BEFORE THE
PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application for Approval of a Pilot Program Regarding Mercantile Applications for Special Arrangements with Electric Utilities and Exemptions from Energy Efficiency and Peak Demand Reduction Riders	))))))	Case No. 10-834-EL-EEC

MEMORANDUM CONTRA OF OHIO EDISON COMPANY, THE CLEVELAND ELECTRIC ILLUMINATING COMPANY AND THE TOLEDO EDISON COMPANY TO THE APPLICATION FOR REHEARING OF THE OHIO ENVIRONMENTAL COUNCIL

A. Introduction

Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company (collectively "Companies") oppose the Ohio Environmental Council's ("OEC") Application for Rehearing ("AFR") of the Finding and Order entered in the above-captioned case on September 5, 2012 ("Order")[1], which extended the Mercantile Application Pilot Program ("Mercantile Program") that the Commission announced on September 15, 2010.[2] The Mercantile Program has been successfully running for over two years, with the Commission, electric utilities and stakeholders investing a lot of resources in improving and streamlining the program. In recognition of this successful program and the large number of applications that has been filed thereunder, the Commission ordered the extension of the Mercantile Program, again, for another six months or until March 15, 2013.[3]

[1] In the Matter of the Application for Approval of a Pilot Program Regarding Mercantile Applications for Special Arrangements with Electric Utilities and Exemptions from Energy Efficiency and Peak Demand Reduction Riders, Case No. 10-834-EL-POR ("Mercantile Case"), September 5, 2012 Finding and Order.
[2] *Id.* at September 15, 2010 Entry.
[3] *Id.* at September 5, 2012 Finding and Order, Paragraph 7.

Nevertheless, OEC complains, again, that the Commission should not have ordered the Mercantile Program. Specifically, OEC's AFR demonstrates its continued dissatisfaction with three elements[4] of the Mercantile Program: (1) the use of the "as found" method for determining energy efficiency savings; (2) the Commission's alleged failure to provide a "reasoned explanation for its decision" and; (3) the waiver of O.A.C. 4901:1-39-05.[5] OEC argues that these decisions are contrary to law and Commission precedent and were made without a sufficient reason.

The Commission should deny OEC's AFR. First, OEC's AFR is nothing more than an impermissible rehashing of arguments that it already has made, and the Commission has already rejected. Second, as the Companies have previously explained when the OEC sought to have the Commission's orders on the Mercantile Program reversed (for the same reasons), the "as found" method is an appropriate method to count energy savings. Third, the Commission has given ample reason for its departure from past precedent. Last, the Commission has properly waived its own rules. The Commission has not once, but twice extended the Mercantile Program. Now is not the time to eliminate it. Accordingly, OEC's AFR should be denied.

B. Procedural Background

On September 15, 2010, the Commission issued an Entry developing the Mercantile Program ("September 15 Entry").[6] In that Entry, the Commission explained "*for purposes of counting savings toward utility compliance and providing available incentives under the pilot program*, all equipment replacements will be considered using the "as found" method."[7] Finally,

[4] OEC does not waive its objections related to the benchmark-comparison method for determining rate exemption because it will participate in the Technical Workshop that the Commission ordered on this issue. *See* Mercantile Case, OEC AFR, October 5, 2012 at p. 11.
[5] *Id.* at OEC AFR, October 5, 2012 at p. 2.
[6] *Id.* at Entry, September 15, 2010.
[7] *Id.* at Paragraph 7 (emphasis added).

the Commission also stated "that it is necessary and appropriate to waive the provisions of Rule 4901:1-39-05(H), O.A.C., *for purposes of the pilot program*."[8] On October 1, 2010, the OEC filed a Motion to Stay the September 15, 2010, asserting some of the very same arguments it makes in this AFR.

On October 15, 2010, several stakeholders, including the OEC, filed applications for rehearing regarding the September 15 Entry. In its October 15, 2010 AFR, OEC again asserting the very same arguments makes in this AFR. On November 10, 2010, the Commission granted the applications for rehearing to further consider the matters raised in the application. On May 25, 2011, the Commission denied the OEC's AFR on the same issues the OEC raises today.[9]

On September 20, 2011, in its Fourth Entry on Rehearing, the Commission extended the Mercantile Program an additional six months, through September 15, 2012 "given the number of EEC applications filed under the pilot"[10]

On September 5, 2012, the Commission issued a Finding and Order extending the Mercantile Program an additional six months, through March 15, 2013. In the Order, the Commission stated continued the use of the Benchmark Comparison Method for the Mercantile Program, but scheduled a Technical Workshop "in order to provide the Commission with adequate information to evaluate the appropriate level and length for exemptions after March 15, 2013" and "to explore alternatives to the Benchmark Comparison Method and review the experience of other jurisdictions which have enacted similar self-direct programs."[11] The Commission also stated:

> the EEC Pilot was initially conceived as an 18-month experiment, which for good cause, the Commission has extended previously and does so again today. When adopting the

[8] *Id.* at Paragraph 8 (emphasis added).
[9] Mercantile Case, May 25, 2011 Second Entry on Rehearing at Paragraphs 6-10.
[10] Mercantile Case, September 20, 2011 Fourth Entry on Rehearing at Paragraph 13.
[11] Mercantile Case, September 5, 2012 Finding and Order at Paragraph 6.

> pilot, the Commission waived its energy efficiency rules and its policy regarding how to determine a mercantile customer's fair share contribution. The Commission directed that the results of the pilot, including waiver of rules and reversal of its policy, were to be reviewed after the first 12 months to determine whether the pilot program was successful in expediting the approval process for mercantile customer applications, motivating mercantile customers to undertake additional energy efficiency projects, and minimizing the overall cost of compliance for all customers with an overall goal of promoting the continuous development of energy efficiency programs in this state. We note the volume of EEC applications filed under the program in determining that the Pilot should again be extended an additional six months, through March 15, 2013. Moreover, to assist the Commission's evaluation of the Pilot, we direct that Staff file, by January 15, 2013, a report of its review and recommendations of the pilot including a recommended process for establishing an appropriate level and length of exemption for mercantile customers opting out of utility energy efficiency programs.[12]

The OEC has not demonstrated that the Order is unreasonable or unlawful. Therefore, the Commission should deny the OEC's AFR.

C. Law and Argument

1. The Commission Should Deny OEC's AFR Because It Is Based on Arguments that the Commission Has Heard and Already Rejected.

The Commission should deny OEC's AFR because it is not raising any new arguments. As the Commission has held on countless occasions, a party's mere repetition of an argument that was previously thoroughly considered is not grounds for granting rehearing. *E.g., Wiley v. Duke Energy Ohio, Inc.*, Case No. 10-2463-GE-CSS, 2011 Ohio PUC LEXIS 1276, *6-7 (Nov. 29, 2011) (rejecting an application for rehearing where "the application for rehearing simply reiterates arguments that were considered and rejected by the Commission"); *In the Matter of the Application of Duke Energy Ohio for Approval of a Market Rate Offer to Conduct a Competitive Bidding Process for Standard Service Offer Electric Generation Supply, Accounting Modifications, and Tariffs for Generation Service*, Case No. 10-2586-EL-SSO, 2011 Ohio PUC LEXIS 543, *15-16 (May 4, 2011) (rejecting an application for rehearing that "raises nothing

[12] *Id.* at Paragraph 7.

new"); *City of Reynoldsburg v. Columbus Southern Power Co.*, Case No. 08-846-EL-CSS, 2011 Ohio PUC LEXIS 680, *19-20 (June 1, 2011) (holding that no grounds for rehearing existed where no new arguments had been raised); *In the Matter of the Application of Columbia Gas of Ohio, Inc., for Approval of a General Exemption of Certain Natural Gas Commodity Sales Services or Ancillary Services*, No. 08-1344-GA-EXM, 2011 Ohio PUC LEXIS 1184, *9-10 (Nov. 1, 2011) (denying application for rehearing because applicant "raised nothing new on rehearing that was not thoroughly considered" in the Commission order at issue).

In both its October 1, 2010 Motion to Stay and October 15, 2010 Application for Rehearing, the OEC makes the same arguments it makes today, namely that the Commission failed to follow precedent, improperly waived its rules and allowed the "as found" method contrary to statute.[13] In its May 25, 2011 Second Entry on Rehearing, the Commission first observed that any issue raised by a party in it application for rehearing that is not specifically addressed below, had been considered and weighed by the Commission and is denied.[14] The Commission further addressed the arguments of OEC, rejecting OEC's assertion that it unlawfully and unreasonably exceeded the scope and purpose of its authority in enacting the Pilot Program.[15] The Commission also explicitly rejected OEC's arguments against the "as found" method.[16] The Commission stated:

> In addressing these concerns, we again note that the goals of this pilot program are to reduce obstacles to compliance with the statutory energy efficiency benchmarks, simplify the existing application process, and minimize the overall cost of compliance to all ratepayers. The September 15 Entry expressly allowed under the pilot program the use of the "as found" method for calculating energy savings, the "benchmark comparison" method for calculating EEDR rider exemptions, and an EEDR rider exemption for projects with a payback of less than one year. These methods and policies may not be permitted beyond the end

[13] *See* Mercantile Case, October 1, 2010 OEC Motion to Stay and October 15, 2010 OEC Application for Rehearing.
[14] Mercantile Case, May 25, 2011 Second Entry on Rehearing at Paragraph 4.
[15] *Id.* at Paragraph 5.
[16] *Id.* at Paragraph 8.

> of the pilot on March 15, 2012, but they should be allowed for those projects under the pilot program, and including those EEC applications filed prior to the September 15 Entry, in order to aid in the analysis of our decisions. Ultimately, this Commission must be at liberty to adjust our policies within the boundaries of its statutory authority, either sua sponte or otherwise, in developing effective mercantile customer programs that will permit Ohio electric utilities to meet their statutory EEDR obligations. Such flexibility is crucial to the development of a vibrant pilot program and the lessons learned by the Commission as a part of the pilot program are the opportunity to engage shareholders and offer the opportunity to demonstrate the long-tern feasibility of the EEDR program.[17]

Those sensible and valid reasons exist today justifying the extension of the Mercantile Program. In its AFR, the OEC is not raising anything new and the Commission has already rejected the arguments it did raise. Thus, the Commission should deny the OEC's AFR.

2. The Use of the "As Found" Method for the Mercantile Program Is Reasonable and Is Consistent with the Plain Language and Purpose of Section 4928.66.

The OEC argues, once again, that the "as found" method as part of the Mercantile Program is in conflict with Section 4928.66. OEC further claims that the statutory term "energy efficiency program" cannot be interpreted to include the savings that result from "business as usual," practices or actions taken as a result of building code requirements or other laws and regulations. OEC's argument relies upon an incorrect interpretation of the phrase "energy efficiency programs" that is inconsistent with the unambiguous language in the statute. Section 4928.66(A)(2)(c), Revised Code, is clear – the gross effects of all mercantile customer-sited programs must count towards an EDU's benchmark compliance effort and the Commission cannot legally constrain this opportunity by rule or otherwise. The September 15 Entry recognizes that SB 221 does not give the Commission authority to place restrictions upon the counting of mercantile customers' efficiency gains and peak demand reductions toward the

[17] *Id.* at Paragraph 9.

EE/PDR mandates in Section 4928.66, Revised Code. OEC's incorrect interpretation of Section 4928.66, Revised Code, must be rejected.

Moreover, OEC's dissatisfaction with the Commission's decisions to establish a mercantile pilot program and to amend its procedure and revisit prior statements regarding mercantile applications is not a sufficient reason for granting rehearing on the issues requested by OEC. Nowhere in either of the above-referenced statutory provisions (or elsewhere in Ohio law for that matter) are there exclusions for projects on the "as found basis." The law explicitly permits the Companies to utilize mercantile self-direct projects to count as savings. Moreover, the law requires the Commission to count the effects of **all** energy efficiency and peak demand reduction programs towards compliance with the statutory benchmarks.[18] Consequently, the Commission did not unreasonably and unlawfully continue the Mercantile Program, which allows the continued use of the "as found" method.

3. The Commission Did Not Fail to Provide a Reasoned Explanation for Its Decision to Extend the Mercantile Program.

Next, OEC argues that the Commission failed to provide a reasoned explanation for its decision to extend the Mercantile Program. Before the Commission implemented the Mercantile Program, the review of mercantile applications had been less than prompt. Through the Mercantile Program, the Commission streamlined the review process so as to reduce or eliminate the existing backlog of applications. In its September 15, 2010 Entry, the Commission made clear the pilot program was motivated by that backlog of hundreds of applications that has developed since the Commission issued its October 15, 2009 Entry on Rehearing in Case No. 08-888-EL-UNC. The Commission confirmed the importance of these applications when it

[18] R.C. § 4928.66 ("Compliance with divisions (A)(1)(a) and (b) of this section shall be measured by including the effects of **all** demand response programs for mercantile customers of the subject electric distribution utility and all such mercantile customer-sited energy efficiency and peak demand reduction programs, adjusted upward by the appropriate loss factors.").

recognized "that the prompt review of applications to commit mercantile customer programs for integration with electric utility programs is essential in order for electric utilities to meet their peak demand reduction and energy efficiency benchmarks."[19] The Companies have filed over 450 mercantile applications since the inception of the program. Any further delay will irreparably harm the Companies by further hindering their compliance with R.C. § 4928.66.

The Commission also explained that the Mercantile Program allows it to review the impact of considering equipment on an "as found" basis upon the ability of the electric utilities to meet their benchmarks and upon the costs of compliance with the benchmarks. The Mercantile Program also allows the Commission to gain experience in considering and approving these applications. Indeed, as demonstrated in the Order, the Commission is moving forward in evaluating the benchmark comparison method through a technical workshop, further demonstrating that the Mercantile Program is meeting the goals it was designed for – the opportunity for the Commission to gain experience and evaluate this area. To the extent the Commission is diverging from prior precedent, it has offered a sound basis for doing so.

4. The Commission Did Not Impermissibly Waive Its Own Regulations.

Lastly, OEC's criticizes the Commission's waiver of Rules 4901:1-39-05(F) and (H) of the Ohio Administrative Code ("Rules") in approving the use of the "as found" method for calculating energy savings. OEC argues that statements made nearly three years ago in the October 15, 2009 Entry on Rehearing in Case No. 08-888-EL-UNC are precedent from which the Commission cannot diverge. Yet OEC fails to cite any legal impediment to the Commission taking a different course in a pilot program so as to test the efficacy of its prior decisions. The Commission "can always waive one of its rules provided that the ruling does not conflict with a

[19] Entry, p. 1.

statute."[20] The limitation on counting measures required to satisfy energy performance standards is not required by statute and, thus, the waiver of this provision does not conflict with a statute. Indeed, as the Commission's previous orders on the Mercantile Program, the Order brings the Mercantile Program closer in line with the actual language of the Revised Code, which requires the Commission to count the effects of **all** energy efficiency and peak demand reduction programs towards compliance with the statutory benchmarks.[21] Thus, the Mercantile Program is consistent with the plain language of R.C. § 4928.66

OEC next argues that the Commission exceeded the scope of its authority and violated its own procedural rules by its *sua sponte* waiver of O.A.C. 4901:1-39-05(H). OEC contends that when the Commission enacted O.A.C. 4901:1-39-02(B), it eliminated the Commission's ability to amend its own rules. O.A.C. 4901:1-39-02(B) states: "The commission may, upon an application or a motion filed by a party, waive any requirement of this chapter, other than a requirement mandated by statute, for good cause shown." OEC asserts that by adopting this provision, the Commission decided to eliminate its ability to waive its own rules.

The Commission's revision of O.A.C. 4901-1-39-02(B) did not, as OEC suggests, remove the ability of the Commission to waive one of its own rules *sua sponte*. OEC cites to the Commission's Entry amending this rule, which stated "[t]he proper method for requesting a waiver is for a party to file an application or a motion." However, all that the Entry cited to by OEC stands for is that the proper method for a *party* to request a waiver is by filing an application or motion. The Entry does not discuss whether or not the Commission can waive one

[20] *In the Matter of the Review of Chapters 4901-1, 4901-3, and 4901-9 of the Ohio Administrative Code*, PUCO Case No. 06-685-AU-ORD, Finding and Order at 57 (December 6, 2006).
[21] R.C. § 4928.66 ("Compliance with divisions (A)(1)(a) and (b) of this section shall be measured by including the effects of **all** demand response programs for mercantile customers of the subject electric distribution utility and all such mercantile customer-sited energy efficiency and peak demand reduction programs, adjusted upward by the appropriate loss factors.").

of its own rules. OEC cites no language from any Commission order in which the Commission manifests its intent to eliminate the Commission's ability to waive one of its own rules. Indeed, O.A.C. 4901-1-38(B) states: "the commission may, upon its own motion or for good cause shown, waive any requirement, standard, or rule set forth in this chapter ...." The Commission has not amended that rule to reflect OEC's interpretation. Accordingly, OEC's argument is without merit and its Application should be denied.

D. Conclusion

OEC has again failed to offer a legitimate basis for the Commission to grant rehearing on the Mercantile Program. OEC's continued frustration with the Commission's decision to waive the rules and to allow utilities to utilize the "as found" method for purposes of the Mercantile Program is not a sufficient reason to grant rehearing. The Mercantile Program is continues to be successful and to change it at this point would be unfair to the numerous customers who have filed applications thereunder. Accordingly, the Commission should deny OEC's AFR.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *Memorandum Contra of Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company to the Application for Rehearing of the Ohio Environmental Council* was filed this 15th day of October, 2012 with the Public Utilities Commission of Ohio Docketing Information System. Notice of this filing will be sent via e-mail to subscribers by operation of the Commission's electronic filing system.

/s/ *Carrie M. Dunn*
One of the Attorneys for Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company

Summary: Memorandum Contra Application for Rehearing filed by the Ohio Environmental Council electronically filed by Ms. Carrie M Dunn on behalf of The Cleveland Electric Illuminating Company and Ohio Edison Company and The Toledo Edison Company