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BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

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In the Matter of Protocols for the Measurement and Verification of Energy Efficiency and Peak Demand Reduction Measures.	))))	Case No. 09-512-GE-UNC

APPLICATION FOR REHEARING AND MEMORANDUM IN SUPPORT OF INDUSTRIAL ENERGY USERS-OHIO

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July 2, 2010

Attorneys for Industrial Energy Users-Ohio

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APPLICATION FOR REHEARING OF INDUSTRIAL ENERGY USERS-OHIO

Pursuant to Section 4903.10, Revised Code, and Rule 4901-1-35, Ohio Administrative Code ("O.A.C"), Industrial Energy Users-Ohio ("IEU-Ohio") submits this Application for Rehearing from the Entry on Rehearing issued by the Public Utilities Commission of Ohio ("Commission") on June 16, 2010 ("June 16 Entry on Rehearing"). As explained in more detail in the attached Memorandum in Support, the Commission's June 16 Entry on Rehearing in this case is unlawful and unreasonable for the following reasons:

A. The Commission's June 16 Entry on Rehearing violates Section 4928.66, Revised Code, again.

B. The Commission's blanket prohibition on the use of incentives associated with energy efficiency and peak demand reduction ("EE/PDR") programs having a payback period of one year or less is unlawful and unreasonable.

IEU-Ohio respectfully requests the Commission promptly grant its Application for Rehearing and the relief requested herein.

Respectfully submitted,

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BEFORE
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In the Matter of Protocols for the Measurement and Verification of Energy Efficiency and Peak Demand Reduction Measures.	))))	Case No. 09-512-GE-UNC

MEMORANDUM IN SUPPORT OF INDUSTRIAL ENERGY USERS-OHIO

I. BACKGROUND

On June 16, 2009, the Commission opened this case for the purpose of developing protocols for the measurement and verification of energy and peak demand reduction measures that would "...provide predictability and consistency for the benefit of the electric and gas utilities, customers, and the Commission itself."[1] As part of this process and on June 24, 2009, the Commission issued an Entry in which it said (at pages 2-4):

> (5) The Commission must be in a position to be able to determine, with reasonable certainty, the energy savings and demand reductions attributable to the energy efficiency programs undertaken by gas and electric utilities, including mercantile customers, in order (a) to verify each electric utility's achievement of energy and peak-demand reduction requirements, pursuant to Section 4928.66(B), Revised Code; (b) to consider exempting mercantile customers from cost recovery mechanisms pursuant to Section 4928.66(A)(2)(c), Revised Code; and (c) to review cost recovery mechanisms for energy efficiency and/or peak-demand reduction programs implemented by the electric or gas utilities. In order to provide guidance regarding how the Commission will determine energy savings and/or peak-demand reductions, the Commission intends to establish

[1] Entry at 3 (June 24, 2009).

protocols for the measurement and verification of energy efficiency and peak-demand reduction measures, which will be incorporated into a Technical Reference Manual (TRM), The Commission's intent is that the TRM would provide predictability and consistency for the benefit of the electric and gas utilities, customers, and the Commission itself.

(6) In many instances, the savings and/or reductions achieved by implementing a particular measure can be predicted, *ex ante*, with such certainty that the savings and/or reductions can be assumed, without any *ex post* evaluation other than to verify proper installation and operation of the measure. In other instances, energy savings and/or peak-demand reductions will be able to be determined through the application of specific engineering calculations that have been previously defined. In some instances, the set of measures installed at a customer's facility may be unique or complex, thus requiring the savings and/or reductions to be calculated on a case-by-case basis for each measure or representative sample of measures. Further, in some cases, *ex ante* estimates may need to be modified based on statistical analysis of billing data to reflect the impact on overall program results of additional factors, including variations in baseline energy use, free ridership, and spillover effects.

(7) Therefore, the TRM will include the following information:

(a) Predetermined energy savings and demand reduction values and calculation assumptions for specific electricity and gas efficiency deemed measures and deemed calculated measures, when such values can be defined with a reasonable level of certainty, including applicability conditions.

(b) Custom measure protocols consisting of standard engineering calculations and/or other methods that are used for determining energy savings and/or peak-demand reductions for electricity and gas efficiency measures that do not have applicable predetermined savings values.

(c) Verification procedures that electric and gas utilities will utilize to confirm both baseline conditions, when appropriate, and the proper installation of energy efficiency measures for which energy savings and/or peak-demand reductions claims will be made.

(d) Protocols and assumptions for determining cost effectiveness parameters, other than energy savings and demand reductions, used in the total resource cost (TRC) test for calculating the cost effectiveness of energy efficiency programs undertaken by the electric and gas utilities.

(8) The Commission recognizes that the TRM will likely continue to evolve as measures and protocols are added, refined, and updated over time. As such, part of the development of the TRM will be the establishment of transparent and participatory procedures to populate the TRM with predetermined values for additional measures or updated values, as well as updated protocols and assumptions, on an ongoing basis.

In the June 24, 2009 Entry, the Commission called for collaboration and asked utilities to work with mercantile customers to advise the Commission on measures that are in current use, measures which the utilities may intend to use in their compliance programs and measures that mercantile customers may intend to use to seek an exemption from cost recovery mechanisms. In Appendix A to the June 24, 2009 Entry, the Commission identified areas in need of policy guidance. Accordingly, numerous parties, including IEU-Ohio, filed comments and reply comments for the Commission's consideration.

The Commission issued a Finding and Order on October 15, 2009, **about four months after it set out on its mission to bring predictability and certainty to the effort by utilities and mercantile customers to comply with the requirements in Sections 4928.64 and 4928.66, Revised Code, and nine months into the first compliance year.**

The October 24, 2009 Finding and Order introduced a new batch of policy questions (contained in Appendix C) with proposed provisional policy recommendations for the manner in which those questions should be resolved in the context of development of the yet illusive and ever-mysterious TRM. It also invited more comments. The Finding and Order also signaled the Commission's intent to illegally rewrite Ohio law so as to change the baseline specified by the General Assembly for purposes of measuring the effects of energy efficiency programs and compliance with the portfolio benchmarks established by the General Assembly. For example, the Commission tossed out measurement based on actual achieved efficiency relative to the three-year average required by Section 4928.66, Revised Code (which has become known as the "as-found" method[2]), and, in effect, it rewrote the law to establish a higher baseline.

On November 16, 2009, Applications for Rehearing were filed by IEU-Ohio, the Office of the Ohio Consumers' Counsel ("OCC"), and Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company (collectively, "FirstEnergy").

The Commission issued its Entry on Rehearing on June 16, 2010, **one year after the Commission opened this proceeding to bring predictability and certainty to the effort by utilities and mercantile customers to comply with the requirements in Sections 4928.64 and 4928.66, Revised Code, eight months after the rehearing applications were filed and six months into the second compliance year.**

[2] "Under the 'as-found' method, savings are calculated by subtracting the energy efficiency of existing equipment from the proposed new, more efficient equipment." Finding and Order at 8, fn 5 (October 24, 2009).

The June 16 Entry on Rehearing is part of the Commission's very unfortunate initiatives to gut Sections 4928.66 and 4928.66, Revised Code, in ways that impose undue, unjust and unconscionable prejudice on Ohio's mercantile customers. It comes at a time when Ohio's economy is struggling, so the penalty is even more severe. It comes at a time when Ohio's citizens want and need government to be accountable for timely and useful performance; so the Commission's dysfunctional quest for making things hard and confusing grinds more severely against the confidence that government needs to restore. It comes at a time when hundreds of mercantile applications have sat at the Commission for six months or more awaiting a final order, so the news it conveys will most certainly encourage mercantile customers to quit trying to "do the right thing". The Commission's resort to complex mysteries rather than understandable, practical and predictable compliance routines sadly comes at a time when Ohio and its citizens have no room for such mischief. Unfortunately and despite the efforts of customers and utilities alike, confusion and a lack of predictability are the Commission's only contributions to Ohio's effort to improve its energy productivity.

Because it represents customers, IEU-Ohio has stood, often alone, to formally oppose the Commission's efforts to substitute its own notions on what the law should be for the law as written by the General Assembly. But, other parties have documented the problems with the Commission's performance in this area.

In a letter to Governor Strickland dated June 19, 2009[3], Mr. Alexander urged the Governor to act to address the problems presented by the Commission's "...costly and convoluted rules." He said that "[i]f not changed, the rules would effectively create a

[3] Mr. Alexander's letter is attached hereto as Appendix A.

program that customers won't embrace, utilities won't be able to implement, and Ohio can't afford" and added that "... 'the perfect has become the enemy of the good,' because the rules eliminated the incremental steps that would lead customers to long-term, sustainable energy savings."

In a letter to Chairman Schriber dated June 2, 2010[4], Mr. Alexander expressed his growing concern about the Commission's delay in issuing an order to address a proposed compliance plan. He said that "... I am concerned that absent prompt action, and quite frankly even with prompt action, ... the Companies will have no meaningful opportunity to meet their energy efficiency and peak demand requirements for 2010 as required by Senate Bill 221."

In a letter to Chairman Schriber dated June 11, 2010,[5] Mr. Dimoff, the Executive Director of the Ohio Environmental Council ("OEC"), "...echo[ed] the concerns of Anthony J. Alexander". While IEU-Ohio's and OEC's views diverge on many issues, OEC has also publicly expressed concern about the Commission's inability to provide timely guidance on critical issues related to compliance with Ohio's portfolio mandates.

The tone of this pleading is strong and its message is direct. But, the tone and directness of this pleading are the byproducts of frustration that has accumulated over many months. IEU-Ohio and others have repeatedly urged the Commission to back away from its illegal course, follow the law and do so with great respect for common sense and the realities that mercantile customers must contend with in the real world. The Commission has responded to kinder invitations with contrary pronouncements that

[4] Mr. Alexander's June 2, 2010 letter is attached hereto as Appendix B.

[5] Mr. Dimoff's June 11, 2010 letter is attached hereto as Appendix C.

indicate that the views, wants and needs of mercantile customers are irrelevant to the Commission and perhaps the State of Ohio. The Commission can do much better and it desperately needs to do so forthwith.

II. SUMMARY OF THE ENTRY ON REHEARING

In its June 16 Entry on Rehearing, the Commission denied IEU-Ohio's Application for Rehearing and said that it was reaffirming its previous "policy guidance" that rejects the baseline called for by Ohio law and replaces it with two separate and unequal baselines for measuring the effects of mercantile customer EE/PDR programs. In turn, these *ultra vires* baselines are then to be applied for purposes of measuring compliance with Sections 4928.64 and 4928.66, Revised Code.

Although Ohio law commands that the Commission count "any" and "all" mercantile customer-sited capabilities, the June 16 Entry on Rehearing said that the Commission will only recognize some of these customer-sited capabilities. In so doing, the June 16 Entry of Rehearing added even more mystery to how much of the "some" the Commission might count for compliance purposes.

More specifically, the June 16 Entry on Rehearing stated that if a mercantile customer retires a piece of functioning equipment early (with no indication of what "functioning" or "early" means), the customer-sited capability will be measured using "as-found" math. If, however, the same level of energy efficiency is achieved by a mercantile customer by replacing a piece of equipment at the end of the equipment's useful life (with no indication of how this end state is going to be determined) or to comply with a building code, or state or federal mandate, then the actual achieved energy efficiency will be ignored for compliance purposes. In this later case, the Entry on Rehearing stated that the Commission will only count the actual energy efficiency increment that is in excess of the amount that would have been achieved based on the "... highest of state or federal standards, or current market practices."[6] In other words, if energy efficiency is one of the outcomes of equipment replacement at the end of the equipment's useful life, the June 16 Entry on Rehearing stated that the Commission is going to use a hypothetical measurement of that energy efficiency that will only make some, if any, of the actual energy efficiency eligible for being included in the compliance count. Of course, the mathematical effect of all of the hypothetical measure of achieved energy efficiency results in elevating the performance obligation that was established by the General Assembly.

Then, in a footnote, the June 16 Entry on Rehearing acknowledged implicitly that the Commission does not know what it means by the words "... highest of state or federal standards, or current market practices"[7]. The footnote said that the Commission may provide some guidance someday through the outcome-challenged process that the Commission has associated with development of the document it calls "TRM".[8]

The June 16 Entry on Rehearing attempted to detract attention from the Commission's invention of new and illegal compliance-count-math by resorting to words that have no obvious or discernable meaning. For example, the June 16 Entry on

[6] June 16 Entry on Rehearing at 5.

[7] *Id.* at fn 1.

[8] *Id.* at 4-6.

Rehearing stated things like "business as usual" practices (whatever that means) cannot be considered an energy efficiency program.[9]

Unrelenting in the quest to muddy the water further, the June 16 Entry on Rehearing then stated that the Commission will initially assume that the actual energy efficiency achieved by a mercantile customer is eligible to be counted (the Commission will assume that it arises from a "program") until an intervening party demonstrates that the assumption is incorrect.[10] In other words, the June 16 Entry on Rehearing made any mercantile customers that might consider relying on this assumption the target for stakeholders (such as OCC) that have already demonstrated that they will take on this assumption using the Commission's own illegal compliance math and the Commission's definitions to pave the way. In plainer words, the June 16 Entry on Rehearing established a process that leaves the dirty work of illegally turning away mercantile customers and the consequences to protesting stakeholders.

Finally, the Commission also denied FirstEnergy's Application for Rehearing, asking the Commission to reconsider its blanket prohibition on incentives for EE/PDR measures with a payback period of one year or less.[11] In other words, the Commission held that the energy efficiency opportunities having the best return on investment must be disadvantaged in favor of those that do not.

IEU-Ohio hereby submits its Application for Rehearing from the unlawful and unreasonable provisions of the Commission's June 16 Entry on Rehearing.

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[9] *Id.* at 6. The words "business as usual", "early retirement", "useful life" are not contained in Sections 4928.64 and 4928.66, Revised Code.

[10] *Id.*

[11] *Id.* at 4.

A. The Commission's June 16 Entry on Rehearing violates Sections 4928.64 and 4928.66, Revised Code.

IEU-Ohio has previously demonstrated in this proceeding and others such as the Commission's "Green Rules" case (PUCO Case No. 08-888-EL-ORD) that the Commission's rules and orders placing restrictions on what mercantile customer-sited resources may count towards the EE/PDR mandates violate Sections 4928.66(A)(2)(c) and (d), Revised Code, and are unreasonable. The Commission's June 16 Entry on Rehearing in this case continues this illegal, unreasonable and unwise rewriting of Amended Substitute Senate Bill 221 ("SB 221").

The Commission's conduct thus far indicates that it is determined to persist on its illegal, unreasonable and unwise course. Therefore, IEU-Ohio hereby incorporates by reference[12] its previous pleadings regarding these issues. In addition, IEU-Ohio offers the following observations about the requirements of the law as they apply to the Commission and the practical consequences of the Commission's unwillingness to timely follow the law.

Section 4928.64(A)(1), Revised Code, defines "alternative energy resource" as an "advanced energy resource" or "renewable energy resource" (defined in Section 4928.01, Revised Code) or **<u>mercantile customer-sited advanced energy resource or renewable energy resource</u>** (new or existing) that the mercantile customer commits for integration into the electric distribution utility's ("EDU") demand response, energy

[12] *In the Matter of Protocols for the Measurement and Verification of Energy Efficiency and Peak Demand Reduction Measures*, PUCO Case No. 09-512-EL-UNC, Application for Rehearing and Memorandum in Support of Industrial Energy Users-Ohio (November 16, 2009); *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 Amended Substitute Senate Bill No. 221*, PUCO Case No. 08-888-EL-ORD, Industrial Energy Users-Ohio's Application for Rehearing or, in the Alternative, Request for Clarification, and Memorandum in Support (November 16, 2009).

efficiency or peak demand reduction programs as provided under Section 4928.66 (A)(2)(c), Revised Code. **The definition of an "advanced energy resource"** (Section 4928.01(A)(34), Revised Code) **includes demand side-management and <u>any</u> energy efficiency improvement**.

There is no mention in Section 4928.64, Revised Code, of "programs", no prohibition on counting energy efficiency improvements that are the result of changes in behavior, no authority delegated to the Commission to define "any" as only the increment above some hypothetical "market practices" standard and no authority for the Commission to preclude EDU compliance by relying on mercantile customer energy efficiency or demand-side management that may occur as a result of compliance with a building code or a federal or state requirement. There is nothing in this Section that suggests that the compliance count will be diminished if the energy efficiency occurs as part of an equipment replacement program that causes more energy efficient equipment to be installed to replace equipment at the end of its "useful life" (whatever that means). There is nothing in the law that allows the Commission to exclude energy efficiency from the compliance count or withhold any incentives because the energy efficiency is too cost-effective (has a payback of less than one year). In other words, "any" means "any".

Compliance with Sections 4928.64 and Sections 4928.66, Revised Code, in any given year, is measured against a baseline that is computed as the average of the three prior years (subject to such baseline adjustments as the Commission may make under the law). Section 4928.64, Revised Code, defines the mercantile resources that are eligible to count towards compliance as those which meet the substantive resource definitions ("advanced" and "renewable") and directs the Commission to count such resources against the compliance requirement when the mercantile customer commits the eligible resource for integration into the EDU's demand response, energy efficiency or peak demand reduction programs as provided under Section 4928.66(A)(2)(c), Revised Code.

Also, "advanced energy project" is defined in Section 4928.01(A)(25), Revised Code. It means **any** technologies, products, activities, management practices (this would include behavioral changes), or strategies that facilitate the generation or use of electricity, and that reduce or support the reduction of energy consumption or support the production of clean, renewable energy for industrial, distribution, commercial, institutional, governmental, research, not-for-profit or residential energy users.

Section 4928.66, Revised Code, directs the Commission to measure **compliance** [with divisions (A)(1)(a) and (b)] by including the **effects** of all demand response programs for mercantile customers of the subject EDU and all such mercantile customer-sited energy efficiency and peak demand reduction programs adjusted upward by appropriate loss factors. Section 4928.66(A)(2)(c), Revised Code, states that the Commission is to apply this compliance language to facilitate efforts by a mercantile customer or group of mercantile customers to offer customer-sited demand response, energy efficiency or peak demand reduction **capabilities** to the EDU as part of a Section 4905.31, Revised Code, reasonable arrangement.

Where an EDU develops and implements, as part of its Section 4928.66, Revised Code or Section 4928.64, Revised Code, compliance effort, programs that are designed to harvest the new and existing customer-sited capabilities of mercantile customers, the Commission must include (in the compliance count) the **effects** of **any** and **all** demand response programs for mercantile customers of the subject EDU and all such mercantile customer-sited energy efficiency and peak demand reduction programs adjusted upwards by appropriate loss factors. In other words, if an EDU proposes/implements a program focused on achieving mercantile customer-sited energy efficiency through behavior modification (usually low or no cost), the Commission must count the energy efficiency effects of this program in measuring compliance (subject to whatever limitation might be imposed by the applicable cost-effectiveness test). If an EDU implements a program focused on achieving mercantile customer-sited energy efficiency through education about "best practices", the Commission cannot ignore the energy efficiency **effects** of this program in measuring compliance. The Commission cannot, by rule or otherwise, threaten to or actually impose prejudice on an EDU that proposes to achieve compliance through these options.

Section 4928.64(A)(2)(c), Revised Code, states that the Commission may exempt a mercantile customer from any Section 4928.66(A)(1)(a) and (b), Revised Code, compliance cost recovery mechanism when the mercantile customer commits its demand response or other new or existing customer-sited **capabilities** for integration into the EDU's demand response, energy efficiency or peak demand reduction programs if the Commission reasonably determines that the exemption will reasonably encourages such customers to commit those **capabilities** to those programs. If the mercantile customer makes such new or existing capabilities available to the EDU pursuant to Section 4928.66(A)(2)(c), Revised Code, the EDU's compliance baseline shall be adjusted to exclude the effects of all **such** demand response, energy efficiency or peak demand reduction programs that may have existed during the period used to establish the baseline. Section 4928.66(A)(2)(d), Revised Code, tells EDUs that they may implement demand response programs, customer-sited programs and transmission and distribution improvement programs focused on the reduction of line losses.

Despite the clear and repeated direction of the General Assembly that the Commission must measure compliance relative to a three-year historical baseline and that "any" and "all" the customer-sited capabilities of mercantile customers are eligible to be counted for compliance purposes, the Commission has persisted in defying the law's required math while eluding its responsibility to transparently, clearly and predictably inform mercantile customers and utilities what the Commission will count. The Commission's defiance of the law on one hand and its refusal to articulate what it would have the law say if it could rewrite the law on the other hand causes persons affected by the portfolio requirements to be unable to ascertain how they might comply with such requirements at the time they are obliged to comply. The law calls this type of government regulation a "standardless trap", a form of regulation that violates the United States and Ohio Constitutions.

The Commission's illegal and unreasonable decisions in this case, including the June 16 Entry on Rehearing, have unfortunate practical consequences. The conduct of the Commission in this proceeding and others, such as Case No. 08-888-EL-ORD, have erected barriers to engaging mercantile customers in the effort to reduce the energy intensity of Ohio's economy and to assist EDUs in meeting their compliance obligations.

The General Assembly set out a simple mathematical expression of the baseline that the Commission must use to measure compliance and clear directions for harvesting the customer-sited capabilities of mercantile customers to this same end. As indicated above, the Commission has taken this simple math and clear direction and created a math model that has no predictable or finite set of variables and provides no guidance on what values may be assigned to any variables that the General Assembly directed the Commission to include in the compliance math.

In the more than 12 months since the Commission opened this proceeding, the Commission has moved slow when it has moved at all. When it has spoken or acted, it has manufactured illegal and confusing results from clear and simple directives from the General Assembly. Despite suggesting that it would soon provide stakeholders with certainty and predictability to guide compliance in June of 2009, the Commission has done nothing to answer fundamental questions that must be answered before anybody can know what the Commission will find to be sufficient to comply with the law. No sensible mercantile customer is going to invest already limited resources to lead the way through the minefield that the Commission has installed between mercantile customers and the opportunity that was enabled by the General Assembly.

What the Commission has done here is as sad as it is illegal. Instead of helping customers to reduce their energy bills, the Commission is driving electric bills higher by: (1) prejudicing low and no cost compliance opportunities; (2) making the "what counts" question incapable of being answered at the time when compliance must be planned and pursued; and (3) squandering the opportunity to constructively engage real customers in the compliance process.

B. The Commission's blanket prohibition on any EE/PDR incentives for customer-sited capabilities with a payback period of one year or less is unlawful and unreasonable.

In its June 16 Entry on Rehearing, the Commission denied FirstEnergy's Application for Rehearing asking the Commission to reconsider prohibition on the use of any incentives for customer-sited EE/PDR capabilities that have a payback period of one year or less. The Commission must revisit this determination; it is unlawful and unreasonable.

It is important to note here that the Commission has been less than clear about what it means by its use of the word "incentive" in this context. For example, the Commission has not said whether it regards an exemption from a Section 4928.64 or Section 4928.66, Revised Code, cost recovery mechanism as an "incentive" or a "swap" that recognizes that the mercantile customer has made an in-kind contribution towards compliance and ought not to also have to help pay for the balance of compliance that the utility must purchase. It is IEU-Ohio's position that a full or partial exemption from the cost recovery mechanism is not an "incentive"; the opportunity to avoid paying twice for the same thing (double slamming) is not an incentive.

In any event, the absolute prohibition on the use of incentives in the case of the most cost-effective (less than one-year payback) customer-sited capabilities offends the law and otherwise is arbitrary and capricious.

The Commission is without jurisdiction to impose a blanket prohibition on the use of incentives associated with mercantile customer-sited EE/PDR programs, including the one year or less payback prohibition except as may be warranted by the applicable cost-effectiveness test. The practical effect of this prohibition is to preclude the use of any incentive to bring forward the most cost-effective customer-sited capabilities thereby raising the overall cost of compliance and the rates that customers must pay to support such compliance.

III. CONCLUSION

IEU-Ohio respectfully requests the Commission grant its Application for Rehearing and amend its June 16 Entry on Rehearing to correct the errors complained of herein.

Respectfully submitted,

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Appendix A

FirstEnergy.

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June 19, 2009

The Honorable Ted Strickland
Governor, State of Ohio
77 S. High Street, 30th Floor
Columbus, OH 43215

Dear Governor Strickland:

I'm writing to share with you several concerns I have about the energy efficiency rules adopted on Wednesday by the Public Utilities Commission of Ohio (PUCO).

I believe these rules would jeopardize Ohio's energy efficiency program by costing customers far more than anyone expects and creating unrealistic standards that may be impossible for customers and utilities to meet.

For example, the Commission's rules regarding interruptible programs for large industrial customers would disrupt production and add to the economic challenges facing our already hard-pressed manufacturers – without creating any new benefits beyond those offered through current programs.

Interruptible programs are important tools that utilities would use to comply with one of the key energy efficiency requirements of S.B. 221 – that is, reducing electricity demand during periods of peak customer usage. Through these voluntary programs, our industrial customers agree to curtail operations when demand is high and electricity supplies are tight. In exchange, they receive favorable pricing that reflects the value of the reduced need for capacity.

A primary objective of these programs is to avoid costly investments in new facilities that would be needed to meet customer demand for only a few hours a year. In fact, interruptible programs for manufacturers offer the most effective and cost-efficient way to reduce peak demand. Other approaches – whether they involve business or residential customers, and no matter how worthwhile they seem to be – simply would achieve less at a greater expense.

Over the years, these programs have been used judiciously to minimize any negative impact on our state's largest employers. For example, manufacturing operations are only curtailed when customer demand for electricity is approaching the limits of available supply.

Unfortunately, the Commission's new rules would impose unnecessary and costly service disruptions on customers – regardless of how much electric supply is available to serve their needs. The PUCO added a requirement that utilities "actually" interrupt service to customers to qualify for the load reduction targets included in S.B. 221, rather than offering proven programs that are "designed to achieve" load reductions, which is the express language of the law.

This is an important distinction, especially when you consider that the former approach could make it even more difficult for our state's major employers to recover from the current recession. By creating a far more expensive energy efficiency program than the General Assembly required, the PUCO undermines the state's efforts to retain business and attract new employers to Ohio.

As the Ohio Energy Group (OEG) stated in its reaction to the Commission's decision, "It would be economically wasteful to require manufacturers to actually shut down for a period of time to prove they can," especially when you consider that many of these customers have had their service interrupted several times in recent years. The OEG also notes, "It would be more reasonable to simply require a demonstration of the ability to interrupt, if needed. There is no reason to unnecessarily disrupt a manufacturing operation which will tend to hurt Ohio's economic competitiveness."

Another example of the significant problems associated with these rules is the Commission's attempt to rewrite S.B. 221 by creating unknowable standards for energy efficiency – based on an uncertain definition of "industry standard new equipment or practices." Simply put, a customer could make an energy efficiency improvement that achieves real and documentable energy savings, but that improvement would not count toward the state's targets unless the customer has used the most efficient product or process available. That's a daunting task under any scenario, and an especially dangerous course to follow as we deal with Ohio's worst economy in decades.

These are just a few of the many significant issues raised by the PUCO's costly and convoluted rules. If not changed, the rules would effectively create a program that customers won't embrace, utilities won't be able to implement, and Ohio can't afford. It appears "the perfect has become the enemy of the good," because the rules have eliminated the incremental steps that would lead customers to long-term, sustainable energy savings.

Governor, I truly believe that we could be facing a worst-case outcome for our customers and the state of Ohio unless significant changes are made to these rules.

Sincerely,

Tony Alexander

AJA/ab

cc: The Honorable Bill Harris
The Honorable Armond Budish

Appendix B

FirstEnergy

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Anthony J. Alexander
President and Chief Executive Officer

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June 2, 2010

Chairman Alan Schriber
Public Utilities Commission of Ohio
180 East Broad Street
Columbus, OH 43215

Re: Ohio Edison Company, The Cleveland Electric Illuminating Company, The Toledo Edison Company (the "Companies"), Case Nos. 09-1947-EL-POR, et.al., Case Nos. 09-1942-EL-EEC, et. al., and Case Nos. 09-580-EL-EEC, et. al.

Dear Chairman Schriber:

I am writing to express my growing concern with the Commission's delay in issuing an Opinion and Order in the Companies' Energy Efficiency and Peak Demand Reduction Program Portfolio Plan proceedings for 2010-2012 (the "EE&PDR Portfolio Plan"). Specifically, I am concerned that absent prompt action, and quite frankly even with prompt action, in this docket approving the Companies' Application, the Companies will have no meaningful opportunity to meet their energy efficiency and peak demand requirements for 2010 as required by Senate Bill 221.

The Companies filed their EE&PDR Portfolio Plan on December 15, 2009. This filing was made five days after the energy efficiency and peak demand rules went into effect[1], and approximately 15 days before the December 31, 2009 required filing date. In their Application, the Companies requested Commission approval on or before March 10, 2010. Moreover, the Companies notified the Commission that it was critical that certain programs be implemented no later than April 1, 2010, in order to achieve the projected savings and help ensure compliance with the 2010 benchmarks. We are now approaching June 1, 2010 and still no decision has been rendered by the Commission.

As valuable time slips away, it is becoming increasingly evident that the Companies again will be required to file an application seeking a waiver or amendment of their 2010 energy efficiency and peak demand reduction benchmarks. This is not the Companies' preferred path – but may be the only path remaining available to the Companies.

[1] The Commission's rules, which are set forth in Section 4901:1:1-39-01 et seq. of the Ohio Administrative Code, went into effect on December 10, 2009 and are still subject to applications for rehearing.

Although it may no longer be possible for the Companies to meet their 2010 energy efficiency and peak demand reduction benchmarks, the Companies, with prompt Commission-approval of this EE&PDR Portfolio Plan, can nevertheless begin implementing a cost-effective portfolio of programs that will provide significant opportunities for energy and cost savings for all of the Companies' customers. I therefore urge the Commission to promptly approve the Companies' EE&PDR Portfolio Plan.

Sincerely,

Tony Alexander

AJA:cjd

Ohio Environmental Council

[UNLEASHING THE POWER OF GREEN]

1207 Grandview Avenue, Suite 201
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614 487-7506
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June 11th, 2010

Keith Dimoff
Executive Director
The Ohio Environmental Council

Chairman Alan Schriber
Public Utilities Commission of Ohio
180 East Broad Street
Columbus, Ohio 43215

Re: Ohio Edison Company, The Cleveland Electric Illuminating Company, The Toledo Edison Company ("FirstEnergy"), Case Nos. 09-1947-EL-POR, et. al., Case Nos. 09-1942-EL-EEC, et. al., and Case Nos. 09-580-EL-EEC, et. al.

Dear Chairman Schriber:

I am writing today to echo the concerns of Anthony J. Alexander and various stakeholders regarding the Commission's delay in issuing an Opinion and Order in FirstEnergy's Energy Efficiency and Peak Demand Reduction Program proceedings for 2010-2012. Delay could hamper efforts to deploy low-cost, job-intensive efficiency investments in the FirstEnergy service territory. In particular, there are some controversial provisions in the FirstEnergy proposal on which all intervenors would appreciate guidance from the Commission.

That noted, the OEC wishes to emphasize that under Senate Bill 221's provisions, energy efficiency targets are binding, and enforced by penalties. *These targets are binding regardless of whether or* not an efficiency plan authored by an investor owned utility is formally approved by the commission before it is carried out. Ohio utilities, even FirstEnergy, have at one time or as a matter of practice deployed energy efficiency programs for S.B. 221 compliance purposes *without* formal commission approval.

Duke Energy, American Electric Power, and Dayton Power and Light all began to deploy 2009 energy efficiency programs prior to formal approval from the Commission. This practice was continued in 2010, when Duke Energy and American Electric Power deployed programs in the early part of the year to comply with 2010 energy efficiency targets prior to the issuance of a formal Opinion and Order by the Commission.

FirstEnergy has itself engaged in this practice. For instance, FirstEnergy continues to file mercantile applications, designed to assist in the 2010 compliance period, even though FirstEnergy's administrative agreements for mercantile programs have not yet been formally approved by the Commission.[1] These administrative agreements are controversial for a host of reasons, yet FirstEnergy sees fit to move forward to achieve compliance with mercantile program implementation, without formal approval.

Accordingly, as Ohio's investor owned utilities have all engaged in the practice of development and deployment of energy efficiency programs designed to achieve S.B. 221 benchmarks without formal approval of those programs, lack of formal approval can never be a justification for failure to achieve benchmarks or for the issuance of a wavier. Waivers may only be granted in cases where an amendment is necessary because a utility cannot reasonably achieve benchmarks due to regulatory, economic, or technological reasons beyond its reasonable control.[2]

Ohio utilities have proven that the lack of formal approval of programs from the Commission is not a "regulatory" barrier beyond their control. Utilities, including FirstEnergy, have on numerous occasions moved forward with programs absent Commission approval. Many energy efficiency programs deployed by Ohio utilities are common-sense, well established programs that have been implemented many times in other states with considerable success. Most of these programs are non-controversial, and can be initiated at any time by a utility without Commission approval. This is the established practice in Ohio.

In conclusion, the OEC notes that Commission guidance on the more controversial aspects of FirstEnergy's plan is appreciated and desired, but delays in Commission approval do not abrogate the responsibility of utilities to meet S.B. 221 targets and benchmarks.

Thank you for your consideration,

Keith Dimoff
Executive Director

[1] See Case No. 09-553-EL-EEC; Entry on Rehearing, February 11th, 2010, p. 4.
[2] Section 4928.66(A)(2)(b) Revised Code, states: "(b) The commission may amend the benchmarks set forth in division (A)(1)(a) or (b) of this section if, after application by the electric distribution utility, the commission determines that the amendment is necessary because the utility cannot reasonably achieve the benchmarks due to regulatory, economic, or technological reasons beyond its reasonable control."

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *Application for Rehearing and Memorandum in Support of Industrial Energy Users-Ohio* was served upon the following parties of record this 2nd day of July 2010, via hand-delivery, electronic transmission or first class mail, postage prepaid.

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