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 MEMORANDUM CONTRA APPLICATIONS FOR REHEARING

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MEMORANDUM CONTRA

I. INTRODUCTION

On August 20, 2008, the Public Utilities Commission of Ohio ("Commission") issued proposed rules to implement the energy efficiency/peak demand reduction ("EE/PDR") benchmarks and alternative energy portfolio standards ("AEPS") contained within Amended Substitute Senate Bill 221 ("SB 221"). Extensive initial and reply comments were filed on September 9, 2008 and September 26, 2008, respectively, by interested parties. On April 15, 2009, the Commission issued an Opinion and Order that adopted Rules that were significantly different from those proposed by Staff that served as the basis for comments. On May 15, 2009, numerous Applications for Rehearing of the Commission's April 15, 2009 Order were filed, including by Industrial Energy Users-Ohio ("IEU-Ohio"). IEU-Ohio hereby files it Memorandum Contra Applications for Rehearing in this proceeding. IEU-Ohio's failure to address specific arguments should not be construed as agreement.

As a general proposition, IEU-Ohio encourages the Commission to use the rehearing opportunity to revise the Rules to permit the widest possible use of EE/PDR and alternative energy capabilities to meet the respective requirements of SB 221. IEU-Ohio believes that this general orientation is required because the EE/PDR benchmarks and AEPS are in their infancy and the electric distribution utilities ("EDUs") and electric service companies ("ESCs") must begin complying with these requirements in 2009.

II. SIMILAR POSITIONS TAKEN BY NUMEROUS PARTIES HAVING DIVERSE INTERESTS

Although the various Applications for Rehearing set forth numerous grounds for rehearing, perhaps the most striking aspect of the Applications for Rehearing comes from the similarities in positions taken by numerous parties having diverse interests.

For example, several rehearing applicants commented on the timing of the rulemaking activities, noting that compliance with the statutory EE/PDR benchmarks and AEPS in 2009 was unlikely at best and impossible at worst.[1] Some rehearing applicants observed that the adopted rules set the stage to make ultimate compliance much more uncertain, difficult and expensive than was just or reasonable. For example, Ohio Consumer and Environmental Advocates ("OCEA") urged the Commission to modify the adopted Rules to streamline the process for Commission approval of qualified resources and eliminate the lengthy timeframe set forth in the adopted Rules.[2] Numerous parties objected to the Commission's exclusion of results obtained from otherwise eligible measures simply because the results or measures are required by

[1] *See, for example*, Dayton Power and Light ("DP&L") Application for Rehearing at 2, 11-17; American Electric Power ("AEP") Application for Rehearing at 14; FirstEnergy Application for Rehearing at 33; Duke Energy Ohio ("DE-Ohio") Application for Rehearing at 2, 8, 10-11.

[2] OCEA Application for Rehearing at 17-18. OCEA's request is limited to small renewable resources, but the point that the Commission's process is cumbersome is the same.

another law or regulation.[3] Several parties also objected to the Commission's limits on the availability of renewable energy credits ("RECs") and the opportunity to use RECs to satisfy the statutory benchmarks.[4] And, here again, OCEA seems to implicitly agree. Agreeing with several other rehearing applicants, OCEA urged the Commission to permit facilities that have been "operating for some time" to readily obtain RECs and "preserve the considerable REC value"[5] that comes from actually being able to apply those RECs towards the AEPS.

In line with many of the applicants for rehearing and in order to remove the unreasonable and unlawful restrictions on RECs, IEU-Ohio continues to urge the Commission to modify the paragraphs of Rule 4901:1-40-04(D), Ohio Administrative Code ("O.A.C."), as follows:

1) Paragraph (3), which requires a REC to be used for compliance any time in the five calendar years following the date of its initial purchase or acquisition, should be modified to follow SB 221's requirement that the REC be permitted to be used for compliance any time in the five calendar years following the "date of their purchase or acquisition from any entity ...";

2) Paragraph (4), which unlawfully and unreasonably restricts the use of measures that may satisfy multiple requirements, should be deleted;

3) Paragraph (5), which unlawfully and unreasonably requires RECs to remain fully aggregated, should be deleted; and

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[3] DP&L Application for Rehearing at 21-23; AEP Application for Rehearing at 11-13; FirstEnergy Application for Rehearing at 7-10; DE-Ohio Application for Rehearing at 5.

[4] *See* IEU-Ohio Application for Rehearing at 23-25; AMP-Ohio Application for Rehearing at 6-7; City of Hamilton Application for Rehearing at 2-3.

[5] OCEA Application for Rehearing at 18-19.

4) Paragraph (6), which unlawfully and unreasonably requires the RECs to be associated with electricity that was generated no earlier than July 31, 2008, should be deleted.

Given the timing problems associated with statutory compliance obligations in 2009 and the rules necessary to implement the statutory obligations that require much more work, it is reasonable to expect that compliance in the early years of the portfolio requirements will involve the use of RECs as fully permitted by Section 4928.65, Revised Code. Indeed, the Commission's determination of any "compliance payment" will ultimately depend on the balance of compliance the Commission determines to be required assuming the use of RECs.[6] Rules that unlawfully or unreasonably restrict the opportunity to obtain RECs or to use RECs to hit the benchmarks are not in the public interest.

III. MEMORANDUM CONTRA INDIVIDUAL APPLICATIONS FOR REHEARING

A. Ohio Consumer and Environmental Advocates ("OCEA")

OCEA suggests the Commission change the definition of non-energy benefits in Rule 4901:1-39-01(O), O.A.C., to mandate that California's Societal Test be used to calculate the non-energy benefits.[7] Rule 4901:1-39-03, O.A.C., defines program planning requirements and requires that the economic potential of peak demand reduction measures and energy efficiency measures be assessed using the total

[6] Section 4928.64(C)(2)(b), Revised Code. Rule 4901:1-40-08, O.A.C., unreasonably and unlawfully ignores the statutory role of RECs in measuring any compliance payment pertaining to the renewable energy resource benchmark.

[7] OCEA Application for Rehearing at 9-10. It is worth noting both that OCEA did not reference the most up-to-date California Standard Practice Manual and that it appears that there are ongoing working groups in California whose goal is to revise these tests.

resource cost test. Rule 4901:1-39-03, O.A.C., also requires the electric utility to consider non-energy benefits when designing its portfolio. If OCEA's definitional change to non-energy benefits were adopted, it would result in electric utilities under Rule 4901:1-39-03, O.A.C., being required to evaluate the economic potential of peak demand reduction measures and energy efficiency measures using the total resource cost test, while at the same time "considering" non-energy benefits measured using the Societal Test. This would create confusion over how to reconcile costs and benefits measured by fundamentally different approaches. Moreover, OCEA's proposed definitional change would limit both the Commission's and the electric utilities' ability to be flexible in its analysis, particularly when there is so little experience upon which to rely. Finally, it is not appropriate to apply a test used in California where circumstances, resources and experience are significantly different from Ohio, particularly when there appears to be debate even in California as to whether the Societal Test is a reasonable approach. Accordingly, the Commission should reject OCEA's request to limit the analysis of non-energy benefits to the Societal Test.

OCEA argues that mercantile customers who integrate their EE/PDR capabilities into an EDU's EE/PDR programs should still be required to pay any portion of the mechanism that recovers the costs to comply with the EE/PDR benchmarks that relates to lost distribution revenues.[8] Under Section 4928.66(A)(2)(c), Revised Code, the mechanism (presumably a rider) designed to recover an EDU's costs to comply with the EE/PDR benchmarks may exempt mercantile customers so long as the mercantile customer commits its EE/PDR capabilities to the EDU's benchmark compliance programs and the Commission determines that the exemption reasonably encourages

[8] OCEA Application for Rehearing at 13-14.

mercantile customers to commit their capabilities to the EDU's programs. OCEA's argument assumes that lost distribution revenues would be recovered through the mechanism associated with collecting EE/PDR costs when there is no requirement that lost distribution revenues be recovered through this mechanism. Further, the Commission already determined that it will review exemption applications on a case-by-case basis.[9] Making the modification suggested by OCEA would undercut the Commission's decision to review exemption applications on a case-by-case basis, as well as prematurely foreclose the opportunity for a mercantile customer to demonstrate that a full exemption (assuming lost distribution revenues are included in the cost recovery mechanism) is warranted. OCEA has not demonstrated that the Rule is unlawful or unreasonable and OCEA's Application for Rehearing should be denied.

B. Dayton Power and Light Company ("DP&L")

DP&L suggests that the Commission modify Rule 4901:1-40-03(A)(3), O.A.C., to permit costs that are approved pursuant to Section 4928.143(B)(2)(c), Revised Code, to be non-bypassable.[10] The Commission should deny this prong of DP&L's Application for Rehearing.

Section 4928.143(B)(2)(c), Revised Code, deals with potential life-of-unit costs of an electric generating facility owned or operated by an EDU where such costs are considered as part of a proposed electric security plan ("ESP"). On the other hand, Rule 4901:1-40-03(A)(3), O.A.C., confirms the bypassability of costs related to compliance with Section 4928.64, Revised Code. Section 4928.64(E), Revised Code,

[9] Opinion and Order at 22.

[10] DP&L Application for Rehearing at 29.

specifically states that all compliance costs incurred by an EDU shall be bypassable by any "shopping customer."

Bypassability of costs related to compliance with Section 4928.64, Revised Code, is also properly recognized by Rule 4901:1-40-03(A)(3), O.A.C., because the portfolio requirements in Section 4928.64, Revised Code, extend to ESCs in addition to EDUs. Even if the Commission could change the bypassability status of costs incurred by an EDU to comply with Section 4928.64, Revised Code (and it cannot), modifying Rule 4901:1-40-03(A)(3), O.A.C., as requested by DP&L would provide EDUs with an undue and unreasonable preference to advance their own supply side agenda, disadvantage competitive retail electric suppliers and disadvantage demand-side options, thereby conflicting with the policy set forth in Section 4928.02, Revised Code.

IV. CONCLUSION

IEU-Ohio respectfully requests the Commission modify its adopted rules consistent with the positions outlined in this Memorandum Contra.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *Industrial Energy Users-Ohio's Memorandum Contra Applications for Rehearing* has been served by regular mail, postage prepaid, this 27th day of May 2009, upon the parties listed below.

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