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BEFORE THE
PUBLIC UTILITIES COMMISSION OF OHIO 2009 JUL 17 PM 5: 17

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

APPLICATION OF OHIO EDISON COMPANY, THE CLEVELAND ELECTRIC ILLUMINATING COMPANY, AND THE TOLEDO EDISON COMPANY FOR REHEARING AND CLARIFICATION OF THE COMMISSION'S JUNE 17, 2009 ENTRY ON REHEARING

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On behalf of Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company

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Pursuant to R.C. § 4903.10 and Rule 4901-1-35, O.A.C., Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company (collectively, the "Companies") hereby apply for a rehearing and clarification of certain issues arising for the first time in the Commission's June 17, 2009 Entry on Rehearing ("Entry") issued in the above-captioned case, because said Entry is unreasonable and unlawful in the following respects:

1. **Rule 4901:1-39 is unconstitutional in that it fails to provide meaningful standards as required by fundamental notions of due process.**

2. **Rule 4901:1-39 is unconstitutional in that it does not bear a rational relationship to the public welfare and unreasonably and arbitrarily excludes certain energy efficiency and demand reduction measures and programs from the utility's compliance portfolio.**

3. **Rule 4901:1-39 violates Ohio Const. Article II, Section 28 because it applies retroactively.**

4. **Rule 4901:1-40 is unconstitutional in that it (i) fails to provide meaningful standards as required by fundamental notions of due process; (ii) does not bear a rational relationship to public welfare and**

unreasonably and arbitrarily prohibits double counting for compliance with certain benchmarks; and (iii) applies retroactively.

5. **With the Commission's clarification that it requires actual peak demand reductions, rather than the development of programs designed to achieve such reductions, Rule 4901:1-39-01(Q) is unconstitutional and unlawful in violation of the plain meaning of R.C. 4928.66(A)(2).**

6. **The Companies request clarification on the reporting requirements for Mercantile Customers.**

7. **The Commission's clarification in its June 17, 2009 Entry that requires electric distribution utilities to deploy all cost-effective energy efficiency measures is unconstitutional, and unlawful and unreasonable as being contrary to the plain meaning of R.C. 4928.66(A).**

For these reasons, which are set forth in greater detail in the Companies' Memorandum in Support, which is attached hereto and incorporated herein by reference, the Companies respectfully request that the Commission grant the Companies' application for rehearing and issue an Entry on Rehearng consistent with this filing.

Respectfully submitted,

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MEMORANDUM IN SUPPORT OF THE APPLICATION FOR REHEARING AND CLARIFICATION

I. INTRODUCTION

The Commission, in its April 15, 2009 Opinion and Order ("Order") sets forth rules ("Orignal Rules") related to energy efficiency, peak demand reduction and alternative energy mandates created in Am. Sub. S.B. 221 ("Senate Bill 221"). Seventeen parties, including the FirstEnergy operating companies of Ohio Edison Company ("Ohio Edison"), The Cleveland Electric Illuminating Company ("CEI") and The Toledo Edison Company ("Toledo Edison") (collectively, the "Companies"), submitted applications for rehearing. On June 10, 2009, the Commission granted rehearing for further consideration of the parties' comments, subsequently issuing on June 17, 2009 its Entry on Rehearing ("Entry"), which included a revised set of rules ("Revised Rules"). While the Commission in its Entry clarified or modified several of the Original Rules, which raise new issues of their own, the Commission, for the most part, ignored the legal challenges and the pleas for direction submitted by many of the parties. As a result of the Commission's action (or inaction), the Revised Rules, at least as they pertain to energy efficiency and peak demand reduction, when taken as a whole, are unconstitutionally vague and create a process that incorporates an ever-moving target that will be subject to retroactive application in violation of the due process rights afforded the Companies and the other electric distribution utilities ("EDUs") within the State.[1] Further, and specific to Rule 4901:1-39-01(Q), the Commission's interpretation of R.C. 4928.66(A)(2) is unconstitutional and contrary to its plain meaning and is therefore unlawful, as too is its clarification in its Entry that requires an EDU to deploy all cost-effective energy efficiency measures pursuant to R.C. 4928.66(A)(1)(a).

For the reasons more fully discussed below, the Commission should grant rehearing and modify the Revised Rules as necessary to bring them into compliance with Ohio law and both the Federal and State constitutions.

II. ARGUMENTS

In their prior Application for Rehearing the Companies raised a number of concerns with regard to proposed Rule 4901:1-39, which purports to implement the energy efficiency and demand reduction benchmarks mandated in R.C. 4928.66(A)(1)(a) and (b). The Companies argued, among other things, that the following portions of the Original Rules were unreasonable or unlawful:

1) 4901:1-39-05(D), to the extent that it prohibits the EDUs from relying on any measures required to comply with energy performance standards set by law or regulation, including building codes, to meet the statutory benchmarks;

2) 4901:1-39-08(B)(4) to the extent that it excludes mercantile customers' on-site generation projects from an EDU's compliance strategy; and

3) 4901:1-39-08(B)(4) to the extent it requires energy savings and peak demand reductions to be calculated by comparing energy use and peak demand associated with a customer's projects to the estimated use and demand that would have

[1] Virtually all of the constitutional arguments addressing defects in Rule 4901:1-39 also apply to the issues arising under Rule 4901:1-40 that were addressed in the Companies initial Application for Rehearing that was filed in this docket on May 15, 2009 and is incorporated herein by reference. Accordingly, Rule 4901:1-40 must be modified consistent with the Companies' comments set forth in said application.

occurred had the customer used "industry standard new equipment or practices" rather than comparing actual use and demand before and after the project is implemented.

The Companies also addressed the unreasonableness and unlawfulness of the Commission's determination that it would adjust baseline calculations to reflect a period of "negative economic growth" (as indicated in the Order at 18-19) and would use a "rolling three year average" (Order at 15-16) in the calculation of the statutory baselines, and requested clarification of the Commission's interpretation of R.C. 4928.66(A)(1)(b).[2] Finally the Companies expressed their concern that, given the number of significant discrete issues raised in their Application for Rehearing, proceeding without significant modification to the Original Rules would implicate the Companies' constitutional rights. The Commission did not respond to many of the points made by the Companies and did not significantly modify the Original Rules in its Entry on Rehearing. Accordingly, the Companies submit this Application for Rehearing. This Application for Rehearing does not repeat the arguments previously made but rather (i) explains why, as a result of the Commission's actions -- or more than not, its inaction -- in its Entry, the Revised Rules violate the Companies' constitutional rights (Sections A, B, C and D); (ii) explains why the final rule as it pertains to peak demand reductions is unlawful, unconstitutional and violates the plain meaning of the statute (Section E); (iii) seeks clarification on the reporting requirements for mercantile customers (Section F); and (iv) explains why the Commission's clarification that, in essence, requires EDUs to implement all cost effective energy measures is contrary to the plain meaning of R.C. 4928.66 (Section G).

[2] The Companies also raised issues pertaining to Rule 4901:1-40 (Cos. AFR, pp. 18-30) and Rule 4901:5-5 (Id. at 30-32.)

A. Rule 4901:1-39 is unconstitutional in that it fails to provide meaningful standards as required by fundamental notions of due process.

1. The void-for-vagueness doctrine.

The Due Process Clauses of the Fifth and Fourteenth Amendment give rise to the void-for-vagueness doctrine. The doctrine has two primary goals. The first goal is to ensure "fair notice" to the subject of the law as to what the law requires; the second is to provide standards to guide the discretion of those charged with enforcing the law. *Columbia, Natural Resources, Inc. v. Tatum*, 58 F.3d 1101, 1104 (6th Cir. 1995). The United States Supreme Court has defined the first goal with greater specificity by holding that "[a] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess as to its meaning and differ as to its application, violates the first essential of due process of law." *Id.* at 1105 (citing *Connally v. General Constr. Co.*, 269 U.S. 385, 391, 46 S. Ct. 126, 70 L.Ed 322 (1926)). The second goal "relates to notice to those who must enforce the law . . . [t]he standards of enforcement must be precise enough to avoid 'involving so many factors of varying effect that neither the person to decide in advance nor the jury after the fact can safely and certainly judge the result.'" *Id.* (citing *Cline v. Frink Dairy Co.*, 274 U.S. 445, 465, 47 S.Ct. 681, 71 L.Ed. 1146 (1927)).

Although the vagueness doctrine arises most often in the context of criminal laws that implicate First Amendment values, "vague laws *in any area* suffer a constitutional infirmity." *Ashton v. Kentucky*, 384 U.S. 195, 200, 86 S.Ct. 1407, 16 L.Ed.2d 469 (1966) (collecting cases at n. 1) (emphasis added). *See also, Cline*, 274 U.S. at 463 ("The principle of due process of law requiring reasonable certainty of description in fixing a standard for exacting obedience from a person in advance has application as well in civil as in criminal legislation.") Laws that impose criminal penalties or sanctions or reach a substantial amount of constitutionally protected conduct, however, must satisfy a "higher level of definiteness." *Belle Maer Harbor v. Charter Township of Harrison*, 170 F.3d 553, 557 (6th Cir. 1999).

Belle Maer Harbor, for example, involved a township ordinance that regulated the use of mechanical agitators ("bubblers") to clear the surrounding waterway of ice. A marina operator challenged the ordinance on vagueness grounds because it empowered enforcement officials to determine whether the area of open water created by the agitator was within a "reasonable radius" around the protected object. The lower court upheld the ordinance. The Sixth Circuit disagreed, finding it unconstitutional. Even though the ordinance did not threaten the exercise of protected First Amendment rights, the appellate court nevertheless applied a heightened scrutiny standard – requiring a "high level of definiteness" – because violation of the ordinance carried criminal penalties:

> This court does not disagree with the Township that many ordinances, statutes and other enactments have "gray areas" requiring the use of an officer's discretionary judgment in their enforcement. However, due process requires at least sufficient exactness to prevent arbitrary enforcement and give notice of what an individual must do to comply with the enactment. . . . Under the present scheme, neither the enforcement officer nor the bubbler operator can ascertain by examining the language of the Ordinance alone whether criminal sanctions will result from one foot or ten feet of open water created by a bubbler around a protected object. This level of imprecision cannot withstand a due process challenge on vagueness grounds.

Id. at 559. See also *Connally v. Gen. Const. Co.*, 269 U.S. at 393-95 (holding state statute requiring state contractors to pay the "current rate of per diem wages in the locality" void for vagueness); *Cline v. Frink Dairy*, 274 U.S. at 465 (state anti-trust statute held void for vagueness).

The Ohio Supreme Court re-affirmed and clarified the void-for-vagueness doctrine in its recent decision in *Norwood v. Horney*, 110 Ohio St.3d 353, 2006-Ohio-3799. The court struck down a municipal ordinance that allowed private property in a "deteriorating area" to be taken by eminent domain, even though the municipal code set forth "a fairly comprehensive array of conditions that purport to describe a 'deteriorating area,' including . . . incompatible land uses, nonconforming uses, lack of adequate parking facilities, faulty street arrangement, obsolete platting, and diversity of ownership." *Id.* at ¶ 93. The Court held:

> In the cases before us, we cannot say that the appellants had fair notice of what conditions constitute a deteriorating area, even in light of the evidence adduced against them at trial. The evidence is a morass of conflicting opinions on the condition of the neighborhood. Though the Norwood Code's definition of 'deteriorating area' provides a litany of conditions, it offers so little guidance in application that it is almost barren of any practical meaning.
>
> In essence, deteriorating area is a standardless standard. Rather than affording fair notice to the property owner, the Norwood Code merely recites a host of subjective factors that invite ad hoc and selective enforcement – a danger made more real by the malleable nature of the public-benefit requirement.

Id. at ¶¶ 97-98.

2. Application of the Doctrine to Rule 4901:1-39.

The void-for-vagueness doctrine, as illustrated by the foregoing cases, is clearly violated by the Commission's rule purporting to implement R.C. 4928.66. Ironically, while the statute itself is relatively clear and precise in articulating what an electric distribution utility must do to implement energy efficiency programs and peak demand reductions, the Commission's rule so muddles the requirements that it drives the regulatory scheme over the constitutional brink. R.C. 4928.66(C) imposes a forfeiture, payable to the state, on a utility that fails to comply with the requirements of R.C. 4928.66(A). The statute is akin to a penal statute, see *Cleveland Mobile*

Radio Sales, Inc. v. Verizon Wireless, 113 Ohio St. 3d 394, 2007-Ohio-2203, and as such, it, and any rule promulgated to carry it into effect, must provide a "high level of definiteness." *Belle Maer Harbor*, 170 F.3d at 557; *Norwood v. Horney*, at ¶¶ 84-85. Rule 4901:1-39, however, does not even cross the threshold for satisfying a minimal level of definiteness.

R.C. 4928.66 allows a utility to employ any and all measures or programs in order to meet its duty to achieve energy savings and reduce peak demand.[3] By not categorizing or limiting the types of programs that may be implemented, the statute gives the utilities clear comfort that any program that helps to achieve the statutory benchmarks will be counted. The rule first mystifies the statute by prohibiting an EDU from counting any measure that is otherwise "required to comply with energy performance standards set by law or regulation." Rule 4901:1-39-05(D). The rule does not define what this exclusion means. It does not give examples of what is meant by "energy performance standards," nor does it suggest where the utility might look to identify those laws or regulations which set forth disqualifying energy performance standards. The rule does not specify whether the energy performance standard must apply to the utility directly or whether all energy performance standards, including those applicable to any utility customer or vendor of a utility customer as well as the utility itself, are encompassed by the rule. By referencing "the Energy Independence and Security Act of 2007, or any applicable building code," the rule suggests that the exclusion is all-encompassing and puts the utility to the task of correctly identifying, at the peril of significant forfeitures, all federal, state or local (municipal, county, township) regulations that might be considered at some

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[3] R.C. 4928.66(A)(2)(c) states: "Compliance with [the energy efficiency and demand reduction benchmarks] shall be measured by including the effects of *all* demand response programs for mercantile customers of the subject electric distribution utility and *all* such mercantile *customer-sited energy efficiency and peak demand reduction programs*...." [Emphasis added.] The clear legislative intent allows no room for the Commission to selectively exclude projects.

point after-the-fact to impose a disqualifying energy performance standard that results in excluding a measure or project from being counted toward the statutory benchmarks. As such, the rule renders what is otherwise a clear statutory standard unconstitutionally vague. *See Cline v. Frink Dairy*, 274 U. S. at 465 (state anti-trust statute found to be unconstitutionally vague, even though federal law had been upheld as sufficiently definite, because state statute added a more detailed and complicated restrictive proviso which resulted in an "utterly impracticable standard.")

The rule compounds the confusion it sows by calculating a mercantile customer's energy savings and peak demand reductions by comparing the customer's post-program use and demand to "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." Rule 4901:1-39-08(B)(4). The rule does not define or illustrate what it means by "industry standard new equipment or practices" nor does it tell the utilities how to make this determination. It does not give any guidance as to how the utility is to determine the relevant "industry in which the mercantile customer operates." It leaves all these determinations to be made in an adversarial proceeding intended to determine, after-the-fact, if the utility should be subject to a forfeiture for failing to comply with the energy efficiency or peak demand reduction requirements of R.C. 4928.66(A). *See* R.C. 4928.66(C). As such, the rule has no practical meaning. It is the classic "standardless standard" referenced in the *Norwood* case and illustrated by the *Connally* case.

The rule also runs afoul of minimum constitutional requirements by its silence. In their respective applications for rehearing, the EDUs identified a number of areas in which greater clarification was required in order to give them intelligible, predictable standards to which they could comply. The Commission more often than not ignored these pleas for needed guidance. Most notably, the Commission failed to provide any guidance as to the proper calculation of baseline, either in terms of use of a "rolling three [three year] average" or its intent to adjust the baseline during a period of "negative economic growth."

The electric distribution utilities have a statutory duty to implement energy efficiency and demand reduction programs beginning in 2009. Yet by not giving the utilities timely or effective guidance as to how their compliance in 2009 – or their compliance in future years – will be judged, the Commission denies the utilities their fundamental due process right to fair notice of what is expected of them and it exposes them to the unconstitutional enforcement of a penal statute. The Commission can cure this constitutional defect only by granting a second rehearing and using that opportunity to conform its rule to the mandates already clearly expressed in R.C. 4928.66, and by stripping the Commission-imposed exclusions, additions and confusing administrative gloss from Rule 4901:1-39, the Commission's June 17, 2009 Entry and its April 15, 2009 Order.

B. Rule 4901:1-39 is unconstitutional in that it does not bear a rational relationship to the public welfare and unreasonably and arbitrarily excludes certain energy efficiency and demand reduction measures and programs from the utility's compliance portfolio.

The Fourteenth Amendment to the United States Constitution and Article 1, Section 16 of the Ohio Constitution guarantee the right of substantive due process. "The essence of substantive due process is the protection from certain arbitrary, wrongful governmental actions, irrespective of the fairness of the procedures used to implement them." *Traditions Tavern v. City of Columbus*, 171 Ohio App.3d 383, 2006-Ohio-6655 at ¶25. In order to comport with substantive due process at the very minimum level, there must be a rational relationship between the governmental act in question and its purpose. *Id.* at ¶ 26. A government regulation comports with the due process clause of the Ohio Constitution *only* "if it bears a real and substantial relation to the public health, safety, morals or general welfare of the public and if it is not unreasonable or arbitrary." *Id.* (quoting *Benjamin v. Columbus*, 167 Ohio St. 103, 110, 146 N.E.2d 854 (1957)). Rule 4901:1-39 violates substantive due process in several significant respects.

The Ohio General Assembly declared as a matter of state public policy that electric distribution utilities should implement energy efficiency programs to achieve energy savings as well as programs designed to achieve peak demand reductions. R.C. 4928.66(A). The statute concededly bears a real and substantial relationship to the public welfare by conserving energy resources. Rule 4901:1-39, however, does not bear any rational relationship to this laudable purpose.

First, Rule 4901:1-39-05(D) prevents utilities from counting any measure required to comply with energy performance standards set by other laws or regulations to meet the statutory benchmarks imposed by R.C. 4928.66(A). This Commission-made exclusion is totally at odds with the stated purpose of the law. The rule actually makes it harder for utilities to achieve the desired results by shrinking the pool of available tools a utility may use to meet the statutory benchmarks. The statute does not state or suggest that the utility is limited to using only new measures for energy efficiency and demand reduction purposes nor does the statute state or suggest that the statutory benchmarks must produce incremental savings in use and/or reductions in demand above those that might be encouraged by other laws and regulations. The rule arbitrarily and unreasonably precludes the utilities from using certain measures to achieve the statutory benchmarks for energy efficiency and peak demand reduction merely because these measures also comply with energy performance standards required by other laws, standards or building codes. The regulation irrationally makes it harder for a utility to achieve the desired goals and discourages the use of key measures merely because some other governmental entity – federal, state or local – also determines the measures should be put to widespread use.

Second, Rule 4901:1-39-08(B)(4) requires energy savings and peak demand reductions to be calculated by making an artificial, speculative comparison between energy use and peak demand associated with a customer's project to the estimated use and demand that would have occurred had the customer used "industry standard new equipment or practices," rather than making the logical and rational comparison between actual use and demand before and after a project is implemented. The artificial, speculative comparison is not mandated or implied in the statute itself; it appears only in the rule. This portion of the rule also makes it more difficult for a utility to meet the desired goal of the statute by preventing the utility from recognizing and counting actual energy savings and demand reductions. A rule that works at cross purposes with a statute by definition lacks a real and substantial relationship with the general welfare. The rule is also irrational because it ignores actual energy savings and demand reductions, pretending they really did not occur only because some portion of the actual, real savings or reduction *might have occurred* through some other means that was never actually deployed. The rule incredulously and irrationally penalizes the EDU by not allowing actual energy savings and demand reductions to be counted solely because the customer exercised its right to use its own business judgment to decide whether it was in the customer's best interests to install new industry standard equipment or implement new industry standard practices.

Third, the Commission's intent to adjust (upwards) the utility's statutory baseline for periods of "negative economic growth" also is a completely arbitrary and unreasonable administrative alteration of the statute not rationally related to its purpose. The purpose of the statute is to encourage utilities to implement energy efficiency and demand reduction programs. The utilities have been given this obligatory burden because they are in a position to affect energy usage and demand reductions as service providers with a unique relationship with their customers. The utilities, however, have no unique power or position to stave off the negative economic conditions affecting the Midwest region in general and certain areas of Ohio in particular. It is completely irrational to penalize the utilities – by increasing their statutory obligations and exposing them to potentially significant forfeitures – for conditions over which they have no control. The General Assembly wisely recognized this fact by allowing a baseline reduction for new economic growth in the utility's certified territory. R.C. 4928.66(A)(1)(b). The statute recognizes that a utility should not be penalized for positive conditions beyond its control or for fostering a positive effect, even if it did play a role in spurring economic growth. That is a rational act reasonably related to the overall public welfare. The rule is not. The rule not only penalizes the utility for a condition beyond its control; it penalizes the utility's customers by causing them to bear even higher costs, associated with additional energy efficiency and demand reduction programs, at a point in time when a declining economy is already straining their budgets.

C. Rule 4901:1-39 violates Ohio Const. Article II, Section 28 because it applies retroactively.

Ohio Constitution, Article II, Section 28 prohibits the passage of retroactive laws. A retroactive law is one that "affect[s] acts or facts occurring, or rights accruing, before it came into force." *Hope Academy v. Ohio Dept. of Education*, 2008-Ohio-4694, ¶12 (quoting *Bielat v. Bielat*, 87 Ohio St.3d 350, 353 (2000)). A law is impermissibly retroactive either "if it takes away or impairs rights that vested or accrued before the statute came into force or it attaches a new disability in respect to past transactions or considerations." *Id.* (citing *State ex rel. Matz v.*

Brown, 37 Ohio St.3d 279, 281 (1988)). Stated another way, "[t]he retroactivity clause nullifies those new laws that 'reach back and create new burdens, new duties, new obligations or new liabilities not existing at the time [the statute becomes effective].'" *Cosby v. Franklin Co. Dept. of Job and Family Services*, 2007-Ohio-6641, at ¶15 (citing *Bielat*, 87 Ohio St. 3d at 352-353). And, "[a]ny prohibition against retroactive laws pertaining to legislative enactments applies to rules and regulations that administrative agencies promulgate." *Id.*

Rule 4901:1-39 is an impermissibly retroactive law. R.C. 4928.66 creates and defines the scope of an electric distribution utility's obligation to implement energy efficiency programs and peak demand reductions commencing in 2009. The utilities rights and obligations under the statute accrued and vested at the time the law took effect. While the General Assembly remained free to alter those rights and obligations *prospectively*, those rights and obligations could not be modified even by the General Assembly retrospectively, and certainly could not be lawfully modified by administrative action either prospectively or retrospectively. In the constitutional parlance, R.C. 4928.66 gave the utilities a reasonable expectation that their obligations were fixed, absent subsequent legislative action.

Rule 4901:01-39, however, significantly increases the burdens the utilities must bear to comply with the statute by reducing the types of measures that can be counted toward achieving energy savings and demand reductions, (Rule 4901:1-39-05(D)), and by discounting actual savings and reductions associated with customers' projects (Rule 4901:1-39-08(B)(4)). The Commission's Entry in this case also increases the burdens on the utilities by imposing the threat of an increased baseline in the event of "negative economic growth" in the utility's certified territory and by the use of a rolling three year average to calculate the statutory baseline that increases compliance requirements beyond those contemplated in the statute. While the

Commission has no authority to rewrite the requirements of R.C. 4928.66, either by rule or order, here it compounds its error by seeking to apply the unlawfully rewritten law retroactively. R.C. 4928.66 took effect in July 2008 and the obligation to implement energy efficiency and demand reduction programs began in 2009.

Moreover, the rules are not even yet in effect, even though 2009 is more than half over. The Commission will seek to apply Rule 4901:1-39 for the first time in April 2010 and at that time it will be applying the rule to the already completed 2009 compliance year. At that time the Commission intends to retrospectively carve out of the utilities' compliance portfolios programs and projects excluded by the rule even though such programs and projects were validly implemented in accordance with the statute in 2009. That is precisely the type of retroactive law enforcement that Ohio Const. Art. II, § 28 prohibits.

D. Rule 4901:1-40 is unconstitutional in that it (i) fails to provide meaningful standards as required by fundamental notions of due process; (ii) does not bear a rational relationship to public welfare and unreasonably and arbitrarily prohibits double counting for compliance purposes; and (iii) applies retroactively.

For all of the reasons set forth in Sections A, B and C, *supra*, the defects in Rule 4901:1-40 as described in the Companies' initial Application for rehearing, which are incorporated herein by reference, are unconstitutional as (i) failing to provide meaningful standards as required by fundamental notions of due process; (ii) does not bear a rational relationship to public welfare and unreasonably and arbitrarily prohibits double counting for compliance purposes; and (iii) applies retroactively. Accordingly the Revised Rules must be modified consistent with the Companies comments set forth in its initial Application for Rehearing.

E. With the Commission's clarification that it requires actual peak demand reductions, rather than the development of programs designed to achieve such reductions, Rule 4901:1-39-01(Q) is unlawful, unconstitutional and in violation of the plain meaning of R.C. 4928.66(A)(1)(b).

In their Application for Rehearing, the Companies sought clarification on the criteria that the Commission would use to determine compliance with the statutorily mandated peak demand reduction requirements set forth in R.C. 4928.66(A)(1)(b), given that none was provided in the Commission's Order or Original Rules and further given that there was an apparent inconsistency between the Commission's ruling in *Columbus Southern Power Company, et al.* PUCO Case No. 08-917-EL-SSO and the statutory provision that created the requirements. (Cos. AFR, p. 15.) In its Entry, the Commission stated:

> The Commission believes that the benefits of [Senate Bill] 221 cannot be realized unless real peak-demand reductions are realized. The baselines and benchmarks will be known in advance. The day ahead forecast demand will dictate whether, and the degree to which, interruptions must be called or not called in order to achieve the benchmarks. If interruptible customers cannot accept the prospect of being interrupted, service should be sought under another tariff, supplier, or operations so as to mitigate demand during peak hours. If the electric utilities cannot rely upon interruptible customers to reduce peak demand, they should seek to implement real peak demand reductions through other means. (Entry, pp. 5-6.)

Inasmuch as the Companies were not a party to the AEP Case, and the Commission, for the first time in its Entry, clarified its position that it will require *actual* peak demand reduction requirements, rather than a *demonstration of the ability* to meet such requirements, the Companies seek rehearing of the Commission's findings on this issue. As discussed below, the Commission's position is unlawful and unreasonable as being contrary to the plain meaning of R.C. 4928.66(A)(2) and a violation of an EDU's right to due process.

As the Commission recognized in the case of *WorldCom, et al. v. Toledo*, Case No. 02-3210-EL-PWC (Opinion & Order, May 14, 2003), in a statutory interpretation case, "determining the intention of the legislative branch [is] of primary importance." *Id.* at 12. The Commission in *WorldCom*, relying on a litany of Ohio Supreme Court cases, concluded that if this intent "is discernable from the face of the statute, using the words either based on their ordinary meaning or based on their technical or statutory meaning, [the Commission] need go no farther." *Id.* at 11.

In this instance, the meaning is clear. The law requires only that an EDU demonstrate that its program "is designed to achieve" the necessary results. If the legislature intended for the utility to demonstrate actual peak reductions under R.C. 4928.66(A)(1)(b), the requirement would not be addressed as a design issue, but rather would be a demonstrable mandate. And while the Companies do not believe that there is any ambiguity in R.C. 4928.66(A)(1)(b) as it pertains to this issue, even if it is assumed that such ambiguity exists, the Commission's interpretation is contrary to basic rules of statutory interpretation which require the Commission to "breathe sense and meaning into [the statute]; [ ] give effect to all of its terms and provisions; and [ ] render it compatible with other and related enactments whenever and wherever possible" *Commonwealth Loan Co. v. Downtown Lincoln Mercury Co.* (1st Dist. 1964), 4 Ohio App. 2d 4, 6.

The Commission's interpretation of R.C. 4928.66 violates each of these basic principals. First, its interpretation renders R.C. 4928.66(A)(1)(a) incompatible with R.C. 4928.66(A)(1)(b). In subparagraph (a), which addresses energy efficiency requirements, the statute expressly states that the EDU must "implement energy efficiency programs *that achieve* energy savings equivalent to at least three-tenths of one percent.... (emphasis added), while in subparagraph (b), which addresses peak demand reductions, the legislature only requires an EDU to implement "peak demand reduction programs *designed to achieve* a one per cent reduction... (emphasis added). Clearly the legislature made a distinction between the need to demonstrate actual results and the need to design programs that could achieve, if necessary, the desired results; and so too must the Commission. To do otherwise fails to give effect to all of the terms and provisions set forth in R.C. 4928.66(A).

Moreover, the Commission's interpretation of this statute fails to breathe sense into the meaning of the statute. As the Ohio Supreme Court indicated in *State ex rel. Webb v. Bliss*, 99 Ohio St. 3d 166, 170, 2003-Ohio-3049, ¶ 22, the Commission must presume that "the General Assembly would not enact a law that produces an unreasonable or absurd result." Requiring peak load reductions while capacity is available on the grid to meet customer demand serves no useful purpose and will unnecessarily disrupt operations for major businesses and/or other customers participating in EDU sponsored peak reduction programs. The actual interruption provides no benefit that is not already achieved by having the ability to do so. It is the ability to interrupt that lowers the amount of capacity that an EDU must acquire to serve the resultant lower customer demand, not the actual interruption. Therefore, an actual requirement to reduce load while there is sufficient capacity on the system leads to an absurd result that disrupts customer operations without any furtherance of legislative objectives underlying the statutory mandates – an outcome that could not have been intended by the General Assembly.

There is also an even broader issue separate and apart from whether the Commission's interpretation of R.C. 4928.66(A)(1)(b) is consistent with what the General Assembly intended. If R.C. 4928.66(A)(2) must be read as the Commission now suggests, the statute violates the essence of substantive due process. The legitimate public purpose intended to be served by the statute is to conserve energy and postpone the need for additional capacity through peak reductions. Because the ability to interrupt at times of peak demand fully accomplishes the intended purpose, regardless of whether actual interruption occurs, the requirement that interruption must occur is not rationally related to the legitimate governmental purpose. As interpreted by the Commission, R.C. 4928.66(A)(2) (1)(a) would needlessly disrupt customer operations and expose utilities to possible penal sanctions for no necessary reason or legitimate purpose in violation of the Fourteenth Amendment and Ohio Const. Art. I, § 16.

In sum, the Commission's interpretation is contrary to the plain meaning of R.C. 4928.66, finding ambiguity where none exists. However, even if the statute is assumed to be ambiguous, which it is not, the Commission's interpretation of R.C. 4928.66(A)(1)(b) violates basic rules of statutory interpretation. Not only is the Commission's interpretation inconsistent with other related statutes, but it results in an absurd outcome that serves no useful purpose and violates due process. Accordingly, the Companies ask that the Commission grant a second rehearing and find that an EDU must submit programs designed to achieve the peak demand reductions set forth in R.C. 4928.66(A)(1)(b), rather than actually reduce peak demand when there is sufficient capacity on the system.

F. The Companies request clarification on the reporting requirements for Mercantile Customers.

Rule 4901:1-39-08(B)(6) requires a mercantile customer to include in its annual report "[a]n accounting of expenditures made for each project and its component energy savings and electric utility peak-demand reduction attributes." The Commission retained this Rule, rejecting the request of Kroger Co. to delete it, saying:

> In order to establish that a measure meets the TRC test, one must know the cost of such measure. Moreover, Kroger makes no compelling argument for treating mercantile energy efficiency measures any differently than electric utility sponsored energy efficiency measures. And since all cost-effective energy efficiency measures should be pursued, cost of mercantile customer projects are relevant to the Commission's inquiry. (Entry, p. 19.)

Given the Commission's rationale set forth above, the Companies ask the Commission to clarify whether such cost information is necessary for *all* mercantile customer projects or simply those pursued on *a going forward basis*. EDUs are permitted to include historic mercantile customer projects as part of their energy efficiency and demand reduction compliance strategy. Clearly the costs incurred for a historic project are sunk costs that have been borne by the customer. Therefore, such costs are irrelevant for TRC purposes. And given the sensitivity surrounding the disclosure of such information in general, the Companies submit that at a minimum, the Commission should clarify its Entry so as to exclude from reporting requirements costs associated with historic mercantile customer projects. Based on the Commission's rationale for requiring such costs, such disclosure serves no useful purpose and could possibly create additional work for all involved if such information is found to be confidential.

Based on the Commission's Entry, it appears that such cost information is required for mercantile customer projects at least on a prospective basis. The Companies ask the Commission to reassess this decision. The rationale for excluding cost information for historical projects equally applies to prospective projects. All mercantile customer projects are *customer* initiated projects that are paid for *by the customer*, based on the *customer's* cost-benefit analysis. It is not the Commission's responsibility to second guess the customer's decision to proceed with the project, especially since there are no EDU sponsored incentives that would be paid by other EDU customers. And while the mercantile customer may be eligible for exemption from paying certain energy efficiency/demand reduction program costs, such eligibility is determined based on consumption and/or demand reduction results, and not the results of a TRC test. Requiring the reporting of project costs for customer initiated projects serves no useful purpose, regardless of whether they are historic or prospective, and creates unnecessary confidentiality issues. This requirement should be removed from the Revised Rules.

G. The Commission's clarification in its June 17, 2009 Entry that requires electric distribution utilities to deploy all cost-effective energy efficiency measures is unconstitutional, and unlawful and unreasonable as being contrary to the plain meaning of R.C. 4928.66(A).

In its Entry, the Commission stated:

> We have previously stated in the April 15 Order, the energy efficiency benchmarks represent the minimum energy efficiency savings required by Section 4928.66(A)[1][a] of the Revised Code. As the substitution of cost-effective energy efficiency for retail electric service is by definition, more cost-effective for consumers, these rules are designed to require electric utilities to deploy *all* cost-effective energy efficiency measures. (Entry, p. 13) (emphasis added.)

R.C. 4928.66(A)(1)(a) provides:

> Beginning in 2009, an electric distribution utility shall implement energy efficiency programs that achieve energy efficiency savings equivalent to *at least* three-tenths of one percent of the total, annual average, and normalized kilowatt hour sales.... [emphasis added.]

While the Companies agree that R.C. 4928.66(A)(1)(a) establishes the minimum targets that must be met by an EDU, nowhere in this statute does it require the EDU to exceed these minimum requirements. The Commission's clarification in its Entry unlawfully expands an EDU's requirements under R.C. 4928.66(A)(1)(a). Accordingly, the Companies ask the Commission to grant rehearing on this issue and clarify that the EDUs will comply with R.C. 4928.66(A)(1)(a) by meeting the targets set forth therein.[4]

[4] Not only is the Commission's expansion of the statutory requirements unlawful as being contrary to the plain meaning of R.C. 4928.66(A)(1)(a), but for the reasons discussed *supra*, the requirement that an EDU must "deploy all cost-effective energy efficiency measures" suffers the same constitutional defects. The requirement is unconstitutionally vague, bears no rational relationship to the public welfare and will be applied retroactively.

III. SUMMARY

In sum because the Commission failed to correct the defects raised by the parties in their respective applications for rehearing, the Revised Rules in general, and Rules 4901:1-39 and 4901:1-40 in particular, create a process that is in violation of Senate Bill 221, is in violation of both the Federal and Ohio constitutions, and creates an impractical approach to compliance with the mandates created by Ohio's General Assembly. For all of the reasons set forth above, the Companies ask the Commission to grant rehearing, remove the Revised Rules from the Joint Committee on Administrative Rules, and modify them, correcting the statutory and constitutional defects discussed in both the Companies' initial and second Applications for Rehearing.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Copies of the foregoing *Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Rehearing* and the *Memorandum in Support* thereof were served by first class United States Mail, postage prepaid (with copies provided electronically), to the persons on the attached Service List on this 17th day of July, 2009.*

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