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BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Adoption of Rules for Standard Service Offer, Corporate Separation, Reasonable Arrangements, and Transmission Riders for Electric Utilities Pursuant to Sections 4928.14, 4928.17, and 4905.31, Revised Code, as amended by Amended Substitute Senate Bill No. 221.	:	**Case No. 08-777-EL-ORD**

REPLY COMMENTS
OF
THE OHIO ENVIRONMENTAL COUNCIL

I. INTRODUCTION

Pursuant to the revised schedule established by the Attorney Examiner's entry in this docket of July 28, 2008, The Ohio Environmental Council ("OEC") hereby submits the following reply comments in response to the comments filed herein on July 22, 2008 by various participants in this rulemaking proceeding. As in the case of its initial comments, OEC's reply comments are limited to issues relating to proposed Rules 4901:1-38-04(B), 4901:1-38-04(C) and 4901:1-38-04(D),Ohio Administrative Code ("OAC"), which, respectively, set forth the requirements for applications for approval of the energy efficiency schedules to be filed by the state's electric utilities, establish a confidentiality requirement related to information supplied by customers to electric utilities to demonstrate eligibility for the energy efficiency schedules, and provide for staff access to relevant customer and utility information for the purpose of conducting audits.

At the outset, OEC wishes to clarify its objectives in participating in this aspect of this rulemaking proceeding. First, although OEC agrees that Rule 4901:1-38-04(B) should reward customer efforts to reduce energy consumption, because electric utilities will ultimately rely on the reductions achieved by customers served under their energy efficiency schedules to demonstrate compliance with the Section 4928.66(A)(1)(a), Revised Code, energy reduction benchmarks, it is important that the customer eligibility and project eligibility criteria included in this rule be established in a manner consistent with the legislative intent underlying Am. Sub. S.B. 221 ("SB 221"). Accordingly, the measure of energy savings should not take into account reductions that would have been achieved in the absence of the incentives provided under the energy efficiency schedule, unless the customer demonstrates that its choice of the equipment involved was predicated on the energy efficiency attributes of the equipment selected versus the attributes of other equipment that could have been installed. Second, although OEC believes that the process ultimately established for evaluating the electric utilities' compliance with the mandatory statutory benchmarks must provide for rigorous scrutiny of claimed savings, the customer application process must be workable from a practical standpoint. This process should not place an unreasonable burden on the electric utilities, the Commission, or Commission staff, nor should it impose a burden on customers that would discourage applications for service under the energy efficiency schedules.

OEC takes no position with respect to any other aspect of these proposed rules, including questions relating to the form or amount of discounts to be offered or the manner in which delta revenues should be recovered. Although OEC recognizes that these are important considerations, these are matters beyond the scope of OEC's interest. However, as indicated in its initial comments, OEC believes that a separate rulemaking should be initiated to establish the protocol for evaluating the level of energy savings achieved by customers served under the energy efficiency schedules and the formal process to be followed in determining if the electric utilities have satisfied the applicable statutory benchmarks. Thus, OEC's failure to include specific recommendations with respect to these subjects in its comments should not be construed to mean that the rules currently under consideration adequately address these matters.

II. PROPOSED RULE 4901:1-38-04(B) – CUSTOMER ELIGIBILITY

Proposed Rule 4901:1-38-04(B) limits eligibility for the energy efficiency schedules to customers with loads of not more than 1,000 Kw. Several parties filed comments addressing the proposed under-1,000 Kw threshold. Ohio Edison Company, The Cleveland Electric Illuminating Company, and Toledo Edison Company (the "FE Companies") suggest that the 1,000 Kw standard is too low, and argue that this limitation would "unreasonably limit the amount of customers which can participate in and take advantage of this schedule."[1] The FE Companies recommend eliminating this criterion so as expand the pool of customers that can participate in energy efficiency initiatives, which, according to the FE Companies, is consistent with policy and directives contained in SB 221. Similarly, the Industrial Energy Users – Ohio ("IEU-Ohio") argue that SB 221 contemplates a much broader scope for customer-sited projects by mercantile customers than the 1,000 Kw limitation would allow.[2] Although IEU-Ohio contends that proposed Rule 4901:1-38-04 should be deleted in its entirety and that the subject matter of this rule should be addressed in proposed rules issued to effectuate Sections 4928.64, 4928.65, and 4928.66, Revised Code, IEU-Ohio recommends, in the alternative, that the customer-eligibility criterion be left to the individual electric utilities so that a standardized rule does not limit opportunities to encourage energy efficiency.[3]

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[1] FE Companies Comments, 30.
[2] IEU-Ohio Comments, 16.
[3] IEU-Ohio Comments, 17.

The Dayton Power and Light Company ("DP&L") comes at the question from a different angle, arguing that the energy efficiency schedules addressed in proposed Rules 4901:1-38-04(A) and (B) and the "unique arrangements" covered by proposed Rule 4901:1-38-05 are two different animals, and that including these provisions in the same chapter confuses the issue.[4] As OEC reads DP&L's comments, DP&L does not necessarily disagree with the 1,000 Kw limitation, but believes that this issue should be addressed elsewhere so as not to blur the distinction between the specifics governing energy efficiency program and the broader "unique arrangements" provision, which DP&L envisions as encompassing alternatives for large mercantile customers to receive a discounted rate to recognize their energy efficiency efforts.

The Ohio Consumer and Environmental Advocates ("OCEA") point out in their comments that 1,000 Kw limitation in proposed Rule 4901:1-38-04(B) is not consistent with the statutory definition of a mercantile customer, which Section 4928.01(A)(19), Revised Code, defines as "a commercial or industrial customer . . . [that] consumes more than seven hundred thousand kilowatt hours per year."[5] OCEA argues that energy efficiency projects of customers of this size tend to be unique, and should be evaluated by a third party specializing in monitoring and verification hired by the Commission to apply a recognized protocol to determine if claimed energy savings have been achieved. OCEA contends that permitting smaller customers to design their own energy efficiency projects "decentralizes the utility's energy efficiency efforts and impedes the utility's ability to establish consistent energy efficiency goals."[6] Thus, OCEA recommends that this provision be stricken from the proposed rules.[7]

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[4] DP&L Comments, 10-14.
[5] OCEA Comments, 90.
[6] *Id.*
[7] *Id.*

In arguing that the 1,000 Kw eligibility limitation in proposed Rule 4901:1-38-04(B) is at cross purposes with the legislative intent to encourage the energy efficiency efforts by mercantile customers, the FE Companies and IEU-Ohio ignore two important points. First, Section 4928.66(A)(2)(c), Revised Code, vests the Commission with discretion to craft rules that will provide incentives to customers to undertake effective energy savings projects. In exercising this discretion, which includes the discretion not to exercise this authority if it determines that this approach is unworkable, the Commission clearly has the authority to limit the availability of the energy efficiency schedules in any manner it sees fit in order to produce an effective and manageable rule. Second, as DP&L suggests, there is nothing in the proposed rules that prevents mercantile customers that are not eligible for the Rule 4901:1-38-04(B) energy efficiency schedules from entering into "unique arrangements" with electric utility that include incentives for the customer to contribute to the utility's effort to meet the mandatory Section 4928.66(A)(1)(a) energy savings benchmarks. Indeed, it appears that IEU-Ohio, in fact, recognizes this opportunity, as evidenced by its comment that, "perhaps," the statutory "scope will be appropriately respected in the proposed rules that will be issued under Section 4928.64, 4928.65, and 4928.66, Revised Code."[8] On the other hand, OEC disagrees with IEU-Ohio's alternative proposal that the eligibility criterion for the energy efficiency schedule should be left to the individual electric utilities. This Commission should make this call so as to assure that all similarly situated customers have the opportunity to qualify for the energy efficiency schedules.

OEC agrees with DP&L's recommendation that the requirements associated with energy efficiency schedules and the requirements governing "unique arrangements" should not be included in the same chapter of the rules. However, OEC believes that DP&L has this backwards, and that the requirements governing energy efficiency schedules should be addressed

[8] IEU-Ohio Comments, 16.

in this proceeding, while the "unique arrangements" provision should, as implied by IEU-Ohio, be addressed in a subsequent proceeding. Subject to the modifications proposed by OEC in its initial comments (*see* OEC Comments, 9-10), OEC believes that proposed Rule 4901:1-38-04(B) represents a workable mechanism for electric utilities to employ in dealing with applications by smaller customers, but that standards for energy savings projects proposed by large mercantile customers in the context of a "unique arrangements" agreement require additional study, for the reasons stated by OCEA.

In the final analysis, OEC's primary concern is that electric utilities meet the applicable energy savings benchmarks mandated by SB 221. OEC is less concerned with respect to how the electric utilities accomplish this result, so long as the mechanisms are consistent with the objective of the statute, which is to generate energy savings that would not have been achieved were it not for the incentives authorized therein. Thus, although OEC supports OCEA's position that protocols must be developed to verify that claimed energy savings were actually achieved, OEC sees this as a separate issue. That the Commission may elect to formulate a rule governing applications for service under energy efficiency by a certain subset of customers in this proceeding does not preclude the Commission from developing the verification protocols and process in a subsequent proceeding, as recommended by OEC in its initial comments. *See* OEC Comments, 8-9. Further, OEC disagrees with OCEA's recommendation that proposed Rule 4901:1-38-04(B) be stricken in its entirety. Customer-initiated energy savings projects should be encouraged, as such projects, regardless of the size of the customer, will play an important role in the electric utilities' efforts to meet the mandatory statutory benchmarks. However, as indicated above, OEC agrees with OCEA that customer-sited projects of large customers should be evaluated separately.

As OEC understands it, there is nothing magical about the staff-proposed 1,000 Kw eligibility criterion. Whether this number, or some other number, is the appropriate cutoff for eligibility for the Rule 4901:1-38-04(B) energy efficiency schedules is a matter within the Commission's discretion. However, as noted in OEC's initial comments, the eligibility standard the Commission adopts for electric utility applications to establish energy efficiency schedules should be consistent with the eligibility standard applicable to individual customers seeking service under such schedules set out in subparagraph (B)(2)(b).[9]

III. PROPOSED RULE 4901:1-38-04(B) – PROJECT ELIGIBILITY

A number of participants addressed the question posed in paragraph 7(d) of the Commission's July 2, 2008 entry regarding how the baseline level of customer energy consumption from which reductions would be measured for purposes of proposed Rule 4901:1-38-04(B). With the exception of the comments of the FE Companies, the responses were surprisingly consistent, evidencing a general consensus that the baseline should be determined based on the customer's average usage over a three-year period.[10] As noted in its initial comments,[11] OEC considers the use of a three-year average to be one of several acceptable methods of establishing the baseline, and, accordingly, supports these recommendations. In addition, OEC agrees that the refinement suggested by Duke Energy Ohio, Inc. (DE-Ohio) has merit, and joins in DE-Ohio's proposal that the Commission define the baseline level of energy consumption as the customer's aggregate average usage over the prior three years, adjusted for documented change in load growth or other relevant circumstances.[12] However, as stated in its initial comments, OEC believes that the period for establishing the baseline must predate the

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[9] *See* OEC Comments, 3-4.
[10] *See, e.g.*, Duke Energy Ohio, Inc. Comments, 5-6; DP&L Comments, 17-18; IEU-Ohio Comments, 20-21.
[11] *See* OEC Comments, 5-6.
[12] DE-Ohio Comments, 6.

availability of the incentives for energy savings created by SB 221, so as to assure that only reductions prompted by these incentives are considered in the baseline calculus.[13] This is consistent with the recommendation of The Ohio Energy Group, et al. ("OEG") that the baseline should be adjusted for known and measurable changes not related to energy efficiency programs[14] as well as the general discussion of this subject set out OCEA's comments.[15] OEG has echoed OEC's concern that the rule be constructed to avoid the potential for gaming.[16] In other words, once a methodology for establishing the baseline is adopted, it must be adhered to prevent utilities from switching to a different methodology in an attempt to show greater energy savings.

The FE Companies, on the other hand, suggest that there be no fixed methodology for determining individual customers consumption reductions, claiming that flexible reporting criteria are necessary to recognize "the multitude of differences among customers and the many different techniques available to achieve these reductions."[17] OEC opposes this recommendation. Although the FE Companies recognize that there must be some ability to validate reductions,[18] they provide no explanation as to how could be accomplished in the absence of fixed standard. Not only would the failure to establish a firm, bright-line test create opportunities for gaming the system, but it would complicate the audit process.

In responding to this Commission's inquiry, DP&L emphasizes that the rule should not prescribe the energy efficiency programs that utilities may implement.[19] OEC agrees. As DP&L correctly points out, it is up to the utility to meet the statutory energy reduction benchmarks, and

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[13] OEC Comments, 4-5.
[14] OEG Comments, 13.
[15] *See* OCEA Comments, 11-14.
[16] OEG Comments, 13.
[17] FE Comments, 4.
[18] *Id.*
[19] DP&L Comments, 17.

thus, the utility should be responsible for determining the most effective manner for doing this.[20] However, OEC does take issue with certain other DP&L comments relating to proposed Rule 4901:1-38-04(B).

First, DP&L contends that the rule "should put in place a structure for identifying how the customer-provided impacts will be measured and valued – and this should be consistent with the measurement and valuation process applicable to the EDU."[21] It is not clear what DP&L has in mind in terms of a structure beyond the establishment of the consumption baseline, but, in OEC's view, the only relevant measuring stick is the reduction in consumption. However, if DP&L's reference is to the establishment of the protocol to be used in verifying that the customer has achieved the reduction anticipated in its application, that is an issue that should be addressed in a subsequent proceeding in which the parameters of the audit process and related procedural rules will be addressed.[22]

Second, DP&L argues that, to the extent a utility relies on customer-provided impacts to meet its statutory target, the utility should not be penalized if such impacts are less than anticipated. OEC believes that this proviso is inconsistent with SB 221. Although savings produced by customer-sited projects eligible for the energy efficiency schedule will contribute to the utility's ability to meet the statutory benchmarks, those benchmarks are mandatory, and the utility should not be relieved from meeting those benchmarks because a customer-sited project did not achieve the expected results. To find otherwise would eliminate the incentive for the utility to scrutinize customer claims of anticipated savings in applications for service under the energy efficiency schedules. Indeed, if this were the rule, the utility could simply approve any customer application submitted to it in the hope that it would produce some level of savings.

[20] *Id.*
[21] DP&L Comments, 16.
[22] *See* OEC Comments, 8-9.

Obviously, this would be totally unfair to the utility's other customers who, after all, must foot the bill for the energy efficiency program.

Finally, DP&L proposes that the rule provide that the amount of any financial incentive accorded a customer under the energy efficiency schedule cannot exceed the product of the energy efficiency surcharge and the customer's baseline usage. OEC agrees that such a test has merit, but believes that this is a subject that should be addressed under proposed Rule 4904:1-38-07, which deals with the level of incentives. As drafted, that rule leaves it to the utility to justify the incentives to be offered in its application to establish its energy efficiency schedule. There is nothing that prevents DP&L from proposing this test in that context.

IV. PROPOSED RULES 4901:1-38-04(B) AND (C) – PROCESS ISSUES

The staff-proposed rules governing the confidentiality of customer information and providing for staff access to customer and utility information drew relatively few comments. However, OCEA criticizes these rules on several counts.[23] OEC believes that these criticisms may be based on a misunderstanding – or, perhaps, a difference of opinion – as to how this entire process will operate.

OCEA objects to the proposed Rule 4901:1-38-04(C) requirement that customer information be treated as confidential, arguing that "(a)s with any case pending before the PUCO, confidentiality should be requested by the party seeking the designation, rather than automatically writing into the rules for every potential agreement."[24] However, this requirement does not automatically grant protected status to customer information as OCEA implies. Rather, this requirement merely imposes a duty on the electric utility to treat the information provided by the customer to demonstrate eligibility for the energy efficiency schedules as confidential. At

[23] OCEA Comments, 89-90.
[24] *Id.*

this point in the process – *i.e.*, when the customer submits its application to the utility -- there is no "case pending before the PUCO." The proposed rules do not contemplate that each customer application must be approved in advance by the Commission in a separate proceeding, nor should they, for obvious logistical reasons. Further, as noted in OEC's initial comments, customers may have a legitimate concern that competitively-sensitive information provided to the utility as part of their applications not be publicly disclosed by the utility. This concern is adequately addressed by the proposed rule, and, in no event, should each customer be required to come to the Commission to secure a protective order as the OCEA comments appear to suggest.

Proposed Rule 4901:1-38-04(D) provides for staff access to all customer and electric utility information related to service provided pursuant to these schedules for purposes of conducting audits. Although OEC has proposed additional language to clarify the point,[25] it is OEC's understanding that these audits would be undertaken in connection with a proceeding commenced to determine if the electric utility has achieved the statutory energy reduction benchmarks. To the extent that the utility relies on savings by customers served under the energy efficiency schedules to support its claim that it has met the applicable statutory benchmark, the auditor, be it the staff or a third party retained by the Commission, would review the underlying customer information to verify its accuracy and validity. In the context of such proceedings, parties would, in fact, have the same opportunity for discovery available in any Commission case, and, unless the utility obtained the customer's consent to release the information, the utility, consistent with its obligation under Rule 4901:1-38-04(C), would have the responsibility to seek protection for the information, whether through a protective agreement or through a protective order issued by the Commission. Thus, contrary to OCEA's argument, there is no provision for automatic protection written into the proposed rule, nor is there anything

[25] *See* OEC Comments, 8-10.

the proposed rule that violates the public records statutes. In fact, this process is entirely consistent with the principles OCEA cites.[26]

OEC agrees with OCEA that it is important that the Commission establish the protocol that will be employed in connection with these audits, and believes that OCEA's suggestion that the "International Performance Measurement and Verification Protocol" be employed for this purpose has merit.[27] OEC renews its recommendation that the Commission commence a rulemaking proceed to establish such a protocol, as well as to establish the procedures that will be utilized in connection with the proceedings to determine if the electric utilities have achieved that statutory benchmarks. OEC also agrees with OCEA that the Commission should consider retaining a third party with expertise in this area to assist in developing this protocol. Further, in view of the substantial undertaking that will be involved, OEC, consistent with its proposed revisions to this rule, also recommends that the Commission retain a third party to perform the audits involved.

V. CONCLUSION

OEC again expresses its appreciation for the opportunity to present its views regarding these proposed rules, and urges the Commission to adopt the language for these rules proposed by OEC in its initial comments.

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[26] OEC notes that the proposed rule's reference to "random" audits suggests that the staff will also, from time-to-time, review the customer information to verify the eligibility of the customer for the energy efficiency schedule incentives. However, OEC assumes that the Commission does not propose to initiate formal proceedings in connection with random audits performed by staff for this purpose unless there is evidence of a pervasive problem.
[27] *See* OCEA Comments, 91.

Respectfully submitted,

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