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BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Commission's Review of its Rules for Energy Efficiency Programs Contained in Chapter 4901:1-39 of the Ohio Administrative Code.	)	Case No. 13-651-EL-ORD
In the Matter of the Commission's Review of its Rules for the Alternative Energy Portfolio Standard Contained in Chapter 4901:1-40 of the Ohio Administrative Code.	)	Case No. 13-652-EL-ORD
In the Matter of the Amendment of Ohio Administrative Code Chapter 4901:1-40, regarding the Alternative Energy Portfolio Standard, to Implement Am. Sub. S.B. 315.	)	Case No. 12-2156-EL-ORD

REPLY COMMENTS OF NUCOR STEEL MARION, INC.

Pursuant to the January 29, 2014 Entry and the March 7, 2014 Entry extending the time for filing reply comments in the above-captioned proceedings, Nucor Steel Marion, Inc. submits the following reply comments.

I. SUMMARY

Nucor's reply comments are summarized below. Our failure to address any comments or proposals raised by another party in these reply comments should not be interpreted as agreement with such comments or proposals.

- Rule 4901:1-39-04 – Portfolio Plan Filing
  - The Commission should ensure that parties have adequate opportunity to review and raises issues with utility portfolio plans, and to have issues and

concerns addressed by the Commission, prior to the portfolio plan taking effect.

- If the Commission retains the current three-year portfolio plan time frame and review process, the hearing should be made discretionary.

- If the Commission moves to a one-year portfolio plan required as proposed in Staff's rules, there still should be an opportunity for parties to review the plan prior to it taking effect, and to request that the Commission address issues and concerns, including having a hearing if the Commission determines one is necessary.

- Rule 4901:1-39-06 – Cost Recovery

  - The Commission should continue to evaluate the appropriate level of shared savings for a utility, and whether shared savings should be allowed at all, on a case-by-case basis in each utility's portfolio plan filing proceeding.

  - Shared savings should be strictly limited to charging customers for shared savings on energy efficiency savings that exceed the statutory benchmark, as recommended by the Office of the Ohio Consumers Counsel.

- Rule 4901:1-40-07 – Three Percent Cost Cap Mechanism

  - The three percent cost cap calculation should not include a price suppression benefit.

  - The Commission should clarify that the cap is prospective, and that the cap applies to a utility's renewable energy requirement in a given compliance year in the aggregate, not separately for each category of renewable energy that a utility is required to procure.

  - The Commission should reject the revisions proposed by FirstEnergy, which would make the cap discretionary on the part of the utility and ineffective.

II. REPLY COMMENTS

A. Rule 4901:1-39-04 – Portfolio Plan Filing

Staff proposes major changes to the current portfolio plan filing and review structure, proposing to replace the current three-year portfolio plan filing with annual filings, a shortened review and comment period before an annual filing takes effect, and a more comprehensive post-plan review process. In their initial comments, several parties express concerns about these proposed changes undermining the ability of ratepayers and other interested stakeholders to have an impact on utility portfolio plans.[1]

Nucor shares these concerns, and agrees with the parties who maintain that there should be a greater opportunity for customers to review portfolio plans, and for Commission approval of a plan prior to it going into effect if issues are found. At the same time, we agree with Staff's goal of trying to streamline the portfolio plan approval process and limit litigation.

If the Commission elects to retain the current three-year portfolio plan framework, we would support FirstEnergy's recommendation that a hearing on the portfolio plan be discretionary rather than mandatory.[2] As we noted in our initial comments, although there should be a full opportunity for stakeholders to review portfolio plans, to raise issues and concerns, and to request that any issues be addressed by the Commission, it may not be necessary to have a hearing in all cases. However, if the Commission elects to adopt one-year portfolio plans as proposed by Staff, the Commission should not adopt FirstEnergy's recommendation to eliminate the pre-approval process in its entirety.[3] Portfolio plan filings involve significant costs to ratepayers, and as is the case today, parties must have adequate opportunity to review portfolio plans and to raise issues and concerns before such plans take effect. Therefore, if the Commission adopts one-year portfolio plans, the Commission should

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[1] *See, e.g.*, Joint Comments of the Environmental Law & Policy Center, Ohio Environmental Council, Sierra Club, Natural Resources Defense Council, Environmental Defense Fund, and Citizens Coalition ("Environmental and Consumer Advocates Comments") at 6; Comments by the Office of the Ohio Consumers' Counsel ("OCC Comments") at 4-9.

[2] Initial Comments of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company ("FirstEnergy Comments") at 14.

[3] FirstEnergy Comments at 7, 14.

modify and strengthen the pre-approval process in the proposed rule by: (i) extending the comment period in the proposed rule from 30 days to 60 days, and (ii) providing an opportunity for parties to have their issues and concerns addressed by the Commission through an opinion and order issued without a hearing, or after a hearing if the Commission decides one is warranted.[4]

B. Rule 4901:1-39-06 – Cost Recovery

OCC and IEU-Ohio correctly observe that a shared savings incentive is unnecessary in light of the statutory requirement for utilities to implement energy efficiency.[5] Since a utility is required to meet the annual energy efficiency benchmarks by statute, and is subject to a forfeiture if it fails to meet the applicable benchmark, no incentive is needed to encourage the utility to hit the benchmark. Staff's proposed rule should not be interpreted as a blanket approval for shared savings. Rather, the Commission should continue to evaluate the proper level of shared savings, and whether shared savings should be permitted at all, on a case-by-case basis when evaluating each utility's portfolio plan. Further, as recommended by OCC, any shared savings the Commission allows should be strictly limited to energy efficiency savings that exceed the statutory benchmark in a given year.[6] As OCC states, "a utility should not be provided an incentive to comply with the law."[7]

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[4] Comments of Nucor Steel Marion, Inc. at 4-5.

[5] OCC Comments at 13-15; Industrial Energy Users-Ohio's Comments at 9.

[6] OCC Comments at 13.

[7] *Id.* at 14.

C. Rule 4901:1-40-07 – Three Percent Cost Cap Mechanism

Staff's proposed Rule 4901:1-40-07 substantially overhauls the existing rule addressing the three percent cost cap provision under Section 4928.64(C)(3) of the Revised Code. Staff's revisions largely codify the Commission's ruling in Case No. 11-5201-EL-RDR with respect to the cost cap by making clear that the cap is mandatory, and by incorporating a specific and simple calculation for determining the "maximum recoverable compliance funds" for alternative energy in a compliance year.[8] As discussed in our initial comments, Nucor supports Staff's proposed revisions to this rule.

1. The cap calculation should not include a price suppression benefit

The Environmental and Consumer Advocates argue that the three percent cost cap should reflect the "price suppression benefit" associated with renewable generation.[9] We disagree; we recommend that the Commission not include a price suppression benefit in the cap calculation. The statute does not contemplate inclusion of such a benefit. Moreover, the Commission has recognized that including a price suppression benefit would add a subjective element to an objective calculation and that the benefit would be difficult to calculate for purposes of the cap calculation.[10] Incorporating a price suppression benefit would also increase the level of the cap beyond the level specified by the legislature, and would therefore erode the cost protection for customers Section 4928.64(C)(3) is intended to provide. As Nucor explained in Case No. 11-5201-EL-RDR:

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[8] *In the Matter of the Review of the Alternative Energy Rider Contained in the Tariffs of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company*, Case No. 11-5201-EL-RDR, Opinion and Order at 34 (August 7, 2013).

[9] Environmental and Consumer Advocates Comments at 48.

[10] Case No. 11-5201-EL-RDR, Opinion and Order at 33.

> [T]he three percent cap is not an exercise in properly valuing renewable energy, or the effect renewable energy has on market prices – it is a cost control mechanism that . . . is intended to put a reasonable, objective, and predictable limit on the costs customers have to bear resulting from a utility's efforts to meet its renewable energy benchmarks. Ohio customers have and (barring a change in the law) will continue to pay significant premiums to support renewable energy through S.B. 221's renewable energy requirements, even without the incorporation of a price suppression element in the cap. These premiums likely will only get larger as the statutory benchmarks increase. A simple, easy to apply cap is the key protection afforded customers against excessive renewable energy costs. Even assuming renewable energy does provide a price suppression benefit . . . , therefore, strong public policy considerations and a reasonable interpretation of the statute weigh in favor of not including a price suppression element in the cap calculation.[11]

We therefore continue to recommend that a price suppression element not be included as part of the cap calculation.

2. The Commission should clarify that the cap calculation is prospective, and that the calculation should be performed in the aggregate, not for each category of renewable energy a utility is required to procure

FirstEnergy requests clarification that Rule 4901:1-40-07 addresses a prospective cap calculation.[12] We agree that the cap is designed to be prospective (*i.e.*, the cap calculation is forward-looking because it calculates the maximum recoverable compliance funds the utility will have available in the compliance year), and we interpret Staff's proposed language as implementing a prospective cap. FirstEnergy also interprets Staff's proposed rule as possibly applying the three percent test separately for each class of required renewable energy under the statute (*i.e.*, Ohio Solar, Other Solar, Ohio Non-Solar, Other Non-Solar), rather than on an aggregate basis.[13] While we agree with FirstEnergy that the cap is intended to be applied on an

[11] Case No. 11-5201-EL-RDR, Memorandum Contra of Nucor Steel Marion, Inc. to Applications for Rehearing of August 7 Opinion and Order at 8 (September 16, 2013).

[12] FirstEnergy Comments at 38.

[13] *Id.* at 39-40.

aggregate basis, we do not agree with FirstEnergy that Rule 4901:1-40-07(A)(5) implies that each benchmark has a separate cost cap.

We think that Staff's proposed rule 4901:1-40-07 is clear that the cap is intended to be prospective, and that it applies on an aggregate basis to a utility's overall renewable energy compliance requirement in a given year, not separately for each category of renewable energy that a utility is required to procure. Nevertheless, in order to avoid any future confusion or misinterpretation of these rules, we request that the Commission provide clarification on both of these points, confirming the prospectice nature of the cap and that it applies on an aggregate basis.

3. The Commission should reject the revisions proposed by FirstEnergy, which would make the cost cap discretionary and ineffective

FirstEnergy proposes numerous substantive revisions to Staff's new cap language, designed to support an interpretation of the cap as discretionary on the party of the utility. FirstEnergy recommends that the terms "maximum recoverable funds" and "cost cap" should be completely removed from the rule because they contradict the language of Section 4928.64(C)(3), which states that a utility "need not comply" with a statutory benchmark rather than "shall not" comply if the cap is exceeded.[14] In FirstEnergy's view, this language means that a mandatory cap cannot be imposed.

The drafters of S.B. 221 and the Commission have made clear that the purpose of the three percent test is to protect customers from significant increases to their electric bills as a

[14] *Id.* at 38.

result of the renewable energy mandate.[15] This purpose would be frustrated if the cap is interpreted to be purely discretionary on the part of the utility, as FirstEnergy advocates here. A discretionary cap would be a weak and inadequate mechanism for controlling costs. Since the utility could simply choose to ignore the cost cap no matter how high renewable energy costs climbed, a discretionary cap mechanism would destroy the careful balance the legislature sought to achieve in S.B. 221 between encouraging the development of renewable energy, and limiting the exposure of consumers to excessive renewable energy costs. The Commission recognized these implications in Case No. 11-5201-EL-RDR, where it considered and rejected the same arguments in favor of a discretionary cap that FirstEnergy makes in this rulemaking proceeding. The Commission ruled that the mandatory cap mechanism recommended by Staff in that case "strikes the appropriate balance to allow electric utilities to achieve compliance with the renewable energy resource benchmarks and to provide a limit to the costs passed along to ratepayers."[16] As it did in Case No. 11-5201-EL-RDR, the Commission should reject FirstEnergy's arguments in favor of a discretionary cap and adopt Staff's mandatory cap mechanism.

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[15] *See* October 1, 2008 letter from Speaker Jon Husted of the Ohio House of Representatives to Commission Chairman Alan Schriber, cited in Case No. 11-5201-EL-RDR, Direct Testimony of Daniel R. Bradley (Public Version), Company Ex. 1 at 45, n.14 (stating that, with regard to S.B. 221's renewable mandates, the "issue of cost was specifically addressed through the three percent cost cap and the force majeure language that was included in Senate Bill 221," and further explaining that a "utility should comply with a benchmark to the extent that the cost caps are not triggered, even if it means that only a part of a benchmark is met." See also, *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, and 4901:5-7 of the Ohio Administrative Code, Pursuant to Chapter 4928.66, Revised Code, as Amended by Substitute Senate Bill No. 221*, Case No. 08-888-EL-ORD, Opinion and Order at 37 (April 15, 2009) (stating that "the function of the cost cap is to protect customers from significant increases to their electric bills.").

[16] Case No. 11-5201-EL-RDR, *Opinion and Order at 33.*

FirstEnergy also argues that the Commission does not have the authority to disallow utility cost recovery for costs incurred to comply with the statutory requirements on the sole basis that the EDU's costs exceed the 3% threshold.[17] But FirstEnergy is wrong – since the statute provides that a utility need not comply with a benchmark to the extent the three percent cap is met, the Commission might very well determine that a utility that exceeds the cap is imprudent (this would be the case even if the cap were discretionary). More importantly, however, it is very unlikely that the disallowance scenario FirstEnergy's fears will arise under the prospective cap, since the utility will know how much it can spend on alternative energy compliance after it performs the cap calculation. When the utility hits the cap, it should simply stop spending on compliance for that year. Consequently, the prospective cap mechanism proposed by Staff provides protection and certainty for customers and utilities alike.

FirstEnergy is also concerned that a prospective review of the three percent calculation in the second quarter will not give the utility enough information to determine whether it will exceed the three percent threshold.[18] Staff's proposed rule 4901:1-40-07(A) states that a utility must perform the cap calculation "*no later* than April fifteenth of each compliance year," which means that there is nothing preventing the utility from performing the cap calculation earlier in the compliance year. The earlier in the year the utility performs the calculation, the sooner it will know its maximum recoverable compliance funds for that year. For example, under FirstEnergy's current ESP plan, the final auction needed to establish the SSO generation price for the full upcoming calendar year is determined in mid-January of that year. Therefore,

[17] FirstEnergy Comments at 39.

[18] *Id.*

FirstEnergy could perform the cap calculation very early in the compliance year and know what its not-to-exceed budget for renewable energy compliance will be in that year. In short, there should be no reason why a utility such as FirstEnergy cannot design its REC procurement plan so as to limit its expenditures in a compliance year to the maximum recoverable compliance funds as calculated under the methodology proposed by Staff in rule 4901:1-40-07.

With the exception of providing the clarification FirstEnergy seeks on the prospective nature of the cap calculation and on the appropriateness of performing the cap calculation on an aggregate basis rather than for each subcategory of renewable energy product, the Commission should reject the changes FirstEnergy proposes to rule 4901:1-40-07 and adopt Staff's proposed rule.

III. CONCLUSION

Nucor respectfully requests that the Commission consider the positions discussed in these reply comments and Nucor's initial comments as it evaluates Staff's proposed changes in these dockets.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of these *Reply Comments* was served via electronic transmission this 24th day of March, 2014 upon the parties in Case Nos. 13-651-EL-ORD, 13-652-EL-ORD, and 12-2156-EL-ORD.

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