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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 Amendment of Chapters 4901:5-1, 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

INDUSTRIAL ENERGY USERS-OHIO'S APPLICATION FOR REHEARING AND MEMORANDUM IN SUPPORT

Samuel C. Randazzo (Counsel of Record)
Lisa G. McAlister
Joseph M. Clark
MCNEES WALLACE & NURICK LLC
21 East State Street, 17th Floor
Columbus, OH 43215-4228
Telephone: (614) 469-8000
Telecopier: (614) 469-4653
sam@mwncmh.com
lmcalister@mwncmh.com
jclark@mwncmh.com

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Attorneys for Industrial Energy Users-Ohio

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APPLICATION FOR REHEARING OF INDUSTRIAL ENERGY USERS-OHIO

Pursuant to Section 4903.10, Revised Code, and Rule 4901-1-35, Ohio Administrative Code ("O.A.C."), Industrial Energy Users-Ohio ("IEU-Ohio")[1] submits this Application for Rehearing of the Opinion and Order ("Opinion and Order") issued by the Public Utilities Commission of Ohio ("PUCO" or "Commission") on April 15, 2009 adopting rules to implement the energy efficiency/peak demand reduction ("EE/PDR") benchmarks and alternative energy portfolio standard ("AEPS") requirements found in Amended Substitute Senate Bill 221 ("SB 221"). As explained in more detail in the attached Memorandum in Support, the Commission's Opinion and Order in this case is unreasonable and unlawful for, among many others, the following reasons:

A. **The Rules adopted by the Commission violate the Due Process Clause of the Fourteenth Amendment to the United States Constitution by establishing requirements that, if not fulfilled, may lead to financial and criminal penalties and which either forbid or**

[1] IEU-Ohio is a membership organization representing commercial and industrial customers. It is also an Electric Services Company according to Section 4928.01(A)(9), Revised Code. Thus, IEU-Ohio's rehearing is designed not only to protect the interests of its members (many of which are "mercantile customers") but also its interest in meeting the needs of its members through the use of its status as a Competitive Retail Electric Service ("CRES") provider.

require the doing of an act in terms so vague that persons of common intelligence must necessarily guess at their meaning.

B. The provisions in Rule 4901:1-39-05(D), O.A.C., that exclude measures producing results that improve energy efficiency, reduce peak demand or otherwise increase utilization of alternative energy resources for purposes of measuring compliance with the portfolio requirements because they may also comply with other energy performance standards set by law, regulation, or an applicable building code are unreasonable and unlawful.

C. The Commission's failure to provide an opportunity for parties to file comments on the Staff Report and recommendations regarding an EDU's EE/PDR benchmark compliance is unlawful and unreasonable.

D. The provisions of Rule 4901:1-39-08(B), O.A.C., that limit mercantile customers' energy savings and peak demand reductions to the difference between actual energy use and peak demand and the estimated energy use and peak demand that would have occurred had the customer used industry standard new equipment or practices are unlawful and unreasonable.

E. The provisions in Rule 4901:1-39-08(B), O.A.C., that preclude counting a mercantile customer's on-site generation as energy savings or reductions in peak demand are unreasonable and unlawful.

F. The provisions in Rule 4901:1-39-08(B), O.A.C., that require an EDU's annual EE/PDR benchmark report to recognize the diminishing effects over time of evolving technologies are unlawful or unreasonable.

G. The requirement in Rule 4901:1-39-08, O.A.C., for a mercantile customer to make a joint application with an EDU for approval of a reasonable arrangement is unlawful.

H. The definitions adopted by the Commission in Rule 4901:1-40-01, O.A.C., are unlawful or unreasonable.

I. The prohibition on "double counting" in Rule 4901:1-40-04(C), O.A.C., is unreasonable and unlawful.

J. The limitations in Rule 4901:1-40-04, O.A.C., on the eligibility of RECs to be used for compliance purposes are unlawful and unreasonable.

1. **The restrictions in Rule 4901:1-40-04(D), O.A.C., placed on the use of renewable energy credits ("RECs") to meet the renewable energy resource benchmarks are unlawful and unreasonable.**

2. **The Commission's failure to provide a system of registering RECs by specifying which generally available registries shall be used for such purpose in accordance with Section 4928.65, Revised Code, is unreasonable and unlawful.**

3. **The requirement that a REC remain fully aggregated to apply towards the renewable energy resource benchmarks as well as the prohibition of counting RECs associated with electricity generated before July 31, 2008 towards the renewable energy resource benchmarks are unlawful and unreasonable.**

4. **The requirement that an entity seeking resource qualification to apply for certification of its resources or technologies as well as withholding judgment as to whether a certified resource will count towards compliance with the benchmarks is unlawful and unreasonable.**

5. **The Commission's failure to explicitly provide for the creation of Ohio RECs that can be registered with the REC registry chosen by the Commission is unlawful and unreasonable.**

K. **Rule 4901:1-40-07, O.A.C.'s, exclusion of costs in an unavoidable surcharge for construction or environmental expenditures of generation resources from the respective renewable energy and advanced energy cost caps is unlawful.**

L. **The establishment of separate cost caps for Sections 4928.64 and 4928.66, Revised Code, pursuant to Rules 4901:1-40-07(A) and (B), O.A.C., is unreasonable and unlawful.**

M. **The requirements of Rule 4901:1-41-03, O.A.C., that all persons owning or operating an electric generating facility in Ohio to become a participating member in the climate registry, report greenhouse gas emissions, and file environmental control plans with the Commission are unlawful.**

N. **Given the timing of the Commission's issuance of this bundle of Rules, the significant legal and substantive problems that are raised by the Rules, and the Commission's acknowledgement that the standards need additional development and consideration, the Commission acted unreasonably and unlawfully by not granting a**

blanket waiver of the 2009 compliance requirements on *force majeure* grounds.

IEU-Ohio requests that the Commission grant this Application for Rehearing. IEU-Ohio also urges the Commission to grant, on its own motion, a blanket waiver of the 2009 compliance requirements on *force majeure* grounds.

Respectfully submitted,

Samuel C. Randazzo (Counsel of Record)
Lisa G. McAlister
Joseph M. Clark
McNees Wallace & Nurick LLC
21 East State Street, 17TH Floor
Columbus, OH 43215
Telephone: (614) 469-8000
Telecopier: (614) 469-4653
sam@mwncmh.com
lmcalister@mwncmh.com
jclark@mwncmh.com

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MEMORANDUM IN SUPPORT

I. INTRODUCTION

On August 20, 2008, the Commission issued proposed rules in this docket for comments. Extensive initial and reply comments were filed on September 9, 2008 and September 26, 2008, respectively, by interested parties. Despite recent indications that the process for developing rules could be improved through the use of informal workshops, collaboratives or other forums rather than a continuous rulemaking proceeding,[2] the Commission has held no workshops or other informal meetings to facilitate issue identification and resolution by stakeholders. On April 15 2009, the Commission issued its Opinion and Order that adopted the Rules that are the subject of this rehearing request.

As acknowledged by the Commission, the adopted Rules differ greatly from the rules that were proposed by the Commission's Staff ("Staff"); proposed rules which

[2] Opinion and Order at 4.

many parties previously addressed extensively in their comments.[3] The substantial differences between the Staff's proposed rules and the adopted Rules mean that stakeholders like IEU-Ohio are essentially commenting on a brand new set of rules but doing so through the rehearing process, which is not designed for this purpose.

The Commission should promptly act on this request for rehearing and revise the adopted Rules so that they comply with the letter and spirit of SB 221 and the United States Constitution. While IEU-Ohio recognizes the strain on resources caused by the ESP cases, rulemaking cases and other proceedings simultaneously, the delay in adopting rules has already put stakeholders like mercantile customers, electric distribution utilities ("EDUs") and Electric Services Companies ("ESCs") behind the regulatory version of proverbial eight ball.[4] It is now May 2009, about one year after SB 221 was signed into law by Governor Strickland. The Commission's Rules establishing parameters around compliance with SB 221's portfolio requirements are, at this juncture, neither fixed, known, nor measurable. Instead, in many instances, they are both unreasonable and unlawful. Nonetheless, EDUs and ESCs are stuck with a "Catch 221" because they must comply with statutory portfolio requirements established by the General Assembly for 2009.

IEU-Ohio noted in both its initial and reply comments that the public interest would be well served by adopting rules that are flexible, especially since the rules and

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[3] Opinion and Order at 5. ("We agree that a rewrite of this chapter is necessary.")

[4] IEU-Ohio is compelled to remind the Commission that stakeholders like IEU-Ohio participate in numerous Commission proceedings that all take time and cost money. While IEU-Ohio has been commenting on three different sets of rules in various stages of completeness, IEU-Ohio has been actively participating in proceedings associated with the implementation of Section 4928.142 and 4928.143, Revised Code. The work associated with the implementation of SB 221 has been difficult, stressful and resource (human and other) intensive. And, as the Commission well knows, conditions in the general economy have added new challenges to an agenda that was already overflowing.

compliance with the SB 221 mandates are new to all parties. In fact, the Commission stated that its "... focus in this proceeding is the adoption of a flexible framework that meets the statutory obligations ...". Unfortunately, the Rules attached to the Opinion and Order bundle rigid prohibitions that unlawfully or unreasonably preclude compliance opportunities with unlawfully vague guidance on what actions might be taken to comply with the portfolio requirements of SB 221.[5]

The result is a powerful barrier to any serious effort to implement a law that was designed to, in part, reduce the energy intensity of Ohio's economy while establishing a better legal framework for integrating new technologies and customer-sited capabilities into Ohio's energy portfolio. And the process adopted by the Commission to periodically convey the proposed or adopted content of the Rules in installments results in a piecemeal distribution of unlawful and unreasonable rules with no regard for the near term obligations that SB 221 places on EDUs and ESCs or the potential consequences for failing to meet such obligations.

At this late date, in this larger context and beyond the Rules being both unreasonable and unlawful, the Commission's latest action in this proceeding indicates that the Commission is, over time, drifting further away from a practical and balanced set of rules and that Ohio is squandering the opportunity to capture the value that might otherwise come from a more practical implementation of the portfolio requirements in SB 221 that recognizes both the current economic realities and the potential long-term effects and opportunities created by the delegation of authority by the General Assembly. For example, many of Ohio's businesses have employees who, in the current downturn, might be available to help install energy efficiency measures, the cost

[5] Opinion and Order at 4.

of which might be rationalized based a system that clearly defines how and to what extent the customer-sited capabilities of mercantile customers can be harnessed to meet the portfolio requirements. Instead of taking advantage of this "opportunity", these resources are put on the sidelines while stakeholders attempt to reform, through their comments and rehearing applications, rules that have become progressively disconnected from SB 221 and reality over time.

IEU-Ohio understands well that the Commission has been under pressure to get its SB 221 tasks completed. In many cases, the Commission has taken more time than it might have hoped to complete certain tasks. But the portfolio requirements in SB 221 are not part of a two or three-year rate plan; they set in motion a long-term commitment that must be properly fit to the public interest from the inception. IEU-Ohio urges the Commission to take the time to make sure that its Rules comply with and complement the letter and spirit of SB 221 even if it means that further time must pass before implementation can begin.

II. ASSIGNMENTS OF ERROR

A. The Rules adopted by the Commission violate the Due Process Clause of the Fourteenth Amendment to the United States Constitution by establishing requirements that, if not fulfilled, may lead to financial and criminal penalties and which either forbid or require the doing of an act in terms so vague that persons of common intelligence must necessarily guess at their meaning.

While the specific deficiencies of the Rules are discussed in great detail below, generally and as highlighted by specific examples, Rules adopted by the Commission offend the Constitutional prohibitions against vagueness.

Pursuant to the Due Process Clause of the Fourteenth Amendment to the United States Constitution, a criminal statute is unconstitutional if it "... either forbids or

requires the doing of an act in terms so vague that [persons] of common intelligence must necessarily guess at its meaning ...." *Connally v. General Constr. Co.*, 269 U.S. 385, 391, 46 S.Ct. 126, 127, 70 L.Ed. 322 (1926). The concept of unconstitutional vagueness is derived from a basic notion of fairness; each person must be given fair warning before being held culpable for conduct deemed to be criminal. *Colten v. Kentucky*, 407 U.S. 104, 110, 92 S.Ct. 1953, 1957, 32 L.Ed.2d 584 (1972); *Grayned v. City of Rockford*, 408 U.S. 104, 108, 92 S.Ct. 2294, 2298-99, 33 L.Ed.2d 222 (1972). A statute is void when it is vague either as to what persons fall within the scope of the statute, what conduct is forbidden, or what punishment may be imposed. A statute meets the constitutional standard of certainty if its language conveys a sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices. *United States v. Wise*, 550 F.2d 1180, 1186 (9th Cir.), cert. denied, 434 U.S. 929, 98 S.Ct. 416, 54 L.Ed.2d 290 (1977). Principles of criminal law are relevant here since Sections 4903.25 and 4903.99, Revised Code, make failure to comply with a Commission order or direction a fourth degree felony. The wording of the Rules adopted by the Commission leave utilities and customers uncertain to such a degree that the Rules amount to a standardless trap.

For example, Rule 4901:1-39-05(O), O.A.C., which prohibits electric utilities from counting any measures that are required to comply with energy performance standards set by law or regulation, will be, in reality, impossible to monitor, track and measure and will require the Commission to treat identical measures differently. If a measure counts towards compliance today, the Commission will need to favorably entertain requests to recover the costs associated with funding or underwriting the costs of the measure. For

example, the Commission will need to address cost recovery for programs to distribute compact fluorescent bulbs to its customers, the results of which, according to the Rule, will not pass the compliance test once provisions of the Energy Independence and Security Act of 2007 become effective. So the Rule sets up a system where compliance and the cost of compliance are recognized initially but then the compliance system invented by the Commission blinds itself to the reality that "energy efficiency" has been achieved.

Knowing today that that the Rule will cause the Energy Independence and Security Act of 2007 to transform a compliant measure today into a future noncompliant measure, EDUs and ESCs will need to forecast and plan based on estimates of how quickly customers will comply with the law. The Commission will, likewise, be required to reduce the baseline used to measure compliance by the effect of measures that are required by the Energy Independence and Security Act of 2007, other laws or regulations. Otherwise, the Commission's compliance system will effectively drive up the percentage benchmarks used to measure compliance in ways that make it impossible for EDUs and ESCs to know how they might comply with the portfolio requirements.

By the way, the Energy Independence and Security Act of 2007 includes an entire Title mandating increased efficiencies for furnaces, heat pumps, air conditioners, and home appliances. Under the Rule's implied logic, as customers replace the existing stock of these types of devices, the effect of these measures will not be counted for purposes of satisfying the portfolio requirements.

The Commission must rectify the Constitutional problems created by all of the rules that are so vague that their meanings cannot reasonably be determined.

B. The provisions in Rule 4901:1-39-05(D), O.A.C., that exclude measures producing results that improve energy efficiency, reduce peak demand or otherwise increase utilization of alternative energy resources for purposes of measuring compliance with the portfolio requirements because they may also comply with other energy performance standards set by law, regulation, or an applicable building code is unreasonable and unlawful.

Rule 4901:1-39-05(D), O.A.C., excludes from the portfolio compliance measurement process any measures that are required by other laws, regulations or applicable building codes. This provision is unlawful inasmuch as this restriction exceeds the authority delegated to the Commission.

"Energy efficiency" "means reducing the consumption of energy while maintaining or improving the end-use customer's existing level of functionality, or while maintaining or improving the utility system functionality".[6] SB 221 does not permit the Commission to make the results of certain types of activities that produce energy efficiency, peak demand reduction or facilitate utilization of alternative energy resources ineligible for compliance with the portfolio requirements. As a creature of statute, the Commission may only exercise that jurisdiction conferred upon it by statute.[7] Accordingly, Rule 4901:1-39-05(D), O.A.C., is unlawful.

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[6] Section 4901:1-39-01(J), O.A.C. At page 10 of the Opinion and Order, the Commission stated that this definition is based on an "... intuitive, common sense understanding among most parties ...". The definition of "measure" reflects a similar common sense spirit: 'Measure' "means any material, device, technology, operational practice, or educational program that makes it possible to deliver a comparable level and quality of end-use energy service while using less energy or less capacity than would otherwise be required." This Rule is also unreasonable in light of the adopted definition of "measure."

[7] *Time Warner AxS v. Pub. Util. Comm.*, 75 Ohio St.3d 229, 234 (1999).

Moreover, the practical effects of this Rule are unreasonable at best. For example, in the Opinion and Order, the Commission acknowledges that, under the new Rule, the replacement of incandescent lighting with compact florescent lighting would count now for compliance purposes, but not after such measures become required under the Energy Independence and Security Act of 2007.[8] The logical but illegal and unreasonable implication of this regulatory creation is that an action that today reduces "... consumption of energy while maintaining or improving the end-use customer's existing level of functionality, or while maintaining or improving the utility system functionality"[9] will no longer meet the definition of energy efficiency if the action is, at some point in the future, compelled by operation of some law or regulation. If the functional consequence of an action produces energy efficiency today, the Commission cannot, in the future and without additional authority from the General Assembly, elect to ignore the functional consequence for purposes of measuring compliance simply because the action might become involuntary or be compelled at some time in the future by some other "regulator."

As presently written, this Rule unlawfully, unreasonably and arbitrarily diminishes the value of energy efficiency actions at a time when the Commission should be doing just the opposite. The Commission should remove this provision from Rule 4901:1-39-05 inasmuch as it is unlawful and unreasonable.[10]

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[8] Opinion and Order at 20.

[9] Rule 4901:1-39-01(J), O.A.C.

[10] If the Commission's true concern is whether utility funding of, for example, compact fluorescent bulbs is cost justified after provisions of the Energy Independence and Security Act of 2007 become effective, these concerns can be addressed by other means.

C. The Commission's failure to provide an opportunity for parties to file comments on the Staff Report and recommendations regarding an EDU's EE/PDR benchmark compliance is unlawful and unreasonable.

Rule 4901:1-39-06, O.A.C., provides an opportunity for parties to file comments on the annual EE/PDR benchmark report submitted by each EDU. The Staff, after reviewing interested party comments, is required to file a report with its findings and recommendations regarding program implementation and compliance with the applicable benchmarks ("Staff Report"). The Staff Report may include recommended remedial action (if the EDU has not met either of its respective EE/PDR benchmarks) as well as recommended modifications to a program within the EDU's portfolio plan. The Commission will then either adopt, or modify and adopt, Staff's findings and recommendations and will use the Staff Report as the annual verification report required under Section 4928.66(B), Revised Code.

The adopted rule is unreasonable inasmuch as it provides no opportunity for parties to file comments on the Staff Report. Comments should be permitted since the Commission will utilize Staff's recommendations and findings (as modified by the Commission) as the annual verification report required by Section 4928.66(B), Revised Code. The initial opportunity for comments is important and appreciated. However, an additional opportunity for comments on the Staff's findings and recommendations is even more important given that Staff may ultimately recommend sanctions and/or modifications to an EDU's EE/PDR programs. Without this comment opportunity, no party will have weighed in on sanctions or program modifications recommended by Staff before the Commission makes its decision. Due process considerations demand that all parties should be given at least one opportunity to address another party's position.

D. The provisions of Rule 4901:1-39-08(B), O.A.C., that limit mercantile customers' energy savings and peak demand reductions to the difference between actual energy use and peak demand and the estimated energy use and peak demand that would have occurred had the customer used industry standard new equipment or practices is unlawful and unreasonable.

Rule 4901:1-39-08(B)(4), O.A.C., identifies how a mercantile customer's EE/PDR savings will be measured when the mercantile customer dedicates its customer-sited capabilities for integration into an EDU's EE/PDR programs. The Rule specifies that energy savings and peak demand reductions will be calculated by "subtracting the energy user [sic] 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." As drafted, the Rule specifies that a customer can only qualify energy savings and peak demand reductions achieved as a result of *exceeding* the energy savings and peak demand reductions attainable through the installation of the best available technology ("BAT").[11] In other words, the compliance measurement process invented in this Rule will require a hypothetical BAT analysis for each energy end-use of a mercantile customer, a hypothetical model to estimate the energy required by the BAT falling out of the BAT analysis, and a determination of what the hypothetical efficiency might have been had the Commission-defined BAT been utilized. Since it is reasonable to expect that the definition of BAT will change over time, the Rule also establishes a moving target for purposes of performing the hypothetical analysis. Since the Commission is not an expert in the end-use technologies employed or employable by mercantile customers, it is likely that BAT

[11] Opinion and Order at 24.

determinations will be left to be resolved on a case-by-case basis leading to further confusion about what, if any, energy efficiency actions might be undertaken with confidence that the results might actually be counted for compliance purposes.[12]

Restricting integration of mercantile customer energy savings and peak reductions to those above and beyond what can be achieved through installation of industry standard new equipment is unlawful and unreasonable. The adopted rule is contrary to SB 221 and eviscerates the provisions of SB 221 regarding the integration of mercantile customer-sited resources ("whether new or existing")[13] into EE/PDR benchmark achievement efforts.

Section 4928.66(A)(2)(c), Revised Code, compels the PUCO to count in EE/PDR reductions "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). As a practical matter, the Rule would foreclose most, if not all, opportunities to pursue an exemption.

Additionally, Section 4928.66(A)(2)(d), Revised Code, directs the PUCO to apply the compliance section of the law in such a manner as 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." (emphasis added). The Commission's adopted Rule does not facilitate mercantile customer-sited capabilities in

[12] For this reason alone, this Rule violates the Constitutional principles discussed in paragraph (A) and should be removed.

[13] Section, 4928.64(A)(1), Revised Code.

reasonable arrangements under Section 4905.31, Revised Code. Instead, the Commission's adopted Rule essentially bars integration of mercantile customer-sited capabilities in EDU EE/PDR programs through reasonable arrangements under Section 4905.31, Revised Code, by creating a standard that is impossible to meet.

Only counting efficiencies or peak demand reductions that are above and beyond what could be achieved through installing hypothetical BAT also unfairly discriminates against utilization of mercantile customer-sited capabilities as there are no similar provisions included in the Rules that prohibit EDUs from offering programs or counting efficiencies achieved by residential customers replacing old appliances or otherwise taking steps that improve efficiencies. The Rules provide no substantive explanation why the very same types of improvements made by mercantile customers as made by residential customers do not count towards an EDU's EE/PDR benchmarks. There is no analytical or practical basis for this Rule and it is (besides being unlawful) unreasonable.

Finally, as the Commission establishes or adopts rules that augment the mathematical calculation that must be performed to measure compliance with the percentage-based benchmarks, it is effectively changing the statutory benchmarks. The Commission has no authority to change the percentage benchmarks. Even if the Commission had the authority to inject a hypothetical determination into the mathematical model used to measure compliance, fundamental fairness requires that the hypothetical analysis be used symmetrically to define both the numerator and denominator. Otherwise, the Commission is, in substance, changing the law and doing so in ways that produce real prejudice, not just hypothetical consequences.

E. The provisions in Rule 4901:1-39-08(B), O.A.C., that preclude counting a mercantile customer's on-site generation as energy savings or reductions in peak demand are unreasonable and unlawful.

Similarly, the language in Rule 4901:1-39-08(B)(4), O.A.C., that forbids counting a mercantile customer's on-site generation as energy savings or reductions in peak demand is also unlawful and unreasonable. Rule 4901:1-39-08(B)(4), O.A.C., states that "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 prohibition amounts to an unlawful (and unwise) modification of SB 221. This provision is also directly contrary to Section 4928.64(A)(1), Revised Code, which declares that mercantile customer-sited renewable energy resources and advanced energy resources that are dedicated to an EDU's EE/PDR programs qualify as an alternative energy resource.

Section 4928.01(A)(34)(b), Revised Code, defines an "advanced energy resource" to include "[a]ny distributed generation system consisting of customer cogeneration of electricity and thermal output simultaneously, primarily to meet the energy needs of the customer's facilities." Section 4928.01(A)(35), Revised Code, defines a "renewable energy resource" to include a "distributed generation system used by a customer to generate electricity from any such energy." SB 221 specifically included modifications to Section 4928.01, Revised Code, so that the Commission is required to "[e]ncourage implementation of distributed generation across customer classes ..."[14] Thus, the Rule's prohibition against counting a mercantile customer's on-

[14] Section 4928.02(K), Revised Code.

site generation as energy savings or reductions in peak demand, even when committed to an EDU by a mercantile customer, is a clear disregard for the law.

As written, the Commission's Rule permits an EDU to integrate a mercantile customer's renewable or advanced energy resources into its portfolio, but the EDU may not count any energy use savings or peak demand reductions stemming from those committed resources towards its benchmark compliance. Yet, Section 4928.64(A), Revised Code, defines an alternative energy resource to include any customer-sited resource if, among other things, it: improves the relationship between real and reactive power; makes efficient use of waste heat or other thermal capabilities; involves a storage technology that gives a mercantile customer more flexibility to modify its demand or load and usage characteristics; is electric generating equipment that uses an advanced energy resource or renewable resource; or, "... can be utilized effectively as part of any advanced energy resource plan of an electric distribution utility and would otherwise qualify as an alternative energy resource if it were utilized directly by an electric distribution utility."[15] The adopted Rule violates the law and the Commission must remove it from the Rules.

F. The provisions in Rule 4901:1-39-08(B), O.A.C., that require an EDU's annual EE/PDR benchmark report to recognize the diminishing effects over time of evolving technologies are unlawful or unreasonable.

Rule 4901:1-39-08(B)(4)(b), O.A.C., suggests that in quantifying the energy savings or peak demand reductions of mercantile customer-sited projects before 2009 for baseline calculation purposes, the annual report must recognize that projects may have diminishing effects over time as technology evolves or equipment degrades.

[15] Section 4928(A)(1)(e), Revised Code.

Requiring an EDU's annual EE/PDR benchmark report to recognize (through yet another hypothetical analysis) the diminishing effects over time of evolving technologies or equipment degradation is unlawful and unreasonable. SB 221 contains no provision that permits such a diminution of efficiency savings over time. Additionally, the Rule is unreasonable inasmuch as it arbitrarily presumes diminishing returns and omits any specification on how this alleged degradation is to be derived.

G. The requirement in Rule 4901:1-39-08, O.A.C., for a mercantile customer to make a joint application with an EDU for approval of a reasonable arrangement is unlawful.

Paragraph (B) of Rule 4901:1-38-08, O.A.C., requires an electric utility and mercantile customer to file joint applications for approval of special arrangements under this Rule and notes that such special arrangement may include a request for an exemption from the cost recovery mechanism by which EDUs recoup their costs for compliance with the EE/PDR benchmarks.[16] As the Commission cannot require a mercantile customer to make a joint application with an EDU for approval of a reasonable arrangement, this Rule is unlawful. SB 221 does not require a joint application for approval of a special arrangement in order to obtain an exemption from an EE/PDR cost recovery rider. In fact, the section of the law regarding reasonable arrangement applications was changed to specifically permit mercantile customers to bring reasonable arrangements before the Commission on their own. The joint application requirement is unlawful inasmuch as it is directly contrary to Section 4905.31, Revised Code, as well as the public policy decision made by the legislature to permit reasonable arrangement applications by mercantile customers on their own.

[16] The reference to the cost recovery mechanism rule contained within this Rule should cite 4901:1-38-07, not 4901:1-38-08.

Additionally, Rule 4901:1-39-08(B), O.A.C., appears to set up a requirement that mercantile customer commitments of customer-sited capabilities occur only through a reasonable arrangement that must be submitted to and approved by the Commission while Rule 4901:1-39-08(A) says that reasonable arrangements are a permissive means.[17] While the Commission will need to approve requests for exemptions from the portfolio cost recovery mechanism, there is nothing in SB 221 that requires customer-sited capabilities to be committed to an EDU through a reasonable arrangement approved by the Commission. A reasonable arrangement may be one of the means of committing customer-sited capabilities to an EDU, but it is certainly only one of the means. To the extent that the Commission requires such commitments to occur through a reasonable arrangement, it is setting up a process that will require formal action by the Commission before any commitment can be enabled.

Finally, IEU-Ohio urges the Commission to reevaluate Rule 4901:1-39-08(B), O.A.C., and its requirements related to the content of a report that an EDU must file per the Rule. In view of the other more general reporting and planning requirements in the adopted Rules, it is not clear why it is necessary to have additional reports associated with customer-sited capabilities. Also, the required detail and scope of the annual report required by this Rule will make it difficult to avoid disclosing customer-specific information that may be competitively sensitive, confidential, or proprietary. Any rule ultimately adopted in this area should make it clear that no public reporting obligation established by the Commission shall require an EDU or any other party to disclose information that is competitively sensitive, confidential, proprietary, subject to a

[17] "A mercantile customer may enter into a special arrangement with an electric utility ..." Rule 4901:1-39-08, O.A.C. (emphasis added).

confidentiality agreement or otherwise protected by law or the Commission's regulations.

H. The definitions adopted by the Commission in Rule 4901:1-40-01, O.A.C., are unlawful or unreasonable.

Rule 4901:1-40-01(U), O.A.C., defines "geothermal energy" as "hot water or steam extracted from geothermal reservoirs in the earth's crust and used for electricity generation." However, harvesting geothermal energy involves more than the extraction of hot water or steam from the earth's crust. In fact, in Ohio, geothermal energy rarely involves the extraction of hot water or steam. Geothermal energy is also not exclusively used to generate electricity. The definition of "geothermal energy" should be amended to reflect the commonly-accepted definition of the term.

Rule 4901:1-40-01(CC), O.A.C., defines a "renewable energy credit" ("REC") as "the fully aggregated environmental attributes associated with one megawatt hour of electricity generated by a renewable energy resource."[18] Section 4928.65, Revised Code, statutorily defines a renewable energy credit as "one megawatt hour of electricity derived from renewable energy resources." Unlike the law of some states, Ohio law does not attribute any environmental characteristics to a REC. As discussed further below, SB 221 does not require a REC used to comply with the portfolio requirements to be fully aggregated and the Commission lacks the statutory authority to mandate that all environmental attributes remain with a REC.[19]

[18] "Fully aggregated" is similarly defined unlawfully in Rule 4901:1-40-01(T), O.A.C.

[19] Of course, since the Commission has failed to fulfill its obligations under Section 4928.65, Revised Code, to provide a system of registering RECs by specifying which generally available registries shall be used for such purpose in accordance with Section 4928.65, Revised Code, there can be no SB 221 RECs whether they are fully aggregated or otherwise.

I. The prohibition on "double counting" in Rule 4901:1-40-04(C), O.A.C., is unreasonable and unlawful.

Rule 4901:1-40-04(C), O.A.C., excludes, for purposes of measuring compliance, a mercantile customer's customer-sited capabilities if inclusion constitutes "... double-counting for any other regulatory requirement ...." As written, the Rule could be interpreted such that a mercantile customer's capabilities could not be used to count towards both the EE/PDR and the AEPS requirements.[20] This provision is unlawful inasmuch as it is contrary to SB 221, which does not prohibit using a mercantile customer-sited capability to satisfy multiple requirements.[21] Further, Section 4928.64, Revised Code, specifically references the mercantile customer-sited EE/PDR resources that may be used to satisfy the AEPS requirements.[22]

Prohibiting the results of customer-sited measures from being applied to measure compliance with all requirements that may be satisfied by such measures is also unreasonable. For example, solar electricity has been shown to be a viable means of providing double benefits – especially when installed on an end-user's facility. In this instance, solar electricity reduces the demand that needs to be satisfied by the EDU and the emissions associated with even the most advanced generation technology. Also, the line and transformation losses that occur when electricity is supplied to an end user from a centralized system of generators and a delivery network do not exist in distributed generation. Therefore, solar resources deployed on the customer's side of the meter can and likely will meet both the solar renewable and energy efficiency

[20] The vagueness of this Rule also violates the Constitutional provisions as discussed in paragraph (A).

[21] The rationale discussed in this assignment of error also demonstrates that the Commission's definition of "double counting" in Rule 4901:1-40-01(M), O.A.C., is unlawful.

[22] *See* also Sections 4928.01(A)(34) and 4928.66, Revised Code.

definitions and may also work to reduce peak demand particularly if accompanied by a storage technology. Where a measure produces the energy efficiency, peak demand reduction or renewable resource outcomes required by SB 221, it must be eligible for being counted for purposes of measuring compliance with each portfolio requirement. Any business (or regulator) making a determination of the best value available from competing technologies or solutions will strive to pick the option that provides the broadest range of benefits for each unit of cost incurred. The Commission's prohibition on the recognition of multiple benefits that are derived from particular measures violates SB 221 and discourages implementation actions that provide the best bang for the buck.

J. The limitations in Rule 4901:1-40-04, O.A.C., on the eligibility of renewable energy credits ("RECs") to be used for compliance purposes are unlawful and unreasonable.

1. The restrictions in Rule 4901:1-40-04(D), O.A.C., placed on the use of RECs to meet the renewable energy resource benchmarks is unlawful and unreasonable.

Rule 4901:1-40-04(D)(1), O.A.C., permits using RECs to comply with the renewable portfolio requirements including RECs associated with a mercantile customer-sited resource that is not committed for integration into an EE/PDR program. But the Rule conditions the use of mercantile customer-sited RECs on the renewable energy resource meeting the parameters listed in Rule 4901:1-40-04(A), which imposes a placed-in-service date of on or after January 1, 1998. This placed-in-service date qualification is unlawful and unreasonable since it is contrary to Section 4928.65, Revised Code.

Section 4928.65, Revised Code, states that an EDU or electric services company "may use renewable energy credits any time in the five calendar years following the date of their purchase or acquisition from any entity, including, but not limited to, a mercantile customer... for the purpose of complying with the renewable energy and solar energy resource requirements of division (B)(2) of section 4928.64 of the Revised Code." Section 4928.65, Revised Code, does not limit the use of RECs to RECs produced by resources with a placed-in-service date that is on or after January 1, 1998 and the Commission cannot rewrite the law to impose a placed-in-service restriction on RECs that may be used to satisfy the renewable energy benchmark.

2. The Commission's failure to provide a system of registering RECs by specifying which generally available registries shall be used for such purpose in accordance with Section 4928.65, Revised Code, is unreasonable and unlawful.

Section 4928.65, Revised Code, states "The rules also shall provide for this state a system of registering renewable energy credits by specifying which of any generally available registries shall be used for that purpose and not by creating a registry. That selected system of registering renewable energy credits ... shall allow customer-sited projects or actions the broadest opportunities to be eligible for obtaining renewable energy credits." (emphasis added). Rule 4901:1-40-04(D)(2), O.A.C., does not fulfill the directive contained in Section 4928.65, Revised Code.

While Rule 4901:1-40-04(D)(2), O.A.C., addresses the registry to which an EDU must belong in order to use RECs to meet the AEPS requirements, it does not identify a system of registering renewable energy credits and it does not enable the process that is required to obtain a REC that can be used to satisfy the portfolio requirements of SB 221. Indeed, in Rule 4901:1-40-04(E), O.A.C., it states that "[c]ertification of a

resource or technology shall not predetermine compliance with annual benchmarks ...". The Commission must establish a system that allows RECs to be obtained and for the obtained REC to count for purposes of measuring compliance with SB 221's benchmarks. In doing so, it must identify the registries that will be used as part of that system.

3. The requirement that a REC remain fully aggregated to apply towards the renewable energy resource benchmarks as well as the prohibition of counting RECs associated with electricity generated before July 31, 2008 towards the renewable energy resource benchmarks are unlawful and unreasonable.

Rule 4901:1-40-04(D)(5), O.A.C., requires a REC to remain fully aggregated (i.e., no separation and individual selling of individual environmental attributes) to be applied towards compliance with the AEPS requirements. This restriction is unlawful inasmuch as no such restriction is contained in SB 221. In fact, SB 221 does not associate any environmental attributes with a REC so there is no such thing as a fully aggregated REC in Ohio. A REC is defined by the terms of Section 4928.65, Revised Code. Further, this adopted Rule is unreasonable inasmuch as it precludes the use of non-aggregated RECs even if they are a cheaper means of compliance with the AEPS. The Commission should remove the "fully aggregated" limitation.

Rule 4901:1-40-04(D)(6), O.A.C., bars counting RECs associated with electricity generated before July 31, 2008. SB 221 authorizes no such prohibition and it is unreasonable and unlawful for the Commission to rewrite SB 221 to include such a limitation.

4. The requirement that an entity seeking resource qualification to apply for certification of its resources or technologies as well as withholding judgment as to whether a certified resource will count towards compliance with the benchmarks is unlawful and unreasonable.

Rule 4901:1-40-04(E), O.A.C., requires an entity seeking resource qualification to apply for certification of its resources or technologies.[23] But, as discussed above, the Rule does not meet the requirements of SB 221.

This Rule reserves to the Commission the discretion to determine, potentially through adjudication, whether a resource qualifies as a resource that is eligible to meet the portfolio compliance requirements. It also requires an entity seeking resource qualification to first apply for certification under the process further defined in the Rule. But Rules 4901:1-40-04(A), 4901:1-40-04(B), and 4901:40-04(C)(1), O.A.C., make affirmative determinations that certain resources are qualified resources. SB 221 statutorily defines qualifying resources and does not permit the Commission to disqualify statutorily qualified resources in a certification process or through any other means. While Section 4928.64(A)(2), Revised Code, permits the Commission to classify any new technology as an advanced energy resource or a renewable energy resource, it does not vest the Commission with the authority to require pre-qualification of resources.

Further, Rule 4901:1-40-04(E)(7), O.A.C., states that certification of a resource or technology shall not predetermine compliance with annual benchmarks and does not constitute any Commission position regarding cost recovery. As discussed above, the

[23] Rule 4901:1-40-04(E), O.A.C., indicates that it will also include a determination of deliverability in this state in accordance with paragraph (I) of Rule 4901:1-40-01, O.A.C. But paragraph (I) of Rule 4901:1-40-01, O.A.C., is a definition that says that the deliverability requirement is met only if the resource is located outside of Ohio. The definition, therefore, excludes resources that are located in Ohio. This omission should be corrected; otherwise, the Rules discriminate against Ohio resources.

Commission has unlawfully and unreasonably delegated itself the authority to attack collaterally and reverse even its resource qualification determination when it comes time to use the Commission-approved qualified resource as part of a compliance scheme. It is provisions like this that cause the Rules adopted by the Commission to amount to a standardless trap. This provision must be removed from the Rules.

5. The Commission's failure to explicitly provide for the creation of Ohio RECs that can be registered with the REC registry chosen by the Commission is unlawful and unreasonable.

The content and context of Rule 4901:1-40-04(E), O.A.C., suggests that it does not include the opportunity to apply for and obtain certifications that may be necessary to permit a customer or any other REC generator to, on a stand-alone basis and separate and apart from a compliance plan, apply for and obtain such documentation to enable the receipt of a REC. Until this opportunity is clearly defined both substantively and procedurally, the Commission has not complied with Section 4928.65, Revised Code.[24]

K. Rule 4901:1-40-07, O.A.C.'s, exclusion of costs in an unavoidable surcharge for construction or environmental expenditures of generation resources from the respective renewable energy and advanced energy cost caps is unlawful.

Rule 4901:1-40-07(D), O.A.C., explains that:

> Any costs included in a commission-approved unavoidable surcharge for construction or environmental expenditures of generation resources shall

[24] Rule 4901:1-40-04(E)(1), O.A.C., indicates that an application for certification consists of completing and filing application forms as prescribed by the Commission or the Staff. In other words, it is not possible to comply with the Rule itself because neither the Commission nor the Staff have prescribed the application forms that might someday lead to certification. But then again, even if a form had been prescribed, completed and filed with the Commission and even if the Commission certified the resource identified in the application form, it would not matter anyway because the Commission's certification determination is not binding for purposes of measuring compliance with SB 221's benchmarks. In summary, the lack of a prescribed form might be regarded as entirely sensible in a nonsensical, Catch 221, way because the existence of a form would falsely imply that securing certification from the Commission might actually mean something and thereby mislead the public!

> be excluded from consideration as a cost of compliance under the terms of the alternative energy portfolio standard and therefore, would not count against the applicable cost cap. Such costs should, however, be included in the calculation of the total expected cost of generation to customers described in paragraph (C) of this rule.[25]

This language appears to be an attempt by the Commission to incorporate the language in Section 4928.143(B)(2)(b), Revised Code, which provides for construction work in progress ("CWIP") for constructing electric generating facilities and for environmental expenditures, as well as for non-bypassable surcharges for electric generating facilities that are sourced through a competitive bid process and are newly used and useful after January 1, 2009. However, Rule 4901:1-40-07(D), O.A.C., violates the 3% cost cap provision in SB 221 to the extent that the construction or environmental expenditures are used to comply with the portfolio requirements.

Section 4928.64(C)(3), Revised Code, states that "An electric distribution utility or an electric services company need not comply with a benchmark under division (B)(1) or (2) of this section to the extent that its reasonably expected cost of that compliance exceeds its reasonably expected cost of otherwise producing or acquiring the requisite electricity by three per cent or more." This code section requires that all costs of compliance be included in the 3% comparison. SB 221 does not contain the described exclusion and the Commission's attempt to remove these costs from the cost comparison is unlawful.

This provision is also unreasonable inasmuch as, practically speaking, this section would permit EDUs and competitive suppliers to take the most expensive route to meet the benchmarks and then exclude those costs from the 3% cost cap. For

[25] Rule 4901:1-40-07(C), O.A.C., explains how calculations involving the 3% cost cap will be derived.

example, under the adopted rule, American Electric Power ("AEP") could exclude all of the costs of building its integrated gasification combined cycle ("IGCC") plant to meet the advanced energy benchmarks. AEP estimated in the IGCC proceeding that constructing the facility would cost approximately $1.27 billion[26] (an estimate that more recent information indicates is decidedly too low). The magnitude of the costs that might be excluded from the comparison patently demonstrate the unreasonableness of excluding these costs as costs of compliance and how this provision works to override the 3% cost cap in SB 221.

L. The establishment of separate cost caps for Section 4928.64 and 4928.66, Revised Code, pursuant to Rules 4901:1-40-07(A) and (B), O.A.C., is unreasonable and unlawful.

Rules 4901:1-40-07(A) and 4901:1-40-07(B), O.A.C., establish separate 3% cost caps for renewable energy resource benchmark compliance and advanced energy resource benchmark compliance. The Commission acknowledges the objections of the electric utilities to separate cost caps, but finds that the statutory language in Section 4928.64(C)(3) indicates there are two separate caps that must be applied.[27] The Commission further explains that since the benchmark for advanced energy does not appear until the end of 2024 there would only be the cap for renewable energy resources (including solar) for the immediate future.[28]

The Commission's interpretation of Section 4928.64(C)(3), Revised Code, is incorrect. The intent of SB 221 was to provide an appropriate off-ramp so that

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[26] *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Authority to Recover Costs Associated with the Construction and Ultimate Operation of an Integrated Gasification Combined Cycle Electric Generating Facility*, Case No. 05-376-EL-UNC, Application at 9 (March 18, 2005).

[27] Opinion and Order at 37.

[28] *Id.*

customers would not be hit with significant increases (i.e. greater than 3%) as a result of EDUs and ESCs meeting the benchmarks. As the EDUs informed the Commission during the comment period, this off-ramp was set at 3% on a combined basis, not on an individual basis that raises the effective cap to 6%.[29] The Commission reads Section 4928.64(C)(3), Revised Code, in isolation, without considering the fact that the alternative energy benchmarks were included under the same subsection [Section 4928.64(B), Revised Code] and were not separated out. The separate 3% cost caps are unlawful and the Commission should modify this rule accordingly.

M. The requirements of Rule 4901:1-41-03, O.A.C., that all persons owning or operating an electric generating facility in Ohio to become a participating member in the climate registry, to report greenhouse gas emissions, and to file environmental control plans with the Commission are unlawful.

Rule 4901:1-41-03, O.A.C., requires all persons owning or operating an electric generating facility in Ohio to become a participating member in the climate registry, to report greenhouse gas emissions, and to file environmental control plans with the Commission. Electric generating facility is defined as "an electric generating plant and associated facilities capable of producing electricity of fifty megawatts or larger." The Commission's authority to require such information stems from Section 4928.68, Revised Code, which provides "To the extent permitted by federal law, the public utilities commission shall adopt rules establishing greenhouse gas emission reporting requirements, including participation in the climate registry, and carbon dioxide control planning requirements for each electric generating facility that is located in this state, is owned or operated by a public utility that is subject to the commission's jurisdiction, and

[29] *See* Initial Comments of Dayton Power & Light at 22; *See also* Initial Comments of FirstEnergy Companies at 18.

emits greenhouse gases, including facilities in operation on the effective date of this section." (emphasis added).

The adopted Rule is unlawful inasmuch as it requires generating facilities owned or operated by non-public utilities to join the climate registry and to file environmental control plans. Section 4928.68, Revised Code, applies only to electric generating facilities that are owned or operated by a public utility and the Commission lacks the statutory authority to subject non-public utilities to these requirements. The Commission's Opinion and Order indicates that the Commission decided to ignore the law because its determination that adopting a Rule that applies to only those generating facilities included in Section 4928.68, Revised Code, would exempt so many entities from the monitoring and reporting requirements to essentially render the Rule meaningless.[30] However, Section 4928.68, Revised Code, commands that these requirements be placed only on public utilities under the Commission's jurisdiction and, thus, the adopted Rule is unlawfully broad.[31]

N. Given the timing of the Commission's issuance of this bundle of Rules, the significant legal and substantive problems that are raised by the Rules, and the Commission's acknowledgement that the standards *need additional* development and consideration, the Commission acted unreasonably and unlawfully by not granting a blanket waiver of the 2009 compliance requirements on *force majeure* grounds.

The timing of the Commission's issuance of this bundle of Rules, the significant legal and substantive problems that are raised by the Rules and the Commission's acknowledgement that there is a "...need for further development and consideration of

[30] Opinion and Order at 41.

[31] It is worth noting that emissions from generators not owned and operated by a public utility are regulated by other agencies of state and federal governments.

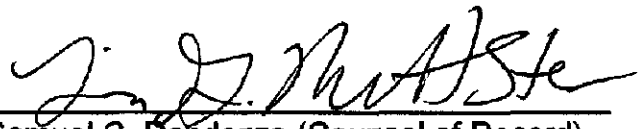
more detailed subjects, such as measurement and verification standards"[32] effectively make compliance in 2009 (and likely thereafter) impossible. Instead of issuing rules that lawfully facilitate and streamline compliance, the Commission's Rules violate the law and, as importantly in the near term, promote confusion and uncertainty at a time when predictability and certainty are required as an essential condition for implementation of SB 221. Even if the unlawful or unreasonable provisions of the Rules are cured during the rehearing process, the effective date of any final rules will be deferred until the Commission completes its work and the Rules navigate through the legislative review process. In this context, the Commission acted unreasonably and unlawfully by not granting a blanket waiver of the 2009 compliance requirements on *force majeure* grounds. For these reasons, and as described herein, the present condition of the Rules make compliance impossible and any attempt at compliance a waste of already severely constrained time and resources.

[32] Opinion and Order at 4.

III. CONCLUSION

For the reasons discussed herein, IEU-Ohio respectfully requests the Commission grant rehearing. The Rules adopted by the Commission on April 15, 2009 are unreasonable and unlawful for the reasons stated herein and many others.

Respectfully submitted,



Samuel C. Randazzo (Counsel of Record)
Lisa G. McAlister
Joseph M. Clark
McNees Wallace & Nurick LLC
21 East State Street, 17TH Floor
Columbus, OH 43215
Telephone: (614) 469-8000
Telecopier: (614) 469-4653
sam@mwncmh.com
lmcalister@mwncmh.com
jclark@mwncmh.com

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *Industrial Energy Users-Ohio's Application for Rehearing and Memorandum in Support* has been served by regular mail, postage prepaid, this 15th day of May, upon the parties listed below.

Lisa G. McAlister

Rodger Kershner
Howard & Howard Attorneys
39400 Woodward Avenue, Suite 100
Bloomfield Hills, MI 48304

Steven Nourse
Marvin Resnik
American Electric Power
1 Riverside Plaza – 29th Fl.
Columbus, OH 43215

Kenneth Schisler
EnerNOC, Inc.
75 Federal Street, Suite 300
Boston, MA 02110

Terrence O'Donnel
Sally Bloomfield
Bricker & Eckler LLP
100 South Third Street
Columbus, OH 43215-4291

Carolyn Flahive
Thompson Hine LLP
10 West Broad Street
Columbus, OH 43215

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

Barbara Morris
Matt White
John Bentine
Chester Willcox & Saxbe
65 East State Street, Suite 1000
Columbus, OH 43215

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

Janine L. Migden-Ostrander
Consumers' Counsel
Deb Bingham
Richard Reese
Jacqueline Roberts
Maureen Grady
Office of Consumers' Counsel
10 West Broad Street, Suite 1800
Columbus, OH 43215

Randall Griffin
Chief Regulatory Counsel
Judi Sobecki
Dayton Power and Light Company
1065 Woodman Drive
Dayton, OH 45401

Kenneth A. Schuyler
Christine Falco
PJM Interconnection LLC
965 Jefferson Avenue
Norristown, PA 19403

Steven Millard
200 Tower City Center
50 Public Square
Cleveland, OH 44113

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

Elizabeth Watts
Duke Energy Ohio
139 East Fourth Street
Cincinnati, OH 45201

Gary Guzy
Kari Decker
APX Inc.
5201 Great America Parkway #522
Santa Clara, CA 95054

Michael Kurtz
Boehm, Kurtz & Lowry
36 East Seventh Street, Suite 1510
Cincinnati, OH 45202

Steven Beeler
City of Cleveland
Department of Law
601 Lakeside Avenue, Room 106
Cleveland, OH 44114

Leslie Kovacik
420 Madison Avenue, 4th Floor
Toledo, OH 43624

Mark Hayden
FirstEnergy Corp.
76 South Main Street
Akron, OH 44308

Howard Petricoff
Vorys Sater Seymour and Please
52 E. Gay Street
P.O. Box 1008
Columbus, OH 43216-1008

Vincent Parisi
Interstate Gas Supply
5020 Bradenton Avenue
Dublin, OH 43017

Langdon Bell
Barth Royer
Bell & Royer Co., LPA
33 South Grant Avenue
Columbus, OH 43215

Jennifer Miller
Sierra Club
131 N. High Street $605
Columbus, OH 43215

David Caldwell
United Steelworkers
777 Dearborn Park Lane – J
Columbus, OH 43085

Dale R. Arnold
Ohio Farm Bureau
280 North High Street
P.O. Box 182383
Columbus, OH 43218

Ann McCabe
Climate Registry
1543 W. School St.
Chicago, IL 60657

Neil Sater
Greenfield Steam & Electric
6618 Morningside Drive
Brecksville, OH 44141

Amy Gomberg
Environment Ohio
203 E. Broad Street - Suite 3
Columbus, OH 43216

Kenneth R. Alfred
Ohio Fuel Cell Coalition
737 Bolivar Rd.
Cleveland, OH 44115

Joseph Koncelik
Frantz Ward LLP
2500 Key Center
127 Public Square
Cleveland, OH 44114

Robert Wevodau
KW Solar Solutions LLC
250 Corporate Blvd. Suite D
Newark, DE 19702

Senator Jon Husted
Ohio Senate
Room #034, Ground Floor
Columbus, OH 43215

Chester R. Jourdan, Jr.
Erin Miller
Mid-Ohio Regional Planning Commission
111 Liberty St., Suite 100
Columbus, OH 43215

Mark A. Whitt
Andrew J. Campbell
JONES DAY
325 John H. McConnell Blvd. - #600
Columbus, OH 43216