of its amended energy

¹ Sierra Club, Natural Resources Defense Council, Environmental Law and Policy Center and Ohio Environmental Council filed a Joint Application for Rehearing, and the Ohio Manufacturers’ Association Energy Group also filed an Application for Rehearing of the PUCO’s November 20 Finding and Order.

efficiency and peak demand reduction plans for 2015 through 2016 (“Amended Plan”), which suspends the majority of its energy efficiency programs.

In its Order, the PUCO ruled that the Utility is not permitted to count savings from customers who have elected to opt out of FirstEnergy’s energy efficiency and peak demand reduction programs.² The PUCO also deferred ruling on the question of whether under Senate Bill 310 Section (7)(B) the PUCO can approve a Utility’s request to reallocate funds and adjust their program mix after their Amended Plan has been approved. The PUCO determined it did not need to make this determination until such a request is before the Commission.³ The PUCO held that FirstEnergy does not have the discretion to adjust its program mix or reallocate funds without first seeking (and receiving) the PUCO’s approval.⁴

FirstEnergy challenges these findings in its Application for Rehearing. FirstEnergy asserts that it should be permitted to count opt-out customer savings towards meeting the statutory benchmark.⁵ And the Utility claims that the PUCO should clarify that it “retains authority under Senate Bill 310 to administer the Amended Plan consistent with Commission rules and the express provisions of the Amended Plan.”⁶ The PUCO should reject FirstEnergy’s Application for the reasons discussed below.

² Case No. 12-2190-EL-POR, Order at 10 (November 20, 2014).

³ Id. at 20.

⁴ Id.

⁵ Case No. 12-2190-EL-POR, FirstEnergy Application for Rehearing at 2-5 (December 22, 2014).

⁶ Id. at 8-10.

II. ARGUMENT

A FirstEnergy’s argument--that the Utility should be permitted to count savings from customers, who have elected to opt-out, toward meeting the statutory benchmarks--should be rejected because it was already considered by the PUCO, misapplies the law, and could lead to increased charges for electricity for residential customers.

The PUCO found that FirstEnergy should not be permitted to count savings from customers who have elected to opt-out toward meeting the statutory benchmarks.⁷ The PUCO held that R.C. 4928.66, when considered in its entirety, indicates that customers who elect to opt-out are essentially excluded from consideration for purposes of energy efficiency and peak demand reduction programs and benchmarks.⁸ The PUCO’s finding is correct.

FirstEnergy contends that excluding savings from customers who have elected to opt-out from meeting the statutory benchmark conflicts with R.C. 4928.662. That provision of law requires the PUCO to count all savings and peak demand reductions toward the benchmarks.⁹ FirstEnergy is wrong.

First, allowing the Utility to count savings from customers who have elected to opt-out of Utility-run programs towards meeting the statutory benchmark could negatively affect residential customers. This is because counting savings from opt-out customers will effectively displace energy and cost savings required from the residential and small business classes. Since the energy efficiency programs save customers money, a reduction to the quantity of savings required of these customer classes could result in higher charges for electricity to consumers. In addition, efficiency programs also increase

⁷ Order at 10.

⁸ Id.

⁹ FirstEnergy Application for Rehearing at 4.

the prices of capacity in PJM, and potentially the cost of complying with Federal Environmental Protection Agency (“EPA”) 111(d) standards. The effect of FirstEnergy counting opt-out customer savings will equate to less real savings for purposes PJM or EPA standards compliance. Because energy efficiency can lower costs in the PJM capacity markets, and energy efficiency is needed to comply EPA 111(d) regulations, having less actual energy efficiency from FirstEnergy could increase costs for capacity in PJM paid by all customers and also increase charges to customers for FirstEnergy to comply with EPA standards.

Second, the Utility previously raised this same argument in its Reply Comments,¹⁰ and the PUCO fully addressed (and rejected) the argument in its Order.¹¹ In order for an Application for Rehearing to be granted, the PUCO must find that “the interests of the applicant were not adequately considered in the proceeding.”¹² FirstEnergy’s argument on counting savings emanating from opt-out customers was adequately considered.¹³ In fact, the PUCO specifically notes that it disagreed with FirstEnergy’s argument “for the reasons set forth in [the PUCO] Staff’s comments.”¹⁴ In this regard, the PUCO Staff opposed FirstEnergy’s counting energy efficiency and peak demand reduction savings of opt-out customers toward the statutory benchmarks.¹⁵ The Staff explained that R.C. 4928.669(A)(2)(a) provides the baseline for energy efficiency and peak demand reduction shall not include the load and usage of customers who have

¹⁰ FirstEnergy Reply Comments at 5.

¹¹ Order at 10.

¹² R.C. 4903.10 (B).

¹³ Order at 9-10.

¹⁴ Id. at 10.

¹⁵ Staff Comments at 4-6 (October 20, 2014).

opted out of the portfolio plan, effectively causing the customer not to exist.¹⁶ The Staff correctly explained that there is no justification for allowing savings to be counted for customers that do not exist.¹⁷ FirstEnergy has now raised the same argument for a second time, but has failed to bring forth any new evidence that the PUCO failed to adequately consider it for purposes of rendering its decision.

Third, the reasoning provided in support of the PUCO's decision is sound. FirstEnergy's argument conflicts with Senate Bill 310 and the Generally Accepted Accounting Principle of "matching." The PUCO found that it would be inconsistent with the intent of the statute to allow the Utility to count savings of customers whose load and usage is not included in the baseline and who do not participate in the Utility-run portfolio programs.¹⁸ Opt-out customers affirmatively choose to remove themselves from the Utility's energy efficiency programs. And as the Staff pointed out, these customers "cannot obtain benefits from or participate in the portfolio plans and they are exempt from the [energy efficiency] rider."¹⁹ Thus, it would be inconsistent with Senate Bill 310 to allow FirstEnergy to count the savings of customers who choose not to participate in Utility-run programs.

FirstEnergy's argument is also contrary to the accounting principle of matching. Matching requires that expenses of a company must match with its revenues. As the PUCO Staff explained in Comments, under the matching principle, the opt-out customers' energy savings and baseline should be treated equally.²⁰ If the energy savings

¹⁶ Id.

¹⁷ Id.

¹⁸ Order at 10.

¹⁹ Staff Comments at 4.

²⁰ Staff Comments at 5.

and baseline are not treated equally (i.e. either all in or all out), FirstEnergy could achieve 22.2 percent energy efficiency savings. This would not be accomplished through the affirmative action of the Utility, but is a consequence of the mismatch. By mismatch OCC is referring to the fact that the historical consumption of the opt-out customers is not included in the baseline while the opt-out customer savings are included.²¹ This would improperly count energy savings for FirstEnergy that are not the results of FirstEnergy efforts but are created through a mismatch.²²

Finally, R.C. 4928.662(A) does not address counting energy efficiency and peak demand reduction savings of opt out customers as FirstEnergy contends. R.C. 4928.662(A) addresses whether electric distribution utilities can count programs that comply with federal standards. R.C. 4928.662(A) states:

Energy efficiency savings and peak demand reduction achieved through actions taken by customers or through electric distribution utility programs **that comply with federal standards** for either or both energy efficiency and peak demand reduction requirements, including resources associated with such savings or reduction that are recognized as capacity resources by the regional transmission organization operating in Ohio in compliance with section 4928.12 of the Revised Code, shall count toward compliance with the energy efficiency and peak demand reduction requirements.²³

The Staff correctly pointed out that R.C. 4928.662(A) does not address counting the savings from customers who choose not to participate in utility-run energy efficiency programs.²⁴ FirstEnergy's argument should be rejected. It is contrary to law and was already considered and rejected by the PUCO.

²¹ Id. at 6.

²² Id.

²³ R.C. 4928.662(A) (emphasis added).

²⁴ Staff Comments at 4.

B. FirstEnergy's argument--that the PUCO should clarify that the PUCO retains the authority under Senate Bill 310 to administer the Utility's Amended Plan--should be rejected so as to protect customers.

FirstEnergy argues that the PUCO should clarify that it retains the authority under Senate Bill 310 to administer the Amended Plan. Specifically, FirstEnergy contends that the PUCO's Order creates risk for the Utility and their customers by deferring ruling on whether Section 7(B) of Senate Bill 310 prevents the PUCO, once the Amended Plan is in place, from authorizing the Companies to (1) recommence suspended programs; (2) reallocate funds; or (3) adjust the program mix.²⁵

FirstEnergy cannot have the new law two alternative ways. The PUCO deferred ruling on the question of whether Senate Bill 310 Section (7)(B) permits the Utility to reallocate and adjust its program mix after the Amended Plan is approved.²⁶ The PUCO also found that FirstEnergy does not have the discretion to adjust its program mix or reallocate funds without first seeking (and receiving) the PUCO's approval.²⁷

First, there is no need for the PUCO to clarify whether FirstEnergy can recommence suspended programs, reallocate funds, or adjust the program mix prior to there being an actual request by the Utility to make such changes to its Amended Plan. The PUCO plainly determined that it does not need to determine the legality of such a request *until such request is made*. But rather than adhering to the PUCO's ruling, FirstEnergy apparently wants to circumvent its ruling by making changes to its amended energy efficiency portfolio in other proceedings, such as the FirstEnergy Electric Security

²⁵ FirstEnergy Application for Rehearing at 8.

²⁶ Order at 20.

²⁷ Id.

Plan.²⁸ And FirstEnergy’s idea that it can further amend its Plan through other proceedings is not just a hypothetical. FirstEnergy is incorrectly interpreting the language in Senate Bill 310 to advance its own interest in its Electric Security Plan IV proceeding in a way that could be harmful to its customers.

The PUCO is a creature of statute, and as such does not have the authority to act beyond the authority provided under Ohio statutes. See, e.g., *Canton Storage and Transfer Co. v. Public Util. Comm.* (1995), 72 Ohio St. 3d 1, 647 N.E.2d 136. FirstEnergy is seeking PUCO authority to expand or modify its energy efficiency portfolio in a manner that is not contemplated under Senate Bill 310. On December 22, 2014, FirstEnergy filed a Stipulation to settle its Electric Security Plan IV proceeding. That Stipulation contains provisions that add certain “energy efficiency “and “demand response” “programs” that were not included in the Utility’s Amended Plan.²⁹ FirstEnergy describes these programs as “additions to the [Utility’s] Amended Plan approved by the Commission in Case No. 12-2190-EL-POR, et al.”³⁰ But the PUCO cannot grant FirstEnergy the opportunity to adjust the programs offered to customers. The deadline for amending or modifying its portfolio under Senate Bill 310 has passed. And the PUCO is without further authority to review the additional programs (included in the ESP Stipulation) that FirstEnergy would now like include in its portfolio.³¹

²⁸ See FirstEnergy Application for Rehearing at 8; see also FirstEnergy Electric Security Plan proceeding, Case No. 14-1297-EL-SSO, Stipulation (December 22, 2014) where the Utility has included various energy efficiency programs as part of a settlement agreement.

²⁹ See, for example, Stipulation at 10-13.

³⁰ Stipulation at 13.

³¹ Order at 20.

Section 6(A)(B)(1) of Senate Bill 310 provides that,

An electric distribution utility that seeks to amend its portfolio plan under division (A)(2) of this section shall file an application with the Commission to amend the plan **not later than thirty days after the effective date of this section.** (Emphasis added).

The effective date of Senate Bill 310 was September 10, 2014. Thus, an application to amend an energy efficiency portfolio was due by October 10, 2014. FirstEnergy filed its Application to amend on September 24, 2014. Senate Bill 310 does not provide utilities with the discretion to continuously amend an energy efficiency portfolio, or to amend a portfolio through various proceedings. In addition, Senate Bill 310 requires that the PUCO review an application to amend a portfolio and approve or approve and modify the application no later than 60 days after the filing. The language of Senate Bill 310 is clear, and the timeframe is clear. Electric distribution utilities were permitted one application to amend their portfolios, due thirty days after the effective date of Senate Bill 310. The PUCO had sixty days in which to review and rule on FirstEnergy's Application. That time for further action on the part of the PUCO and FirstEnergy has now expired.

Second, the language of Senate Bill 310 is clear. Uncodified Section 6(B)(1) states that the PUCO "shall review and approve, or modify and approve, the application not later than sixty days after the date that the application is filed."³² Uncodified section 7(B) of Senate Bill 310 states that "[p]rior to January 1, 2017, the [PUCO] shall not take any action with regard to any portfolio plan or application regarding a portfolio plan, except those actions expressly authorized or required by Section 6 of this act and actions necessary to administer the implementation of existing portfolio plans." Senate Bill 310 permits the PUCO to review and approve a portfolio, or modify and approve a portfolio.

³² Senate Bill 310, uncodified Section 6(B)(1).

Senate Bill 310 prohibits any other action by the PUCO with respect to a modified plan prior to January 1, 2017.

FirstEnergy contends that the phrase “administer the implementation of existing portfolio plans” gives the PUCO the authority to allow FirstEnergy to recommence suspended programs, reallocate funds, or adjust the program mix.³³ But this argument is wrong and misinterprets Section 7(B) of Senate Bill 310. FirstEnergy ignores the fact that the word “administer” as used in Section 7(B) is referring to “**existing** portfolio plans.” (Emphasis added). FirstEnergy did not elect to keep in place its existing portfolio plan, and instead, filed an application to amend. Section 7(B) provides the PUCO with the authority to *administer existing plans*, and Section 6(B)(1) provides the PUCO with the authority to *approve or approve and modify amended plans*. It is unlawful for the PUCO to take any other action.

Finally, FirstEnergy’s proposal to potentially stop and restart energy efficiency programs is inherently flawed, even if it were permissible. Stopping and restarting (or adding new) energy efficiency programs could result in increased costs to customers. For example, if FirstEnergy unsuspending an energy efficiency program and hires personnel (or contractors) to run the program, purchases marketing materials to inform customers about the program, or incurs other expenses, FirstEnergy might seek to pass these costs on to customers. This is unjust and unreasonable. Customers should not have to pay additional money just because the Utility has decided to stop and restart its programs. And FirstEnergy should have included a complete Amended Plan as part of its September 24

³³ FirstEnergy Application for Rehearing at 8.

Application in order to provide the PUCO and stakeholders the opportunity to review the programs available to customers and associated costs.

III. CONCLUSION

For the reasons articulated herein, the PUCO should deny FirstEnergy's Application for Rehearing. FirstEnergy's argument that the savings from opt-out customers should count toward the Utility's benchmark compliance is contrary to the law. Additionally, it was already considered and rejected by the PUCO. And FirstEnergy's argument that the PUCO should clarify that it retains the authority under Senate Bill 310 to administer the Utility's Amended Plan should be rejected..

Respectfully submitted,

BRUCE J. WESTON
OHIO CONSUMERS' COUNSEL

/s/ Kyle L. Kern
Kyle L. Kern, (0084199) Counsel of Record
Assistant Consumers' Counsel

Office of the Ohio Consumers' Counsel
10 West Broad Street, Suite 1800
Columbus, Ohio 43215-3485
614-466-9585 (Kern Telephone)
Kyle.kern@occ.ohio.gov *

** Will accept service via electronic transmission*

CERTIFICATE OF SERVICE

I hereby certify that a copy of this Memorandum Contra was served on the persons stated below via electronic service this 2nd day of January 2015.

/s/ Kyle L. Kern _____

Kyle L. Kern
Assistant Consumers' Counsel

SERVICE LIST

Katie.johnson@puc.state.oh.us
kjkolich@firstenergycorp.com
cdunn@firstenergycorp.com
toddm@wamenergylaw.com
cmooney2@columbus.rr.com
Cathy@theOEC.org
Trent@theOEC.org
callwein@wamenergylaw.com
casey.roberts@sierraclub.org
jvickers@elpc.org
rkelter@elpc.org
dboehm@BKLawfirm.com
mkurtz@BKLawfirm.com
jkylercohn@BKLawfirm.com

ricks@ohanet.org
tobrien@bricker.com
tsiwo@bricker.com
gpoulos@enernoc.com
sam@mwncmh.com
fdarr@mwncmh.com
mpritchard@mwncmh.com
mlavanga@bbrslaw.com
NMcDaniel@elpc.org
robinson@citizenpower.com

Attorney Examiners:

mandy.willey@puc.state.oh.us
Gregory.price@puc.state.oh.us

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