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FILE

BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

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

INDUSTRIAL ENERGY USERS-OHIO'S MEMORANDUM CONTRA THE APPLICATION FOR REHEARING OF THE OHIO CONSUMER AND ENVIRONMENTAL ADVOCATES

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November 23, 2009

Attorneys for Industrial Energy Users-Ohio

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MEMORANDUM CONTRA

I. INTRODUCTION

On November 13, 2009 the Ohio Consumer and Environmental Advocates ("OCEA") filed an Application for Rehearing challenging the modifications made by the Public Utilities Commission of Ohio ("Commission") to its rules related to the counting of mercantile customer-sited energy efficiency and peak demand reduction ("EE/PDR") capabilities towards electric distribution utilities' annual EE/PDR benchmarks. Additionally, among other things, OCEA also disputes the Commission's revisions to the definitions of "renewable energy credit" and "double counting" as well as the elimination of the term "fully aggregated." Industrial Energy Users-Ohio ("IEU-Ohio") also filed an Application for Rehearing on November 16, 2009, protesting (among other things) the limitations on the counting of mercantile customer-sited EE/PDR capabilities, the application of cost-benefit tests to limit the statutorily-granted opportunity for a mercantile customer to receive an exemption from an electric distribution utility's ("EDU") charge to recover its EE/PDR compliance costs when the mercantile customer commits to integrate its EE/PDR capabilities towards an EDU's EE/PDR benchmark

compliance efforts, and the continued inclusion of the definition of "double counting" in Rule 4901:1-40-01, Ohio Administrative Code ("O.A.C.").

For the reasons set forth below, IEU-Ohio respectfully requests the Commission deny OCEA's Application for Rehearing and instead grant IEU-Ohio's Application for Rehearing to cure the unlawful and unreasonable portions of the Commission's rules.

II. MEMORANDUM CONTRA

A. The Commission must deny OCEA's Application for Rehearing regarding the counting of mercantile customer-sited programs and instead grant IEU-Ohio's Application for Rehearing to properly count mercantile customer-sited EE/PDR programs towards the EE/PDR benchmarks.

OCEA asserts that the word "programs" in Section 4928.66, Revised Code, should be interpreted to mean that no energy efficiency or peak demand reduction can be counted towards an EDU's benchmarks unless that energy efficiency or peak demand reduction is accomplished as part of a program meant to exceed energy efficiencies or peak demand reductions required by another law or regulation.[1] To this end, OCEA suggests (without citation) that actions taken by customers to comply with a law or regulation cannot be considered the effect of a "program," even though it is common knowledge that "compliance programs" are the result of many laws and regulations.[2] Of course, the real purpose of OCEA's claims and assertions is to alter the law and redefine the mandates to fit their particular vision of the future. And, OCEA reveals its real intentions on page 7 of its Application for Rehearing. There, OCEA frets that the "misattribution" of mercantile-customer savings could have the effect of limiting

[1] OCEA Application for Rehearing at 3.

[2] Id.

the energy efficiency programs delivered to residential and small commercial customers in Ohio.

The Commission must deny OCEA's effort to rewrite SB 221 and escalate the portfolio mandates and the resulting costs that will be recovered from customers inasmuch as OCEA's use of the word "programs" is unsupported by SB 221 and ignores the provisions of SB 221 that provide for the counting of new and existing mercantile customer EE/PDR capabilities that are committed for integration into an EDU's benchmark compliance efforts.

SB 221 contains no language that says only energy efficiencies or peak demand reductions above and beyond any law or regulation are part of a "program" that may count towards the EE/PDR benchmarks. Section 4928.66(A)(2)(d), Revised Code, simply requires as follows:

> (c) Compliance with divisions (A)(1)(a) and (b) of this section shall be measured by including the effects of all demand-response programs for mercantile customers of the subject electric distribution utility and all such mercantile customer-sited energy efficiency and peak demand reduction programs, adjusted upward by the appropriate loss factors. (Emphasis added.)

The plain language of SB 221 requires the Commission to count the effects of all mercantile customer EE/PDR capabilities regardless of whether they are undertaken to comply with another law or regulation and the Commission lacks the statutory authority to define "programs" otherwise. Because SB 221 is clear and specific on this point, it is unnecessary to resort to interpretation to arrive at the meaning of SB 221's use of the word "all."

Additionally, OCEA's definition of "programs" runs directly contrary to the provisions of SB 221 that envision the counting of mercantile customer-sited capabilities

that are committed to an EDU's EE/PDR benchmark compliance portfolio. OCEA contends that "naturally occurring actions that would have occurred without the influence of an energy savings program" should not count towards benchmark compliance. However, SB 221 makes it clear that the effects of mercantile customers' programs include those EE/PDR capabilities that are existing or new and are committed by the mercantile customer for integration into the utility's EE/PDR benchmark compliance portfolio. Section 4928.66 (A)(2)(c), Revised Code, states that the baseline that is computed to measure the performance obligation gets adjusted to remove the mercantile customer's capabilities that existed during the base period and then add the capability back in for purposes of measuring compliance for the year in question. Thus, it is clear from Section 4928.66(A)(2)(c), Revised Code, that all mercantile customer-sited EE/PDR capabilities that existed prior to SB 221 (the baseline for 2009 is the three years 2006, 2007 and 2008) and that naturally occurred without the influence of a statutory mandate are eligible to be counted if they are committed by the mercantile customer for integration into the EDU's compliance portfolio.

The advocacy of OCEA throughout this rule making process indicates that OCEA is attempting to infuse provisions from the American Clean Energy Security Act ("ACES", H.R. 2454 – hereinafter referred to as the "Waxman-Markey Climate Bill") into SB 221 through the Commission's rule making process. For example, the "business-as-usual" limitation that OCEA has continued to push during the rule making process is extracted from, among other Sections, Section 610(a)(6) of Title I in the Waxman-Markey Climate Bill.

As the Commission knows, the Waxman-Markey Climate Bill was narrowly adopted on May 21, 2009 by the House of Representatives with a 3-vote mostly-party-line margin.[3] A majority of the Ohio delegation voted against the Waxman-Markey Climate Bill, the Bill has strong bipartisan opposition throughout the Midwest[4] and no one, including the proponents, expects the Waxman-Markey Climate Bill to become the law of the land. The point here is not to initiate a debate on the merits of the Waxman-Markey Climate Bill or the politics. The point here is to alert the Commission to OCEA's effort to, in effect, commit Ohioans to the mandates in the Waxman-Markey Climate Bill while disguising to make it look like OCEA's recommendations are based on Ohio law.

For these reasons, the Commission must deny OCEA's Application for Rehearing, grant IEU-Ohio's November 16, 2009 Application for Rehearing, and modify this rule to comply with the General Assembly's mandate that all mercantile customer EE/PDR capabilities count towards the EDUs' EE/PDR benchmarks.

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[3] One estimate of the economic impact of Waxman-Markey Climate Bill projects that by 2035 the Bill would:

- Reduce aggregate gross domestic product (GDP) by $9.4 trillion;
- Destroy 1,145,000 jobs on average, with peak years seeing unemployment rise by over 2,479,000 jobs;
- Raise electricity rates 90 percent after adjusting for inflation;
- Raise inflation-adjusted gasoline prices by 58 percent;
- Raise residential natural gas prices by 55 percent;
- Raise an average family's annual energy bill by $1,241; and
- Result in an increase of $28,728 in additional federal debt per person, again after adjusting for inflation

The analysis is available *via* the Internet at http://www.heritage.org/Research/EnergyandEnvironment/wm2450.cfm (last visited November 20, 2009)

[4] *See* interactive map at http://politics.nytimes.com/congress/votes/111/house/1/477 (last visited November 20, 2009).

B. The Commission's removal of the term "fully aggregated" from Chapter 4901:1-40, O.A.C., comports with SB 221 and OCEA's Application for Rehearing on this point should be denied.

OCEA further contests the Commission's elimination of the term "fully aggregated" from Chapter 4901:1-40, O.A.C. OCEA is concerned that this change will permit the use of renewable energy credits ("REC") as both an offset and a REC, thereby permitting the same megawatt of generation to be double counted to satisfy multiple regulatory requirements.[5] OCEA expresses concern that permitting the double counting of a REC will "significantly slow the development of renewable energy in Ohio, which would subtract from the legislative enactment in SB 221."[6]

The Commission should deny OCEA's Application for Rehearing inasmuch as the Commission's deletion of the "fully aggregated" limitation is required to conform the rule with SB 221. As IEU-Ohio previously pointed out, the "fully aggregated" restriction is unlawful inasmuch as no such restriction is contained in SB 221.[7] In fact, SB 221 does not associate any environmental attributes with a REC so there is no such thing as a fully aggregated REC in Ohio. A REC is defined by the terms of Section 4928.65, Revised Code.[8] Further, the Commission's decision is reasonable inasmuch as it enables a cheaper means of compliance with the AEPS, which will lower compliance costs that are eligible to be passed onto customers.

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[5] OCEA Application for Rehearing at 11.

[6] Id.

[7] IEU-Ohio Application for Rehearing at 25 (May 15, 2009).

[8] Section 4928.65, Revised Code, states "The public utilities commission shall adopt rules specifying that one unit of credit shall equal one megawatt hour of electricity derived from renewable energy resources."

C. The Commission must deny OCEA's challenge to the revised definition of "double counting" in Rule 4901:1-40-01, O.A.C., and grant IEU-Ohio's request to delete the unlawful and unreasonable "double counting" provisions from Chapter 4901:1-40, O.A.C.

OCEA also avers that the Commission's revised definition of "double counting" to allow RECs to count towards both the Ohio state renewable energy requirement and any future federal regulatory requirement for a different regulated attribute of energy production is unlawful.[9] OCEA finds problems with the fact that the Commission's change may permit easier compliance with the Ohio renewable requirements in the event that a federal standard is implemented.

The Commission must deny OCEA's Application for Rehearing and instead grant IEU-Ohio's November 16, 2009 Application for Rehearing to completely eliminate the "double counting" concept from the Commission's rules in Chapter 4901:1-40, O.A.C. As IEU-Ohio fully explained in its Application for Rehearing,[10] the Commission has no statutory authority to miscount measures that may satisfy multiple requirements. The definition of double counting, as modified by the Commission, still unlawfully and unreasonably drives up compliance costs at a perilous time for Ohio's fragile economy.

Respectfully submitted,

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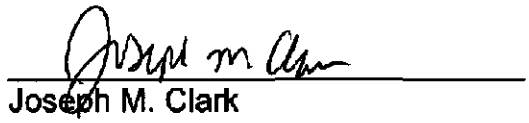
[9] OCEA Application for Rehearing at 14.

[10] IEU-Ohio Application for Rehearing at 15-17 (November 16, 2009).

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *Industrial Energy Users-Ohio's Memorandum Contra the Application for Rehearing of the Ohio Consumer and Environmental Advocates* has been served by regular mail, postage prepaid, this 23rd day of November 2009, upon the parties listed below.



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