BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Energy Efficiency and Peak Demand Reduction Program Portfolio of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company.	))))))	 Case No. 09-951-EL-EEC 09-952-EL-EEC 09-953-EL-EEC

REPLY TO THE FIRSTENERGY EDU'S MEMORANDUM CONTRA MOTION TO DISMISS
BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL, THE NATURAL RESOURCES DEFENSE COUNCIL, CITIZEN POWER, AND THE OHIO ENVIRONMENTAL COUNCIL

I. INTRODUCTION AND STATEMENT OF THE CASE

In their Application filed on October 14, 2009, the Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company (collectively, "FirstEnergy EDUs" or "Companies") proposed a method for implementing the energy efficiency provisions of S.B. 221 in connection with improvements in electrical systems.

The OCC, Citizen Power, the NRDC, and the OEC (collectively referred to as "Movants") moved on May 28, 2010 to dismiss part of the above-captioned cases. In the Motion to Dismiss ("Motion"), Movants attached the Companies' responses to discovery requests showing that three of the projects contained in the Companies' Application are owned by the American Transmission System, Incorporated ("ATSI") and not by the FirstEnergy EDUs. These projects may not be counted towards the FirstEnergy EDUs' energy efficiency requirements under S.B. 221.

The FirstEnergy EDU's filed their Memorandum Contra Motion to Dismiss ("Memo Contra") on June 14, 2010.

II. ARGUMENT: The Part of the Companies' Application that Clearly Violates R.C. 4928.66(A)(1)(a) Should be Dismissed.

The Companies' Application relies upon R.C. 4928.66(A)(1)(a), stating that "an EDU [i.e. electric distribution utility], starting in 2009, [is required] to 'implement energy efficiency programs . . . .'"[1] R.C. 4928.66(A)(1)(a), the provision cited by the FirstEnergy EDUs, states:

> Beginning in 2009, an electric distribution utility shall implement energy efficiency programs that achieve energy savings equivalent to at least three-tenths of one percent of the total, annual average, and normalized kilowatt-hour sales of the electric distribution utility during the preceding three calendar years to customers in this state.

As stated in the Motion, the required compliance actions in connection with transmission and distribution improvements must be taken by "an electric distribution utility."[2] This requirement in Ohio law is not satisfied by the Cardington-Tangy line project, the Avon substation project, and the Babb substation project that are included in the Application. All of these facilities are owned by ATSI and not the FirstEnergy EDUs,[3] and the Companies' Memo Contra makes no argument otherwise.

The Memo Contra argues -- quoting a small part of the requirements in S.B. 221 out of context -- that reduced line losses on transmission and distribution facilities is one

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[1] Application at 1.

[2] Motion, Memorandum in Support at 2.

[3] Id.., Memorandum in Support at 3, documented by responses to OCC Interrogatories 1, 3, and 4 that are attached to the Motion.

of three exceptions to the requirement that EDUs must undertake the energy efficiency compliance action.[4] R.C. 4928.66(A)(2)(d) states, numbering in brackets the three "exceptions" claimed by the FirstEnergy EDUs:[5]

> Programs implemented by a utility may include [i] demand-response programs, [ii] customer-sited programs, and [iii] transmission and distribution infrastructure improvements that reduce line losses. Division (A)(2)(c) of this section shall be applied to include facilitating efforts by a mercantile customer or group of those customers to offer customer-sited demand-response, energy efficiency, or peak demand reduction capabilities to the electric distribution utility as part of a reasonable arrangement submitted to the commission pursuant to section 4905.31 of the Revised Code.

S.B. 221 contains only *one* exception to the requirement that energy efficiency and peak demand reduction programs must be implemented by the EDU -- the exception for the customer-sited capabilities of mercantile customers. The three "exceptions" claimed by the FirstEnergy EDUs (noted by the bracketed roman numerals) would permit an EDU to count all or nearly all the conservation activities of customers and companies in the electric services industry. The result would be the elimination of the general rule -- stated in R.C. 4928.66(A)(1) -- that *EDUs* must implement energy efficiency and peak demand reduction programs.

The single exception for the capabilities of mercantile customers is the subject of extensive and special provisions in S.B. 221. The exception is specially addressed in R.C. 4928.66(A)(2)(c), which is cited in R.C. 4928.66(A)(2)(d) (quoted above). As an example of the special treatment for the mercantile source of conservation efforts in S.B.

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[4] Memo Contra at 3-4.

[5] Id.

221, R.C. 4928.66(A)(2)(c) addresses mercantile capabilities "whether existing or new." The Commission has determined, however, that the reference to "existing" capabilities does not apply to transmission and distribution improvements.[6] Nonetheless, the FirstEnergy EDUs state that a transmission and distribution improvement program is "akin to the Companies' mercantile customer program."[7] The *statutory* treatment of infrastructure improvements and mercantile conservation capabilities is separate, and these two categories of programs are also physically, financially, and administratively different from one another. The Companies' effort in its Memo Contra to generally count the energy efficiency and peak demand reduction efforts of their customers and electric service companies other than the FirstEnergy EDUs should be rejected.

No provision in Ohio law permits an EDU to count the activities of other companies that provide services in the electric services industry (such as ATSI) towards compliance with the energy efficiency requirements in S.B. 221 -- whether affiliated with the electric distribution utility or otherwise. The Application should be dismissed regarding the claims associated with the three projects that are the subject of the Motion. The Motion should be granted.

III. CONCLUSION

The FirstEnergy EDU's propose to satisfy energy efficiency requirements based upon upgrades to the facilities of another company. This proposal violates Ohio law. The Motion to Dismiss should be granted, and that part of the Application that claims benefits from facilities owned by another company should be dismissed.

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[6] *In re FirstEnergy's Early T&D Cases*, Case Nos. 09-384-EL-EEC, et al., Entry at 3 (December 16, 2009).

[7] Memo Contra at 4.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this *Reply* was electronically served on the persons stated below this 21st day of June 2010.

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