

THE PUBLIC UTILITIES COMMISSION OF OHIO

IN THE MATTER OF THE COMMISSION'S
REVIEW OF CHAPTER 4901:1-37 OF THE
OHIO ADMINISTRATIVE CODE.

CASE NO. 18-1190-EL-ORD

FINDING AND ORDER

Entered in the Journal on June 17, 2020

I. SUMMARY

{¶ 1} The Commission adopts proposed amendments to Ohio Adm.Code 4901:1-37-01, 4901:1-37-04, 4901:1-37-05, and 4901:1-37-06, and as no change rules Ohio Adm.Code 4901:1-37-02, 4901:1-37-03, 4901:1-37-07, 4901:1-37-08, and 4901:1-37-09.

II. DISCUSSION

A. *Procedural Background*

{¶ 2} R.C. 111.15(B) and R.C. 106.03(A) require all state agencies to conduct a review, every five years, of their rules and to determine whether to continue their rules without change, amend their rules, or rescind their rules. Ohio Adm.Code Chapter 4901:1-37 concerns corporate separation for electric utilities and affiliates.

{¶ 3} R.C. 106.03(A) requires the Commission to determine whether:

- (a) The rules should be continued without amendment, be amended, or be rescinded, taking into consideration the purpose, scope, and intent of the statute(s) under which the rules were adopted;
- (b) The rules need amendment or rescission to give more flexibility at the local level;
- (c) The rules need amendment or rescission to eliminate unnecessary paperwork;
- (d) The rules incorporate a text or other material by reference and, if so, whether the text or other material incorporated by reference is

deposited or displayed as required by R.C. 121.74, and whether the incorporation by reference meets the standards stated in R.C. 121.71, 121.75, and 121.76;

- (e) The rules duplicate, overlap with, or conflict with other rules;
- (f) The rules have an adverse impact on businesses, as determined under R.C. 107.52;
- (g) The rules contain words or phrases having meanings that in contemporary usage are understood as being derogatory or offensive; and
- (h) The rules require liability insurance, a bond, or any other financial responsibility instrument as a condition of licensure.

{¶ 4} Among other things, the Commission must review its rules to determine the impact that a rule has on small businesses; attempt to balance properly the critical objectives of regulation and the cost of compliance by the regulated parties; and amend or rescind rules that are unnecessary, ineffective, contradictory, redundant, inefficient, needlessly burdensome, have had negative unintended consequences, or unnecessarily impede business growth.

{¶ 5} Also, in accordance with R.C. 121.82, in the course of developing draft rules, the Commission must conduct a business impact analysis (BIA) regarding the rules. If there will be an adverse impact on business, as defined in R.C. 107.52, the agency is to incorporate features into the draft rules to eliminate or adequately reduce any adverse impact. Furthermore, the Commission is required, pursuant to R.C. 121.82, to provide the Common Sense Initiative office the draft rules and the BIA.

{¶ 6} By Entry issued on October 24, 2018, the Commission scheduled a workshop to be held at the Commission offices on November 8, 2018, to elicit feedback on the rules

and to permit stakeholders to propose their own revisions to the rules for Staff's consideration. The workshop was conducted as scheduled, with changes proposed by four stakeholders.

{¶ 7} Staff evaluated the rules contained in Ohio Adm.Code Chapter 4901:1-37 and, following its review, proposed nonsubstantive amendments to Ohio Adm.Code 4901:1-37-01, 4901:1-37-04, 4901:1-37-05, and 4901:1-37-06. The remaining rules in the chapter were, under Staff's proposal, to remain unchanged.

{¶ 8} By Entry issued on June 19, 2019, the Commission ordered all interested parties to file comments and reply comments concerning the proposed amendments. Initial and reply comments were due by July 12, 2019, and July 26, 2019, respectively.

{¶ 9} Consistent with the June 19, 2019 Entry, written comments were filed in this proceeding on July 12, 2019, by Duke Energy Ohio (Duke), Office of the Ohio Consumers' Counsel (OCC), and the Dayton Power & Light Company (DP&L). Reply Comments were filed on July 26, 2019, by Industrial Energy Users – Ohio (IEU), Ohio Power Company dba AEP Ohio (AEP), First Energy (FE), Interstate Gas Supply (IGS), DP&L, OCC, and Duke.

B. Consideration of the Comments

{¶ 10} Ohio Adm.Code 4901:1-37-01 Definitions

{¶ 11} In its comments, OCC contends that the Commission should require affiliates of regulated utilities to operate as structurally separate companies funded by their shareholders. In addition, OCC asserts, if the Commission does not require separate structural entities, the affiliate rules should be improved to protect consumers in several ways.

{¶ 12} OCC proposes that Ohio Adm. Code 4901:1-37-01 should be amended to add a definition for the term “unregulated service,” which would be defined as “a competitive service provided to a customer after the electric utility meter. These services include, but are

not limited to, Distributed Energy Resources (including wind and solar generation and battery storage), electric vehicle charging stations and associated equipment, energy management services (including demand response), energy monitoring and control systems and devices, lighting and other smart controls, maintenance services, and warranty programs.”

{¶ 13} In reply comments, AEP asserts that OCC’s proposed definition of “unregulated service” is “encompassed by electric distribution portfolio plans for compliance with R.C. 4928.66.” AEP adds that the rules in this chapter set forth general requirements, such as the code of conduct, but “* * * do not address granular issues that are resolved through other dockets or venues.”

{¶ 14} In reply comments, IEU states that it does not generally take issue with OCC’s proposed definition of “unregulated service,” but IEU seeks to ensure that the reference to “energy management services (including demand response)” is not extended beyond a reasonable interpretation.” IEU urges that if the Commission adopts the proposed definition, the Commission should clarify that the proposed definition does not affect the current interruptible tariffs, the Commission’s ability to extend or adopt new interruptible tariffs, or the Commission’s ability to take customer’s demand response capabilities into account when addressing other potential rate structures or options.”

{¶ 15} In reply comments, DP&L observes that OCC’s proposed definition of “unregulated service” would mean that any services offered after the electric meter are competitive unregulated services. In DP&L’s opinion, such a definition draws “* * * an outdated and arbitrary line at the meter and * * * [deems] *anything* behind the meter to be unregulated – a determination that is not supported by law and is not in the public interest” (emphasis added by DP&L). DP&L adds that OCC’s proposed edits to Ohio Adm.Code 4901:1-37-01 are “* * * not supported by and conflict with the definitions set forth” in R.C. 4928.01 and 4928.17. For example, contends DP&L, R.C. 4928.17(A)(1) states that a corporate separation plan must provide for “provision of competitive retail electric service or the

nonelectric product or service through a fully separate affiliate.” DP&L adds that any retail electric service, unless otherwise deemed competitive by the Revised Code or the Commission, “‘is a noncompetitive retail electric service’ that can be offered by the regulated utility” pursuant to R.C. 4928.01. Thus, contends DP&L, it can provide any retail electric service that is not competitive, as “retail electric service” is currently defined by R.C. 4928.17 to be any service that supplies electricity “* * * up to ‘the point of consumption.’” DP&L concludes that said definition does not stop at the meter, but rather extends all the way to the “‘point of consumption,’” allowing DP&L to provide retail electric services “* * * after the meter to the point of consumption.” DP&L urges the Commission to not deem all behind-the-meter electric services as competitive unregulated services. DP&L concludes that, because the Commission should not accept OCC’s proposed definition of “unregulated services,” OCC’s other proposed amendments concerning Ohio Adm.Code 4901:1-37-04(A)(6) and 4901:1-37-04(D)(10)(e) are superfluous and also should not be accepted.

{¶ 16} FE contends that OCC’s proposed category of competitive “unregulated service” has no statutory support; the Revised Code defines which services are “competitive” and noncompetitive,” but this distinction does not align with OCC’s recommended new category of competitive “unregulated” services. Regarding OCC’s second proposal concerning cross-subsidization, FE asserts that OCC’s recommendation exceeds the purpose of the rules in this chapter. As stated by FE, “[t]he rules are intended to regulate the behavior of regulated utilities * * * and are not meant to control how an unregulated affiliate operates independently, or to force undue costs on an unregulated affiliate’s consumers through price floors.” Regarding OCC’s third proposal to “prevent unintended cross subsidies and unfair advantages,” FE emphasizes that there is “* * * no apparent reason to require an affiliate to purchase a tariffed service from the regulated utility when providing unregulated services.”

{¶ 17} In reply comments concerning OCC’s proposed definition for “unregulated service,” Duke states that competitive services offered by affiliates are already subject to Ohio Adm.Code 4901:1-37-04(D)(6), which distinguishes between “noncompetitive retail

electric service” and “competitive retail electric service,” while forbidding any “anticompetitive subsidies.” Further, states Duke, the Commission may eventually choose to approve tariffs for the provision of certain behind-the-meter services, so it would be inaccurate to define such services as “unregulated,” nor would it be appropriate to impose the same restrictions to avoid cross-subsidization by a utility. In Duke’s opinion, the Commission should preserve its flexibility to approve behind-the-meter services on a case-by-case basis, rather than create a new category of “unregulated services.”

{¶ 18} The Commission does not support the proposed rule change. In so doing, we find that OCC has not provided an adequate reason to make such a rule change. We do not believe that, at this time, including a definition of “unregulated service” in the rules is necessary or reasonable, or that such an issue should be decided in a rulemaking proceeding. Amendments that the Commission will adopt for this rule, therefore, are nonsubstantive.

{¶ 19} Ohio Adm.Code 4901:1-37-04(A)(6) and 4901:1-37-04(D)(10)(e) General Provisions

{¶ 20} OCC contends that a provision should be added requiring that unregulated services be accounted for on the affiliate books at fully allocated costs. Ohio Adm.Code 4901:1-37-04(A)(6) should read: “To safeguard against cross subsidization from the regulated utility to the benefit of its affiliate, all unregulated services shall be accounted for on the affiliate books at fully allocated costs. All unregulated service(s) provided by an affiliate shall be provided to its consumers at charges equal to or above its fully allocated cost.”

{¶ 21} Finally, asserts OCC, language should be added to Ohio Adm.Code 4901:1-37-04(D)(10)(e) that requires regulated utilities’ affiliates to purchase from the identical electric utility tariff as their competitors do when providing unregulated services. OCC proposes that such language should read: “When providing unregulated services, the affiliate shall be required to purchase from the identical electric utility tariff as its competitors for all

similarly situated customers in the same service classification. This will prevent unintended cross subsidies and unfair advantages that will harm innovation and prevent lower prices for consumer benefits.”

{¶ 22} AEP contends that OCC’s recommendations improperly seek to specify prohibitions or declarations that exceed the scope of the rules and prejudge the outcome of pending matters. In AEP’s opinion, there are other dockets in which the Commission is considering specific policies and rulings; thus, OCC’s proposed language would “* * * improperly short-circuit those pending endeavors.”

{¶ 23} Regarding OCC’s proposals, Duke argues that the Commission lacks jurisdiction to regulate competitive services, and so cannot require unregulated affiliates to provide “unregulated service(s) * * * at charges equal to or above [the affiliates’] fully allocated cost.” Duke contends that OCC’s two other proposals “* * * are simply redundant because existing provisions [found in Ohio Adm.Code 4901:1-37-08(E)] address the same cross-subsidizing concerns.”

{¶ 24} The Commission does not support OCC’s proposed rule change; the proposal may prejudge the outcome of pending matters and may be inconsistent with current law and policy. The Commission’s amendments to this rule, therefore, are nonsubstantive.

{¶ 25} Ohio Adm.Code 4901:1-37-04(D)(8) General Provisions

{¶ 26} Duke observes that this subparagraph sets forth the requirement for an electric utility’s compliance officer to “promptly report . . . unreasonable sales practices, market deficiencies, and market power” to the appropriate Commission staff. Duke interprets this as obligating an electric utility’s compliance officer to promptly report instances of the listed problematic conduct by his or her own electric utility, but not obligating an electric utility’s compliance officer to report problematic conduct by other entities. Duke Energy Ohio requests that the Commission confirm this interpretation as reasonable and proper.

{¶ 27} In reply comments, DP&L states that it interprets Ohio Adm.Code 4901:1-37-04(D)(8) “* * *consistently with Duke’s intentions.”

{¶ 28} In reply comments, OCC contends that Duke’s interpretation of this rule is “narrow * * * and should be rejected. It is unnecessarily restrictive and may impede or delay reports to the PUCO of abusive practices that are hurting customers.” In OCC’s opinion, the Commission “* * * should affirm that a utility’s compliance officer * * * [must report] to the PUCO Staff unreasonable sales practices, market deficiencies, or the exercise of market power regardless of whether the problem involves the compliance officer’s utility or any other entity operating on its distribution system.”

{¶ 29} The Commission does not agree with Duke’s interpretation of the rule and does not believe that a change to the rule is needed. We find that the rule is clear and unambiguous as written. A utility should report any unreasonable sales practices, market deficiencies, and market power of which it is aware.

{¶ 30} Ohio Adm.Code 4901:1-37-04(E) General Provisions

{¶ 31} Duke observes that the current version this rule permits an electric utility to “take actions necessary to ensure public safety and system reliability” only in a “declared emergency situation.” In Duke’s opinion, the term “declared emergency situation” is a narrow technical term, apparently referring to an energy emergency declared by the governor pursuant to R.C. 4935.03. Duke asserts that such a declared emergency is extremely rare, thus limiting the scope of paragraph (E) and rendering the scope effectively null. Duke contends that, to better ensure public safety, paragraph (E) should be revised to empower an electric utility to act swiftly and decisively whenever a consumer’s health, safety, or economic security faces an immediate threat. Duke proposes the following revisions to the rule.

{¶ 32} First, Duke explains, insert new language as subparagraph (E)(2) stating: “Notwithstanding the foregoing, an electric utility may also take actions reasonably

necessary to prevent, reduce, or remedy any immediate threat to a person's health and/or safety."

{¶ 33} Second, proposes Duke, insert new language as subparagraph (E)(3) stating: "Notwithstanding the foregoing, an electric utility may also take actions reasonably necessary to avert or reduce any immediate threat of significant economic harm to a customer."

{¶ 34} Third, Duke recommends, insert new language as subparagraph (E)(4) stating: "The electric utility shall maintain a log of all such actions that do not comply with this chapter, and such log shall be subject to review by the commission and its staff. *On review, such actions shall be granted a rebuttable presumption of reasonableness.*" (Emphasis added by Duke.)

{¶ 35} In reply comments, IEU states that, while it supports Duke's efforts to protect the health and safety of its customers and the public, it is unclear how " * * * waiving the corporate separation requirements under a claim of emergency will further that objective." Similarly, IEU states, it is not readily apparent how such a waiver would " * * * support Duke's ability to avert or reduce immediate economic harm to a customer." Further, argues IEU, there are already other means to avoid significant economic harm, such as Commission authorization of a " * * * laddered and staggered Standard Service Offer * * *," and financial assistance such as the Percentage of Income Payment Plan and the Home Energy Assistance Program, in addition to the Commission's Winter Disconnection Order and budget billing programs. Finally, asserts IEU, although Duke seeks a rule change that would allow actions it takes under its proposed expanded definition of emergencies to be accompanied by a rebuttable presumption of reasonableness, Duke offers no support for why such a presumption is appropriate or necessary.

{¶ 36} In reply comments, OCC contends that Duke's definition of the kinds of actions that a utility could undertake during an energy emergency are unnecessarily restrictive and inconsistent with R.C. 4935.03, which discusses in a broader sense the actions that a utility could take in the event of an emergency. OCC further asserts that Duke's

proposed language creates ambiguity regarding the responsibilities for declaring energy emergencies, as R.C. 4905.03 specifically states that only the governor can declare an emergency after certain requirements are met.

{¶ 37} In reply comments, IGS states that, although Duke claims that the scope of current language in the rule is limited, Duke provides no examples of how the narrow scope has interfered with Duke's ability to take steps to ensure public safety and system reliability. IGS expresses concern that incorporating broad exceptions into the Commission rules will have unintended consequences. IGS also questions the source for Duke's references to protect "economic security" of its customers, given that economic security or economic harm to a customer is not mentioned in this rule or the corporate separation statutes.

{¶ 38} The Commission finds that no changes are needed. Duke has not provided an adequate rationale in support of this change; because Duke offered no support for its proposal, it is unclear what exactly is the perceived harm from which Duke seeks additional flexibility to address. It is even less clear how an emergency waiver of the corporate separation rules would allow Duke to address any such immediate threat of economic harm to customers. Duke's proposal is too broad, vague, and ambiguous.

{¶ 39} In addition, the Commission does not agree with Duke's rebuttable presumption proposal. Duke offers no support for why the rebuttable presumption is appropriate or necessary. The law requires electric utilities to comply with the corporate separation requirements; the burden is on electric utilities to demonstrate compliance, or demonstrate that, because of some emergency, temporary compliance with the corporate separation plan and rules had to be suspended. The Commission is not persuaded that this should change.

{¶ 40} The amendments that the Commission does make to this rule are, therefore, nonsubstantive.

{¶ 41} Ohio Adm.Code 4901:1-37-05(A) Application

{¶ 42} DP&L recommends that the following language be added to paragraph (A) immediately after the current language: “Notwithstanding the above, to the extent an electric distribution utility makes a filing before the * * * [C]ommission and receives approval to offer a regulated behind the meter service, or other similar customer service, it will be deemed a noncompetitive retail electric service under section 4928.01(B) of the Revised Code, eliminating the need to file a corporate separation plan.”

{¶ 43} In reply comments, IGS urges the Commission to reject DP&L’s proposal. IGS emphasizes that, pursuant to Ohio’s corporate separation statute, no electric distribution utility can engage, directly or indirectly via an affiliate, in the business of supplying a noncompetitive retail electric service and a competitive retail electric service, or supplying a noncompetitive retail electric service and a product or service other than retail electric service, without a Commission-approved corporate separation plan. IGS adds that the plan must require, at a minimum, that the utility provide any competitive retail electric service or nonelectric products and services through a fully separated affiliate. IGS asserts that DP&L is asking the Commission to violate Ohio law, as the Commission has no authority to waive the requirements of R.C. 4928.17. Further, states IGS, “* * * there is no such thing as regulated ‘behind the meter’ service in Ohio. Noncompetitive retail electric services provided by an EDU are subject to the supervision and regulation of the Commission.”

{¶ 44} In reply comments, Duke considers “appropriate” DP&L’s proposal that certain “behind the meter” services be deemed noncompetitive, and thus exempt from corporate separation plan requirements. Duke states that “[a] regulated service poses no cross-subsidization risk when offered by a utility providing other regulated services. Drafting and filing a corporate separation plan in such cases would be a pure formality, wasteful and efficient.” Duke adds that the Ohio General Assembly has indicated the importance of competition in the electric market, and that nothing in state policy suggests that a utility should be eliminated from the pool of possible providers of competitive products and services. Duke urges the Commission to adopt DP&L’s proposal.

{¶ 45} In reply comments, IEU states that DP&L presumes that the Commission has authority to declare services as noncompetitive retail electric services in the context of an effective marketplace. IEU observes that the Commission has some ability to act and declare retail electric services noncompetitive, but only in the absence of effective competition; where there is effective competition, the Commission's mission is to consider whether any noncompetitive retail electric service should be declared noncompetitive. To foster effective competition, contends IEU, corporate separation requirements dictate that EDUs cannot participate in competitive markets. IEU notes that the Commission has already determined that EDUs offering new nonelectric products and services would not foster state policies. IEU adds that DP&L's proposal is basically the same as Duke's made in a prior corporate separation plan that was rejected by the Supreme Court of Ohio and the Commission, under which Duke had sought to amend its corporate separation plan to allow it to offer nonelectric products and services. In sum, argues IEU, EDUs are required to move to structural corporate separation and are prohibited from providing competitive retail electric services and nonelectric products and services.

{¶ 46} In reply comments, OCC contends that the meter “* * * acts as a line of demarcation between regulated and competitive services.” OCC argues that DP&L's proposal would harm consumers and competition by allowing regulated utilities to offer behind-the-meter services without complying with restrictions specified in the Commission rules for corporate separation. In OCC's opinion, DP&L is “* * * attempting to bypass these rules and create a customer-funded monopoly.” OCC adds that the proposal would give requesting EDUs an unfair advantage in the competitive market for behind-the-meter services, thus harming consumers by not allowing them the benefit of lower costs and more innovation from competitive markets. In OCC's opinion, allowing a regulated utility to provide noncompetitive retail electric service would allow for customer-funded subsidies and a transfer of business risk to captive monopoly customers, because a regulated utility can simply pass along its costs and market risk to captive customers. Thus, states OCC, R.C. 4928.092(H) would be violated, which seeks to enhance competition and avoid subsidies.

OCC adds that subsidized products and services that reach into consumer' homes will be disruptive of the emerging market for electricity storage, electric vehicle supply equipment, and other distributed energy resources. OCC emphasizes that unregulated businesses in the competitive market have no regulatory funding to depend on, as do regulated utilities, so regulated companies could be forced out of business. OCC considers it important that the Commission reject DP&L's proposal in order to protect consumers and the competitive market that brings consumers lower prices and greater innovation.

{¶ 47} The Commission does not agree with DP&L's proposed language. We find that DP&L has not provided an adequate reason to make such a rule change and do not believe that such an issue should be decided in a rulemaking proceeding at this time. In addition, DP&L's proposal may prejudice the outcome of pending matters and may be inconsistent with current law and policy.

{¶ 48} The Commission's amendments to this rule, therefore, are nonsubstantive.

{¶ 49} Ohio Adm.Code 4901:1-37-06(A) Revisions and Amendments

{¶ 50} No comments were filed concerning this rule, which contains nonsubstantive amendments proposed by the Commission.

C. Conclusion

{¶ 51} The Commission has considered the matters set forth in R.C. 121.82. With these factors in mind, and upon consideration of Staff's recommendations and the written comments, the Commission finds that Ohio Adm.Code 4901:1-37-01, 4901:1-37-04, 4901:1-37-05, and 4901:1-37-06 should be amended, as set forth in Attachment A. The Commission also finds that no change should be made to Ohio Adm.Code 4901:1-37-02, 4901:1-37-03, 4901:1-37-07, 4901:1-37-08, and 4901:1-37-09.

{¶ 52} The rules are posted on the Commission's Docketing Information System website at <http://dis.puc.state.oh.us/>. To minimize the expense of this proceeding, the

Commission will serve a paper copy of this Finding and Order only. All interested persons are directed to input Case Number 18-1190 in the Case Lookup box to view the rules, as well as this Finding and Order, or to contact the Commission's Docketing Division to request a paper copy.

III. ORDER

{¶ 53} It is, therefore,

{¶ 54} ORDERED, That amended Ohio Adm.Code 4901:1-37-01, 4901:1-37-04, 4901:1-37-05, and 4901:1-37-06 be adopted. It is, further,

{¶ 55} ORDERED, That Ohio Adm.Code 4901:1-37-02, 4901:1-37-03, 4901:1-37-07, 4901:1-37-08, and 4901:1-37-09 be adopted with no changes. It is, further,

{¶ 56} ORDERED, That the adopted rules be filed with the Joint Committee on Agency Rule Review, the Secretary of State, and the Legislative Service Commission, in accordance with R.C. Chapter 111.15. It is, further,

{¶ 57} ORDERED, That the final rules be effective on the earliest date permitted by law. Unless otherwise ordered by the Commission, the five-year review date for Ohio Adm.Code Chapter 4901:1-38 shall be in compliance with R.C. 106.03. It is, further,

{¶ 58} ORDERED, That a copy of this Finding and Order be served upon the Common Sense Initiative at CSIPublicComments@governor.ohio.gov. It is, further,

{¶ 59} ORDERED, That a copy of this Finding and Order be served upon all investor-owned electric utilities in the state of Ohio, all certified competitive retail electric service

providers in the state of Ohio, the Electric-Energy list-serve, Duke, OCC, DP&L, IEU, AEP, FE, IGS, and all other interested persons of record.

COMMISSIONERS:

Approving:

Sam Randazzo, Chairman

M. Beth Trombold

Lawrence K. Friedeman

Daniel R. Conway

Dennis P. Deters

JML/hac

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AMENDED

4901:1-37-01 Definitions.

- (A) "Affiliates" are companies that are related to each other due to common ownership or control. The affiliate standards shall also apply to any internal merchant function of the electric utility whereby the electric utility provides a competitive service.
- (B) "Commission" means the public utilities commission of Ohio.
- (C) "Competitive retail electric service provider" means a provider of a competitive retail electric service as defined in division (A)(4) of section 4928.01 of the Revised Code.
- (D) "Electric services company" shall have the meaning set forth in division (A)(9) of section 4928.01 of the Revised Code.
- (E) "Electric utility" shall have the meaning set forth in division (A)(11) of section 4928.01 of the Revised Code.
- (F) "Employees" are all full- or part-time employees of an electric utility or its affiliates, as well as consultants, independent contractors, or any other persons performing various duties or obligations on behalf of or for an electric utility or its affiliate.
- (G) "Fully allocated costs" are the sum of direct costs plus an appropriate share of indirect costs. For purposes of these rules, the term "fully allocated costs" shall have the same meaning as the term fully loaded embedded costs as that term appears in division (A)(3) of section 4928.17 of the Revised Code.
- (H) "Person" shall have the meaning set forth in division (A)(24) of section 4928.01 of the Revised Code.
- (I) "Staff" means the staff of the commission or its authorized representative.

NO CHANGE

4901:1-37-02 Purpose and scope.

- (A) The purpose of this chapter is to require all of the state's electric utilities to meet the same standards so a competitive advantage is not gained solely because of corporate affiliation.

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- (B) This chapter is intended to create competitive equality, prevent unfair competitive advantage, prohibit the abuse of market power and effectuate the policy of the state of Ohio embodied in section 4928.02 of the Revised Code.
- (C) 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.
- (D) To ensure compliance with this chapter, examination of the books and records of affiliates may be necessary.
- (E) Violations of this chapter shall be subject to section 4928.18 of the Revised Code. The electric utility has the burden of proof to demonstrate compliance with this chapter.

NO CHANGE

4901:1-37-03 Applicability.

- (A) The provisions of this chapter shall be applicable in accordance with sections 4928.17 and 4928.18 of the Revised Code and apply to:
 - (1) The activities of the electric utility and its transactions or other arrangements with its affiliates.
 - (2) Any shared services of the electric utilities with any affiliates.
 - (3) The sale or transfer of generating assets.
- (B) Nothing in this chapter is to be construed as prohibiting or otherwise impeding an electric utility's ability to conduct activities pursuant to rules 4901:1-38-03 to 4901:1-38-05 of the Administrative Code.

AMENDED

4901:1-37-04 General provisions.

- (A) Structural safeguards.
 - (1) Each electric utility and its affiliates that provide services to customers within the electric utility's service territory shall function independently of each other.

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- (2) Each electric utility and its affiliates that provide services to customers within the electric utility's service territory shall not share facilities and services if such sharing in any way violates paragraph (D) of this rule.
- (3) Cross-subsidies between an electric utility and its affiliates are prohibited. An electric utility's operating employees and those of its affiliates shall function independently of each other.
- (4) An electric utility may not share employees and/or facilities with any affiliate, if the sharing, in any way, violates paragraph (D) of this rule.
- (5) An electric utility shall ensure that all shared employees appropriately record and charge their time based on fully allocated costs.
- (6) Transactions made in accordance with rules, regulations, or service agreements approved by the federal energy regulatory commission, securities and exchange commission, and the commission, which rules the electric utility shall maintain in its cost allocation manual (CAM) and file with the commission, shall provide a rebuttable presumption of compliance with the costing principles contained in this chapter.

(B) Separate accounting.

Each electric utility and its affiliates shall maintain, in accordance with generally accepted accounting principles and an applicable uniform system of accounts, books, records, and accounts that are separate from the books, records, and accounts of its affiliates.

(C) Financial arrangements.

Unless otherwise approved by the commission, the financial arrangements of an electric utility are subject to the following restrictions:

- (1) Any indebtedness incurred by an affiliate shall be without recourse to the electric utility.
- (2) An electric utility shall not enter into any agreement with terms under which the electric utility is obligated to commit funds to maintain the financial viability of an affiliate.
- (3) An electric utility shall not make any investment in an affiliate under any circumstances in which the electric utility would be liable for the debts and/or liabilities of the affiliate incurred as a result of actions or omissions of an affiliate.
- (4) An electric utility shall not issue any security for the purpose of financing the acquisition, ownership, or operation of an affiliate.

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- (5) An electric utility shall not assume any obligation or liability as a guarantor, endorser, surety, or otherwise with respect to any security of an affiliate.
- (6) An electric utility shall not pledge, mortgage, or use as collateral any assets of the electric utility for the benefit of an affiliate.

(D) Code of conduct.

- (1) The electric utility shall not release any proprietary customer information (e.g., individual customer load profiles or billing histories) to an affiliate, or otherwise, without the prior authorization of the customer, except as required by a regulatory agency or court of law.
- (2) On or after the effective date of this chapter, the electric utility shall make customer lists, which include name, address, and telephone number, available on a nondiscriminatory basis to all nonaffiliated and affiliated certified retail electric service providers transacting business in its service territory, unless otherwise directed by the customer. This provision does not apply to customer-specific information, obtained with proper authorization, necessary to fulfill the terms of a contract, or information relating to the provision of general and administrative support services. This information shall not be used by the certified retail electric service providers for any other purpose than the marketing of electric service to the customer.
- (3) Employees of the electric utility's affiliates shall not have access to any information about the electric utility's transmission or distribution systems (e.g., system operations, capability, price, curtailments, and ancillary services) that is not contemporaneously available, readily accessible, and in the same form and manner available to a nonaffiliated competitor~~s~~ providing retail electric service.
- (4) An electric utility shall treat as confidential all information obtained from a competitive retail electric service provider, both affiliated and nonaffiliated, and shall not release such information, unless a competitive retail electric service provider provides authorization to do so or unless the information was or thereafter becomes available to the public other than as a result of disclosure by the electric utility.
- (5) The electric utility shall not tie (or allow an affiliate to tie), as defined by state and federal antitrust laws, or otherwise condition the provision of the electric utility's regulated services, discounts, rebates, fee waivers, or any other waivers of the electric utility's ordinary terms and conditions of service, including but not limited to tariff provisions, to the taking of any goods and/or services from the electric utility's affiliates.

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- (6) The electric utility shall ensure effective competition in the provision of retail electric service by avoiding anticompetitive subsidies flowing from a noncompetitive retail electric service to a competitive retail electric service or to a product or service other than retail electric service, and vice versa.
- (7) The electric utility, upon request from a customer, shall provide a complete list of all competitive retail electric service providers operating on the system, but shall not endorse any competitive retail electric service providers, indicate that an electric services company is an affiliate, or indicate that any competitive retail electric service provider will receive preference because of an affiliate relationship.
- (8) The electric utility shall use reasonable efforts to ensure retail electric service consumers protection against unreasonable sales practices, market deficiencies, and market power and the electric utility's compliance officer shall promptly report any such unreasonable sales practices, market deficiencies, and market power to the director of the utilities-rates and analysis department (or their designee).
- (9) Employees of the electric utility or persons representing the electric utility shall not indicate a preference for an affiliated electric services company.
- (10) The electric utility shall provide comparable access to products and services related to tariffed products and services and specifically comply with the following:
 - (a) An electric utility shall be prohibited from unduly discriminating in the offering of its products and/or services.
 - (b) The electric utility shall apply all tariff provisions in the same manner to the same or similarly situated entities, regardless of any affiliation or nonaffiliation.
 - (c) The electric utility shall not, through a tariff provision, a contract, or otherwise, give its affiliates or customers of affiliates preferential treatment or advantages over nonaffiliated competitors of retail electric service or their customers in matters relating to any product and/or service.
 - (d) The electric utility shall strictly follow all tariff provisions.
 - (e) Except to the extent allowed by any applicable law, regulation, or commission order, the electric utility shall not be permitted to provide discounts, rebates, or fee waivers for any retail electric service.

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- (11) Shared representatives or shared employees of the electric utility and affiliated electric services company shall clearly disclose upon whose behalf their public representations are being made when such representations concern the entity's provision of electric services.

(E) Emergency.

- (1) Notwithstanding the foregoing, in a declared emergency situation, an electric utility may take actions necessary to ensure public safety and system reliability.
- (2) The electric utility shall maintain a log of all such actions that do not comply with this chapter, and such log shall be subject to review by the commission and its staff.

AMENDED

4901:1-37-05 Application.

- (A) Consistent with section 4928.17 of the Revised Code, an electric utility that provides in this state, either directly or through an affiliate, a noncompetitive retail electric service and a competitive retail electric service (or a noncompetitive retail electric service and a product or service other than retail electric service) shall file with the commission an application for approval of a proposed corporate separation plan. The application shall include a narrative describing how the plan ensures competitive equality, prevents unfair competitive advantage, prohibits the abuse of market power, and effectuates the policy of the state of Ohio embodied in section 4928.02 of the Revised Code.
- (B) The proposed corporate separation plan shall be a stand alone document that, at a minimum, includes the following:
- (1) Provisions that maintain structural safeguards.
- (2) Provisions that maintain separate accounting.
- (3) A list of all current affiliates identifying each affiliate's product(s) and/or service(s) that it provides.
- (4) A list identifying and describing the financial arrangements between the electric utility and all affiliates.
- (5) A code of conduct policy that complies with this chapter and that employees of the electric utility and affiliates must follow.

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- (6) A description of any joint advertising and/or joint marketing activities between the electric utility and an affiliate that the electric utility intends to utilize, including when and where the name and logo of the electric utility will be utilized, and explain how such activities will comply with this chapter.
- (7) Provisions related to maintaining a cost allocation manual (CAM).
- (8) A description and timeline of all planned education and training, throughout the holding company structure, to ensure that electric utility and affiliate employees know and can implement the policies and procedures of this rule. The information shall be maintained on the electric utilities' public web site.
- (9) A copy of a policy statement to be signed by electric utility and affiliate employees who have access to any nonpublic electric utility information, which indicates that they are aware of, have read, and will follow all policies and procedures regarding limitation on the use of nonpublic electric utility information. The statement will include a provision stating that failure to observe these limitations will result in appropriate disciplinary action.
- (10) A description of the internal compliance monitoring procedures and the methods for corrective action for compliance with this chapter.
- (11) A designation of the electric utility's compliance officer who will be the contact for the commission and staff on corporate separation matters. The compliance officer shall certify that the approved corporation separation plan is up to date and in compliance with the commission's rules and orders. The electric utility shall notify the commission and the director of the utilities-rates and analysis department (or their designee) of changes in the compliance officer.
- (12) A detailed description outlining how the electric utility and its affiliates will comply with this chapter. The format shall identify the provision and then provide the description.
- (13) A detailed listing of the electric utility's electric services and the electric utility's transmission and distribution affiliates' electric services.
- (14) A complaint procedure to address issues concerning compliance with this chapter, which, at a minimum, shall include the following:
 - (a) All complaints, whether written or verbal, shall be referred to the compliance officer designated by the electric utility to handle corporate separation matters or the compliance officer's designee.

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- (b) The complaint shall be acknowledged within five working days of its receipt.
 - (c) A written statement of the complaint shall be prepared and include the name of the complainant, a detailed factual report of the complaint, all relevant dates, the entities involved, the employees involved, and the specific claim.
 - (d) The results of the preliminary investigation shall be provided to the complainant in writing within thirty days after the complaint was received, including a description of any course of action that was taken.
 - (e) The written statements of the complaints and resulting investigations required by paragraphs (B)(14)(c) and (B)(14)(d) of this rule shall be kept in the CAM, in accordance with rule 4901:1-37-08 of the Administrative Code for a period of not less than three years.
 - (f) This complaint procedure shall not in any way limit the rights of any person to file a formal complaint with the commission.
- (C) Each electric utility shall file its approved corporate separation plan in its tariff docket.

AMENDED

4901:1-37-06 Revisions and amendments.

- (A) All proposed revisions and/or amendments to the electric utility's approved corporate separation plan shall be filed with the commission, and a copy of the filing shall be provided simultaneously to the director of the utilities-rates and analysis department (or their designee).
- (B) Except for proposals related to the sale or transfer of assets filed pursuant to rule 4901:1-37-09 of the Administrative Code, if a filing to revise and/or amend the electric utility's corporate separation plan is not acted upon by the commission within sixty days after it is filed, the modified corporate separation plan shall be deemed approved on the sixty-first day after filing.
- (C) Each electric utility shall file any modified corporate separation plan in its tariff docket upon approval of such plan.

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NO CHANGE

4901:1-37-07 Access to books and records.

- (A) The electric utility shall maintain records sufficient to demonstrate compliance with this chapter, and shall produce, upon the request of staff, all books, accounts, and/or other pertinent records kept by an electric utility or its affiliates as they may relate to the businesses for which corporate separation is required under section 4928.17 of the Revised Code, including those required under section 4928.145 of the Revised Code.
- (B) The staff may investigate such electric utility and/or affiliate operations and the interrelationship of those operations at the staff's discretion. In addition, the employees and officers of the electric utility and its affiliates shall be made available for informational interviews, at a mutually agreed time and place, as required by the staff to ensure proper separations are being followed.
- (C) If such employees, officers, books, and records cannot be reasonably made available to the staff in the state of Ohio, then upon request of the staff, the appropriate electric utility or affiliate shall reimburse the commission for reasonable travel expenses incurred.

NO CHANGE

4901:1-37-08 Cost allocation manual (CAM).

- (A) Each electric utility that receives products and/or services from an affiliate and/or that provides products and/or services to an affiliate shall maintain information in the CAM, documenting how costs are allocated between the electric utility and affiliates and the regulated and nonregulated operations.
- (B) The CAM will be maintained by the electric utility.
- (C) The CAM is intended to ensure the commission that no cross-subsidization is occurring between the electric utility and its affiliates.
- (D) The CAM will include:
 - (1) An organization chart of the holding company, depicting all affiliates, as well as a description of activities in which the affiliates are involved.

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- (2) A description of all assets, services, and products provided to and from the electric utility and its affiliates.
- (3) All documentation including written agreements, accounting bulletins, procedures, work order manuals, or related documents, which govern how costs are allocated between affiliates.
- (4) A copy of the job description of each shared employee.
- (5) A list of names and job summaries for shared consultants and shared independent contractors.
- (6) A copy of all transferred employees' (from the electric utility to an affiliate or vice versa) previous and new job descriptions.
- (7) A log detailing each instance in which the electric utility exercised discretion in the application of its tariff provisions.
- (8) A log of all complaints brought to the electric utility regarding this chapter.
- (9) A copy of the minutes of each board of directors meeting, where it shall be maintained for a minimum of three years.
- (E) The method for charging costs and transferring assets shall be based on fully allocated costs.
- (F) The costs should be traceable to the books of the applicable corporate entity.
- (G) The electric utility and affiliates shall maintain all underlying affiliate transaction information for a minimum of three years.
- (H) Following approval of a corporate separation plan, an electric utility shall provide the director of the utilities department (or their designee) with a summary of any changes in the CAM at least every twelve months.
- (I) The compliance officer designated by the electric utility will act as the contact for the staff when staff seeks data regarding affiliate transactions, personnel transfers, and the sharing of employees.
- (J) The staff may perform an audit of the CAM in order to ensure compliance with this rule.

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NO CHANGE

4901:1-37-09 Sale or transfer of generating assets.

- (A) Consistent with division (E) of section 4928.17 of the Revised Code, an electric utility shall not sell or transfer any generating asset it wholly or partly owns without prior commission approval.
- (B) An electric utility may apply for commission approval to sell or transfer its generating assets by filing an application to sell or transfer.
- (C) An application to sell or transfer generating assets shall, at a minimum:
 - (1) Clearly set forth the object and purpose of the sale or transfer, and the terms and conditions of the same.
 - (2) Demonstrate how the sale or transfer will affect the current and future standard service offer established pursuant to section 4928.141 of the Revised Code.
 - (3) Demonstrate how the proposed sale or transfer will affect the public interest.
 - (4) State the fair market value and book value of all property to be transferred from the electric utility, and state how the fair market value was determined.
- (D) Upon the filing of such application, the commission may fix a time and place for a hearing if the application appears to be unjust, unreasonable, or not in the public interest. The commission shall fix a time and place for a hearing with respect to any application that proposes to alter the jurisdiction of the commission over a generation asset.
- (E) If, after such hearing or in the case that no hearing is required, the commission is satisfied that the sale or transfer is just, reasonable, and in the public interest, it shall issue an order approving the application to sell or transfer.
- (F) Staff shall have access to all books, accounts, and/or other pertinent records maintained by the transferor and transferee as related to the application to sell or transfer generating assets and in accordance with rule 4901:1-37-07 of the Administrative Code.

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Case No(s). 18-1190-EL-ORD

Summary: Finding & Order adopting proposed amendments to Ohio Adm.Code 4901:1-37-01, 4901:1-37-04, 4901:1-37-05, and 4901:1-37-06, and as no change rules Ohio Adm.Code 4901:1-37-02, 4901:1-37-03, 4901:1-37-07, 4901:1-37-08, and 4901:1-37-09 electronically filed by Heather A Chilcote on behalf of Public Utilities Commission of Ohio