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24

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

APPLICATION FOR REHEARING BY THE OFFICE OF THE OHIO CONSUMERS' COUNSEL, CITIZEN POWER, THE OHIO ENVIRONMENTAL COUNCIL, AND THE NATURAL RESOURCES DEFENSE COUNCIL

JANINE L. MIGDEN-OSTRANDER
CONSUMERS' COUNSEL

Jeffrey L. Small, Counsel of Record
Terry L. Etter
Assistant Consumers' Counsel

Office of the Ohio Consumers' Counsel
10 West Broad Street, Suite 1800
Columbus, Ohio 43215-3485
Phone: (614) 466-8574
small@occ.state.oh.us
etter@occ.state.oh.us

Theodore S. Robinson
Staff Attorney and Counsel
Citizen Power
2121 Murray Avenue
Pittsburgh, PA 15217
Telephone: (412) 421-7029
robinson@citizenpower.com

Henry W. Eckhart
1200 Chambers Rd., #106
Columbus, OH 43212
Telephone: (614) 461-0984
henryeckhart@aol.com
Natural Resources Defense Council

Nolan Moser
Trent A. Dougherty
1207 Grandview Ave., Suite 201
Columbus, OH 43212-3449
Telephone: (614) 487-7506
nmoser@theOEC.org
trent@theOEC.org
Counsel for the OEC

TABLE OF CONTENTS

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The Office of the Ohio Consumers' Counsel ("OCC"), Citizen Power, the Ohio Environmental Council ("OEC"), and the Natural Resources Defense Counsel ("NRDC") each seek rehearing[1] of the Finding and Order ("Order") issued by the Public Utilities Commission of Ohio ("PUCO" or "Commission") in these cases on June 8, 2011. The Order follows an application ("Application") filed by Ohio Edison Company, the Cleveland Electric Illuminating Company, and the Toledo Edison Company (collectively, "FirstEnergy EDUs" or the "Companies") on October 14, 2009.

The Commission erred in its Order in the following particulars that are unlawful and unreasonable:

A. The Commission Erred by Including Projects Conducted by the FirstEnergy EDUs' Affiliate, ATSI, in Concluding that the Standard in R.C. 4928.66 Was Met When the General Assembly Limited Consideration of Energy Savings to those Achieved by an Electric Distribution Utility.

[1] This filing is submitted pursuant to R.C. 4903.10 and Ohio Adm. Code 4901-1-35(A).

B. The Commission Erred by Failing to Hold the Required Hearing to Develop a Record, Despite the Numerous Disputed Issues in these Cases.

C. The Commission Erred by Failing to Address Numerous Disputed Issues Based Upon the Commission's Failure to Finalize an Ohio TRM.

D. The Commission Erred by Failing to Address Important Issues, Failing to State Reasons Prompting Decisions Based Upon Findings of Fact as Required by R.C. 4903.09.

1. The Commission must do more than repeat arguments in pleadings submitted by parties to satisfy the requirements located in R.C. 4903.09.

2. The Commission's approval of the Application without specifically addressing the important issue of an appropriate definition of a baseline for energy efficiency projects was unjust, unreasonable, and unlawful.

3. The Commission's failure to specifically evaluate the conflicting views regarding the Companies' proposed use of a system-wide loss factor in measuring efficiencies was unjust, unreasonable, and unlawful.

The reasons for granting this Application for Rehearing are set forth in the attached Memorandum in Support.

Respectfully submitted,

JANINE L. MIGDEN-OSTRANDER
CONSUMERS' COUNSEL

Jeffrey L. Small, Counsel of Record
Terry L. Etter
Assistant Consumers' Counsel

Office of the Ohio Consumers' Counsel
10 West Broad Street, Suite 1800
Columbus, Ohio 43215-3485
Telephone: (614) 466-8574
small@occ.state.oh.us
etter@occ.state.oh.us

Theodore S. Robinson
Staff Attorney and Counsel
Citizen Power
2121 Murray Avenue
Pittsburgh, Pennsylvania 15217
Telephone: (412) 421-7029
robinson@citizenpower.com

Henry W. Eckhart
1200 Chambers Rd., #106
Columbus, Ohio 43212
Telephone: (614) 461-0984
henryeckhart@aol.com
Counsel for Natural Resources Defense Council

Nolan Moser
Trent A. Dougherty
1207 Grandview Ave., Suite 201
Columbus, Ohio 43212-3449
Telephone: (614) 487-7506
nmoser@theOEC.org
trent@theOEC.org
Counsel for the OEC

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MEMORANDUM IN SUPPORT

I. INTRODUCTION AND STATEMENT OF THE CASE

In their Application filed on October 14, 2009, the FirstEnergy EDUs proposed a method for implementing the energy efficiency provisions of S.B. 221 in connection with improvements in electrical systems. On November 23, 2009, the OCC, NRDC, and OEC filed a Motion for Hearing ("First Motion for Hearing"). The First Motion for Hearing was based on both the legal requirements stated in R.C. 4928.66(A)(1)(a)[2] and technical problems observed regarding the method proposed by the FirstEnergy EDUs to measure energy savings.[3] The First Motion for Hearing was filed before discovery could be conducted and during the early stages of the PUCO's development of a state-specific technical reference manual ("TRM").

On May 28, 2010, the OCC, NRDC, Citizen Power, and OEC moved to dismiss part of the above-captioned cases. That Motion to Dismiss argued that the FirstEnergy EDUs' claimed energy reductions from transmission and distribution ("T&D") projects

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[2] First Motion for Hearing at 2-3 (November 23, 2010).

[3] Id. at 3-5.

were not undertaken by "an electric distribution utility" as required by R.C. 4928.66(A)(1)(a).[4]

The Commission Staff filed its Review and Recommendations in this docket on September 10, 2010. Those comments stated that the Commission should approve the energy savings claimed by the FirstEnergy EDUs in their Application.[5]

The technical expert hired by the Commission to evaluate energy savings calculations in the form of the Ohio TRM -- Vermont Energy Investment Corporation ("VEIC") [6] -- released its draft TRM in the *TRM Case* after the PUCO Staff filed its recommendations in these cases. In a Motion for Hearing, dated January 6, 2011 ("Second Motion for Hearing"), the OCC and the NRDC contrasted the views of the PUCO Staff in the instant cases with those of VEIC in the *TRM Case*. The draft TRM was the subject of extensive comment in the *TRM Case*, and those comments were the subject of responsive comments by VEIC. Based upon a review of the Ohio TRM, comments by VEIC, the Application, and other pertinent documents in these cases (including responses by the FirstEnergy EDUs in discovery), the Companies' claimed energy savings in this proceeding should have been rejected.

On June 9, 2011, the Commission issued a Finding and Order ("Order"). The Order denied motions to dismiss and for a hearing. The Commission emphasized the affiliate relationship between the FirstEnergy EDUs and American Transmission System,

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[4] See Motion to Dismiss, Memorandum in Support at 2-3.

[5] Staff Review and Recommendations at 2 (September 10, 2010).

[6] The TRM has been the subject of extensive effort and comment in a separate proceeding before the Commission. *In the Matter of Protocols for the Measurement and Verification of Energy Efficiency and Peak Demand Reduction Measures*, Case No. 09-512-GE-UNC ("*TRM Case*"). The TRM contains measurement protocols that are applicable to the programs that are the subject of the Companies' Application. TRM, Chapter V ("Protocols for Transmission & Distribution Projects").

Inc. ("ATSI"), a relationship that is not mentioned or recognized in R.C. 4928.66. The Commission's statement that the Companies' "properly determined the energy savings claimed"[7] is not based upon the Commission's investigation of the facts and does not recognize conflicting views taken by the Commission's technical expert in the closely related *TRM Case*. On this last point regarding the proper measurement of claimed energy efficiencies, Commissioners Centolella and Roberto stated that the "Commission should promptly set these matters for hearing to provide appropriate guidance to the industry."[8] The undersigned parties agree.

II. STANDARD OF REVIEW

Applications for rehearing are governed by R.C. 4903.10. The statute allows that, within thirty days after issuance of a PUCO order, "any party who has entered an appearance in person or by counsel in the proceeding may apply for rehearing in respect to any matters determined in the proceeding." OCC, OEC, NRDC and Citizens Power were granted intervention in this proceeding and filed numerous pleadings in this proceeding.

R.C. 4903.10 requires that an application for rehearing must be "in writing and shall set forth specifically the ground or grounds on which the applicant considers the order to be unreasonable or unlawful." In addition, Ohio Adm. Code 4901-1-35(A) states: "An application for rehearing must be accompanied by a memorandum in support, which shall be filed no later than the application for rehearing." These requirements are met by the instant pleading.

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[7] Order at 4.

[8] Order, Concurring and Dissenting Opinion at 2.

In considering an application for rehearing, R.C. 4903.10 provides that "the commission may grant and hold such rehearing on the matter specified in such application, if in its judgment sufficient reason therefore is made to appear." The statute also provides: "If, after such rehearing, the commission is of the opinion that the original order or any part thereof is in any respect unjust or unwarranted, or should be changed, the commission may abrogate or modify the same; otherwise such order shall be affirmed." As shown herein, the statutory standard for abrogating and modifying the Order is met here.

III. ARGUMENT

A. The Commission Erred by Including the Projects Conducted by the FirstEnergy EDUs' Affiliate, ATSI, in Concluding that the Standard in R.C. 4928.66 Was Met When the General Assembly Limited Consideration of Energy Savings to those Achieved by an Electric Distribution Utility.

The Order incorrectly states that Ohio law recognizes "improvements made to facilities owned by an electric utility *affiliate*."[9] The Commission, as a creature of statute, lacks the authority to amend or ignore the requirements imposed by the General Assembly.[10] R.C. 4928.66(A)(1)(a), the provision imposed by the General Assembly and cited in the Companies' Application, 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*

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[9] Order at 7 (emphasis added).

[10] *Time Warner AxS v. Public Util. Comm.* (1996), 75 Ohio St.3d 229, 234, 661 N.E.2d 1097; *Canton Storage & Transfer Co. v. Pub. Util. Comm.* (1995), 72 Ohio St. 3d 1, 4, 647 N.E.2d 136.

> *utility* during the preceding three calendar years to customers in this state.[11]

The required compliance actions must be taken by "an electric distribution utility." The Order cites R.C. 4928.66(A)(2)(d) regarding infrastructure improvements that reduce line losses.[12] Neither of these statutory provisions mentions the *affiliate* of the electric distribution utility, and the absence of such a reference to affiliates is likewise shared by the entirety of R.C. Chapter 4928 on the subject of energy efficiency improvements. In the Order, the Commission unlawfully attempts to amend and ignore the statutes as written.

The Order also states that the Commission is "cognizant of the fact that most energy efficiency projects are completed by parties other than the electric utility on non-electric utility property."[13] But the projects the Commission refers to (i.e. non-T&D projects) are not associated with the "line" function for the delivery of electricity, in contrast with the projects that are the subject of the Companies' Application. Under the Commission's formulation, T&D projects undertaken by affiliates of the FirstEnergy EDUs across the vast geographic region served by their affiliates (most of which lies outside Ohio) could be the subject of energy efficiency claims that the Commission would approve. This is not Ohio's statutory framework.

R.C. 4928.66(A)(1)(a) specifically requires that energy efficiency programs must be implemented by the EDU in order to count toward the energy savings benchmarks required by statute. No provision in Ohio law permits an EDU to count the activities of other companies that provide services in the electric services industry -- whether

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[11] Application at 1, quoting R.C. 4928.66(A)(1)(a) (emphasis added).

[12] Order at 7.

[13] Id.

affiliated with the electric distribution utility or otherwise. The Application should have been dismissed regarding the claims associated with projects undertaken by the Companies' affiliate. The Commission should correct this error on rehearing.

B. The Commission Erred by Failing to Hold the Required Hearing to Develop a Record, Despite the Numerous Disputed Issues in these Cases.

The Commission should have investigated the Companies' claims. A hearing was essential in order to hear the serious concerns raised by intervenors and subject the Companies' proposal to cross-examination, the "greatest legal engine ever invented for the discovery of truth."[14]

The Commission may not evade the hearing requirement stated in R.C. 4928.66(C) by piecemeal approval of claims of energy efficiency and peak demand reductions in separate applications that are not the subject of hearings.[15] R.C. 4928.66(C) states that the Commission must determine whether electric distribution utilities meet their requirements "after notice and opportunity for hearing." This statutory requirement is violated where, as in these cases, the Commission approves claimed efficiency improvements without a hearing to examine disputed matters.

The Commission failed to properly address the disputed policy and factual issues in these cases. Instead, the Commission approved the Application and deferred many of the disputed issues by ordering the Companies to conform future filings to the TRM once

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[14] See *California v. Green*, 399 U.S. 149, 158, 26 L. Ed. 2d 489, 90 S. Ct. 1930 (1970) (quoting 5 J. Wigmore, Evidence § 1367, at 32 (J. Chadbourn rev. 1974)).

[15] The Commission held a hearing regarding the Companies' portfolio plans, but determined that "[w]ith respect to the transmission and distribution programs, the Commission will address FirstEnergy's proposed programs in Case Nos. 09-951-EL-EEC, et al." *In re FirstEnergy's Portfolio Cases*, Case Nos. 09-1947-EL-POR, et al., Order at 22-23 (March 23, 2011). But the Commission approved the Application in these cases that involve T&D programs without a hearing, an unlawful evasion of the hearing requirement set out in R.C. 4928.66(C).

it is adopted.[16] The Commission shows complacency regarding measurement issues in the wake of real controversies in these cases. For example, the Commission states in the Order that "line loss reductions are subject to verification from the Companies' EMV consultant."[17] But the Commission does not specifically confront important and real controversies regarding the proper measurement of line losses that should *guide* the verification process. This is properly the subject of the hearing that is required by R.C. 4928.66(C).

Approval of the Application leaves EDUs unsupervised regarding the enforcement of one segment of energy efficiency and peak demand reduction requirements under Ohio law. The Commission's action is unjust, unreasonable, and unlawful. The Commission should correct this error by holding a hearing regarding the Application.

C. The Commission Erred by Failing to Address Numerous Disputed Issues Based Upon the Commission's Failure to Finalize an Ohio TRM.

The Commission's failure to timely act in the *TRM Case* to finalize an Ohio TRM cannot justify approval of the Application in the presence of important and disputed issues of policy and fact. Three years have passed since Sub. S.B. 221 was enacted that brought about the energy efficiency and peak demand reduction requirements that are the subject of the Ohio TRM and the Companies' Application.

Following the passage of Sub. S.B. 221, an effective process for handling T&D projects regarding compliance with Ohio's legal requirements would have been the timely completion of an Ohio TRM and use of that TRM by the Commission to evaluate

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[16] Order at 6-7.

[17] Id. at 7.

applications such as the one submitted by the FirstEnergy EDUs. As noted in the Order, "the final version of the TRM has not yet been approved."[18] Unfortunately, the Commission's failure to complete its tasks in the *TRM Case* leaves policy and factual issues unresolved. As supported by Commissioners Centolella and Roberto, important issues that remain a matter of first impression should have been addressed in these cases. The Concurring and Dissenting Opinion of these commissioners raised five questions that should have been answered by granting a hearing and taking testimony: [19]

(1) Were the cited transmission and distribution infrastructure improvements required to meet reliability standards, contractual obligations, or any RTO tariff or other regulatory standard?

(2) What is the engineering basis for the claimed reductions in line losses associated with these improvements?

(3) Do the claimed reductions in losses represent a sustainable improvement in transmission or distribution system efficiency?

(4) What is the appropriate baseline for measuring reductions in losses associated with transmission and distribution infrastructure improvements?

(5) What is the appropriate methodology for measuring the resulting energy efficiency improvements?

The Commission failed to confront important policy and factual issues related to T&D improvements by approving the first application on this subject based upon the Commission's failure to act in the *TRM Case*. The Order does not deny that a conflict exists between the measurements of efficiency proposed in the Application and the work of the Commission's expert in the *TRM Case*. On rehearing, the Commission should directly address the numerous disputed issues in these cases of first impression.

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[18] Id. at 6.

[19] Order, Concurring and Dissenting Opinion at 1.

D. The Commission Erred by Failing to Address Important Issues, Failing to State Reasons Prompting Decisions Based Upon Findings of Fact as Required by R.C. 4903.09.

1. The Commission must do more than repeat arguments in pleadings submitted by parties to satisfy the requirements located in R.C. 4903.09.

The Commission's approval of the Application was based upon simple statements that the PUCO agreed with Staff's recommendation to accept the Companies' claims, without further elaboration.[20] While coming to this conclusion, the Commission stated that "[o]nce a final version of the TRM is adopted, then all future filings should conform to that TRM."[21] The Order recognizes that intervenors pointed to the *TRM Case* as "substantiat[ing] the existence of real controversies in the measurement of energy efficiency savings in the Companies' application."[22] But the Commission offers no analysis of its own -- any "reasons prompting the decisions arrived at"[23] -- for a result that conflicts with the current status of the Ohio TRM in the *TRM Case*. The PUCO repeated intervenors' arguments, but entirely failed to address intervenors' substantive comments.

Under Section 4903.09 of the Revised Code, the PUCO must make findings of fact and written opinions setting forth the reasons prompting the decisions arrived at, based upon said findings. The purpose of R.C. 4903.09 is to provide sufficient details to enable the Court to determine how the PUCO reached its decision.[24] The Court has determined that merely filing an opinion that summarizes the testimony of each witness

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[20] Order at 7, ¶(17).

[21] Id. at 7, ¶(16).

[22] Id. at 6, ¶(15).

[23] R.C. 4903.09.

[24] *Cleveland Electric Illum. v. Public Util. Comm.*, (1983),4 Ohio St.3d 107, 447 N.E.2d 746.

and a statement of the conclusion reached is insufficient to comply with R.C. 4903.09.[25] The Commission was less diligent in the instant cases by not taking any testimony, but simply summarizing the arguments made by parties in pleadings. The requirements of R.C. 4903.09 were not met by the Order.

Merely summarizing the arguments of the parties, with no analysis thereafter, falls short of the statutory requirements of R.C. 4903.09. The Commission should correct this error by holding a hearing regarding the Application and ultimately providing a reasoned decision based upon the testimony presented.

2. The Commission's approval of the Application without specifically addressing the important issue of an appropriate definition of a baseline for energy efficiency projects was unjust, unreasonable, and unlawful.

The Commission failed to address the important issue of an appropriate definition of a baseline for energy efficiency projects, a matter that has been extensively commented upon in the *TRM Case*. As provided for in the Ohio TRM, the Companies' T&D projects in the instant proceeding do not result in energy savings. A central objective of R.C. 4928.66 is to encourage energy savings. Energy "savings" should be quantifiable beyond what is considered the status quo of normal operations. While the Commission repeats this concern of commenting parties,[26] the conflict between the approach taken in the Ohio TRM and that taken by the Companies in their Application is not specifically evaluated in the Order. The Commission should quantify such savings in a manner that is consistent with the approach taken in the closely related *TRM Case*. The Commission should explain the reasons prompting its implicit decision regarding baseline determinations.

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[25] *Commercial Motor Freight, Inc. v. Public Util. Comm.*, (1951), 156 Ohio State 360, 102 N.E.2d 842.

[26] Order at 4-5.

The definition of energy savings for T&D projects is critical for the outcome of the evaluation of the projects contained in the Application. All T&D system upgrade projects reduce line losses when compared to a "do-nothing" option. However, a majority of T&D projects are required in the course of business to meet other regulatory requirements such as North American Electric Reliability Corporation ("NERC") compliance or meeting voltage level standards. Doing nothing would result in overloaded systems, poor reliability, and low voltage service to consumers. Doing nothing inherently results in *higher* losses due to future system overloads.

As highlighted in the various protocols developed in the *TRM Case*, it is important to determine the appropriate starting point for measuring energy savings. The starting point, or baseline, for T&D projects should be the standard practice of the utility to meet regulatory compliance such as NERC compliance or voltage levels. The baseline for purposes of satisfying the requirements in R.C. Chapter 4928 should be the standard practice of the utility to meet regulatory compliance for system operation absent the energy efficiency benchmarks required by R.C. 4928.66.[27] The approach that is stated in the TRM supports the comparison of energy losses for the efficient and base cases. The latter is defined as "base-efficiency equipment that would be installed under current standard utility practice."[28]

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[27] Understanding Cost-Effectiveness of Energy Efficiency Programs: Best Practices, Technical Methods, and Emerging Issues for Policy-Makers, a Resource of the National Action Plan for Energy Efficiency at 1-1 (November 2008), available at: http://www.epa.gov/cleanenergy/documents/suca/cost-effectiveness.pdf ("National Action Plan").

[28] *TRM Case*, TRM at 340-341. See also, Replies from Vermont Energy Investment Corporation to Joint Objections and Comments to the August 6, 2010 Draft Technical Reference Manual, clarification 270 at 67 (November 15, 2010) ("If the EDU has a 'unique' T&D infrastructure project that produces energy savings *compared to standard practice*, it should propose a protocol for estimating incremental savings.") (emphasis added).

The Commission should have used the definition of "baseline" stated in the TRM in evaluating the Companies' T&D projects in the instant proceeding. The Companies' "do-nothing" approach to a baseline is inconsistent with the TRM that was developed with the assistance of the Commission's consultant and should not be used for measuring progress towards meeting the requirements set out in R.C. 4928.66. The Commission acted unreasonably by implicitly adopting the "do nothing" approach in approving the Application without specific evaluation of this issue. The Order should be abrogated, and the Commission should hold a hearing to evaluate the appropriate definition of "baseline" such that final determinations can be made and explained by the Commission based upon findings of fact.

3. The Commission's failure to specifically evaluate the conflicting views regarding the Companies' proposed use of a system-wide loss factor in measuring efficiencies was unjust, unreasonable, and unlawful.

The Commission repeats concerns over the Companies' proposed use of a system-wide loss factor in the measurement of efficiencies[29] but does not specifically evaluate the conflicting views of the FirstEnergy EDUs and intervenors. The "loss factor" approach used by the Companies to estimate energy savings is very simplified, not transparent for verification of the purported losses, and inconsistent with the approach taken by the Commission's consultant in development of the TRM.[30]

The loss factor can be calculated on a project basis, on an area basis, or by the entire system. The further removed the loss factor value is from the project level, the greater the

[29] Order at 5.

[30] *TRM Case*, VEIC Replies at 67 (November 15, 2010) ("All engineering references require that the loss computations be based on the actual load on the equipment in question, not on load in some other part of the system (see, e.g., Fink DG and Bealy HW, Standard Handbook for Electrical Engineers, 13th Edition, 1993, pp, 18-107 to 18-109)").

uncertainty of the results. The Companies used a weighted average of the loss factors of 98 feeders to create a system-wide loss factor.[31] The record of this proceeding contains no explanation from the Companies as to how these circuits were selected or if they are representative of the system as a whole. The Commission appears unconcerned in its Order over the failure of the Companies to document their methods in this proceeding. Instead, the Commission merely repeats the concerns of the intervenors without explaining how the Commission arrived at its decision.[32]

The Commission acted unjustly and unreasonably by approving the Application without holding a hearing on the Companies' proposed use of a system-wide loss factor in the measurement of efficiencies in light of the issues raised by intervenors. Intervenors proposed using an annualized load duration curve, which can be effectively used to determine losses for projects, as stated in the TRM.[33] The TRM goes further to state the load duration curve should be applied at or near a new piece of equipment or project.[34] Modern utility systems maintain hourly demand data at the feeder or substation level. This data, which represents the energy usage patterns near a potential project, provides a transparent method for determining energy savings. The work required of a utility's engineering staff increases by using site specific data, but this approach allows for future verification of the energy savings. Departures from best practices, as described in the Ohio TRM, should not be permitted.

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[31] Application, Exhibit B at 2.

[32] See Order at 5.

[33] This is the same method proposed for T&D projects in Chapter V of the TRM, "Protocols for Transmission & Distribution Projects."

[34] Chapter V of the TRM, "Protocols for Transmission Projects," describes the use of load duration curves for each new equipment type and at each line section.

The Order was unjust and unreasonable. The Commission should abrogate the Order and hold a hearing on the appropriate means to measure the energy efficiencies claimed in the Application such that final determinations can be made and explained by the Commission based upon findings of fact.

IV. CONCLUSION

The Commission should specifically address the significant legal, policy, and factual controversies that arose in this matter of first impression regarding savings related to T&D projects. The Commission failed to undertake its review responsibilities under the energy resource provisions of S.B. 221 and investigate the Application that involves legitimate controversies. These controversies include the conflict between the Commission's Order and the work performed by the Commission-appointed expert in the *TRM Case*. Failure of the Commission to promptly act in the *TRM Case* does not justify the further failure to oversee utility applications under the energy efficiency provisions of R.C. Chapter 4928.

As discussed herein, the Commission's Order is unjust, unreasonable, and unlawful. The Commission should abrogate the Order and hold a hearing on each of the issues raised in this pleading in order to develop of a record upon which the Commission can make meaningful determinations.

Respectfully submitted,

JANINE L. MIGDEN-OSTRANDER
CONSUMERS' COUNSEL

Jeffrey L. Small, Counsel of Record
Terry L. Etter
Assistant Consumers' Counsel

Office of the Ohio Consumers' Counsel
10 West Broad Street, Suite 1800
Columbus, Ohio 43215-3485
Telephone: (614) 466-8574
small@occ.state.oh.us
etter@occ.state.oh.us

Theodore S. Robinson
Staff Attorney and Counsel
Citizen Power
2121 Murray Avenue
Pittsburgh, PA 15217
Telephone: (412) 421-7029
robinson@citizenpower.com

Henry W. Eckhart
1200 Chambers Rd., #106
Columbus, OH 43212
Telephone: (614) 461-0984
henryeckhart@aol.com
Natural Resources Defense Council

Nolan Moser
Trent A. Dougherty
1207 Grandview Ave., Suite 201
Columbus, OH 43212-3449
Telephone: (614) 487-7506
nmoser@theOEC.org
trent@theOEC.org
Counsel for the OEC

CERTIFICATE OF SERVICE

I hereby certify that a copy of this Application for Rehearing was electronically served on the persons listed below this 8th day of July 2011.

Jeffrey L. Small
Assistant Consumers' Counsel

SERVICE LIST

Kathy J. Kolich
FirstEnergy Service Company
76 South Main Street
Akron, OH 44308
kjkolich@firstenergycorp.com

Attorney for FirstEnergy EDUs

Thomas McNamee
William Wright
Assistant Attorney General
Public Utilities Commission of Ohio
180 E. Broad St., 6th Fl.
Columbus, OH 43215
Thomas.mcnamee@puc.state.oh.us
William.wright@puc.state.oh.us

Samuel C. Randazzo
McNees Wallace & Nurick LLC
21 East State Street, 17TH Floor
Columbus, OH 43215
sam@mwncmh.com

Attorneys for Industrial Energy Users-Ohio

James F. Lang
Kevin P. Shannon
Calfee, Halter & Griswold LLP
1400 KeyBank Center
800 Superior Ave.
Cleveland, OH 44114
jlang@calfee.com
kshannon@calfee.com

Attorneys for FirstEnergy EDUs

Todd M. Williams
P.O. Box 6885
Toledo, OH 43612
williams.toddm@gmail.com

Attorney for the Ohio Environmental Council

David C. Rinebolt
Colleen C. Mooney
Ohio Partners for Affordable Energy
P.O. Box 1793
Findlay, OH 45839-1793
cmooney2@columbus.rr.com
drinebolt@aol.com

Thomas.mcnamee@puc.state.oh.us
William.wright@puc.state.oh.us
kjkolich@firstenergycorp.com
sam@mwncmh.com
nmoser@theOEC.org
trent@theOEC.org
williams.toddm@gmail.com
cmooney2@columbus.rr.com
drinebolt@aol.com
jlang@calfee.com
kshannon@calfee.com
robinson@citizenpower.com
henryeckhart@aol.com