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**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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2009 NOV 23 PM 4:57

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Case No. 08-888-EL-ORD

In the Matter of the Adoption of Rules for)
Alternative and Renewable Energy Technology,)
Resources, and Climate Regulations, and Review of)
Chapters 4901:5-1, 4901:5-3, 4901:5-5, and 4901:5-)
7 of the Ohio Administrative Code, Pursuant to)
Chapter 4928.66, Revised Code, as Amended by)
Amended Substitute Senate Bill No. 221.)
)

**THE OHIO MANUFACTURERS' ASSOCIATION'S
AND THE OHIO HOSPITAL ASSOCIATION'S
JOINT MEMORANDUM CONTRA APPLICATION FOR REHEARING
OF THE OHIO CONSUMER AND ENVIRONMENTAL ADVOCATES**

Pursuant to Ohio Revised Code ("R.C.") Section 4903.10 and Ohio Administrative Code ("O.A.C.") Rule 4901-1-35(B), the Ohio Hospital Association ("OHA") and the Ohio Manufacturers' Association ("OMA") submits its Memorandum Contra to the Application for Rehearing of Ohio Consumer and Environmental Advocates (collectively "OCEA") filed November 13, 2009. The OHA and OMA urge the Commission to reject the entirety of OCEA's application for rehearing.

In its Application for Rehearing, OCEA spent considerable space discussing the Commissions latest changes in O.A.C. Rule 4901:1-39-05 ("Rule 39-05"). OCEA correctly points out that R.C. Section 4928.66 contains language stating that compliance with SB 221's energy efficiency targets shall be measured by including the effects of all mercantile customer energy efficiency programs. OCEA then proceeds to define the word "program" for the Commission stating "An energy efficiency program can be considered nothing less than a coherent, deliberate plan, carried out by a mercantile customer, for the purpose of creating energy savings while creating, producing, or offering the same level of goods

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and services.”¹ OCEA goes onto to argue that only those mercantile customers who have adopted an energy efficiency program can count their savings towards a utility’s benchmarks.² OCEA’s surrounding arguments regarding this point lead one to believe that programs that result in energy efficiency, but were not done for exclusively for energy efficiency, cannot count towards an EDU’s efficiency benchmarks. This interpretation and application of the statute render the provisions moot as no mercantile customer could satisfy the requirements. It bears note that few, if any, residential customer would be able to satisfy this requirement, as mass market programs will suffer fatal verification flaws, before the question of motivation come into play. This interpretation is plainly unreasonable and OCEA’s arguments must be rejected.

First, efficiency programs are common to mercantile customers. There is an entire energy efficiency industry that serves the needs of mercantile customers. This industry only tangentially is able to serve the needs of mass market customers (weatherization providers excepted) because the stakes are simply not as great for smaller consumers. Certainly, some mercantile customers are more attentive to their efficiency programs than others. Some mercantile customers invest more, but, as a class, mercantile customers have managed efficiency programs that long predate R.C. 4928.66. These programs improve efficiency through the development and implementation of streamlined processes and the adoption of energy efficiency equipment. Generally, these programs are called business plans and implemented by Ohio’s employers to allow them to continue to employ Ohioans. Hospitals, in particular, adopt energy efficiency measures to mitigate the relentless increase in the overall cost of healthcare. As manufacturers and hospitals evaluate the capital investment in new energy efficient equipment, it is done through the lens of these business plans and weighed against things such as payroll, tax liabilities, accounts-receivable liabilities, and a host of other considerations the general residential customer does not think about when considering an incandescent versus a CFL light-bulb.

¹ Application for Rehearing p. 5

² *Id.* p. 6

For mercantile customers, energy efficiency is not new, and the concept of an efficiency “program” is not simply a fashion of the day. The provision of R.C. 4928.66 that carves out separate treatment for mercantile customer “programs” is simply a recognition of this fact. The intent of the legislature in adopting the mercantile opt-out language contained in 4928.66 was to recognize that mercantile customers, some of whom are desperate to stay competitive in the world economy have been adopting energy efficiency measures for years. Requiring such mercantile customers to participate in, and pay for, utility programs that effectively subsidize other consumers who may not have taken the same actions would be punitive and unreasonable. Therefore, allowing mercantile customers to choose to commit their actions that resulted in energy efficiency to the utility in exchange for opting out of the utility’s programs was a decision based in common sense. Advanced lighting systems, more efficient HVAC systems, switching from electrical welding to inertial welding, upgrading furnaces are all examples of energy efficiency that has taken place in Ohio’s mercantile customer facilities since 2006. Tossing this measurable, legitimate energy savings into the trash because the mercantile customers did not have the proper *mens rea* when it adopted the project would be absurd.

OCEA agonizes that the changes contained in the October 15th Entry regarding earlier language limiting qualifying energy efficiency projects to those where the old equipment was not fully depreciated “creates a very large class of free-riders and results in no net energy efficiency as was intended in S.B. 221.”³ OCEA’s arguments ignore common sense and real-world considerations faced by employers operating in a painfully competitive world-market. Depreciation is a tax concept. There are accelerated depreciation schedules and various forms of depreciation based on types of equipment. It is likely that nearly every piece of equipment in a manufacturer’s facility will operate beyond its scheduled depreciation. Limiting qualifying energy efficiency improvements to those that were with fully depreciated equipment would, again, result in the rules effectively writing out the mercantile opt-

³ *Id.* p. 4

out provisions contained in R.C. Section 4928.66. The Commission's modifications in its October 15th order were good, common sense changes that correctly reflect reality.

OCEA argues that the "misattribution of energy savings to mercantile projects could have the effect of limiting the energy efficiency programs delivered to residential and small commercial customers in Ohio."⁴ As a practical matter it should not matter if no *residential* energy efficiency programs are developed. Neither should it matter if any *mercantile* energy efficiency programs are developed. What *really* matters is that Ohio's utilities comply with SB 221's energy efficiency benchmarks in the most efficient and most affordable, manner. Meeting the benchmarks must be the focus of the Commission's attention. If a mercantile program produces energy efficiency more affordably than residential programs, the utilities should be directed to focus resources on those programs. As OCEA points out in its Application, "The benchmarks are intended to reduce the utility's need to meet demand by building new power plants that are far more costly than energy efficiency."⁵ With this statement, OCEA correctly identifies the ultimate goal – the avoidance of costs to customers. It should not matter where that avoidance comes from, or what the underlying intentions of the behavior that produces efficiency happens to be. An attempt to place qualitative distinctions on a particular kW of efficiency is a new twist on the Orwellian notion of political correctness.

It should also be noted, that while the benchmarks are "floors" and not "ceilings," they are ambitious none-the-less. Getting Ohio's EDU's to meet the standards will be hard enough without any focus on trying to exceed the benchmarks. Further, there is no statutory basis for denying an EDU's energy efficiency portfolio based on the fact it does not go far enough or does not include enough programs for particular customer segments. If it meets the benchmarks and it's the most affordable option it passes the statutory test.

While OCEA devotes over five full pages to strained interpretations based on worst-case

⁴ *Id.* p. 7

⁵ *Id.*, p. 7

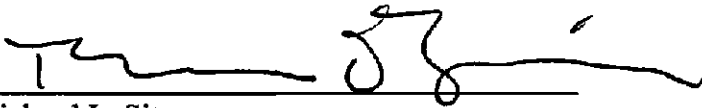
scenarios, the basic argument of their argument can be boiled down to this – if a mercantile customer adopted an energy efficiency measure for any reason other than pure energy savings, that project cannot be counted towards a utilities benchmark. This ignores the plain language of 4928.66 and would result in energy efficiency programs that cost more than is required – resources that could be applied elsewhere in Ohio’s efforts to remain competitive. These unnecessary costs would be foisted upon every electricity customer in the state - those represented by the OHA and OMA, and certainly those represented by OCEA. The Commission should be very concerned that such unnecessary costs could doom the laudable intentions that are reflected in R.C. 4928.66 to failure.

In conclusion, OCEA’s application for rehearing on O.A.C. Rule 4901:1-29-05 should be rejected. OCEA’s arguments do not reflect the legislature’s intent, nor does it reflect the real world consideration and adoption of energy efficient measures in mercantile customer facilities. OCEA’s would result in quantifiable energy efficiency being dismissed⁶. The result being Ohio’s utility’s will be forced to adopt more expensive programs, resulting in a more expensive rider than necessary to meet SB 221’s goals. The OHA and OMA argue for reasonable, affordable programs that limit the cost to customers and would respectfully suggest other consumer representatives do the same.

WHEREFORE, the OHA and OMA urge the Commission to reject OCEA’s application for rehearing for the reasons stated herein.

⁶ The OHA and OMA point out that the best a utility can hope to do regarding the measurement of residential programs is to model likely outcomes. The mercantile opt-out programs developed by Ohio’s electric utilities require historical data. The result is that mercantile programs are detailed and measured down to the kWh while residential programs must be taken on faith.

Respectfully submitted on behalf of
OHIO HOSPITAL ASSOCIATION



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CERTIFICATE OF SERVICE

I hereby certify that the OHIO MANUFACTURERS' ASSOCIATION'S MEMO CONTRA APPLICATION FOR REHEARING was served by electronic mail on the parties of record listed below this 23rd day of November 2009.


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