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BEFORE THE
PUBLIC UTILITIES COMMISSION OF OHIO

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, 4901:5-5, and 5901:5-7 of the Ohio Administrative Code, Pursuant to Chapter 4928.66, Revised Code, as Amended by Amended Substitute Senate Bill No. 221	)	**Case No. 08-888-EL-ORD**

COLUMBUS SOUTHERN POWER COMPANY'S AND OHIO POWER COMPANY'S APPLICATION FOR REHEARING

In accordance with Sec. 4903.10, Ohio Rev. Code, and Sec. 4901-1-35, Ohio Admin. Code, Columbus Southern Power Company and Ohio Power Company ("AEP Ohio" or "the Companies") apply for rehearing because the Commission's April 15, 2009 Opinion and Order ("Order") is unreasonable and/or unlawful as follows:

I. **The definition of "peak demand benchmark" and the annual compliance demonstration for peak demand reductions both conflict with the governing statute, Sec. 4928.66, Ohio Rev. Code, and should be amended. [Rules 4901:1-39-01(Q) and 4901:1-39-05(C)]**

II. **It is burdensome and unreasonable to require identification and reporting for energy efficiency (EE) and peak demand reduction (PDR) measures that were considered but not selected. [Rule 4901:1-39-03]**

III. **A delay in the Measurement & Verification (M&V) requirement is problematic and the requirement for an independent program evaluator is unnecessary. [Rules 4901:1-39-04 and 4901:1-39-05]**

IV. **The Commission should clarify "double counting measures" regarding the EE benchmarks. [Rule 4901:1-39-05]**

V. **The Commission erred by not amending the 2009 EE/PDR benchmark requirements based on the timing of the adopted rules and the significant unresolved issues.**

VI. **The requirement that cost recovery not commence until after the program portfolio plan is approved "hardwires" regulatory lag into the rule and makes launching and running programs even more challenging. [Rule 4901:1-39-07]**

VII. **Clarification should be provided on rehearing to expressly permit AEP Ohio's proposed approach of one-time payment (versus exemption from EE/PDR Rider) to mercantile customers that commit resources. [Rule 4901:1-39-08]**

VIII. **It is unreasonable and without statutory basis to prevent leftover RECs from green tariff offerings from being used for SB 221 benchmark compliance. [Rule 4901:1-40-01(M); Order, pp. 28-29]**

IX. **It is unreasonable to require the annual renewable benchmarks to be based on Ohio resources and this should be amended or, at a minimum, should be waived for 2009 and 2010 and revisited for 2011. [Rule 4901:1-40-03]**

X. **The requirement that EDUs join the Climate Registry, especially given that the USEPA is developing a mandatory greenhouse gas reporting system, is burdensome for the utility and adds cost for reporting. [Rule 4901:1-41-03]**

XI. **"Substantial Change" is Improperly Defined in a Manner Different Than That Term's Definition in Sec. 4935.04 (D) (3) (c) (i), Ohio Rev. Code. [Rule 4901:5-1-01 (L)]**

XII. **Rules 4901:5-1-04 and 4901:5-03-01 Improperly Delete the Statutory Reference to Substantial Change. [Rules 4901:5-1-04 and 4901:5-3-01]**

XIII. **Rule 4901:5-5-02 (B) Unlawfully Proposes to Permit Changes to the LTFR Forms Without Complying With the Statutory Requirements for Rule Making. [Rule 4901:5-5-02 (B)]**

XIV. **Rule 4901:5-6 Unlawfully and Unreasonably Require the Annual Filing of a Detailed Integrated Resource Plan (IRP) as Part of a Long-Term Forecast Report. Further, The Rule Would Require Information to be Filed as Part of the IRP Which Already Will Be Subject to Litigation Under Other Statutes and/or Rules. [Rule 4901:5-5-06]**

In presenting these grounds for rehearing in detail below, AEP Ohio respectfully requests that the Commission clarify on rehearing certain modifications contained within the

Order (either as a direct request for clarification or as an alternative to granting rehearing).[1]

MEMORANDUM IN SUPPORT OF APPLICATION FOR REHEARING

I. The definition of "peak demand benchmark" and the annual compliance demonstration for peak demand reductions both conflict with the governing statute, Sec. 4928.66, Ohio Rev. Code, and should be amended. [Rules 4901:1-39-01(Q) and 4901:1-39-05(C)]

The term "peak demand benchmark" is defined in the adopted rules as meaning "the reduction in peak-demand an electric utility's system must achieve as provided in division (A)(1)(b) of section 4928.66 of the Revised Code." *See* Rule 4901:1-39-01(Q). The language "must achieve" should be "is designed to achieve" in order to be consistent with the governing statute, Sec. 4928.66, Ohio Rev. Code. Similarly, the requirement for an annual compliance report demonstrating "its achieved energy savings and demand reductions" should have stated "its achieved energy savings and its programs designed to achieve peak demand reductions" in order to be consistent with the governing statute, Sec. 4928.66, Ohio Rev. Code. *See* Rule 4901:1-39-05(C). AEP Ohio submits that this is an important distinction that could have a significant impact on electric utilities' and their customers' compliance costs and ability to satisfy the mandates of Am. Sub S.B. No. 221 (SB 221).

For example, if a utility implements peak demand programs designed to achieve 100 MW of peak demand reduction in a particular year and actually achieves 80 MW of

[1] The Commission has previously held that an application for rehearing is the appropriate place to "seek further understanding of the intent and effect of a commission order." *In the Matter of the Application of Columbia Gas of Ohio, Inc., for Approval of Tariffs to Recover, Through an Automatic Adjustment Clause, Costs Associated with the Establishment of an Infrastructure Replacement Program and for Approval of Certain Accounting Treatment,* Case No. 07-478-GA-UNC (Entry on Rehearing, ¶13) (September 12, 2007), citing *In the Matter of the Review of Chapters 4901-1,4901-3, and 4901-9 of the Ohio Administrative Code,* Case No. 06-685-AU-ORD (Finding and Order, ¶ 59) (December 6, 2006).

peak load reduction, credit should be given for 100 MW. Likewise, if interruptible capabilities for that year are 100 MW and actual interruption of 70 MW occurs, the utility should be given credit for 100 MW. In other words, if the utility had a peak demand benchmark of 200 MW for that year, it would comply with the benchmark. The Commission's rules should be modified to permit that approach and conform with the requirements with Sec. 4928.66, Ohio Rev. Code.

A plain reading of the law supports AEP Ohio's position. In contrast to the requirement in Sec. 4928.66(A)(1)(a), Ohio Rev. Code, for an EDU to implement programs that "achieve" specified levels of energy savings, Sec. 4928.66(A)(1)(b), Ohio Rev. Code, requires an EDU to implement programs "designed to achieve" specified peak demand reductions. The General Assembly used two distinct and different phrases to convey that a distinct and different standard applies for peak demand reductions than for energy efficiency achievements. Requiring that peak demand programs be "designed to achieve" the stated benchmarks is quite different than requiring that energy efficiency programs "achieve energy savings" at the stated benchmarks.

The General Assembly's deliberate and unequivocal distinction between the requirement to "achieve" versus being "designed to achieve" recognizes important differences between the nature of energy efficiency programs and the nature of peak demand reduction programs. Energy efficiency programs are an ongoing effort that produces energy savings during any given period of time; unused energy savings capabilities do not achieve energy reductions during the time period being measured and the opportunity to do so is lost after the time period elapses. In a manner of speaking, it is "water under the bridge" at that point in time (or electrons through the wires). The policy or social underpinnings for energy efficiency –such as depletion of fossil fuel resources or reducing environmental impacts associated with fossil fuel – are not directly advanced when measured energy reductions do not occur during a particular period of time.

By contrast, peak demand reduction programs create a capability to reduce peak demand that can either be exercised or reserved for future use as needed; unused peak reduction capabilities are still "designed to achieve" the same level of peak reduction and remain available for future use when needed. If a peak demand reduction resource or capability is not needed for operational reasons or because weather is mild and a critical peak will not be reached, that peak demand reduction capability is fully reserved for future use without depletion or diminishing its value as a resource. The policy and social underpinnings for peak demand reduction – avoiding the need to build additional power plants to meet increasing load – continue to be fulfilled even where the peak demand resources are not immediately needed and those resources are held without diminution for future use. These logical and policy distinctions dovetail neatly with the "achieve" versus "designed to achieve" language used by the General Assembly. An electric utility's basic obligation is to implement programs "designed to achieve" peak demand reductions and the General Assembly did not intend that the Commission hold utilities strictly liable for actual peak demand reductions.

One example of applying this distinction is interruptible load. Excluding interruptible load for purposes of long-term resource planning is reasonable and appropriate. In the Commission's adopted IRP rules, native load is defined as internal load minus interruptible load. *See* Rule 4901:5-5-01(R). It follows that a utility's interruptible capability should be counted toward compliance with the peak demand reduction mandates. In addition, unnecessary interruptions of service do not add to the demand response capabilities of an electric utility and serve no purpose –especially in these economic times when any business that is fortunate enough to be running objects to being unnecessarily interrupted. AEP Ohio raised the issue of including interruptible customer load in its Electric Security Plan cases (Case Nos. 08-917-EL-SSO and 08-918-EL-SSO) and the issue is pending on rehearing. Consequently, AEP Ohio is concurrently raising this issue in a timely manner in this rulemaking proceeding.

Broader than the interruptible issue, however, the language in the rules needs to be changed to track the statute when defining a utility's basic obligation to implement peak demand reduction programs. In sum, while energy efficiency programs contribute to meeting the benchmark only if they "achieve" energy efficiency, peak demand programs should be considered as meeting the benchmark if they are "designed to achieve" reductions. Accordingly, Rule 4901:1-39-01(Q) and Rule 4901:1-39-05(C) should be amended as outlined above.

II. It is burdensome and unreasonable to require identification and reporting for energy efficiency (EE) and demand reduction (PDR) measures that were considered but not selected. [Rule 4901:1-39-03]

Rule 4901:1-39-03 requires an electric utility to conduct an extensive and detailed assessment of potential energy savings and peak demand reduction measures within its certified territory, relative to technical potential, economic potential and achievable potential. There are specific requirements for program design criteria and consideration of factors such as nonenergy benefits and even "promising measures not selected." Subsection (C) even requires utilities to identify all measures considered that were not found to be cost-effective or achievable yet show promise. The rules also require the utility to identify potential actions so that the measure would become cost-effective and achievable.

These requirements go beyond the statutory requirement to achieve energy savings and improperly invade upon the management functions of the utility –whose responsibility it is to comply with the energy efficiency and peak demand reduction mandates. These requirements are burdensome and unnecessarily add substantial complexity, cost and time to the planning process required of the utilities.

The Commission seems to give credence to OCEA's argument "that there must be transparency in the evaluation process, and that failure to consider potentially cost effective measures or programs may lead to improper screening if rejected measures or programs are not reported" (Order p. 14). What this argument fails to recognize is that the utility will already screen measures by considering the "energy-using capital stock located in its certified territory" as required in 4901:1-39-03(A)(1). It is unclear what reporting of these non cost-effective measures will prove; it is clear that it will raise additional questions and improperly invade on the utility's management and discretion.

Although the Commission indicated that it "struck the appropriate balance" by requiring the utilities to begin with the broadest view of possible EE programs (technical potential), this approach does not acknowledge that it is the utility's responsibility to meet the benchmarks and it would only make sense that the utility would identify as many energy efficiency and demand reduction programs as possible to reach those targets. On the contrary, the rule's requirement could ultimately have a chilling effect on programs considered since even rejected programs will now be "placed under the microscope" and subjected to second-guessing. SB 221 does not require the Commission to micromanage utilities in their compliance efforts and the law does not sanction such a regulatory approach. To avoid all of these problems and reduce the overall cost of compliance with SB 221's energy efficiency and peak demand reduction mandates, AEP Ohio submits that the Commission should change Rule 4901:1-39-03 to eliminate this requirement.

III. A delay in the Measurement & Verification (M&V) requirement is problematic and the requirement for an independent program evaluator is unnecessary. [Rules 4901:1-39-04 and 4901:1-39-05]

Under Rule 4901:1-39-04, there are detailed requirements about the content of the plan, including a requirement for inclusion of a plan prepared by an independent program evaluator to measure and verify energy savings and demand reductions and to conduct process and impact evaluations of each program. Specifically, subsection (C)(5)(l) requires that a utility's program portfolio plan contain a description of the Measurement & Verification (M&V) plan prepared by the independent program evaluator. Similarly, Rule 4901:1-39-05(C)(2)(b) requires a M&V report from the independent program evaluator to verify the energy savings and peak-demand reduction projections. This rule provides that "[u]pon commission order, the staff may publish guidelines for program measurement and verification." In Rule 4901:1-39-01(L), the independent program evaluator is the person or firm hired by the utility at the direction of the Commission Staff. AEP Ohio submits that these requirements are flawed.

As a threshold matter, a delay in the issuance of guidelines <u>will</u> hold up the filing of AEP Ohio's program portfolio plan. If the Commission had decided not to issue guidelines, AEP Ohio would proceed on that basis and there be would no additional delay. Because the rules seem to contemplate subsequent issuance of guidelines, however, that approach will cause additional uncertainty and delay. Moreover, there is an inherent and fundamental due process problem with providing that a utility's compliance with current statutory obligations will be measured by standards that will be promulgated at some future date. Ideally, the Commission would decide and promulgate, with clarity and specificity, the M&V guidelines now. To be practical and considering current time constraints, AEP Ohio recommends that the proposed rule provide that any M&V approach adhering to generally accepted industry standards, such as the 2001 International Performance Measurement and Verification Protocol (IPMVP) standards, will be deemed acceptable. If the Commission does not adopt any measurement and verification standards at this time or even give guidance as described above, it should, at a minimum, indicate that any Staff guidelines are not binding on the utilities or the Commission.

In addition, AEP Ohio emphasizes that development of M&V guidelines is of critical importance at this stage and recommends that the Commission ensure:

- M&V guidelines are developed very quickly in order for utilities to make a timely portfolio filing since a description has to be included in subsection 1-39-04(5)(C)(1).
- M&V guidelines are developed immediately so utilities ensure the program design and data collected will be sufficient for reporting purposes.
- M&V guidelines follow generally accepted industry standards.
- M&V guidelines are formulated so there is consistency across the board.

As referenced above, the independent program evaluator is hired by the electric utility but will work at the direction of the Commission Staff. The requirement that the utility pay for the M&V contractor yet not allow the utility to hire and direct said contractor will require the utility to, in essence, spend twice the cost to do effective evaluation. As the Commission recognized in its Order (p.6) in connection with administering DSM programs, SB 221 "places the responsibility of implementing programs on the electric utilities." Similarly, while AEP Ohio agrees that third-party M&V should be required, it remains the utility's responsibility to achieve compliance with the benchmarks.

To achieve accurate and cost effective results, it is necessary for the utility to work on a daily basis with its implementation contractors and M&V contractors to ensure accurate results. It is unnecessarily burdensome for the utility to have to go through staff to work with the Staff's M&V contractors as well on such an involved basis. Thus, it will be necessary for the utility to hire their own third-party M&V in addition to the contractor hired by staff. In other words, AEP Ohio will likely have to hire and pay both for its independent program evaluator and pay for the independent program evaluator that will operate under the Staff's direction. AEP Ohio submits that such an approach is inefficient and will unnecessarily drive up the cost of compliance that will be recovered from customers.

Rather than take that approach, the rules should be revised to require third-party evaluation administered by the utility with reporting transparency to its Collaborative as well as to the Commission. The Commission Staff could hire a third-party consultant paid for by the utility if determined necessary to review the results of the utility's evaluation contractor or could hire a third-party consultant to evaluate certain aspects of all the electric utilities. The consultant hired by staff can review the work of each utility's third-party evaluation contractor at much lower cost than the rules would require as written.

IV. The Commission should clarify "double counting measures" regarding the EE benchmarks. [Rule 4901:1-39-05]

Rule 4901:1-39-05(D) also addresses the "double counting" issues by providing that a utility shall not count in meeting any statutory benchmark the adoption of measures required to comply with energy performance standards set by law, including the Energy Independence and Security Act of 2007. Although this language is narrower than the original proposed rule, it still could operate to substantially and unnecessarily increase the cost of compliance with the Ohio benchmarks, especially if a national energy portfolio standard is imposed under federal law. The Commission did indicate in the context of discussing the alternative energy requirements that, if there is a national portfolio standard that is enacted under federal law, "it is not our intent to require an additional layer of compliance above any potential national renewable or advanced energy standard." (Order, pp. 29, 34). But the Commission did not make a similar indication with respect to federal energy efficiency or peak demand reduction mandates. The Commission should clarify that the "double counting" prohibition in Rule 4901:1-39-05(D) narrowly applies to standards set by law or regulation that create specific technical performance standards and do not apply to general mandates or benchmarks for energy efficiency and peak demand reduction like those contained in SB 221.

Rule 4901:1-39-05(D) states that utilities cannot count measures that are required to meet performance standards. As more federal energy efficiency legislation is being contemplated, there is a good chance that a program that has been approved and is concurrently being implemented when the legislation passes may technically fall into this category. Since the program may have been approved prior to the federal requirement, the Commission should include language that allows the utility to include the program's reduction in its EE benchmarks.

The Commission's Order (p. 20) states that "[w]e see no reason to credit electric utilities for benefits of measures that would have happened regardless of their efforts. Under the new rule, the replacement of incandescent lighting with compact fluorescent lighting program would count now, but not after such measures become required under the Energy Independent and Security Act of 2007." The unfortunate consequence of this position is that a legitimate cost-effective 10-year program approved and implemented today might be displaced by a subsequent enactment of federal law or regulation. This is through no fault of the utility and is based upon events subsequent to the program's design and implementation. In other words, it is unfair to consider the subsequent enactment of federal law or regulation as changing the meaning and effect of SB 221 as it was enacted in 2008. It is one thing to say that changing federal law and regulation might affect the evaluation and approval of a program at the time the program is proposed. But ratcheting up the meaning and effect of the current law (*i.e.*, approved programs under SB 221) based on the arbitrary and unknown future development of federal law and regulation violates due process, can operate to create a "hole" in the utility's compliance plan, unnecessarily drives the cost of compliance higher and is simply unfair. On rehearing, the Commission should provide that, while changing federal law and regulation might affect the evaluation and approval of a program at the time the program is proposed, the ongoing impacts of an approved program will continue to be counted or imputed during the course of the approved program – at least for the term of the approved portfolio plan.

Another "double counting" issue relates to the peak demand reduction attributes of renewable energy. In this regard, AEP Ohio agrees with the Commission that the energy associated with specific renewable generation cannot be simultaneously counted for both energy efficiency and alternative energy targets. However, the distinct demand reduction attributes of that renewable generation should be counted toward meeting AEP Ohio's peak demand reduction goal regardless of whether the energy is counted as energy efficiency or alternative energy. By analogy, where a CFL replaces an incandescent lamp, it is common practice to separately count the energy and demand attributes of the measure.

AEP Ohio understands that it is important to retain the ability to count energy efficiency or alternative energy in either, but not both, benchmark targets. But peak demand reduction benchmarks are a separate obligation and the peak demand reduction attributes of renewable generation should be counted separately from the energy efficiency attributes. For example, if the company (or one of its customers under a utility program or tariff) installs solar panels, the renewable energy being created during periods of sunshine will likely occur during the utility's peak demand period and will cause a peak demand reduction – in addition to producing renewable energy and associated RECs. In that situation, the utility should be able to count the RECs toward compliance with the alternative energy mandates and count the peak demand reduction associated with the renewable generation toward peak demand reduction mandates (assuming the tariff program or contract between the customer and utility exists to support attribution of the associated RECs and renewable generation to the utility).

V. The Commission erred by not amending the 2009 EE/PDR benchmark requirements based on the timing of the adopted rules and the significant unresolved issues.

Given that the Order was published in the second quarter of 2009 and the rules will not become effective until mid-2009, and that M&V guidelines, among other issues, have not been finalized, it may be impossible for utilities to reach the required 2009 EE goals. Although AEP Ohio is diligently pursuing energy efficiency, peak demand and alternative energy opportunities, the "devil is in the details" and the regulatory details remain unresolved. There are several material uncertainties that are only recently being tentatively resolved and/or remain unresolved, such as the use of interruptible capabilities to satisfy peak demand reduction mandates, the retail participation in wholesale demand response programs being offered by PJM in competition with AEP Ohio's efforts to marshal available demand response resources, and the unresolved issues concerning "double counting." Any one of these issues could have a significant impact on AEP Ohio's compliance plan for 2009. Accordingly, the Commission should acknowledge that the substantial uncertainty associated with the yet-to-be-finalized "rules of the road" is a matter that is beyond the utility's control for purposes of Sec. 4928.64(C)(1) and Sec. 4928.66(A)(2)(b), Ohio Rev. Code. Consequently, the Commission should amend the benchmarks for 2009 in recognition of this substantial uncertainty.

VI. The requirement that cost recovery not commence until after the program portfolio plan is approved "hardwires" regulatory lag into the rule and makes launching and running programs even more challenging. [Rule 4901:1-39-07]

Rule 4901:1-39-07(A) defers the ability to recover costs for S.B 221 mandates until "approval of" an electric utility's program portfolio plan. Yet, the Commission did not set a deadline for approving proposed portfolio plans in Rule 4901:1-39-04(E) and it is not clear when such approval would occur. There is no such statutory condition on the utility's ability to recover costs associated with these mandatory statutory obligations and AEP Ohio submits that there is no good reason to so limit a utility's ability to do so.

On the contrary, such a restriction unreasonably delays recovery of costs for mandatory obligations that have already commenced and hardwires regulatory lag into the process. As part of AEP Ohio's ESP proceeding, the Commission approved an EE/PDR Rider for recovery of compliance costs. Having the recovery vehicle in place and having incurred compliance costs already, there should be no reason that AEP Ohio cannot begin recovering costs from its customers. All costs that pass through the rider would be subject to audit and reconciliation, as well as prudence review if appropriate. There is no condition in the EE/PDR Rider that restricts the timing or ties cost recovery to approval of the program portfolio plan. As a related matter, neither the rules nor the Commission's Order specifies that the utility may collect carrying charges on the unrecovered costs during the indeterminate period of delay. Accordingly, the requirement that a utility's program portfolio plan be approved prior to commencement of cost recovery should be eliminated on rehearing. The Commission should also explicitly authorize carrying charges if it retains the hardwired regulatory lag approach.

AEP Ohio would also point out that there is a typographical error in the last sentence of 4901:1-39-07(A)(2), which references 4901:1-39-09 when it should reference 4901:1-39-08.

VII. Clarification should be provided on rehearing to expressly permit AEP Ohio's proposed approach of one-time payment (versus exemption from EE/PDR Rider) to mercantile customers that commit EE/PDR resources. [Rule 4901:1-39-08]

Rule 4901:1-39-08(B) provides that an electric utility and mercantile customer shall file a joint application for approval of a special arrangement under this rule "which may include a request for exemption from the cost recovery mechanism set forth in rule 4901:1-39-08." First, AEP Ohio notes that the reference to 4901:1-39-08 here is a typographical error as it should refer to 4901:1-39-07. On a more substantive level, AEP Ohio requests that the Commission clarify on rehearing that the remuneration to be provided by the utility to the mercantile customer in exchange for a commitment of resources is not limited to a rider exemption. Specifically, AEP Ohio proposes more flexible alternatives that are also permitted by the governing statute and are described below.

Sec. 4928.66(A)(2)(c), Ohio Rev. Code, enables the Commission to approve an exemption for mercantile customers from the cost recovery rider associated with EE/PDR compliance. Sec. 4928.66(A)(2)(d), Ohio Rev. Code, also provides that (A)(2)(c) "shall be applied to include facilitating efforts by a mercantile customer or group of those customers to offer customer-sited demand-response, energy efficiency, or peak demand reduction capabilities to the electric distribution utility as part of a reasonable arrangement submitted to the commission pursuant to section 4905.31 of the Revised Code." SB 221 also amended Sec. 4905.31(E), Ohio Rev. Code, to provide for a cost recovery device in conjunction with "any development and implementation of peak demand reduction and energy efficiency programs under section 4928.66 of the Revised Code" based on an application that is submitted "by the public utility or the mercantile customer or group of mercantile customers ..." Thus, the Commission has multiple and flexible regulatory tools to facilitate commitment of energy efficiency and demand response resources by mercantile customers and AEP Ohio recommends that the Commission fully preserve that flexibility through clarifications to Rule 4901:1-39-08 on rehearing.

The Commission has indicated that it will "review applications for exemption on a case-by-case basis" (Order p. 22). But AEP Ohio would like to ensure up front that the rules maximize flexibility and options, so as to minimize compliance costs, consistent with the governing statutes. AEP Ohio's proposal would allow customers to commit qualifying resources and choose from numerous flexible incentives for those resources. That approach would more appropriately encourage efficient use of mercantile resources and allow customers flexibility to choose a partial exemption, total exemption or receive payments for committed resources that enable compliance to an extent that is greater than their "fair share."

AEP Ohio's approach promotes consistency and fairness, while maximizing flexibility and ultimately minimizing compliance costs, as shown by the following options available to mercantile customers that commit resources:

<u>Proposed Option 1: Incentive Payment Based on Value of Committed Resource</u>

- Customer commits their energy efficiency and/or peak demand reduction projects to AEP Ohio
- One-time incentive payment made upon approval.
- Incentive payment based on a standard $/kWH and $/kW payment that is lower than the cost of the utility's own compliance options so that the incentive payment is automatically scaled to size and characteristics of the resource.

- The incentive payment is included in the utility's cost recovery mechanism along with all other compliance costs.

- Customer continues to pay the EE/PDR rider and can continue to participate in the utility's programs.

OR <u>Proposed Option 2: Exemption from Rider Based on Calculation of Resource Value</u>

- Customer commits its energy efficiency and peak demand reduction completed projects to AEP Ohio.

- Customer is exempted from EE/PDR rider for a period of time commensurate with total calculated incentive payment (based on the same standard $/kWH and $/kW method) and the expected rider charge for that period.

- Customer can not participate in any forward-looking programs during the time of exemption.

Although the special arrangements with each mercantile customer would be filed for case-by-case consideration, AEP Ohio would also maintain the standard incentive payment "rates" through a tariff filing that is periodically updated. This approach would greatly simplify the processing and administration resources associated with these mercantile arrangements (for both the utilities and the Commission) and would, thus, encourage greater participation and lower compliance costs. While AEP Ohio does not wish to impose its proposed approach on all utilities, it requests that the rules be clarified to permit its proposed approach.

Finally, AEP Ohio submits that a typographical error is contained in Rule 4901:1-39-08(B)(4), which refers to "subtracting the energy user" when it apparently intended to refer to "subtracting the energy use."

VIII. It is unreasonable and without statutory basis to prevent leftover RECs from green tariff offerings from being used for SB 221 benchmark compliance. [Rule 4901:1-40-01(M); Order, pp. 28-29]

The Commission's order indicated that, under a green tariff program, the associated RECs cannot be used for compliance since the utility is already fully compensated for the RECs (Order, pp. 28-29). This conclusion seems to presume that the utility would levy an additional charge when using the REC for compliance with SB 221's mandates. On the contrary, these unused RECs that are left over from prior voluntary green tariff initiatives are paid for and could be used at no additional cost to reduce the cost of compliance with SB 221 mandates. The Order's restriction serves no apparent purpose and the effect of the restriction is to raise the compliance costs that will be paid by all customers. Elsewhere in the Order the Commission recognizes the goal of keeping compliance costs down (*e.g.*, Order, p. 30), while the restriction against using left over green tariff RECs conflicts with that goal. This restriction should be eliminated on rehearing.

IX. It is unreasonable to require the annual renewable benchmarks to be based on Ohio resources and this should be amended or, at a minimum, should be waived for 2009 and 2010 and revisited for 2011. [Rule 4901:1-40-03]

Rule 4901:1-40-03(A)(2)(a) requires that half of the annual renewable energy resources shall be met through electricity generated by facilities within Ohio. This requirement is unreasonable and should be amended on rehearing or, at a minimum, should be waived for 2009 and 2010 and revisited for 2011. Sec. 4928.64(B)(3), Ohio Rev. Code, merely requires half of the renewable energy resources implemented by the utility to be met through facilities located in Ohio. The Commission's additional requirement that half of each year's interim benchmark requirements must be met through Ohio resources goes beyond the statutory requirement, fails to recognize the current lack of renewable energy generation resources in Ohio, unduly restricts flexibility for utilities and unnecessarily increases compliance costs to be borne by all customers.

AEP Ohio submits that the requirement should be amended to require that 6.25% of electricity sold starting in 2025 (*i.e.*, half of the renewable energy requirement to be generated by facilities within Ohio). This approach would maximize flexibility for compliance and recognize the current lack of renewable energy generation resources in Ohio, while satisfying the statutory directive to produce half of the required 12.5% renewable energy benchmark in 2025 and beyond using Ohio resources. By recognizing the current limitations on available renewable generation resources in Ohio and adopting a plain interpretation of the statutory requirement, this modified approach would also significantly reduce the cost of compliance that all customers will pay for.

Other AMP-Ohio's 7.4 MW four-turbine wind farm near Bowling Green Ohio, AEP Ohio is not aware of any commercial scale wind generation or biomass projects within the state that has received the necessary siting and permitting approvals, let alone financed, constructed and operational. Recently, there was an application filed under the OPSB's new rules for wind generation, though it is not certain when of if this first project will receive final OPSB approvals. Another large Ohio developer encountered a setback from the U.S. Fish & Wildlife Service even prior to submitting an application to the OPSB. We note that Ohio wind and solar projects are at a disadvantage vis-à-vis projects in neighboring states in terms of comparative personal property tax rates on renewable generation assets.

Although these challenges may be worked out and overcome in time, the fact remains that there is currently no commercial scale wind generation or biomass available in Ohio from which AEP Ohio and the other IOUs could acquire renewable generation or RECs in 2009 and 2010. This would mean that the "Ohio requirement" as written would have to be met entirely through solar and other renewable generation if it is retained for 2009 and 2010. In addition to being extremely expensive, such a requirement would also be impractical if not impossible to have online until the middle of 2010, at the earliest. Because the siting and construction process would take at least 18-24 months once it is initiated, the Commission at a minimum should waive the in-state requirement for 2009 and 2010 and subsequently revisiting that issue for 2011 (if the annual Ohio requirement is kept at all). Consistent with Sec. 4928.64(C), unavoidable noncompliance justifies a waiver for this time period as Ohio-based renewable generation resources are very limited.

X. The requirement that EDUs join the Climate Registry, especially given that the USEPA is developing a mandatory greenhouse gas reporting system, is burdensome for the utility and adds cost for reporting. [Rule 4901:1-41-03]

Rule 4901:1-40-03 requires an annual report (April 15) on an environmental control plan, including carbon dioxide control planning. The USEPA has proposed national greenhouse gas monitoring and reporting rules, eliminating the need for the Commission's rules. USEPA's proposed rule will require facilities emitting 25,000 metric tons or more per year of greenhouse gas to submit annual reports. AEP Ohio meets these criteria. Thus, under USEPA's rules AEP Ohio annually would report it greenhouse gas emissions to USEPA. Implementing the Commission's rules, prior to

USEPA finalizing its national greenhouse gas reporting rules, will, at a minimum, result in a duplicative reporting process burdensome to the regulated community. If the Commission decides to move forward with its rules despite their significant drawbacks, it should modify the rules.

First, the Commission should modify its definitions in Rule 4901:1-41-01. For example, climate registry, according to the rule, is the "international greenhouse gas measurement and reporting system, including accounting and verification measures, which provide voluntary or mandatory reporting requirements." Further, under Rule 4901:1-41-03(A), the Commission requires a person to become a participating member in the climate registry. But it is unclear whether the Commission is mandating that a person participate in "The Climate Registry," a nonprofit organization located in California, or any climate registry that meets its generic definition. Further, the Commission failed to explain or correct this ambiguity in its April 15, 2009 order. Hence, the Commission should modify its definition of "climate registry" to resolve the confusion.

Additionally, the Commission should replace the term "person," in Rule 4901:1-41-01 with the term "public utility" as defined in Sec. 4905.02, Ohio Rev. Code. In SB 221, the General Assembly granted the Commission the authority to, "adopt rules establishing greenhouse gas emission reporting requirements . . . and carbon dioxide control planning requirements for each electric generating facility that is . . . owned and operated by a public utility . . ." But the Commission's definition and use of the term "person" in Rule 4901:1-41 improperly applies the requirements to "an individual, corporation, business trust, association, estate, trust, or partnership or any officer, board, commission, department, division, or bureau of the state or a political subdivision of the state, or any other entity." This broad application of the rule exceeds the General Assembly's narrow grant of authority to the Commission. Therefore, the Commission should replace the term "person" with "public utility" to avoid unlawfully applying its greenhouse gas reporting and carbon dioxide control planning rules beyond its jurisdiction.

Second, the Commission should clarify in Rule 4901:1-41-02 that electric utilities are not required to report under multiple programs. Specifically, the Commission should unequivocally permit electric utilities to comply with USEPA's finalized greenhouse gas monitoring rule in lieu its rule. Such action will allow electric utilities to avoid costly duplicative reporting requirements under state and federal laws that would give out-of-state facilities a significant economic advantage.

In the same vein, the Commission should also explicitly state in Rule 4901:1-41-02 that the regulated community need not report information previously submitted to USEPA under existing state and federal regulations. Indeed, the Commission should strike any requirement to report criteria pollutants and limit reporting to carbon dioxide. Without these modifications, the Commission will force public utilities to duplicate the reporting they already perform under SOx, NOx, and particulate matter regulations. This procedure will be costly. Therefore, the Commission should limit the scope of its rule.

Third, the Commission should strike all requirements in Rule 4901:1-41-03 to submit an "environmental control plan." In SB 221, the General Assembly granted the Commission the authority to "adopt rules establishing . . . carbon dioxide control planning requirements . . ." Nowhere in the statute does the General Assembly give the Commission the power to require submission of an "environmental control plan, including carbon dioxide control planning." The Commission's use of this undefined term creates ambiguity and appears to require more extensive reporting than contemplated in the statute. Therefore, the Commission should strike all references to "environmental control plan."

XI. "Substantial Change" is Improperly Defined in a Manner Different Than That Term's Definition in Sec. 4935.04 (D) (3) (c) (i), Ohio Rev. Code. [Rule 4901:5-1-01 (L)[2]]

The definition of "substantial change" in §§4901:5-1-01 (L) (1) refers to energy "delivery." The statutory definition of "substantial change" in §4935.04 (D) (3) (c) (i), Ohio Rev. Code, refers to energy "consumption." Using the statutory language will avoid any confusion that would exist regarding the Commission's use of "delivery" rather than "consumption." This change should be made on rehearing.

XII. Rules 4901:5-1-04 and 4901:5-03-01 Improperly Delete the Statutory Reference to Substantial Change. [Rules 4901:5-1-04 and 4901:5-3-01]

In Paragraphs (A) and (B) in Rule 5-1-04 reference to the statutory definition of "substantial change" is deleted. Particularly since the rule in 4901:5-1-01 (L) defines that term differently than the statutory definition, the deletion of the statutory reference in this rule will create confusion as to which definition is controlling, assuming the Commission actually intended its definition to differ from the statutory definition. This same issue is presented in 4901:5-3-01 (A) which deletes reference to the statutory definition of "substantial change."

[2] The definition of "Electric Generating Facility" is in Paragraph (M). To maintain alphabetical order, this term should be designated as Paragraph (C) and the remaining definitions re-designated.

XIII. Rule 4901:5-5-02 (B) Unlawfully Proposes to Permit Changes to the LTFR Forms Without Complying With the Statutory Requirements for Rule Making. [Rule 4901:5-5-02 (B)]

This rule indicates that the forms, which have the effect of controlling the content of the LTFR, "may be changed without further commission entry...." Reporting persons are advised to check the Commission's web site to obtain the current forms before filing a LTFR.

On rehearing the Commission should modify this rule. As written, LTFR forms can be changed without a formal Commission rule making and without a requirement for input from those persons required to meet LTFR requirements. Changing the forms which are part of the rules is itself a modification of the LTFR rules. As such, the Commission must comply with statutory requirements, including the submission of proposed rule changes to the Joint Committee on Agency Rule Review (JCARR).[3] Beyond the statutory requirements with which the Commission must comply, it would be inappropriate to make changes to the LTFR forms without input from the persons required to provide the data sought by the forms. Reporting persons should have an opportunity to comment on the availability of additional data sought by new forms, the cost of gathering the information, and whether the purpose of the new information proposed to be included in the modified forms can be met in a more efficient, less costly manner.

Finally, even if the current version of this rule is not modified as suggested above, the Commission at least should provide that changes to the forms will not be made any later than December 31st prior to the next April 15th filing date. With this restriction,

[3] See §§111.15 (D) and (E) and 119.302, Ohio Rev. Code.

Reporting Persons can proceed with the preparation of the LTFR without concern that forms they complete might be changed prior to filing their LTFR.

XIV. Rule 4901:5-6 Unlawfully and Unreasonably Requires the Annual Filing of a Detailed Integrated Resource Plan (IRP) as Part of a Long-Term Forecast Report. Further, The Rule Would Require Information to be Filed as Part of the IRP Which Already Will Be Subject to Litigation Under Other Statutes and/or Rules. [Rule 4901:5-5-06]

The Commission's stated purpose for requiring that an IRP be filed each year by an electric utility with its LTFR is to enable the Commission "to make informed decisions dependent upon the status of Ohio's energy industries and markets." (Order, p. 42). The Commission also referred to its need "to develop an accurate view of Ohio's energy industries and markets, particularly in light of the efficiency and alternative energy requirements imposed by SB 221." (*Id.* at 43). The Commission believes that the "burden on Ohio utilities of filing annual resource plans, must be balanced against the need for timely review and adjustment to changes in how Ohioans produce and use, or do not use, energy." (*Id.*) Finally, the Commission relies on Sec. 4935.04 (C) (1), Ohio Rev, Code, which refers to a "*general description* of the resource plan," (emphasis added) as a basis for requiring the annual filing of a detailed IRP.

The Companies understand the Commission's interest in resource planning, particularly in light of the enactment of Sec. 4928.64 and Sec. 4928.66, Ohio Rev. Code. However, the LTFR filed pursuant to Sec. 4935.04 (C), Ohio Rev. Code, does not provide the legal authority for compelling the annual filing of an IRP, particularly one as detailed as the Commission has proposed. Moreover, requiring such a filing is likely to result in continuous litigation concerning the IRP that will not be completed for any given

IRP before the filing of the next IRP initiates a new round of litigation, year after year after year.

Regarding the legal authority under Sec. 4935.04 (C), Ohio Rev. Code, to require inclusion of an IRP as part of the LTFR, it is instructive to review the Commission's Finding and Order in Case No. 99-1614-EL-ORD, the rule making proceeding which removed the IRP filing requirements from the LTFR rules in effect prior to the passage of SB 3.[4] In that order, the Commission noted *"SB 3 removed generation resource information from the LTFR requirements,* but left in place all other requirements for filing data on distribution and transmission.... *The rules should be further amended to delete whole sections dealing with demand side management and integrated resource management."* (Finding and Order pp. 1, 2: emphasis added).

The Commission's observation that SB 3 removed generation resource information from the LTFR requirements refers to the definition of "major utility facility" in Sec. 4935.04 (A) (1), Ohio Rev. Code, deleting "electric generating plant and associated facilities designed for, or capable of, operation at a capacity of 50 megawatts or more." Consistent with that change, SB 3 also modified Sec. 4935.04 (C), Ohio Rev. Code. That provision required, and still requires, that persons owning or operating a major utility facility must file their LTFR. Prior to enactment of SB 3, an electric utility's LTFR had to include, among other items, "a range of projected loads and a projection of annual energy demand, anticipated generating capacity, and system seasonal peak demand for a twenty-year period." With the enactment of SB 3, this requirement was eliminated.

[4] *In the Matter of the Commission's Promulgation of Amendments to Rules for Long-Term Forecast Reports Pursuant to Chapter 4935.04, Revised Code,* Finding and Order dated April 6, 2000.

Neither of these SB 3 statutory modifications were reinstated by SB 221. Since, the LTFR statutory structure created by SB 3, and relied upon by the Commission for dropping the IRP rules from the broader LTFR rules, still is in place, it stands to reason that the Commission's order in this proceeding directly conflicts with its proper order in the prior LTFR rule making proceeding.

Even if the Commission's authority under some other statute did extend to requiring the submission of an IRP by an electric utility, the Commission should refrain from requiring that the IRP be filed, rather than submitted to the Commission for its Staff's analysis and recommendations. The IRP could be made available to interested parties so that those that wish to conduct their own analysis and make their own recommendations to the Commission and/or the electric utility can do so.

A filing requirement, however, will most likely engender an extensive and extended discovery process, followed by a hearing and ultimately a Commission decision, just as the electric utility is preparing its next IRP.[5] The continuous process will create significant burdens on the electric utility's personnel who are responsible for integrated resource planning. This is particularly true if the IRP has to be filed every year. Given an annual filing requirement, the personnel responsible for developing and continuously refining the Companies' IRP will be faced with devoting too much time to litigating the IRP instead of being actually engaged in the planning process. When this burden is balanced with the Commission's desire for IRP information, and the LTFR statutory reference to a *general description* of the resource plan, the Companies request

[5] Discovery the Companies typically receive asks questions about every assumption inherent in a Company document, and every document supporting or related to each assumption. The Companies realistically expect that if an IRP is filed in a formal proceeding some parties' appetite for discovery will be unquenchable.

the Commission to modify on rehearing the filing requirement and permit the submission of an IRP in a process that does not lead to litigation.

A final reason for not placing an IRP in a litigation context is that such litigation will duplicate other formal proceedings involving information required to be in the IRP. For instance, Rule 4901:5-5-06 (A) (4) requires the submission of environmental data that would have been part of an electric utility's Electric Security Plan under Sec. 4928.143 (B) (2) (b) and/or (B) (2) (c). Rule 4901:5-5-06 (D) (2) (b) requires a description of fuel procurement policies and procedures, fuel requirements, geographic source of fuel supply and percentage of fuel supply under contract. Requiring the submission of this information as part of the LTFR process will lead to the relitigation of issues that will be the subject of Fuel Adjustment Clause proceedings. Finally, Rule 4901:5-5-06 (D) (5) (b) requires a discussion of the electric utility's demand-side management programs, based at least on the Total Resource Cost test being used to determine cost effectiveness of those programs. This requirement will result in the relitigation of the electric utility's program portfolio plan that is required to be filed pursuant to Rule 4901:1-39-04 (A).

Based on this discussion, the Commission on rehearing should delete the detailed IRP rules from the LTFR process. The rules go far beyond the general description of the resource plan contemplated in Sec. 4935.04 (C) (1), Ohio Rev. Code. To the extent the Commission develops some other context for the filing of an annual IRP in a docketed proceeding it should remove those sections which will result in the inefficient relitigation of issues year after year.

CONCLUSION

For the foregoing reasons, the Commission should grant rehearing or clarification as requested by the Companies.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of Columbus Southern Power Company's and Ohio Power Company's Application for Rehearing was served by U.S. Mail upon counsel identified below for all parties of record this 15th day of May, 2009.

Steven T. Nourse