15

FILE

BOEHM, KURTZ & LOWRY
ATTORNEYS AT LAW
36 EAST SEVENTH STREET
SUITE 1510
CINCINNATI, OHIO 45202
TELEPHONE (513) 421-2255

TELECOPIER (513) 421-2764

RECEIVED-DOCKETING DIV
2009 MAY 15 PM 2:14
PUCO

Via Hand Delivery

May 15, 2009

Public Utilities Commission of Ohio
PUCO Docketing
180 E. Broad Street, 10th Floor
Columbus, Ohio 43215

In re: Case No. 08-888-EL-ORD

Dear Sir/Madam:

Please find enclosed an original and twenty (20) copies of the APPLICATION FOR REHEARING OF THE OHIO ENERGY GROUP filed in the above-referenced matter.

Copies have been served on all parties on the attached certificate of service. Please place this document of file.

Respectfully yours,

David F. Boehm, Esq.
Michael L. Kurtz, Esq.
BOEHM, KURTZ & LOWRY

MLKkew
Encl.
Cc: Certificate of Service

CERTIFICATE OF SERVICE

I hereby certify that true copy of the foregoing was served by electronic mail (when available) or ordinary mail, unless otherwise noted, this 15th day of May, 2009 to the following:

*Kershner, Rodger A. Mr.
Howard & Howard Attorneys PC
39400 Woodward Avenue Suite 101
Bloomfield Hills MI

*Schisler, Kenneth D Mr.
EnerNOC, Inc.
75 Federal St. Suite 300
Boston MA 02110

BLOOMFIELD, SALLY ATTORNEY AT LAW
BRICKER & ECKLER LLP
100 SOUTH THIRD STREET
COLUMBUS OH 43215-4291

*Flahive, Carolyn S
Thompson Hine LLP
41 South High Street Suite 1700
Columbus OH 43215-6101

*Morris, Barbara L Ms.
Chester Willcox & Saxbe LLP
65 E. State St. Suite 1000
Columbus OH 43215

GRADY, MAUREEN
OFFICE OF CONSUMERS' COUNSEL
10 W. BROAD STREET SUITE 1800
COLUMBUS OH 43215-3485

GRIFFIN, RANDALL V CHIEF REGULATORY COUNSEL
DAYTON POWER AND LIGHT COMPANY
1065 WOODMAN DRIVE P O BOX 8825
DAYTON OH 45401

*Falco, Christine M Ms.
PJM Interconnection LLC
965 Jefferson Avenue
Norristown PA 19403

*Lockwood, Dwight N Mr.
Global Energy, Inc.
312 Walnut Street Suite 2300
Cincinnati OH 45202

*Bingham, Deb J. Ms.
Office of the Ohio Consumers' Counsel
10 W. Broad St., 18th Fl.
Columbus OH 43215

ROBERTS, JACQUELINE ATTORNEY AT LAW
OHIO CONSUMERS' COUNSEL
10 WEST BROAD STREET SUITE 1800
COLUMBUS OH 43215

*REESE, RICHARD ATTORNEY AT LAW
10 WEST BROAD STREET SUITE 1800
COLUMBUS OH 43215-3485

*Christensen, Mary W. Ms.
Christensen Christensen Donchatz Kettlewell & Owen
100 East Campus View Blvd., Suite 360
Columbus OH 43235

STONE, GARRETT A ATTORNEY AT LAW
BRICKFIELD, BURCHETTE, RITTS & STONE, P.C.
1025 THOMAS JEFFERSON STREET N.W. 8TH FLOOR, WEST TOWER
WASHINGTON DC 20007

*Orahood, Teresa
Bricker & Eckler LLP
100 South Third Street
Columbus OH 43215-4291

POULOS, GREGORY J ATTORNEY
OHIO CONSUMERS' COUNSEL
10 WEST BROAD ST. SUITE 1800
COLUMBUS OH 43215-3485

*White, Matt S Mr.
Chester Willcox & Saxbe
65 E State Street
Columbus OH 43228

*Lausten, Connie L Ms.
New Generation Biofuels
4308 Brandywine St. NW
Washington DC 20016

ETTER, TERRY
OHIO CONSUMERS' COUNSEL
10 W. BROAD STREET SUITE 1800
COLUMBUS OH 43215

SMALL, JEFFREY
OHIO CONSUMERS' COUNSEL
10 WEST BROAD STREET SUITE 1800
COLUMBUS OH 43215-3485

COLBERT, PAUL ATTORNEY AT LAW
CINCINNATI GAS & ELECTRIC COMPANY
139 EAST FOURTH STREET 2500 ATRIUM II BLDG
CINCINNATI OH 45201-0960

IDZKOWSKI, MICHAEL E.
OHIO CONSUMER COUNSEL
10 WEST BROAD STREET SUITE 1800
COLUMBUS OH 43215-3485

SAUER, LARRY
OHIO CONSUMERS COUNSEL
10 W. BROAD STREET 18TH FLOOR
COLUMBUS OH 43215

RINEBOLT, DAVID C
OHIO PARTNERS FOR AFFORDABLE ENERGY
231 WEST LIMA ST P O BOX 1793
FINDLAY OH 45839-1793

GUZY, GARY S GENERAL COUNSEL
APX INC
5201 GREAT AMERICA PARKWAY #522
SANTA CLARA CA 95054

TRIOZZI, ROBERT J
CLEVELAND CITY HALL 601-LAKESIDE AVE, ROOM 206
CLEVELAND OH 44114-1077

HOTZ, ANN
ATTORNEY AT LAW

OFFICE OF CONSUMERS' COUNSEL 10 W. BROAD STREET, SUITE 1800
COLUMBUS OH 43215

MARCHESE, DAVID
2603 AUGUSTA SUITE 900
HOUSTON TX 77057

*Decker, Kari Ms.
APX
2939 27th St
Sacramento CA 95818

MASKOVYAK, JOSEPH V
OHIO STATE LEGAL SERVICES ASSOCIATION
555 BUTTLES AVENUE
COLUMBUS OH 43215-1137

Interested Party

DAYTON POWER & LIGHT COMPANY
DONA SEGER-LAWSON
1065 WOODMAN DRIVE
DAYTON OH 45432

SOBECKI, JUDI L ATTORNEY AT LAW
1065 WOODMAN DR
DAYTON OH 45432

DUKE ENERGY OHIO
PAUL G. SMITH
139 EAST FOURTH STREET P.O. BOX 960
CINCINNATI OH 45202

WATTS, ELIZABETH H. ATTORNEY AT LAW
155 EAST BROAD ST., 21st FLOOR
COLUMBUS OH 43215

ENVIRONMENT OHIO-ENVIRONMENTAL ADVOCATE

GREENFIELD STEAM & ELECTRIC

AMY GOMBERG
203 EAST BROAD STREET, STE 3
COLUMBUS OH 43215

NEIL SATER
6618 MORNINGSIDE DRIVE
BRECKSVILLE OH 44141

INDUSTRIAL ENERGY USERS OF OHIO
SAMUEL C. RANDAZZO, GENER
21 E. STATE STREET, 17TH FLOOR
COLUMBUS OH 43215

CLARK , JOSEPH M ATTORNEY AT LAW
MCNEES WALLACE & NURICK LLC
21 EAST STATE STREET, 17TH FL.
COLUMBUS OH 43215-4228

MID OHIO REGIONAL PLANNING COMMISSION
ERIN MILLER
111 LIBRARY STREET SUITE 100
COLUMBUS OH 43215

OHIO FARM BUREAU FEDERATION, INC.
DALE ARNOLD
DIRECTOR ENERGY SERVICES P.O. BOX 182383
COLUMBUS OH 43218

OHIO FUEL CELL COALITION
737 BOLIVAR ROAD
CLEVELAND OH 44115

ROLLS-ROYCE FUEL CELL SYSTEMS, INC.
6065 STRIP AVENUE NW
NORTH CANTON OH 44720

SIERRA CLUB OHIO CHAPTER
BRANDI WHETSTONE
131 N HIGH ST., STE. 605
COLUMBUS OH 43215

THE CLIMATE REGISTRY
ANN MCCABE
1543 W. SCHOOL ST
CHICAGO IL 60657

UNITED STEELWORKERS DISTRICT 1
DAVE CALDWELL
777 DEARBORN PARK LAND J
COLUMBUS OH 43085

VERTUS TECHNOLOGIES INC
JOSEPH KONCELIK
2500 KEY CENTER 127 PUBLIC SQUARE
CLEVELAND OH 44114-1230

Party of Record

AARP
RON BRIDGES
17 SOUTH HIGH STREET SUITE 800
COLUMBUS OH 43215

AMERICAN MUNICIPAL POWER-OHIO INC
MARC GERKEN, P.E., PRESIDENT
2600 AIRPORT DRIVE
COLUMBUS OH 43219-2226

BENTINE, JOHN
CHESTER, WILLCOX & SAXBE LLP
65 E. STATE STREET SUITE 1000
COLUMBUS OH 43215-4259

AMERICAN WIND ENERGY ASSOC.
1101 14TH STREET NW 12TH FLOOR
WASHINGTON DC 20005

APPALACHIAN PEOPLE'S ACTION, COALITION
MICHAEL R. SMALZ
OHIO STATE LEGAL SERVICE ASSOC. 555 BUTTLES AVENUE
COLUMBUS OH 43215

APX INC
5201 GREAT AMERICA PARKWAY # 522
SANTA CLARA CA 95054

BUCKEYE POWER, INC.
P.O. BOX 26036
COLUMBUS OH 43226-0036

CITIZEN POWER

DAVID HUGHES, EX. DIR.
2121 MURRAY AVENUE THIRD FLOOR
PITTSBURGH PA 15217

CITIZENS FOR FAIR UTILITY RATES
TJM WALTERS
c/o THE MAY DUGEN CENTE 4115 BRIDGE AVENUE
CLEVELAND OH 44113

MEISSNER, JOSEPH
DIRECTOR OF URBAN DEVELOPMENT
ATTORNEY AT LAW
1223 WEST SIXTH STREET
CLEVELAND OH 44113

CITY OF CLEVELAND
601 LAKESIDE AVENUE ROOM 106
CLEVELAND OH 44114-1044

BEELER, STEVEN L ASSISTANT DIRECTOR OF LAW
CITY OF CLEVELAND DEPARTMENT OF LAW
601 LAKESIDE AVENUE ROOM 106
CLEVELAND OH 44114

CITY OF HAMILTON
345 HIGH STREET
HAMILTON OH 45011

CITY OF TOLEDO
ONE GOVERNMENT CENTER
SUITE 2250
TOLEDO OH 43604

KOVACIK, LESLIE
420 MADISON AVENUE,
4TH FL
TOLEDO OH 43624

CLEVELAND ELECTRIC ILLUMINATING COMPANY
76 SOUTH MAIN STREET
AKRON OH 44308

HAYDEN, MARK A MR.
FIRSTENERGY CORP
76 SOUTH MAIN STREET
AKRON OHIO 44308

CLEVELAND HOUSING NETWORK
2999 PAYNE AVENUE
CLEVELAND OH 44114

COLUMBUS SOUTHERN POWER COMPANY
1 RIVERSIDE PLAZA
COLUMBUS OH 43215

NOURSE , STEVEN T SENIOR COUNSEL
AMERICAN ELECTRIC POWER COMPANY
1 RIVERSIDE PLAZA
COLUMBUS OH 43215

COMMUNITIES UNITED FOR ACTION
NOEL M. MORGAN, ATTORNEY
LEGAL AID SOCIETY OF SOUTHWEST OHIO 215 E. NINTH STREET SUITE 200
CINCINNATI OH 45202

CONSTELLATION NEWENERGY, INC.
DAVID I. FEIN
550 W. WASHINGTON BLVD,
SUITE 300
CHICAGO IL 60661

PETRICOFF, M.
VORYS, SATER, SEYMOUR & PEASE
52 EAST GAY STREET
P.O. BOX 1008
COLUMBUS OH 43216-1008

COUNCIL OF SMALLER ENTERPRISES

STEVE MILLARD
100 PUBLIC SQUARE SUITE 201
CLEVELAND OH 44113

DIRECT ENERGY SERVICES LLC
RON CERNIGLIA
40 COLUMBINE DRIVE
GLENMONT NY 12077

PETRICOFF, M.
VORYS, SATER, SEYMOUR & PEASE
52 EAST GAY STREET P.O. BOX 1008
COLUMBUS OH 43216-1008

EDGEMONT NEIGHBORHOOD COALITION
ELLIS JACOBS
333 WEST FIRST STREET SUITE 500B
DAYTON OH 45402

EMPOWERMENT CENTER OF GREATER CLEVELAND
3030 EUCLID AVENUE UNIT 100
CLEVELAND OH 44115

ENVIRONMENT OHIO-ENVIRONMENTAL ADVOCATE
AMY GOMBERG
203 EAST BROAD STREET, STE 3
COLUMBUS OH 43215

GLOBAL ENERGY
DWIGHT N. LOCKWOOD, GROUP VICE PRESIDENT
312 WALNUT STREET, SUITE 2300
CINCINNATI OH 45202

GREAT LAKES ENERGY DEVELOPMENT TASK FORCE, CUYAHOGA COUNTY, OHIO
100 EAST CAMPUS VIEW BLVD. SUITE 360
COLUMBUS OH 43235-4679

CHRISTENSEN, MARY W. ATTORNEY AT LAW
CHRISTENSEN CHRISTENSEN
DONCHATZ KETTLEWELL OWENS
100 E. CAMPUS VIEW BLVD ., SUITE 360
COLUMBUS OH 43235-4679

INTEGRYS ENERGY SERVICES, INC
TERESA RINGENBACH
300 WEST WILSON BRIDGE ROAD SUITE 350
WORTHINGTON OH 43085

PETRICOFF, M.
VORYS, SATER, SEYMOUR & PEASE
52 EAST GAY STREET P.O. BOX 1008
COLUMBUS OH 43216-1008

INTERSTATE GAS SUPPLY, INC.
VINCENT PARISI
5020 BRADENTON AVENUE
DUBLIN OH 43017

PARISI, VINCENT
INTERSTATE GAS SUPPLY
5020 BRADENTON AVENUE
DUBLIN OH 43017

KROGER COMPANY, THE
MR. DENIS GEORGE
1014 VINE STREET-GO7
CINCINNATI OH 45202-1100

BENTINE, JOHN
CHESTER, WILCOX & SAXBE, LLP
65 EAST STATE STREET
SUITE 1000
COLUMBUS OH 43215-4213

LEGAL AID SOCIETY OF CLEVELAND
JOSEPH MEISSNER
URBAN DEVELOP OFF,
1223 W. SIXTH ST
CLEVELAND OH 44113

LUCAS COUNTY COMMISSIONERS
LANCE KEIFFER
2ND FLOOR
711 ADAMS
TOLEDO OH 43624

MIDWEST ENERGY EFFICIENCY ALLIANCE
645 N. MICHIGAN AVENUE SUITE 990
CHICAGO IL 60611

NATURAL RESOURCES DEFENSE COUNCIL
REBECCA STANFIELD
2 N RIVERSIDE PLAZA # 2250
CHICAGO IL 60606-2600

NEIGHBORHOOD ENVIRONMENTAL COALITION
REV. MIKE FRANK, CO-CHAIR
5920 ENGLE AVE.
CLEVELAND OH 44127

NOPEC
31320 SOLON ROAD STE 20
SOLON OH 44139

BELL, LANGDON D
BELL & ROYER CO., LPA
33 SOUTH GRANT AVENUE
COLUMBUS OH 43215

NUCOR STEEL MARION, INC
912 CHENEY AVENUE
MARION OH 43302

LAVANGA, MICHAEL K
BRICKFIELD, BURCHETTE, RITTS & STONE, P.C.
1025 THOMAS JEFFERSON STREET N.W. 8TH FLOOR
WEST TOWER
WASHINGTON DC 20007

OHIO ADVANCED ENERGY
SALLY BLOOMFIELD ATTORNEY
100 SOUTH THIRD ST
COLUMBUS OH 43215-4291

OHIO CONSUMERS' COUNSEL
10 W. BROAD STREET SUITE 1800
COLUMBUS OH 43215-3485

OHIO EDISON COMPANY
76 SOUTH MAIN STREET
AKRON OH 44308

HAYDEN, MARK A MR.
FIRSTENERGY CORP
76 SOUTH MAIN STREET
AKRON OHIO 44308

OHIO ENVIRONMENTAL COUNCIL
NOLAN MOSER 1207 GRANDVIEW AVE. SUITE 201
COLUMBUS OH 43212-3449

ROYER, BARTH E
BELL & ROYER CO LPA
33 SOUTH GRANT AVENUE
COLUMBUS OH 43215-3927

OHIO FARMERS UNION
20 S. THIRD STREET
COLUMBUS OH 43215

OHIO HOUSE OF REPRESENTATIVES
JON A. HUSTED
77 SOUTH HIGH STREET
COLUMBUS OH 43215-6111

OHIO INTERFAITH POWER AND LIGHT
GREGORY E. HITZHUSEN, MD
P.O. BOX 26671
COLUMBUS OH 43226

OHIO PARTNERS FOR AFFORDABLE ENERGY
MOONEY COLLEEN L
1431 MULFORD RD
COLUMBUS OH 43212

OHIO POWER COMPANY
1 RIVERSIDE PLAZA, 29TH FLOOR
COLUMBUS OH 43215

NOURSE , STEVEN T SENIOR COUNSEL
AMERICAN ELECTRIC POWER COMPANY
1 RIVERSIDE PLAZA
COLUMBUS OH 43215

SIERRA CLUB OHIO CHAPTER
JENNIFER MILLER
131 N. HIGH STREET, SUITE 605
COLUMBUS OH 43215

SUNEDISON
12500 BALTIMORE AVENUE
BELTSVILLE MD 20705

TOLEDO EDISON COMPANY
76 S MAIN STREET
AKRON OH 44308

HAYDEN, MARK A MR.
FIRSTENERGY CORP
76 SOUTH MAIN STREET
AKRON OHIO 44308

UNITED CLEVELANDERS AGAINST POVERT
MAY DUGAN CENTER 4115 BRIDGE AVENUE
CLEVELAND OH 44113

VERTUS TECHNOLOGIES INC
JOSEPH KONCELIK
2500 KEY CENTER 127 PUBLIC SQUARE
CLEVELAND OH 44114-1230

WIND ON THE WIRES
1619 DAYTON AVENUE SUITE 203
SAINT PAUL MN 55104

David F. Boehm, Esq.
Michael L. Kurtz, Esq.

BEFORE THE
PUBLIC UTILITY 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 Amendment 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 No. 221.	:	**Case No. 08-888-EL-ORD**

APPLICATION FOR REHEARING OF THE OHIO ENERGY GROUP

Pursuant to R.C. §4903.10 and OAC §4901-1-35, the Ohio Energy Group (OEG) seeks rehearing of the Commission's Opinion and Order of April 15, 2009 in this matter ("Order") and submits that the Order is unlawful or unreasonable in the following particulars:

1. Rule 4901:1-39-08(b)(4) is contrary to law because it excludes mercantile customer sited generation projects from a utility's compliance strategy and calculates energy savings based on comparisons to standards, rather than actual results.

2. Rule 4901:1-39-05(d) is contrary to law because it excludes from inclusion in a utility's compliance strategy projects implemented to comply with energy performance standards set by law, regulation or applicable building codes.

3. The Commission unreasonably exceeded its statutory authority by requiring adjustments to statutory benchmarks for economic downturns and failing to modify its methodology to calculate the three year rolling average so as to avoid energy savings requirements that exceed those required by law.

4. OEG seeks clarification on the requirements for compliance with the demand reduction benchmarks set forth in R.C. 4928.66(a)(1)(b).

RECEIVED-DOCKETING DIV
2009 MAY 15 PM 2:14
PUCO

Respectfully submitted,

David F. Boehm, Esq.
Michael L. Kurtz, Esq.
BOEHM, KURTZ & LOWRY
36 East Seventh Street, Suite 1510
Cincinnati, Ohio 45202
Ph: (513) 421-2255 Fax: (513) 421-2764
E-Mail: dboehm@BKLlawfirm.com

May 15, 2009

COUNSEL FOR THE OHIO ENERGY GROUP

BEFORE THE
PUBLIC UTILITY 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 Amendment 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 No. 221.	:	**Case No. 08-888-EL-ORD**

MEMORANDUM IN SUPPORT

The energy efficiency and demand reduction requirements established by S.B. 221 are stringent. Compliance will be costly. The Commission must enforce those requirements as written. But it would be unreasonable and unlawful to make the stringent statutory requirements even more so by regulation. This rehearing application seeks to restore the balance established through the legislative process. On this issue, we believe that the position of the utilities and their energy intensive industrial customers is consistent.

1. Rule 4901:1-39-08(B)(4) Is Contrary To Law Because It Excludes Mercantile Customer Sited Generation Projects From A Utility's Compliance Strategy And Calculates Energy Savings Based On Comparisons To Standards, Rather Than Actual Results.

Rule 4901:1-39-08(B)(4) provides:

> A mercantile customer's energy savings and peak-demand reductions shall be calculated by subtracting the energy [use] and peak demand associated with the customer's projects from the estimated energy use and peak demand that would have occurred if the customer had used industry standard new equipment or practices to perform the same functions in the industry in which the mercantile customer operates. Kilowatt-hours of energy and kilowatts of capacity provided by electric generation sited on a mercantile customer's side of an electric utility's meter shall not be considered energy savings or reductions in peak demand.

This provision is contrary to law and must be modified. Not only does the above provision exclude projects expressly permitted by law to be included, but the calculation of savings set forth above directly contradicts that set forth in R.C. 4928.66.

R.C. 4928.66(A)(2)(c) states:

> Compliance with [the energy efficiency and demand reduction benchmarks] shall be measured by including the effects of *all* demand response programs for mercantile customers of the subject electric distribution utility and *all* such mercantile *customer-sited energy efficiency and peak demand reduction programs*.... [Emphasis added.]

Based on the above, the legislature intended for *all* mercantile customer projects that contribute to energy efficiency or peak demand reduction to qualify for inclusion in a utility's benchmark compliance strategy. By excluding customer generation projects, the Commission forces utilities to develop additional programs at additional costs to customers.

The Commission also failed to provide any explanation as to why a project must be compared to industry standards rather than actual circumstances when determining energy savings. R.C. 4928.66(A)(2)(c) states that compliance measurements should be based on the *effects* of the project. The effects of the project are determined by comparing energy consumption prior to the implementation of the project with energy consumption under similar conditions after the project has been completed. Comparisons to industry standards, rather than actual conditions, do not properly reflect the *effects* of the project. Therefore, the Commission's requirement to compare consumption after the completion of the project with industry standards is contrary to law and must be modified. Failure to do so will understate actual energy efficiency results, require electric utilities to unlawfully over comply with the S.B. 221 benchmarks, and raise the costs of compliance.

2. Rule 4901:1-39-05(D) Is Contrary To Law Because It Excludes From Inclusion In A Utility's Compliance Strategy Projects Implemented To Comply With Energy Performance Standards Set By Law, Regulation Or Applicable Building Codes.

Rule 4901:1-39-05(D) states:

> [a]n electric utility shall not count in meeting any statutory benchmark the adoption of measures that are required to comply with energy performance standards set by law or regulation … or an applicable building code.

Section 4901:1-39-05(D) unlawfully reduces the number and types of projects that can qualify for inclusion in a utility's compliance strategy. By excluding projects that are put in place to comply with a mandated energy performance standard, the Commission will reduce the number and types of projects for consideration at the same time S.B. 221 mandates will become more stringent. This would create additional costs in excess of those contemplated by the General Assembly.

As an example, in its Order, the Commission indicated that compact lighting program results, which would count today, will not count after the Energy Independence and Security Act of 2007 becomes effective. (Order, p. 20.) Carrying this proposition to its logical conclusion, a utility that implements a program for early replacement of light bulbs that will have energy savings effects well into the future, will not be permitted to continue to count these same energy savings effects once a law is passed that would mandate such a replacement. Under the rules as adopted, the ability to continue counting such savings would stop as of the effective date of the new legislation. Not only does such an outcome create administrative problems in tracking each and every building code, statute and regulation on federal, state, and local levels, but it also leaves the utility with a compounding deficit to overcome in the next year of compliance that would not otherwise exist but for the passage of the new legislation, regulation or building code. As a result, sunk costs for programs that are no longer valid would be lost and new costs for replacement programs would need to be incurred in order to overcome the deficit.

The legislature made it clear that *all* mercantile customer projects that contribute to energy efficiency and/or peak demand reduction may be included as part of a utility's compliance strategy. The direct language of R.C. 4928.66(A)(2)(c) provides that compliance with the benchmarks "*shall be measured by including the effects of all*" such mercantile projects. Moreover, R.C. 4928.66(A)(2)(d) states:

> Programs implemented by a utility may include demand response programs, customer sited programs, and transmission and distribution infrastructure improvements that reduce line losses.

Nowhere are there exclusions for projects implemented *"to comply with energy performance standards set by law or regulation ... or an applicable building code"* and the Commission is without the authority to create them. Accordingly, Rule 4901:1-39-08(D) is unlawful and unreasonable and should be removed.

3. The Commission Unreasonably Exceeded Its Statutory Authority By Requiring Adjustments To Statutory Benchmarks For Economic Downturns And Failing To Modify Its Methodology To Calculate The Three-Year Rolling Average So As To Avoid Energy Savings Requirements That Exceed Those Required By Law.

In its Order, the Commission acknowledged its authority to adjust both the economic efficiency and demand reduction benchmarks for economic growth. However, it then went on to unlawfully expand its authority to include the ability to require adjustments to baselines based on "*negative economic growth.*" (Order, p. 18.)

R.C. 4928.66(A)(2)(a) provides:

> The baseline for energy savings under division (A)(1)(a) of this section shall be the average of the total kilowatt hours the electric distribution utility sold in the preceding three calendar years, and the baseline for a peak demand reduction under division (A)(1)(b) of this section shall be the average peak demand on the utility in the preceding three calendar years, except that the commission may reduce either baseline to adjust for new economic growth in the utility's certified territory.

Although the Commission is correct in noting its authority to reduce baselines for economic growth, a review of R.C. 4928.66(A)(2)(a) makes clear that its authority stops there. Thus, the Commission's expectation that a "*negative reduction*" will be applied during an economic downturn, presumably meaning that baselines will be *increased* to reflect an economic downturn, is unreasonable as an unlawful expansion of its statutory authority and, accordingly, such a requirement should be eliminated. Such an approach would have the effect of increasing the cost on customers due to the utility being forced to over comply with the S.B. 221 requirements during an economic downturn. The General Assembly did not intend this counter intuitive outcome which tends to raise electric rates during an economic downturn, thus making the economic downturn worse.

On page 16 of its Order, the Commission addressed another issue dealing with the calculation of the baseline, finding "*that the use of a 'rolling [three year] average' when determining the statutory baselines is the most reasonable interpretation, consistent with the goals of SB 221....*" The issue of whether the use of a rolling average is appropriate was the subject of comments and reply comments from numerous parties to this proceeding. As the Commission noted in its Order (at page 16):

> The electric utilities argue that the use of a rolling average would result in a compounding effect which would, over time, make the targets impossible to achieve. DP&L provides an example that indicated that by year 2025, the effective savings requirement is closer to 39 percent rather than the 22.2 percent required by law. In the alternative, DP&L argues that the Commission could use a rolling three-year period but make adjustments to eliminate the compounding effect.

Although the Commission acknowledged the above arguments, it never discussed their impact on the required level of compliance or any reason why these meritorious arguments should be ignored, instead simply finding that the use of a three year rolling average is appropriate. As demonstrated in DP&L's compounding example, a failure to adjust the baseline for the compounding effects results in energy efficiency benchmarks that are significantly higher than required by statute. Therefore, OEG respectfully requests the Commission to either modify the rule to recognize the need for an adjustment that would eliminate the compounding effect, or alternatively clarify in its Entry on Rehearing that annual energy savings reduction requirements will not exceed those set forth in R.C. 4928.66(A)(1)(a).

4. **OEG Seeks Clarification On The Requirements For Compliance With The Demand Reduction Benchmarks Set Forth In R.C. 4928.66(A)(1)(B).**

R.C. 4928.66(A)(1)(b) requires a utility, starting in 2009, to "*implement peak demand reduction programs designed to achieve a one per cent reduction in peak demand in 2009 and an additional seventy-five hundredths of one per cent reduction each year through 2018.*"

Many utilities intend to comply with the peak demand reduction benchmarks through their respective interruptible programs. It would be economically wasteful to require manufacturers to actually shut down for a period of time to prove that they can, so that the interruptible load will count as demand response. It would be more reasonable to simply require a demonstration of the ability to interrupt, if needed. There is no reason to unnecessarily disrupt a manufacturing operation which will tend to hurt Ohio's economic competitiveness.

Respectfully submitted,

David F. Boehm, Esq.
Michael L. Kurtz, Esq.
BOEHM, KURTZ & LOWRY
36 East Seventh Street, Suite 1510
Cincinnati, Ohio 45202
Ph: (513) 421-2255 Fax: (513) 421-2764
E-Mail: dboehm@BKLlawfirm.com

May 15, 2009

COUNSEL FOR THE OHIO ENERGY GROUP