BEFORE THE
PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of The Lubrizol Corporation and The Cleveland Electric Illuminating Company For Approval of a Special Arrangement Agreement With A Mercantile Customer	))))))	**Case No. 09-1100-EL-EEC**

THE CLEVELAND ELECTRIC ILLUMINATING COMPANY'S MEMORANDUM CONTRA APPLICATION FOR REHEARING OF THE OHIO ENVIRONMENTAL COUNCIL AND THE OFFICE OF THE OHIO CONSUMERS' COUNSEL

I. INTRODUCTION

Pursuant to Section 4901-1-35(B) of the Ohio Administrative Code, The Cleveland Electric Illuminating Company ("Company") submits its Memorandum Contra Application for Rehearing ("AFR") of The Ohio Environmental Council ("OEC") and The Office of The Ohio Consumers' Counsel ("OCC") (collectively, "OEC/OCC"). As more fully discussed below, the Commission's actions in approving the Application at issue in this proceeding were lawful and proper and, accordingly, the Company respectfully requests that OEC/OCC's Application for Rehearing be denied.

II. ARGUMENT

A. Background

On July 28, 2009, the Company, in conjunction with Lubrizol Corporation ("Customer") (collectively, "Applicants"), filed a joint application for approval of both a special arrangement with a mercantile customer, pursuant to R.C. 4905.31 and R.C. 4928.66(A)(2)(d), and request for exemption from payment of costs included in the Company's Rider DSE2, pursuant to R.C. 4928.66(A)(2)(c) ("Application"). The Application sought approval for commitment to the Company of an energy efficiency

project implemented in 2008.[1] It also sought authority to allow the Company to waive Rider DSE2 charges for the Customer as provided in Rider DSE.[2] Included with the Application was a copy of the project commitment agreement between the Customer and the Company, which included three exhibits – (i) a description of the project, which in this instance was a lighting retrofit project for four of the Customer's buildings ("Project"); (ii) a calculation of the Customer's energy baseline; and (iii) a general description of evaluation, measurement and validation ("EM&V") methodologies, protocols and/or practices reviewed by the Company in conjunction with the Project.[3] At the time the Application was filed, the Company's Rider DSE, which was approved by the Commission on May 27, 2009 in Case No. 08-935-EL-SSO, set forth prerequisites for exemption from paying the charges included in the Rider, including a requirement that the Project produce "energy savings and/or peak demand reductions equal to or greater than the statutory benchmarks to which the Company is subject."[4] Further, while proposed Commission rules governing the filing of applications such as that filed in the instant proceeding were pending at the time the Application was filed, these rules were modified at least two times since that date and did not become effective until December 10, 2009.[5]

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[1] Application, p. 2.

[2] Application, p. 3.

[3] *See generally*, Application, Exhibit A to Exhibit 1, and Exhibits 2 and 3.

[4] CEI Tariff, P.U.C.O. No. 13, Rider DSE, Rate Sheet 115 (hereinafter "Rider DSE"), p. 2 (Avoidability, para. 2(a)).

[5] *See* Case No. 08-888-EL-ORD (Entry on Rehearing June 17, 2009), Entry Nunc Pro Tunc (June 24, 2009), Entry (October 15, 2009), and Entry (October 28, 2009). *See also*, Entry on Rehearing (Dec. 9, 2009) in which the Commission granted rehearing on issues related to the already final rules, with such rehearing still pending.

In a Finding and Order dated February 11, 2010 ("Order"), the Commission approved the Application, finding that the request for commitment and request for exemption through 2014 "[did] not appear to be unjust or unreasonable."[6]

On March 15, 2010, OEC/OCC filed their AFR, claiming that the Commission's Order was unlawful and unreasonable because the Application allegedly "fails to include important required information, and the methodology for exemption calculation is improper."[7] As more fully discussed below, both claims are without merit. The Application complied with the terms and conditions set forth in R.C. 4905.31, R.C. 4928.66 and the Company's Rider DSE -- the only valid requirements in effect at the time the Application was filed -- as well as the then-proposed rules. Moreover, while certain after-the-fact information requirements were not, nor could not be, included in the Application, any information subsequently required by the Commission was provided by the Applicants through responses to data requests. And finally, OEC/OCC's challenge to the exemption calculation is based solely on the dissenting opinion of one Commissioner which, with all due respect to that Commissioner, is not legally binding. Accordingly, there is no error, and the OEC/OCC's Application for Rehearing must be denied.

B. The Application Included Data and Information Sufficient for Commission Review and Approval.

OEC/OCC argue that the Application is deficient because the Applicants did not include with the Application filed on July 28, 2009 information that was not known to be required until October 28, 2009 and was not legally required until December 10, 2009.[8]

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[6] Order, pp. 4-5.

[7] OEC/OCC Memorandum in Support of AFR (hereinafter, "Memo"), p. 3.

[8] OEC/OCC Memo, pp. 5-9.

However, the Application satisfied all applicable regulations *and* complied with the Commission's draft rules at the time it was filed. The retroactive application of rules that became effective more than four months later would be both unreasonable and unlawful. Regardless, the Commission had available to it all information required to approve the Application.

1. A retroactive application of Commission rules enacted after the filing of the Application would be unjust and unreasonable.

While proposed rules pertaining to such filings were pending at the time the Application was filed, neither they, nor the revised version that ultimately became final, were in effect at the time of such filing. Indeed, the statutes governing the filing of the Application are R.C. 4905.31 and R.C. 4928.66, neither of which set forth any specific filing requirements at the time the Application was filed. Inasmuch as R.C. 4928.66 imposed statutory energy efficiency and peak demand reduction benchmarks on the Company for 2009 with potential significant forfeitures for non-compliance,[9] it would be unreasonable and unlawful to expect the Company to wait until December 10, 2009 for final rules before filing this and other similar applications.[10] Moreover, it would be unjust and unreasonable for the Commission to retroactively apply the additional prerequisites set forth in the final rules – prerequisites that became known only after the Application was filed.

[9] R.C. 4928.66(A)(1)(a) and (A)(1)(b); R.C. 4928.66(C).

[10] At the time the Application was filed, the requirements for such applications were set forth in proposed rules included in the Commission's Entry on Rehearing, Case No. 08-888-EL-ORD (June 17, 2009.) Because the Rules were not yet final, Company personnel met with Commission Staff on several occasions prior to filing to discuss the content of the filing. Since filing the Application, the proposed rules were amended at least two more times before becoming final. *See* Case No. 08-888-EL-ORD, Entry (October 15, 2009), and Entry (October 28, 2009).

In reviewing an application, the Commission applies the rules, if any, in effect at the time the application was filed. *See Pack v. Osborn* (2008), 117 Ohio St. 3d 14 (rules in effect at the time of the application must be applied to the applicant.) Rules cannot be applied retroactively, except in limited circumstances, as explained by the Ohio Supreme Court in *Van Fossen v. Babcock & Wilcox Co.* (1988), 36 Ohio St. 3d 100. A statute or administrative regulation cannot constitutionally be retroactively applied unless it expressly specifies that it shall have retroactive applicability.[11] Even then, the regulation cannot be retroactively applied if it "takes away or impairs vested rights acquitted under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past."[12] This test was applied in the case of *Smith v. Ohio Edison*, 1999 WL 6444, at *4 (Ohio App. 2 Dist.), wherein the *Smith* court found no indication that a Commission regulation was intended to have retroactive effect, thus negating the need to address the second prong of the *Van Fossen* test.[13] As in the *Smith* case, there is no indication in *any* of the Commission's rules established through PUCO Case No. 08-888-EL-ORD of any intent to retroactively apply these rules. In fact, in its October 15, 2009 Entry on Rehearing in PUCO Case No. 08-888-EL-ORD (at page 13), the Commission recognized the need for greater flexibility with respect to historical programs implemented prior to the adoption of the rules.

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[11] *Van Fossen*, 36 Ohio St. 3d at 106. *See also* R.C. 1.48.

[12] *Van Fossen*, 36 Ohio St. 3d at 106 (*citing Cincinnati v. Seasongood* (1889), 46 Ohio St. 296, 303).

[13] *Id.* at *4. *See also* R.C. 1.48 (a statute is presumed to be prospective in its operation, unless expressly made retrospective); Section 28, Article II of the Ohio Constitution (denying the General Assembly the power to pass retroactive laws); *Murphy v. Ohio Dept. of Highway Safety* (1984), 18 Ohio App. 3d 99 (the prohibition against retroactive laws pertaining to legislative enactments also applies to rules and regulations promulgated by administrative agencies); *Ohio Assn. of Cty. Boards of Mental Retardation and Developmental Disabilities v. Public Employees Retirement Sys.* (1990), 61 Ohio Misc. 2d 836 (an administrative rule with retroactive application is a violation of due process.)

In light of the foregoing, the Commission properly refrained from retroactively applying the requirements set forth in Rule 4901:1-39-05 that ultimately became effective on December 10, 2009. Indeed, it would have been error had the Commission applied the rule retroactively.

2. The Application complied with the only prerequisites in effect at the time the Application was filed.

R.C. 4928.66(A)(2)(c) provides that the effects of mercantile customer projects shall be counted toward the Company's compliance with statutory energy efficiency and peak demand reduction benchmarks, while R.C. 4928.66(A)(2)(d) allows for such projects to be submitted to the Commission as a special arrangement under R.C. 4905.31. At the time the Application was filed, no regulations addressing applicable filing requirements for such special arrangements were in effect. In fact, the only requirements in effect at that time were those set forth in the Company's Rider DSE, which was approved by the Commission on May 27, 2009 in PUCO Case No. 08-935-EL-SSO. As part of the Company's tariff, this rider has the force and effect of law. *See Barr v. Ohio Edison Company* (9th Dist.), 1995 WL 66351 at *4 ("When approved, the tariffs have the force and effect of law and the public is bound thereby."); *The Dayton Power & Light Company v. Deagle-Anderson Development, Inc.* (2nd Dist.), 1993 WL 333651, at *4 ("tariffs of a public utility which are filed with the PUCO and approved by it, 'have the force of law. And all users of its services are charged with notice thereof'"). Rider DSE provided additional authority for the submission of the Application. The information OEC/OCC now contend was required to be included in the Application was not required by R.C. 4928.66, R.C. 4905.31 or Rider DSE.

Rider DSE required the Customer to meet certain criteria for avoidance of Rider DSE2 charges and to "submit *to the Company* verifiable information detailing how the criteria are met...."[14] Specifically, the Customer was required to provide to the Company (i) capital investments and expenses related to the Project;[15] (ii) data to illustrate that it undertook the Project and that it resulted in energy savings;[16] and (iii) a written commitment of the Project to the Company;[17] as well as demonstrate (iv) that the exemption from paying Rider DSE2 charges reasonably encouraged the Customer to commit the project to the Company;[18] and (v) that the Customer would commit to use best efforts to cooperate in any regulatory reviews.[19] As the Application indicates in Paragraph 5, the Company reviewed the details associated with the Project and believed that it satisfied all requirements set forth in R.C. 4928.66. It also indicates in Paragraph 7 of the Application that the Company reviewed documentation generally described in Exhibit 3 of the commitment contract (which was attached to the Application as Exhibit 1) and to the best of its knowledge and belief found the EM&V information to be correct and sufficient for inclusion in the Company's energy efficiency and demand response compliance plan. Furthermore, as more fully discussed *infra* in Section B(4), upon request of the Commission Staff, the Company provided virtually all of the

[14] Rider DSE, p. 2, Avoidability Section, para. 2 (emphasis added.)

[15] *Id.* at para. 2(a).

[16] *Id.* at para 2(b).

[17] *Id.* at para. 2(c).

[18] *Id.* at para 2(d).

[19] *Id.* at para. 2(e).

materials reviewed by Company personnel – the same information on which such assertions by the Company were based.[20]

In sum, the only specific requirements pertaining to a request for exemption from paying the Company's Rider DSE2 charge were set forth in Rider DSE. As demonstrated above, the Application complies with those requirements.

3. The Application complies with the then-proposed rules known at the time the Application was filed.

The June 17, 2009 version of the proposed rules (which were subject to numerous applications for rehearing that had not been ruled upon at the time the Application was filed) required any application filed under then-proposed Rule 4901:1-39-08(A) to include (i) coordination requirements between the Company and the Customer, including specific communication procedures and intervals;[21] (ii) a provision granting the Company and Commission Staff permission to measure and verify energy savings and/or peak-demand reductions;[22] and (iii) identification of all consequences of non-compliance.[23]

As indicated in Paragraph 6 of the Application, the Company entered into a Customer Project Commitment Agreement, attached to the Application as Exhibit 1, that fully addresses each of these requirements. Specifically, Paragraph 2 of that Agreement requires at a minimum that it communicate with the Company through a report on at least an annual basis, and Paragraph 7 sets forth the procedures for any notices or other

[20] Because most customers view much of this information to be competitively sensitive, the Company refrained from including the details underlying these assertions as part of the public filing, especially since such information could be sought through discovery.

[21] Proposed Rule 4901:1-39-08(A)(1), Case No. 08-888-EL-ORD (Entry on Rehearing, June 17, 2009.)

[22] *Id.* at Proposed Rule 4901:1-39-08(A)(3). Subsection (A)(2) involves circumstances under which demand reduction can be effectuated, which is not germane to the issues addressed in this memorandum contra.

[23] *Id.* at Proposed Rule 4901:1-39-08(A)(4).

communication required. Paragraph 1(c) requires the Customer to provide representatives from either the Company or the Commission access to the Project for purposes of measuring and verifying energy savings and/or peak demand reductions, while Paragraphs 3 and 4 set forth the consequences for non-compliance, expressly terminating the Agreement and related exemption from paying Rider DSE2 charges.

Then-proposed Rule 4901:1-39-08(B) further required a customer to agree to provide an *annual report* that includes specific information if requesting an exemption from paying charges through a utility's cost recovery mechanism as allowed by R.C. 4928.66(A)(2)(c). The Customer Project Commitment Agreement fully satisfies all provisions of this draft rule and the Commission's final rules, as the Customer is contractually obligated to provide an annual report that "shall include, at a minimum, all requirements set forth in the Commission's rules, as modified from time to time."[24] Thus, a detailed examination of this rule's sub-parts is unnecessary.

In sum, as demonstrated above, the Application complies with both the terms and conditions set forth in the Company's Rider DSE, as well as the proposed rules then known at the time the Application was filed.

4. <u>The Commission had all information required by the final rules at the time it rendered its decision.</u>

OEC/OCC argue that the Application does not contain certain information required by (final) Rule 4901:1-39-05, including (i) details of the Project; (ii) consequences for non-compliance (which has already been addressed in Section B(3) above); (iii) information as to whether the Project involved the early retirement of fully functioning equipment or the installation of new equipment; (iv) whether the Project was

[24] Application, Exh. 1 at ¶ 2.

implemented in order to comply with performance standards set by law or regulation; (v) the beginning and ending dates of the commitment (which as Paragraph 1 of the commitment agreement indicates, is committed for the life of the Project); and (vi) a description of the EM&V protocols.[25] As has already been discussed, a retroactive application of the final rule to the Application filed prior to such rule becoming effective is unlawful and unreasonable. Nevertheless, as discussed below, any information not already provided to the Commission through the Application was provided to the Commission through data requests – all of which OEC/OCC could have sought through discovery had either so desired. Indeed, OCC requested and was given access to all of this information.

As the Commission indicated in its Order, the Company provided Staff with a significant amount of information, including:

> (1) annual energy baseline consumption data; (2) an accounting of incremental energy saved; (3) a description of projects implemented and measures taken; (4) a description of the methodologies, protocols, and practices used to measure and verify the energy savings; (5) an accounting of expenditures to demonstrate the cost-effectiveness of the project; (6) supporting documents to verify the timeline and in-service dates of the project. In its evaluation of the Joint Application, Staff reviewed the items listed above, in addition to further supporting documentation provided by [the Company], including third-party calculations using a combination of customer-specific usage information (annual hours of operation) and incremental kilowatts saved based on standard wattage ratings of fixtures. Staff confirmed that the methodology the Applicants used to calculate energy savings conforms to the general principles of the International Performance Measurement Verification Protocol. [Order, p. 4.]

In light of the above, the Commission had sufficient information upon which to base its decision. Moreover, as demonstrated above, the Application complied with the only

[25] OEC/OCC Memo, p. 4.

prerequisites in effect at the time of its filing (Rider DSE), as well as the only proposed rules then known (the June 17th version). Accordingly, OEC/OCC's first assignment of error is without merit and should be summarily rejected.

C. The Commission's Determination of the Amount of the Exemption for Which the Customer Qualified is Lawful.

In its Order, the Commission adopted the "Benchmark Comparison Method" when determining the period during which the Customer is exempt from paying Rider DSE2 charges.[26] This method allows an exemption for so long as the mercantile customer demonstrates energy savings at its own facility or facilities equal to or greater than the electric utility's benchmark requirement.[27] This methodology is consistent with a provision set forth in the Company's Rider DSE, which requires that the Project produce "energy savings and/or peak demand reductions equal to or greater than the statutory benchmarks to which the Company is subject."[28] Inasmuch as Rider DSE is a Commission-approved tariff, it has the force and effect of law and is binding on the public as well as the Company and its customers. *Barr v. Ohio Edison*; *DP&L v. Deagle-Anderson, supra.*

It is unclear as to the exact nature of the error that OEC/OCC allege in their second "assignment of error." In essence, they claim that the Benchmark Comparison Methodology used to determine the amount of the exemption is not valid because the Commission did not agree with the points raised in a dissent.[29] It is not error simply because the *majority* of the Commission made a different policy decision than that set

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[26] Dissenting Opinion of Commissioner Cheryl L. Roberto (February 11, 2010), at p. 5.

[27] *Id.*

[28] Rider DSE, p. 2 (Avoidability, para. 2(a)).

[29] OEC/OCC Memo, pp. 9-11.

forth in the dissent, especially when a change in such policy in this instance would have been contrary to a prior ruling made when approving Rider DSE. In fact, instead of seeking rehearing on an alleged error in the majority opinion, OEC/OCC simply ask the Commission to "reconsider Commissioner Roberto's recommendation [made in her dissenting opinion] that the Commission's Staff undertake a workshop.[30] Inasmuch as OEC/OCC fail to allege any legitimate error (or any error at all) pertaining to the Benchmark Comparison Methodology, their second "assignment of error" must also be rejected.

III. CONCLUSION

Based upon the foregoing, OEC/OCC's Application for Rehearing must be rejected. Not only does the Application comply with all requirements in effect at the time the Application was filed, it also complied with the rules then being proposed at that time. Moreover, while not included with the Application, additional information was provided to the Commission's Staff for review – any of which could have been sought by OEC and/or OCC through discovery, and to which OCC was given access. The fact that OEC chose not to seek discovery and OCC chose to ignore what it had reviewed does not create error on the part of the Commission. And finally, refusal of the majority of the Commission to agree with a single Commissioner's observations does not error make, especially when doing so would have resulted in a policy that contradicts a rate schedule already approved by the Commission. Accordingly, for all of the reasons discussed above, the OEC/OCC Application for Rehearing must be denied.

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[30] *Id.* at 11.

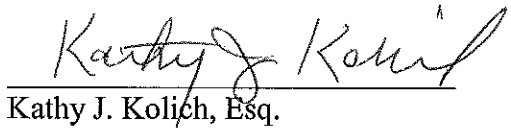
Respectfully submitted,

Kathy J. Kolich (Attorney No. 0038855)
FIRSTENERGY SERVICE COMPANY
76 South Main Street
Akron, OH 44308
Telephone: (330) 384-4580
Fax: (330) 384-3875
kjkolich@firstenergycorp.com

Attorney for The Cleveland Electric Illuminating Company

CERTIFICATE OF SERVICE

This is to certify that a copy of Cleveland Electric Illuminating Company's Memorandum Contra Application for Rehearing of The Ohio Environmental Council and The Office of the Ohio Consumers' Counsel was served on the persons listed below by electronic and regular U.S. Mail, postage prepaid, on this 25th day of March, 2009.



Kathy J. Kolich, Esq.

John Leonard
The Lubrizol Corporation
29400 Lakeland Boulevard
Wickliff, OH 44092
John.leonard@lubrizol.com

Ann M. Hotz
Jeffrey L. Small
Office of The Ohio Consumers' Counsel
10 West Broad Street, Suite 1800
Columbus, OH 43215-3485
hotz@occ.state.oh.us
small@occ.state.oh.us

Will Reisinger
Nolan Moser
Trent A. Dougherty
Ohio Environmental Council
1207 Grandview Avenue, Suite 201
Columbus, OH 43212-3449
will@theoec.org
nolan@theoec.org
trent@theoec.org

Duane Luckey
Assistant Attorney General
Public Utilities Commission of Ohio
180 East Broad Street, 9th Floor
Columbus, OH 43215
duane.luckey@puc.state.oh.us

Todd M. Williams
Williams & Moser, LLC
P.O. Box 6885
Toledo, OH 43612
toddm@williamsandmoser.com

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