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not be considered, but even if considered should be rejected in the interest of Ohio consumers.

## II. STATEMENT OF THE CASE

On June 24, 2009, the Commission set a procedural schedule for development of protocols for measurement and verification of energy efficiency and peak demand reduction measures. Comments were filed on Appendix A and B to the Entry dated June 24, 2009 (“June Entry”). Comments regarding Appendix B<sup>2</sup> to the June 24, 2009 Entry were due on July 15, 2009. Ten separate filings were docketed with the PUCO on July 15, 2009, including comments submitted by the OCC. Comments on Appendix A<sup>3</sup> were due on July 24, 2009. Ten separate filings were docketed with the PUCO on July 24, 2009, including comment in which the OCC joined.<sup>4</sup>

An Order was issued in this case on October 15, 2009 (“October Order”) that addressed policy issues posed by the Commission. Comments were invited to a newly presented Appendix C that addressed issues related to the total resource cost test.<sup>5</sup> The deadline for comments on Appendix C was November 10, 2009.<sup>6</sup> Seven separate filings were docketed with the PUCO on November 10, 2009, including comments in which the OCC joined.

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<sup>2</sup> Appendix B addressed the assessment of deemed, calculated measures. See, e.g., June Entry at 6 and Appendix B.

<sup>3</sup> Appendix A addressed various policy issues involved in the development of a technical reference manual (“TRM”) for Ohio. See, e.g., June Entry at 5 and Appendix A.

<sup>4</sup> Entry at 2, ¶(4) October 15, 2009.

<sup>5</sup> October Order, Appendix C.

<sup>6</sup> Id. at 15.

The Commission order on October 15, 2009 (“October Order”) decided several policy matters that the PUCO raised in Appendix A.<sup>7</sup> The OCC and one other party filed applications for rehearing to the October Order on November 16, 2009. Those applications remain pending after having been granted by the Commission on December 11, 2009 for the purpose of providing additional time for PUCO consideration.

On January 15, 2010, well past the deadline stated in procedural schedules for this case, PWC’s Motion was filed along with an attached “proposal” (“Proposal”). Among other matters, the Proposal seeks changes to the matters decided in the October Order.

### **III. ARGUMENT**

#### **A. PWC’s Motion is Untimely, and is Therefore Unlawful.**

##### **1. PWC Violated the Ohio Administrative Code.**

PWC represents that it is experienced in a variety of proceedings before the Commission,<sup>8</sup> yet PWC’s Motion shows no recognition of the law applicable to the pleading that it submitted. Extensions of time are the subject of Ohio Adm. Code 4901-1-13 (“[c]ontinuances and extensions of time”). Motions for continuances “must be timely filed so as to permit . . . a ruling prior to the established filing date.”<sup>9</sup> PWC’s Motion was submitted months after the due dates for comments in this proceeding.

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<sup>7</sup> Id. at 4-15.

<sup>8</sup> PWC’s Motion at 3 (“regular intervenor”).

<sup>9</sup> Ohio Adm. Code 4901-1-13(B). PWC has previously failed to recognize the Commission’s rule. *In re Duke RSP*, Case Nos. 03-93-EL-ATA, et al., OCC Memorandum Contra PWC’s Motion for Extension of Time at 3-4 (June 6, 2007).

For approval of such a request for an extension, the moving party must show “good cause.”<sup>10</sup> PWC provides *no* excuse, and provides *no* explanation, for its untimely submission of comments. *No* cause is presented, let alone “good cause.”

The PUCO recently addressed the unfairness of untimeliness for parties affected by the late actions of others. In a case involving an application for an increase in water rates, the applicant waited an unreasonable time to request a waiver. The PUCO held: “To make such a request at the time of filing testimony creates due process concerns for all parties in the case. Therefore, Aqua’s request for a waiver from Rule 4901-7-01, O.A.C, is hereby denied.”<sup>11</sup>

PWC’s Motion violates the Ohio Administrative Code, and should be denied.

## **2. PWC Violated the Ohio Revised Code.**

A portion of PWC’s Proposal was addressed in the PUCO’s October Order, and therefore PWC’s pleading violates the timing requirement stated in the Revised Code. Pursuant to R.C. 4903.10, applications for rehearing are due “within thirty days after the entry of [an] order upon the journal of the commission.” That statute is amplified by Ohio Adm. Code 4901-1-35 that restates the thirty-day deadline.

The PUCO has also addressed the matter of the filing of an untimely substitute for an application for rehearing. For example, the PUCO denied a motion to reopen a proceeding when the filing party submitted the motion that “essentially equate[d] to an application for rehearing.”<sup>12</sup> The PUCO stated that “such motion, to the extent it is in

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<sup>10</sup> Ohio Adm. Code 4901-1-13(A).

<sup>11</sup> *In re Aqua Ohio Lake Erie Division Rate Case*, Case No. 09-1044-W-AIR, Entry at 2, ¶9 (January 20, 2010).

<sup>12</sup> *In re Dominion East Ohio Rate Case*, Case Nos. 07-829-GA-AIR, et al., Entry at 4-5 (July 29, 2009).

essence an application for rehearing, is untimely” and “should be denied.”<sup>13</sup> Similarly, the Commission should deny PWC’s Motion where its subject matter shows that it should have been filed as an application for rehearing.

On January 15, 2010, three months after the October Order was issued, PWC stated that the “Commission should explicitly combine the Appendix Bs to clarify that there is one TRM and each entity may take full credit for its energy efficiency investment . . . .”<sup>14</sup> The Commission provided for separate treatment of savings in the electric and natural gas industries since “there is no statutory requirement in SB 221 to implement gas energy efficiency programs,” but “encourage[d] the gas utilities to use the technical reference manual (TRM) in energy efficiency program development. . . .”<sup>15</sup> PWC’s Proposal, therefore, directly conflicts with the structure for separate treatment of savings in the electric and natural gas industries that is provided for in the October Order.

PWC’s argument regarding Appendix B, as an argument against the contents of the October Order, is late by two months when PWC should have filed a timely application for rehearing. The argument must be rejected as a violation of the Revised Code and the Ohio Administrative Code.

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<sup>13</sup> Id. at 5, ¶(9).

<sup>14</sup> Proposal at 8-9.

<sup>15</sup> October Order at 6.

**B. If PWC's Untimely Comments are Considered, in Violation of Ohio Law, PWC's Proposal Should be Rejected.**

**1. The Proposed "Conversion" to Kwh Violates Ohio Law.**

As stated directly above, the Commission recognizes that the savings required under S.B. 221 must be achieved in the electric industry.<sup>16</sup> PWC proposes that "each entity may take full credit for its energy efficiency investment [whether derived from electric, gas or environmental savings]."<sup>17</sup> For purposes of meeting the electric savings requirements under Ohio law, PWC thereby proposes that electric utilities should be able to take credit for changes other than those related to electricity.

Savings requirements are set forth in R.C. Chapter 4928 for electric distribution utilities, not in R.C. Chapter 4929 that sets out the regulation of the natural gas industry (without stating any conservation requirements) and not within other chapters of the Revised Code that deal with environmental regulation. PWC recognizes that "only electric utilities are required to meet energy efficiency mandates," and "[g]as utilities . . . have no statutory mandate."<sup>18</sup> PWC's statement contradicts its Proposal.

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<sup>16</sup> Staff's Provisional Recommendation #18a in this docket touches upon, and supports, the Commission's recognition that the provisions of R.C. 4928.64 require savings in kilowatt-hours ("kwh"). In pertinent part, it states that "[t]hese co-benefits . . . should not be included in the UCT-/PAC test results of an electric utility. While natural gas co-benefits . . . should be included in cost-effectiveness, the program impacts should be measured strictly in terms of electric energy and capacity saved." October Order, Appendix C at 21. Impacts of utility programs on water resources and carbon dioxide emissions are also mentioned in the PUCO Staff's recommendations, but without a hint that they would count towards the measurement of savings required under R.C. 4928.66. *Id.*

<sup>17</sup> Proposal at 9. The bracketed, explanatory phrase is repeated from the section title in PWC's pleading. *Id.* at 7. PWC apparently proposes that electric distribution utilities be permitted to count not only kwh savings, but also ccf-to-kwh savings and environmental changes-to-kwh savings that result from utilities' investments. PWC does not explain the method by which the PUCO would provide such "full credit" by "combin[ing] the Appendix Bs." *Id.* at 8.

<sup>18</sup> Proposal at 7-8.

PWC's only "legal analysis" hinges upon a single word in R.C. 4928.66: utility programs must achieve savings "equivalent" to kwh amounts stated in the statute.<sup>19</sup> "Equivalent" simply means equal in amount.<sup>20</sup> Stated measures of kilowatt-hour ("kwh") and kilowatt ("kw") savings are necessary, under R.C. 4928.66, to achieve the purposes of substituting economically efficient conservation efforts for the need to construct a new generation of expensive electric generating plants to serve Ohioans. R.C. 4928.66 is part of a grouping of related statutes -- R.C. 4928.64 through R.C. 4928.66 -- first introduced as part of S.B. 221 along with an intensified State policy advancing electric "demand-side management."<sup>21</sup> This purpose is not served, for example, by crediting electric utilities for programs that reduce the demand for the services of natural gas utilities (who are in some places their competitors) and flowing program costs through electric rates.<sup>22</sup>

The terminology used in R.C. 4928.66 reflects the fundamental nature of R.C. Chapter 4928 as one that deals with electricity. According to R.C. 4928.66(A)(2)(a): "The baseline for energy savings . . . shall be the average of the total kilowatt hours the electric distribution utility sold in the preceding three calendar years, and the baseline for the peak demand reduction . . . shall be the average peak demand on the utility in the preceding three calendar years. . . ." References to kwh energy efficiency and kw peak demand reductions from those baseline amounts dot the remainder of R.C. 4928.66. Reductions attributed to "customer-sited energy efficiency and peak demand reduction

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<sup>19</sup> R.C. 4928.66(A)(1)(a) and Proposal at 9.

<sup>20</sup> Black's Law Dictionary at 581 (8<sup>th</sup> Ed. 2004).

<sup>21</sup> R.C. 4928.02(D).

<sup>22</sup> As a practical matter, PWC proposes no limitation on the conversion that could be claimed by an electric utility. For example under PWC's Proposal, an electric utility program could provide savings entirely in the form of reductions in natural gas use in order to meet R.C. 4928.66 requirements.

programs” must be adjusted for “the appropriate loss factors.” “Loss factors” is a term of art used for electricity, not natural gas (where the term would be “unaccounted for gas”<sup>23</sup> or “unaccounted-for gas loss”<sup>24</sup>).

From a legal and practical perspective, PWC’s Proposal to permit electric utilities to receive credit under R.C. 4928.66 for reductions that are not related to electricity should be rejected if PWC’s arguments are considered in this docket.

## **2. Utilities Such as Duke Energy May Not Gain Credit for the Activities of Others.**

PWC argues for “full credit” for co-benefits (including where all benefits are non-electric) to the demand-side management programs of Duke Energy Ohio, Inc. (“Duke Energy”).<sup>25</sup> Inconsistently, PWC also argues that Duke Energy should be entitled to claim *more than full credit* for programs when Duke Energy only partially funds programs such as those that PWC claims to run (i.e. credit for program support by non-Duke Energy entities).<sup>26</sup> The argument is inimical to all developments in this docket regarding program testing to meet the statutory requirement for “*cost-effective . . . demand-side management.*”<sup>27</sup> Adopting the PWC framework, the most advantageous

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<sup>23</sup> See, e.g., Ohio Adm. Code 4901:1-14-01(CC) (“Unaccounted-for gas”).

<sup>24</sup> See, e.g., Duke Energy, P.U.C.O. Gas Tariff No. 18, Sheet No. 44.9, page 5 of 24 (under “Definitions”). Other slight variations on the common terminology exist, such as use of the term “lost and unaccounted for gas.”

<sup>25</sup> See *supra*; see also Proposal at 13.

<sup>26</sup> Proposal at 9-10. R.C. 4928.66 requirements are not stated in dollars, so PWC’s Proposal fails to provide a recommendation that can be implemented by the PUCO.

<sup>27</sup> R.C. 4928.02(D) (emphasis added).

programs would likely be decided by funding source rather than by merit. However, merit (i.e. cost effectiveness) is required by Ohio law.<sup>28</sup>

PWC's Proposal is a transparent effort to promote PWC as a recipient of funding from Duke Energy over the interests of other potential recipients of funding for energy efficiency (as well as utility-run programs) due solely to PWC's "business model."<sup>29</sup> PWC claims funding in the proportion of "almost \$3.00 for every \$1 it receives from DE-Ohio,"<sup>30</sup> and argues that Duke Energy should receive credit for the funding not provided by Duke Energy.<sup>31</sup> The transparency of PWC's self-interested argument is evident from the Proposal itself: "If the Commission permits PWC to give DE-Ohio [i.e. Duke Energy] the expanded energy efficiency benefits that result from the leveraged funding PWC receives, there is an incentive for DE-Ohio . . . to expand its funding of these [PWC operated] valuable programs . . . ."<sup>32</sup> The value of the programs must be tested, not the business model of the program manager.

PWC's Proposal is fraught with policy problems. For instance, providing Duke Energy with credit for work supported by other entities would likely result in reduced demand-side management efforts by Duke Energy elsewhere, quite possibly reduced where such efforts are more cost-effective. The result of PWC's Proposal would likely

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<sup>28</sup> PWC essentially submitted late arguments regarding effectiveness evaluation, which is the subject of the Commission's Appendix C. PWC proposes to replace the "TRC test" (see, e.g., October Order, Appendix C at 2) with the "PWC test," a substitution that has no legal or scientific basis.

<sup>29</sup> Proposal at 1.

<sup>30</sup> Id. at 9.

<sup>31</sup> R.C. 4928.66 requirements are not stated in dollars, so PWC's Proposal fails to provide a recommendation that can be practically implanted by the PUCO.

<sup>32</sup> Proposal at 4.

be reduced Duke Energy demand-side energy efforts, distortion of tests to determine the most beneficial programs, and the loss of benefits by customers who would benefit from lost programs that are the most beneficial (including lost benefits by the low-income customers PWC professes to be concerned about).

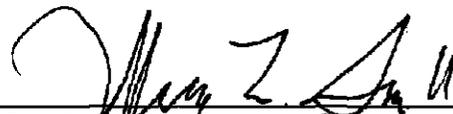
PWC proposes to “give DE-Ohio” the benefit of running the utility’s funding through PWC so that DE-Ohio obtains credit for the kilowatt-hour and kilowatt reductions that are achieved via funding by other entities. Such credit is not permitted under Ohio law, and would destroy the work achieved thus far in this docket towards determining which programs should be supported based upon merit.

#### IV. CONCLUSION

The Commission should reject PWC’s untimely pleadings that were submitted in violation of Ohio law under the Revised Code and the Ohio Administrative Code. If considered, PWC’s Proposal should be rejected on both legal and policy grounds.

Respectfully submitted,

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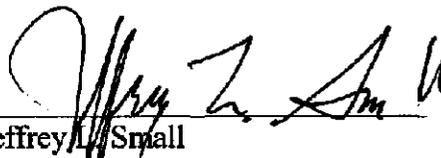


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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of this Memo Contra was served on the persons stated below by regular U.S. Mail, postage prepaid, on this 1<sup>st</sup> day of February 2010.

  
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