BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application for Approval of a Pilot Program Regarding Mercantile Applications for Special Arrangements with Electric Utilities and Exemptions from Energy Efficiency and Peak Demand Reduction Riders.	))))))	Case No. 10-834-EL-EEC

MOTION TO STAY, REQUEST FOR EXPEDITED RULING AND REQUEST FOR PROCEDURAL SCHEDULE
BY
THE OHIO ENVIRONMENTAL COUNCIL

The Ohio Environmental Council ("OEC") moves to stay[1] the implementation of the mercantile opt-out pilot program authorized by the Public Utilities Commission of Ohio ("Commission" or "PUCO") in its Entry of September 15, 2010 ("Entry") because the Entry is unlawful and unsupported by the record. The Commission's Entry did not provide any opportunity for interested parties to comment on the proposed pilot program or upon the Commission's decision to waive its own rules and precedent regarding mercantile programs. The Entry, therefore, exceeded the scope of the docket, raised issues *sua sponte,* failed to provide parties with notice of changes to be made, and failed to provide parties with opportunity to participate in the above-captioned case.

The PUCO should stay the implementation of the mercantile opt-out pilot program and establish a procedural schedule to avoid irreparable harm to consumers and the public's interest in conservation and effectuating the intent of Ohio's Energy Efficiency and Demand Response Programs. Moreover, the stay will allow interested parties who were denied adequate notice and

[1] Pursuant to Ohio Adm. Code 4901-1-12.

due process to present their views. The PUCO must provide an opportunity to develop a record in this case upon which a decision may be rendered, especially in a case that involves the waiver of Commission rules and reversal of significant precedent. The radical changes proposed by the Entry may imperil the intent of the energy efficiency and demand response goals of Senate Bill 221 by delaying the development of new, utility-sponsored energy efficiency programs.

Expedited consideration of this matter is critical because the Commission's September 15, 2010 Entry calls for the immediate implementation of the mercantile pilot program. This motion to stay the implementation of the pilot program will be ineffective unless expedited consideration of this Motion is provided.

For these reasons, and as set forth in greater detail in the attached Memorandum in Support, the OEC respectfully requests that the Commission expedite consideration of this matter, stay implementation of the pilot program and establish a procedural schedule.

Respectfully Submitted,

/s/ Megan De Lisi

Megan De Lisi, Counsel of Record
William T. Reisinger,
Nolan Moser
Trent A. Dougherty

Ohio Environmental Council
1207 Grandview Avenue, Suite 201
Columbus, Ohio 43212-3449
(614) 487-7506 - Telephone
(614) 487-7510 - Fax
megan@theoec.org
will@theoec.org
nolan@theoec.org
trent@theoec.org

Attorneys for the OEC

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MEMORANDUM IN SUPPORT

I. INTRODUCTION

On June 16, 2010, in various orders, [2] the Commission announced that it would open the 10-834-EL-EEC docket for the purpose of creating a "streamlined" approval process for mercantile applications.[3] On June 16, 2010, the 10-834-EL-EEC docket was opened with the filing of a one-page caption. On June 17, 2010, the OEC filed a Motion to Intervene, which was granted. In its Motion to Intervene, the OEC stated that it wanted to "ensure that the mercantile opt-out application process is fair and efficient and that all approved applications represent verifiable energy savings." With regard to the concerns raised above, the OEC stated that it intended to file "additional comment on this docket."[4] On September 15, 2010, the Commission issued an Entry, granting OEC's Motion to Intervene and outlining an eighteen-month "pilot program" for mercantile arrangement applications. In implementing the pilot program, the Entry

[2] See, e.g., *In the matter of the application of Parma General Hospital and The Cleveland Electric Illuminating Company for approval of a special arrangement with a mercantile customer and exemption from payment of costs included in Rider DSE2*, Case No. 09-1103-EL-EEC, Finding and Order at 6 (June 16, 2010); and *In the Matter of Protocols for the Measurement and Verification of Energy and Peak Demand Reduction Measures*, Case No. 09-512-GE-UNC, Entry at 6 (June 16, 2010).
[3] *In the Matter of a Mercantile Application Pilot Program Regarding Special Arrangements with Electric Utilities and Exemptions from Energy Efficiency and Peak Demand Reduction Riders*, Case No. 10-834-EL-EEC (Sept. 15, 2010) at 2.
[4] OEC Motion to Intervene, June 17, 2010.

reverses several previous decisions regarding the use of the benchmark comparison method and the "as found" method of determining savings.[5] Moreover, the Commission waives 4901:1-39-05(H) and "any and all conflicting Ohio rules and regulations for purposes of the pilot program."[6]

In light of the numerous issues raised in this Entry, the Commission should order a stay of the implementation of the pilot program and establish a procedural schedule to allow intervenors time to comment and file objections to the PUCO's unlawful waiver of the rules and significant reversal of precedent.

II. STANDARD OF REVIEW

Justice Andrew Douglas set forth the factors or "standards" that may be employed when evaluating a Motion to Stay in a dissenting opinion in *MCI Telecommunications Corp. v. Public Utilities Commission* (1987):

> These standards should include consideration of whether the seeker of the stay has made a strong showing of the likelihood of prevailing on the merits; whether the party seeking the stay has shown that without a stay irreparable harm will be suffered; whether or not, if the stay is issued, substantial harm to other parties would result; and, above all in these types of cases, where lies the interest of the public.[7]

Although the Ohio Supreme Court has yet to adopt these standards, the PUCO has relied upon these factors for determining whether to grant a stay of its own order.[8] When these factors are applied to the circumstances in this case, it is clear that the PUCO should stay the implementation of the eighteen-month pilot program. The arguments are set forth in detail below.

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[5] Entry at 4.
[6] Id. at 7.
[7] *MCI Telecommunications Corp. v. Public Utilities Commission* (1987), 31 Ohio St.3d 604, 606, 510 N.E.2d 806.
[8] *See, e.g., In the Matter of the Application of Columbus Southern Power Company for Approval of an Electric Security Plan; an Amendment to its Corporate Separation Plan; and Sale or Transfer of Certain Generating Assets,* Case No. 08-917-EL-SSO, Entry at 3 (March 30, 2009).

III. ARGUMENT

A. The Public Interest is in Developing Utility-Sponsored Energy Efficiency and Demand Response Programs that Effectuate the Intent of Senate Bill 221, Thus Ensuring the Creation of Real Energy Savings.

In his dissent recommending standards for a staying a PUCO decision, Justice Douglas notes that PUCO Orders "have an effect on everyone in this state -- individuals, business and industry."[9] Specifically, the decisions, entries and orders made by the PUCO will have long-term effects on how Ohio's energy efficiency policy is developed and applied. Reversing precedent after several cases in which this policy has been thoroughly discussed and carefully shaped for the sake of convenience is not in the public interest, nor is waiving rules that govern the process of counting energy efficiency achieved by a utility. This precedent was reached after input from numerous stakeholders, after years of examination and deliberation. It was fitting that Justice Douglas emphasized that the most important consideration is "the interest of the public" and that "the public interest is the ultimate important consideration for this court in these types of cases."[10] Here, the public interest lies in encouraging the development of utility-sponsored programs that will result in actual and significant energy savings. This effectuates the intent of Senate Bill 221 ("SB 221"). The pilot program does not.

As Commissioner Roberto noted in her dissent, allowing utilities to count toward their benchmarks standard maintenance or business as usual replacement practices was rejected by the PUCO *on the same day* the docket for this case was established:

> As explained in the October 15 Order, using the "as found" method of establishing the baseline for all energy efficiency calculations runs a high risk of overstating the energy savings effects of efficiency programs. Additionally, when equipment is replaced based upon the failure of existing equipment or normal

[9] *MCI*, 31 Ohio St.3d at 606.

[10] Id.

> replacement schedules, or is installed due to new construction, using the "as found" method may allow electric utilities to claim savings for changes in energy use that are in no way related to efficiency programs.[11]

The PUCO offers no explanation for this sudden reversal other than to say that including all equipment replacement will allow the PUCO to "review the impact of considering equipment on an "as found" basis upon the ability of the electric utilities to meet their benchmarks and upon the costs of compliance with those benchmarks."[12]

But the PUCO has already considered this approach. Again, as pointed out in Commissioner Roberto's dissent, the PUCO previously interpreted R.C. 4928.66 as emphasizing *programs* and not just "the simple replacement of worn-out equipment."[13] Counting business-as-usual practices is not in the public interest and not the intent of the legislation, which unambiguously states that savings counted must be the result of "programs."[14]

Further, the Commission is obligated to follow its own precedent. The Ohio Supreme Court noted that the PUCO must demonstrate error in its previous proceedings in order to ensure stability in its procedures and processes:

> When the commission has made a lawful order, it is bound by certain institutional constraints to justify that change before such order may be changed or modified. We have previously articulated this concern in Cleveland Elec. Illuminating Co., supra, at 431, as follows: Although the Commission should be willing to change its position when the need therefore is clear and it is shown that prior decisions are in error, it should also respect its own precedents in its decisions to assure the

[11] Comm. Roberto Dissent at 1, citing In the Matter of the Protocols for the Measurement and Verification of Energy Efficiency and Peak Demand Reduction Measures, Case No. 09-512-GE-UNC, Entry on Rehearing at (June 16, 2010) (footnote omitted).
[12] Entry at 4-5 (September 15, 2010).
[13] Comm. Roberto Dissent at 2, citing In the Matter of the Protocols for the Measurement and Verification of Energy Efficiency and Peak Demand Reduction Measures, Case No. 09-512-GE-UNC, Entry on Rehearing at (June 16, 2010) (footnote omitted).
[14] R.C. 4928.66(A)(2)(c) states that compliance with energy efficiency benchmarks includes the "effects of all demand-response programs…and all such mercantile customer-sited energy efficiency and peak demand reduction **programs**...." (Emphasis added).

> predictability which is essential in all areas of the law, including administrative law."[15]

The Commission made no mention of error in the Entry. This is an experiment that goes beyond the scope of a streamlining the application process. The PUCO should not overturn its previous decisions solely based on a desire to reduce its caseload more quickly. Therefore, a stay would further the public interest because the Entry not only requires the waiver of Commission rules and precedent, but is also contrary to the applicable statute.

B. Irreparable Harm Will Occur if the Commission Waives Established Rules and Overturns its Own Precedent.

1. The utility-sponsored programs contemplated by 4928.66 will not materialize.

Irreparable harm will occur in the form of weakened EE/PDR program development if the changes made in the Entry are allowed to go forward. In the FirstEnergy administrator case, the Commission noted that it expected the Company to "propose new programs" as part of FirstEnergy's attempts to comply with the benchmarks.[16] Counting business-as-usual replacements and standard maintenance are not going to encourage mercantile customers to participate in utility-sponsored programs, as the Entry suggests.[17]

Rather, the "as-found" approach will encourage utilities to cull the maintenance log of every mercantile customer in their territory to search for any maintenance or replacement action that may have resulted in energy savings. In the FirstEnergy administrator case, the Commission noted that it wanted to "encourage new investments in energy efficiency as contemplated by

[15] *Office of Consumers' Counsel v. Public Utilities Com.* (1984), 10 Ohio St. 3d 49, 50-51; 461 N.E.2d 303, 304-305.
[16] *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company and the Toledo Edison Company for Approval of Administrator Agreements and Statements of Work*, Case No. 09-553-EL-EEC, Finding and Order at 3 (December 2, 2009).
[17] Entry at 2.

Section 4928.66, Revised Code."[18] Allowing utilities to count any action by a customer that happens to produce savings will not encourage new energy efficiency investment. It will encourage mercantile customers merely to be vigilant when keeping track of their maintenance procedures.

Consequently, if utilities can count the simple replacement of worn-out motors and business-as-usual practices, it logically follows that utility-sponsored programs will be delayed, reduced or even eliminated as unnecessary. This will hamper effort by utilities to comply with the ever-increasing amount of savings and demand response required by the Ohio benchmarks. Thus, the Commission is acting contrary to the intent of the legislature, which is to encourage energy efficiency programs, not the diligent documentation of company maintenance. The utility-sponsored programs contemplated by the legislature will never materialize, or do so too late to meet the benchmarks. Therefore, a stay is proper in this proceeding and should be granted by the PUCO.

2. A lack of due process constitutes irreparable harm.

This case docket is specifically limited to streamlining the application process. In the Technical Resource Manual case (09-512-EL-UNC), the Commission outlined the purpose and scope of the 10-834-EL-EEC case docket in the June 16, 2010 Entry on Rehearing:

> Accordingly, in the near future, the Commission will publish an application and filing instructions for such applications. Additionally, the Commission intends to streamline the approval of certain types of applications via an auto-approval process. Case No. 10-834-EL-EEC has been opened for this purpose.[19]

[18] *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company and the Toledo Edison Company for Approval of Administrator Agreements and Statements of Work*, Case No. 09-552-EL-EEC, Second Entry on Rehearing at 4 (February 11, 2010).
[19] *In the Matter of Protocols for the Measurement and Verification of Energy and Peak Demand Reduction Measures*, Case No. 09-512-GE-UNC, Entry at 6 (June 16, 2010).

Nearly identical language was used to describe the case docket in the Parma Hospital case.[20] There was no description of the substantive changes, now requiring the Commission to ignore its own precedent and waive established rules, in either description. Thus, there was no notice by the PUCO that such radical changes were being considered. This is a denial of due process rights, guaranteed by the Fourteenth amendment to the U.S. Constitution.

Because of the inadequate notice, parties could not determine whether to participate in the process. The fundamental requisite of procedural due process of law is the opportunity to be heard.[21] Procedural due process for individuals is a constitutional right protected by the Fourteenth Amendment. The opportunity to be heard can have no meaning, however, if one is not informed of the issues in contention and consequently cannot make a decision as to whether to challenge or object to a matter.[22] Consequently, the Commission violated interested parties' rights to procedural due process in the form of an opportunity to be heard.

Courts have ruled that when the process is flawed or biased, if events subsequent to the process produce irreparable harm, injunctive relief may be appropriate.[23] Those circumstances exist in this case. Therefore, the implementation of the pilot program, created without providing any interested parties the chance to object or comment, will result in irreparable harm to those parties and Ohio's energy efficiency and demand response policies.

[20] *In the matter of the application of Parma General Hospital and The Cleveland Electric Illuminating Company for approval of a special arrangement with a mercantile customer and exemption from payment of costs included in Rider DSE2*, Case No. 09-1103-EL-EEC, Finding and Order at 6 (June 16, 2010)
[21] *Grannis v. Ordean*, 234 U.S. 385, 394, 43 S. Ct. 779, 784 (1914), citing *Louisville& N.R. Co. v. Schmidt*, 177 U.S. 230, 236 (1900); *Simon v. Craft*, 182 U.S. 427, 436 (1901).
[22] See for example Mullane v. Central Hanover Band & Trust Co., 339 U.S. 306, 313, 70 S. Ct. 652 (1950), where the Court noted that "[t]he right to be heard has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest."
[23] *United Church of the Medical Center v. Medical Center Commission*, 689 F.2d 693, 701.

C. No Party Will Suffer Harm as a Result of the Stay.

A temporary stay with a procedural schedule will not harm any party to this case. First, the only formal party to this case is the OEC. A stay would not pose any risk of harm to any other potential parties, including utilities, as no party except for the OCC found this case important enough to participate in. Postponing implementation of the pilot program will not affect the utilities' ability to reach the EE/PDR benchmarks mandated by S.B. 221. The utilities for two years have operated under a regulatory structure which did not anticipate the waiver of these rules. Therefore, they have no right to expect that these rules would have been lifted. Moreover, in the 2009 Annual Energy Efficiency and Peak Demand Reduction Status Reports filed with the Commission, all of the utilities[24] met their 2009 benchmarks.[25] This indicates that the utilities are able to meet the benchmarks without the pilot program. Therefore, delaying the pilot program until parties have an opportunity to comment and fully analyze the pilot program will not affect any utilities' compliance with S.B. 221 requirements.

Second, the Commission has approved hundreds of mercantile applications.[26] Admittedly, the mercantile application process and the rules governing mercantile applications require clarification by the Commission to ensure that applicants and intervenors understand the process. In the past, the OEC has even suggested that the Commission adopt a uniform application form to facilitate applicants with the filing process. However, in light of the

[24] Pursuant to the January 7, 2010 Finding and Order issued by the Commission in Case No. 09-1004-EL-EEC et al., FirstEnergy's 2009 statutory benchmarks for EE/PDR were amended to zero, contingent on the completion requirements for 2010 through 2012. Therefore, for purposes of FirstEnergy's *2009 Benchmark Status Report*, (Case No. 10-227-EL-EEC et al.) FirstEnergy was in compliance with their statutory EE/PDR requirements for 2009 as amended by the Commission.

[25] See *In the Matter of the Status Report of American Electric Power Company*, Case No. 10-318-EL-EEC (March 15, 2010); *In the Matter of the Annual Energy Efficiency Portfolio Status Report of Duke Energy Ohio, Inc.*, Case No. 10-317-EL-EEC (March 15, 2010); *In the Matter of the Dayton Power and Light Company's Portfolio Status Report*, Case No. 10-0303-EL-POR (March 12, 2010); FirstEnergy's *Energy Efficiency and Peak Demand Reduction Program Portfolio Status Report*, Case No. 10-227-EL-EEC et al. (March 8, 2010).

[26] See e.g., *In the Matter of the Applications of Various Mercantile Companies and Electric Utilities for Approval of Special Arrangements and Exemptions from Payment of Energy Efficiency and Peak Demand Reduction Riders*, Case No. 10-833-EL-EEC (June 16, 2010).

hundreds of applications that have been filed and approved without participation in the pilot program, immediate implementation of the pilot program is by no means necessary to prevent harm to the parties of this case.

Finally, the electric utilities are protected by the efficiency waiver provisions of 4901:1-39-05(I). The Commission used these provisions to amend FirstEnergy's 2009 benchmarks to zero, thereby waiving FirstEnergy's 2009 benchmarks.[27] Although the OEC does not encourage the use of the waiver provisions, the existence of these provisions demonstrates that delaying implementation of the pilot program, even if it negatively impacts a utility's ability to reach its benchmark goals for the 2010 period, will not harm the utility because the utility would still be able to apply for a waiver.

The pilot program will result in significant changes to the mercantile application process and represents a striking reversal of prior Commission precedent. A temporary stay of implementation of the pilot program will merely serve to give the OEC time to comment and fully participate in the development of said pilot program, ensuring that the program will guarantee that the mercantile process is fair and efficient, before the program becomes effective. A temporary stay will not harm any party to this case. The stay will simply maintain the effectiveness of the current rules the electric utilities have been operating under, and meeting their benchmarks with, until an efficient, sensible program is designed.

D. OEC is Likely to Prevail in this Case Where Notice was Denied and No Record was Established Justifying the Waiver of Commission Rules and Reversal of Precedent.

The Commission's Entry was improper and out-of-rule for several reasons, and the OEC is likely to prevail. First, the Commission's *sua sponte* decision to waive Ohio Adm. Code 4901:1-39-05(H) without notice and an opportunity for parties to provide comment was

[27] Supra note 10.

improper. While the Commission's rules do allow the PUCO to waive a procedural rule, that right may only be exercised "upon an application or a motion filed by a party."[28] In this situation, no party requested a change to Rule 4901:1-39-05(H) by filing an application or motion. This rule provides that EE/PDR credit may not be awarded for projects that were implemented to comply with another energy standard. Waiving this rule would be a radical change. Such a change would reverse the Commission's precedent in its 09-888-EL-UNC Finding and Order and would have a significant impact on the effectiveness of R.C. 4928.66 by allowing previously ineligible projects to be counted towards benchmark compliance. The Commission cannot *sua sponte* issue a waiver of the Ohio Administrative Code and should not do so in this situation without allowing interested party comment on the change.

The Entry also reverses its own precedent by reinstating the "benchmark comparison" method and reinstates the "as found" method for calculating energy baselines. No rationale is given for this change in Commission policy. This change reverses the Commission's unambiguous statement of policy in its 09-512-EL-GE-UNC.[29]

Finally, the Commission's rules require that decisions must be based on an evidentiary record, but there was no record in this case.[30]

For the foregoing reasons, the OEC is likely to succeed in a challenge of the Entry. The Commission's *sua sponte* decision to waive Ohio Adm. Code 4901:1-39-05(H) without notice and an opportunity for parties to provide comment is improper. While the Commission's rules allow the PUCO to waive a procedural rule, that right may only be exercised in response to a petition. The Commission cannot *sua sponte* issue a waiver of the Ohio Administrative Code under these circumstances.

[28] Ohio Adm. Code 4901:1-39-02(B).
[29] Entry at 4-5.
[30] Ohio Adm. Code 4903-09

IV. REQUEST FOR A PROCEDURAL SCHEDULE

It is appropriate for the PUCO to order a procedural schedule that will allow intervenors to comment on the pilot program and provide an evidentiary record upon which a decision can be properly supported. As a party to the above captioned case, the OEC has the right to an opportunity to meaningfully participate. The Commission should establish a procedural schedule that allows parties the opportunity to participate in this case and affords parties the opportunity to present their cases.

Precedent exists for the establishment of the requested procedural schedule that would provide the public and parties important input to the resolution of the issues that arise in this case. For example, on October 24, 2001, the Commission initiated an investigation into the line extension policies by several electric utilities after the Commission became more fully aware of the consequences of the PUCO's approval of electric transition plans subsequent to the enactment Sub. Senate Bill 3. Based on complaints received by the PUCO, the Commission issued an entry to obtain additional information "regarding the past and present policies and procedures of AEP, FE, and Mon Power for handling new line extensions."[31] The companies responded to twelve questions and later replied to comments. By an entry dated February 6, 2002, the Commission directed its Staff to prepare and file a staff report of investigation.[32] A hearing was convened on April 26, 2002.

The need for such a procedural schedule at this time is underscored by prior events related to this case. As noted in the dissent, well-established precedent by the PUCO is being overturned with no justification.[33] The establishment of a procedural schedule will help ensure that timely progress is made regarding the procedures that are stated in the Commission's entries

[31] *In re Line Extension Investigation*, Case Nos. 01-2708-EL-COI, et al. at 2, ¶(3) (October 24, 2002).
[32] Id., Entry at 3, ¶8 (February 6, 2002).
[33] Comm. Roberto Dissent at 3-4.

and orders as well as those procedures that have yet to be announced. Therefore, the OEC respectfully requests that the Commission grant this Motion to Stay and establish a procedural schedule that includes a comment period for interested parties.

V. REQUEST FOR EXPEDITED CONSIDERATION

The PUCO has the power to consider a motion on an expedited basis and may issue an expedited ruling when "no party objects to the issuance of such a ruling."[34] The OEC has contacted the Office of the Ohio Consumers' Counsel ("OCC") regarding this request for expedited consideration,[35] and the OCC does not object to the issuance of an expedited ruling. Therefore, no party has any objection to the Commission's ruling on this motion without allowing time for the filing of memoranda contra.

The Commission should expedite consideration of OEC's Motion to Stay and Request for Procedural Schedule. Expedited consideration of this matter is critical because the Commission's September 15, 2010 Entry calls for the immediate implementation of the mercantile pilot program. Applications filed through the pilot program may be eligible for an automatic approval process, under which a qualifying application will be approved on the sixty-first calendar day after filing.[36] The purpose of these applications is to count customer sited energy efficiency and peak demand toward a utility's S.B. 221 compliance obligations, and to incentivize mercantile customer's commitment of their EE/PDR capabilities to the electric utilities' programs. Because the Commission's Entry significantly alters the mercantile application process, it is imperative that this Motion be considered as soon as possible, before applications are approved through the new pilot program.

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[34] Ohio Adm. Code 4901-1-12(C).
[35] Id.
[36] *In the Matter of a Mercantile Application Pilot Program Regarding Special Arrangements with Electric Utilities and Exemptions from Energy Efficiency and Peak Demand Reduction Riders*, Case No. 10-834-EL-EEC (Sept. 15, 2010) at 3.

V. CONCLUSION

The Commission's Entry substantially changes the structure of the mercantile opt-out program, which will affect the quality of energy efficiency programs undertaken by utilities and will impact the amount of energy efficiency projects performed in Ohio. The OEC was granted leave to intervene on this docket in order to ensure that the mercantile process is fair and efficient, and that all approved applications represent verifiable energy efficiency project. Therefore, OEC and should have the opportunity to comment and meaningfully participate in the above captioned case. Moreover, because the Commission's Entry states that the pilot program is effective immediately, it is critical that the Commission consider this Motion to Stay on an expedited basis.

Respectfully Submitted,

/s/ Megan De Lisi

Megan De Lisi, Counsel of Record
William T. Reisinger,
Nolan Moser
Trent A. Dougherty

Ohio Environmental Council
1207 Grandview Avenue, Suite 201
Columbus, Ohio 43212-3449
(614) 487-7506 - Telephone
(614) 487-7510 - Fax
megan@theoec.org
will@theoec.org
nolan@theoec.org
trent@theoec.org

Attorneys for the OEC

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing has been served upon the following parties by first class or electronic mail this 1st day of October, 2010.

/s/ Megan De Lisi

William L. Wright
Attorney General's Office
Public Utilities Commission of Ohio
180 E. Broad St., 6th Fl.
Columbus, OH 43215
William.wright@puc.state.oh.us

Christopher J. Allwein, Counsel of Record
Ann M. Hotz
Office of the Ohio Consumers' Counsel
10 West Broad Street, Suite 1800
Columbus, Ohio 43215-3485
Telephone: (614) 466-8574
allwein@occ.state.oh.us
hotz@occ.state.oh.us

Summary: Motion Motion to Stay electronically filed by Mr. Will Reisinger on behalf of Ohio Environmental Council