

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of Elyria)	Case No. 09-1205-EL-EEC
Foundry and the Ohio Edison Company, For)	
Approval of a Special Arrangement)	
Agreement With a Mercantile Customer)	
)	

**COMMENTS REGARDING THE JOINT APPLICATION AND REQUEST FOR A
WORKSHOP
BY
THE OHIO ENVIRONMENTAL COUNCIL AND THE OFFICE OF THE OHIO
CONSUMERS' COUNSEL**

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I. INTRODUCTION

In its Joint Application in the above-captioned case, the Ohio Edison Company (“FirstEnergy”) seeks approval of a Special Arrangement Agreement with a Mercantile Customer, Elyria Foundry (“Elyria”). The Joint Application seeks to allow Elyria to opt-out of paying FirstEnergy for the costs collected under energy efficiency Rider DSE2. Approval of the Application would also allow FirstEnergy to attribute the energy reductions associated with the projects undertaken by Elyria to the energy efficiency benchmarks established by Substitute Senate Bill 221 (“S.B. 221”) and codified in R.C. 4928.66. The Joint Application does not provide sufficient information to allow Commission approval. The Commission should deny the Joint Application. The Commission should not approve this application unless the Applicants make significant revisions and file supplemental information.

The undeniable purpose and goal of S.B. 221, as described in R.C. 4928.66, was to promote the development of energy efficiency and renewable energy in the state of Ohio. To meet this goal of cleaner generation and reduced energy consumption, R.C. 4928.66 requires all

electric distribution utilities (“utilities”) to meet annual Energy Efficiency and Peak Demand Reduction (“EE/PDR”) benchmarks, which culminate in a 22 percent reduction in energy usage by the year 2025. R.C. 4928.66(A)(2)(c) also allows utilities to count certain qualifying customer-sited energy improvements towards those benchmarks and, in exchange, for the customer to opt-out of a utility’s EE/PDR cost recovery mechanism.

The Joint Application clearly fails to include data that must be reviewed by the Commission in order to provide a foundation for a review process that could lead to approval. Specifically, the Joint Application fails to include a description of measurement and verification methodologies, lacks information on remaining useful life of equipment or avoided incremental cost, and includes inadequate descriptions of energy efficiency programs and initiatives. For all of these reasons, the Joint Application is inadequate.

Accordingly, the Joint Application should be denied. Moreover, this application and others like it should not be considered without significant revisions or the filing of supplemental information. The Ohio Environmental Council (“OEC”) and Ohio Consumers’ Counsel (“OCC”) also request that the Commission convene a workshop to educate interested parties about the Commission’s criteria for approval of mercantile exemption cases and to establish a standard form that will be used to evaluate this and future applications. Finally, we note that FirstEnergy intends to use the energy savings from this and other projects to meet a substantial portion of its 2010-2012 EE/PDR benchmark obligations. FirstEnergy’s Portfolio Plan application is currently being litigated before the Commission in Case No. 09-1947-EL-POR, et al. The viability of the Company’s Portfolio Plan is directly dependant on the viability of this and other mercantile exemption applications. Therefore, the Commission should promptly consider the matters raised in these Comments.

II. BURDEN OF PROOF AND STANDARD OF REVIEW

The Applicants request approval of their Application under R.C. 4928.66 and Ohio Adm. Code 4901-1-39-08, asking for approval of the agreement, the customer energy projects and for an exemption that would allow Elyria to avoid paying the Company's Rider DSE2. R.C. 4928.66 permits the utility to use energy efficiency and peak demand reduction effects made by mercantile customers to meet utility compliance benchmarks under certain circumstances. The mercantile customer would also be exempted from paying the costs of energy efficiency, demand response or peak reduction programs if the customer commits its programs for integration into the electric distribution utility's programs. But the Commission cannot grant the requested approvals without finding that the "exemption reasonably encourages such customer to commit those capability."

Under Ohio Adm. Code 4901-1-39-08, before the mercantile customer can be granted the exemption the Applicants seek, the mercantile customer must agree to provide an annual report on the energy savings and electric utility peak-demand reductions achieved in the customer's facilities in the most recent year. That report must demonstrate numerous items, listed under Ohio Adm. Code 4901-1-39-08(A)-(G). Finally, under Ohio Adm. Code 4901-1-39-08(H), the Applicant's request for the exemption combined with the request for approval of the reasonable arrangement must demonstrate that the reasonable arrangement "contains appropriate measurements and verification of program results." As addressed in more detail below, the Applicants have not met these evidentiary requirements in order to allow the Commission to make a decision. For that reason, the Commission should not approve the exemption under R.C. 4903.09.

Ohio Adm. Code 4901-1-39-05(G)(1)-(5) identifies what the Applicants must provide in order to obtain approval for a mercantile customer to commit its programs for integration with the utility's programs. As addressed in more detail below, the Applicants have not met these burdens in order to allow the Commission to make its review. For that reason, the Commission should not approve the special arrangement under R.C. 4903.09.

The Joint Application is subject to review under all applicable laws and regulations, including the provisions contained in Ohio Administrative Code sections 4901:1-39 et seq. Recent litigation before the Commission has raised the issue of whether O.A.C. rules with an effective date of December 10, 2009 are applicable to joint applications filed before December 10, 2009.¹ However, there can be no doubt that the Commission's rules apply to all pending mercantile exemption applications. First, the Company's Rider DSE² and R.C. 4905.31³ both contain "Savings Clauses," contemplating subsequent rule changes. Second, while there is a general presumption against the retroactive application of statutes, that presumption does not apply with regard to these rules. The presumption against retroactivity does not apply to the procedural and remedial rules at issue.⁴ Finally, the Commission has made clear in several recent decisions that the rules regarding mercantile applications are the standard that will be used to judge applications filed, even if filed before December 10, 2009.⁵ The Commission's rules, therefore, apply to the Joint Application.

¹ See, e.g., 09-1226-EL-EEC, Joint Applicants' Memorandum Contra OEC's Motion to Dismiss.

² Case No. 08-935-EL-SSO, Finding and Order at 2.

³ "Every such schedule or reasonable arrangement shall be under the supervision and regulation of the commission, and is subject to change, alteration, or modification by the commission." R.C. § 4905.31.

⁴ *Montgomery v. John Doe 26 et al.* (2000), 141 Ohio App.3d 242, 252, 750 N.E.2d 1149; *Smith v. New York Cent. Rd. Co.* (1930), 122 Ohio St. 45, 170 N.E. 637; *Bielat v. Bielat* (2000), 87 Ohio St.3d 350, 721 N.E.2d 28; *Murphy v. Ohio Dept. of Highway Safety* (1984), 18 Ohio App.3d 99, 481 N.E.2d 648.

⁵ See Case Nos. 09-595-EL-EEC, 09-1100-EEC, 09-1200-EEC, and 09-1201-EEC. We note that in these cases, FirstEnergy did not object to the Commission's application of the new rules to previously filed applications.

III. ARGUMENT

A. The Application Does Not Contain Sufficient Information For Commission Approval And Should be Denied.

The Joint Application should not be approved until further information has been provided consistent with the requirements of the Ohio Administrative Code. In the present Joint Application, there is insufficient information describing the methodologies used to measure and verify program results, no information regarding the remaining life of the replaced equipment or the electric utility's avoided incremental cost, and inadequate descriptions of the specific initiatives themselves. Commissioner Cheryl Roberto has expressed concern regarding the lack of such necessary information contained in similar applications.⁶

1. The Joint Application Contains An Insufficient Description Of Measurement And Verification Methodologies.

The Joint Application should be denied. And the Commission should not consider such applications until the Applicants file further information regarding measurement and verification methodologies, as required by Commission regulations. According to O.A.C. 4901:1-39-05(G)(5), a joint application for a special arrangement between a mercantile customer and an electric utility must:

“[i]nclude a description of all methodologies, protocols, and practices used or proposed to be used in measuring and verifying program results, and identify and explain all deviations from any program measurement and verification guidelines that may be published by the commission.”

⁶ *In the Matter of the Application of PolyChem Corporation and the Cleveland Electric Illuminating Company For Approval of a Special Arrangement with a Mercantile Customer*, Case No. 09-1102-EL-EEC, Finding and Order at pages 3-5 (February 11, 2010) (Roberto, Comm'r, dissenting).

The Joint Application does not satisfy the requirements of O.A.C. 4901:1-39-05(G)(5). The Joint Application in whole is fifteen pages, the majority of which is boilerplate information, including a six-page agreement and a five-page recitation of the statutory requirements.⁷ Only the final three pages provide the Commission with any substance about the Project. These pages fail to provide enough information upon which the Commission could approve the Joint Application. More specifically, FirstEnergy submits Exhibit 3 as the description of all relevant methodologies, protocols, and practices.⁸ The description contained in Exhibit 3 consists of conclusory statements regarding the amount of energy saved.⁹ Without more information, the Commission is incapable of determining whether the savings reported for this energy project are purely speculative, or an accurate estimate of anticipated savings. The Commission should deny this Application because the Applicants have not provided sufficient information to form the basis for approval. The Commission should not consider the Application or other similar to it until the Applicants file the additional information needed to make the record regarding the measurement and verification methodologies used in the Joint Application.

2. The Joint Application Contains No Information On Remaining Useful Life Of Equipment Or Avoided Incremental Cost.

The Joint Application also lacks the information necessary for the Commission to make a proper decision as to whether the energy efficiency will be attributed to the project alone. For a customer-sited project to be eligible for an exemption, the customer's energy savings must have been the result of an EE/PDR project. The Commission's rules provide that that an EE/PDR

⁷ The agreement is required by O.A.C. § 4901:1-39-05(G)(4).

⁸ *In the Matter of the Application of Elyria Foundry and the Ohio Edison Company, For Approval of a Special Arrangement Agreement With a Mercantile Customer*, Case No. 09-1205-EL-EEC, Joint Application, Exhibit 3 (October 28, 2009).

⁹ *Id.*

project must involve either early retirement of fully functioning equipment or the installation of new energy efficient equipment that exceeds the market standard:

A mercantile customer's energy savings and peak-demand reductions shall be presumed to be the effect of a demand response, energy efficiency, or peak demand reduction program to the extent they involve the early retirement of fully functioning equipment, or the installation of new equipment that achieves reductions in energy use and peak demand that exceed the reductions that would have occurred had the customer used standard new equipment or practices where practicable.¹⁰

Therefore, pursuant to O.A.C. § 4901:1-39-05(F), if the customer retires fully-functioning equipment, or if newly-installed equipment provides greater reductions than new standard equipment would have, the Commission presumes the energy savings resulting from those projects to be the result of the project. As noted by Commissioner Roberto, the Commission cannot make this presumption unless the application contains the appropriate information.¹¹ The application must describe the functionality and remaining useful life of the replaced equipment and the energy efficiency of standard replacement equipment.¹²

The Joint Application does not contain this information. Specifically, project 1 referenced in Exhibit A contains no representations regarding the early retirement of fully functional equipment.¹³ Without information describing the remaining useful life of the equipment replaced, it is impossible to know whether the savings were *incidental* as the result of a necessary "business as usual" investment, or *additional*, as the result of an energy efficiency project. The mercantile opt-out provision is intended to reward mercantile customers who make

¹⁰ O.A.C. 4901:1-39-05(F).

¹¹ *In the Matter of the Application of PolyChem Corporation and the Cleveland Electric Illuminating Company For Approval of a Special Arrangement with a Mercantile Customer*, Case No. 09-1102-EL-EEC, Finding and Order at pages 3 (February 11, 2010) (Roberto, Comm'r, dissenting).

¹² *Id.*

¹³ *In the Matter of the Application of Elyria Foundry and the Ohio Edison Company, For Approval of a Special Arrangement Agreement With a Mercantile Customer*, Case No. 09-1205-EL-EEC, Joint Application, Exhibit A (October 28, 2009).

a choice to invest in energy efficiency, not for customers who simply make a necessary replacement of equipment that is at the end of its useful life.

In order to comply with O.A.C. 4901:1-39-08(A), Commissioner Roberto points out that “the mercantile customer and/or electric utility would need to provide the electric utility’s avoided incremental cost of energy, the administrative costs to obtain the commitment, and the value of the rider that would not be paid.”¹⁴ The Joint Application does not contain this information. Because of these deficiencies, the Commission should require the Applicants to submit additional information on these topics.

3. Additional Data Is Necessary to Determine Whether The Joint Application Encourages Further Customer-Sited Energy Efficiency Development, And Whether The Energy Efficiency Projects Pass The Total Resource Cost Test.

The Commission is authorized by R.C. 4928.66(A)(2)(c) to allow an exemption from paying the DSE2 rider if the Commission determines that the exemption reasonably encourages the customer to commit those energy savings to the utility. Specifically, a rider exemption requires, according to rule 4901:1-39-08, “[a] demonstration that energy savings and peak-demand reductions associated with the mercantile customer’s program are the result of investments that meet the total resource cost test, or that the electric utility’s avoided costs exceeds the cost to the electric utility for the mercantile customer’s program.” Nowhere in the Joint Application is this demonstration included, discussed or alluded to. In light of this central component of the Commission’s “reasonableness” determination under O.A.C. 4928.66(A)(2)(c), the Commission cannot approve this Joint Application until the Applicants make this demonstration of reasonable cost. Accordingly, the Commission should deny the

¹⁴ *In the Matter of the Application of PolyChem Corporation and the Cleveland Electric Illuminating Company For Approval of a Special Arrangement with a Mercantile Customer*, Case No. 09-1102-EL-EEC, Finding and Order at page 5 (February 11, 2010) (Roberto, Comm’r, dissenting).

application and others like it until these Applicants or other applicants file additional information on this issue.

4. The Joint Application Does Not Include Adequate Descriptions Of Energy Efficiency Programs And Initiatives.

The Joint Application's description of specific measures is inadequate as a basis for approval. Specifically, the project description included in the Joint Application leaves significant questions about the nature of the project and whether it qualifies as energy efficiency. The Commission's rules require a specific description of the project to be filed as part of the Joint Application:

“A listing and description of the Customer Energy Projects implemented, including measures taken, devices or equipment installed, processes modified, or other actions taken to increase energy efficiency and reduce peak demand, including specific details such as the number, type and efficiency levels both of the installed equipment that is being replaced, if applicable;”¹⁵

Filed with the present Joint Application is the “Mercantile Customer Project Commitment Agreement,” signed by Elyria. This agreement includes a listing of items that Elyria agrees to provide to the Commission as part of the Joint Application. However, the Joint Application fails to provide this information in a coherent form. The description of the project does not lead to the conclusion that the project is an energy efficiency project. It is unclear from the descriptions in Exhibit A whether or not these actions are part of routine business and maintenance practices.¹⁶ If this reduction effort is part of routine maintenance efforts, it does not qualify as an energy efficiency savings project under the applicable rule. O.A.C. 4901:1-39-01 (L) states that “Energy Efficiency” means:

¹⁵O.A.C. 4901:1-39(E).

¹⁶ *In the Matter of the Application of Elyria Foundry and the Ohio Edison Company, For Approval of a Special Arrangement Agreement With a Mercantile Customer*, Case No. 09-1205-EL-EEC, Joint Application, Exhibit A (October 28, 2009).

“reducing the consumption of energy while maintaining or improving the end-use customer’s existing level of functionality, or while maintaining or improving the utility system functionality;”

If routine maintenance projects produce energy savings, this is incidental savings, not additional savings. If maintenance projects produce savings and are new additions to a facility’s operation, then under the Ohio Admin. Code the projects would qualify as energy efficiency measures. That noted, Elyria makes no representation that the projects identified in Exhibit A are more than routine maintenance projects.¹⁷ Elyria must demonstrate that this project qualifies as an energy efficiency project eligible for exemption.

B. The Commission Should Outline Criteria For Approval Of Mercantile Opt-Out Applications.

FirstEnergy’s mercantile application is a vague, legally inadequate document. If approved by the Commission, this Joint Application could initiate a flood of other deficient mercantile exemption applications. The Commission should stop the flood of these deficient applications by outlining the criteria required for approval of mercantile applications. A workshop on the mercantile application process would be the ideal venue for all interested parties and the Commission to discuss the information required in applications, and to develop a standard application for mercantile customers looking to opt-out of EE/PDR riders.

1. The Commission Should Convene a Workshop

To address the Commission’s obligation to promote the state policy under R.C. 4928.02(J) to “provide coherent, transparent means of giving appropriate incentives to technologies that can adapt successfully to potential environmental mandates,” the Commission

¹⁷ *In the Matter of the Application of Elyria Foundry and the Ohio Edison Company, For Approval of a Special Arrangement Agreement With a Mercantile Customer*, Case No. 09-1205-EL-EEC, Joint Application, Exhibit A (October 28, 2009).

should consider Commissioner Roberto's recommendation that the Commission's Staff undertake a workshop.¹⁸ The workshop¹⁹ would allow for a methodical formulation of a regulatory framework that would provide for input from all interested parties, develop standardized forms and develop a "go—no go" decision matrix for mercantile EE/PDR applications. This process would provide the Commission with an opportunity to explain the information it needs under the new rules, would lessen future litigation, and would encourage the use of low-cost opportunities for Ohio electric utilities to meet their benchmarks. Given the plethora of mercantile opt-out applications, it would also help the Staff and other interested parties in the review process.

If the Commission arranges the workshop, the OEC and the OCC would volunteer to draft a straw document from which the parties can work. The parties request the Commission to render a decision on this matter no later than June 30 so that all new filings can be consistent with PUCO requirements.

2. The Commission Should Provide a Standard Application Form.

One of the goals of the workshop on the mercantile opt-out application process should be the creation of a standard application form, similar to those that must be filed to certify renewable energy generating facilities.²⁰ Utilities and their customers could then use the standardized application, toward filing an application that would include all information necessary for a decision. Additionally, a uniform application would simplify the review process

¹⁸ See *In the Matter of the Application of Casualty Insurance and the Cleveland Electric Illuminating Company For Approval of a Special Arrangement Agreement With a Mercantile Customer*, Case No. 09-0595-EL-EEC, Dissenting Opinion at 7.

¹⁹ Ohio Admin. Code 4901-1-37 (providing "The commission may, from time to time, schedule informational workshops for the purpose of receiving information and exchanging ideas regarding relevant topics").

²⁰ The standard form for REN applications, with its specific criteria, can be used a model for creating a standard mercantile application form.

for the Commission and interested parties because those reviewing the applications would be familiar with the standard forms and would be able to quickly navigate the application to find specified information. For example, reviewers would know that descriptions of the energy projects were located in section 'x', or that descriptions of the methodologies used to measure and verify program results are located in section 'y'. A uniform application would also focus the review process on substantive issues, such as whether the projects implemented by the customer constitute energy efficiency projects, instead of the current debate over what information applications need to include.

C. The Commission Should Take Up This Matter Promptly To Prevent Unlawful Mercantile Applications From Being Included in Portfolio Plan Calculations.

As discussed above, FirstEnergy intends to use the energy savings obtained from this and other similar mercantile projects to satisfy a substantial portion of its EE/PDR obligations. In fact, the Company intends to use such historic mercantile savings to meet over 50 percent of its 2010 benchmark.²¹ Therefore, it is critically important that each mercantile exemption application represents a lawful use of the mercantile exemption statute. The Commission should promptly take up this matter, while FirstEnergy's Portfolio Plan, Case No. 09-1947-EL-POR, et al., is being litigated. Given that time is of the essence, the OEC and OCC recommend that the Commission schedule a workshop within the next two weeks, to be continued daily in the same fashion as a hearing would until there is either a consensus of the parties or a partial consensus, with a week to file comments on what is not resolved through consensus.

²¹ See Case No. 09-1947-EL-POR, et al., OEC's Post-Hearing Brief at 8, citing OEC Exhibit 1, FirstEnergy's Data Responses.

IV. CONCLUSION

In conclusion, the Joint Application fails to include data and representations that must be reviewed by the Commission in order to provide a foundation for statutorily permissible approval. Specifically, the Joint Application fails to include a description of measurement and verification methodologies, lacks information on remaining useful life of replaced equipment or avoided incremental cost, and includes inadequate descriptions of energy efficiency programs and initiatives. The Commission should request that FirstEnergy significantly revise, or file supplemental information in addendum to, the Joint Application. The Commission should also use this filing as an opportunity to elaborate on the criteria it will use to judge mercantile exemption applications. To this end, the Commission should promptly convene a workshop as outlined above. This process will allow the Commission to discuss the mercantile application process, clarify what information it requires for approval under the new rules, and develop a standard application form. The OEC and the OCC volunteer to be active participants in such a process, and to help develop a standardized mercantile application form.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing Comments has been served upon the following parties, via electronic and/or U.S. Mail, this 19th day of May, 2010.

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