

**BEFORE THE  
PUBLIC UTILITIES COMMISSION OF OHIO**

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|--|---|--------------------------------|
| <b>In the Matter of the Application of</b> | ) |                                |
| <b>Marsulex and The Toledo Edison</b>      | ) |                                |
| <b>Company For Approval of a Special</b>   | ) | <b>Case No. 09-1317-EL-EEC</b> |
| <b>Arrangement Agreement With A</b>        | ) |                                |
| <b>Mercantile Customer</b>                 | ) |                                |
|  | ) |                                |

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**REPLY TO COMMENTS OF THE OHIO ENVIRONMENTAL COUNCIL  
AND THE OHIO CONSUMERS' COUNSEL**

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**I. INTRODUCTION**

On December 29, 2009, The Toledo Edison Company (“Toledo Edison”) and Marsulex (“Marsulex”) (collectively “Applicants”) filed an application in this docket for approval of a special arrangement agreement with a mercantile customer pursuant to O.A.C. 4901:1-39-05(G) (“Application”). On May 19, 2010, the Ohio Environmental Council and Office of the Ohio Consumers’ Council (“OEC/OCC”) jointly filed Comments Regarding the Joint Application and Request for a Workshop (“Comments”) in which they argued that the Application fails to contain certain “required” information and that the Commission should not approve it unless the Applicants significantly revise or supplement it. OEC/OCC then used this proceeding, as they have in the past with other proceedings, to argue that the Commission should convene a workshop to create a “standard application form” for public utilities to use when requesting approval of the commitment of energy efficiency savings from a mercantile customer.

As a preliminary matter, OEC/OCC have not been granted leave to intervene and are not parties to this proceeding. The Commission’s rules do not authorize the filing – either by parties or non-parties – of comments or objections to an application filed under O.A.C. 4901:1-39-05(G), and OEC/OCC have not cited to a statute or rule that authorize these Comments. The

Commission's rules authorize comments within thirty days of the filing of an annual portfolio status report (O.A.C. 4901:1-39-06(A)), but it is clear that the Commission intended initial applications filed by mercantile customers under O.A.C. 4901:1-39-05(G) to be processed by Commission Staff in cooperation with the applicable electric utility. The streamlined process designed by the Commission requires that a mercantile customer make specific commitments, including a commitment to allow Staff and the utility to verify energy savings and/or peak demand reductions using methods acceptable to Staff. *See* O.A.C. 4901:1-39-05(G)(2), (G)(5). Once an application has been approved, the mercantile customer must provide details of its actual energy savings to Staff and the utility in an annual report filed pursuant to O.A.C. 4901:1-39-08. To the extent those savings are included in the utility's portfolio plan results, comments are permitted by O.A.C. 4901:1-39-06(A). However, OEC/OCC's attempt to comment on this Application more than four months after its filing is out-of-rule and should be ignored.

Moreover, the Comments misstate the legal requirements concerning the required contents of the Application and lack a factual basis. Had OEC/OCC approached Toledo Edison prior to filing their Comments, they would have learned that *all* the information they seek has already been provided to Staff for purposes of verifying the savings of the energy efficiency projects implemented by Marsulex. For all of these reasons, the Commission should reject the Comments, approve Marsulex's commitment of its energy efficiency savings to Toledo Edison and exempt Marsulex from the DSE2 charge of Toledo Edison's Rider DSE.

## **II. ARGUMENT**

### **A. The Applicants have Provided the Commission with Sufficient Information to Approve the Application.**

The Comments argue that the Commission should not approve the Application because it is missing certain information. But the Applicants have provided the Commission, through its

Staff, with all of the information required by law. In response to Staff data requests, the Applicants provided documents evidencing the energy savings realized by the projects, described the methodologies used to calculate energy savings, and demonstrated that the costs avoided by Toledo Edison exceed the costs incurred by it for the projects. OEC/OCC have not asked Toledo Edison to review any of this information, although it would have been made available under an appropriate protective agreement.

The Comments reveal a lack of understanding concerning the realities of a competitive business environment. Ideally, Marsulex would publicly disclose each and every document relating to its energy efficiency projects. However, Marsulex operates in a competitive market and must protect its proprietary and confidential business information. Indeed, the Commission's rules recognize this reality and specifically allow mercantile customers to protect this information. O.A.C. 4901:1-39-05(G)(4) (stating that mercantile applications may "include[e] 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 rule 4901-1-24 of the Administrative Code"). Further, the same dissent that OEC/OCC rely on to support their argument that the Application is lacking certain "required information" expressly acknowledges that Ohio's energy efficiency regulatory framework "must protect the confidentiality of information sensitive to preserving the competitive advantage of a participating mercantile customer." *In the Matter of the Application of PolyChem Corp. and the Cleveland Elec. Illuminating Co. For Approval of a Special Arrangement with a Mercantile Customer*, Case No. 09-1102-EL-EEC, Dissenting Opinion of Commissioner Cheryl Roberto at p. 2 (February 11, 2010). Thus, the Applicants have provided the Commission and its Staff with all of the

information necessary to determine the energy efficiency savings produced by Marsulex's projects.

**1. The Application and Documents Provided to Commission Staff Provide a Complete and Detailed Description of the Methodologies Used to Measure and Verify Program Results.**

OEC/OCC argue that the Application lacks information concerning the methodologies used to measure and verify the energy savings from the energy projects and that without this information the Commission cannot determine whether the savings are speculative or accurate. Comments, pp. 4-5. However, the Application explains that Marsulex provided documentation to Toledo Edison demonstrating that the calculation of energy savings "conforms to the general principals of the International Performance Measurement Verification Protocol." Application, p.

2. Exhibit 3 to the Application contains detailed descriptions of each project and the methodologies used to measure the energy savings associated with Marsulex's projects. For example, the description for project number 1 states: "A 600 H.P. Fan motor was removed from service and replaced with a steam turbine. Savings were quantified through the use of deemed calculations and meter data." The descriptions of the remaining two projects contain a similar level of detail. Moreover, in response to Staff data requests, the Applicants provided further detailed information concerning the methodologies they used to calculate the energy savings realized through the projects. Thus, the Commission and its Staff already have detailed information regarding the methodologies used to calculate the energy savings attributable to Marsulex's energy efficiency projects.

**2. The Rules do not Require the Application to Contain Information on Remaining Useful Life of Equipment or Avoided Incremental Cost.**

OEC/OCC next assert that the Application must contain information on the remaining useful life of the equipment. Comments, pp. 5-7. But they ignore the fact that this

“requirement” is not in the Revised Code or the Commission’s Rules. Instead, they find this “requirement” in a dissent issued by Commissioner Roberto on February 11, 2010. Comments, p. 6. That dissent was issued more than *one month after* the filing of this Application. Thus, even if the Commission decides to read such a requirement into its rules, which it should not, it would be unreasonable and unfair to require the Applicants to provide such information in their Application. The rules simply do not require the Applicants to provide this information in their Application.

**3. The Rules do not Require the Application to Contain a Demonstration that the Energy Efficiency Projects Satisfy the Total Resource Cost Test or that Toledo Edison’s Avoided Costs Exceed the Costs of the Projects.**

Contrary to the suggestion of OEC/OCC, O.A.C. 4901:1-39-08 does not require the Applicants to demonstrate *in their Application* that the energy savings associated with the mercantile customer’s program satisfy the total resource cost test or that its avoided costs exceed the costs to the utility for the mercantile customer’s program. Comments, pp. 7- 8. Instead, that demonstration is required in the mercantile customer’s annual report, not the application. O.A.C. 4901:1-39-08(A). The only requirement regarding eligibility for a rider exemption is that the mercantile customer “consent to providing an annual report on the energy savings and electric utility peak-demand reductions achieved in the customer’s facilities in the most recent year.” *Id.* Marsulex has consented to providing such a report. Mercantile Customer Project Commitment Agreement (“Agreement”), § 3.a.

Despite the fact that it is not required in the Application, the Applicants demonstrated in their responses to Staff data requests that Toledo Edison’s avoided costs exceed the costs of the projects to Toledo Edison. Thus, OEC/OCC’s criticism lacks both a legal and factual basis.

**4. The Energy Efficiency Projects are not a “Routine Business and Maintenance Practice.”**

OEC/OCC next argue that the Application contains inadequate descriptions of the projects implemented by Marsulex, and that the Applicants were required to identify the projects as either routine business and maintenance practices or true energy efficiency measures. Comments, p. 8-9. Again, however, this “requirement” is not found in R.C. § 4928.66 or the Commission’s Rules. Despite this, the Application does identify the projects as valid energy efficiency projects. Section 6 of the Application states, “[b]ased upon a review of said materials, the Company believes to the best of its knowledge and belief that the information included on Exhibit 2 to this Application is correct and that said Customer Energy Projects *meet the requirements as valid mercantile customer-sited energy efficiency projects.*” Application, p. 3 (emphasis added). Moreover, Exhibit 3 to the Application specifically describes energy efficiency projects involving the early retirement of fully functioning equipment.

The projects implemented by Marsulex are valid energy efficiency projects, despite the efforts of OEC/OCC to suggest otherwise. In addition to the Application and Agreement, the Applicants provided Commission Staff with information demonstrating that the projects qualify as valid mercantile-sited projects. Since this proprietary and confidential information would harm Marsulex in its industry if made public, it could not be provided in the Application and Agreement. But this information has been provided to the Commission and its Staff in response to data requests. Thus, OEC/OCC’s request that the Commission require the applicants to submit additional information is moot.

**B. A Workshop and Standard Application are only Acceptable to Toledo Edison if Rulings on its Pending Applications are not Further Delayed as a Result.**

The remainder of the Comments argue that the Commission should promptly convene a workshop to adopt a regulatory framework for mercantile applications and to provide a

standardized application form for mercantile applications. Comments, pp. 9-11. While Toledo Edison certainly supports efforts by the Commission to streamline the mercantile application process and provide guidance as to what is needed to approve such applications, it strongly opposes any further delay in ruling on this and other pending applications. This Application has been pending for more than five months, and it is possible that the DSE2 charge of Toledo Edison's Rider DSE will be approved soon by the Commission. Marsulex has agreed to commit its projects to Toledo Edison because of the exemption available under R.C. § 4929.66 and O.A.C. 4901:1-39-08. The Commission should approve this Application in a timely manner.

Failing to approve mercantile applications in a timely manner will discourage customers from committing existing and new programs to Toledo Edison. Given OEC/OCC's opposition to the inclusion of mercantile customer programs in portfolio plans, this may be their goal. Regardless, while a technical conference and standardized application could benefit all parties, Toledo Edison would support such efforts only if they did not further delay rulings on its currently pending mercantile applications.

### **III. CONCLUSION**

The Application contains all of the information required by R.C. § 4928.66 and the Commission's rules. The Applicants also provided detailed confidential supporting documentation for Marsulex's energy efficiency projects to the Commission's Staff. Thus, OEC/OCC's objections lack both a legal and factual basis and should be rejected. The projects implemented by Marsulex are valid mercantile-sited energy efficiency projects. The Commission should approve the commitment of them to Toledo Edison and exempt Marsulex from the DSE2 charge of Toledo Edison's Rider DSE.

Additionally, convening a technical conference and drafting a standard application could provide guidance to the industry, but Toledo Edison supports such measures only if they do not further delay rulings on its pending mercantile applications.

Respectfully submitted,

*s/ Kevin P. Shannon*

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## **CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing *Reply to Comments of the Ohio Environmental Counsel and the Ohio Consumers' Counsel* was served this 3rd day of June, 2010 by first-class United States Mail, postage prepaid, upon the persons listed below.

/s/ Kevin P. Shannon

One of the Attorneys for The Toledo Edison  
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