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Public Utilities Commission of Ohio
Investigation and Audit Division

Memorandum

Date: 8/10/2009

Re: Nolan Moser
1207 Grandview Ave
Ste 201
Columbus, OH 43212

Docketing Case No.: 08-888-EL-ORD

Notes:

Please docket the attached in the case number above.

N 1705 080509 L6

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AUG 05 2009

Office of Chairman
P.U.C.O.

Alan Schriber
PUCO Chairman
180 E. Broad St.
Columbus, OH 43215

Please find two Memorandum from the Ohio Consumer and Environmental Advocates concerning the PUCO's recently adopted "Green Rules." These memos were created in response to materials produced by some industrial advocates stating numerous objections to those rules, materials which were forwarded to legislators, JCARR administrative staff, and PUCO commissioners. We respond in defense of these rules. Should you have any questions regarding this matter please contact any of the following individuals:

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MEMORANDUM

To: **Representative Michael Skindell, Senator Tom Niehaus, Representative Marian Harris, Senator Timothy Grendell, Representative Mike Moran, Senator Karen L. Gillmor, Representative Ross McGregor, Senator Sue Morano, Representative Clyde Evans, Senator Tom Sawyer**

CC: **PUCO Chairman Alan Schriber, Commissioners Paul Centolella, Cheryl Roberto, Valerie Lemmie, and Ronda Fergus; and JCARR Administrator William Hills and Assistant Director Greg Fouche**

From: **From members of the Ohio Consumer and Environmental Advocates, including The Office of the Ohio Consumers' Counsel, The Natural Resources Defense Council, The Ohio Environmental Council, Midwest Energy Efficiency Advocates, The Ohio Sierra Club, The Citizens Coalition, Citizen Power Inc., and Environment Ohio**

Re: **The Technical Concerns of some Industrial Advocates regarding the PUCO's Green Rules, and the OCEA response:**

Industrial and utility advocates do not generally argue that the Public Utilities Commission of Ohio ("PUCO" or "Commission") has been derelict in creating its Rule Summary or Fiscal Analysis, nor do they argue that the rules conflict with other rules. Instead, they argue that the rules exceed the scope of PUCO's authority and conflict with the intent of the legislature in enacting Amended Substitute Senate Bill 221 (SB 221). Below are summaries of specific industrial/utility arguments and our responses.

Industrial argument: For purposes of complying with the portfolio benchmarks, prohibiting utilities and industrials from counting the full increment between old technology and its efficient replacement exceeds the scope of PUCO's authority and violates the intent of the General Assembly.

Our response: Section 4928.66 (A)(2)(c) states:

> "Compliance with divisions (A)(1)(a) and (b) of this section 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, adjusted upward by the appropriate loss factors."

Industrial advocates argue that the phrases, "including the effects of all demand response programs" and "all such mercantile customer-sited energy efficiency and peak demand reduction programs" require the Commission to recognize *all the effects of* an increase in energy efficiency or a reduction in peak demand. This argument ignores the fact that only efficiency implemented above code or standard practice can be considered the results of a program. The incremental efficiency below code would have occurred without the energy efficiency program, so its effect cannot rightly be attributed to the program.

Additionally, the industrial advocates argue that determining code or standard practice will be exceedingly difficult. However, there is a whole profession of evaluators experienced in making these determinations and the Commission ruling is consistent with the interpretation of energy efficiency savings used nationally by utility energy efficiency programs, regional transmission organizations in their energy efficiency capacity bidding programs, the federal government, and measurement and verification professionals. In its rules, the Commission rightly determined that only energy efficiency that was the result of programs should count toward utility benchmarks.

Industrial argument: Prohibiting mercantile customer-sited electric generation from being eligible for compliance with the energy efficiency and peak demand reduction benchmarks is beyond the PUCO's statutory authority and violates the General Assembly's intent.

Our response: Industrial advocates use Section 4928.66 (A)(2)(c), the same section cited above, to make their argument, again ignoring the fact that it is within the Commission's jurisdiction to determine what constitutes an energy efficiency and peak demand reduction program. According to definitions in 4901:1-39-01 that industrial advocates don't challenge, "demand response" is defined as "a change in customer behavior or a change in customer-owned or operated assets that affects the demand for electricity as a result of price signals or other incentives." "Energy efficiency" is defined as "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."

Customer-sited electric generation may have benefits, but it does not meet the definition of energy efficiency. To meet the definition, it would have to actually reduce the amount of energy used on site while maintaining the current level of functionality. Customer-sited generation clearly does not do this; it merely substitutes one source of energy for another. Therefore, amended SB 221 and the Commission rules rightly place distributed generation within the scope of the advance energy standard and not the energy efficiency and peak reduction standard.

Industrial advocates also argue that Ohio law requires the Commission to "encourage implementation of distributed generation across customer classes through regular review and updating of administrative rules governing critical issues..." and that the current rules actively discourage distributed generation. But the incentives for distributed generation are unchanged. Industrial advocates are trying to fit a square peg into a round hole: not every rulemaking is an opportunity to promote distributed generation, especially if it would conflict with the intent of the legislature to increase Ohio's energy efficiency.

Industrial argument: The Commission's requirement that peak demand reductions be "actual" instead of "potential" exceeds the scope of the PUCO's authority and violates the General Assembly's intent. The industrials argue that they should be permitted to include a hypothetical amount of energy savings for which an interruptible program is "designed" to achieve.

Our response: S.B. 221 did not include a policy under R.C. 4928.02 that would ensure discounted rates to large customers in exchange for the possibility that they will not "buy through" and may actually be interrupted. Rather S.B. 221(D) included a policy that is to:

> "Encourage innovation and market access for cost-effective supply and demand-side retail electric service including, but not limited to, demand-side management, time-differentiated pricing, and implementation of advanced metering infrastructure."

The provisions of S.B. 221 were intended to create cost-effective peak reductions under the R.C. 4928.66 benchmarks. In other words, if a project does not actually reduce demand it was not designed to meet the demand reductions that are required under R.C. 4928.66. Utilities cannot know whether a program is correctly designed to meet demand reductions unless the program actually reduces demand.

In defending their attempt to count "designed" demand savings, the industrials toss a red herring: that requiring actual demand reductions would force utilities to curtail customers when not necessary from a system perspective simply to prove that demand reductions are actual. This is absurd. There are many types of programs that electric providers can rely on to reduce peak demand. For example, peak time rebates, time of use rates, including critical peak pricing. The solution to the utilities' supposed problem is obviously procuring additional cost-effective demand resources, not capriciously shutting down industrial facilities critical to Ohio's economy.

Industrial argument: Prohibiting electric utilities from counting any cost-effective energy efficiency or peak demand reduction measures against their portfolio benchmarks simply because the measure may also be undertaken to comply with another law or regulation exceeds the scope of the PUCO's authority and violates the General Assembly's intent.

Our response: Industrial advocates (and utilities) make the same argument they make earlier: that the effects of programs should include even actions that were not the result of the program. This was not the legislature's intent in passing SB 221. The energy efficiency benchmarks in the bill were meant to take Ohio beyond "business as usual," not to initiate an elaborate accounting exercise whereby mercantile customers get utility subsidies to do things they were already going to do.

Industrial argument: Prohibiting a customer-sited facility from counting against multiple individual portfolio benchmarks where a customer-sited measure increases energy efficiency and reduces peak demand by using alternative energy resources exceeds the scope of the PUCO's authority and conflicts with the General Assembly's intent.

Our response: This argument fails to recognize that the Commission has very broad authority to establish rules: "the public utilities commission has general supervision over all public utilities within its jurisdiction as defined in section 4905.05"[1]. Under R.C. 4905.06 the Commission has the authority to "prescribe any rule or order that the commission finds necessary for protection of the public safety." In addition, utility and industrial advocates fail to acknowledge that there is also no statutory authority permitting double counting of resources. In establishing these mandates, the General Assembly could easily have explained that double-counting was permitted. It did not.

Industrial argument: The Commission's failure to designate a REC registry violates SB 221 and the intent of the General Assembly.

Our response: In contradiction of the industrial argument, the Commission has provided a flexible approach to utilize RECS to achieve compliance with SB 221. Designated REC registries in the rules are comprised of PJM GATS, MISO's M-RETs or another credible tracking system approved for use by the Commission.

Industrial argument: The requirement that a REC be "fully aggregated" to be applied towards the renewable energy resource requirement exceeds the scope of the PUCO's authority and conflicts with the expressed intent of the General Assembly.

Our response: Section 4928.65 states that "the public utilities commission shall adopt rules specifying that one unit of credit shall equal one megawatt hour of electricity derived from renewable energy resources," but does not address the issue of aggregation. It is well within the Commission's jurisdiction to require a strict definition of RECs that requires the compliance instrument to retain the full environmental benefits of renewable generation. Indeed, one of the best reasons for implementing renewable resources such as wind, solar, or biomass are these technologies' environmental attributes. Allowing utilities to divide renewable energy production into "renewable" and "environmental" attributes would undermine the General Assembly's intent to improve the air quality and environment of Ohio and usurp the Commission's role as a supervisor of utilities.

Industrial argument: Prohibiting the use of RECs derived from electricity generated before July 31, 2008, towards the renewable energy resource mandates exceeds the scope of the PUCO's authority and conflicts with the intent of SB 221.

Our response: The industrials argue that Section 4928.65 of SB 221, which states: "An electric distribution utility ... may use renewable energy credits any time in the five calendar years following the date of their purchase or acquisition" prohibits the Commission from requiring that RECs used for purposes of compliance represent electricity generated after the date of the bill's signing. This rule is imminently sensible and lawful, however. If the General Assembly wished to "grandfather" old RECs into the bill, it easily could have made this explicit. It did not. Indeed, such grandfathering would have conflicted with the intent of the General Assembly to change Ohio's energy future.

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[1] R.C. 4905.06

Industrial argument: Requiring each renewable energy and advanced energy resources to apply for resource qualification exceeds the scope of the PUCO's authority and directly conflicts with the intent of the General Assembly.

Our response: The Commission's rule is designed to ensure that renewable and alternative energy resources meet the requirements of SB 221 in three areas: technology, placed-in-service date, and deliverability into the state. The process will ensure that marginal applications receive adequate scrutiny. The industrials' claim of the process' difficulty is belied by the fact that the Commission already had 12 open cases for renewable certification on July 27, 2009.

Industrial argument: Establishing separate cost caps for renewable and alternative energy resources exceeds the scope of PUCO's authority and directly conflicts with the intent of the General Assembly.

Our response: Industrial advocates and utilities have made this argument throughout the rulemaking process. The Commission is appropriately interpreting the bill as setting up two cost caps. Section 4928.64(C)(3) of the Revised Code states that "An electric distribution utility ... 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." The Commission rightly interpreted that the italicized "or" indicates that two separate three percent caps should be applied.

Industrial argument: Extending greenhouse gas reporting requirements to competitive suppliers and public utility affiliates exceeds the PUCO's authority and directly conflicts with the intent of the General Assembly.

Our response: The Commission sensibly interprets Section 4928.68 of the Revised Code to apply to entities that serve customers beyond its traditional jurisdiction of regulated utilities. Doing otherwise would make the greenhouse gas reporting requirements nearly meaningless and set up an uneven playing field between utilities and competitive suppliers. In the context of likely greenhouse gas legislation, exempting entities that serve a large portion of Ohio electric customers from greenhouse gas planning and reporting requirements would be simply irresponsible.

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MEMORANDUM

To: **Representative Michael Skindell, Senator Tom Niehaus, Representative Marian Harris, Senator Timothy Grendell, Representative Mike Moran, Senator Karen L. Gillmor, Representative Ross McGregor, Senator Sue Morano, Representative Clyde Evans, Senator Tom Sawyer**

CC: **PUCO Chairman Alan Schriber, Commissioners Paul Centolella, Cheryl Roberto, Valerie Lemmie, and Ronda Fergus; and JCARR Administrator William Hills and Assistant Director Greg Fouche**

From: **From members of the Ohio Consumer and Environmental Advocates, including The Office of the Ohio Consumers' Counsel, The Natural Resources Defense Council, The Ohio Environmental Council, Midwest Energy Efficiency Advocates, The Ohio Sierra Club, The Citizens Coalition, Citizen Power Inc., and Environment Ohio**

Re: **The Concerns of some Industrial Advocates regarding the PUCO's Green Rules:**

As stated in the June 29, 2009 memorandum drafted by the Industrial Energy Users – Ohio ("IEU-Ohio"), the main concern of industrial advocates can be boiled down into a simple statement: these representatives of mercantile customers assert that they are the only parties that may decide what or what is not "energy efficiency" for the mercantile sector or what is or what is not a "customer-sited energy efficiency.....program[s]" for the mercantile sector. They wrongly assert that the Public Utilities Commission of Ohio ("PUCO" or the "Commission") and its staff have no right to determine what qualifies and what does not qualify as energy efficiency or a savings measure in the mercantile context. The legislature did not enact specific parameters for "energy efficiency," in Amended Substitute Senate Bill 221, for these terms – the PUCO has done so, and done so reasonably and well within the spirit and letter of the law.

As you are well aware, JCARR is charged with reviewing new agency rules based upon five factors:

1. The rules do not exceed the scope of the executive rule-making agency's statutory authority;

2. The rules do not conflict with a rule of that agency or another executive rule-making agency;

3. The rules do not conflict with the intent of the legislature in enacting the statute under which the rule is proposed;

4. The executive rule-making agency has prepared a complete and accurate Rule Summary and Fiscal Analysis of the proposed rule, amendment, or rescission; and

5. If the executive rule-making agency has incorporated a text or other material by reference, the rule-making agency has met the standards stated in [sic] of the Ohio Revised Code.

There have been no allegations that the adopted rules conflict with factors: 2, 4 or 5 – the only allegations are that the rules exceed the scope of the Commission's authority and conflict with the intent of the legislature. As addressed below, the Commission's rules were carefully developed after reviewing over 1,000 pages of comments from numerous stakeholder groups, and the adopted rules do not conflict with the intent of the legislature or the scope of the Commission's rule making authority.

Introduction

On May 1, 2008, Governor Strickland signed a landmark law which will shape the future of Ohio. The Governor and the General Assembly embraced the simple fact that as a state it was time to change how energy is created, distributed, and used. To that end, Amended Substitute Senate Bill 221 ("S.B. 221") was passed and signed.

S.B. 221 not only revised Ohio law as it related to the regulation of default generation supply pricing by Ohio's electric distribution utilities ("EDUs") otherwise known as pricing of the Standard Service Offer ("SSO"). S.B. 221 also added portfolio mandates. S.B. 221 requires each EDU, by 2025, to provide from "alternative energy resources" twenty-five percent of the electricity supply required for its requisite SSO sales and each "electric services company" to provide a portion of its Ohio retail electricity supply from alternative energy resources. Alternative energy resources are made up of advanced energy resources and renewable energy resources. S.B. 221 also requires EDUs to implement energy efficiency programs. More specifically and with regard to S.B. 221's energy efficiency requirements, EDUs must achieve cumulative annual energy efficiencies in excess of 22% by 2025 as well as specific peak demand reductions.

These new portfolio mandates mark a major change in the way in which energy is to be created, distributed, and used in Ohio. More importantly, they represent a considerable block of new initiatives which the General Assembly charged the Commission to regulate. The complex programs developed in S.B. 221 clearly mandate the Commission to develop a set of rules, based upon their expertise in the area, which will implement the intention of the General Assembly. It is exactly the expertise of the Commission, and the other parties to the rule making process, that is now being attacked.

Rule Making Process

Other parties have asserted that the Commission "held no informal meetings or workshops prior to initially adopting the rules in April," and that the initial set of rules resulted in "protests" from "every stakeholder sector." Additionally they complain that the process took over a year from the signing of the bill to the proposed version of the rules submitted before this body. What the now complaining parties fail to stress is just how much work was accomplished over that year;

and that stakeholders from every economic sector have had ample opportunity to influence the process and vocalize concerns to the Commission and its staff.

The rules that are subject to JCARR review were proposed by the Commission Staff on August 20, 2008, and addressed (1) energy efficiency and demand reduction; (2) the alternative energy portfolio standard including renewable energy credits; (3) clean coal technology; and (4) greenhouse gas emissions and carbon dioxide regulations.

The PUCO Staff proposed modifications to the current forecast rules stated in Ohio Adm. Code Chapters 4901:5-1, 4901:5-3, 4901:5-3, 4901:5-5, and 4901:5-7 and the establishment of three new chapters of administrative rules related to new statutory language of R.C. Chapter 4928. The three chapters are as follows:

1. Ohio Adm. Code Chapter 4901:1-39 Energy Efficiency and Demand Reduction Benchmarks;

2. Ohio Adm. Code Chapter 4901:1-40 Alternative Energy Portfolio Standard; and,

3. Ohio Adm. Code Chapter 4901:1-41 Greenhouse Gas Reporting and Carbon Dioxide Control Planning.

By September 9, 2008, over 30 groups had filed initial comments to the PUCO's Staff's proposed rules that included nearly 500 pages of comments for the Commission Staff to review. Those who filed included groups like the Ohio Consumer and Environmental Advocates ("OCEA") who submitted comments on behalf of numerous smaller organizations – in OCEA's case, 14 organizations signed onto the comments. Subsequently, on September 26, 2008, 20 parties, with over 250 pages of comments, took advantage of the opportunity to file reply comments addressing some of the issues raised by other parties in the September 9, 2008 comments.

On April 15, 2009, after reviewing over 750 pages of comments from over 30 groups, the Commission issued a Finding and Order that adopted new rules for the sections mentioned above and provided lengthy explanations for a number of those rules. After reviewing the Commission's April 15 Finding and Order, parties--including OCEA and IEU-Ohio--were given an additional opportunity to request that the Commission reconsider its position. On June 17, after reviewing over 1,000 pages of comments by numerous parties, the Commission entered a final entry on rehearing.

All parties involved in this intensive 10-month stakeholder process had issues with the initial draft rules. We challenge any party to find any one stakeholder who is happy with everything in the adopted version of the rules. As with any rule set crafted through an open and inclusive process, the numerous parties have all seen their version of the "perfect rules" tempered and compromised by the views of opposing parties. However, the adopted rules are the result of the diligent work of professionals; including the Staff of the PUCO and the legion of lawyers and staff retained by every stakeholder sector to advance their own individual viewpoints and concerns – through almost a year of engagement. The combined work hours spent on each round of draft rules and comment submission have shaped a proposed rule set which clearly complies with the intent of the legislation, and conforms to the scope of the Commission's statutory rulemaking authority.

The comments of the numerous parties to the rule making process have indeed become repetitive. The Commission, recognizing the lack of new issues being raised by the participating parties, has wisely moved to the next stage in the rulemaking process. The adopted rules represent the best possible work product of intelligent parties, who rightfully remain in disagreement as to the best possible manner in which to handle a task as complex as that called for in by the General Assembly in S.B. 221.

The Main Concern of Industrial Customers and JCARR Review Standards

For better or worse, the legislature chose not to determine what shall qualify as "energy efficiency" or "customer-sited energy efficiency.....program[s]" in S. B. 221. [See sections 4928.66 (A)(1)(a), and 4928.66 (A)(1)(c)] These terms and measures were left for PUCO to define and develop. The PUCO has done so, and though some industrial representatives (though notably, not all) decry the result, the definitions the PUCO has settled upon are mainstream and reasonable. An example is instructive – Ohio Adm. Code Rule 4901: 1-39-05(D) requires utilities and voluntary mercantile customer participants to create energy efficiency savings above and beyond energy performance standards already required by other federal and state laws. The PUCO has decided that for the purposes of SB 221, only programs that create savings not already required by law produce "energy efficiency" savings, or would be a "customer-sited energy efficiency.....program[s]."

This requirement is imminently reasonable and within the Commission's statutory authority. Notwithstanding statements of outrage that some parties have raised concerning this baseline standard during the "Green Rules" proceedings, the PUCO's recommendation is also the energy efficiency industry standard as articulated in the various time tested and industry accepted measurement and verification reference manuals such as IPMVP, PJM Manual 18B, ISO New England Manual for Measurement of M&V, M&V Guidelines for Federal Energy Projects, the NAPEE reference guide, the Pennsylvania PUC Technical Reference Manual, and many others.[1]

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[1] "The International Performance Measurement & Verification Protocol" (IPMVP) provides standard measurement and verification ("M&V") terminology and defines four M&V options to quantify energy and water savings. The IPMVP is a savings verification device with principles that are applicable to commercial and industrial energy efficiency projects. The use of IPMVP has become standard in almost all energy efficiency projects where payments to the contractors are based on the energy savings that will result from the implementation of a variety of energy conservation measures. IPMVP has been translated into ten languages. More than 300 professionals from 100 U.S. and international organizations have contributed thousands of hours on a completely voluntary basis to update and revise IPMVP. More information can be found at http://www.ipmvp.org. "PJM Manual 18B" at http://www.pjm.com/documents/~/media/documents/manuals/m18b.ashx. "M & V Guidelines for Federal Energy Projects" at http://ateam.lbl.gov/mv/docs/mv_guidelines-3_0_wAppend.pdf. "ISO New England Manual for

To allow utilities or other entities to utilize energy efficiency program dollars, collected from the full range of customer classes, to help a small number of customers comply with energy performance standards already required by other federal and state laws would defeat the intent of S.B. 221—which is the creation of new increased energy efficiency within Ohio And such a result would not, by any reasonable definition, qualify as true "energy efficiency" or a "customer-sited energy efficiency....program" worthy of broad ratepayer support. Instead, customers would be subsidizing select mercantile entities to comply with laws and regulations they are already subject to, and presumably would have complied with on their own, regardless of customer support. No person or entity could with any justification claim that efficiency savings were created.

Aside from the fact that this is reasonable, it is the PUCO's responsibility, under statute, to determine what is and is not "energy efficiency" or "customer-sited energy efficiency.....programs." Industrial customers seem to have a fundamental problem with the PUCO taking on this role. But their opportunity for remedy does not reside at JCARR, it resides with the house and senate, and our legislative process. The adopted rules clearly express the intent of S.B. 221.

This bill was crafted by the Governor and the General Assembly to modernize the creation, distribution, and use of energy in Ohio. All parties recognize that this is a generational undertaking. It will have profound effects on everything in the State; from residential to commercial and industrial. It has the potential to shape and spark consumer savings for the next 15 years if implemented properly.

Wisely, the General Assembly has granted the Commission a broad scope in the crafting of the rules which will be used to implement this unprecedented undertaking. The Commission stayed well within the letter of the law, and has with the help of active parties through the open and inclusive rule making process, crafted rules which fairly and clearly implement the intent of S.B. 221.

The intent of S.B. 221 is clear: to make Ohio a leader in new green technologies, energy efficiency, alternative and advanced energy technologies, while at the same time protecting Ohio's citizens, manufacturing and commercial base. The adopted rules have accomplished this balance, carrying the intent of the legislation into the practice. Now is not the time to derail this progress. Now is the time to embrace the positive change brought about by S. B. 221, while recognizing that like any major undertaking, there may need to be functional changes to the rules and law as more practical understanding of the implications of these rules are developed.

Measurement of M & V" at www.iso-ne.com/.../isone.../m_mvdr_measurement_and_verification_demand_reduction_revision_1_10_01_07.doc "Energy-Efficiency and DSM Rules for Pennsylvania's Alternative Energy Portfolio Standard, Technical Reference Manual" in Docket No. M-00051865. "Model Energy Efficiency Program Impact Evaluation Guide" at http://www.epa.gov/cleanenergy/documents/evaluation_guide.pdf.

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