FILE

BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Adoption of Rules for Alternative and Renewable Energy Technologies and Resources, and Emission Control Reporting Requirements and amendments of Chapters 4901:5-1, 4901:5-3, 4901:5-5, and 4901:5-7 of the Ohio Administrative Code, pursuant to Chapter 4928, Revised Code, to Implement Senate Bill 221.	))))))))	Case No. 08-888-EL-ORD

DUKE ENERGY OHIO, INC.'S APPLICATION FOR REHEARING

I. INTRODUCTION

In its Entry dated August 20, 2008, the Public Utilities Commission of Ohio (Commission) proposed certain changes to its regulations pertaining to alternative and renewable energy technologies and resources and emission control reporting requirements. The Commission sought comments to be filed on September 9, 2008 and reply comments September 26, 2008. Duke Energy Ohio (DE-Ohio) submitted initial and reply comments in response to the Commission's proposed rules, as did many other parties. On April 15, 2009, the Commission issued an Opinion and Order (Order) wherein it submitted final rules that incorporated many of the interested Parties suggested changes. DE-Ohio expresses its appreciation to the Commission for its attempt to create balanced and consistent rules that meet the requirements of Amended

Sub. S.B. 221. DE-Ohio further recognizes that there is an urgent need to enact these rules in order to allow retail electric service providers to move forward with compliance. Notwithstanding the time constraint, it is important that the rules be fair, reasonable and clear. Therefore, DE-Ohio respectfully requests that the Commission grant rehearing for the purpose of making some additional necessary corrections to the final rules. The regulated community is struggling with a significant lack of certainty which precludes its ability to ensure compliance, thereby exposing the community to the risk of penalties. For these reasons, it is imperative that the Commission grant rehearing and clarify its intentions.

DE-Ohio is mindful of the need to reduce its comments to only those issues that truly require further development in order to permit compliance. For that reason, DE-Ohio is limiting its comments to only the most important suggested clarifications and changes. DE-Ohio appreciates the opportunity to comment one final time on these rules and looks forward to working with the Commission and its Staff to meet its respective mandates.

II. DISCUSSION

As the single most important issue requiring rehearing, DE-Ohio urges the Commission to reconsider its interpretation of Revised Code Sections 4928.64 and 4928.66 wherein the Commission states that it does not believe that it is appropriate to recognize the specific benefits of energy efficiency and demand-side management

under requirements set forth in both of the statutes. DE-Ohio submits that the statutes are not ambiguous and as written, do not support the Commission's present interpretation. Revised Code 4928.01 (A)(34)(g) states that an "Advanced Energy Resource" means demand-side management and any energy efficiency improvement. Thus any demand-side management and energy efficiency savings used to comply with the advanced energy resource requirements should also count toward requirements under 4928.66, Revised Code. The Commission's refusal to recognize this overlap in mandates creates an unduly onerous and burdensome additional mandate that is unnecessarily costly. Such a draconian reading of the statutory requirements in SB 221 is overly aggressive and discouraging to EDUs working to meet statutory requirements. It simply sets the bar far higher than is possible to reach. The Commission should amend Rule 4901:1-40-01(M) to clarify that energy efficiency savings will not be regarded as "double counting" when used in compliance with both statutory mandates.

Rule 39-01 (W)

This rule provides a definition for the total resource cost test. The rule does not specify how non-energy benefits will be treated, if at all, in the test. More definition and clarity is needed.

Rule 39-03(A)(1)

This rule requires that each utility "survey and characterize energy-using capital stock" and "quantify its actual and projected energy use and peak demand." It is

unclear what the Commission intended in the requirement to "survey and characterize energy using capital stock." The methodology of such a survey, what should be included or not included, and the means by which its energy use and demand are quantified are all parameters that are not specified. Even the definition of "capital stock" is impossible to understand in Rule 39-01(E). "Devices, equipment and processes" are exceedingly broad terms. DE-Ohio submits that this area of the Rules requires significant clarification prior to enforcement as the rules are undefined and too broad to allow for compliance.

Rule 39-05(C)(2)(a)(i)

There is a reference in this rule to the term "trend analysis." This term is not otherwise defined and it is unclear what was intended with this requirement. If the Commission intends a specific type of analysis here, it should so specify.

Rule 39-05(C)(2)(b)

This rule specifies the parameters of a report from an independent program evaluator, including measurement and verification, which is performed on data from the previous calendar year. DE-Ohio submits that more time is required for such a study, especially for studies that rely upon billing analyses that can require a full year of load impact results due to the installation of weather sensitive measures. For example, if a weather sensitive technology (e.g. insulation) is installed after the summer cooling season, it is impossible to obtain a measure of the summer load savings until after the

next cooling season. The Commission should recognize that results from measurement and verification studies will evolve over time.

New Rule 39-05(D)

In the Order promulgating the final rules in this docket, the Commission specifically addressed a question with regard to Rule 39-04(C)(1), which is now new Rule 39-05(D). In its Order, the Commission stated that "the replacement of incandescent lighting with compact fluorescent lighting [CFL] program would count now, but not after such measures become required under the Energy Independence and Security Act of 2007." DE-Ohio appreciates the Commission's efforts to be clear about how it will address this particular provision. The question remains, for those energy savings obtained as a result of CFL replacements installed prior to a legal mandate, will these results continue to count in the future or will they cease to be included, once a legal mandate is in place? In other words, once the law is enacted, is it the intent of the Commission that the EDU must remove the counting of the benefits of this program from benchmark results? The end result of this interpretation would require the EDU to meet its planned targets and also find replacements for programs already counted in the benchmark.

Rule 39-07(A)(2)

As explained in its Order, "The Commission believes that a partial exemption may be appropriate where mercantile customer energy savings and peak demand

reductions, as a percentage of the customer's baseline period energy use and peak demand, are significantly below the utility's applicable energy efficiency and demand reduction requirements. We will review applications for exemptions on a case-by-case basis."[1] DE-Ohio submits that this statement requires clarification. It is unclear what is intended and how this provision might be applied. DE-Ohio notes that the Commission specifically stated in DE-Ohio's Electric Security Plan case:

> ...if a customer committing less than the benchmark were exempted from the entire rider, other customers would have to bear an increased burden of Duke's cost recovery. We find such a result inequitable. On the other hand, requiring Duke and the Commission to calculate and review percentages of exemptions that are appropriate for each customer would be time consuming and expensive, the cost of which would have to be borne by ratepayers. We also note that the governing statute makes no reference to the possibility of a partial exemption.[2]

Is the Commission, in its rulemaking, now seeking to provide for partial exemption and partial rider obligations? If so, Rule 39-07(A)(2) does not state that such an arrangement is possible. DE-Ohio is therefore unclear as to the Commission's intent with regard to partial exemption.

General Questions With Respect to Chapter 4901:1-39 et seq.

DE-Ohio seeks clarification as to how utility baselines will be calculated. Is it intended that they will be based on default load or switched load? If based upon

---

[1] *In the Matter of the Adoption of Rules for Alternative and Renewable Energy Technology, Resources and Climate Regulations*, Case No. 08-888-EL-ORD, Opinion and Order, April 15, 2009 at p. 22.

[2] *In re DE-Ohio's Application for Approval of an Electric Security Plan*, Case No. 08-920-EL-SSO, et al., Opinion and Order, December 17, 2008 at p. 36.

switched load, will the Commission recognize the problem inherent in the program if a block of load suddenly returns to the EDU?

General Questions With Respect to Chapter 4901:1-40 et seq.

With respect to the Renewable Energy Credit certification process generally, DE-Ohio submits that the rules do not address many of the questions that have arisen to date. For example, how will the Commission prevent "double counting" when RECs can be certified in different registries? If a certification is revoked, would the revocation be retroactive such that the REC supplied prior to the revocation would become invalid? If the Commission's REC certification and registration process is completed on June 30, 2009, will the Commission accept RECs that were generated prior to the source being registered?

Rule 40-03(A)(2)(b)

This rule contains the phrase "deliverable into this state." If a supplier has a renewable facility in a non-contiguous state, if the facility is a Capacity Resource as defined in the PJM Resource Model or the Deliverability Test in MISO, and the energy is accordingly considered to be physically deliverable into Ohio by these entities, will the Commission accept this as "deliverable into this state" or will the Commission need more information to confirm the physical delivery requirement?

Rule 40-04 (D)(2)(c)

This rule specifies that an electric services company must be a registered member of either PJM's generation attributes tracking system, MISO's renewable energy tracking system or "another credible tracking system subsequently approved for use by the Commission." DE-Ohio respectfully requests that the Commission clarify what constitutes another credible tracking system and/or when such potential tracking systems will be approved. At present, there is much discussion and debate about the Commission's potential recognition of purchased RECs. DE-Ohio finds it difficult to proceed with compliance in light of the fact that many of the details regarding what will be acceptable to the Commission are as yet undetermined. As a result, DE-Ohio is reluctant to undertake the risk inherent in purchasing RECs that might ultimately prove to be unacceptable to the Commission. As time is growing short for compliance in 2009, DE-Ohio urges the Commission to clarify many of these details so that companies can move forward with potential contracts in order to be able to comply with 2009 requirements.

Rule 40-04(D)(3)

This rule specifies that a REC may be used for compliance any time in the five calendar years following the date of its initial purchase or acquisition. The wording of this rule should be revised to state that a REC may be used for compliance any time in the five calendar years following the date in which it was earned (i.e. - when the renewable energy was generated). The revision would clarify forward purchases so

that all RECs would have a life equivalent to its vintage year plus four years. Otherwise, if an entity owns a REC and does not sell it, the REC would seem to have an infinite lifespan until the point at which it is sold. The point at which the clock begins to run on the REC should be when it is generated.

Rule 40-07(D)

The Commission notes that Rule 40-07(D) provides that "any costs included in an unavoidable surcharge for construction or environmental expenditures of generation resources may be excluded from consideration as a cost of compliance... ."[3] The Commission has not yet described or set forth in rule, any methodology for calculating the three percent cost cap that is of concern here. The cost cap is mentioned in many different rules and is central to the question of compliance. The EDUs are presently not able to complete business planning in order to ensure compliance without further clarification regarding how the Commission intends to make such determination. DE-Ohio requests that the Commission provide greater detail and guidance to the EDUs about how it intends to enforce this provision.

Chapter 4901:1-41

This chapter provides rules for the reporting of greenhouse gas emissions and carbon dioxide control planning for electric generating facilities. These rules are redundant to proposed national greenhouse gas monitoring rules written by the United

[3] Id. at p. 37

States Environmental Protection Agency (USEPA). Additionally, it is premature to enact such rules as carbon dioxide control processes are still in development stages. Thus, requirements that the electric distribution utilities submit goals and procedures over periods of five, ten and twenty years are not feasible for current compliance. Absent the recognition that these rules are redundant and overreaching at this time, the Commission must at least provide needed guidance to the EDUs so that they can attempt to meet the mandates set forth in the draft rules.

Rule 1-41-01

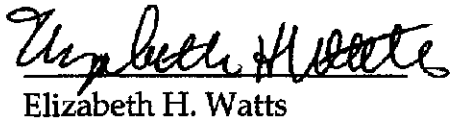
As noted in Duke Energy Ohio's initial comments in this docket, the term "climate registry" is undefined in this rule. To date, the Commission has not corrected this problem and the ambiguity remains. DE-Ohio respectfully submits that this generic reference does little to assist EDUs in meeting compliance requirements. Additionally, per Rule 4901:1-41-02, the Commission should clarify that the regulated community need not report under any other greenhouse gas reporting program once the USEPA's mandatory reporting program is finalized. Duplicative reporting is costly and unnecessary.

III. CONCLUSION

DE-Ohio appreciates the long hours and hard work that the Commission has invested to prepare these rules and to successfully implement the requirements of SB

221. DE-Ohio respectfully urges that the existing rules are not yet "fully baked" and that more clarity is required to permit the electric distribution utilities to move forward with implementation of renewable requirements. For these reasons, DE-Ohio respectfully requests that the Commission grant rehearing to make the needed corrections and clarifications.

Respectfully submitted,



Elizabeth H. Watts
Assistant General Counsel
Amy B. Spiller
Associate General Counsel
Duke Energy Ohio
155 East Broad Street,
21st Floor
Columbus, Ohio 43215
Phone: 614-222-1330
Facsimile: 614-222-1337

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was served via ordinary mail or via electronic mail on the all Parties of Record this 15th day of May, 2009.

Elizabeth H. Watts