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BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Adoption of Rules for Standard Service Offer, Corporate Separation, Reasonable Arrangements, and Transmission Riders for Electric Utilities Pursuant to Sections 4928.14, 4928.17, and 4905.31, Revised Code, as amended by Amended Substitute Senate Bill No. 221.	:	**Case No. 08-888-EL-ORD**

REPLY COMMENTS OF THE OHIO ENVIRONMENTAL COUNCIL

Pursuant to the revised schedule established by the attorney examiner's entry in this docket of August 20, 2008, The Ohio Environmental Council ("OEC") hereby submits the following reply comments in response to certain of the comments filed herein on July 22, 2008 by various participants in this rulemaking proceeding. As in the case of its initial comments, OEC's reply comments are limited to issues relating to proposed Chapter 4901:1-39 of the Ohio Administrative Code ("OAC"), which sets forth the staff-proposed procedural framework for implementing the energy efficiency and demand reduction requirements of Amended Substitute Senate Bill No. 221 ("SB 221").

Proposed Rule 4901:1-39-01, OAC:

Proposed Rule 4901:1-39-01 sets out the definitions of various terms used in the remainder of this chapter, including a definition of the term "energy efficiency." In its initial comments, Nucor Steel Marion Inc. ("Nucor") recommends expanding this definition to include "any production process that uses recycled materials as a majority of its raw materials" so as to

recognize the energy savings attributes of using recycled materials in manufacturing processes.[1] OEC opposes the inclusion of this language. Although OEC acknowledges the obvious environmental benefits of using recycled materials and does not dispute Nucor's claim that the use of such materials in its production process reduces its energy requirements, OEC believes that including recycling as an energy efficiency measure in this fashion is inconsistent with a core concept of SB 221. The energy efficiency incentives contemplated by SB 221 are expressly intended to prompt customers and utilities to alter behavior and to create additional investment. Thus, energy savings produced by customer projects or measures that would have been undertaken in the absence of these incentives should not be counted in determining whether the electric utility has met the applicable benchmarks. Clearly, Nucor made a pre-SB 221 business decision to use recycled materials based on the economics involved. Although the associated energy savings may have figured heavily in this decision, no additional incentives were required to induce Nucor to make this choice. To expand the definition of energy efficiency in the manner proposed by Nucor would create a significant free rider problem. Utility customers should not be required to assist in funding projects or measures where the associated payback period is such that the subject customer would have undertaken the project or measure in any event simply because it made economic sense to do so.

In its initial comments, Duke Energy Ohio ("DE-Ohio) joins OEC in criticizing the staff-proposed definition of energy efficiency on the ground use of the phase "energy content of useful output" is unduly vague and confusing.[2] Although OEC again urges the Commission to adopt the definition of energy efficiency proposed in its initial comments, the definition proposed by DE-Ohio is clearly closer to the mark than that proposed by staff. However, OEC objects to

[1] Nucor Comments, 3.

[2] DE-Ohio Comments, 2; OEC Comments, 4-5.

reference in the DE-Ohio definition to "demand response." As used in the industry, demand response relates to shifting load as opposed to reducing total consumption. Lumping these two concepts together in the energy efficiency definition could create confusion in determining whether the separate statutory benchmarks for energy efficiency and peak demand reduction have been met.

Proposed Rule 4901:1-39-04, OAC:

This proposed rule contains the requirements for the annual benchmark reports to be submitted by electric utilities.[3] The Dayton Power and Light Company ("DP&L") and DE-Ohio both express concern that paragraph (A)of the rule does not specify whether the baseline for energy savings is the historical three-year average for the period 2006-2008 or a rolling three-year average that would be recalculated each year. DP&L argues that, if a rolling average is required, the compounding of the SB 221 annual benchmark savings requirements would produce a required cumulative savings by year-end 2025 that would far exceed the 22 percent mandated by the statute. OEC agrees that clarification is required.

Section 4928.66, Revised Code, is less than a model of clarity in this regard, and one could interpret the authority accorded to the Commission to approve adjustments for load growth and other items under divisions (2)(a) and (c) of the statute as evidence of a legislative intent that a three-year rolling average be used. However, in OEC's view, in the absence of extraordinary circumstances, either method will produce essentially the same result. In other words, adjusting annually for load growth, number of customers, sales, etc., would, at least theoretically, bring the current rolling average back to the initial, historical 2006-2008 baseline. This outcome, coupled

[3] As indicated in its initial comments, OEC recommends that proposed Rules 4901:1-39-03 and 4901-39-04 be reversed so that the report requirements are presented before setting out the procedure for the review and approval of the reports. However, for ease of reference, OEC will utilize the staff designations of these rules for purposes of its reply comments.

with the fact that the division (A)(1)(a) annual savings increments are designed to total 22 percent by year-end 2025, strongly suggests that the annual savings requirements are simply to be added together and are not to be compounded as DP&L fears. Under this construction, adjustments can still be made to assure that the annual reduction in usage being measured has been produced by the implementation of energy efficiency measures and is not simply the product of abnormally mild weather or other unforeseen circumstances such as the recent extended outages. Thus, OEC does not object to the use of the historical three-year average for the 2006-2008 period as the baseline for measuring compliance with the benchmarks.

DE-Ohio also seeks clarification as to whether the reporting and verification requirements of paragraph (B)(5) of the rule relate solely to the utility's programs or whether they include customer-initiated energy efficiency projects and measures as well. DE-Ohio's understandable confusion regarding these requirements has undoubtedly been compounded by the final version of the rules adopted last week by the Commission in Case No. 08-777-EL-ORD. These rules appear to have completely altered the scheme initially envisioned by the staff.

Sections 4928.66(A)(1)(a) and (b), Revised Code, require electric distribution utilities to implement energy efficiency and demand reduction programs to induce customers to assist the utilities in meeting the respective energy savings and demand reduction benchmarks set out in those provisions. Consistent with the statute, the original staff model contemplated that the utility would develop such programs and that a customer would submit an application to the utility demonstrating its eligibility for service under the tariffed energy efficiency incentive rate associated with the program in question. The utility would then determine if the customer qualified for service under such tariffed schedule and would verify the energy savings claimed in the customer's application. That verification would then be reviewed by the Commission in the

annual benchmark proceeding to determine if the savings could be counted toward meeting the utility's benchmark. Under the original staff model, unique customer-initiated projects and measures that did not fit within an existing utility program would be handled as special arrangements under Section 4905.31, Revised Code, and, after evaluation and verification, could also be counted toward meeting the utility's benchmark in the annual benchmark case.

Unfortunately, the final version of the rules approved in Case No. 08-777-EL-ORD makes no mention of utility programs or energy efficiency schedules. As adopted, these rules apparently envision that all energy efficiency measures will be treated as unique arrangements, which will require a case-by-case evaluation by the Commission of every such arrangement, whether proposed by the utility or by an individual customer. Moreover, there is nothing in the adopted "Unique arrangements" rule, Rule 4901:1-38-05, OAC, that specifically relates to energy efficiency, which means that there are no fixed criteria by which the Commission will evaluate if such arrangements are to be approved.[4] Under these circumstances, it is imperative that the Rule 4901:1-39-05(B) be clarified in this regard.

Several commentators recommended that proposed Rule 4901:1-39-04(C)(1) be deleted in its entirety.[5] This paragraph provides that technologies or measures that are mandated by law, including those embodied in the Energy Independence and Security Act of 2007, are not to be counted in determining compliance with the applicable benchmark. Although OEC agrees that some refinements may be necessary in applying this test, OEC believes that underlying rationale for this rule is sound and that proposed exceptions can be explored in the annual benchmark proceedings. As previously explained, the SB 221 incentives are intended to spur investment in

[4] The adopted version of the "Energy efficiency arrangements" rule, Rule 4901:1-38-04, which, despite the title, now deals only with energy efficiency production facilities, contains numerous such criteria, as does the adopted version of the "Economic development arrangements" rule, Rule 4901:1-38-03.

[5] DPL Comments, 9; DE-Ohio Comments, 4-5; FE Companies Comments, 8.

energy efficiency measures that would not otherwise be undertaken. Additionally, including improvements mandated by law could create intractable cost-recovery questions. OEC recommends that the savings associated with any such measures implemented by the utilities that exceed energy codes and or other mandatory standards be counted for the reasonable lifetimes of the facilities in question, but, in no instance, should credit be given for a mandated measure's savings that merely matches what the utility is otherwise required by law to do.

Proposed Rule 4901:1-39-05, OAC:

In their comments, a number of the electric utilities seek to remove the provision of proposed Rule 4901:1-39-05(A) that establishes "approval of an electric utility's long-term forecast and benchmark reports" as a prerequisite for seeking cost recovery under the rule.[6] As indicated in its initial comments, OEC believes that review of the benchmark report should be decoupled from the long-term forecast review process. However, OEC believes that approval of the benchmark report should remain a condition precedent to the utility seeking cost recovery. How else can the Commission be assured that recovery of costs is appropriate? Similarly, OEC opposes the recommendation that the statement in the paragraph (A)(1) of the rule limiting recovery of transmission and distribution investments "to the portion of those investments that are attributable to energy efficiency purposes as opposed to reliability or market purposes" be eliminated.[7] This protection is necessary to ensure that utilities only recover once for these investments.

In conclusion, OEC notes that initial comments evidence a marked lack of consensus as to how the process for determining compliance with the benchmarks should work. Proposals

[6] DP&L Comments, 10-11; AEP Comments, 7-8; FE Companies Comments, 9.
[7] DP&L Comments, 12; FE Companies Comments, 4, 9-10.

range from Kroger's endorsement of the creation of a third-party administrator model after the Oregon approach, which has a proven track record,[8] to a much less restrictive paradigm advocated by certain of the electric utilities. Regardless of the version of these rules that the Commission ultimately elects to adopt, OEC urges the Commission to provide a complete explanation of the basis for its decision in the order approving the rules to serve as a guide to the participants in interpreting the Commission's vision of the process.

OEC again expresses its appreciation for the opportunity to present its views regarding these proposed rules, and urges the Commission to adopt the language for these rules proposed by OEC in its initial comments.

Respectfully submitted,

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[8] Kroger Comments, 4.

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