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BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Adoption of Rules )  
for Alternative and Renewable Energy )  
Technologies and Resources, and )  
Emission Control Reporting Requirements ) Case No. 08-888-EL-ORD  
and amendments 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 221. )

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DUKE ENERGY OHIO, INC.'S  
APPLICATION FOR REHEARING

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Pursuant to Section 4903.10, Revised Code, and Rule 4901-1-35, O.A.C., Duke Energy Ohio, Inc. (Duke Energy Ohio) hereby applies for rehearing with regard to certain issues in the Public Utilities Commission of Ohio's (Commission) Entry on Rehearing dated October 15, 2009, and its Entry dated October 28, 2009. Those entries are unreasonable and unlawful in the following respects:

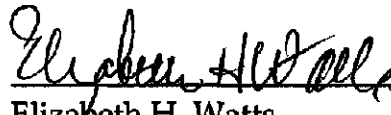
1. Rule 4901:1-39-05, Ohio Administrative Code (O.A.C.), conflicts with the authorizing statute and exceeds the Commission's rulemaking authority.
2. Rule 4901:1-39-08, O.A.C., is unreasonably and unnecessarily burdensome and results in confidential information becoming public.

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3. Rule 4901:5-5-06, O.A.C., is unreasonable in that it requires the disclosure of generation resource information and integrated resource planning contrary to the Commission's lack of jurisdiction over the generation side of the industry.

In support of this Application for Rehearing, Duke Energy Ohio tenders the following.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Elizabeth H. Watts", is written over a horizontal line.

Elizabeth H. Watts

Assistant General Counsel

Amy B. Spiller

Associate General Counsel

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## MEMORANDUM IN SUPPORT

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### I. INTRODUCTION

In its Entry on Rehearing dated October 15, 2009, and in a more recent Entry dated October 28, 2009, the Public Utilities Commission of Ohio (Commission) proposed additional changes to its regulations pertaining to alternative and renewable energy technologies and resources and emission control reporting requirements. Although these regulations have been the subject of a lengthy and contracted regulatory process, many of the regulations continue to mandate solutions that do not comport with good business or regulatory practice. Therefore, Duke Energy Ohio, Inc., (Duke Energy Ohio) respectfully requests that the Commission grant rehearing for the purpose of making some additional necessary corrections to the rules.

### II. DISCUSSION

In its most recent Entry on Rehearing, the Commission made changes in response to various comments and concerns raised by interested parties. Notwithstanding these changes, the rules addressed in that Entry on Rehearing continue to present problems with regard to compliance and enforcement. Additionally, specific rules exceed the Commission's rulemaking authority and violate the legislative intent of Amended Substitute Senate Bill 221 (SB 221).

**Rule 4901:1-39-05**

Rule 4901:1-39-05, O.A.C., conflicts with the authorizing statute and exceeds the Commission's rulemaking authority. Ohio Revised Code (R.C.) Section 4928.66 allows energy savings from energy efficiency programs that are implemented by electric utilities to be included in benchmark calculations without restriction as to compliance with other mandates. The rule as written continues to state that energy savings mandated by federal law or building codes or regulations may not be counted toward benchmarks. Despite the Commission's statement that these arguments were considered and rejected in Findings 19 and 20 of its June 17 Entry at page 11, Duke Energy Ohio respectfully submits that this provision exceeds the Commission's statutory authority.

**Rule 4901:1-39-08**

In response to some of the concerns raised in connection with Rule 4901:1-39-08, O.A.C., which governs mercantile customer participation in energy efficiency, the Commission has responded that matters will be addressed in the Commission's dockets wherein related issues are under discussion and consideration. In particular, the Commission instructs that it will measure a utility's compliance with energy efficiency mandates by applying measurements more particularly described in its order in Case No. 09-512-GE-UNC. However, the details being developed in that docket do not remedy problems inherent in Rule 4901:1-39-08, O.A.C., but, rather, exacerbate them.

Despite the Commission's effort to substantially revise Rule 4901:1-39-08, O.A.C., and more clearly organize the mercantile customer reporting requirements, the rule continues to be problematic. For example, the language now seems to suggest that mercantile customers can opt out of an energy efficiency cost recovery mechanism without the requirement to demonstrate its contribution to the utility's benchmarks. Additionally, the most recent (October 28) version of the mercantile rule requires the mercantile customer to demonstrate either that its energy savings and peak demand reductions are the result of investments that meet the total resource cost test (TRC) or that the utility's avoided cost exceeds the cost to the utility for the mercantile customer's program. This language requires the utility to publish its avoided cost, even though such costs should be allowed to remain confidential, particularly in a competitive market. It also requires the mercantile customer to perform a TRC test, which most mercantile customers will find particularly burdensome absent the investment in an energy consultant. Again, the Commission is complicating a process that should be fairly simple.

#### **Rule 4901:5-5-06**

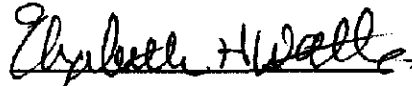
In 1999, in Amended Substitute Senate Bill 3 (SB 3), the General Assembly eliminated the Commission's regulatory authority over generation, except for certain very limited exceptions. The Commission recognized this explicitly in rulemaking, subsequent to the passage of SB 3, when it stated: "SB 3 removed generation resource

information from the [long-term forecast report] requirements, but left in place all other requirements for filing data on distribution and transmission. . . . The rules should be further amended to delete whole sections dealing with demand side management and integrated resource management." Case No. 99-1614-EL-ORD (Finding and Order, April 6, 2000, at p.1-2). SB 221 did not amend Chapter 4935 Revised Code or otherwise reauthorize the Commission to reinstitute its requirements for integrated resource planning, except where an electric distribution utility proposes to own or operate new generation facilities and recover the costs through a nonbypassable charge. Thus, the Commission's reorganization and substantial revision of this rule does not go far enough to correct the statutory impediment to the rule. Moreover, the rule would allow parties to have access to information that details energy demand, peak load, and reserve and resource planning that must be confidential in a competitive market. For these reasons, Duke Energy Ohio respectfully submits that the only requirement for an integrated resource plan should be the one set forth in Section 4928.143, Revised Code.

### **III. CONCLUSION**

Duke Energy Ohio appreciates the opportunity to comment again on the proposed rules. For the reasons set forth herein, Duke Energy Ohio respectfully requests that the Commission grant rehearing to make the needed corrections and clarifications.

Respectfully submitted,



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**CERTIFICATE OF SERVICE**

I certify that a copy of the foregoing was served via ordinary mail or via electronic mail on the all Parties of Record this 13th day of November, 2009.



Elizabeth H. Watts