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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. 08-777-EL-ORD**

APPLICATION FOR REHEARING OF THE OHIO ENVIRONMENTAL COUNCIL

Pursuant to Section 4903.10, Revised Code, and Rule 4901-1-35(A), Ohio Administrative Code ("OAC"), the Ohio Environmental Council ("OEC") hereby applies for rehearing from the Commission's September 17, 2008 finding and order in this docket adopting rules to implement certain provisions of Amended Substitute Senate Bill No. 221 ("SB 221"), including new Chapter 4901:1-38, OAC, which governs "Reasonable Arrangements" between electric utilities and their customers. OEC respectfully submits that the Commission's finding and order is unreasonable and unlawful in the following particular, for reasons more fully explained in the accompanying memorandum:

> The Commission's removal of staff-proposed paragraph (B) from the adopted version of the "Energy efficiency arrangements" rule, Rule 4901-38-04, OAC, is inconsistent with the legislative scheme for implementing electric utility energy efficiency programs set forth in Section 4928.66, Revised Code, violates the policy of the state set forth in Section 4928.02(D), Revised Code, by imposing an unreasonable and unnecessary burden on customers that will discourage customer participation in such programs, and will needlessly tax the resources of the both the electric utilities and the Commission.

Accordingly, OEC respectfully requests that its application for rehearing on the above grounds be granted, and that the Commission issue an order on rehearing modifying adopted Rule 4901:1-38-04, OAC, by including a provision governing tariffed electric utility energy efficiency schedules.

WHEREFORE, OEC respectfully requests that its application for rehearing be granted.

Respectfully submitted,

Barth E. Royer
Bell & Royer Co., LPA
33 South Grant Avenue
Columbus, Ohio 43215-3927
(614) 228-0704 – Telephone
(614) 228-0201 – Fax
BarthRoyer@aol.com – Email

Nolan Moser
Air & Energy Program Manager
The Ohio Environmental Council
1207 Grandview Avenue, Suite 201
Columbus, Ohio 43212-3449
(614) 487-7506 – Telephone
(614) 487-751 – Fax
nmoser@theOEC.org – Email

Trent A. Dougherty
Staff Attorney
The Ohio Environmental Council
1207 Grandview Avenue, Suite 201
Columbus, Ohio 43212-3449
(614) 487-7506 – Telephone
(614) 487-7510 – Fax
trent@theOEC.org – Email

Attorneys for
The Ohio Environmental Council

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MEMORANDUM IN SUPPORT OF APPLICATION FOR REHEARING OF THE OHIO ENVIRONMENTAL COUNCIL

I. INTRODUCTION

By its entry in this docket of July 2, 2008, the Commission called for comments from interested parties with respect to a set of staff-proposed rules designed to implement various provisions of SB 221. Among the rules under consideration was proposed Rule 4901-1-38-04 "Energy efficiency schedule," which appeared as a part of new Chapter 4901:1-38, OAC, the chapter governing "Reasonable Arrangements" between electric utilities and their customers.

Proposed Rule 4901:1-38-04 dealt with two discrete types of energy efficiency schedules. Paragraph (A) mandated that each electric utility file an application for approval of an energy efficiency schedule that would provide incentives for customers to invest in energy efficiency production facilities and set forth various criteria that the customers would be required to meet to qualify for those incentives. Paragraph (B) of the proposed rule mandated that electric utilities file applications for approval of an energy efficiency schedule to recognize efforts by customers

to reduce their electrical consumption. Like paragraph (A), proposed paragraph (B) also set forth specified criteria for eligibility for the schedule. Although the entry and the proposed rule were both silent as to the statutory basis for this provision, paragraph (b) was obviously tied to the Section 4928.66(A), Revised Code, requirement that electric distribution utilities implement energy efficiency programs to achieve the mandatory annual energy savings benchmarks set forth in that statute.[1]

The version of Rule 4901:1-38-04, OAC, ultimately adopted by the Commission in its September 17, 2008 finding and order differs from the version originally proposed by the staff in several respects. Although the title of the rule was changed to "Energy efficiency arrangements," staff-proposed paragraph (B) was eliminated in its entirety, leaving the paragraph (A) customer-owned energy production facilities as the only type of energy efficiency arrangement addressed in the rule.[2] In addition, the concept of pre-approved, tariffed energy efficiency schedules went by the boards in that, under the adopted version of the rule, every arrangement between the utility and a customer to provide incentives for the development of customer-owned energy efficiency production facilities will require Commission approval on a case-by-case basis. *See* Adopted Rule 4901:1-38-04(B), OAC. However, the most significant consequence of the changes made by the Commission to the staff-proposed version of the rule is that the removal of paragraph (B) will mean that customer participation in every program developed by the utility to provide incentives to customers to undertake energy savings measures will have to be separately approved by the Commission as a "unique arrangement" under Rule

[1] Paragraphs (C) and (D) of the proposed rule dealt, respectively, with confidentiality requirements associated with, and staff access to, information provided by the customer to demonstrate eligibility for the paragraph (A) and paragraph (B) energy efficiency schedules.

[2] Indeed, it something of misnomer to characterize the paragraph (A) arrangements as "energy efficiency arrangements," in that they are actually a subset of the economic development arrangements addressed in Rule 4901:1-38-03(A), OAC.

4901:1-38-05, OAC. Moreover, unlike the adopted versions of "Economic development arrangements" rule and the "Energy efficiency arrangements" rules, both of which contain specific eligibility criteria [*see* Adopted Rules 4901:1-38-03(A) and 4901-38-04(B), OAC], there are no such criteria in Rule 4901:1-38-05, which means that the Commission will be making up the criteria for approval of energy savings incentive arrangements as it goes along. OEC submits that this case-by-case approach is totally inconsistent with the Section 4928.66, Revised Code, requirement that electric utilities implement programs to provide incentives to customers to undertake measures to reduce their energy consumption. For those reasons set forth below, OEC believes that the removal of the requirement that electric utilities implement tariffed energy efficiency programs is unreasonable, contrary to the legislative intent, and inconsistent with the policy of the state enunciated in Section 4928.02, Revised Code.

II. ARGUMENT

A. THE COMMISSION'S REMOVAL OF STAFF-PROPOSED PARAGRAPH (B) FROM THE ADOPTED VERSION OF RULE 4901-38-04, OAC, IS INCONSISTENT WITH THE SECTION 4928.66, REVISED CODE REQUIREMENT THAT ELECTRIC DISTRIBUTION UTILITIES IMPLEMENT ENERGY EFFICIENCY PROGRAMS.

1. The Commission's stated rationale for removing all references to energy efficiency schedules from Rule 4901:1-38-04, OAC, is fatally flawed.

The Commission begins its discussion of the Chapter 4901-1-38, OAC, rules with the statement that it has determined that "it is necessary to approve all reasonable arrangements entered into between the electric utility and one or more of its customers," then cites this statement as the basis for removing "all references to standard to standard schedules" from the chapter. Finding and Order, 7. This logic is clearly flawed. Yes, all special arrangements – i.e., contracts between a utility and a customer that provide for service at something other than

tariffed rates, terms, and conditions – unquestionably require Commission approval on a case-by-case basis under Section 4905.31, Revised Code. However, by definition, filed tariff offerings and special arrangements are two different animals. Although tariffed schedules require Commission approval, once a tariffed schedule is approved, no further Commission approvals are required for the utility to provide service pursuant to the schedule. Thus, it does not follow from the fact that all reasonable arrangements require Commission approval that Rule 4901:1-38-04 cannot include requirements governing tariffed energy efficiency programs.

2. The legislative scheme embodied in Section 4928.66, Revised Code, clearly contemplates tariffed utility energy efficiency incentive programs.

Although measures that reduce energy consumption obviously reduce customer bills, mercantile customers will not undertake such measures unless the payback can be achieved over a period that justifies the expenditure from a business standpoint. The legislature obviously understood that, if the mandatory annual energy savings benchmarks set forth in Section 4928.66(A)(1)(a), Revised Code, are to be met, electric distribution utilities will have to provide financial incentives that will reduce the payback period for energy efficiency measures to an acceptable length. Thus, Section 4928.66(A)(1)(a) requires electric distribution utilities to "implement energy efficiency programs" to achieve the energy savings benchmarks. The use of the term "programs" in the statute clearly suggests that the electric distribution utilities are to develop an array of tariffed, incentive-based energy savings options, and that a customer may then select from this menu of energy efficiency programs any option it deems to be advantageous from its business perspective.

Like any tariffed offering, each tariffed energy efficiency program would contain eligibility requirements, and the utility would, based on information provided in the customer's

application to participate in the program, determine if the customer met those requirements. Although, like any tariffed offering, the programs themselves would require advance Commission approval, there would be no need for the utility and/or the customer to seek any additional Commission approval before permitting the customer to participate in the program. Indeed, given the number of mercantile customers statewide, it is unthinkable that the legislature intended that the Commission would have to approve customer participation in utility energy efficiency programs on case-by-case basis. However, because Section 4928.66(A)(2)(c) provides that effects of all utility demand-response programs are be included in measuring compliance with the statutory benchmarks, the Commission would, in the context of the utility's annual benchmark proceeding, provide for after-the-fact audits of the program results to verify the utility's claimed energy savings under a given program.[3]

The foregoing is not intended to suggest that tariffed utility energy efficiency programs represent the only vehicle available to provide incentives to mercantile customers to undertake energy efficiency measures. Obviously, cookie-cutter utility energy efficiency programs may not be suitable for mercantile customers with unique operating characteristics. Such customers are free to enter into special energy efficiency arrangements with the utility that provide incentives for the customer to pursue its own self-directed energy efficiency program in exchange for permitting the utility to include the energy savings attributes of the customer program in achieving compliance with the applicable statutory energy savings benchmark. Indeed, Section 4928.66(A)(2)(c), Revised Code, specifically contemplates this approach by providing for relief from the otherwise applicable energy efficiency cost-recovery mechanism in

[3] This appears to be precisely the process envisioned by the staff-proposed version of paragraph (D) of Rule 4901:1-38-04, which provided for staff access to utility and customer information related to service provided pursuant to energy efficiency schedules for periodic and random audits.

exchange for the customer permitting the utility to adjust the baseline used to test for benchmark compliance to recognize the effects of the effects of customer's program. However, unlike tariffed utility energy efficiency programs, arrangements of this type clearly require Commission approval on a case-by-case basis under Rule 4901:1-38-05, OAC.

3. **The requirement that every energy efficiency incentive offered to customers be approved by the Commission as a unique arrangement under Rule 4901:1-38-05, OAC, will impose an unreasonable and unnecessary burden on customers that will discourage customer participation in utility programs, and will needlessly tax the resources of the both the electric utilities and the Commission.**

Although, for the reasons set forth above, OEC believes that SB 221 clearly contemplates tariffed energy efficiency programs, the Commission should not lose sight of the practical ramifications of requiring every energy incentive offered to customers to be approved as a unique arrangement Rule 4901:1-38-04, OAC. Although, as envisioned by the staff-proposed version of Rule 4901:1-38-04, customers seeking to participate in tariffed utility energy efficiency program would be required to demonstrate to the utility that they met the eligibility requirements, this is a far cry from the substantial burden placed on customers under the unique arrangements rule. Under the unique arrangements rule, a formal application for approval of energy efficiency incentive would have to be filed with the Commission, which could lead to a full-blown hearing process. At minimum, the customer would have to seek formal protection from the Commission for competitively sensitive information included in the application, whereas, under the staff-proposed rule, the utility would have been required to treat the information provided by the customer in its application for service under a tariffed energy efficiency program as confidential without any action on the customer's part. As provided in Section 4928.02(D), Revised Code, the state policy is to encourage innovation and market access

for cost-effective supply- and demand-side retail electric service including, demand-side management. Clearly, imposing unnecessary burdens on customers is inconsistent will discourage energy efficiency efforts and is consistent with this policy objective.

In addition, as suggested above, requiring all energy efficiency incentives for mercantile customers to be approved by the Commission on a case-by-case basis could result in a huge number of applications that could literally tie up the Commission's staff for months. Plainly, case-by-case approval should be required only for arrangements that are truly unique, and not in instances in which a customer seeks to participate in an approved utility energy efficiency program.

B. TO THE EXTENT THE COMMISSION FOUND CERTAIN ELEMENTS OF THE STAFF-PROPOSED RULE TO BE PROBLEMATIC, THE COMMISSION SHOULD MODIFY THOSE ELEMENTS IN THIS RULEMAKING PROCEEDING.

In its discussion of paragraph (B) of staff-proposed Rule 4901:1-38-04, OAC, the Commission enumerated a few of the many issues raised in the filed comments regarding this provision. Finding and Order, 7. However, rather than deciding the identified issues on their merits, the Commission merely stated that it found the rule to be problematic and concluded that the rule should not be adopted as proposed. *Id.* OEC submits that this is an extremely short-sighted result. The failure to establish bright-line tests for customer eligibility for energy efficiency incentives in this case will necessarily mean that, unlike applications for approval of economic development arrangements under Rule 4901:1-38-03, OAC, and applications for approval of energy efficiency arrangements relating to energy efficiency production facilities under adopted Rule 4901:1-38-04, OAC, there will be no set standards for Commission approval of energy efficiency incentives. Indeed, Rule 4901:1-38-05 contains no reference to energy

efficiency arrangements, let alone and standards by which such arrangements are to be evaluated. In other words, the Commission has, as a practical matter, simply deferred its decision with respect to eligibility criteria to individual "unique arrangements" cases, where it will have to make up criteria on the fly. Clearly, this is extraordinarily poor regulatory policy.

If, after reviewing all the comments that addressed staff proposed paragraph (B), the Commission was unable to come to a decision, the appropriate course is to reopen this issue by granting rehearing for the purpose of entertaining further comments. In any event, the Commission should modify this rule on rehearing so as to accommodate tariffed utility energy efficiency programs.

Respectfully submitted,

Barth E. Royer
Bell & Royer Co., LPA
33 South Grant Avenue
Columbus, Ohio 43215-3927
(614) 228-0704 – Telephone
(614) 228-0201 – Fax
BarthRoyer@aol.com – Email

Nolan Moser
Air & Energy Program Manager
The Ohio Environmental Council
1207 Grandview Avenue, Suite 201
Columbus, Ohio 43212-3449
(614) 487-7506 – Telephone
(614) 487-7510 – Fax
nmoser@theOEC.org – Email

Trent A. Dougherty
Staff Attorney
The Ohio Environmental Council
1207 Grandview Avenue, Suite 201
Columbus, Ohio 43212-3449
(614) 487-7506 – Telephone

(614) 487-7510 – Fax
trent@theOEC.org – Email

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing has been served upon the following parties by first class mail, postage prepaid, this 17th day of October 2008.

Barth E. Royer

David Boehm
Michael Kurtz
Boehm, Kurtz & Lowry
36 E. Seventh St., Ste. 1510
Cincinnati, OH 45202-4454

Ann Hotz
Office of the Ohio Consumers' Counsel
10 West Broad Street, Suite 1800
Columbus, Ohio 43215-3485

Glenn Krassen
E. Brett Breitschwerdt
Thomas O'Brien
Bricker & Eckler, LLP
100 South Third St.
Columbus, OH 43215

John Bentine
Mark Yurick
Chester, Willcox & Saxbe LLP
65 E. State St., Ste. 1000
Columbus, OH 43215-4213

Garrett Stone
Michael Lavanga
Brickfield, Burchette, Ritts & Stone
1025 Thomas Jefferson St., N.W.
8th West Tower
Washington, D.C. 20007

Steven Millard
200 Tower City Center
50 Public Square
Cleveland, OH 44113

Arthur Korkosz
James Burk
Ebony Miller
Mark Hayden
FirstEnergy Crop.
76 S. Main St.
Akron, OH 44308

Sam Randazzo
Lisa McAlister
Daniel Neilsen
Joseph Clark
McNees, Wallace & Nurick LLC
21 E. State St., 17th Fl.
Columbus, OH 43215

Dave Rinebolt
Colleen Mooney
Ohio Partners for Affordable Energy
231 W. Lima St., P.O. 1793
Findlay, OH 45839-1793

Leslie Kovacik
City of Toledo
420 Madison Ave., Ste. 100
Toledo, OH 43604-1219

Marvin Resnik
Steve Nourse
AEPower Service Corp.
1 Riverside Plaza, 29th Fl.
Columbus, OH 43215

Jenna Johnson-Holmes
Dona Seger Lawson
Judi Sobecki
Dayton Power & Light Co.
1065 Woodman Dr.
Dayton, OH 45432

Lance M. Keiffer,
Asst. Prosecuting Attorney
711 Adams St.
Toledo, OH 43624

Dale Arnold
Ohio Farm Bureau Federation Inc.
P.O. Box 182383
Columbus, OH 43218

M. Howard Petricoff
Vorys, Sater, Seymour & Pease
52 E. Gay St., P.O. Box 1008
Columbus, OH 43216

Jerry Klenke
Richard Lewis
David Varda
8050 N. High St., Ste. 150
Columbus, OH 43235-6486

Tommy Temple
Whitfield A. Russell
Ormet Primary Aluminum Corp.
4232 King St.
Alexandria, VA 22302

Randell J. Corbin
AMP-Ohio
2600 Airport Dr.
Columbus, OH 43219

Melissa Mullarkey
740 Quail Ridge Dr.
Westmont, IL 60559