

FILE

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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In the Matter of the Adoption of Rules for :
Alternative and Renewable Energy :
Technologies and Resources, and Emission :
Control Reporting Requirements, and : **Case No. 08-888-EL-ORD**
Amendment of Chapters 4901:5-1, 4901:5-3, :
4901:5-5, and 4901:5-7 of the Ohio :
Administrative Code, pursuant to Chapter :
4928, Revised Code, to Implement Senate Bill :
No. 221.

**INITIAL COMMENTS
OF
THE OHIO ENVIRONMENTAL COUNCIL**

By its entry in this docket of August 20, 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. Specifically, this set of proposed rules addresses the SB 221 provisions regarding alternative energy resources, renewable energy credits, clean coal technology, and federal environmental regulations. See August 20, 2008 Entry, Paragraph 2. As explained in the entry, staff is proposing to implement these new statutory requirements by creating the three new Ohio Administrative Code ("OAC") chapters, Chapters 4901:1-39, 4901:1-40, and 4901:1-41, which deal, respectively, with the energy efficiency and demand reduction benchmarks, alternative energy portfolio standards, and greenhouse gas reporting and carbon dioxide control planning, and by modifying certain of the Commission's existing forecast rules set out in Chapters 4901:5-1, 4901:5-3, 4901:5-5, and 4901:5-7, OAC.

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

OEC is generally supportive of the staff's efforts to address energy efficiency and demand reduction requirements contemplated by SB 221 in proposed Chapter 4901:1-39, OAC, and endorses adoption of proposed Rule 4901:1-39-02, which sets out the purpose and the scope of the rules contained in this chapter. However, OEC finds certain other elements of the proposed Chapter 4901:1-39 rules to be problematic. Thus, OEC hereby submits the following initial comments with respect to those rules in accordance with the Commission's August 20, 2008 entry.¹

Proposed Rule 4901:1-39-01, OAC:

Proposed Rule 4901:1-39-01 provides the definitions of various terms as used in Chapter 4901:1-39, OAC. Because the definitions of these terms can have significant substantive implications, it is vital that these definitions accurately capture the underlying legislative intent.

¹ OEC recognizes that the Commission does not typically require participants in its rulemaking proceedings to file motions to intervene. OEC clearly has a real and substantial interest in this proceeding and otherwise satisfies the criteria for invention 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.

OEC notes that certain terms that appear throughout the chapter are not defined in proposed Rule 4901:1-39-01, notwithstanding that these terms have very specific meanings in the context in which they are used in SB 221. In addition, the failure to include specific definitions for certain other terms results in those terms being used interchangeably throughout the chapter, even though they have substantially different meanings. Finally, certain of the definitions that are provided are inconsistent with the meaning commonly ascribed to those terms in the industry. To minimize the possibility for confusion, and to reduce the potential for future disputes, OEC proposes the following revisions to staff-proposed Rule 4902:1-39-01.

Definitions for the terms "baseline" and "benchmark" should be incorporated in Rule 4901:1-39-01. Moreover, the definitions for these terms should be consistent with the underlying statutory definitions. Accordingly, OEC recommends the insertion of the following as subparagraphs (A) and (B) of this rule:

- (A) "BASELINE," WHEN APPLIED TO ENERGY SAVINGS, MEANS THE AVERAGE OF THE TOTAL KILOWATT HOURS THE ELECTRIC DISTRIBUTION UTILITY SOLD IN THE PRECEDING THREE CALENDAR YEARS AS PROVIDED IN DIVISION (A)(2)(A) OF SECTION 4928.66 OF THE REVISED CODE. "BASELINE," WHEN APPLIED TO PEAK DEMAND REDUCTION, MEANS THE AVERAGE PEAK DEMAND ON THE UTILITY IN THE PRECEDING THREE CALENDAR YEARS AS PROVIDED IN DIVISION (A)(2)(A) OF SECTION 4928.66 OF THE REVISED CODE.
- (B) "BENCHMARK," WHEN APPLIED TO ENERGY SAVINGS, MEANS THE ANNUAL LEVEL OF ENERGY SAVINGS THAT AN ELECTRIC DISTRIBUTION UTILITY MUST ACHIEVE AS PROVIDED IN DIVISION (A)(1)(A) OF SECTION 4928.66 OF THE REVISED CODE. "BENCHMARK," WHEN APPLIED TO PEAK DEMAND REDUCTION, MEANS THE LEVEL OF PEAK DEMAND REDUCTION AN ELECTRIC DISTRIBUTION UTILITY MUST ACHIEVE AS PROVIDED IN DIVISION (A)(1)(B) OF SECTION 4928.66 OF THE REVISED CODE.

The staff-proposed definition of "demand response" found in proposed Rule 4901:1-39-01(A) appears to confuse the concept of energy savings (*i.e.*, reducing total kWh consumption)

with the concept of demand reduction (*i.e.*, reducing the kW of demand experienced at a particular point in time). In customary industry parlance, "demand response" relates only to the latter. OEC proposes the following revisions to the staff-proposed definition to draw this distinction more clearly (and to correct a grammatical nit). The definition has been redesignated as paragraph (C) to reflect the proposed insertion of definitions for the terms "baseline" and "benchmark" discussed above.

(A)(C) "Demand response" means a change in customer behavior or a change in customer owned or operated assets that ~~effects~~ AFFECTS the quantity and/or ~~timing~~ DEMAND FOR electricity AT A PARTICULAR TIME (USUALLY DURING THE UTILITY'S PEAK) as a result of price signals or other incentives. Demand response can reduce kilowatts of demand, and/or MAY OR MAY NOT REDUCE kilowatt-hours of energy usage OVER TIME. Demand response includes economic interruption or reduction of customer load, ~~and may include~~ certain types of energy conservation.

Admittedly, "energy efficiency" is a broad concept that can have different connotations depending on the context. Although staff has attempted to reduce this concept to workable definition for purposes of proposed Chapter 4901:1-39, OEC believes that the staff definition of "energy efficiency" set out in proposed Rule 4901:1-39-01(B) is rife with potential for misinterpretation and is not consistent with the way the term is actually used in many of those rules in which it appears. OEC favors a definition of "energy efficiency" modeled after that used by the Massachusetts Technology Collaborative Renewable Energy Trust, which more precisely defines the term as referring "to products or systems designed to use less energy for the same or higher performance than regular products or systems." Thus, OEC proposes that the staff's definition be revised as follows:

(B)(D) "Energy efficiency" ~~means the energy content of the useful output from a process, device, or system divided by the energy input into that process, device, or system.~~ MEANS THE ENERGY SAVINGS ATTRIBUTES OF PROCESSES, PRODUCTS, OR SYSTEMS DESIGNED TO USE LESS ENERGY FOR THE

SAME OR HIGHER PERFORMANCE THAN REGULAR PROCESSES,
PRODUCTS, OR SYSTEMS.

The definition of "peak demand reduction" found in staff-proposed Rule 4901:1-39-01(E), like the proposed definition for "demand response" previously discussed, does not mesh with the way this term is typically used in the industry. Although the staff's proposed definition implicitly recognizes that efforts to reduce on-peak consumption will not necessarily have any impact on total kWh consumption measured over a longer period, the language should be refined to clarify the distinction between peak-shifting strategies, which are properly part of the peak demand reduction toolkit, and energy efficiency efforts designed to reduce overall consumption, which are subject to separate requirements. Thus, OEC proposes that paragraph (E) of staff-proposed Rule 4901:1-39-01 be revised as follows:²

~~(E)~~(G) "Peak demand reduction" means altering the time and/or demand for electricity AT A PARTICULAR TIME to reduce the electric distribution utility's peak period requirements. Peak demand reduction results in fewer kilowatts of load during peak periods, and may or may not result in fewer kilowatt-hours of energy usage OVER TIME.

OEC would also point out that the terms "program" and "project" appear to be used interchangeably in various places in staff-proposed Chapter 4901:1-39, OAC, despite the fact that these terms refer to two completely different things. To remedy this, OEC recommends that these terms each be clearly defined in Rule 4901:1-39-01. Inclusion of specific definitions that draw a clear distinction between these terms will reduce the potential for confusion in applying the requirements of this chapter. OEC recommends that the Commission adopt the definition for these terms used in the Association for Energy Services Professionals "Common Energy

² OEC proposes no changes to the intervening staff-proposed paragraphs (B), (C), and (D), other than to redesignate those paragraphs as (D)(E), and (F), respectively, to accommodate the insertion of OEC-proposed paragraphs (A) and (B) as discussed above. As a result, staff-proposed paragraph (E) becomes paragraph (G) under OEC's proposal.

Efficiency/Self Generation Terms and Definitions,” which are reflected in proposed paragraphs

(H) and (I) below.³

(H) “PROGRAM” MEANS A COLLECTION OF DEFINED ACTIVITIES AND MEASURES THAT:

- (1) ARE ADMINISTERED AND CARRIED OUT BY AN ELECTRIC DISTRIBUTION UTILITY AND/OR ITS SUBCONTRACTORS AND IMPLEMENTERS;
- (2) TARGET A SPECIFIC MARKET SEGMENT, CUSTOMER CLASS, A DEFINED END USE, OR A DEFINED SET OF MARKET ACTORS (E.G., DESIGNERS, ARCHITECTS, HOMEOWNERS);
- (3) ARE DESIGNED TO ACHIEVE SPECIFIC EFFICIENCY-RELATED CHANGES IN BEHAVIOR, INVESTMENT PRACTICES, OR MAINTENANCE PRACTICES IN THE ENERGY MARKET; AND
- (4) ARE GUIDED BY A SPECIFIC BUDGET AND IMPLEMENTATION PLAN.

(I) “PROJECT” MEANS AN UNDERTAKING BY A SINGLE END-USER CUSTOMER TO BRING ABOUT AN ENERGY EFFICIENCY IMPROVEMENT OR REDUCTION IN DEMAND. A “PROJECT” HAS A DEFINED STARTING AND ENDING POINT. A “PROJECT” USUALLY CORRESPONDS TO THE SET OF ACTIVITIES DESCRIBED IN AN APPLICATION BY THE END-USER CUSTOMER FOR SERVICE UNDER AN ELECTRIC DISTRIBUTION UTILITY’S ENERGY EFFICIENCY SCHEDULE OR OTHER ARRANGEMENT PROVIDING FOR A REDUCTION IN THE OTHERWISE APPLICABLE RATE FOR SERVICE.

Proposed Rules 4901:1-39-03 through 4901:1-39-06, OAC:

As indicated above, OEC recommends adoption of staff-proposed Rule 4901:1-39-02. However, although OEC is supportive of the general the intent of the remainder of the staff-proposed rules in Chapter 4901:1-39, OEC is concerned that the proposed rules, as currently structured, may be confusing and misleading. OEC believes that these rules should be

³ OEC proposes no changes to the two remaining staff-proposed paragraphs, other than to redesignate those paragraphs as paragraphs (J) and (K) to accommodate the insertion of OEC-proposed paragraphs (A) and (B).

reorganized so as to enhance the distinction between requirements relating to reporting activities, verification activities, program design activities, and the Commission process for the review and approval of same. Thus, OEC, in addition to the specific substantive changes recommended below, has rearranged various provisions in the staff-proposed rules in an effort to assemble all text relating to specific topic in one place.

Proposed Rule 4901:1-39-03, OAC:

As proposed by staff, paragraph (A) of Rule 4901:1-39-03, OAC, establishes the requirement that each electric utility file, in conjunction with its a long-term forecast report, a benchmark report by April 15th of each year “regarding compliance with baselines and benchmarks for energy efficiency and peak reduction programs.” Proposed paragraph (B) provides for the filing of comments regarding the benchmark report, while proposed paragraph (C) provides that the staff, after review of the benchmark report and comments, will issue a report of its findings regarding the “utility’s compliance with the mandated energy efficiency improvements and demand reductions.” Proposed paragraph (C) further provides that, if the staff finds that the electric utility has not demonstrated compliance with the statutory sales reduction benchmark, it may recommend the imposition of a forfeiture as contemplated by Section 4928.66(D), Revised Code. Proposed paragraph (D) provides that, if staff recommends a forfeiture, the electric utility may file a request for a hearing within thirty days. OEC opposes adoption of the staff-proposed version of this rule on several grounds.

First, OEC believes that the benchmark report and should be filed in a docket separate and apart from the long-term forecast report, and should be subject to a separate, rigorous, review and approval process in which all interested parties are permitted to participate. Although the proposed rule permits parties to file comments, there is no provision for

Commission review of such comments, which leaves the determination as to the merits of the comments, and, indeed, the validity of the benchmark report itself, solely in the hands of the staff. Moreover, although proposed paragraph (D) provides recourse to the electric utility in the event the staff finds a forfeiture should be imposed, no similar opportunity to be heard is accorded to other parties that may disagree with the staff's findings and recommendations. In fact, as drafted, proposed rule does not even guarantee the electric utility the right to be heard because the rule refers only to the opportunity to request a hearing and does not require that such a request be granted by the Commission. Moreover, the rule makes no mention of any procedure for Commission adoption (or rejection) of the staff's findings, and is also silent with respect to the procedures that would be employed if the electric utility's request for a hearing is granted, including any public notice requirements. Clearly, this process violates the Section 4928.66(C), Revised Code, requirement that the Commission provide notice and the opportunity for hearing with respect to benchmark reports, and, even if it did not, the provisions would still be totally unacceptable simply from a fairness standpoint.

OEC begins with the self-evident proposition that the Commission – not its staff – is the entity charged with the responsibility for determining whether an electric utility is compliance with the statutory benchmarks. Although staff input is certainly necessary and appropriate, as in the applicable procedures in a general rate case or in a GCR case in which the audit is performed by the staff, the staff should conduct its own investigation of the matters contained in the benchmark report and issue a report of its findings and recommendations. Interested parties, including the electric utility, should then have the right to file objections to the staff findings.⁴

⁴ Although OEC does not necessarily oppose the filing of comments by interested parties prior to the issuance of the staff report, unless parties are accorded the opportunity for discovery before filing such comments, the comments are not likely to be particularly helpful to staff in conducting its investigation. Thus, OEC is indifferent as to whether this feature of the proposed process is approved.

Such objections should frame the issues in the case, and a hearing should be held upon the issues raised by the objections after providing the parties the opportunity to engage in discovery and to file testimony in support of their positions. If no objections are filed, the Commission should proceed directly to order, but, if objections are filed, the Commission must adjudicate the issues raised based on the record before it. Under either scenario, the Commission must ultimately issue an order determining whether the utility has complied with the benchmarks if, for no other reason, because under staff-proposed Rule 4901:1-39-05 (A), the approval of the benchmark report is condition precedent to an application by the utility for cost recovery.

Second, from an organizational standpoint, OEC submits that it would make more sense to present the requirements for benchmark reports before setting out the procedure for the review and approval of the reports. Indeed, reordering the rules in this fashion would be consistent with the format proposed by the staff for Chapter 4901:1-40 for evaluating compliance with benchmarks governing the resource mix of power supply portfolios. Accordingly, OEC suggests that proposed Rule 4901:1-39-03 and proposed Rule 4901:1-39-04 be reversed.

Finally, even if the staff-proposed order is retained, the specific language proposed by the staff for certain paragraphs of the "filing and review" rule is problematic. Proposed paragraph (A) characterizes the benchmark report as the report "regarding compliance with baselines and benchmarks for energy efficiency and peak reduction programs." However, "compliance with baselines" is a non sequitur because, as defined elsewhere in the chapter and in the relevant statutes, baselines are simply the historical starting point against which energy savings and peak demand reductions are measured. Thus, although the reports should certainly contain, among other things, the electric utility's proposed baselines and the justification for those baselines, the report cannot, by definition, address "compliance with baselines." The fix for this is to delete the

language that attempts to describe the contents of benchmark reports and simply substitute a reference to the rule containing the requirements for the benchmark reports. In addition, the filing date for the benchmark reports should be moved to the rule governing the requirements for the reports. The staff-proposed language for paragraph (C) is also flawed because the verbiage does not match the scope of the of subject matter to be investigated by the staff, and does not include a requirement that staff perform audits to verify claimed energy savings and peak demand reductions, notwithstanding that the staff-proposed Rule 4901:1-38-04(D) under consideration in Case No. 08-777-EL-ORD clearly contemplates that such audits will be conducted. As in its comments in that case, OEC again recommends that the Commission consider retaining a qualified independent third party to assist staff in conducting such audits in view of the scope of the work that will be required and the logistical constraints that will arise due to the fact that all electric utilities are required to file their benchmark reports on the same date. The procedure set out in Rule 4901:1-14-07-D, OAC, with respect to the engagement of third-party auditors to perform management performance audits of natural gas companies provides a useful model in this regard. By including similar language in this rule, the Commission at least gives itself the option to use a third-party auditor, even if it ultimately determines that the staff should perform the audit in a particular case.

Consistent with the foregoing discussion, OEC recommends that proposed Rule 4901:1-39-03 be redesignated as Rule 4901:1-39-04 and that the language of the rule be revised as follows.

4901:1-39-0304 Filing and ~~r~~PROCEDURES FOR review of the benchmark report

(A)(B) Any person may file SUBMIT comments regarding an electric utility's benchmark report FILED PURSUANT TO 4901:1-39-03 OF THE ADMINISTRATIVE CODE within thirty days of the filing of such report.

- ~~(C)~~(B) The staff shall ~~review the~~ CONDUCT AN INVESTIGATION OF THE MATTERS SET FORTH IN THE ELECTRIC utility's benchmark report and SHALL REVIEW any comments FILED PURSUANT TO PARAGRAPH (A) OF THIS RULE. AS A PART OF ITS INVESTIGATION, THE STAFF, OR A QUALIFIED INDEPENDENT THIRD PARTY SELECTED BY THE COMMISSION TO ASSIST STAFF, SHALL CONDUCT AN AUDIT TO VERIFY ANY CLAIMED ENERGY SAVINGS AND PEAK DEMAND REDUCTIONS RELIED UPON BY THE ELECTRIC UTILITY TO DEMONSTRATE COMPLIANCE WITH THE ANNUAL SALES AND PEAK DEMAND REDUCTION BENCHMARKS SET FORTH IN DIVISION (A) OF SECTION 4928.66 OF THE REVISED CODE. STAFF SHALL file a report of its findings AND RECOMMENDATIONS regarding THE ELECTRIC UTILITY'S COMPLIANCE WITH THE REQUIREMENTS OF RULE 4901:1-39-03 OF THE ADMINISTRATIVE CODE WITHIN SIXTY DAYS OF THE FILING OF THE BENCHMARK REPORT.
- ~~the baselines and benchmarks, and any proposed modifications thereto, and the utility's compliance with the mandated energy efficiency improvements and demand reductions.~~ If staff finds that an electric utility has not demonstrated compliance with the annual sales AND PEAK DEMAND reductions required by division (A) of section 4928.66 of the Revised Code, staff may SHALL recommend the imposition of a forfeiture AS AUTHORIZED BY DIVISION (D) OR SECTION 4928.66 OF THE REVISED CODE.
- ~~(D)~~(C) If staff recommends the assessment of a forfeiture, the electric utility may file, within thirty days, a request for hearing. THE ELECTRIC UTILITY OR ANY OTHER INTERESTED PERSON MAY FILE OBJECTIONS TO THE STAFF'S REPORT WITHIN THIRTY DAYS OF THE ISSUANCE OF THE REPORT.
- (D) IF AN OBJECTION TO THE STAFF'S REPORT IS FILED, THE COMMISSION SHALL PROMPTLY SET THE MATTER FOR HEARING, ESTABLISH A PROCEDURAL SCHEDULE, AND REQUIRE THE ELECTRIC UTILITY TO PUBLISH NOTICE OF THE HEARING IN SUCH MANNER AS THE COMMISSION MAY DIRECT. AFTER THE HEARING IS COMPLETED AND BRIEFS ARE FILED, THE COMMISSION SHALL ISSUE AN ORDER WITH RESPECT TO THE BENCHMARK ACHIEVEMENT REPORT AS IS JUST AND REASONABLE BASED ON THE RECORD IN THE CASE.
- (E) IF NO OBJECTIONS ARE FILED PURSUANT TO PARAGRAPH (C) OF THIS RULE, THE COMMISSION SHALL ISSUE AN ORDER ADOPTING THE FINDINGS AND RECOMMENDATIONS CONTAINED IN THE STAFF'S REPORT.
- (F) IF, AS PROVIDED IN PARAGRAPH (B) OF THIS RULE, THE COMMISSION ELECTS TO UTILIZE A QUALIFIED INDEPENDENT THIRD-PARTY AUDITOR OR CONSULTING FIRM TO ASSIST THE

STAFF IN VERIFYING CLAIMS IN THE BENCH MARK REPORT REGARDING ENERGY SAVINGS AND DEMAND REDUCTIONS, THE SUBJECT ELECTRIC UTILITY SHALL ENGAGE THE SELECTED AUDITOR OR CONSULTING FIRM. THE COMMISSION SHALL DEVELOP A REQUEST FOR PROPOSAL (RFP) DESIGNED TO SOLICIT RESPONSES FOR PERFORMING SUCH ACTIVITY. THE COMMISSION SHALL HAVE SOLE RESPONSIBILITY FOR SENDING OUT AND ACCEPTING ALL RESPONSES TO THE RFP AND FOR THE SELECTION OF THE AUDITOR OR CONSULTING FIRM.

Proposed Rule 4901:1-39-04, OAC:

Proposed Rule 4901:1-39-04 contains the staff-proposed requirements for the contents of the benchmark reports. As indicated above, OEC recommends that this rule be redesignated as Rule 4901:1-39-03 so that the report requirements are presented before the rules governing the review process, and that the filing date be included in this rule rather than in this rule rather than in the procedural rule. OEC also believes that this rule should be expanded to require that the report include additional support for the proposed baselines and any proposed adjustments thereto, a more detailed description of all actions taken to comply with the statutory benchmarks and the verification procedures employed, an analysis of whether such actions were cost-effective, and the inclusion of a complete explanation of the electric utility's planned programs for achieving the statutory benchmarks in the future. This information is necessary for the Commission to evaluate the efficacy of the programs and to order modifications of those programs if it finds to be deficient, as well as for the primary purpose of the Commission review, which is to determine whether compliance with the statutory benchmarks has been achieved.

OEC also notes that the description of the baseline for peak demand reduction in subparagraph (B)(2) of the rule is inconsistent with the language of the underlying statute. The staff describes the baseline as "the highest seasonal hourly integrated peak demand in each of the past three calendar years," whereas Section 4928.66(A)(2)(a) defines the baseline as "the average

peak demand on the utility in the preceding three calendar years.” OEC submits that the statutory language controls and that this definition, which, under OEC’s scheme, would be moved to Rule 4901:1-39-01, should be changed to conform to the statute.

Accordingly, OEC recommends that proposed-rule 4901:1-39-04 be redesignated as Rule 4901:1-39-03 and that the rule be revised as follows:

4901:1-39-04 Benchmark report requirements

- (A) ON APRIL FIFTEENTH OF EACH YEAR, EACH ELECTRIC UTILITY SHALL FILE A BENCHMARK REPORT WITH THE COMMISSION THAT INCLUDES ALL THE INFORMATION REQUIRED PURSUANT TO PARAGRAPHS (B), (C), AND (D) OF THIS RULE.
- (B) EACH ELECTRIC UTILITY SHALL INCLUDE A SECTION IN ITS ANNUAL BENCHMARK REPORT DETAILING ITS ACHIEVED ENERGY SAVINGS AND DEMAND REDUCTIONS RELATIVE TO ITS CURRENT BASELINES. AT MINIMUM, THIS SECTION OF THE BENCHMARK REPORT SHALL INCLUDE EACH OF THE FOLLOWING:
 - (1) A calculation of THE baselines for kilowatt-hour sales and kilowatt demand for the current year.
 - (2) A DESCRIPTION OF THE METHOD OF CALCULATING THE BASELINES, INCLUDING SUPPORTING DATA.
 - (3) Any proposed adjustments to the baselines and benchmarks for the current calendar year. IN PROPOSING ADJUSTMENTS TO ITS BASELINES, THE ELECTRIC UTILITY shall DESCRIBE THE METHODOLOGY USED TO DETERMINE THE ADJUSTED BASELINE, including THE RATIONALE FOR THE ADJUSTMENT AND all assumptions, rationale, and calculations UPON WHICH THE ADJUSTMENT IS BASED. Unless modified by the commission, THIS BASELINE METHODOLOGY shall be used for all subsequent adjustments and normalizations, and consistently applied BY THE ELECTRIC UTILITY from year to year IN ALL SUBSEQUENT BENCHMARK REPORTS.
 - (4) THE APPLICABLE STATUTORY BENCHMARKS FOR ENERGY SAVINGS AND PEAK DEMAND REDUCTION.
 - (5) ANY PROPOSED ADJUSTMENTS TO THE APPLICABLE STATUTORY BENCHMARKS FOR ENERGY SAVINGS AND PEAK DEMAND REDUCTION. IN PROPOSING AN ADJUSTMENT TO

THE APPLICABLE STATUTORY BENCHMARKS, THE ELECTRIC UTILITY SHALL DESCRIBE THE METHODOLOGY USED TO DETERMINE THE ADJUSTED BENCHMARK, INCLUDING THE RATIONALE FOR THE ADJUSTMENT AND ALL ASSUMPTIONS AND CALCULATIONS UPON WHICH THE ADJUSTMENT IS BASED. THE ELECTRIC MUST ALSO DEMONSTRATE THAT COMPLIANCE WITH THE APPLICABLE STATUTORY BENCHMARK IS NOT POSSIBLE due to regulatory, economic, or technological reasons beyond the electric utility's reasonable control AND ~~In any such proposal, the electric utility shall demonstrate that it has exhausted all compliance options.~~

- (6) A description of all actions considered and taken to comply with the APPLICABLE STATUTORY BENCHMARKS OR adjusted benchmarks for the prior calendar year INCLUDING:
 - (a) A DESCRIPTION OF EACH ENERGY EFFICIENCY PROGRAM, THE KEY ACTIVITIES TAKEN IN THOSE PROGRAMS, THE NUMBER AND TYPE OF PARTICIPANTS, AND THE SAVINGS ACHIEVED BY THOSE PROGRAMS.
 - (b) A DESCRIPTION OF EACH DEMAND RESPONSE PROGRAM, THE KEY ACTIVITIES TAKEN IN THOSE PROGRAMS, THE NUMBER AND TYPE OF PARTICIPANTS, AND THE SAVINGS ACHIEVED BY THOSE PROGRAMS.
 - (c) A DESCRIPTION OF ALL ENERGY SAVINGS PRODUCED BY MERCANTILE CUSTOMERS AND COUNTED TOWARD THE APPLICABLE BENCHMARK, INCLUDING A DESCRIPTION OF THE METHODS TAKEN TO SAVE ENERGY AND A DESCRIPTION OF THE CUSTOMERS INVOLVED.
 - (d) A DESCRIPTION OF ALL DEMAND REDUCTIONS PRODUCED BY MERCANTILE CUSTOMERS AND COUNTED TOWARD THE UTILITY'S GOALS, INCLUDING A DESCRIPTION OF THE METHODS TAKEN TO REDUCE DEMAND AND A DESCRIPTION OF THE CUSTOMERS INVOLVED.
 - (e) A DESCRIPTION OF ANY TRANSMISSION LOSS MITIGATION EFFORTS UNDERTAKEN TO MEET THE APPLICABLE BENCHMARKS.
- (7) AN EVALUATION OF THE COST-EFFECTIVENESS OF EACH ENERGY EFFICIENCY AND DEMAND SIDE PROGRAM

DESCRIBED IN PARAGRAPH (B)(6) OF THIS RULE USING THE TOTAL RESOURCE COST TEST. ALL COSTS AND BENEFITS SHALL BE EXPRESSED IN NOMINAL DOLLARS.

- (8) A DESCRIPTION OF THE STEPS TAKEN TO VERIFY THE ENERGY AND DEMAND SAVINGS UTILIZED IN THE EVALUATION OF THE COST-EFFECTIVENESS OF EACH ENERGY EFFICIENCY AND DEMAND SIDE MANAGEMENT PROGRAM REPORTED PURSUANT TO PARAGRAPH (B)(7) OF THIS RULE. THE STAFF MAY PUBLISH GUIDELINES FOR PROGRAM MEASUREMENT AND VERIFICATION. IF THE STAFF PUBLISHES SUCH GUIDELINES, THE ELECTRIC UTILITY SHALL EXPLAIN AND DEVIATION FROM SUCH GUIDELINES.
 - (9) A COMPARISON OF THE ACTUAL ENERGY SAVINGS AND PEAK DEMAND REDUCTIONS ACHIEVED WITH THE APPLICABLE BENCHMARKS TO QUANTIFY ANY ENERGY SAVINGS AND/OR PEAK DEMAND REDUCTIONS THAT EXCEED THE APPLICABLE BENCHMARKS. SUCH EXCESS SAVINGS AND/OR PEAK DEMAND REDUCTIONS MAY BE APPLIED TO THE APPLICABLE BENCHMARKS FOR THE FOLLOWING YEAR.
- (C) EACH ELECTRIC UTILITY SHALL INCLUDE A SECTION IN ITS ANNUAL BENCHMARK REPORT DESCRIBING AND JUSTIFYING THE PROGRAMS IT HAS OFFERED OR WILL OFFER TO MEET THE STATUTORY BENCHMARKS ON A YEAR-TO-YEAR BASIS FOR THE NEXT FIVE YEARS. PROGRAMS INVOLVING technologies or measures mandated by law, including those embodied in the Energy Independence Security Act of 2007 ARE NOT INCLUDABLE PROGRAM PORTFOLIO, AND ENERGY SAVINGS OF DEMAND REDUCTIONS RESULTING FROM SUCH PROGRAMS SHALL NOT BE COUNTED IN PROJECTING COMPLIANCE WITH THE APPLICABLE STATUTORY BENCHMARKS. AT MINIMUM, THIS SECTION SHALL INCLUDE EACH OF THE FOLLOWING:
 - (1) A DESCRIPTION OF EACH PROPOSED ENERGY EFFICIENCY AND DEMAND RESPONSE PROGRAM INCLUDING:
 - (a) A PROGRAM DESCRIPTION SUMMARY.
 - (b) A DESCRIPTION OF THE TARGETED CUSTOMER SECTOR.
 - (c) A DESCRIPTION OF THE MARKETING APPROACH TO BE EMPLOYED.

- (d) AN ESTIMATE OF THE LEVEL OF PROGRAM PARTICIPATION.
 - (e) A DESCRIPTION OF THE PROGRAM DELIVERY APPROACH TO BE EMPLOYED.
 - (f) THE EXPECTED ENERGY SAVINGS AND/OR DEMAND REDUCTION RESULTING FROM THE PROGRAM.
 - (f) A DESCRIPTION OF THE PLAN FOR MONITORING AND VERIFYING ENERGY SAVINGS AND/OR DEMAND REDUCTION RESULTING FROM THE PROGRAM INCLUDING A DETAILED DESCRIPTION OF ALL PROTOCOLS INVOLVED.
 - (g) THE PROGRAM BUDGET.
 - (h) AN ANALYSIS OF THE COST-EFFECTIVENESS OF THE PROGRAM USING THE TOTAL RESOURCE COST TEST, WITH ALL COSTS AND BENEFITS EXPRESSED IN NOMINAL DOLLARS.
 - (i) CONFIRMATION THAT THE ELECTRIC UTILITY HAS AND WILL provide monthly billing, usage, and demand data to the United States environmental protection agency's portfolio data manager data base, subject to customer consent, for buildings, facilities, and community systems. The ELECTRIC utility shall provide customers with notice and opportunity to opt-out of sharing customer-specific data.
- (2) A TEN-YEAR PROJECTION OF ALL ENERGY EFFICIENCY AND DEMAND RESPONSE PROGRAMS OFFERED OR TO BE OFFERED, INCLUDING:
- (a) THE PROJECTED CUMULATIVE ENERGY SAVINGS AND DEMAND REDUCTIONS, BY YEAR, RESULTING FROM THE PROGRAMS IN THE PORTFOLIO.
 - (b) THE PROJECTED ENERGY SAVINGS AND DEMAND REDUCTIONS, BY YEAR, FOR EACH CUSTOMER SECTOR RESULTING FROM THE PROGRAMS IN THE PORTFOLIO.
- (D) EACH ELECTRIC UTILITY SHALL INCLUDE A SECTION IN ITS ANNUAL BENCHMARK REPORT CONTAINING A PLAN FOR A MARKETING POTENTIAL STUDY TO BE CONDUCTED WITHIN THREE YEARS OF THE FILING OF ITS INITIAL BENCHMARK REPORT TO

ESTIMATE THE POTENTIAL FOR ENERGY EFFICIENCY AND DEMAND RESPONSE IN ITS TERRITORY. SUCH STUDY MAY BE CONDUCTED IN CONJUNCTION WITH OTHER ELECTRIC UTILITIES, AND, DEPENDING ON THE NUMBER OF ELECTRIC UTILITIES SPONSORING THE STUDY, THE ELECTRIC UTILITY MAY REPORT THE RESULTS ON A STATE-WIDE BASIS. THE ELECTRIC UTILITY SHALL REPEAT THE MARKET POTENTIAL STUDY AT LEAST ONCE EVERY FIVE YEARS AFTER THE INITIAL STUDY IS PERFORMED.

Proposed Rule 4901:1-39-05, OAC:

Staff-proposed Rule 4901:1-39-05 sets out the requirements governing an electric utility's recovery of costs incurred in connection with its efforts to meet the statutory benchmarks. Consistent with its proposal to consider benchmark reports separate and apart from long-term forecast reports, OEC recommends that the reference to long-forecasts be deleted from paragraph (A) of the proposed rule. OEC also believes that the interests of economy and efficiency would be best served if the electric utility's application for recovery of costs were filed in the same docket in which the benchmark report is considered so that the record with respect to the benchmark report would automatically be available in evaluating the application for cost recovery. In addition, for reasons stated in connection with its proposed changes to the staff-proposed "filing and review" rule, OEC believes that, with the exception to the provision for comments prior to the issuance of the staff's report, which would add nothing in this context, the same procedures should apply to processing applications for cost recovery. Thus, OEC proposes that staff-proposed Rule 4901:1-39-04 be revised as follows:

4901:1-39-05 Recovery mechanism

- (A) Upon approval of an electric utility's benchmark report as set forth in RULE 4901:1-39-0403 OF THE ADMINISTRATIVE CODE, the utility may file an application IN THE BENCHMARK REPORT DOCKET for recovery of costs due to peak demand reduction, demand response, energy efficiency program costs, appropriate lost distribution revenues, and potential shared savings.

- (1) Recovery of transmission and distribution infrastructure investments pursuant to division (A)(2)(d) of section 4928.66 of the Revised Code is limited to the portion of those investments ~~that are~~ attributable to energy efficiency purposes as opposed to reliability or market purposes.
 - (2) Mercantile customers who commit their peak demand reduction, demand response, or energy efficiency ~~programs~~ PROJECTS for integration with the electric utility's programs may apply for exemption from such recovery ~~as set forth in~~ PURSUANT TO rule 4901:1-39-06 of the Administrative Code.
- (B) ~~Any person may file objections within thirty days of the filing of an electric utility's application for recovery. The commission staff shall review the utility's application and any objections, and file its report and recommendations within ninety days of the filing of the application. If a stipulation resolving all issues in the proceeding is not filed on behalf of all parties with thirty days of the filing of the staff report, the commission will set the matter for hearing and publish notice of hearing. The staff shall CONDUCT AN INVESTIGATION OF THE MATTERS SET FORTH IN THE review the ELECTRIC utility's COST RECOVERY APPLICATION, and SHALL file a report of its findings AND RECOMMENDATIONS regarding THE APPLICATION within ninety days of the filing of the application.~~
 - (C) THE ELECTRIC UTILITY OR ANY OTHER INTERESTED PERSON MAY FILE OBJECTIONS TO THE STAFF'S REPORT WITHIN THIRTY DAYS OF THE ISSUANCE OF THE REPORT.
 - (D) IF AN OBJECTION TO THE STAFF'S REPORT IS FILED, THE COMMISSION SHALL PROMPTLY SET THE MATTER FOR HEARING, ESTABLISH A PROCEDURAL SCHEDULE, AND REQUIRE THE ELECTRIC UTILITY TO PUBLISH NOTICE OF THE HEARING IN SUCH MANNER AS THE COMMISSION MAY DIRECT. AFTER THE HEARING IS COMPLETED AND BRIEFS ARE FILED, THE COMMISSION SHALL ISSUE AN ORDER WITH RESPECT TO THE APPLICATION AS IS JUST AND REASONABLE BASED ON THE RECORD IN THE CASE.
 - (E) IF NO OBJECTIONS ARE FILED PURSUANT TO PARAGRAPH (C) OF THIS RULE, THE COMMISSION SHALL ISSUE AN ORDER ADOPTING THE FINDINGS AND RECOMMENDATIONS CONTAINED IN THE STAFF'S REPORT.

Proposed Rule 4901:1-39-06, OAC:

This proposed rule, which is entitled "Commitment for integration by mercantile customers" sets out the terms and conditions governing joint applications by an electric utility

and a mercantile customer for approval of a special arrangement, which may include a request by the mercantile customer for an exemption from the electric utility's Rule 4901:1-39-05 cost recovery mechanism. OEC offers the following comments.

First, OEC recommends the title of the rule be change to read "Commitment for meeting energy savings and demand reduction criteria and integration requirement by mercantile customers" so as to better reflect the subject matter of the rule. Second, the rule repeatedly uses the term "program" when the appropriate reference would be to the customer's "project." These errors should be corrected. Third, staff-proposed subparagraph (A)(2) provides that the special arrangement must specify "all circumstances under which demand reductions may be effectuated by the customer." Read literally, this language implies that any reduction in demand, no matter why or how effectuated, is material to the approval of the special arrangement, when, in fact, only those demand reductions resulting from projects undertaken in response to the SB 221 incentives should be eligible for special arrangements. Thus, this language should be modified by replacing "all" with the word "qualifying." Fourth, OEC questions the mechanics set forth in the proposed relating to the mercantile customer's consent to the integration of its project into the electric utility's energy efficiency and/or demand response programs. As drafted, the rule states that the customer must consent to "providing data on its facilities to the EPA portfolio manager." However, the primary focus of the Portfolio Manager data base is buildings, and, thus, consent to providing data to the Portfolio Manager, may not capture data relating to other types of commercial or industrial energy efficiency or demand response applications. Thus, rather than requiring the mercantile to consent to providing data to the Portfolio Manager, OEC would suggest that the customer be required to consent to reporting the data to the electric utility, with the understanding that the electric utility would provide the data to the Portfolio Manager.

The electric utility would still have the obligation to prevent the information from disclosure in the context of the Commission proceeding by seeking appropriate protection from the Commission. OEC has proposed a modification to the rule that would accomplish this result.

Finally, and most importantly from a substantive standpoint, a mercantile customer requesting exemption from the applicant electric utility's cost recovery mechanism should be required to demonstrate that the energy savings and/or demand reductions resulting from the project in question meet or exceed the percentage reductions required under the statutory benchmarks to which the electric utility is subject. In other words, merely changing a light bulb should not relieve a mercantile customer from the electric utility's cost recovery mechanism. Although the Commission has some level of discretion in determining whether projects qualify for special arrangements, in no event should requests for exemption be granted unless the energy savings and/or demand reductions meet or exceed the percentages specified by the applicable statutory benchmarks. As indicated below, OEC has proposed revisions to the proposed rule to memorialize this concept.

Consistent with the foregoing discussion, OEC recommends that proposed Rule 4901:1-39-06 be modified as follows:

4901:1-39-09 Commitment for MEETING ENERGY SAVINGS AND DEMAND REDUCTION CRITERIA AND integration REQUIREMENT by mercantile customers

- (A) A mercantile customer may enter into a special arrangement with an electric utility, pursuant to division (A)(2)(d) of section 4928.66 of the Revised Code, to commit the customer's demand reduction, demand response, or energy efficiency programsPROJECTS for integration with the electric utility's demand reduction, demand response, and energy efficiency programs. Such arrangement shall:
 - (1) Address coordination requirements between the electric utility and the mercantile customer, including specific communication procedures and intervals.

- (2) Specify all QUALIFYING circumstances under which demand reductions may be effectuated by the customer.
 - (3) Grant permission to the electric utility and staff to measure and verify energy savings and/or demand reductions resulting from customer-sited ~~programs~~PROJECTS and resources, AND, IN THE CASE OF MERCANTILE CUSTOMER REQUESTING EXEMPTION FROM THE COST RECOVERY MECHANISM SET FORTH IN RULE 4901:1-39-05 OF THE ADMINISTRATIVE CODE, TO VERIFY THAT THE MERCANTILE CUSTOMERS' ENERGY SAVINGS AND DEMAND REDUCTIONS MEET OR EXCEED THE PERCENTAGE REDUCTIONS REQUIRED UNDER THE STATUTORY BENCHMARKS TO WHICH THE ELECTRIC UTILITY IS SUBJECT.
 - (4) Identify all consequences of noncompliance by the customer with the terms of the commitment.
- (B) The electric utility and mercantile customer shall file a JOINT application for approval of a special arrangement under this rule. That application may include a request for an exemption from the COST recovery mechanism set forth in rule 4901:1-39-05 of the Administrative Code. To be eligible for such exemption, the mercantile customer must consent to providing AN ANNUAL REPORT ON THE ENERGY SAVINGS AND PEAK DEMAND REDUCTIONS THEY HAVE ACHIEVED IN THEIR OWN FACILITIES IN THE MOST RECENT YEAR IN ACCORDANCE WITH THE TERMS SPECIFIED BELOW AND CONSENT TO THE ELECTRIC UTILITY PROVIDING THE CUSTOMER'S data RELATING TO ~~on~~ its facilities to the United States environmental protection agency's portfolio manager as described in rule 4901:1-39-04 OF THE ADMINISTRATIVE CODE. If the application includes a request for exemption from the ELECTRIC UTILITY'S COST recovery mechanism, the application shall include the following:
- (1) Baselines for kilowatt-hour consumption and kilowatt demand based upon averages of the three most recent years of metered data or, if metered data is not available, based upon a reasonable method of estimation.
 - (2) An accounting of energy saved and demand reductions achieved, and the resulting new levels of kilowatt-hour consumption and kilowatt demand.
 - (3) A listing and description of ~~programs~~PROJECTS undertaken by the customer.
 - (4) A description of measures taken, devices or equipment installed, processes modified, or other actions taken to increase energy efficiency and reduce demand, INCLUDING SPECIFIC DETAILS SUCH AS THE NUMBER, TYPE, AND EFFICIENCY LEVELS BOTH OF THE INSTALLED

EQUIPMENT AND THE OLD EQUIPMENT THAT IS BEING REPLACED, IF APPLICABLE.

- (5) An accounting of expenditures made for each ~~program~~, PROJECT AND ITS COMPONENT ENERGY SAVING AND DEMAND REDUCTION ATTRIBUTES ~~and for each program element~~.
- (6) The time line SHOWING when each ~~program~~ PROJECT OR MEASURE went into effect and when the energy savings and demand reductions took place.
- (7) A copy of the formal declaration or agreement that commits the mercantile customer's ~~programs~~ PROJECTS for integration, INCLUDING THE REQUIREMENT THAT THE ELECTRIC UTILITY WILL TREAT THE INFORMATION PROVIDED AS CONFIDENTIAL AND WILL NOT DISCLOSE SUCH INFORMATION EXCEPT UNDER AN APPROPRIATE PROTECTIVE AGREEMENT OR A PROTECTIVE ORDER ISSUED BY THE COMMISSION PURSUANT TO RULE 4901-1-24 OF THE ADMINISTRATIVE CODE.
- (C) The application shall include a description of all methodologies, protocols, and practices used or proposed to be used in measuring and verifying ~~program~~ PROJECT results. The application should also identify and explain all deviations from any guidelines which may be published by the staff for ~~program~~ PROJECT measurement and verification of compliance.
- (D) Any special arrangement under this rule may be combined with any other arrangement made pursuant to section 4905.31 of the Revised Code, if such arrangement contains appropriate measurements and verification of ~~program~~ PROJECT results.

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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