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BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Adoption of Rules for Alternative and Renewable Energy Technology, Resources, and Climate Regulations, and Review of Chapters 4901:5-1, 4901:5-3, 4901:5-5, and 4901:5-7 of the Ohio Administrative Code, Pursuant to Chapter 4928.66, Revised Code, as Amended by Amended Substitute Senate Bill No. 221.	))))))))	Case No. 08-888-EL-ORD

APPLICATION FOR REHEARING BY THE OHIO CONSUMER AND ENVIRONMENTAL ADVOCATES

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The undersigned members of the Ohio Consumer and Environmental Advocates (collectively "OCEA")[1] jointly and individually submit this Application for Rehearing pursuant to R.C. 4903.10 and Ohio Adm. Code 4901-1-35(A) regarding the Entries on Rehearing issued by the Public Utilities Commission of Ohio ("PUCO" or "Commission") on October 15 and October 28 (respectively the "October 15 Entry" and "October 28 Entry") in the above-captioned case. The undersigned OCEA members appreciated the PUCO's work over an 8-month period starting with the October 20, 2008 filing of the initial draft of the proposed rules through the June 15, 2009 initial Entry on Rehearing for these rules. The first 8 months of the rule making process took into consideration the thousands of pages of comments by over 30 groups that filed comments.

[1] OCEA includes the Office of the Ohio Consumers' Counsel, Ohio Sierra Club, Natural Resources Defense Council, Environment Ohio, Environmental Law and Policy Center, Ohio Environmental Council, and Citizen Power.

The same open, transparent process cannot be used to describe the final stages of the rule making process. In particular for the time period between the October 15 Entry and the October 28 Entry significant modifications were made to a number of the rules including the rules relating to energy efficiency mercantile customer savings, Ohio Adm. Code 4901:1-39-05 and the definition of a Storage facility – Ohio Adm. Code 4901:1-40-04(A)(8)(a). During that 13-day period the Commission made material changes to its own Entry without any demonstration in the record to support the Commission's significant revisions on critical issues.

The undersigned OCEA members submit that the Commission's October 15 Entry and October Entry are unreasonable and unlawful in the following particulars:

> The Commission's October 15 and 28 Entries are Unreasonable and Unlawful Because the Proposed Modifications to Ohio Adm. Code 4901:1-39-05 and the Energy Efficiency Reporting Requirements Presented in the Rule are Conflicting and Fail to Comply With the Statutory Requirements of R.C. 4928.66.
>
> The Commission's October 15 and 28 Entries are Unreasonable and Unlawful Because the Commission Failed to Formulate Rules Regarding Renewable Energy Credits (Ohio Adm. Code Chapter 4901:1-40) that Meet the Statutory Requirements of R.C. 4935.04. *Amoco v. Petro. Undergr. Stor. Tank Release Comp. Bd.*, 89 Ohio St.3d 477, 483.
>
> The PUCO's Modifications to the Requirements that a "Storage Facility" Must Satisfy to Qualify as a Resource for Meeting the Renewable Energy Resource Benchmarks are Unreasonable and Unlawful Because They Violate the Legislative Intent of S.B. 221.
>
> The Commission's October 15 and 28 Entries are Unreasonable and Unlawful Because the Commission Failed to Formulate Rules Regarding the Long-Term Forecast Reports Filed by Electric Utilities and Transmission Owners (Ohio Adm. Code Chapter 4901:5-5) Sufficient to Meet the Statutory Requirements of R.C. 4935.04. Amoco *V. Petro. Undergr. Stor. Tank Release Comp. Bd.*, 89 Ohio St.3d 477, 483.

In the absence of the modifications sought by OCEA, the October 15 and October 28 Entries are unreasonable and unlawful and no longer represent the product of work that was created through the open, transparent process that resulted from the initial part of the rulemaking process. OCEA requests that the Commission re-consider the modifications made to the rules on October 15 and 28 that were not part of an open and transparent process.

The reasons for granting this Application for Rehearing are set forth in the attached Memorandum in Support.

Respectfully submitted,

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MEMORANDUM IN SUPPORT OF APPLICATION FOR REHEARING BY THE OHIO CONSUMER AND ENVIRONMENTAL ADVOCATES

I. INTRODUCTION

The undersigned members of the Ohio Consumer and Environmental Advocates (collectively "OCEA") jointly submitted comments and reply comments regarding rules proposed in an Entry dated August 20, 2008. Rules are instrumental in setting forth a transparent minimum level of expectation that can be monitored by all parties. While many of the rules developed by the Commission will provide benefits to the public, there are nevertheless rules that the Commission should revise to comply with Ohio law. In particular the energy efficiency and renewable energy requirements established by S.B. 221 are the jewels of Ohio's electric energy law because they can help avoid building expensive power plants and can provide consumers with tools to reduce their utility bills. The changes in the rules made by the PUCO take away these benefits, turning a balanced law into a bad deal for consumers. While the rest of the country is taking steps forward on efficiency and renewable energy, the PUCO's latest changes to the rules have moved Ohio at least several steps backwards.

OCEA members urge the Commission to reconsider its October 15 and October 28 Entries to keep in the forefront the public interest and the utilities' duty to serve that interest in a fair and reasonable manner.

II. STATUTORY BASIS FOR APPLICATIONS FOR REHEARING

Applications for rehearing are governed by R.C. 4903.10. In considering an application for rehearing, Ohio law provides that the Commission "may grant and hold such rehearing on the matter specified in such application, if in its judgment sufficient reason therefore is made to appear." Furthermore, if the Commission grants a rehearing and determines that "the original order or any part thereof is in any respect unjust or unwarranted, or should be changed, the Commission may abrogate or modify the same . . . ."[2] The undersigned members of OCEA meet the statutory conditions applicable to an application for rehearing pursuant to R.C. 4903.10. Accordingly, OCEA respectfully requests that the Commission abrogate or modify the Entry on the matters specified below as requested herein.

III. THE COMMISSION'S OCTOBER 15 AND 28 ENTRIES ARE UNREASONABLE AND UNLAWFUL BECAUSE THE PROPOSED MODIFICATIONS TO OHIO ADM. CODE 4901:1-39-05 AND THE ENERGY EFFICIENCY REPORTING REQUIREMENTS PRESENTED IN THE RULE ARE CONFLICTING AND FAIL TO COMPLY WITH THE STATUTORY REQUIREMENTS OF R.C. 4928.66

R.C. 4928.66(A)(2)(c) states that compliance with S.B. 221's energy efficiency targets shall be measured by including the effects of all mercantile customer energy efficiency programs. Thus, the legislature clearly stated that compliance shall come from

[2] R.C.4903.10.

energy efficiency programs. OCEA parties have consistently argued that the Commission must not allow mercantile customers to count as "energy savings" actions that are required to take by law or standard, as these "savings" cannot be considered to have occurred as a result of a program.[3]

The Commission agreed, stating in its June 17, 2009 Entry that it is "not persuaded by comments that the gross amount savings between replaced and replacement equipment should count."[4] But in its October 15, 2009 Entry, the Commission wrote a new paragraph, Ohio Adm. Code 4901:1-39-05, that contradicts its earlier position about mercantile customer savings. The new paragraph allows the effects of mercantile energy efficiency programs to include gross savings "to the extent they involve the early retirement of functioning equipment, which is not yet fully depreciated, or the installation of new equipment that achieves reductions in energy use ... that exceed the reductions that would have occurred had the customer used standard equipment and practices."[5]

In Finding (15) of the October 15 Entry, the Commission states that the change, unexplained in the finding in which it is presented, was made "to ensure that savings from mercantile customer sited programs are treated reasonably and comparably to savings from electric utility efficiency ... programs." The Commission's 180-degree change regarding the measurement of mercantile customer savings is not supported by the Commission's prior statements, or the fact that no evidence or even new arguments were submitted in the record between the June 17th Entry and the October 15 Entry. In addition, the Commission's new position regarding the measurement of mercantile

[3] See OCEA *Memorandum Contra Application for Rehearing* at page 3 (May 27, 2009).

[4] Entry on Rehearing at 18 (June 17, 2009).

[5] Entry on Rehearing, at 7 (October 15, 2009).

customer savings in the October 15 Entry is inconsistent with the Commission's accounting of mercantile energy savings by the electric distribution utilities.

In the October 15 Entry, proposed Ohio Adm. Code 4901:1-39-05(H) states that "an *electric utility* shall not count in meeting any statutory benchmark the adoption of measures that are required to comply with energy performance standards set by law or regulation...." (Emphasis added). The rules contained in the October 15, 2009 Entry pertaining to measurement of mercantile customer savings are different – and conflict with one another -- depending on whether it is the mercantile customer or the electric utility that must account for the savings. The proper, lawful standard is applied to utility programs, while mercantile customers can count as the result of a program actions that they were required by law to take – and are not programs at all. In addition, "standard practices" is a broad phrase open to a variety of interpretations. The use of this phrase by the Commission creates a loophole that undermines any real energy efficiency program attempts, allowing instead the ability for mercantile customers to creatively re-name standard maintenance practices that will take the place of progressive energy efficiency efforts.

The Commission's October 28, 2009 Entry exacerbates this problem, removing the assurance that the early retirement provision applies only to equipment "which is not fully depreciated." This potentially creates a very large class of free-riders and results in no net new energy efficiency as was intended in S.B. 221. Moreover, this provision in the October 15, 2009 Entry was necessary because the only fair and auditable standards for estimating the useful life of equipment are depreciated life or actuarial data. The October 28th Entry, in addressing newly installed equipment, also inserts the provision

that mercantile customers only have to compare newly installed equipment to standard equipment or practices "where practicable."

Together, the changes to Ohio Adm. Code 4901:1-39-05(F) in the Commission's October 15 and 28 Entries violate the intent of the legislature and create a presumption of energy savings where energy savings might not exist.

Revised Code 4928.66(A)(2)(c) states that compliance with the energy and demand savings targets in 4928.66(A)(1)(a) and (b) 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 response programs..."

Thus, the legislature clearly stated that compliance shall come from "energy efficiency programs."[6] The PUCO has the statutory duty and authority to create reasonable parameters and definitions for undefined legislative terms. However, the PUCO's treatment of mercantile customers, allowing the counting of savings that would have been achieved absent an energy efficiency program, essentially renders that important term presented in the legislation meaningless. The PUCO may not ignore legislative language and directives; through its interpretation of the term "energy efficiency... program" it has done exactly that. Actions that would have taken place in absence of an energy efficiency program cannot be considered an effect of a program. It is simply not a program as required under the law. An energy efficiency program can be considered nothing less than a coherent, deliberate plan, carried out by a mercantile customer, for the purpose of creating energy savings while creating, producing, or offering the same level of goods and services.

[6] R.C.4928.66(A)(2)(c).

Random savings, scheduled maintenance, even individual savings actions are not and cannot be considered "energy efficiency...programs." The plain language of the statute requires two components, first, true energy efficiency, accurately defined by the PUCO as a reduction in "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."[7] Second, the statute requires a "program"; defined by Ohio Adm. Code 4901:1-39-01(V) to mean "a single offering of one or more measures provided to consumers" and Merriam-Webster defines a program as "a plan or system under which action may be taken toward a goal."[8] Both elements; energy efficiency, and a plan intended to produce that energy efficiency are necessary. The legislature deliberately chose the word "program"; it did not choose the words "action," or "initiative." Instead the legislature chose to recognize those mercantile customers, and only those mercantile customers, who put in place or would put in place energy efficiency plans that were intended to produce savings.

Accordingly, it is a clear violation of the intent of the legislature to allow "naturally occurring" actions that would have occurred without the influence of an energy savings program to count toward compliance. The Commission must determine savings by asking the simple question: what would have happened had energy saving programs not been implemented? In the case of "early retirement of functioning equipment," S.B. 221 clearly caused the action. Mercantile customers should be able to count as energy savings the difference in efficiency between the old and new piece of equipment for the amount of time the old piece of equipment would have continued operating, as

[7] Ohio Adm. Code 4901:1-39-01 (J).

[8] http://www.merriam-webster.com/dictionary/program.

determined from actuarial tables. In the case of "the installation of new equipment," an S.B. 221 program could only have facilitated energy savings above the amount required by existing code or standard practice: the energy saved by replacing the old piece of equipment with a code or standard practice piece of equipment would have occurred without the passage of S.B. 221.

This internal conflict in the Entry should be rectified by holding both mercantile and utility programs to the same, lawful standard: only savings facilitated by a program count toward the energy savings benchmarks. If the Commission chooses not to hold the utility and mercantile energy saving programs to the same standard, OCEA requests that the Commission review Ohio Adm. Code 4901:1-39-05(F) on an expedited basis, sooner than the usual 5 years. The misattribution of energy savings to mercantile projects could have the effect of limiting the energy efficiency programs delivered to residential and small commercial customers in Ohio. This is not the intent of the Legislature.

Depending on how much a utility relies on mercantile opt-out to meet its benchmark becomes a significant new concern that should have the Commission reconsidering its position. If hypothetically, 60 percent of a utility's benchmark is met through mercantile opt-out and that mercantile opt-out is achieved through replacing fully depreciated equipment with new equipment expected to last five to fifteen years or more, that is more efficient but does not exceed code or standard practices, then theoretically 60 percent of the benefits to the utility's customers that was intended by that benchmark, will be lost. The benchmarks exist for a reason. The benchmarks are intended to reduce the utility's need to meet demand by building new power plants which are far more costly than energy efficiency. See chart attached. If the Commission's Entries of October 15

and 28 are allowed to stand, the Commission with a stroke of a pen will have eviscerated the many months of hard work and deliberation that went into formulating the language of S.B. 221. Clearly, the Commission has exceeded the scope of its authority.

IV. THE COMMISSION'S OCTOBER 15 AND 28 ENTRIES ARE UNREASONABLE AND UNLAWFUL BECAUSE THE COMMISSION FAILEDTO FORMULATE RULES REGARDING RENEWABLE ENERGY CREDITS (OHIO ADM. CODE CHAPTER 4901:1-40) THAT MEET THE STATUTORY REQUIREMENTS OF R.C. 4928.64. *AMOCO V. PETRO. UNDERGR. STOR. TANK RELEASE COMP. BD.*, 89 OHIO ST.3D 477, 483 AND 498.[9]

Modifications to the definitions of "double-counting" (Ohio Adm. Code 4901:1-40-01(M)) and "renewable energy credit" (Ohio Adm. Code 4901:1-40-01(BB)) undermine the legislative intent of R.C. 4928.64(B) and Ohio Policy Directives of R.C. 4928.02. In addition, the Commission eliminated the definition of "fully aggregated," both in its own entry, and from the renewable energy credit description. These changes, which represent an unjustified *complete reversal* of the PUCO's June 17 Entry, unlawfully undermine the legislative intent of R.C. 4928.64, which describes the required percentage of diversification for the generation sources of an electric distribution utility. In addition, these changes contradict State Policy outlined in R.C. 4928.02, which presents the General Assembly's vision of a robust renewable energy sector and the development of effective choices for utility customers.

[9] The *Amoco* ruling states that administrative rules must implement the public policy embodied in the legislation that the agency is charged with implementing. The ruling also states that "an administrative rule cannot add or subtract from the legislative enactment."

A. The PUCO's modification to the definition of "renewable energy credit" and the elimination of the definition of "fully aggregated," both from its own entry, and from the REC description represent a misunderstanding of REC attributes, does not help clarify how a REC is defined, and frustrates the intent of the Legislature as embodied in R.C. 4928.64(B) and the policy directives of R.C. 4928.02.

The Commission's original definition of renewable energy credit ("REC") required that each REC must be "fully aggregated."[10] "Fully aggregated" meant that a REC retained "all of its environmental attributes, including those pertaining to air emissions...."[11] In the June 17 Entry, the Commission explained that it would consider a waiver of this rule on a case-by-case basis.[12] In addition, the Commission noted it would revisit this rule "in the event that state or federal carbon mandates are enacted."[13]

On October 15, 2009, the PUCO issued another Entry on Rehearing in the same docket. In these revised rules, "fully-aggregated" is no longer a defined term, and the words have been removed from the definition of a REC, which now reads "the environmental attributes associated with one megawatt-hour of electricity generated by a renewable energy resource..."[14] The Commission added:

> We believe this change should clarify our position on this topic...For facilities that the Commission recognizes as eligible renewable energy facilities, such facilities are not precluded from pursuing carbon offsets in addition to RECs. The Commission would not perceive the receipt of carbon offsets as diminishing the value of any associated RECs. The Commission may revisit this position in the future if carbon regulations and related markets

[10] Entry on Rehearing, Ohio Adm, Code 4901:1-40-01(CC) (June 17, 2009).

[11] Entry on Rehearing, Ohio Adm. Code 4901:1-40-01(T) (June 17, 2009).

[12] Entry on Rehearing, Finding 48 (June 17, 2009).

[13] Id.

[14] Entry on Rehearing, Ohio Adm. Code 4901:1-40-01(BB) (October 15, 2009).

> develop, but facilities recognized under this current position would not be subjected to any retroactive policy revisions.[15]

The Commission was responding in part to a request by AMP-Ohio that the definition of a REC be amended to allow the portion of a REC associated with greenhouse gas destruction (i.e., via flaring or other combustion) to be separate from the portion of the REC associated with the generation of renewable energy. This concern mischaracterizes when the REC attributes are created and the change to the rules should be removed.

RECs are not the result of capturing and flaring a greenhouse gas; RECs result only when and if that gas is used to generate electricity. Flaring a greenhouse gas such as methane is an environmental benefit. However, this benefit is not associated with a REC unless, in addition to capturing the gas, fossil fuel electricity generation is displaced by burning the methane to generate electricity. Otherwise, flaring is a separate benefit. The attributes of a REC arise only from generation using an eligible source and the displacement by that source of emitting generators. The United States Environmental Protection Agency agrees that these are two separate products.[16] Thus, if the Commission wants to reassure AMP-Ohio, or other parties with an interest in realizing the value of offsets from collecting and flaring greenhouse gases, it should do so by

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[15] Entry on Rehearing, Finding 24 (October 15, 2009).

[16] U.S. Environmental Protection Agency, Climate Leaders Greenhouse Gas Inventory Protocol Offset Project Methodology for Project Type: Landfill Methane Collection and Combustion. Climate Protection Partnerships Division/Climate Change Division, Office of Atmospheric Programs. August 2008 Version 1.3. http://www.epa.gov/stateply/documents/resources/draft_landfill_offset_protocol.pdf ; See, also: U.S. Environmental Protection Agency, Climate Leaders Greenhouse Gas Inventory Protocol Optional Modules Methodology for Project Type: Green Power and Renewable Energy Certificates (RECs). Climate Protection Partnerships Division, Office of Atmospheric Programs. November 2008 Version 2.1. http://www.epa.gov/stateply/documents/greenpower_guidance.pdf; and See: U.S. Environmental Protection Agency, Direct Emissions from Municipal Solid Waste Landfilling. Climate Leaders Greenhouse Gas Inventory Protocol, Core Module Guidance. 2004. http://www.epa.gov/stateply/documents/resources/protocol-solid_waste_landfill.pdf

clarifying that collecting and flaring such gases is not an attribute of a REC, as opposed to removing the blanket requirement that RECs be fully aggregated.

The risk is that by removing the language requiring fully aggregated RECs, the Commission may lead the parties into thinking that they can use a REC as both an offset and a REC. RECs and offsets are not the same thing. Renewable energy generation that meets screening criteria (that resulting emissions reductions are permanent, additional, verified, and enforceable) and may also be considered an offset should then be used to satisfy only one regulatory requirement. Otherwise, the same megawatt of generation is being double-counted to satisfy multiple regulatory requirements. Double-counting a REC for multiple regulatory requirements will significantly slow the development of renewable energy in Ohio, which would subtract from the legislative enactment of S.B. 221. As presented in *Amoco*, an administrative rule should not diminish legislative enactment.[17] Allowing one REC to be counted for two different purposes halves any statutory requirements that overlap. This contradicts the intent of the legislature as embodied in R.C. 4928.64(B) and the policy directives of R.C. 4928.02. The Commission should eliminate this loophole in order to ensure that the intent of the legislation is fulfilled.

R.C. 4928.65 allows for electric distribution utilities and electric service companies to use renewable energy credits to comply with the renewable energy and solar energy requirements set in R.C. 4928.64(B)(2). However, if one REC is allowed to be disaggregated into many environmental components, the purpose of allowing RECs to meet the R.C. 4928.64(B)(2) requirements is dubious. One of the main purposes of

[17] Amoco *v. Petro. Undergr. Stor. Tank Release Comp. Bd.* (2000), 89 Ohio St.3d 477, 484, 733 N.E.2d 592, 598.

requiring a percentage of electricity to be generated from renewable energy sources is the substantial environmental benefits these sources provide for Ohio. If these benefits are allowed to be severed piece by piece from the REC, what remains is essentially an empty shell. By using these incomplete RECs to count towards the percentage goals as stated in R.C. 4928.64(B)(2), the environmental benefits envisioned by the General Assembly may not come to fruition.

In addition, NOx allowances are not an attribute automatically arising from the generation of renewable energy. They are separate from RECs, as presented in the Commission discussion in the June 17th Entry.[18] Therefore, the disaggregation of a REC is an unnecessary step to govern these allowances. Rather, the Commission should declare, as part of the rule, whether any allowances issued to a renewable generator should be retired along with RECs when submitted for benchmark compliance. Thus, the Commission should re-reverse itself, as the "disaggregation" only presents the potential for harm to Ohio's renewable development. Rather than clarifying its position as hoped, the Commission's reversal on this issue serves only to cause additional confusion about what is and what is not an attribute of a REC, and whether specific attributes may be severable. Furthermore, the Commission has not discussed how potential separate revenue will be accounted for, in terms of financial implications to utility customers. The Commission's original position was clear. This clarity should be restored.

Finally, by allowing a REC to satisfy multiple regulatory requirements and be disaggregated by the generating facility, the Commission contradicts the General Assembly's statutorily presented vision, which includes "Ensur[ing] diversity of electric

[18]Entry on Rehearing at 24 (June 17, 2009).

supplies and suppliers,"[19] providing "...[A]ppropriate incentives to technologies that can adapt successfully to potential environmental mandates,"[20] and "Encourag[ing] the implementation of distributed generation across customer classes...."[21] Allowing disaggregation results in fewer RECs being generated due to a decreased demand for them, because the Commission's revisions will potentially allow some RECs to be counted twice.

Disaggregation of RECs also potentially diminishes the value of REC in a regional market. These changes shrink Ohio's ability to maximize the economic potential of the ever-growing renewable and alternative energy markets, wither the development of effective choices for consumers, and discourage the interest of small business owners to employ alternative energy resources in their businesses.[22]

The Commission's motivation for these modifications appears to be based on a misunderstanding regarding REC attributes. The Commission should re-adopt its original position in order to promote the development of renewable energy and diversification of an electric distribution utility's energy portfolio, which is a primary and overarching policy goal of the S.B.221 legislation. These definitions were originally in line with legislative intent. The changes are unsupported by the record and unlawful. The original definition for "renewable energy credit," along with the "fully aggregated" requirement and its original definition should be restored in these rules.

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[19] R.C. 4928.02(C).

[20] R.C. 4928.02(J).

[21] R.C.4928.02(K).

[22] These are also statutory goals presented in SB221; See R.C. 4928.02(N), (C), and (M), respectively.

B. The Commission's modification to the definition of "double counting" expands the meaning beyond the intent of the legislation as embodied in R.C. 4928.64(B) and the policy directives of R.C. 4928.02.

The Ohio Adm. Code's 4901:1-40-01(M) definition of "double counting" originally ensured that a particular renewable energy credit (and all of its attributes) is only used once; "Double-counting means utilizing renewable energy, renewable energy credits, or energy efficiency savings to: (1) satisfy multiple regulatory requirements...". The Commission's October 15 Entry diluted this concept by allowing RECs to satisfy an Ohio state renewable energy requirement AND a federal regulatory requirement for a different regulated attribute of energy production; "Double-counting means utilizing renewable energy, renewable energy credits, or energy efficiency savings to: (1) satisfy multiple Ohio State renewable energy requirements or such requirements for more than one state...".

This modified definition now allows for a REC to be counted by both Ohio and federally in the event that a federal renewable portfolio standard is enacted. This has the potential of allowing the federal renewable requirements to define a ceiling for renewable production in Ohio. If electric utilities can count both an Ohio REC and a federal REC for the same renewable output, they will likely end up with excess federal RECs, which they can use to purchase Ohio RECs. In effect, by allowing this type of double counting, electric utilities will be able to comply with Ohio's requirements more easily in the event a federal standard is implemented. This is in conflict with the legislative intent of R.C. 4928.64(B) and the policy directives of R.C. 4928.02.

V. THE PUCO'S MODIFICATIONS TO THE REQUIREMENTS THAT A "STORAGE FACILITY" MUST SATISFY TO QUALIFY AS A RESOURCE FOR MEETING THE RENEWABLE ENERGY RESOURCE BENCHMARKS ARE UNREASONABLE AND UNLAWFUL BECAUSE THEY VIOLATE THE LEGISLATIVE INTENT OF S.B. 221

The Commission's October 28 Entry modified Ohio Adm. Code 4901:1-40-04(A)(8)(a) to allow for "equivalent renewable energy credits" to be used to qualify storage facilities as renewable energy resources even when the electricity stored is not from a renewable energy resource.[23] This is a significant change from the April 15 Entry which limited what counts as a storage facility to those facilities where "[t]he electricity used to pump the resource into a storage reservoir must qualify as a renewable energy resource."[24] The April 15 Entry reflected the intent of the legislature that certain renewable energy resources, such as wind power, should not lose their renewable attribute at times when it is more economical to store the electricity generated for later use, for example, during peak electricity use periods.[25] On the other hand, the October 28 Entry change allows for a purchase of non-related RECs to transform any storage using electricity derived from any fuel source into a storage facility that qualifies as a "renewable energy resource."[26]

This new formulation of what is a qualified "storage facility" conflicts with the plain language of R.C. 4928.01(A)(35) which includes in the definition of "renewable energy source" only storage facilities "that will promote the better utilization of a renewable energy resource that primarily generates off-peak". The purchase of an

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[23] Entry on Rehearing at 4 (October 28, 2009).

[24] Opinion and Order, Proposed Ohio Adm. Code 4901:1-40-04(A)(8) (April 15, 2009).

[25] R.C. 4928.01(A)(35).

[26] Entry on Rehearing at 4 (October 28, 2009).

equivalent amount of non-related RECs to qualify a storage facility clearly does not promote the better utilization of a renewable energy resource, let alone renewable energy resources that primarily generates during off-peak times.

First, it is clear that the dirty energy going into storage does not have to qualify as a renewable energy resource by itself. Second, permitting the status of a facility to be altered simply by the purchase of RECs does not "promote the better utilization of a renewable energy resource."[27] The RECs are derived from a renewable energy resource and we support that type of energy use. However, it is extremely dubious to permit the simple act of purchasing non-related RECs to alter the qualification of a facility into a "storage facility" that develops a renewable energy resource. The purchase of RECs does not have any effect on the utilization of the facility generating the RECs. That is because the ability of a renewable facility to generate RECs and keep or sell them is already calculated into decisions concerning when and how to operate that facility. This can be compared to the situation envisioned by S.B. 221 where an off-peak renewable energy resource is allowed to perform at maximum efficiency because of the use of storage facilities.

Third, storage facilities can only qualify if they promote the utilization of a renewable energy resource that is mostly generated during off-peak times.[28] Therefore, the use of RECs to qualify storage facilities can only meet this statutory requirement if the RECs themselves are derived from renewable energy resources that are primarily generated during off-peak times. However, by their very nature, renewable resources can be generated at any time. In addition, electricity that is primarily generated during off-

[27] Entry on Rehearing at 4 (October 28, 2009).

[28] R.C. 4928.01(A)(35).

peak times from renewable resources is exactly what would be expected to be used in storage devices. Thus, it is much more likely that the renewable electricity generated during peak periods will not benefit from storage devices. The inclusion of a REC purchase option in the rule impermissibly broadens the types of renewable energy that can qualify storage facilities and permits the use of resources that may go beyond off-peak time resources.

It is clear that the purpose of allowing storage facilities to qualify as renewable energy resources is to allow renewable facilities that mainly generate during off-peak times to store their electricity when economically beneficial without incurring a penalty. The expansion of how storage facilities can qualify to include a REC option has nothing to do with this legislative intent and is not supported by the plain language of S.B. 221. Therefore, the Commission should modify Ohio Adm. Code 4901:1-40-04(A)(8)(a) by eliminating this REC option.

VI. THE COMMISSION'S OCTOBER 15 AND 28 ENTRIES ARE UNREASONABLE AND UNLAWFUL BECAUSE THE COMMISSION FAILEDTO FORMULATE RULES REGARDING THE LONG-TERM FORECAST REPORTS FILED BY ELECTRIC UTILITIES AND TRANSMISSION OWNERS (OHIO ADM. CODE CHAPTER 4901:5-5) SUFFICIENT TO MEET THE STATUTORY REQUIREMENTS OF R.C. 4935.04. *AMOCO V. PETRO. UNDERGR. STOR. TANK RELEASE COMP. BD.*, 89 OHIO ST.3D 477, 483.

The Commission's decision to reduce the information required for submission by electric distribution utilities in their Resource Plan filings, as proposed in Ohio Adm. Code 4901:5-5-06, diminishes the ability of the Commission and interested parties to properly scrutinize any utility's request to construct a generating facility as required by R.C. 4928.143(B)(2)(b):

> "No such allowance for generating facility construction shall be authorized, however, unless the commission first determines in the proceeding that there is need for the facility based on resource planning projections submitted by the electric distribution utility."[29]

The Commission's modification to its originally approved rule is an unreasonable action because the rule reduces the frequency of required submissions to as little as once every five years. The potential information gaps created by the Commission's *complete reversal* and rule change compromise the Commission's ability to carry out the legislative intent presented in R.C.4928.02 (A):

> "It is the policy of this state to...ensure the availability of adequate, reliable, safe, efficient, and nondiscriminatory, and reasonably priced electric service"[30]

Without adequate and regularly submitted energy efficiency program savings information, it is likely the Commission will be unable to accurately determine whether cost recovery, for items such as power plants, should be approved. Therefore Commission should return to this rule the requirement that Resource Plans, as previously presented, be filed on an annual basis.

A. In previous Commission Opinions and Entries, Ohio Adm. Code 4901:5-5-06 was deemed *by the Commission* to be a vital part of reviewing Ohio energy production and consumption.

1. In the April 15 Opinion and Order, the Commission described the annual reporting requirements as a "necessary planning and evaluation tool.

The Commission explained in its April 15 Opinion and Order that it viewed the annual resource plan filings as a vital part of its assessment responsibilities under S.B. 221:

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[29] R.C.4928.143(B)(2)(b).

[30] R.C.4928.02(A).

> "...[W]e will...require an annual IRP filing as a necessary tool for this Commission to assess the reasonableness of the demand and supply forecasts based on anticipated population and economic growth in the state in accordance with Section 4935.04(F)(5), Revised Code. Section 4935.04(C)(1), Revised Code, requires the LTFR [long term forecasting report] to contain a year-by-year, ten-year forecast of annual energy demand, peak load, reserves, and a general description of the resource plan to meet demand, but does not distinguish between an electric utility whose rates are set under the market-based option of Section 4928.142, Revised Code, versus an electric utility whose rates are set in an ESP pursuant to Section 4928.143, Revised Code. So long as the electric utility that is filing an LTFR owns a major electric utility facility or furnishes electricity directly to more than 15,000 customers in Ohio, it shall be required to include a resource plan in its annual LTFR."[31]

The Commission's position on these annual reporting requirements was rigid. It noted that, although there were many comments from various parties regarding these requirements, it would not address any of the comments, because it considered the rule to be a "necessary planning and evaluation tool."[32] Thus, the plain language of the Commission's Order emphasized how important and vital these annual plans would be in assisting the PUCO to make proper assessments regarding "the new energy efficiency, peak demand response, and alternative energy requirements mandated by S.B. 221."[33]

2. In the June 17th Entry, the Commission emphasized that the annual reporting requirements had a firm statutory motivation.

In the June 17, 2009 Entry, the PUCO countered utility company arguments that Ohio Adm. Code 4901:5-5-06 should be deleted by noting both OCEA assertions and AEP acknowledgement that the resource plans were the only way to evaluate the electric utilities' compliance with statutorily mandated conduct:

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[31] Opinion and Order at 46 (April 15, 2009).

[32] Id. at 45.

[33] Id.

> IRP is critical because it is the only context in which the Commission can determine whether the actions of the electric utilities under Sections 4928.64 and 4928.66, Revised Code, will ensure the availability to consumers of adequate, reliable, safe, efficient, nondiscriminatory, and reasonably priced electric service.[34]

The Commission offered no assertions of its own, other than to reiterate, in detail, the statutory annual reporting requirements of R.C.4935.04[35], and noting that the annual reports would include energy efficiency and peak demand response program information as required in S.B. 221. Thus, the Commission, in its first Entry on Rehearing made few substantive changes to the reporting rules, and in fact reiterated the statutory foundation underlying its position.

3. In the October 15 Entry, the Commission presented substantial revisions to Ohio Adm. Code 4901:5-5-06 that eliminated many of the provisions, originally part of the annual reporting requirements, that it justified using statutory provisions in the previous Opinion and Order and Entry on Rehearing.

In the October 15, 2009 Entry, the Commission stripped out many of the provisions that it justified in earlier presentations:

> the pre-2000 rule was rewritten to reflect the statutory mandates of SB 221, and streamlined to limit the amount and type of information required from the electric utilities to that which is necessary for the Commission to fulfill its obligations under SB 221. We believe that the new, abbreviated resource plan, as amended by this entry, satisfies those goals.[36]

The requirements that were originally required to be filed on an annual basis are now required only "in the forecast year prior to any filing for an allowance under Section

[34] Entry on Rehearing at 42 (June 17, 2009).

[35] Entry on Rehearing at 42 (June 17, 2009).

[36] Entry on Rehearing at 20 (October 15, 2009).

4928.143(B)(2)(b) and (c), Revised Code."[37] This Section gives the PUCO the discretion to allow a utility to recover a non-bypassable surcharge for construction of a generating facility or for an environmental cost (incurred in 2009 or later) associated with that facility.[38]

Thus the PUCO has greatly reduced the amount of information it requires on an annual basis, unless the utility is planning on filing for a cost recovery of a new generating facility. These reductions are unreasonable. The information upon which a cost recovery decision is made will be inconsistent, and undermine the PUCO's ability to fulfill the statutory assurances required under R.C.4928.02. The PUCO should restore the annual reporting requirements it eliminated and modified in the October 15, 2009 Entry on Rehearing.

B. Infrequent filings are unreasonable because they will provide an incomplete picture of Ohio energy trends and compromise the ability of the PUCO to make informed decisions on cost recovery filings.

Ohio Adm. Code 4901:5-5-06, as revised in the October 15 Entry, allows utilities to submit resource plans once every five years. As noted, earlier versions of the rule required annual reporting. As presented by OCEA and acknowledged by AEP, resource plans are the critical and the only context in which the PUCO can determine whether the actions of the utilities under Revised Code sections 4928.64 and 4928.66 will ensure the "availability to consumers of adequate, reliable, safe, efficient, nondiscriminatory and reasonably priced electric service."[39]

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[37] Entry on Rehearing at 20 (October 15, 2009).

[38] R.C.4928.143(B)(2)(b).

[39] Entry on Rehearing at 42 (June 17, 2009).

Furthermore, the Commission asserted that the annual requirements of a resource plan "are clearly specified in R.C. 4935.04(C)."[40] These plans ensure that energy savings from utility energy efficiency programs are used to avoid construction of unnecessary and expensive power plants. The multi-year gap between resource plan filings means that the PUCO could make expensive and irreversible decisions with outdated and incomplete information. Without more frequent filings, the OCC, other consumer and environmental groups, and the PUCO will have limited information from which to determine the public interest in important resource allocation questions, such as approving cost recovery for an expensive new power plant. It is difficult to present the arguments for these requirements in a manner more thoroughly and plainly than the Commission itself presented them in the April 15, 2009, Opinion and Order, and the June 17, 2009, Entry. The Commission was correct when it stated that the annual requirements as originally presented are a "necessary planning and evaluation tool to implement the new energy efficiency, peak demand response, and alternative energy requirements mandated by S.B. 221."[41] The Commission should undo the October 15 changes and restore Ohio Adm. Code 4901:5-5-06 to the version presented in the June 17 Entry on Rehearing.

C. The reduction in information submitted to the PUCO imperils Ohio statutory policy presented in R.C. 4928.02(A) to ensure availability of reasonably priced electric service.

The modifications made to Ohio Adm. Code 4901:5-5-06 compromise the Commission's ability to carry out its statutory obligations, including those obligations stated in R.C. 4928.143(B)(2)(b). Without the "necessary" tools in its toolbox, the

[40] Entry on Rehearing at 42 (June 17, 2009).

[41] Opinion and Order at 45 (April 15, 2009).

Commission is hampering its ability to maintain Ohio's statutory policy. The Commission has gone from recommending "electric utilities and stakeholders to work with staff in the development of practical and realistic timelines in accomplishing the goals of SB 221"[42] to allowing, for no justified reason, Ohio electric utilities to keep the staff and stakeholders in the dark. Decisions will be made based on material that has not been submitted for up to five years. The changes in the rule are unreasonable and imperil the PUCO and stakeholders' ability to ensure adequate implementation of S.B. 221 requirements. Without timely information, it will be difficult, if not impossible to assess important resource allocation questions and thus to "ensure the availability of adequate, reliable, safe, efficient, nondiscriminatory, and reasonably priced electric service," as stated in law. The changes made to Ohio Adm. Code 4901:5-5-06 in the October 15 Entry should be reversed.

VII. CONCLUSION

The Commission should carefully consider this Application for Rehearing along with the Initial Comments and Reply Comments previously submitted by the OCEA members toward ensuring that Ohioans receive the intended benefits of Senate Bill 221. The Commission should make changes to the rules stated in the October 15 and 28 Entries as set out in this Application for Rehearing.

[42] Opinion and Order at 46 (April 15, 2009).

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing Application for Rehearing has been served via First Class U.S. Mail, postage prepaid, to the following persons this 13th day of November, 2009.

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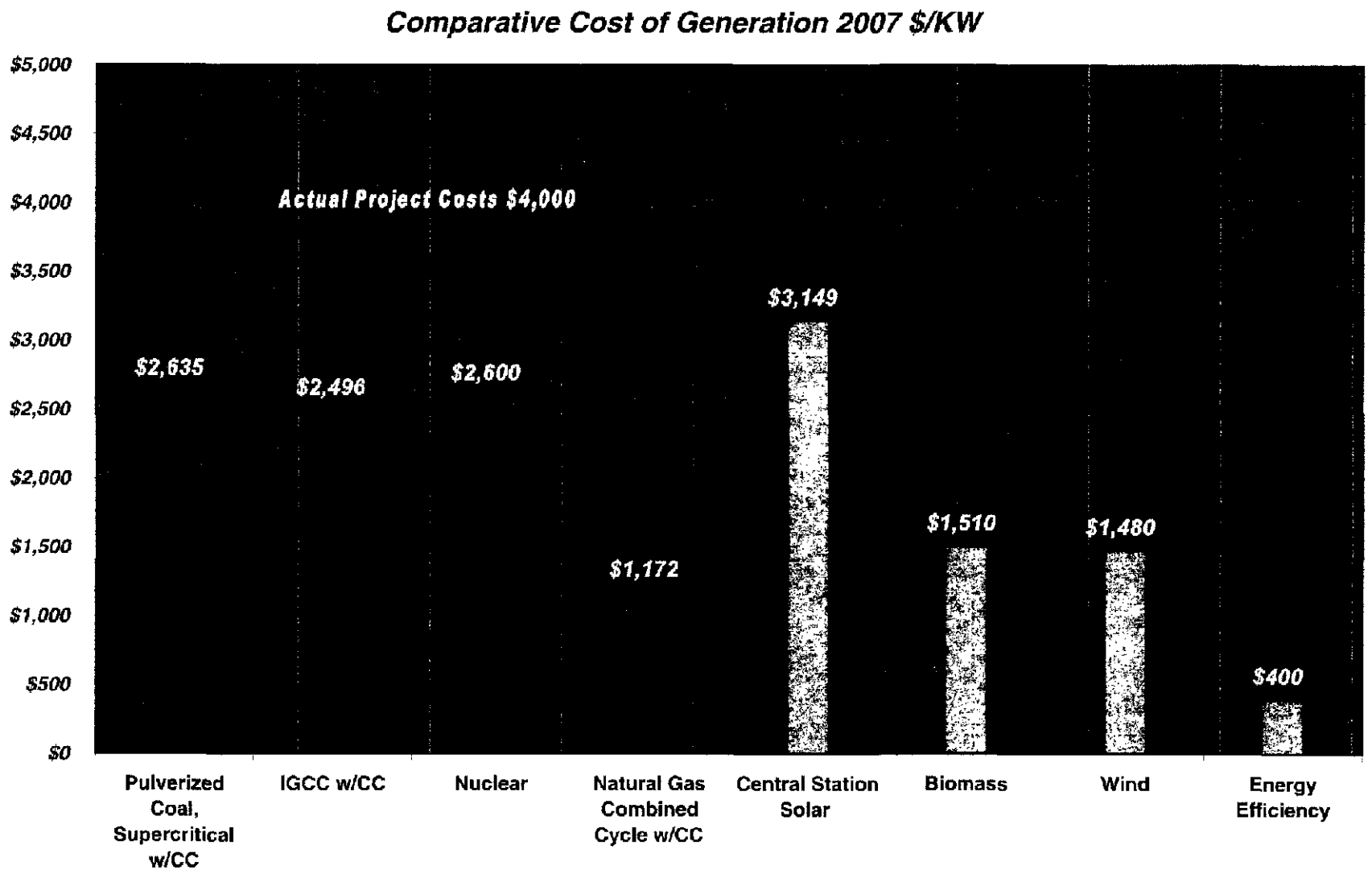
Comparative Cost of Generation 2007 $/KW
$5,000
$4,500
$4,000
$3,500
$3,000
$2,500
$2,000
$1,500
$1,000
$500
$0
Actual Project Costs $4,000
$2,635
$2,496
$2,600
$1,172
$3,149
$1,510
$1,480
$400
Pulverized Coal, Supercritical w/CC
IGCC w/CC
Nuclear
Natural Gas Combined Cycle w/CC
Central Station Solar
Biomass
Wind
Energy Efficiency