

FILE

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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

Case No. 08-777-EL-ORD

**INITIAL COMMENTS
OF
THE OHIO ENVIRONMENTAL COUNCIL**

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By its entry in this docket of July 2, 2008, the Commission has called for comments from interested parties with respect to the staff-proposed rules relating to the implementation of certain provisions of Amended Substitute Senate Bill No. 221 ("SB 221"), the recently-enacted legislation amending the Ohio statutory electric restructuring plan created by Amended Substitute Senate Bill No. 3 in 1999. The entry also invites interested parties to respond to specific questions posed by the Commission to assist it in evaluating the staff's proposed rules. See July 2, 2008 Entry, Paragraph 7.

The Ohio Environmental Council ("OEC") is a non-profit, charitable organization comprised of a network of over 100 affiliated group members, whose mission is to secure a healthier environment for all Ohioans. Over its 40-year history, OEC, relying on scientific principles, has been a leading advocate for fresh air, clean water, and sustainable land use before the legislature and administrative agencies, as well as in the courts. Consistent with its mission, OEC was an active participant in the effort that led to the inclusion of energy efficiency mandates and renewable and alternative energy standards in SB 221, and has a real and

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substantial interest in assuring that the rules adopted by the Commission to implement those benchmarks will produce the intended environmental benefits.

OEC has reviewed the staff-proposed rules attached to the Commission's July 2, 2008 entry, and is generally supportive of the staff's effort to capture the energy efficiency requirements contemplated by SB 221 in proposed Rule 4901:1-38-04, Ohio Administrative Code ("OAC"). However, although OEC endorses the staff-proposed version of Rule 4901:1-38-04(A), OAC, governing special incentive arrangements for energy efficiency production facilities, OEC finds certain elements of proposed Rules 4901:1-38-04(B), (C), and (D), OAC, to be problematic. Thus, OEC hereby submits the following initial comments with respect to those rules in accordance with the Commission's entry July 2, 2008 entry.¹

Proposed Rule 4901:1-38-04(B), OAC:

Proposed Rule 4901:1-38-04(B) requires each electric utility file an application for approval of an energy efficiency schedule "that recognizes the efforts by a customer with loads not more than one thousand kilowatts to reduce its energy consumption per unit of production." Subparagraph (B)(1) of the rule provides that the electric utility must include a standard application form for customers applying for service under such energy efficiency schedule with its application, while subparagraph (B)(2) sets out, in subparts (a) through (e), the specific criteria that applicants must meet, and further requires, *inter alia*, that applicants submit "verifiable information" detailing how these criteria are satisfied.

¹ OEC recognizes that the Commission does not typically require participants in its rulemaking proceedings to file motions to intervene. However, OEC clearly has a real and substantial interest in this proceeding and otherwise satisfies the criteria for intervention set forth in Section 4903.221, Revised Code and Rule 4901-1-11, OAC. Thus, if the Commission determines that formal intervention is necessary as a condition of participating in this case, OEC respectfully requests that it be granted leave to intervene.

At the outset, OEC would note that there is an inconsistency between the description of the demand limitation on customer eligibility for service under an energy efficiency schedule proposed for approval by the electric utility pursuant to paragraph (B) and the description of the demand limitation eligibility standard applicable to individual customers seeking service under such schedule set out in subparagraph (B)(2)(b). The former limits the availability of an electric utility's proposed energy efficiency schedule to "a customer with loads not more than one thousand kilowatts," while the latter imposes a requirement that an applicant customer's "average billing load must be no more than *[sic]* one thousand kilowatts." Because there is no apparent reason why these criteria should be different, OEC assumes that the staff's use of different language in paragraph (B) and subparagraph (B)(2)(b) was inadvertent.² If this assumption is correct, the rule should be revised to make the demand limitation the same in both contexts. On the other hand, if the staff's use of different caps in paragraph (B) and subparagraph (B)(2)(b) was deliberate, OEC requests that an explanation be provided as to why the standards are different for the electric utility and customer applications.

OEC favors the use of the "average billing load" test of proposed subparagraph (B)(2)(b) in both instances because that standard is more likely to reflect the customer's characteristic load, and could serve to open the energy efficiency schedule incentive for efforts to reduce consumption per unit of production to more customers (*i.e.*, a customer whose load exceeded one thousand kilowatts in one month would not be precluded from applying for the incentives if its average monthly billing load were less than one thousand kilowatts). However, if the Commission elects to adopt this "average billing load" test for either or both the electric utility

² Indeed, proposed Rule 4901:1-38-04(A) utilizes the same load limitation standard for both electric utility's application to establish an energy efficiency schedule applicable to energy efficiency production facilities and the customer application for service under such schedule. Compare proposed Rule 4901:1-38-04(A) with proposed Rule 4901:1-38-04(A)(2)(d).

and customer applications, the standard should specify the period over which the average billing load would be determined. As reflected in the redline of proposed Rule 4901:1-38-04(B) set out at the conclusion of these comments, OEC recommends that the average billing load be determined over the most recent twelve months, or, if the customer's facility has not been operation for twelve months, over the months the facility has been in operation.

OEC's next comment goes to the staff's failure to include a defined baseline for measuring the energy savings or demand reduction the qualifying customer-sited project has achieved. This is a critical omission, because the savings resulting from these projects will count towards the mandatory energy reduction benchmarks the electric utility must achieve pursuant to Section 4928.66, Revised Code. See proposed Rule 4901:1-38-04(B)(2)(e). The Commission obviously recognizes the significance of this issue in that it has requested responses to the question of how the rules should define the baseline level of customer energy consumption from which a reduction should be measured. See July 2, 2008 Entry, Paragraph 7(d). At first blush, it may appear that the answer to this question should be relatively straightforward, but, in fact, determining the baseline level of customer energy efficiency from which a reduction should be measured involves a number of complicated considerations. This is especially true for manufacturing facilities with diverse production processes.

OEC begins with the proposition that, consistent with the underlying intent of the statute, neither customer-sited improvements nor utility-wide sustained efficiency achievements made prior to the May 1, 2008 effective date of SB 221 should be included in the baseline calculus. The energy efficiency and demand reduction incentives contemplated by SB 221 – the carrot for customers and the stick for electric utility companies – are expressly designed to prompt

customers and utilities to alter behavior and to create additional investment. Thus, energy savings generated by customer-sited projects that were in place prior to the effective date of the legislation should not, under any circumstances, be counted towards the mandatory utility benchmarks contained in Section 4928.66, Revised Code. Accordingly, the rule governing energy efficiency schedules adopted by the Commission in this proceeding should not make the incentives available for existing projects.

For this same reason, OEC believes that savings produced by customer-sited projects that would have been undertaken in the absence of the energy efficiency and demand reduction incentives authorized by SB 221 should not be considered to be a reduction from the baseline used to determine eligibility for the energy efficiency schedule, unless the applicant can demonstrate that its choice of the specific new or replacement equipment involved was predicated on the energy efficiency attributes of the equipment selected versus the attributes of other equipment that could have been installed. Although this standard may appear to introduce a level of subjectivity into the process, bright-line measures, such as the degree by which the equipment installed exceeds applicable building energy code requirements, state and federal appliance standards, or the current industry norm as determined by an independently produced benchmarking study are, in fact, available. The overriding principle is that there should be no free riders. If the savings would have occurred in the absence of the energy efficiency schedule incentives, the project should not be deemed eligible for the incentives and the energy reduction attributable to the project should not count towards the Section 4928.66, Revised Code, utility benchmarks.

OEC believes that there are three reasonable options available for defining the baseline against which customer savings claims should be measured: (1) actual consumption for the prior

year, (2) actual consumption for the prior year adjusted for weather, or (3) the average of actual annual consumption over the prior three years. OEC is indifferent as to which of these baseline definitions the Commission chooses to approve, so long as the selected definition is consistently applied year over year, and, of course, so long as the concerns discussed above are recognized in applying the selected definition. Consistent use of the same definition is required to prevent “baseline shopping.” In other words, once selected, the baseline definition should be fully embraced. The Commission should not permit switching between definitions so as to generate higher energy reduction numbers.

OEC also has a concern with respect to minimal level of detail that is required to be provided in customer applications under subparagraph (B)(2)(d) of the staff-proposed rule. As drafted, this rule requires only that applicants “provide sufficient financial data to illustrate that it has reduced its consumption per unit of production.” First, it is far from clear how “financial data” would illustrate reduced energy consumption. Plainly, technical data would be required to document the level of energy savings achieved by the project in question. Moreover, the rule should require that applications include the anticipated energy savings over the life of the equipment, and should also provide for periodic reporting by the customer to permit the electric utility to determine that the equipment is, in fact, still in place and is continuing to produce the level of savings the customer represented would be achieved in the initial application. The “verifiable information” language included in subparagraph (B)(2) clearly imposes an obligation upon the host electric utility to assess the claims made in the application to assure that the customer is eligible for the energy efficiency schedule. OEC submits that this obligation should be ongoing so as to assure that the customer continues to be eligible for the energy efficiency incentives. Periodic reporting is a necessary part of this process.

Proposed Rule 4901:1-38-04(C) and (D), OAC:

Paragraph (C) of proposed Rule 4901:1-38-04 provides that the information provided by the customer to demonstrate eligibility for the Rule 4901:1-38-04(A) incentives for energy efficiency production facilities and the Rule 4901:1-38-04(B) incentives for energy efficiencies “shall remain confidential by the electric utility. Nonetheless the name and address of customers eligible for the schedules shall be public information.” Paragraph (D) of the proposed rule provides that the Commission staff “shall have access to all customer and electric utility information related to service provided to these schedules for periodic and random audits.” Obviously, these requirements are interrelated.

As a preliminary matter, OEC would note that the language of proposed paragraph (C) is less than artful. The requirement that the information in question “remain confidential by the electric utility company” is awkward and should be revised. Further, the exception indicating that the name and address of customers eligible for these schedules shall be public information provides no clue as to the information is to find its way into the public domain.³

Although these provisions may seem innocent enough on their face, they actually raise significant issues regarding the process that will be utilized to verify achieved savings. As discussed above, proposed Rule 4901:1-38-04(B)(2) places the initial responsibility for verifying customer energy savings claims on the electric utility in determining the eligibility (and continuing eligibility) of customers for the energy efficiency schedule incentives. OEC understands that customers applying for service under these schedules can have legitimate concerns regarding supplying competitively-sensitive information if there is the prospect that it

³ In addition, although the provision states that the name and address of eligible customers is public information, the fact that a customer may be eligible does not mean that electric utility company knows of its existence. OEC assumes that staff’s real intent is that the name and address of customers served under the respective energy efficiency schedules should be public information. If that is the case, the rule should so state.

will be made public. Thus, OEC agrees with the requirement that the electric utility treat this information as confidential. However, as suggested by the proviso in paragraph (D) of the proposed rule, it will be necessary for Commission staff to have access to this information so as to conduct audits to verify that the electric utility company has achieved the Section 4928.66, Revised Code, energy reduction benchmarks. But that does not end the matter.

Although paragraph (D) contemplates periodic and random staff audits, a much more rigorous, systematic process is necessary to provide confidence that the utility has, in fact, achieved the mandatory benchmarks set forth in the statute. This cannot be the black-box, behind-closed-doors determination that paragraph (D) of the proposed rule seems to envision. Further, in view of the scope of this undertaking, it may well be that the Commission will find it necessary and appropriate to retain an independent third party to assist in the audit process. Moreover, regardless whether the audit is performed by the staff or an independent third party, the audit findings must be subject to public scrutiny before the Commission makes a final determination with respect to whether the statutory benchmarks have been achieved. OEC understands that the rules under consideration at this point relate to the requirements of utility applications proposing energy efficiency schedules and customer applications for service under those schedules, and does not expect the Commission to establish specific rules regarding the audit process and related proceedings at this juncture. However, the confidentiality requirements now under consideration should anticipate proceedings of this type, and, thus, should provide for disclosure of the information in question to parties to such proceedings under appropriate protective agreements or Commission-issued protective orders. Paragraphs (C) and (D) of the proposed rule should be revised accordingly. Further, the Commission should initiate a separate

rulemaking proceeding to establish the parameters for audits to verify the accuracy and validity of claimed reductions in energy consumption and a process for hearings on such audit reports.

Consistent with the foregoing discussion, OEC recommends that staff-proposed Rule 4901:1-38-04(B), (C), and (D) be revised as follows:

- (B) The electric utility shall file an application for APPROVAL OF an energy efficiency schedule that recognizes the efforts by a customer with AN AVERAGE BILLING loads OF not more than one thousand kilowatts to reduce its electricity consumption per unit of production. FOR PURPOSES OF THIS RULE, THE AVERAGE BILLING LOAD SHALL BE DETERMINED OVER THE MOST RECENT TWELVE-MONTH PERIOD, OR, IF THE CUSTOMERS' FACILITY HAS NOT BEEN IN OPERATION FOR TWELVE MONTHS, OVER THE MONTHS THE FACILITY HAS BEEN IN OPERATION.
 - (1) The filing shall include a standard application form for customers.
 - (2) Each customer applying TO with the ELECTRIC utility for SERVICE UNDER the ENERGY EFFICIENCY schedule must meet the criteria set forth in paragraphs (a) to THROUGH (e) below and must submit to the electric utility verifiable information detailing how the criteria are met, and must provide an affidavit from a company official as to the veracity of the information provided.
 - (a) Eligible projects must be for manufacturing.
 - (b) The average billing load must be no more than one thousand kilowatts.
 - (c) The customer must identify its capital investments and expenses related to energy efficient measures.
 - (d) The customer must provide sufficient financial AND TECHNICAL data to ~~illustrate~~ DEMONSTRATE that it has reduced its electricity consumption per unit of production. IN DEMONSTRATING THE LEVEL OF REDUCTION ACHIEVED, THE CUSTOMER SHALL NOT INCLUDE REDUCTIONS ATTRIBUTABLE TO INVESTMENT MADE AND EXPENSES INCURRED PRIOR TO MAY 1, 2008, AND SHALL NOT INCLUDE REDUCTIONS THAT WOULD HAVE BEEN ACHIEVED IN THE ABSENCE OF THE INCENTIVES PROVIDED UNDER THE ENERGY EFFICIENCY SCHEDULE.

- (e) The customer must agree that the electric utility may count the reduction in electricity consumption attributable to its investments and expenses toward its energy efficiency targets as set forth in section 4928.66 of the Revised Code.
- (3) EACH CUSTOMER SERVED UNDER AN ENERGY EFFICIENCY SCHEDULE DESCRIBED IN PARAGRAPH(B) OF THIS RULE SHALL, NO LESS THAN FREQUENTLY THAN ONCE EVERY TWO YEARS, SUBMIT A REPORT TO THE ELECTRIC UTILITY DEMONSTRATING ITS CONTINUING ELIGIBILITY FOR SERVICE UNDER SUCH SCHEDULE.
- (C) Customer information provided to THE ELECTRIC UTILITY TO demonstrate eligibility FOR THE ENERGY EFFICIENCY SCHEDULES under paragraphs (A) and (B) of this rule shall BE TREATED AS ~~remain~~ confidential by the electric utility. ~~Nonetheless;~~ PROVIDED, HOWEVER, THAT THE ELECTRIC UTILITY SHALL MAINTAIN A LIST OF *the nameS and addressES* of customers ~~eligible for the~~ SERVED UNDER SAID SCHEDULES ~~shall be public information~~ AND SHALL MAKE SUCH LIST AVAILABLE FOR PUBLIC INSPECTION.
- (D) NOTWITHSTANDING THE REQUIREMENTS OF PARAGRAPH (C) OF THIS RULE, ~~The staff~~ AND/OR ANY INDEPENDENT THIRD PARTY RETAINED BY THE COMMISSION TO VERIFY CLAIMED REDUCTIONS IN ENERGY CONSUMPTION shall have access to all customer and electric utility information related to service provided pursuant to these schedules for PURPOSES OF CONDUCTING ~~periodic and random~~ audits TO DETERMINE THE ACCURACY AND VALIDITY OF SUCH INFORMATION. THE ELECTRIC UTILITY SHALL PROVIDE THIS INFORMATION TO ANY PARTY TO A COMMISSION PROCEEDING IN WHICH CLAIMED REDUCTIONS IN ENERGY CONSUMPTION ARE IN ISSUE PURSUANT TO AN APPROPRIATE PROTECTIVE AGREEMENT OR A PROTECTIVE ORDER ISSUED BY THE COMMISSION PURSUANT TO RULE 4901-1-24, OHIO ADMINISTRATIVE CODE.

OEC appreciates the opportunity to comment on the proposed rules, and urges the Commission to adopt these comments in formulating the final version of these rules.

Respectfully submitted,



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