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BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of The Cleveland Electric Illuminating Company, and Progressive Corporation For Approval of a Special Arrangement Agreement With a Mercantile Customer	)))))	Case No. 09-595-EL-EEC

APPLICATION FOR REHEARING
BY THE
OHIO ENVIRONMENTAL COUNCIL AND THE OHIO CONSUMERS' COUNSEL

The Ohio Environmental Council ("OEC") and the Ohio Consumers' Counsel ("OCC") hereby submit this Application for Rehearing pursuant to R.C. 4903.10 and O.A.C. 4901-1-35(A) regarding the Finding and Order issued by the Public Utilities Commission of Ohio ("PUCO" or "Commission") on February 11, 2010, in the above-captioned case. The undersigned parties maintain that the Commission's decision to grant the customer-sited mercantile exemptions was unlawful and unreasonable for several reasons:

A. **Assignment of Error 1: The Application Does Not Include Data and Information Necessary for Review to Lawfully Authorize Approval.**

B. **Assignment of Error 2: The Benchmark Comparison Method is Not a Valid Approach to Determining the Amount of Exemption a Mercantile Customer Should Earn.**

The Commission's order does not adequately consider the prerequisites to approval of such arrangements found in R.C. 4928.66(a)(2)(c) and O.A.C. §§ 4901:1-39-05(F), (H), and (G). Because the Commission's decision and reasoning does not account for these controlling provisions, a Rehearing on the matter is proper.

The reasons for granting the Application for Rehearing are more fully explained in the accompanying memorandum in support.

WHEREFORE, the undersigned parties respectfully request that the Commission grant their Application for rehearing in the above-captioned matter.

Respectfully Submitted,

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BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of The Cleveland Electric Illuminating Company, and Progressive Corporation For Approval of a Special Arrangement Agreement With a Mercantile Customer	)))))	Case No. 09-0595-EL-EEC

MEMORANDUM IN SUPPORT OF APPLICATION FOR REHEARING

The undersigned parties maintain that the Commission's decision to grant the customer-sited mercantile exemptions that are subject to this case was unlawful and unreasonable because the application fails to include important required information, and the methodology for exemption calculation is improper. In order to encourage the full development of non-historical energy efficiency investments, the Commission should limit the amount or terms of exemptions for pre-2009 projects. The Commission's order does not adequately consider the prerequisites to approval of such arrangements found in R.C. 4928.66(a)(2)(c) and O.A.C. §§ 4901:1-39-05(F), (H), and (G). Because the Commission's decision and reasoning does not account for these controlling provisions, a Rehearing on the matter is proper.

I. The Application Does Not Include Data and Information Necessary for Review to Lawfully Authorize Approval.

Progressive Casualty Insurance Company's ("Progressive") and the Cleveland Electric Illuminating Company's ("CEI") Joint Application For Approval of a Special Arrangement Agreement With A Mercantile Customer and Exemption from Payment of Costs Included in Rider DSE2 ("Application") does not provide sufficient information for the Commission to

grant approval. The Application does not contain information sufficient to meet the statutory and regulatory requirements for applications to commit a customer's demand reduction or energy efficiency programs for integration with an electric utility's energy efficiency and demand reduction savings, as set forth in Ohio Revised Code Section 4928.66 and Ohio Administrative Code Section 4901:1-39-05. Specifically, the Application does not contain:

1. Details or descriptions of the 'Energy Projects' implemented by Progressive;
2. Information about the consequences of Progressive's non-compliance with the Mercantile Customer Project Commitment Agreement;
3. Information regarding whether Progressive's heating, ventilating, and air conditioning (HVAC) retrofit project (Energy Project 1) involved the early retirement of fully functioning equipment, or the installation of new equipment;
4. Information regarding whether Progressive's lighting replacements (Energy Project 2) involved the early retirement of fully functioning equipment, or the installation of new equipment;
5. Information regarding whether the Energy Projects for which the Applicants are seeking credit were implemented in order to comply with energy performance standards set by law or regulation;
6. Information regarding the beginning and ending dates of the commitment; and
7. A description of the methodologies, protocols, and practices used or proposed to be used in measuring and verifying program results.

Because the Application contains inadequate information, the Commission did not have sufficient grounds for approving the Application. The Commission's order does not

sufficiently consider the prerequisites to approval of such arrangements, is therefore unlawful and unreasonable, and a rehearing on this matter is appropriate.

R.C. § 4928.66 requires electric utilities to implement energy efficiency programs that achieve certain energy efficiency and demand reduction savings from established benchmarks. R.C. § 4928.66(A)(2)(c) allows an electric utility to include, for purposes of compliance with said benchmarks, "mercantile customer-sited energy efficiency and peak demand reduction programs." O.A.C. 4901:1-39-05 sets out the procedures a mercantile customer must follow when filing, either individually or jointly with an electric utility, an application to commit the customer's demand reduction or energy efficiency programs for integration with the electric utility's demand reduction, demand response, and energy efficiency programs, pursuant to R.C. § 4928.66(A)(2)(d). An application filed pursuant to O.A.C. 4901:1-39-05(G) shall:

> (1) Address coordination requirements between the electric utility and the mercantile customer with regard to voluntary reductions in load by the mercantile customer, which are not part of an electric utility program, including specific communication procedures.
>
> (2) Grant permission to the electric utility and staff to measure and verify energy savings and/or peak demand reductions resulting from customer-sited projects and resources.
>
> (3) Identify all consequences of noncompliance by the customer with the terms of the commitment.
>
> (4) Include a copy of the formal declaration or agreement that commits the mercantile customer's programs for integration, including any requirement that the electric utility will treat the customer's information as confidential and will not disclose such information except under an appropriate protective agreement or a protective order issued by the Commission pursuant to O.A.C. 4901-1-24.
>
> (5) Include a description of all methodologies, protocols, and practices used or proposed to be used in measuring and verifying program results, and identify

and explain all deviations from any program measurement and verification guidelines that may be published by the Commission.

To measure the contribution a mercantile customer's program provides to the electric utility, a mercantile customer's energy savings "shall be presumed to be the effect of a demand response, energy efficiency, or peak-demand reduction program to the extent they involve the early retirement of fully functioning equipment, or the installation of new equipment that achieves reductions in energy use and peak demand that exceed the reductions that would have occurred had the customer used standard new equipment or practices where practicable." O.A.C. 4901:l-39-05(F). However, "[a]n electric utility shall not count in meeting any statutory benchmark the adoption of measures that are required to comply with energy performance standards set by law or regulation." O.A.C. 4901:l-39-05(H). If a mercantile customer does commit its programs, the electric utility's baseline is required to be adjusted to exclude the effects of all such programs that may have existed during the period used to establish the baseline. R.C. § 4928.66(A)(2)(c).

In light of this authority, Commissioner Roberto in her dissent to the Commission's Findings and Orders issued on February 11, 2010 in the above-captioned case, stated that applicants must provide more information in their applications before such applications can be approved by the Commission. Particularly, Commissioner Roberto asserted that, "the Commission must have before it information sufficient to answer these questions: (1) do these projects involve early retirement of fully functioning equipment; (2) if so, what was the remaining useful life; (3) or was the equipment replaced at the end of useful life with equipment that exceeds standard issue new equipment; and (4) was the measure installed as a result of an energy performance standard." Additionally, Commissioner Roberto states that

"the Commission must have before it the beginning and ending dates of the commitment as well as the amount of savings achieved during any individual year within that period."

The Application does not contain information sufficient to determine whether the above requirements are satisfied. Initially, the Application merely contains a conclusory statement by CEI that Progressive's "Energy Projects meet the requirements for inclusion in the Company's EEDR compliance plan." Application at 3, ¶ 7. The Application contains no supporting information or facts for this assertion, and there is insufficient information for the Commission to make its own determination as to whether the Energy Projects meet the statutory and regulatory requirements.

The Application contains no description of the Energy Projects. The Energy Projects are described in Exhibit A of the Application, and the "relevant details surrounding the Energy Projects are set forth on attached Exhibit 2." Application at 2, ¶ 5. Exhibit A contains the customer name, the "In-Service Date" of the respective energy projects, the project cost, and a column titled "Project Description." Application, Exhibit A. The "Project Description" for the first Energy Project is "HVAC (Air Handling Retrofit)" and for the second Energy Project is "Lighting Replacements." Application, Exhibit A. The cost of the Energy Projects is listed as a total sum, with no explanation. Exhibit A does not contain enough information for the Commission to determine whether the Energy Projects meet the statutory and regulatory requirements listed above.

Nowhere does the Application state what was done to "retrofit" Progressive's HVAC system, or what the lighting replacement entailed. At a minimum, the Application needs to describe whether HVAC retrofit or lighting replacement involved the early termination of fully functioning equipment, or the installation of new equipment, because this information is

necessary for the Commission's approval of the Application under O.A.C. 4901-39-05(F). If the HVAC retrofit does not fall into one of those categories, then Progressive's energy savings are not presumed to be the effect of a demand response, energy efficiency, or peak-demand reduction program under O.A.C. 4901:1-39-05(F). Without making a showing that this presumption applies, or otherwise establishing that the customer's energy savings are the result of demand response, energy efficiency, or peak-demand reduction program, the Application fails to prove that the Energy Programs qualify for integration with CEI's energy efficiency and demand reduction savings.

Further, the Application does not identify the consequences of Progressive's non-compliance with the Mercantile Customer Project Commitment Agreement with CEI, as required by O.A.C. 4901:1-39-05(G)(3). Nowhere in the Application does it identify or list the consequences of Progressive's non-compliance, but merely states that the Agreement "identifies all consequences for noncompliance by the Customer of any of the terms of the Agreement." Application at 2, ¶ 6. However, the Agreement does not identify any consequences that Progressive would face if it somehow breached the Agreement. The Agreement simply states that "[t]his Agreement shall automatically terminate if Customer fails to substantially comply with the provisions set forth in this Agreement." Application, Exhibit 1. The Agreement does not provide for any consequences of Progressive's breach, simply stating that breach will terminate the agreement. Clearly, the Application does not comply with O.A.C. 4901:1-39-05(G)(3), making the Commission's approval of the Application unreasonable and unlawful.

Also, the Application does not state whether the HVAC retrofit or lighting replacements were implemented in order to comply with energy performance standards set by

other laws and regulations, such as a building code or a federal regulation. O.A.C. 490:1-39-05(H) requires that programs undertaken to comply with energy performance standards not be included in meeting any statutory benchmarks to ensure that true energy savings are achieved when an electric utility meets their benchmarks. As the Application contains no assertions or statements regarding this requirement, the Commission had no basis for finding that the Application complied with this requirement.

Finally, the Application does not state what the beginning or ending dates of the commitment are, and includes no information regarding the methodologies, protocols, or practices used to measure and verify program results. Therefore, it is unclear which years' benchmarks CEI wishes to apply Progressive's alleged energy savings to, and unclear which years Progressive is seeking to be exempted from paying Rider DSE2 costs. Similarly, the Commission cannot determine if program results will be accurately verified, because the Application does not disclose how results will be measured.

In conclusion, because the Application does not contain the required information, it does not comply with R.C. § 4928.66(A)(2) and O.A.C. 4901:1-39-05. Because the Commission approved the Application, and the Application does not comply with relevant rules and regulations, the Commission's approval of the Application was unlawful and unreasonable. Under these grounds, the Commission should order a rehearing on this matter.

II. The Benchmark Comparison Method is Not a Valid Approach to Determining the Amount of Exemption a Mercantile Customer Should Earn.

In her dissent, Commissioner Roberto persuasively argued that mercantile customers should not receive a 100% exemption from paying the energy efficiency rider for so long as the mercantile customer demonstrates that it is saving a percentage of its historical energy

needs that is equal to or more than the percentage of the utilities energy savings benchmarks.[1] Commissioner Roberto refers to this measure of exemption as the "Benchmark Comparison Method."

Commissioner Roberto accurately complains that, "(T)his methodology bears no relationship to statutory requirements or goals or to the practical reality of energy efficiency programs."[2] The central provision to mercantile exemptions R.C. 4928.66(A)(2)(c) provides:

> Any mechanism designed to recover the cost of energy efficiency and peak demand reduction programs under divisions (A)(1)(a) and (b) of this section may exempt mercantile customers that commit their demand-response or other customer-sited capabilities, whether existing or new, for integration into the electric distribution utility's demand-response, energy efficiency, or peak demand reduction programs, if the commission determines that that exemption **reasonably encourages such customers to commit those capabilities to those programs**. (Emphasis added.)

The statute indicates that the exemption only needs to be sufficient to encourage a mercantile customer to commit those capabilities to the utility's programs. In other words, the amount of an exemption that a mercantile customer should be permitted to claim is only that amount that would be incrementally greater than the value the mercantile customers could get for their energy efficiency capabilities with an alternative commitment or use. These mercantile customers will not just be receiving the benefit of the exemption through these projects that they commit but will also continue to benefit from the power they will not be required to purchase because of the projects.

In addition, Commissioner Roberto points out that there is no basis for the "Benchmark Comparison Method" in law because R.C. 4928.66(A)(1)(a) that established the utility benchmarks makes no references to benchmarks for individual customers or customer

[1] Mercantile Exemption Cases, Finding and Order (February 11, 2010) Dissenting Opinion of Commissioner Cheryl L. Roberto at 5-7.
[2] Id at 6.

classes.[3] Commissioner Roberto also provides significant documentation of her claim that the choice of the "Benchmark Comparison Method" by the majority is a unique choice among other jurisdictions in the United States. A common choice, in fact, is that a customer has not received a full exemption or met its "fair share" until "a mercantile customer has implemented all cost-effective energy efficiency available within its facility."[4] Another choice that Commission Roberto identified is that the exemption is based upon costs expended by the customer.[5] These exemptions **reasonably** encourage such customers to commit those capabilities to those programs as intended under R.C. 4928.66(A)(2)(c). On the other hand, the majority's approach grossly overpays the mercantile customers for projects they would have done with or without the exemption. Moreover, as Commissioner Roberto predicted, the majority's approach will lead to the utilities paying for higher cost energy efficiency and demand response programs to meet their benchmarks.[6]

The majority of the Commission should not rely on the "Benchmark Comparison Method" in order to create some kind of equity among customer classes in allocating responsibilities in meeting energy efficiency and demand reduction goals. The law allows only the mercantile customers to obtain an exemption and that benefit can be reasonably offset by a greater obligation to meet energy efficiency and demand reduction goals.

For these reasons, if the Commission intends to sincerely address the Commission's obligation to promote the state policy under R.C. 4928.02(J) to "provide coherent, transparent means of giving appropriate incentives to technologies that can adapt successfully to potential environmental mandates" the Commission should reconsider Commissioner Roberto's

[3] Dissent at 6.
[4] Id. at f.n. 7.
[5] Id. at 7, f.n. 8.
[6] Id. at 7.

recommendation that the Commission's Staff undertake a workshop. The workshop would allow for a methodical formulation of a regulatory framework that would provide for input from all interested parties, develop standardized forms and develop a "go—no go" decision matrix for mercantile EE/PDR applications. The latter process if undertaken would lessen future litigation and would encourage the use of the most low cost opportunities for the Ohio electric utilities to meet their benchmarks. This is necessary for the mandates under S.B. 221 to succeed.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing has been served upon the following parties by first class and/or electronic mail this 15th day of March, 2010.

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