

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Mercantile Customer)	
Pilot Program for Integration of Customer)	Case No. 10-834-EL-POR
Energy Efficiency or Peak Demand)	
Reduction Programs.)	

COMMENTS OF INDUSTRIAL ENERGY USERS-OHIO

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COMMENTS OF INDUSTRIAL ENERGY USERS-OHIO

Industrial Energy Users-Ohio (“IEU-Ohio”) has repeatedly demonstrated that the plainly written language of Amended Substitute Senate Bill 221 (“SB 221”) requires the Public Utilities Commission of Ohio (“Commission”) to count **all** of the energy efficiency and peak demand reduction (“EE/PDR”) measures of Ohio’s mercantile customers towards the EE/PDR mandates contained in Section 4928.66, Revised Code. The Commission currently has an open review in Case Nos. 08-888-EL-ORD, 09-512-EL-UNC, 13-651-EL-ORD, and in this proceeding. IEU-Ohio requests that the Commission use these open dockets to correct its rules and standardized application template and bring them into conformance with Ohio law.

As IEU-Ohio previously identified, if the Commission were properly applying Ohio law there would not have been a need for the Commission to create the mercantile customer Pilot Program to remedy its failures on the “what counts” determination. The Commission has granted rehearing on its rules covering “what counts” but has not yet addressed arguments raised on rehearing by IEU-Ohio and others.¹ The Commission

¹ *In the Matter of the Adoption of Rules for Alternative and Renewable Energy Technology, Resources, and Climate Regulations, and Review of Chapters 4901:5-01, 4901:5-3, 4901:5-5, and 4901:5-7 of the Ohio Administrative Code, Pursuant to Amended Substitute Senate Bill 221, Case No. 08-888-EL-ORD, Entry on Rehearing at 2 (Dec. 9, 2009).*

has also granted rehearing regarding its review of the measurement and verification standards associated with EE/PDR projects, but has not yet addressed arguments raised by IEU-Ohio and others on rehearing.² Recently, the Commission deferred the “what counts” issue raised in FirstEnergy’s EE/PDR portfolio plan case back to this proceeding for further review.³ The Commission also has initiated an investigation in Case No. 13-651-EL-ORD and has scheduled a workshop on April 23, 2013. The Commission directed its Staff to elicit feedback on Staff’s proposed rule revisions and directed interested parties to “propose their own revisions to the rules for Staff’s consideration.”⁴ Additionally, the Senate Public Utilities Committee is currently reviewing Ohio’s portfolio mandates.

The time is ripe for the Commission to complete its four open reviews and bring its rules and the standardized template into conformance with Ohio law. While the mercantile customer Pilot Program includes lawful provisions such as the use of the as-found methodology of measuring the energy efficiency improvements of mercantile customers and advances the goal of efficient administration, the Commission should more broadly eliminate the uncertainty and confusion that has made compliance efforts unnecessarily complex and expensive. There is a need for the Commission to address the interests of both the electric distribution utilities (“EDUs”) and mercantile customers

² *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, Entry on Rehearing at 3 (July 29, 2010) (hereinafter “M&V Case”).

³ *In the Matter of the Application of The Cleveland Electric Illuminating Company, Ohio Edison Company, and The Toledo Edison Company for Approval of Their Energy Efficiency and Peak Demand Reduction Program Plans for 2013 through 2015*, Case Nos. 12-2190-EL-POR, *et al.*, Opinion and Order at 34 (Mar. 20, 2013).

⁴ *In the Matter of the Commission’s Review of its Rules for Energy Efficiency Programs Contained in Chapter 4901:1-39 of the Ohio Administrative Code*, Case Nos. 13-651-EL-ORD, *et al.*, Entry at 3 (Mar. 15, 2013).

in having the terms and conditions for determining what counts as an EE/PDR measure, and, establishing the criteria to qualify for incentives, including rider exemptions, established on a more permanent basis.

For the reasons discussed below, the Commission should hold that the as-found methodology should be used for quantifying a mercantile customer's EE/PDR savings (including in the instance of failed equipment), should use the as-found methodology for purposes of determining a mercantile customer's incentives, should continue to measure EE/PDR rider exemptions based upon the benchmark comparison methodology, should modify its practices in order to count the EE/PDR savings associated with historical projects where the applicant failed to submit an application within three years of completing the EE/PDR project, should continue the automatic approval process created in this proceeding, and, should correct the errors identified below regarding the standardized mercantile customer application form. By adopting these recommendations the Commission can reduce the uncertainty and unnecessary costs imposed by the Commission on Ohio businesses.

I. MEASURING EE/PDR SAVINGS

A. As-Found Methodology

Before addressing the lawfulness and reasonableness of using the as-found methodology it is first important to distinguish two separate determinations that exist in Ohio law and the mercantile customer application process. The first determination is establishing "what counts" towards an EDU's statutory compliance obligation. The second determination is identifying what "incentive" mercantile customers should receive for committing their self-directed EE/PDR improvements towards an EDU's

compliance obligation. Ohio law specifies that the Commission must count **all** of the effects of a mercantile customer's EE/PDR project.⁵ On the incentive side, the Commission has discretion to determine if exempting the mercantile customer from the EDU's cost-recovery mechanism will "reasonably encourage" the mercantile customer to contribute its EE/PDR savings towards the EDU's portfolio plan. The Commission's orders in this case recognize that these are two separate determinations.⁶

In creating the mercantile customer Pilot Program, the Commission held that "for purposes of counting savings toward utility compliance and providing available incentives under the pilot program, all equipment replacements will be considered using the 'as found' method of establishing the baseline for all energy efficiency calculations."⁷ As part of the Pilot Program, the Commission also directed Staff to create a standard mercantile customer application template. As IEU-Ohio has previously identified, the standardized template created by Staff did not mirror the Commission's directives.⁸ Specifically, the standardized template issued by the Staff does not utilize the as-found methodology for purposes of counting the savings for all equipment replacement; it utilizes a hypothetical standard equipment baseline in the case of failed equipment with no useful remaining life.

Staff's January 15, 2013 recommendation in this proceeding, if adopted by the Commission, would continue the unlawful and unreasonable use of a hypothetical standard practice baseline that currently exists in the standardized template for

⁵ Section 4928.66(A)(2)(c), Revised Code.

⁶ Entry at 3-4 (Sept. 15, 2010).

⁷ *Id.* at 4.

⁸ Application for Rehearing and Memorandum in Support of IEU-Ohio at 11-12 (Oct. 13, 2010).

purposes of both determining the EE/PDR savings and identifying the incentives available to a mercantile customer who replaces failed equipment. As discussed in more detail below, Staff's recommendation is contrary to Ohio law.

First, as mentioned above Section 4928.66(A)(2)(c), Revised Code, directs the Commission to include **all** of a mercantile customer's EE/PDR savings towards an EDU's compliance obligation:

Compliance with divisions (A)(1)(a) and (b) of this section shall be measured by including the effects of **all** demand-response programs for mercantile customers of the subject electric distribution utility, **all** waste energy recovery systems and **all** combined heat and power systems, and **all** such mercantile customer-sited energy efficiency, including waste energy recovery and combined heat and power, and peak demand reduction programs, adjusted upward by the appropriate loss factors.

Thus, there is no lawful basis for the Commission to limit what counts towards an EDU's compliance with the portfolio requirements to only the incremental EE/PDR savings in excess of an undefined hypothetical standard equipment baseline.

Second, use of the as-found methodology is not only mandated by Ohio law on the "what counts" determination, but is also appropriate to use for the incentive determination because it satisfies the Commission's goals "to reduce obstacles [towards] compliance with the statutory energy efficiency benchmarks, simplify the existing application process, and minimize the overall cost of compliance to all ratepayers."⁹ Replacing the as-found methodology for purposes of quantifying the EE/PDR savings or for purposes of determining an incentive with some hypothetical baseline based upon standard equipment will not promote these goals. Incentivizing less than the actual savings from EE/PDR projects will increase the obstacles towards

⁹ Second Entry on Rehearing at 4 (May 25, 2011).

compliance with the EE/PDR benchmarks – it will complicate the application process as debates will endlessly drag on as to what hypothetical baseline is appropriate in each case and it will increase the overall cost of compliance for all ratepayers.

And the Commission's failure to hold that the as-found methodology will be used on a permanent basis only encourages stakeholders to continue their repeated challenges to the use of the as-found methodology in any case before the Commission in which this issue can be raised, which are partially based upon the conflicts that exists between the rules the Commission has adopted and Ohio law.¹⁰

The Commission can remove obstacles towards an EDU's satisfaction of the State portfolio requirements, can reduce costs of compliance and can simplify the application process by acting on IEU-Ohio's pending applications for rehearing in Case Nos. 08-888-EL-ORD and 09-512-EL-UNC, holding that the use of the as-found methodology is mandated by Ohio law on determining what counts towards an EDU's compliance obligation and is an appropriate metric to identify whether a mercantile customer that completes self-directed EE/PDR projects should qualify for an exemption from an EDU's EE/PDR rider.

Third, there is no legitimate means to identify for most mercantile customer EE/PDR projects what the applicable standard equipment baseline is for purposes of quantifying the incremental EE/PDR savings above that hypothetical baseline. On June 16, 2009, the Commission opened Case No. 09-512-EL-UNC, for the purpose of

¹⁰ For example, the Ohio Environmental Council ("OEC") has filed numerous pleadings in this case challenging the as-found methodology and has now taken an appeal to the Ohio Supreme Court challenging, among other things, the use of the as-found methodology. OEC has also challenged using the as-found methodology in other cases, for example, FirstEnergy's EE/PDR portfolio plan case. *In the Matter of the Application of The Cleveland Electric Illuminating Company, Ohio Edison Company, and The Toledo Edison Company for Approval of Their Energy Efficiency and Peak Demand Reduction Program Plans for 2013 through 2015*, Case Nos. 12-2190-EL-POR, *et al.*, Opinion and Order at 33 (Mar. 20, 2013)

developing protocols for the measurement and verification of EE/PDR measures that would “provide predictability and consistency for the benefit of the electric and gas utilities, customers, and the Commission itself.”¹¹ IEU-Ohio and others filed multiple applications for rehearing in that case challenging the Commission’s decisions that effectively rewrote Sections 4928.64 and 4928.66, Revised Code, artificially increasing the baseline to measure EE/PDR savings and increasing the ultimate cost to Ohio customers. The Commission granted rehearing on July 29, 2010, to further consider the matters raised by IEU-Ohio, but has not yet issued a final decision on IEU-Ohio’s application for rehearing.

Subsequently, on August 6, 2012, the Draft Technical Reference Manual (“TRM”) was docketed in the case, and on August 10, 2010, a workshop was held to discuss the TRM. IEU-Ohio participated in the workshop and identified the technical and legal defects in the TRM. Specifically, IEU-Ohio submitted Joint Objections and Comments on the TRM, which identified the TRM’s lack of clarity to what the standard equipment baseline would be for most mercantile projects.¹² The layered references in the TRM instruct EDU’s and their customers to embark on a continuous-loop journey that is incapable of producing any information that can be relied upon to identify what the Commission will count against the Ohio portfolio obligations in the case of failed equipment.¹³

¹¹ *M&V Case*, Entry at 3 (June 24, 2009).

¹² *M&V Case*, Joint Objections and Comments to the August 6, 2010 Draft Technical Reference Manual from Ohio Edison Company, The Cleveland Electric Illuminating Company, The Toledo Edison Company, Columbus Southern Power Company, Ohio Power Company, Duke Energy Ohio, Inc., the Dayton Power and Light Company, and IEU-Ohio at 16-19 (Nov. 3, 2010).

¹³ *Id.*

In contrast to the numerous problems that exist in attempting to use an undefined hypothetical baseline, using the as-found methodology is simple and efficient (two goals of the Commission in creating the Pilot Program). Mercantile customers can readily conduct a cost-benefit analysis of replacing old equipment with various types of new energy efficient equipment. There will not be endless debates about the appropriate efficiency rating of standard equipment. Calculating incentives based upon the as-found methodology is simply the best option; it is efficient, easy to work with, and will reduce the overall time that mercantile customers, EDUs, and Staff have to spend on each mercantile application.

In sum, the standard equipment baseline is not defined by the TRM or elsewhere by the Commission, and the TRM's uninformative references do not allow the standard equipment baseline to be defined. For purposes of counting a mercantile customer's EE/PDR savings associated with replacing existing equipment (whether at the end of its useful life or not), Ohio law mandates use of the as-found methodology. For purposes of calculating incentives, the as-found methodology is efficient and will provide certainty to the mercantile application process. Therefore, IEU-Ohio opposes Staff's recommendation to use a hypothetical standard equipment baseline to determine what an EDU may count towards its statutory compliance obligation when a mercantile customer has replaced failed equipment at the end of its useful life, as well as Staff's proposal to use this criteria to determine whether a mercantile customer may receive an exemption from an EDU's EE/PDR rider.¹⁴

¹⁴ IEU-Ohio recognizes that for newly constructed equipment some baseline must be used, however, the current references to standard equipment do not provide a workable solution.

B. Benchmark Comparison Methodology

IEU-Ohio agrees with Staff's recommendation to continue to use the benchmark comparison methodology to measure the length of an exemption from an EDU's EE/PDR rider. Staff also noted that the majority of the comments filed in this docket support continuation of the benchmark comparison methodology.¹⁵

The benchmark comparison methodology provides a straightforward and efficient methodology for a mercantile customer to screen the results of its self-directed projects to determine if they will be eligible to seek a rider exemption. In the absence of some screening mechanism applicable to mercantile customer applications, mercantile customers would be left guessing whether the Commission might approve any application seeking a rider exemption.

Therefore, IEU-Ohio agrees with Staff that the Commission should continue to utilize the benchmark comparison methodology to measure the length of a rider exemption for mercantile customers.

II. THREE YEAR WINDOW TO FILE HISTORICAL MERCANTILE APPLICATIONS

IEU-Ohio opposes excluding the effects of mercantile customers' EE/PDR projects towards an EDU's compliance with the state portfolio requirements if the mercantile customer fails to submit an application within a 3-year window. Ohio law mandates that the effects of all mercantile customers' EE/PDR projects be counted and does not provide any exception. While the Commission has discretion on the incentive determination in terms of what it deems satisfies the "reasonably encourages" standard, there is no such statutory discretion on the "what counts" determination.

¹⁵ Review and Recommendation of the PUCO Staff at 4 (Jan. 15, 2013).

Furthermore, IEU-Ohio believes that it would “reasonably encourage” mercantile customers to commit their EE/PDR savings to the EDU if the Commission provided incentives to mercantile customers who implemented EE/PDR projects, regardless of whether the project was completed last year or over 4 years ago. The practical effect of counting these historical projects and providing incentives for mercantile customers to identify and commit additional historical projects would be to reduce the overall cost of Ohio’s portfolio requirements: a benefit to all Ohio customers. Therefore, IEU-Ohio objects to Staff’s recommended 3-year window for filing applications related to historical EE/PDR projects.

III. ANNUAL REPORTS FOR CUSTOMERS ELECTING RIDER EXEMPTIONS

IEU-Ohio opposes Staff’s recommendation to have mercantile customers that file applications seeking rider exemptions to file annual reports detailing the mercantile customer’s ongoing EE/PDR savings.¹⁶ There is no statutory requirement that mercantile customers demonstrate their EE/PDR capabilities on an ongoing basis; as discussed above, the operative standard is what “reasonably encourages” the mercantile customer to commit its EE/PDR savings towards an EDU’s portfolio plan. While Section 4928.66, Revised Code, mentions an annual verification report, that reporting process is directed at the Commission and not mercantile customers:

In accordance with rules it shall adopt, the public utilities commission shall produce and docket at the commission an annual report containing the results of its verification of the annual levels of energy efficiency and of peak demand reductions achieved by each electric distribution utility pursuant to division (A) of this section. A copy of the report shall be provided to the consumers’ counsel.

¹⁶ Review and Recommendation of the PUCO Staff, Attachment 2 at 1 (Jan. 15, 2013).

Furthermore, annual reporting requirements will not “reasonably encourage” a mercantile customer to commit its EE/PDR savings towards its EDU’s portfolio compliance effort. As discussed herein, the mercantile customer application process is compromised by uncertainty, changing measurement standards, changing incentive standards, and years of ongoing review processes. Adding in additional levels of uncertainty will not help the matter and the additional uncertainty will only serve to further increase the cost of doing business in Ohio above and beyond the real costs imposed on Ohio businesses from the portfolio requirements themselves. Additionally, applying more stringent requirements to the more expensive mercantile customer projects that would actually be eligible for multi-year rider exemptions will further disincentive mercantile customers from proactively seeking out and implementing large-scale EE/PDR projects. Coupling the more stringent administrative reporting burdens with the possibility that the Commission could revoke a rider exemption in the future based upon unforeseen events makes it increasingly less likely that mercantile customers will implement large-scale EE/PDR projects. Ohio should reward businesses that are willing to proactively reduce their energy intensity, not frustrate and punish them.

Additionally, Staff has neither proposed, nor has the Commission required, mercantile customers who elected a cash incentive over a rider exemption to return to the Commission to justify the incentive they received. It would be unjust and unreasonable to treat these similarly situated mercantile customers differently and subject one group to annual reporting requirements that could result in the termination of their benefits.

If the Commission rejects IEU-Ohio's recommendation that annual reporting requirements will not "reasonably encourage" mercantile customers to commit EE/PDR savings to their EDUs, additional clarity is needed regarding Staff's annual reporting recommendation. First, the mercantile customer annual report form proposed by Staff (Attachment 1 to the Staff's January 15, 2013 review and recommendations) would require a mercantile customer to recalculate the exemption period based upon an updated customer baseline that reflects the most recent three calendar years of historical usage. Unfortunately, Staff's recommendation fails to recognize that a customer's baseline will be affected by economic growth (as well as contraction) and that such growth may be entirely irrelevant regarding whether EE/PDR measures remain in place and are delivering EE/PDR savings. Section 4928.66, Revised Code, provides the Commission with the ability to adjust the baseline for economic growth, and, the following example demonstrates why such an adjustment should be adopted by the Commission if it adopts Staff's recommended annual report requirement.

As an example, consider a manufacturer that operates a single shift facility operating Monday through Friday. The facility operates 50 weeks per year for eight hours per day and consumes 5,000 kilowatt hour ("kWh") each hour. The manufacturer's annual energy usage would be 10,000,000 kWh (5,000 kWh per hour times 2,000 hours per year) and would be at this level for the prior three years. The manufacturer modifies its process and achieves a 10% reduction in energy savings such that its hourly and annual usage is now 4,500 kWh and 9,000,000 kWh, respectively. Under the Staff's recommended benchmarking methodology the customer would qualify for a rider exemption through approximately the end of 2019.

As a result of reducing the energy intensity of its manufacturing operations the mercantile customer lowers its cost and is able to gain additional business the year after completing the energy efficiency measure. The additional business allows the customer to add a second shift at its manufacturing facilities with no loss in energy efficiency. Therefore, the customer's annual electrical usage is now 18,000,000 kWh (5,000 kWh per hour times 4,000 hours per year). The customer's historical baseline after the first year of additional operations is 12,333,333 kWh (the total of 10,000,000 kWh plus 9,000,000 kWh plus 18,000,000 kWh divided by 3). However, under the Staff's proposed reporting methodology the customer now only achieves an 8.1% reduction from its baseline energy usage, rather than 10%. In the subsequent year, as the customer's growth ripples through its baseline, the calculated energy reduction would be only 6.7% of the customer's baseline.

As this example demonstrates, although there has been no change in the level of actual EE/PDR savings achieved by the customer, its economic growth results in a penalty relative to the value of the customer's rider exemption. To eliminate this problem IEU-Ohio recommends that Staff's proposal be modified to allow a mercantile customer to adjust its baseline in annual reports submitted to Staff to reflect new economic growth. IEU-Ohio also recommends that any such adjustment to a baseline as a result of new economic growth be flowed through as a corresponding adjustment to an EDU's baseline as permitted pursuant to Section 4928.66(A)(2)(a), Revised Code.

Second, Staff's proposed annual reporting method does not address which mercantile customers will be subjected to the reporting requirement. For instance, the Commission did not previously impose ongoing reporting requirements for all customers

that have previously been granted rider exemptions that exceed 24 months.¹⁷ To the extent the Commission requires mercantile customers to submit measurement and verification reports after already receiving rider exemptions, IEU-Ohio recommends the Commission bifurcate its ruling. For customers that have already received approval of their rider exemptions, the Commission should require those customers to abide by the terms in the Commission's decision approving the rider exemption (which may or may not have required ongoing reporting obligations). For mercantile customers who receive rider exemptions after the Commission issues a final decision, assuming the Commission adopts Staff's recommendation, IEU-Ohio would request that the Commission clarify that only those customers would be required to file reports on an annual basis.

Additionally, and consistent with the Commission's previous orders and Staff's recommendations regarding payment for annual reporting associated with behavioral changes, IEU-Ohio recommends that to the extent the Commission requires mercantile customers with EE/PDR rider exemptions to follow an annual or biannual reporting process, those mercantile customers should receive \$0.005/kWh of annual savings as an incentive payment for filing each report.

¹⁷ In Case No. 10-833-EL-EEC, the Commission conditionally approved numerous mercantile applications, but the Commission's Order only stated that:

As noted in prior cases, although these projects are conditionally approved, as described above, they are subject to evaluation, measurement, and verification in the portfolio status report proceeding initiated by the filing of the applicable electric utility's portfolio status report on March 15 of each year, as set forth in Rule 4901:1-39-05(0), O.A.C.

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 Rider, Case No. 10-833-EL-EEC, Finding and Order at 4 (Jun. 23, 2010). Thus, in the case of the 241 applications approved by the Commission on June 23, 2010, there were no restrictions placed upon mercantile customers to continually justify their rider exemptions.

In sum, IEU-Ohio opposes an ongoing reporting requirement for customers who elect to receive a rider exemption instead of the cash incentive. The ongoing reporting requirements will increase costs and decrease efficiency for mercantile customers and will discourage mercantile customers from committing their EE/PDR savings towards their EDUs. Additionally, the asymmetrical treatment between rider exemption and cash incentive customers is unjust and unreasonable. However, if the Commission adopts Staff's recommendation, IEU-Ohio requests that the Commission clarify the recommendation of the Staff to address the concerns IEU-Ohio has identified.

IV. AUTOMATIC APPROVAL PROCESS

IEU-Ohio supports Staff's recommendation to continue to use an automatic approval process. Before the automatic approval process began there was a significant backlog in mercantile customer applications. The automatic approval process has been instrumental in reducing the backlog. As noted by Staff, since the Pilot Program was implemented, 1145 mercantile customer applications have been filed (as of December 31, 2012), and of those applications only 11 have been denied, less than 1% of the total applications. Therefore, an automatic approval process is reasonable and IEU-Ohio supports its continuous use.

V. CONCLUSION

It is overdue for the Commission to clear up the ongoing confusion regarding mercantile customer applications. The Commission should provide final orders in its four open dockets where it is reviewing how much of a mercantile customer's EE/PDR savings will count towards an EDU's compliance obligation and resolve what level of incentives "reasonably encourages" mercantile customers to commit their EE/PDR

savings towards their EDUs' portfolio plans. As demonstrated herein, the as-found methodology is mandated by law for purposes of counting EE/PDR savings, and the as-found methodology is the proper method for determining a mercantile customer's incentives. And for purposes of measuring the length of a rider exemption, Staff, IEU-Ohio, and a majority of commenters in this proceeding support the continued use of the benchmark comparison methodology. The Commission, however, should not layer on additional reporting requirements that have no statutory support and would further discourage mercantile customers from committing EE/PDR improvements to EDUs. Disincentives only increase the already accelerating cost of compliance.

Accordingly, the Commission should take the actions necessary to bring its rules into compliance with Ohio law, and should adopt IEU-Ohio's recommendations herein, which will reduce the administrative burden and overall cost for Ohio to comply with the State EE/PDR portfolio requirements.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *Comments of Industrial Energy Users-Ohio* was served upon the parties of record this 27th day of March 2013 via electronic transmission, hand-delivery, or ordinary U.S. mail, postage prepaid.

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Summary: Comments of Industrial Energy Users-Ohio electronically filed by Mr. Matthew R. Pritchard on behalf of Industrial Energy Users-Ohio