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BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Review of Chapters :
4901:5-17, 4901:5-19, 4901:5-21, 4901:5-23 : Case No. 06-1201-AU-ORD
4901:5-25, 4901:5-29, 4901:5-33, 4901:5-35, and :
4901:5-37 of the Ohio Administrative Code :

INITIAL COMMENTS OF THE OHIO COAL ASSOCIATION
ON BEHALF OF ITSELF AND ITS MEMBERS

I. INTRODUCTION

On October 11, 2006, the Public Utilities Commission of Ohio ("PUCO" or "Commission") proposed rules governing fuel emergencies set forth in Ohio Administrative Code ("OAC") Chapters 4901:5-17 through 4901:5-37 ("Proposed Fuel Emergency Rules"). After granting an extension of time for submission of comments, the Commission ordered initial comments on the Proposed Fuel Emergency Rules to be filed by December 15, 2006 and reply comments filed by January 16, 2007.

The Ohio Coal Association ("Ohio Coal") is a nonprofit association dedicated to representing Ohio's underground and surface coal-mining companies. Representing nearly forty different coal-producing companies and nearly fifty associate members, Ohio Coal is the voice of Ohio's coal industry on issues of interest to the many Ohioans who produce, supply, sell, transport, utilize, finance, and benefit from coal. Ohio Coal and its members are impacted by the Proposed Fuel Emergency Rules, and, as such, Ohio Coal files these initial comments on behalf of itself and its members.

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II. COMMENTS OF OHIO COAL AND ITS MEMBERS

As direct and indirect suppliers of coal to various customers and consumers, Ohio Coal and its members are impacted by the proposed Fuel Emergency Rules. The following comments address areas of concern to Ohio Coal and its members and are submitted for consideration by the Commission. Ohio Coal specifically reserves the right to add additional comments, as necessary, during the reply process.

A. The definition of “coal supplier” is vague

The definition of “coal supplier” is confusing and leads to absurd results. Under the definition, an entity is only a “coal supplier” if such entity sells coal to consumers “in an area within which an energy emergency has been declared or in which the Commission has determined that there is an actual or threatened shortage of coal.” OAC 4901:5-21-01(A) and 4901:5-23-01(A). As such, all later references to “coal supplier” in the rules must, by definition, involve situations where “an energy emergency has been declared” or where “the Commission has determined that there is an actual or threatened shortage of coal.”

Despite this definition, the rules seek to impose pre-emergency requirements on “coal suppliers.” See OAC 4901:5-23-04. This leads to regulatory confusion, as an entity cannot, by definition, be a “coal supplier” during a non-emergency or non-shortage. Pre-emergency requirements are also unlawful, as explained in detail below.

In addition, it is unclear whether the Commission intended the general provisions found in OAC 4901:5-21-02 to only apply during energy emergencies. All references to “coal supplier,” by definition, involve energy emergencies or separate determinations by the Commission of a coal shortage, thus none of the general provisions referencing “coal supplier” apply to any entity unless and until such emergency has been declared or shortage has been

determined. For example, OAC 4901:5-21-02(A)(1), which expects a coal supplier to “assure, to the extent reasonably possible, provision of coal to its consumers for priority use” would only apply in situations where an energy emergency has already been declared or a determination of a coal shortage has been made by the Commission. It is unclear whether the Commission truly intended this provision to have no force or effect in the absence of a declared emergency and/or determination of a coal shortage. Further explanation and revision is necessary to clarify these ambiguities.

In addition, if the Commission is empowered to trigger these requirements based on a “separate determination” of a coal shortage (the lawfulness of which Ohio Coal disputes below), such a determination should be clearly spelled out and include an opportunity for reasonable public review and comment.

B. Pre-emergency requirements are unlawful

The definition of “coal supplier” and its application to requirements proposed during pre-emergencies is unlawful. The Commission, as a creature of statute, is only empowered to take actions authorized by statute. The empowering statute here, R.C. 4935.03, authorizes the Commission to promulgate rules “defining various foreseen types and levels of energy emergency conditions for critical shortages or interruptions in the supply of . . . coal.” R.C. 4935.03(A) (emphasis added). The Fuel Emergency Rules, as currently drafted, seek to impose various pre-emergency requirements on coal suppliers. For example, “coal supplier” is defined and used throughout the rules as an entity supplying coal “in an area within which an energy emergency has been declared or in which the Commission has determined that there is an actual or threatened shortage of coal.” OAC 4901:5-21-01(A). The latter part of this definition seeks

to impose requirements in situations other than declared emergencies, which are additional requirements not authorized by R.C. 4935.03.

In another example, OAC 4901:5-23 allows the Commission to require coal suppliers to notify consumers about an imminent shortage of coal and request consumers to reduce consumption of coal and implement energy conservation measures, even in the absence of a declared emergency. OAC 4901:5-23-04(A)(1). This falls outside the statutory authorization to define “various foreseen types and levels of energy emergency conditions.” R.C. 4935.03(A).

Additionally, the provision empowering the Commission to impose requirements on “coal suppliers” based upon a determination “that there is an actual or threatened shortage of coal,” absent an emergency declaration, is unlawful.

C. Mandatory curtailment creates pricing and compensation ambiguities and injustices

Under Stage One of Mandatory Curtailment for coal suppliers, the rules require suppliers to “sell or provide fuel” to consumers to alleviate hardship or extraordinary need. See 4901:5-23-05(B)(3). This is problematic in two respects:

1.) Requiring suppliers to “provide” fuel to consumers implies it must be provided regardless of compensation or pricing, which is vague, unreasonable, and may be misinterpreted.

2.) The provision references “fuel” instead of “coal.” This may be a typographical error, but if it is not, it is unreasonable to require suppliers of coal to supply “fuel” to consumers under these circumstances. Other than coal, it is impractical for coal suppliers to sell other types of fuel to consumers during fuel emergencies.

Yet another ambiguity in pricing and compensation exists under Stage Three of Mandatory Curtailment, which allows the state to provide coal and delivery and mandates the consumer be billed for the coal received. This same section also empowers PUCO to order

suppliers to “provide coal,” yet provides no similar language mandating compensation for private suppliers. See OAC 4901:5-23-05(D)(4)(a)-(D)(4)(b). Allowing the state to seek compensation for its coal delivery during mandatory curtailment, while at the same time omitting such language with respect to private coal suppliers, has no basis in law or reason, and in addition creates ambiguities as to pricing and compensation in situations where private suppliers are ordered to “provide” coal.

D. The Commission should convene an industry forum to address fuel emergency rules

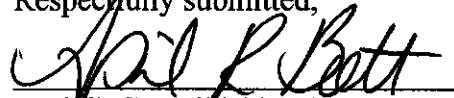
The proposed revised rules not only break new ground but are massive and complex and they are simply too important to adopt without thorough and careful consideration of their legality, appropriateness and impact on utilities, fuel suppliers, customers and consumers, the economy of the State, and ultimately on the public, health and welfare of the residents of this State. In addition, the issues surrounding the creation of workable final Fuel Emergency Rules are extremely inter-related given the number of stakeholders the Fuel Emergency Rules affect. As such, Ohio Coal recommends that this Commission convene a forum of interested stakeholders to study the proposed revisions to the Fuel Emergency Rules in more detail and to suggest revisions as necessary to ensure that any revisions to the Fuel Emergency Rules will be legal, appropriate and effective.

III. CONCLUSION

Ohio Coal and its members understand the need for rules to address fuel emergencies and shortages. However, Ohio Coal and its members have concerns about the proposed rules as currently drafted and cannot support the finalization of the rules as proposed.

Ohio Coal, on behalf of itself and its members, requests that this Commission review, analyze, and revise the Fuel Emergency Rules consistent with the comments set forth above.

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Initial Comments of the Ohio Coal Association, pertaining to the proposed revisions to the Fuel Emergency Rules will be served on those parties designated by entry of the attorney examiner in these proceedings once such entry is issued.



April R. Bott