

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Adoption of Rules for)
Standard Service Offer, Corporate Separation,)
Reasonable Arrangements, and Transmission)
Riders for Electric Utilities Pursuant to) Case No. 08-777-EL-ORD
Sections 4928.14, 4928.17, and 4905.31,)
Revised Code, as amended by Amended)
Substitute Senate Bill No. 221.)

FINDING AND ORDER

The Commission finds:

BACKGROUND:

On July 7, 1999, the governor of the state of Ohio signed Amended Substitute Senate Bill No. 3 (SB 3). That legislation, among many things, established a starting date for competitive retail electric service in the state of Ohio and provided for the establishment of market development periods (MDP) for each electric utility. After the MDP, pursuant to Section 4928.14(A), Revised Code, as originally enacted into law, each electric utility was required to provide consumers, on a comparable and nondiscriminatory basis within its certified territory, a market-based standard service offer (MBSSO) to maintain essential electric service to consumers, including a firm supply of electric generation service. Pursuant to Section 4928.14(B), Revised Code, each electric utility was required to offer customers within its certified territory an option to purchase competitive retail electric service after its MDP ends, the price of which is to be determined through a competitive bidding process (CBP). On December 17, 2003, the Commission issued a Finding and Order in Case No. 01-2164-EL-ORD which adopted, with certain modifications, staff's proposed rules for processing applications to establish the MBSSO and CBP in Chapter 4901:1-35-01, Ohio Administrative Code (O.A.C.).

On May 1, 2008, the governor signed into law Amended Substitute Senate Bill No. 221 (SB 221) amending various provisions of SB 3. Among those amendments were changes to Section 4928.14, Revised Code, to establish a standard service offer (SSO); Section 4905.31, Revised Code, to approve reasonable arrangements and utility schedules; and Section 4928.17, Revised Code, to establish corporate separation plans. Pursuant to the amended language of Section 4928.14, Revised Code, electric utilities are required to provide consumers with an SSO, consisting of either a market-rate offer (MRO) or an electric security plan (ESP). The SSO shall serve as the electric utility's default SSO. Electric utilities may apply simultaneously under both options; however, at a minimum,

the first SSO application must include an application for an ESP. The amendments to Section 4905.31, Revised Code, modify the applicability of reasonable arrangements and the amendments to Section 4928.17, Revised Code, impose additional requirements on electric utilities relating to the transfer of assets.

The staff of the Commission (Staff) has proposed a complete rewrite of Chapter 4901:1-35, O.A.C., and its incorporated appendices, which include procedural requirements for filing applications for an MRO and ESP as well as filing requirements for such applications in accordance with SB 221. The Staff has also proposed Chapter 4901:1-36 to establish procedures for the implementation of transmission riders and Chapter 4901:1-38 to establish procedures for approving reasonable arrangements between the electric utility and customers. Further, the Staff is proposing to rescind Rule 4901:1-20-16, O.A.C., and revise and place the existing Commission requirements in a stand-alone Chapter 4901:1-37 to address electric utility corporate separation between affiliated entities, as well as new SB 221 requirements.

On July 2, 2008, the Commission issued an entry requesting comments from interested persons to assist in the review of Staff's proposed Chapters 4901:1-35 through 4901:1-38. Comments and/or reply comments were filed in this docket by the following parties:

Ohio Hospital Association
Ohio Home Builders Association, Inc.
The Greater Cincinnati Health Council
City of Cleveland
Kraft Foods Global, Inc.
Alliance for Real Energy Options
Columbus Southern Power Company and Ohio Power Company (AEP Ohio)
Ohio Energy Group, Chemistry Technology Council, Ohio Cast Metals Association,
Ohio Hospital's Association, Ohio Aggregates and Industrial Minerals
Association and Ohio Manufacturers' Association (OEG)
Ohio Consumer and Environmental Advocates (OCEA)
Duke Energy Ohio, Inc. (Duke)
Ohio Environmental Council
Kroger Company, Inc.
Nucor Steel Marion, Inc.
City of Cincinnati
Ohio Edison Company, The Cleveland Electric Illuminating Company and The
Toledo Edison Company (FirstEnergy)
Council of Small Enterprises
Dayton Power and Light Company
Ohio Farm Bureau Federation
Ohio Association of School Business Officials, the Ohio School Boards Association
and The Buckeye Association of School Administrators

Northeast Ohio Public Energy Council
Ormet Primary Aluminum Company
Recycled Energy Development, LLC
Industrial Energy Users-Ohio (IEU)

DISCUSSION:

After reviewing the Staff's proposal, initial comments, and reply comments, the Commission will adopt new Chapters 4901:1-35, 4901:1-36, 4901:1-37, and 4901:1-38 as attached to the order. Further, the Commission will rescind existing Chapter 4901:1-35 and Rule 4901:1-20-16, O.A.C. In this order, we will only address the more salient comments. In some respects, we agree with certain comments and have incorporated them into our rules without specifically addressing such changes in this Finding and Order. To the extent that a comment was raised and is not addressed in this order or incorporated into our adopted rules, it has been rejected.

Chapter 4901:1-35:

The Commission has made several changes to Staff's proposed Chapter 4901:1-35, based upon our review of the comments and our interpretations of SB 221. With regard to Rule 4901:1-35-01,¹ Definitions, the Commission has modified Staff's proposed definition in Rule 4901:1-35-01(E) "electric security plan," to recognize that such plans may relate to matters other than electric generation service as provided for in Section 4928.143, Revised Code.

With respect to Rule 03, Filing and Content of Application, the Commission has reorganized the structure of this rule. OCEA believes that the appendices should be incorporated into the rules rather than as appendices so that they are readily obtainable to interested persons. Inasmuch as a good deal of Appendices A and B to this rule, which involve the content of SSO applications, are substantive directives to the electric utilities, the Commission has decided to delete the appendices and incorporate the requirements of the appendices into Rules 03(B) and (C) of this chapter. Rule 03(B) now contains the requirement formerly set forth in Appendix A and Rule 03(C) now contains the requirements formerly set forth in Appendix B. The Commission has also modified language in Rule 03 to reflect that provisions of an SSO application must be "consistent with" instead of "achieve" the policies of the state as set forth in divisions (A) to (N) of Section 4928.02, Revised Code, recognizing the need for flexibility in attempting to satisfy those policies.

¹ Hereafter, the Commission will refer to specific rules by their last two numbers instead of the full code section being discussed in each subsection of the Finding and Order.

With regard to former Appendix A, AEP Ohio and FirstEnergy indicated that items (A)(2) and (A)(3) go beyond the scope of SB 221. We disagree. The language as originally proposed by Staff is useful in describing the requirements necessary to fulfill the meaning of SB 221, and we are retaining it largely in the form in which it was proposed. OCEA proposes an extensive addition to both Appendix A and Appendix B, that would provide a list of items that an electric utility must consider in developing a generation supply procurement plan. Although we find OCEA's suggestion to be overly proscriptive, we agree that the electric utility should demonstrate its consideration of alternatives in development of its CBP plan. We have therefore amended section (B) of former Appendix A accordingly.

The Commission has received various comments and proposed revisions with regard to former Appendix B, Requirements for Electric Security Plans, and Rule 10, Annual Review of Electric Security Plans. Many parties found that the original language in the "Additional Requirements Information" section of Appendix B did not clearly make the proper distinctions between the two different situations calling for an earnings review, and we have re-written this section to clarify this matter. In terms of substantive recommendations, the OEG has proposed extending the comment period from the proposed 30 days to 60 days, to enable consideration of the information contained in the Federal Energy Regulatory Commission (FERC) Form 1 which is generally available at the end of April. Also, all of the electric utilities objected to the requirement that they provide information on a functionalized basis, although these objections were not identical in nature. In consideration of these objections, we recognized that the income statement and balance sheet information which was being sought is satisfactorily contained in the FERC Form 1 and the Securities and Exchange Commission (SEC) 10-K. Therefore, we are changing the date for the submission of the filing for the annual review from April 1 to May 15. Further, proposed Rule 4901:1-35-10 and former Appendix B have been revised based on the comments discussed above.

Among the general requirements for ESPs in former Appendix B, first section provision (B) requires that an electric utility provide pro forma financial projections of the effect of the ESP's implementation upon the utility. The OCEA and the OEG filed comments suggesting that this requirement include supporting material, workpapers, and explanations of assumptions used. The comments of AEP Ohio, however, argue that the requirement of pro forma financial information is without basis in statute and constitutes improper prospective evaluations of the significantly excessive earnings test and should thus be deleted.

We agree with OCEA and OEG that any quantitative projection can be understood and be useful only if the basis for the projection is also available and have added this requirement. We reject AEP Ohio's characterization of this information as constituting an excess earnings test. An ESP is quite complex, with many aspects to be decided, and these

decisions should be made in the context of all available information. The Commission, throughout its history, has been charged with consideration and balancing of the competing interests of various stakeholders, a process which requires knowledge and understanding of the possible effects of decisions on various parties. AEP Ohio's argument would have the Commission, and the public, flying blind in this regard, and could jeopardize the sense of fairness and legitimacy of the process. We would also observe that none of the other electric utilities objected to this provision or interpreted it as an excess earnings test.

Former Appendix B, second section titled Specific Information, paragraph (B) provides requirements for a utility which is seeking to include unavoidable surcharges for certain expenditures pursuant to division (B)(2)(b) and (B)(2)(c) of Section 4928.143, Revised Code. Duke proposes "a bidding process appropriate for the dedication to load of existing assets, rather than newly constructed assets." We disagree with this proposal. We believe that the impetus for these provisions of SB 221 was a concern that the market might not provide sufficient means for the creation of additional generation resources which might be needed in the future. Existing resources are already available to Ohio consumers through the market. Consequently, we will not include Duke's recommendation into these rules.

One last area of former Appendix B that the Commission finds worthy of discussion is the second section titled Specific Information, paragraph (G). OCEA has made a large number of recommendations as preconditions for cost recovery. Many of these provisions go beyond informational filing requirements and have the effect of predetermining the outcome of the Commission's review. However, we agree with OCEA that proposed subsection (G)(3) should include a description of the utility's efforts to mitigate stranded investment with respect to its modernization plan, and we have therefore added such language at the end of the corresponding provision in Rule 03.

Based on the comments, the Commission finds that each electric utility should submit with its SSO application a proposed notice for newspaper publication describing the application and the rate impacts. Such requirement has been added to Rule 04(B).

Chapter 4901:1-36, Transmission Cost Recovery

The Commission has made some minor changes to proposed Chapter 4901:1-36. Among the changes, the Commission revised Rule 03 based on the comments of Duke and FirstEnergy. They requested that the Commission clarify that the costs of consultants retained by the Staff be recoverable through the transmission cost recovery rider. The Commission has amended this rule accordingly. With respect to Rule 04, IEU recommended that the Commission include a requirement in this rule that electric utilities must include offsetting benefits in the calculation of the rider. The Commission agrees with this recommendation and revised the rule.

Chapter 4901:1-37, Corporate Separation Rules

As for proposed Chapter 4901:1-37, which establishes corporate separation rules, numerous comments focused on general corporate separation prohibitions and the reporting requirements of the electric utility (including the information maintained in the electric utility's cost allocation manual), and recommended modifications to the proposed rules to expand the existing provisions and provide additional detail. However, most of these comments merely repeated, rephrased, or relocated the existing requirements or provisions set forth in Staff's proposed rules. Accordingly, the Commission reviewed the recommendations and has clarified or expanded Staff's proposed rules where necessary.

Similarly, comments were filed that recommended an expansion of the complaint procedures and remedies set forth in Staff's proposed rules. The Commission finds that such an expansion is unnecessary. Section 4928.18 of the Revised Code clearly enumerates the appropriate complaint process concerning violations of corporate separation plans established pursuant to section 4928.17 of the Revised Code and the Commission's rules and orders, as well as applicable remedies. Additionally, Rule 02(E) of Staff's proposed rules reference the pertinent statutory provision for violations of Chapter 4901:1-37, O.A.C.

OCEA proposed modifications to proposed Rule 09, that would require mandatory hearings regarding all applications to sell or transfer an electric utility's generating asset that it wholly or partly owns. With the exception of those transactions which would alter the jurisdiction of the Commission over a generation asset, the Commission agrees with Staff that the decision to hold an evidentiary hearing should be discretionary, decided on a case-by-case basis. The Commission may receive applications that are classified as a transfer in ownership, but that may not necessarily require a hearing. Under OCEA's proposal, a slight change in the percentage of ownership of a small generating asset among two electric utilities would trigger a hearing, regardless of whether there is participation, or even interest, by other parties in the proceeding. Such a result is unnecessary and burdensome on the parties involved, Staff, and the Commission.

Throughout the rules, OCEA requests that all parties receive the same access as Staff to the books, accounts, and records of the electric utility and affiliates. While the Commission does not believe any modifications to the proposed rules are warranted, the Commission notes that the proposed rules do not limit a party's right to discovery in a pending proceeding pursuant to the Commission's rules of practice.

With the adoption of the new corporate separation chapter, the Commission clarifies that each electric utility must file, within sixty days of the effective date of this chapter, an application for approval of its proposed corporate separation plan as outlined in proposed Rule 05. Upon approval of its corporate separation plan, the electric utility

shall file the plan in its "TRF" docket, and maintain a current version of its approved plan in that docket.

Chapter 4901:1-38, Reasonable Arrangements

The last chapter being considered in the docket is Chapter 4901:1-38, Reasonable Arrangements. The Commission has made various revisions to this chapter after considering the comments that have been filed. The Commission has determined that it is necessary to approve all reasonable arrangements entered into between the electric utility and one or more of its customers. Accordingly, all references to standard schedules have been removed and the chapter has been modified accordingly.

With respect to proposed Rules 03(A)(2)(d) and 04(A)(2)(e) regarding eligibility requirements for customers to be served under economic development and energy efficiency arrangements, some commenters requested that the Commission remove the criterion for fixed asset investment. The Commission recognizes that the primary focus of these arrangements is to create jobs. Since it is possible that jobs can be created without additional investments in fixed assets, the criterion requiring a fixed asset investment in land, buildings, machinery/equipment, and infrastructure has been removed. In addition, certain commenters have expressed a concern that the criterion that the customer must have an electric intensity of at least 10% as set forth in proposed Rule 03(B)(2)(d) is unrealistic. The Commission finds that this criterion is not necessary on a stand-alone basis because such considerations can be incorporated into the demonstration that the cost of electricity is a major factor in the decision to cease, reduce, or relocate operations.

With respect to proposed Rule 04(A), the criterion that the energy efficiency arrangements be applicable to facilities with loads of not more than one thousand kilowatts has been removed. The Commission agrees with those commenters that believe that there should be no load maximum load for eligibility. The Commission has also determined that division (B) of proposed Rule 04 should be deleted. The rule required the electric utility to file an application for an energy efficiency schedule that recognized the efforts by a customer to reduce its electricity consumption per unit of production. There was uncertainty as to how the baseline would be established and how the ratio of electricity consumption to unit of output would be measured, monitored, and valued. Several parties commented that there was no basis for this rule in SB 221 and that it should be deleted. Parties commented that a third-party specialist would be required to do the evaluations. OCC argues that such a schedule would dilute the value of the other energy efficiency provisions of SB 221. The Commission finds that the rule is problematic and should not be implemented as proposed in the rules for comment.

The Commission also received comments regarding proposed Rule 07(D). The proposed rule set forth that no customer shall be provided incentives from more than one

arrangement under this chapter. Commenters did not see the necessity for this provision and believe it should be eliminated. The Commission has determined that it can look at each arrangement on a case-by-case basis and deleted this provision.

Lastly, based upon comments received, the Commission has revised proposed Rule 08 which addresses cost recovery for the delta revenue related to reasonable arrangements. With respect to division (C) of Rule 08, rather than disallow any delta revenue recovery of arrangements which are based upon cost savings to the electric utility, the rule has been modified to reflect that any such cost savings be reflected as an offset to the recovery of delta revenues. Also some comments recommended that the Commission revise paragraph (A)(3) of this rule to reflect that the recovery of delta revenue is not up to Commission discretion. We disagree, Section 4905.31(E), Revised Code, provides for the filing of an application to recover costs incurred and revenue forgone; however, filings still must be approved by the Commission as set forth in Section 4905.31, Revised Code. Accordingly, we will not adopt the recommendations on this point.

CONCLUSION:

The Commission finds that the rules proposed by Staff should be approved as modified by this order. Attached is a copy of the rules adopted.

The Commission notes that the rules being approved by this order are over 40 pages. While the Commission finds that a hard copy of this entry should be served upon all stakeholders, we believe that, rather than mail hard copies of the rules to the stakeholders, it would be prudent and more efficient to provide a web address where the attachment can be accessed. Accordingly, interested entities can access the attachment by going to the Commission's web site at www.puco.ohio.gov/PUCO/Rules, and clicking on the link to Staff's Proposed Rules for Electric Utility Standard Service Offer, Corporate Separation, Reasonable Arrangements, and Transmission Riders to implement Senate Bill 221. If an entity has questions regarding how to access the attachment or does not have access to the internet, it may contact the Commission's Docketing Division at (614) 466-4095, Monday through Friday between the hours of 7:30 a.m. and 5:30 p.m.

ORDER:

It is, therefore,

ORDERED, That the attached rules are hereby adopted. It is, further,

ORDERED, That existing Chapter 4901:1-35, O.A.C., and Rule 4901:1-20-16, O.A.C., are rescinded. It is, further,

ORDERED, That attached new Chapters 4901:1-35, 4901:1-36, 4901:1-37, and 4901:1-38 should be filed with the Joint Committee on Agency Rule Review, the Secretary of State, and the Legislative Service Commission in accordance with divisions (D) and (E) of Section 111.15, Revised Code. It is, further,

ORDERED, That the final rules be effective on the earliest day permitted by law. Unless otherwise ordered by the Commission, the review date for Chapters 4901:1-35, 4901:1-36, 4901:1-37, and 4901:1-38 shall be September 30, 2013. It is, further,

ORDERED, That a copy of this entry, without the attachments, be served upon all parties filing comments in this docket and all interested parties of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO

Alan R. Schriber, Chairman

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Entered in the Journal



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