EXHIBIT A

BEFORE THE PUBLIC UTILITIES COMMISSION OF OHIO

OHIO EDISON COMPANY
THE CLEVELAND ELECTRIC ILLUMINATING COMPANY AND
THE TOLEDO EDISON COMPANY

ALTERNATIVE ENERGY RESOURCE PLAN
2010 THROUGH 2020

APRIL 15, 2010

CASE NO. 10-506-EL-ACP

I. INTRODUCTION

Pursuant to Section 4901:1-40, Ohio Administrative Code ("OAC"), Ohio Edison Company ("Ohio Edison"), The Cleveland Electric Illuminating Company ("CEI"), and The Toledo Edison Company ("Toledo Edison") (collectively, the "Companies") submit their Alternative Energy Resource Plan for compliance with future annual advanced and renewable energy resource benchmarks for the period January 1, 2010 through December 31, 2020 (the "Plan"). This Plan is subject to change for a number of reasons, including but not limited to, the statutory requirements for renewable energy resource increase, the alternative energy resource market further develops, the statutory requirements for advanced energy resource take effect in a current calendar year, and as information is obtained regarding the Companies' baselines and benchmarks for any given year covered by this Plan.

II. ALTERNATIVE ENERGY RESOURCE PLAN

A. Baselines and Benchmarks for Alternative Energy Resource Compliance

Section 4901:1-40-03(B), OAC, provides that an electric utility's baseline for compliance with the alternative energy resource requirements shall be determined using the following methodology:

> . . . the baseline shall be computed as an average of the three preceding calendar years of the total annual number of kilowatt-hours of electricity sold under its standard service offer to any and all retail electric customers whose electric load centers are served by that electric utility and are located within the electric utility's certified territory. The calculation of the baseline shall be based upon the average, annual, kilowatt-hour sales reported in that electric utility's three most recent forecast reports or reporting forms.

In compliance with Section 4901:1-40-03(B) set forth above, the Companies calculated their total annual number of kilowatt-hours of electricity sold to their respective retail electric customers under their standard service offer ("SSO") for each of calendar years 2007, 2008, and 2009 utilizing their three most recent reporting forms (herein referred to respectively as, the "2007 Sales" "2008 Sales" and "2009 Sales")[1]. The Companies then averaged their respective 2007 Sales, 2008 Sales and 2009 Sales to compute their respective 2010 baselines ("2010 Baselines"). The Companies did not make any adjustments to the 2010 Baseline[2]. See Appendix A.

The Companies' baselines, for the purpose of this Plan, for 2011 forward are calculated using 2008 Sales and 2009 Sales (when applicable to formulate an average of the three preceding calendar years), and a projected amount of sales for calendar years 2010 forward (as reported in the Long Term Forecast Report filed on April 15, 2010[3]), in each case to formulate an average of the three preceding calendar years ("Projected Sales"). The Companies then averaged their respective Projected Sales to compute their respective 2011-2020 baselines ("2011-2020 Baselines"[4]). The Companies' forecast years do not reflect any shopping that may occur, nor did the Companies make any adjustments to the 2011-2020 Baselines in this Plan. See Appendix A. The Companies then calculated their respective renewable energy resources and solar energy resources benchmarks in accordance with Amended Substitute Senate Bill 221 ("SB 221"). See Appendix A. The Companies do not have a statutory requirement for advanced energy resources in this ten year planning period.

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[1] The actual kilowatt hours sold in each of 2007, 2008, and 2009 were reported on the SB -1 Reporting Forms.

[2] The 2010 Baselines include the 2009 solar energy resource compliance shortfall as ordered by the Commission on March 10, 2010, Finding and Order for Case No. 09-1922-EL-ACP, Paragraph 8.

[3] See, Case No. 10-504-EL-POR.

[4] The Companies baselines for calendar years 2011-2020 will be updated to reflect actual sales when such information becomes available, and shall be reported in the Companies' applicable Annual Status Report and Compliance Review.

B. Supply Portfolio Projection

The Companies plan to supply the generation associated with the above baselines in accordance with standard service offer procurement plans ("SSO Procurement Plans")[5]. The amount projected to be delivered to the Companies' respective retail electric customers including distribution losses and unaccounted for energy is as reported in the Long Term Forecast Report filed April 15, 2010. See Appendix A. These quantities represent the energy that the suppliers of the SSO will be obligated to supply through applicable supplier master agreements associated with the SSO Procurement Plans.

C. Methodology Used to Evaluate Compliance Options

Given that the Companies do not own alternative energy resource facilities, the Companies' methodology or process for assessing compliance options was to evaluate a variety of potential options. Such options included purchasing renewable energy credits ("RECs"), purchasing a bundled energy and REC product, or building alternative energy resource facilities to generate RECs. The Companies are not in the business of generating electricity, renewable or otherwise, and currently do not foresee entering the energy generation business. Thus, the potential option of building an alternative energy resource facility was eliminated. The Companies also eliminated the option of procuring a bundled energy and RECs product, given that their current SSO Procurement Plan strategy for this ten year planning period[6] is to procure a product for energy that does not include RECs.

The Companies have purchased and plan to continue to purchase RECs through a competitive request for proposal solicitation structure for the duration of this ten year plan ("RFP

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[5] The Companies' SSO Procurement Plans contemplate power purchases. The Companies do not own generation.

[6] The Companies' SSO Procurement Plan strategy for this ten year planning period is consistent with the Companies' Commission approved Electric Security Plan, Case No. 08-935-EL-SSO.

REC Procurement Process"). The RFP REC Procurement Process is an efficient means of meeting the annual benchmarks as required by SB 221, and provides the Companies with market intelligence about potential suppliers and the availability of RECs from completed and planned renewable projects. The 2009 RFP REC Procurement Process was managed by Navigant Consulting, Inc. ("NCI"). The Companies plan to retain an independent consultant for the management of future RFP REC Procurement Processes. The Companies will also continue to explore the feasibility of entering into long term RECs contracts.

D. Impediments to Achieving Compliance

The most significant impediment to achieving compliance (particularly for solar renewable energy resources) is the limited availability of renewable energy resources. Such limited availability is exacerbated by the legislative requirement that fifty percent of the renewable energy resource requirement originate from facilities located within Ohio, and the regulatory requirement that renewable energy resource facilities be certified by the Public Utilities Commission of Ohio ("Commission"). As of July, 2009, NCI had identified less than 1 MW of solar energy resource installed in Ohio, with a portion of such amount already subscribed in long-term contracts or committed to reducing the owners' existing carbon footprint (thus, removed from the marketplace). Given the length of time it takes to bring a new facility (particularly solar) on line, this impediment is likely to continue for some time into the future.

Moreover, in most cases, siting, easements, permits, interconnections, contracts, and site preparation will require twelve to eighteen months. As a result, unless facilities are well under construction at this time, there is little opportunity for new facilities to come online and produce sufficient RECs for some time. Such facilities will also require Commission certification. In short, although the supply of RECs are likely to increase as the market further develops, the demand will also increase as benchmark requirements increase over time making achieving compliance an ongoing challenge. The Companies may also face an additional challenge in purchasing sufficient solar RECs in 2010 to not only cover the 2010 statutory benchmarks in a tight market, but to also cover the 2009 solar RECs shortfall in 2010. The Companies' only suggestion for addressing impediments to achieving compliance is for the Commission to remain flexible in the event regulatory relief is necessary as this new market develops.

III. CONCLUSION

The Companies' Plan is filed pursuant to and complies with Rule 4901:1-40, OAC. As stated above, the Plan is subject to change as statutory requirements for renewable energy resources increase, requirements for advanced energy resource commence, sufficient quantities of alternative energy resources become reasonably available in the marketplace and as more information becomes available about the Companies' requirements. The Companies' expect this Plan will be updated and refined over the ten-year planning horizon.

Respectfully submitted,

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Appendix A

Ohio Edison Company

Renewable Energy Resource Baselines and Benchmarks

(Megawatt Hours/Year)

Planning baselines and benchmarks that are calculated using forecasted SSO Retail Electric Sales do not reflect any shopping that may occur. Associated compliance baselines and benchmarks will reflect actual SSO Retail Electric Sales.

Year	Delivery Retail Electric Sales Excluding Losses	Delivery Retail Electric Sales Including Losses	Company's Calendar-Month SSO Retail Electric Sales	Renewable Energy Resource Target %	Solar Energy Resource Target %	Alternative Energy Baselines	Renewable Energy Resource Benchmark	Solar Energy Resource Benchmark	Renewable Less Solar Benchmark	Revised Solar Energy Resource Benchmark	Supply Portfolio Projection
(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)=(5)*(7)	(9)=(6)*(7)	(10) = (8)-(9)	(11)	(12)
			100% Assumed Standard Service Offer								
2007			21,354,818								
2008			21,040,189								
2009			19,043,752								
2010	23,218,000	24,975,000	23,218,000	0.50%	0.01%	20,479,586	102,398	2,048	100,350	2,857	24,975,000
2011	23,926,000	25,681,000	23,926,000	1.00%	0.03%	21,100,647	211,006	6,330	204,676		25,681,000
2012	24,444,000	26,205,000	24,444,000	1.50%	0.06%	22,062,584	330,939	13,238	317,701		26,205,000
2013	24,712,000	26,466,000	24,712,000	2.00%	0.09%	23,862,667	477,253	21,476	455,777		26,466,000
2014	24,793,000	26,543,000	24,793,000	2.50%	0.12%	24,360,667	609,017	29,233	579,784		26,543,000
2015	24,734,000	26,475,000	24,734,000	3.50%	0.15%	24,649,667	862,738	36,975	825,763		26,475,000
2016	24,640,000	26,370,000	24,640,000	4.50%	0.18%	24,746,333	1,113,585	44,543	1,069,042		26,370,000
2017	24,562,000	26,283,000	24,562,000	5.50%	0.22%	24,722,333	1,359,728	54,389	1,305,339		26,283,000
2018	24,447,000	26,159,000	24,447,000	6.50%	0.26%	24,645,333	1,601,947	64,078	1,537,869		26,159,000
2019	24,084,000	25,764,000	24,084,000	7.50%	0.30%	24,549,667	1,841,225	73,649	1,767,576		25,764,000
2020	23,693,000	25,340,000	23,693,000	8.50%	0.34%	24,364,333	2,070,968	82,839	1,988,129		25,340,000

Column (2) and (3) PUCO Case No. 10-504-EL-FOR PUCO FORM FE4-D1
Column (4) = 2007 through 2009 From PUCO Form(s) Form SE-1: Monthly Historical Electricity Data, Part A
= 2010 through 2020 From Column (2) Times Assumed Standard Service Offer Percent
Column (5) and (6) from OAC 4901:1-40-03 (A)
Column (7) Average of the three preceding calendar years of Column (4)
Column (8) and (9) from OAC 4901:1-40-03 (A) [Column (9) is not incremental to Column (8)]
Column (10) = Net renewable benchmark
Column (11) 2009 and 2010 Solar Energy Resouce Benchmarks were revised based on Commission March 10, 2010 Finding and Order for Case No. 09-1922-EL-ACP
Column (12) = Column (3) times the Assumed Standard Service Offer Percent- SSO supplier is obligated to provide Standard Service Offer percent of delivery retail electric sales including distribution losses.

Appendix A

The Cleveland Electric Illuminating Company

Renewable Energy Resource Baselines and Benchmarks

(Megawatt Hours/Year)

Planning baselines and benchmarks that are calculated using forecasted SSO Retail Electric Sales do not reflect any shopping that may occur. Associated compliance baselines and benchmarks will reflect actual SSO Retail Electric Sales.

Year	Delivery Retail Electric Sales Excluding Losses	Delivery Retail Electric Sales Including Losses	Company's Calendar-Month SSO Retail Electric Sales	Renewable Energy Resource Target %	Solar Energy Resource Target %	Alternative Energy Baselines	Renewable Energy Resource Benchmark	Solar Energy Resource Benchmark	Renewable Less Solar Benchmark	Revised Solar Energy Resource Benchmark	Supply Portfolio Projection
(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)=(5)*(7)	(9)=(6)*(7)	(10) = (8)-(9)	(11)	(12)
			100% Assumed Standard Service Offer								
2007			17,403,753								
2008			17,157,556								
2009			14,450,199								
2010	18,284,000	19,741,000	18,284,000	0.50%	0.01%	16,337,169	81,686	1,634	80,052	2,298	19,741,000
2011	18,215,000	19,650,000	18,215,000	1.00%	0.03%	16,630,585	166,306	4,989	161,317		19,650,000
2012	18,291,000	19,709,000	18,291,000	1.50%	0.06%	16,983,066	254,746	10,190	244,556		19,709,000
2013	18,556,000	19,984,000	18,556,000	2.00%	0.09%	18,263,333	365,267	16,437	348,830		19,984,000
2014	19,215,000	20,679,000	19,215,000	2.50%	0.12%	18,354,000	458,850	22,025	436,825		20,679,000
2015	19,347,000	20,816,000	19,347,000	3.50%	0.15%	18,687,333	654,057	28,031	626,026		20,816,000
2016	19,258,000	20,719,000	19,258,000	4.50%	0.18%	19,039,333	856,770	34,271	822,499		20,719,000
2017	19,188,000	20,643,000	19,188,000	5.50%	0.22%	19,273,333	1,060,033	42,401	1,017,632		20,643,000
2018	19,108,000	20,554,000	19,108,000	6.50%	0.26%	19,264,333	1,252,182	50,087	1,202,095		20,554,000
2019	18,843,000	20,266,000	18,843,000	7.50%	0.30%	19,184,667	1,438,850	57,554	1,381,296		20,266,000
2020	18,570,000	19,968,000	18,570,000	8.50%	0.34%	19,046,333	1,618,938	64,758	1,554,180		19,968,000

Column (2) and (3) PUCO Case No. 10-504-EL-FOR PUCO FORM FE4-D1
Column (4) = 2007 through 2009 From PUCO Form(s) Form SE-1: Monthly Historical Electricity Data, Part A
= 2010 through 2020 From Column (2) Times Assumed Standard Service Offer Percent
Column (5) and (6) from OAC 4901:1-40-03 (A)
Column (7) Average of the three preceding calendar years of Column (4)
Column (8) and (9) from OAC 4901:1-40-03 (A) [Column (9) is not incremental to Column (8)]
Column (10) = Net renewable benchmark
Column (11) 2009 and 2010 Solar Energy Resouce Benchmarks were revised based on Commission March 10, 2010 Finding and Order for Case No. 09-1922-EL-ACP
Column (12) = Column (3) times the Assumed Standard Service Offer Percent- SSO supplier is obligated to provide Standard Service Offer percent of delivery retail electric sales including distribution losses.

Appendix A

The Toledo Edison Company

Renewable Energy Resource Baselines and Benchmarks

(Megawatt Hours/Year)

Planning baselines and benchmarks that are calculated using forecasted SSO Retail Electric Sales do not reflect any shopping that may occur. Associated compliance baselines and benchmarks will reflect actual SSO Retail Electric Sales.

Year	Delivery Retail Electric Sales Excluding Losses	Delivery Retail Electric Sales Including Losses	Company's Calendar-Month SSO Retail Electric Sales	Renewable Energy Resource Target %	Solar Energy Resource Target %	Alternative Energy Baselines	Renewable Energy Resource Benchmark	Solar Energy Resource Benchmark	Renewable Less Solar Benchmark	Revised Solar Energy Resource Benchmark	Supply Portfolio Projection
(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)=(5)*(7)	(9)=(6)*(7)	(10) = (8)-(9)	(11)	(12)
			100% Assumed Standard Service Offer								
2007			9,228,709								
2008			9,006,924								
2009			7,815,831								
2010	9,983,000	10,577,000	9,983,000	0.50%	0.01%	8,683,821	43,419	868	42,551	1,220	10,577,000
2011	10,128,000	10,701,000	10,128,000	1.00%	0.03%	8,935,252	89,353	2,681	86,672		10,701,000
2012	10,237,000	10,784,000	10,237,000	1.50%	0.06%	9,308,944	139,634	5,585	134,049		10,784,000
2013	10,495,000	11,044,000	10,495,000	2.00%	0.09%	10,116,000	202,320	9,104	193,216		11,044,000
2014	10,649,000	11,196,000	10,649,000	2.50%	0.12%	10,286,667	257,167	12,344	244,823		11,198,000
2015	10,687,000	11,234,000	10,687,000	3.50%	0.15%	10,460,333	366,112	15,690	350,422		11,234,000
2016	10,666,000	11,209,000	10,666,000	4.50%	0.18%	10,610,333	477,465	19,099	458,366		11,209,000
2017	10,631,000	11,170,000	10,631,000	5.50%	0.22%	10,667,333	586,703	23,468	563,235		11,170,000
2018	10,571,000	11,103,000	10,571,000	6.50%	0.26%	10,661,333	692,987	27,719	665,268		11,103,000
2019	10,394,000	10,914,000	10,394,000	7.50%	0.30%	10,622,667	796,700	31,868	764,832		10,914,000
2020	10,210,000	10,715,000	10,210,000	8.50%	0.34%	10,532,000	895,220	35,809	859,411		10,715,000

Column (2) and (3) PUCO Case No. 10-504-EL-FOR PUCO FORM FE4-D1
Column (4) = 2007 through 2009 From PUCO Form(s) Form SE-1: Monthly Historical Electricity Data, Part A
= 2010 through 2020 From Column (2) Times Assumed Standard Service Offer Percent
Column (5) and (6) from OAC 4901:1-40-03 (A)
Column (7) Average of the three preceding calendar years of Column (4)
Column (8) and (9) from OAC 4901:1-40-03 (A) [Column (9) is not incremental to Column (8)]
Column (10) = Net renewable benchmark
Column (11) 2009 and 2010 Solar Energy Resouce Benchmarks were revised based on Commission March 10, 2010 Finding and Order for Case No. 09-1922-EL-ACP
Column (12) = Column (3) times the Assumed Standard Service Offer Percent- SSO supplier is obligated to provide Standard Service Offer percent of delivery retail electric sales including distribution losses.

Appendix A

Total Ohio

Renewable Energy Resource Baselines and Benchmarks

(Megawatt Hours/Year)

Planning baselines and benchmarks that are calculated using forecasted SSO Retail Electric Sales do not reflect any shopping that may occur. Associated compliance baselines and benchmarks will reflect actual SSO Retail Electric Sales.

Year	Delivery Retail Electric Sales Excluding Losses	Delivery Retail Electric Sales Including Losses	Company's Calendar-Month SSO Retail Electric Sales	Renewable Energy Resource Target %	Solar Energy Resource Target %	Alternative Energy Baselines	Renewable Energy Resource Benchmark	Solar Energy Resource Benchmark	Renewable Less Solar Benchmark	Revised Solar Energy Resource Benchmark	Supply Portfolio Projection
(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)=(5)*(7)	(9)=(6)*(7)	(10) = (8)-(9)	(11)	(12)
			100% Assumed Standard Service Offer								
2007			47,987,280								
2008			47,204,669								
2009	-	-	41,309,781								-
2010	51,485,000	55,293,000	51,485,000	0.50%	0.01%	45,500,576	227,503	4,550	222,953	6,375	55,293,000
2011	52,269,000	56,032,000	52,269,000	1.00%	0.03%	46,666,484	466,665	14,000	452,665		56,032,000
2012	52,972,000	56,698,000	52,972,000	1.50%	0.06%	48,354,594	725,319	29,013	696,306		56,698,000
2013	53,763,000	57,494,000	53,763,000	2.00%	0.09%	52,242,000	1,044,840	47,017	997,823		57,494,000
2014	54,657,000	58,420,000	54,657,000	2.50%	0.12%	53,001,334	1,325,034	63,602	1,261,432		58,420,000
2015	54,768,000	58,525,000	54,768,000	3.50%	0.15%	53,797,333	1,882,907	80,696	1,802,211		58,525,000
2016	54,564,000	58,298,000	54,564,000	4.50%	0.18%	54,395,999	2,447,820	97,913	2,349,907		58,298,000
2017	54,381,000	58,096,000	54,381,000	5.50%	0.22%	54,662,999	3,006,464	120,258	2,886,206		58,096,000
2018	54,126,000	57,816,000	54,126,000	6.50%	0.26%	54,570,999	3,547,116	141,884	3,405,232		57,816,000
2019	53,321,000	56,944,000	53,321,000	7.50%	0.30%	54,357,001	4,076,775	163,071	3,913,704		56,944,000
2020	52,473,000	56,023,000	52,473,000	8.50%	0.34%	53,942,666	4,585,126	183,406	4,401,720		56,023,000

Column (2) and (3) PUCO Case No. 10-504-EL-FOR PUCO FORM FE4-D1
Column (4) = 2007 through 2009 From PUCO Form(s) Form SE-1: Monthly Historical Electricity Data, Part A
= 2010 through 2020 From Column (2) Times Assumed Standard Service Offer Percent
Column (5) and (6) from OAC 4901:1-40-03 (A)
Column (7) Average of the three preceding calendar years of Column (4)
Column (8) and (9) from OAC 4901:1-40-03 (A) [Column (9) is not incremental to Column (8)]
Column (10) = Net renewable benchmark
Column (11) 2009 and 2010 Solar Energy Resouce Benchmarks were revised based on Commission March 10, 2010 Finding and Order for Case No. 09-1922-EL-ACP
Column (12) = Column (3) times the Assumed Standard Service Offer Percent- SSO supplier is obligated to provide Standard Service Offer percent of delivery retail electric sales including distribution losses.

EXHIBIT B

FILE

6

BEFORE THE
PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of Columbus Southern Power Company for Amendment of the 2009 Solar Energy Resource Benchmark, Pursuant to Section 4928.64(C)(4), Ohio Revised Code.	)	**Case No. 09-987-EL-EEC**
In the Matter of the Application of Ohio Power Company for Amendment of the 2009 Solar Energy Resource Benchmark, Pursuant to Section 4928.64(C)(4), Ohio Revised Code.	)	**Case No. 09-988-EL-EEC**

COLUMBUS SOUTHERN POWER'S AND OHIO POWER'S APPLICATION AND REQUEST FOR EXPEDITED CONSIDERATION

Columbus Southern Power Company (CSP) and Ohio Power Company (OP), collectively the "Companies" or "AEP Ohio," submit this application regarding the Companies' 2009 Solar Energy Resource (SER) benchmark.[1] Am. Sub S.B. No. 221 (SB 221) adopted benchmark requirements for solar energy resources found in Section 4928.64, Ohio Rev. Code (SER benchmarks). Of particular relevance to this application, Section 4928.64(B)(2), Ohio Rev. Code, specifically requires the Companies to meet a SER benchmark of 0.004% in 2009 and 0.010% in 2010. The Commission's final rules concerning the alternative energy portfolio requirements, including the renewable energy requirements generally and solar energy requirements specifically, have only recently been adopted (and have not yet become effective). The Companies have made good faith

[1] The Companies are not currently anticipating the need for amendment of the non-solar renewable energy resource benchmarks for 2009, but that result presumes that all of the applications for qualified facility certification pending before the Commission are granted. Accordingly, the Companies reserve the right to request through a separate application that the non-solar renewable energy resource benchmarks for 2009 be amended, should circumstances subsequently develop that necessitate such a request.

efforts to comply with the 2009 SER benchmark, as further discussed below, and have been unable to achieve compliance. Because the period for compliance is rapidly coming to closure, the issues raised in this application are urgent and expedited consideration is requested. In particular, the Companies request that the Commission determine, for compliance purposes, that the Companies' 2009 SER benchmark be reduced as explained below based on factors beyond the Companies' control, pursuant to the Commission's *force majeure* authority under Section 4928.64(C)(4), Ohio Rev. Code.

In further support of their application, CSP and OP state the following:

1. The Companies are both an "electric distribution utility" as that term is defined in Section 4928.01 (A) (6), Ohio Rev. Code, and as that term is used in Chapter 4928, Ohio Rev. Code.

2. The Commission has conducted a rulemaking proceeding in Case No. 08-888-EL-ORD that has recently resulted in the adoption of rules concerning the SER benchmarks. The rules adopted in Case No. 08-888-EL-ORD are not yet effective and remain subject to legislative oversight review by the General Assembly's Joint Committee on Agency Rule Review.

3. AEP Ohio has been planning and developing its compliance activities but also needs to wait until after the 08-888 rulemaking was completed to finalize or fully implement those plans. There were significant compliance issues regarding the SER benchmarks that remained pending throughout most of 2009 as part of the 08-888 rulemaking, such as whether the Ohio-based requirements will be imposed annually (as opposed to being imposed by 2025). Due to these uncertainties, AEP Ohio's could not implement a final compliance plan for 2009.

4. Section 4928.65, Ohio Rev. Code, permits usage of Renewable Energy Credits (RECs) for compliance and AEP Ohio's focus has been on obtaining RECs. In order to achieve full statutory compliance with the SER benchmark (with half of the needed SER required to be from within Ohio), CSP would need to produce 798 MWh of energy from a solar energy resource or obtain 798 RECs (at least half from within Ohio and the remainder from elsewhere); OP would need to produce 1,028 MWh of energy from a solar energy resource or obtain 1,028 RECs (at least half from within Ohio and the remainder from elsewhere). Thus, the total AEP Ohio SER benchmark for 2009 would be the equivalent of 1,826 RECs.

5. In a good faith effort to comply with the SER benchmarks contained within SB 221, AEP Ohio funded and constructed its own solar generating facilities. Specifically, CSP has constructed a 70 kW photovoltaic distributed generating facility on the roof of its Athens Service Center and OP has constructed a 70 kW photovoltaic distributed generating facility on the roof of its Newark Service Center. Both projects were completed in early 2009 and certification of these facilities as renewable energy resources is pending before the Commission in Case Nos. 09-880-EL-REN and 09-881-EL-REN, respectively.

6. AEP Ohio has made a good faith effort to comply with the SER benchmarks contained within SB 221, in coordination with efforts made by American Electric Power Service Corporation (AEPSC) on AEP Ohio's behalf. AEPSC has developed expertise and experience in commodity markets and exchanges, including the solar REC market.

7. On behalf of AEP Ohio, AEPSC issued a competitive request for proposals in July of 2009 for Ohio solar RECs produced between July 31, 2008 and December 31, 2009. As a result of this RFP, three Expressions of Interest Forms were submitted but no bids were received.

8. AEP Ohio purchased thirteen 2009-vintage solar RECs in the open market (subject to certification of the producing facility by the Commission). These RECs were purchased for $450/REC plus transaction costs. Based on AEPSC's experience, this price was competitive and consistent with the present conditions in the solar REC market. In AEPSC's opinion, the insufficient supply for 2009 solar RECs is inflating the current price. In any case, AEPSC believes that there is an insufficient supply in the solar REC market to achieve compliance.

9. As a result of a competitive RFP for Solar Resources, AEP Ohio also entered into a 20-year renewable energy purchase agreement (REPA) with Wyandot Solar LLC in connection with the construction of a 10 MW AC (~12 MW DC) solar farm in Wyandot County, Ohio. The estimated commercial operation date for the Wyandot facility is April 15, 2010 (partial production date with full production anticipated by August 15, 2010). This REPA is expected to provide AEP Ohio a stream of Ohio-based solar RECs well into the future – but there will be none produced in 2009 from the Wyandot Solar project. Further, the Wyandot Solar project will utilize solar panels from First Solar, Inc., which has manufacturing facilities in Perrysburg, Ohio.

10. AEP Ohio has also explored the possibility of obtaining solar RECs from its own customers that have distributed solar generating facilities. But most of these

customers do not have utility-grade metering in place and have not yet sought the required certification from the Commission for their facilities. In light of the exemption recently adopted by the Commission (but not yet effective) for facilities that are 6kW or less, the Companies can now re-evaluate a solicitation of these customers. In any case, there are not nearly enough of those solar RECs available to help AEP Ohio reach compliance with the 2009 SER benchmarks and it is not clear that customers would sell their RECs any cheaper than the open market.

11. Notwithstanding these reasonable compliance efforts, AEP Ohio would remain short of compliance with the 2009 SER benchmark by approximately 1,666 RECs (depending on the actual output of the Newark and Athens distributed solar generating facilities in 2009).

12. Section 4928.64(C)(4), Ohio Rev. Code, enables the Commission to invoke *force majeure* and modify a SER compliance obligation by eliminating all or part of a benchmark after considering whether the SER are reasonably available in the marketplace in Ohio or PJM/MISO in sufficient quantities for the utility to comply with the minimum benchmark. The Commission is to consider whether the utility has made a good faith effort to comply. Based on the above-described market conditions and factual circumstances, AEP Ohio submits that it is appropriate for the Commission to modify the 2009 SER benchmark for AEP Ohio by the amount of the Companies' actual shortfall and requests that the Commission issue an order granting the Companies' request.

13. Based on an approval of the Companies' request as stated in paragraph 12 above, the Companies would propose that the Commission increase their 2010 SER benchmark, absent any further action in 2010 by the Commission, to be more than 0.010% (by adding the Companies' actual 2009 shortfall to the statutory 2010 SER benchmark). Based on the Wyandot REPA described above, AEP Ohio will obtain enough RECs to achieve that level of increased compliance in 2010 at a more reasonable cost.

14. Under these circumstances, the Commission decision to modify the 2009 SER benchmark advances the public interest and preserves future compliance requirements without taking away from State energy policy of pursuing alternative energy resources.

WHEREFORE, based on the reasons stated above, AEP Ohio requests that the Commission expeditiously approve this application.

Respectfully submitted,

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EXHIBIT C

BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of Columbus Southern Power Company for Amendment of the 2009 Solar Energy Resource Benchmark, Pursuant to O.R.C. Section 4928.64(C)(4)	)	Case No. 09-0987-EL-EEC
In the Matter of the Application of Ohio Power Company for Amendment of the 2009 Solar Energy Resource Benchmark, Pursuant to O.R.C. Section 4928.64(C)(4)	)	Case No. 09-0988-EL-EEC

COMMENTS IN OPPOSITION TO AEP'S APPLICATION FOR A WAIVER OF ITS 2009 SOLAR ENERGY RESOURCE BENCHMARKS BY THE OHIO ENVIRONMENTAL COUNCIL

This case concerns the alternative energy requirements established by Senate Bill 221 ("S.B. 221"). R.C. 4928.64(B)(2) provides that electric utilities shall obtain 0.004 percent of their energy from solar resources in 2009 and 0.010 percent in 2010. Columbus Southern Power Company and Ohio Power Company (collectively "AEP Ohio") have requested that the Commission grant a waiver of the 2009 Solar Energy Resource ("SER") benchmark established by R.C. 4928.64(B)(2). AEP Ohio has asked the Commission to use its *force majeure* power pursuant to R.C. 4928.64(C)(4) to reduce its 2009 SER requirements for 2009. The Ohio Environmental Council ("OEC") hereby submits these comments addressing whether AEP has met the high standard necessary for a showing of *force majeure*. The OEC maintains that AEP Ohio has not presented evidence sufficient to allow the Commission to use its authority to amend AEP Ohio's SER benchmarks for 2009. Further, by using its *force majeure* authority in the present case, the Commission would establish a precedent that could undermine the future effectiveness of the solar requirements of S.B. 221.

I. AEP Ohio Has Not Made a Showing of *Force Majeure*

R.C. 4928.64(C)(4)(c) allows the Commission to grant a waiver of the SER benchmarks if a utility is able to show a *force majeure*, which is commonly defined as an uncontrollable force or an "act of God."[1] This code section provides that the Commission may grant such a waiver if it "determines that renewable energy or solar energy resources are not reasonably available to permit the electric distribution to comply [with the benchmarks]." In making this decision and determining whether the utility has made a good faith effort to comply, the Commission is to consider whether the utility has sought to comply by acquiring and banking RECs or "by seeking the resources through long-term contracts." The Commission is also to consider "the availability of renewable energy or solar energy resources" within the PJM region. R.C. 4928.64(C)(4)(b).

First, it is important to note that a showing of *force majeure* requires the applicant to meet a high burden. Typically, *force majeure* clauses in contracts require a party to demonstrate that compliance with the contract's terms was not possible due to an "act of God" or other significant, unforeseen, and uncontrollable event. Certainly, as Ohio courts have held, "The inability to purchase a commodity at an advantageous price is not a contingency beyond a party's control."[2] In other words, relatively high prices for renewable energy credits cannot equal an "act of God" sufficient for a waiver of the code's SER benchmarks. It is in this context that AEP Ohio's Application should be considered.

AEP Ohio makes several arguments to support its Application, none of which satisfies the high burden for a showing of *force majeure*. For example, the company argues that many of its customer-sited generation projects are not yet creditable because the customers have not

[1] *Blacks Law Dictionary* 657 (7th ed. 1999).
[2] *Stand Energy Corp. v. Cinergy Servs.*, 144 Ohio App. 3d 410, 416 (2001).

installed "utility grade metering"[3] and that its contract with Wyandot Solar will not produce creditable RECs until 2010.[4] But the thrust of AEP Ohio's argument appears to be that high REC prices have made compliance more difficult or expensive, which is not a basis for a *force majeure* determination. It is also not clear whether AEP Ohio has attempted to secure long-term contracts pursuant to R.C. 4928.64(C)(4)(b). AEP Ohio's Application does not state that it sought such contracts, nor does it state that solar RECs were not available with the PJM organization. Further, nothing prevented AEP Ohio from building its own additional solar capacity earlier, as opposed to relying on REC availability.

Finally, AEP Ohio states in several places in its Application that the rules implementing S.B. 221 are "not yet effective" and "subject to legislative oversight review by the General Assembly's Joint Committee on Agency Rule Review."[5] This line of argument—that compliance can be excused because the rules are not yet finalized—should be dismissed by the Commission. The SER benchmarks were enacted on July 31, 2008. From that point forward, AEP Ohio could have been preparing to build more solar capacity, to utilize customer-sited generation, or to pursue long-term REC contracts to meet the solar benchmarks. The solar requirement is not a close question; AEP Ohio need not wait for the final disposition of the rules to address the clear and consistent solar benchmarks.

II. Granting AEP Ohio's Request Could Undermine the Effectiveness of S.B. 221's Solar Energy Resource Benchmarks

Finally, the Commission should consider the precedential effect of its decision. This case may be the first in which the Commission determines the meaning of *force majeure* under R.C. 4928.64(C)(4). If the Commission grants AEP Ohio's Application for a waiver using its *force*

[3] Application at 5
[4] Application at 4.
[5] Application at 2.

majeure authority, it will establish a very low standard for *force majeure* applications and a weak precedent for future waiver requests. For the solar energy benchmarks set by the General Assembly to be effective, utilities must not be able to avoid them without a genuine showing of hardship. Therefore, if the Commission chooses to grant the wavier application, the OEC recommends that the Commission issue such an order on very narrowly tailored grounds. The OEC also recommends that the 2009 benchmark be added to the 2010 target should a waiver be approved by the Commission.

In conclusion, the OEC states that AEP Ohio has not made a showing of *force majeure*. AEP Ohio has not demonstrated that it attempted to secure long-term REC contracts or to capture customer-sited generation or build sufficient capacity to meet the 2009 benchmarks. If AEP Ohio is unable to meet the SER benchmarks for 2009, it will be due to the Company's lackluster effort to comply, not an "act of God." Consequently, the standard for *force majeure* has not been met, and the Commission should not use its authority under R.C. 4928.64(C)(4) to reduce the Companies 2009 benchmarks for 2009.

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I hereby certify that a true copy of the foregoing has been served upon the following parties by first class or electronic mail this 8th day of December, 2009.

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Summary: Comments Comments in Opposition by the Ohio Environmental Council electronically filed by Mr. Will Reisinger on behalf of Ohio Environmental Council

EXHIBIT D

BEFORE THE
PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of Columbus Southern Power Company for Amendment of the 2009 Solar Energy Resource Benchmark, Pursuant to Section 4928.64(C)(4), Ohio Revised Code.	)))))))	**Case No. 09-0987-EL-EEC**
In the Matter of the Application of Ohio Power Company for Amendment of the 2009 Solar Energy Resource Benchmark, Pursuant to Section 4928.64(C)(4), Ohio Revised Code.	)))))	**Case No. 09-0988 -EL-EEC**

COLUMBUS SOUTHERN POWER COMPANY'S
AND OHIO POWER COMPANY'S
REPLY COMMENTS

Columbus Southern Power Company (CSP) and Ohio Power Company (OP), collectively "AEP Ohio" or the "Companies," filed an application regarding the Companies' 2009 Solar Energy Resource (SER) benchmark. In particular, the Companies requested that the Commission determine, for compliance purposes, that the Companies' 2009 SER benchmark be reduced by the amount of the Companies' actual shortfall and requested that the Commission issue an order, pursuant to its *force majeure* authority under Section 4928.64(C)(4), Revised Code, granting the Companies' request. The Companies proposed that the Commission correspondingly increase their 2010 SER benchmark, absent any further action in 2010 by the Commission, to be more than the statutory SER 2010 benchmark. In other words, as stated in the application, the

Companies' request was being made to achieve full compliance by 2010 but to do so at a more reasonable cost.

Several parties have moved to intervene in these cases since the time the application was filed, a few of those parties making passing remarks about the propriety of the Companies' request. One party, the Ohio Environmental Council (OEC), submitted substantive comments in opposition to the application on December 8, 2009. The Companies hereby submit reply comments in response to OEC's comments.

OEC opposes the application, making two basic points – both of which are without merit. First, OEC claims – primarily by attempting to elevate the applicable statutory standard – that AEP Ohio has not made a proper showing to support a *force majeure* excusal. In this regard, OEC equates *force majeure* in this context with an "act of God." More specifically, OEC argues (at 2) that high prices cannot equal an "act of God" and, therefore, concludes that AEP Ohio failed to make the requisite showing. That extreme view is unsupported by the General Assembly's manifest intent, as reflected in the plain language of the statute.

Section 4928.64(C)(4)(b), Revised Code, provides that the Commission "shall determine if renewable energy resources are reasonably available in the marketplace in sufficient quantities" for compliance. Similarly, division (C)(4)(c) provides, that if "the commission determines that renewable energy or solar energy resources are not reasonably available to permit the electric distribution utility or electric services company to comply, during the period of review, with the subject minimum benchmark prescribed under division (B)(2) of this section, *the commission shall modify that compliance obligation of the utility* or company as it determines appropriate to accommodate the finding." (Emphasis added.) Thus, the dispositive question is whether renewable energy resources or RECs are reasonably available in the market. OEC simply misstates the required showing. Once the proper standard is used, it is evident that the Companies' application makes a sufficient showing that Solar RECs are not reasonably available in the market.

Further, OEC argues in this regard (at 3) that nothing prevented AEP Ohio from building its own additional solar capacity earlier, as opposed to relying on REC availability. This argument must necessarily fail, as Section 4928.65, Revised Code, definitively provides that an electric utility may rely upon RECs for compliance. Moreover, the applicable statutory standard for excusal, as discussed above, speaks to renewable energy resources or RECs being reasonably available in the market. In any case, AEP Ohio did reasonably build its own substantial solar facilities that have already been certified as renewable energy resources by the Commission and whose output will count toward the Companies' 2009 compliance and offset the need for a total excusal of the 2009 SER benchmark.

Nonetheless, OEC argues (at 3) that from July 31, 2008 forward, AEP Ohio should have been preparing to build *more* solar capacity and OEC suggests that the solar requirements were clear and needed no clarification through the Commission's rulemaking process. Aside from improperly diminishing the critical importance of the Commission's extensive (and ongoing) deliberations in the 08-888-EL-ORD docket, this argument ignores the substantial unanswered questions that were only recently resolved by the Commission – such as whether the Ohio portion of the 2025 SER benchmarks would need to be achieved annually. More importantly, OEC's claim that AEP Ohio was somehow required to build solar capacity must fail because Section 4928.64, Revised Code, cannot reasonably be interpreted to require an electric utility to build and directly own solar capacity.

OEC's second argument is that granting the Companies' application would set a bad precedent for handling other excusal requests. This argument is circular and represents no more than a restatement of OEC's first argument. This is especially true given that AEP Ohio's request is to simply defer compliance for a short period in order to significantly reduce the compliance costs to be paid by all of its customers due to the lack of RECs in the market in 2009. Granting a deferral of compliance, rather than an excusal, is not precedence for allowing Companies to avoid compliance. The statute does not presume that a fully justified excusal (as is justified here) would be subsequently made up. Section 4928.64(C)(4)(c) merely provides that Commission modification "shall not *automatically* reduce the obligation for the electric distribution utility's or electric services company's compliance in subsequent years." (Emphasis added.) Thus, if anything, the statutory presumption is that a justified excusal will normally, but not necessarily, result in being permanently excused from compliance. When appropriately viewed, the Companies' proposal to fully catch up in 2010 at a more reasonable cost is even more appropriate in light of this statutory standard.

CONCLUSION

Both of OEC's arguments should be rejected and the Companies' application should be granted.

Respectfully submitted,

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I hereby certify that a copy of Columbus Southern Power Company's and Ohio Power Company's Reply Comments was served by U.S. Mail upon the individuals listed below this 15th day of December 2009.

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EXHIBIT E

BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Adoption of Rules for Alternative and Renewable Energy Technologies and Resources, and Emission Control Reporting Requirements, and Amendment of Chapters 4901:5-1, 4901:5-3, 4901:5-5, and 4901:5-7 of the Ohio Administrative Code pursuant to Chapter 4928, Revised Code to Implement Senate Bill No. 221	)	**Case No. 08-888-EL-ORD**

Request for Rehearing and
Memorandum in Support of
The Dayton Power and Light Company

The Dayton Power and Light Company ("DP&L"), pursuant to Revised Code ("R.C.") section 4903.10 and the Public Utilities Commission of Ohio ("Commission" or "PUCO") Rule 4901:1-35, hereby respectfully requests rehearing of the Commission's Opinion and Order of April 15, 2009, in the above-captioned proceeding.

In support of its request for rehearing, DP&L's memorandum in support is as follows:

Memorandum in Support

I. INTRODUCTION

It is not surprising that the rulemaking process to finalize regulations to implement of SB 221 still has steps to take. SB 221 is an extraordinarily complex piece of legislation and its provisions on renewable energy, alternative energy, demand reduction and energy efficiency are among its most complex elements. Moreover, while the emphasis placed within the legislation on insuring broad participation among the many different interests and constituencies within Ohio is salutary, it necessarily results in an extensive process for the development of regulations.

DP&L recognizes and commends the efforts that all participants, including the Commission and Staff, have made to move this process to conclusion. Its comments here are not intended to be critical of that effort. However, it is fact that we are already five months into the first year in which Ohio utilities are supposed to meet new legislative requirements by implementing new programs for energy efficiency and demand reduction and by obtaining new sources of generation from renewable resources. Utilities are now faced with the daunting challenge of actually implementing programs within the remaining seven months of the year that will comply with targets designed for a 12-month period. This challenge will only be heightened by the fact that these regulations may further change on rehearing and will ultimately be confirmed through the Joint Committee on Agency Rule Review ("JCARR") process no earlier than late summer or perhaps significantly later.

In light of the complexity of the task at hand, both in terms of finalizing these regulations and in developing the programs to comply with them, DP&L is proposing that the Commission implement some changes on an interim basis to address two particularly difficult areas. The use of this interim approach will allow the Commission to study the issues further prior to finalizing the policies that may be employed on a more permanent basis.

These interim proposals are designed to recognize the enormous practical difficulties of creating demand response and energy efficiency programs, marketing and attracting customers to those programs, and actually achieving some measurable results by the end of the year. Interim proposals are also made to respond to difficulties arising in connection with efforts to identify and make real potential opportunities in renewable resource projects. In this first year in particular, there needs to be flexibility and far less regulatory complexity.

DP&L's rehearing request discusses these interim proposals in detail. In the latter portion of this rehearing request, additional recommendations on other issues are also made.

II. TWO PRE-EMINENTLY IMPORTANT ISSUES NEED TO BE RESOLVED FOR 2009 and 2010.

A. What are the Practical Difficulties of a "Case by Case" Determination as to Whether or Not a Mercantile Customer's Participation in Demand Response Programs Administered By PJM will Count Towards a Utility's Targets?

1. PJM Programs Have Been a Key Element of DP&L's Compliance Plans for Months.

DP&L may be uniquely situated among Ohio's investor-owned utilities in that its legal obligations to have capacity and demand response available to meet its peak load requirements are defined by the requirements of PJM and PJM's tariffs approved by the FERC. AEP is also a member of PJM, but it has opted out of the Reliability Pricing Model ("RPM") capacity program in which the rest of PJM, including DP&L, participates. Because DP&L is uniquely situated as an Ohio utility that is a member of PJM participating in the RPM capacity program, it is uniquely harmed by the proposed rules that fail to recognize the positive benefits achieved through existing PJM demand response and energy efficiency programs.

DP&L, along with its affiliate DPL Energy Resources, Inc., proactively and aggressively moved to implement a whole suite of programs designed to comply with its understanding of SB 221. Even before the legislation had finished working its way through the General Assembly, DP&L had assembled teams of its internal staff and outside consultants to develop a comprehensive approach to promote demand response, energy efficiency, and utility infrastructure modernization. That comprehensive set of programs was then supported by testimony and incorporated within the six volume Electric Security Plan ("ESP") filing made on October 10, 2008, in Docket Nos. 08-1094-EL-SSO, et al. An irreplaceable component of that overall plan was the active participation in demand reduction and energy efficiency programs that PJM had already developed and initiated.

After the legislation was enacted and consistent with the ESP filing, DP&L and its affiliate DPL Energy Resources, Inc., has worked hard to identify and enroll customer accounts into these PJM programs. Within DP&L's service territory alone there are over 160 customer accounts already enrolled to participate in such programs for the upcoming summer. At this date, well into 2009, the work done and the resources expended should not be disregarded by excluding the benefits of participation in these programs from compliance towards the 2009 and 2010 targets.

The Commission has stated that it will consider this topic generically at some undefined future date and, in the meantime, will consider whether participation in PJM programs will count "on a case-by-case" basis. Order at 23. See also Rule 4901:1-39-07(A)(2) [requiring integration with the utility's program] and Rule 4901:1-39-08 [defining the mercantile customer integration commitments]. DP&L feels compelled to ask whether the Commission really has time this year to review potentially hundreds of individual applications by customers who are currently participating in these PJM programs. This is a cornerstone of DP&L's compliance effort. DP&L respectfully requests that the Commission implement a more flexible approach with respect to these PJM programs for 2009 and 2010, which will give the Commission time for further review and consideration of this issue and give DP&L sufficient time to make and implement any appropriate modifications to its future compliance plans.

2. Specific Action Requested.

In this rehearing request and with respect to this key issue, DP&L specifically asks the Commission:

> To find on an interim basis for 2009 and 2010 and without requiring individual filings that the "integration" provisions of Rule 4901:1-39-07(A)(2) and Rule 4901:1-39-08 shall be interpreted to include the demand response and energy efficiency programs administered by PJM.

3. DP&L Has Concurrent Obligations to PJM that Fulfill SB 221 Objectives.

A primary objective of SB 221 is to minimize the need for the construction of additional generation capacity. Demand reductions through customer-owned distributed generation or other commitments to reduce utility's peak load obligations and commitments by customers to reduce energy usage are effective means of accomplishing this goal. Demand response programs within PJM further fulfill the objective of SB 221 in that the benefits of these programs have been integrated into the system. Integration occurs in that the generation capacity procured by PJM for DP&L in order to meet DP&L's peak load obligation is reduced by the amount of capacity savings that is procured through the load reduction programs. Going forward, there will also be a capacity adjustment to reflect a portion of energy efficiency programs that, in the aggregate, reduce overall capacity needs.

DP&L was and is required by Ohio law to be a member of a qualifying transmission entity, and in order to join PJM, it was required to execute agreements under which it is legally obligated to have capacity and demand response available that is sufficient to meet its peak load obligations as determined by PJM.[1] At page 16 of its Opinion and Order, the Commission correctly notes that SB 221 refers to a utility's peak load, but that provision does not compel the Commission to use a particular method for determining what DP&L's peak load is. For DP&L,

[1] R.C. § 4928.12; PJM Reliability Assurance Agreement. PJM Rate Schedule FERC No. 44,

as a member of PJM that obtains capacity through PJM's Reliability Pricing Model, its "peak load" and its obligations to meet peak load are as established under PJM rules. As a member of PJM, DP&L and its customers benefit greatly from the vastly enhanced pool of capacity available and the amount of generation needed, collectively, is considerably smaller than would be required if each utility member were operating independently. But part of the quid-pro-quo to obtain this significant benefit is that DP&L is no longer a separate "Control Area" and a peak load measured solely with reference to usage within the DP&L zone during some summer hour is no longer relevant to any reliability requirement that DP&L currently has.

Of note, an Ohio program that did not "count" for PJM purposes would yield little or no tangible benefits. Consider the scenario where DP&L initiated interruptions of its customers under a program that operated differently from PJM's and reduced usage during some hour that was associated with a DP&L zonal peak but did not reduce usage during the hours used by PJM in calculating DP&L's peak load obligations. The result of that would be that PJM would acquire through its capacity resource auction process the same amount of capacity for DP&L that it would if DP&L had no demand response program at all. DP&L and its customers would incur the same costs as if the program did not exist at all.

4. <u>Additional Background on the PJM Programs</u>.

PJM launched demand response programs several years ago. These programs have been encouraged and supported by FERC and most State Commissions. PJM has been viewed as a leader among Regional Transmission Organizations ("RTOs") and Independent System Operators ("ISOs") in this area. In 2002, PJM created and still administers a Demand Response Energy Market under which over $45 million annually is paid to Curtailment Service Providers ("CSPs") who have gone through certification and creditworthiness processes. CSPs, in turn, are marketers that take the initiative and spend the money necessary to identify potential customers. PJM administers a peak load reduction program under which 4,620 MW of demand response was committed for the June 2008- May 2009 PJM year. This program has several components including aggregation rights and the ability to commit to load reduction either on an economic or an emergency-only basis.[2] PJM also has a program under which CSPs enroll and compensate end-use customers who agree to reduce kWh consumption when kWh prices are projected in the day-ahead market to be high.[3] PJM has even developed programs with additional training and equipment requirements that allow entities with the ability to modify their demand to participate in day-ahead scheduling, regulation, and synchronized reserve markets.[4]

Over time participation in such programs has been significant and growing, but development of these programs does not stop. Each year, through its stakeholder process that involves input from utilities, energy users, state commissions and consumer's counsels, PJM seeks to make improvements to those programs. Many of these improvements have been aimed at properly valuing and verifying the resource. Where Rule 4901:1-39-05(C) sets forth a page of general principles and the minimum components of a filing required to show the performance of peak-load and energy efficiency programs, PJM has a 44 page manual on "measurement and verification" ("M&V") requirements that must be met in order to bid energy efficiency program installations into PJM's capacity auctions.[5] In fact, new testing requirements are being

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[2] http://www.pjm.com/markets-and-operations/demand-response/dr-capacity-market.aspx

[3] http://www.pjm.com/markets-and-operations/demand-response/dr-energy-market.aspx

[4] See http://www.pjm.com/markets-and-operations/demand-response/dr-da-scheduling.aspx ; http://www.pjm.com/markets-and-operations/demand-response/dr-synchro-reserve-mkt.aspx ; http://www.pjm.com/markets-and-operations/demand-response/dr-regulation-market.aspx

[5] See PJM's 44 page Manual 18B on "Energy Efficiency Measurement and Verification." These requirements must be met in order to bid energy efficiency installations into PJM's four year forward RPM market. http://www.pjm.com/~/media/documents/manuals/m18b.ashx Revisions to the program and this manual are

implemented in lieu of a called interruption event beginning with the 2009/2010 delivery year. In addition, penalties for non-compliance have been raised. Beginning with the auction taking place this year for the 2012/2013 delivery year, demand resources offered as capacity will participate in the same capacity bidding process as generation, subjecting CSPs and customer participants to the same market risks and credit requirements as generators.

5. The Benefits of the PJM Programs to Ohio Are Substantial.

Significant benefits accrue to DP&L's customers from PJM Demand Response programs. Some of these benefits occur even if no interruption events are called. PJM has the legal right and option to activate demand response. This option has inherent value just as financial options have value even if they are never exercised. None of these benefits are tied to whether the interruption event occurs during a DP&L zonal peak. The zonal peak becomes largely irrelevant in a large power pool or RTO, where one of primary objectives and benefits is the reduction in peak load requirements that occurs as the result of sharing an aggregated and lower reserve margin spreading the risk of outages and the ability to share an overall reserve margin. Among the significant benefits of these PJM programs to DP&L and its customers are:

- DP&L customers benefit from the joint planning that PJM does for capacity. DP&L is required to buy less capacity because it is responsible only for its contribution to the coincident PJM peak.
- DP&L benefits from the lower impact of unit loss on loss of load probability in a large system like PJM vs. an individual system.
- DP&L DR customers allow less new generation to be built regardless of the timing of any physical interruptions.
- Counting PJM program compliance towards SB 221 targets allows our customers to take full advantage of the benefits of PJM participation and to achieve SB 221 goals in a least cost manner. PJM's costs to administer these programs are

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ongoing through the stakeholder process and to comply with a FERC order issued earlier this year that requires updated data to be submitted each year in order to continue receiving payments through the PJM RPM market for the capacity benefit of these energy efficiency installations.

already being charged to DP&L and it would be wasteful to disregard the savings that the programs achieve and to require that a second layer of costs be incurred to reinvent the same types of programs under a different administrator.

- A stand-alone demand reduction program that is not registered through PJM would not "count" towards DP&L's obligations to PJM. The costs associated with such a program would be largely wasted in that they would not affect the timing of when PJM would determine when new generation or transmission lines would be needed.

DP&L is aware that some informal objections have been raised to PJM programs based on the view that PJM has rarely called on customers to interrupt or curtail service. We do not believe that that is a valid criticism. The above PJM programs provide benefits to Ohio customers regardless of how many physical interruptions occur or whether any physical interruptions take place at the time of the utility's individual peak. Additionally, PJM is currently considering and will likely implement changes so that going forward, DP&L customers who participate in PJM demand reduction programs will reduce DP&L's share of PJM's capacity requirements when interruption events are called by PJM in order to reduce PJM's peak load. That in turn will reduce DP&L's capacity obligation.

The PJM programs provide significant benefits to Ohio and futher the aims of SB 221. Participation in these programs should count towards compliance with the SB 221 targets.

6. DP&L Agrees with the Commission's Policy Regarding Proportionality for Mercantile Customers to Avoid Utility Charges.

DP&L agrees with the Commission's finding, Opinion and Order at 22, that some proportionality is necessary so that a small amount of savings by a mercantile customer does not totally exempt the customer from costs that would otherwise be charged. The Commission's finding in this should be expanded slightly to clarify that while a customer participating in a PJM demand response program should be given credit against a portion or all of that part of its retail bill that would be otherwise billed with respect to costs incurred by a utility to meet the load reduction targets, it would not be appropriate to give any credit to that mercantile customer for costs incurred by DP&L to meet energy efficiency targets. Similarly, participation in a PJM energy efficiency program would not qualify for exemption from utility charges associated with demand reduction programs, except to the limited extent that the energy efficiency savings may also have an effect of reducing demand.

7. <u>Conclusion with Respect to PJM Demand Response Programs</u>.

Since PJM demand response programs are already designed, operational, and accepted by participants in this market, the PUCO should explicitly recognize and use these existing programs to meet Ohio's legislative goals of promoting energy efficiency and demand reduction. Specifically, to the extent a customer participates in PJM demand response programs, the results of that participation should qualify as demand response in Ohio and should allow that customer to meet all or a proportionate portion of the mercantile opt-out provisions of SB 221 with respect to DP&L's costs for demand response programs. Additionally and for the same reasons, demand reduction within the utility's service territory should qualify to meet the utility's demand response benchmark in SB 221 regardless of which curtailment service provider is chosen by the customer.

SB 221 imposes certain requirements on the utility, but the objective of SB 221 is not the imposition of targets. That is only the means to the objective, which is to lower the overall electric demands of consumers in Ohio. That objective is served by PJM's demand response programs and they already exist. This Commission should avoid regulatory actions that, in effect, penalize utilities and discourage participation in PJM demand response programs and which would increase programs costs by creating duplicative and potentially competing programs. Instead, this Commission should take this opportunity to encourage utilities to work with third parties to deliver the positive benefits of the PJM demand response programs to Ohio consumers.

Recognizing that the Commission may prefer to gather additional information to become more certain that it has fully examined the ramifications of permitting participation in PJM programs to count towards the utility requirements, DP&L proposes that the Commission should should permit PJM program to count towards the requirements on an interim basis for the 2009 and 2010 targets. This finding would then be subject to prospective change after the Commission gathers more information about how these programs operate to further the objectives of SB 221.

B. What are the Practical Difficulties in Procuring 2009 and 2010 Renewable Resources including Renewable Energy Certificates ("RECS")?

SB 221 Certified RECs do not exist. It is impossible to buy one. That is because creating the legal instrument known as a REC requires a state certification program that has not yet been established in Ohio.[6] What can be purchased, however, are RECs certified by other nearby States that are associated with generation using technologies that clearly qualify under Ohio law. Of these, wind energy is the technology that in the near term is most available and growing fastest. Wind energy resources that are available today vary widely in price from about $9/MWh (REC) in Indiana (an adjacent state within MISO) to about $2/MWh (REC) in North Dakota (a non-adjacent state also within MISO).

The April 15, 2009 rules, however, jeopardize the ability to obtain the lesser cost supply by imposing a requirement to file a special deliverability or load flow study in order to prove

[6] For definitional purposes, it is important to recognize that within the power marketing business a "Pennsylvania REC" means that the resource meets Pennsylvania's requirements and does not mean the resource is located in Pennsylvania. The resource could be located in Ohio and still create Pennsylvania RECs. In fact, the same resource may "generate" RECs qualified in several states, but the PJM GATS registry and the equivalent system within MISO assure that the REC is sold only once. This rehearing request uses the term SB 221 Certified RECs rather than Ohio RECs to avoid the potential to misinterpret the latter term as meaning a REC from a facility located in Ohio.

that, for example, the RECs from a North Dakota wind generator is associated with electricity that is deliverable into Ohio. At some point in the future, once Ohio's certification program is up and running, we believe that these generators may apply for certification and may present whatever information is then deemed necessary to prove that the resource qualifies under Ohio law. But on an interim basis, recognizing that we are already well into 2009, the Commission should take three actions.

1) At least for 2009 and 2010, the Commission should find that there will be a rebuttable presumption that any generator interconnected with a utility that is a member of the Mid-West Independent Transmission System Operator, Inc. ("MISO") or PJM Interconnection, LLC ("PJM") produces power that is deliverable into the state.

2) The Commission should direct its Staff to work with MISO, PJM, and Ohio utilities to prepare a generic report on deliverability and/or power flows within MISO and PJM. DP&L is confident that such a report will demonstrate that all generation within these Regional Transmission Organizations ("RTOs") is deliverable throughout the RTOs including Ohio. This is because the feasibility and impact studies conducted by the RTOs already determine what, if any, additional facilities are needed in order to allow for the interconnection and operation of any new generator that is interconnecting with the transmission system. If the report reaches the conclusion that DP&L believes it will reach, the result will significantly reduce the administrative burden on renewable energy generators to prepare and the Commission to review what could be hundreds of "deliverability studies."

3) At least for a transitional period, any REC certification program or other resource qualification decision made under Rule 4901:1-40-05(E) should explicitly make the qualifying determinations retroactive at least to July 1, 2008, consistent with the statutory starting date and as set forth in Rule 4901:1-40-04(D)(6).

At the onset, DP&L would note that this issue of "deliverable into the state" is separate from and unrelated to the issue of how PJM allocates the costs of large new transmission lines. The vast majority of the new resources that will be available over the next few years will be interconnected with existing facilities. Many will be small scale projects that will actually interconnect at distribution line voltage levels and the resulting impacts on higher voltage transmission lines would be so miniscule that PJM and MISO would not even have to prepare a feasibility and impact study. Proximity to existing transmission lines would be a significant factor in allowing any larger scale projects to be placed in service within the next few years. The interim period proposed here by DP&L will be over before any significant cost impacts could occur with respect to new large transmission lines that might be associated with truly large new renewable resource projects. Moreover, the restriction in the Ohio rules relating to "deliverable into the State" would not act as a disincentive for the construction of such transmission lines and may even encourage such construction in order to prove deliverability.

Interim rules as proposed above are necessary. While it may be patently obvious that a windmill located in Ohio or one of these other states is generating electricity from a resource that would also meet Ohio's definition of a renewable resource, neither the generator owner nor the holder of the REC associated with that production, will indemnify or certify to a buyer that the REC will ultimately be certified as an SB 221 Qualifying REC. By the time such a REC may actually exist as a legal instrument, the 2009 compliance year, measured from January through December, may be over or nearly so.

A rebuttable presumption is appropriate because there will be very few instances where the question of deliverability could even legitimately arise and without it there would be a flood of separate applications and studies that would have to be filed and reviewed by the Commission. As noted above, the vast majority of renewable energy projects will come in the form of dozens or hundreds of small-scale projects that will get interconnected with utility systems within PJM and MISO and even the local utilities may need to make only minimal reviews to ensure that the interconnections are compliant with the National Electric Safety Code and their own requirements. To the extent that the potential injection of electric energy is large enough or at a voltage high enough to warrant any PJM or MISO involvement, those Regional Transmission

Organizations ("RTOs") fulfill their obligations by performing an analysis that is focused on ensuring that the injection of new power from the resources can be received into the existing transmission system and become part of the indistinguishable electrons transmitted and deliverable throughout the entire system, without creating significant congestion or reliability problems at any point within the system. To the extent that additional interconnection facilities may be needed to accommodate the new injection of power, those will be ordered by the RTO.

Further support for the conclusion that a rebuttable presumption can be made regarding deliverability can be found in current annual reports submitted by Ohio utilities that document Available Transfer Capabilities and Total Transfer Capabilities to move power reliability between their systems and other parts of the applicable Regional Transmission Organization.

There is an economic reason as well for implementing a rebuttable presumption of deliverability in the state for resources built within PJM and MISO. Differences in prices of REC's are significant based on geography. DP&L, its customers and the Commission have a common interest in meeting SB 221 objectives and requirements in a manner that is at the lowest reasonable cost for its customers, consistent with reliability and other objectives. Uncertainty regarding what is "deliverable" and delays in certification create a climate where utilities may pay more for RECs to insure against the risks of non-compliance in the event some subsequent finding is made that the RECs were not created from qualifying resources that generated electricity that was deliverable into Ohio. Clarity, certainty and simplicity are in the best interests of Ohio customers and Ohio utilities.

The proposal to direct Staff to prepare a report is designed to provide the Commission the information that it may need to form a final judgment that the output generation located within PJM and MISO is deliverable and that there should be no ongoing requirement for some special type of deliverability study or power flow study. In this regard, DP&L would note that the rules appear to contemplate individual studies of a hypothetical flow from a generating facility to an Ohio load. But there is no physical significance to studying a hypothetical flow from a generating facility to a load within the RTO region. This is not how physical energy flows in reality and, therefore, it is not the limiting factor in determining the deliverability of energy from generator to load. The Commission should recognize that PJM and MISO indirectly deal with the issue of deliverability through their planning processes and through the feasibility and impact studies they routinely perform to determine what facilities might need to be constructed to allow the new generator to be interconnected with and integrated into the transmission system. All energy and the associated REC's from generators located within PJM or MISO should be considered deliverable without need of any special review or study.

Another way to understand this issue might be to view it from another State's perspective. This Commission and its Staff led the development of the procedures used in Ohio to streamline the process for small renewable resources to allow them to interconnect with Ohio utilities and sell their power into retail and wholesale markets.[7] For the most part, these small generators can be interconnected with little or no additional construction needed beyond the point of interconnection. Similar processes are in place in other States. It is virtually impossible to create a scenario where the output of one of these small generators would overload transmission lines and not be "deliverable" anywhere within or between MISO and PJM. The Pennsylvania Public Utilities Commission should not need a special power flow study or deliverability study to determine that the power from a 15 MW landfill gas-to-electric generator located in Ohio and interconnected with the PJM system through DP&L is "deliverable into"

[7] See generally Rule 4901:1-22 "Interconnection Services;" and with respect to the sale into wholesale markets, Rule 4901:1-22-04(E)(2).

Pennsylvania. Of course it is. Under no conceivable circumstance is this 15 MW of power going to overload transmission circuits within PJM. Such a generator is unlikely to be tied in directly to high-voltage lines and probably would not even have a significant impact on the lower-voltage distribution circuits to which it is interconnected. Even if there were an impact, DP&L and the generator would build whatever additional facilities were necessary to accommodate the interconnection. In the same way, renewable energy generation located in North Dakota, Indiana, Pennsylvania or elsewhere within PJM and MISO can be presumed to be deliverable into Ohio without the need for any special studies, unless there is some unique aspect involved that causes deliverability to be called into question.[8]

There is also a fundamental disconnect between how REC markets operate and the 60 day qualification process set forth Rule 4901:1-40-05(E) or the process envisioned by the Commission's interpretation of its rules to require that a "power flow" or "deliverability study" be necessary. RECs are purchased by an individual within a company calling one or several brokers and asking if they have any RECs available and at what price. A standard form transaction agreement is faxed or e-mailed and the entire process typically takes less than 48 hours. It is unlikely that any willing seller could be found who would sell a REC to an Ohio utility subject to a condition that a deliverability study be done and 60 days or so pass before the transaction is finalized.

DP&L recognizes that there may be some degree of discomfort in reaching a conclusion today that all generation within MISO and PJM is "deliverable" into Ohio. DP&L strongly urges the Commission to establish a rebuttable presumption on an interim basis so that utilities have a

[8] The only circumstance that DP&L can currently envision where deliverability might be questionable for facilities located within PJM or MISO is a very large scale operation of say 600 MW that PJM or MISO determines will require significant transmission upgrades and, contrary to all expectations and normal practices, the generation is built and generating power locally prior to the time the transmission upgrades are complete.

clear path forward for compliance with these rules for 2009 and 2010. The proposed report on deliverability to be prepared by Staff in collaboration with MISO, PJM, and Ohio utilities will provide more comprehensive analysis that the Commission can use to determine whether to make the rebuttable presumption a permanent part of the rules.

III. ADDITIONAL COMMENTS

DP&L's remaining comments are presented in order as they arise within the regulations rather than in order of significance.

A. Rule 4901:1-39-01 Definitions.

1. Rule 4901:1-39-01(C) "Energy baseline." DP&L in its initial and reply comments to the proposed regulations proposed modifications to this language and suggested specific types of adjustments that should be taken into account in determining the baseline. DP&L continues to believe that absent appropriate adjustments to the baselines, there will be a compounding effect that results in targets in excess of the statutory requirement. With that as a preface, however, the Commission has made clear that there will be a reasonable opportunity to propose appropriate adjustments to the baseline. Rule 4901:1-39-05(B). DP&L will attempt to work within that framework and in its individual filings will propose appropriate adjustments to the baseline that will account for the effects of prior year savings.

2. Rule 4901:1-39-01(L) "Independent program evaluator." DP&L strongly opposes this provision. If there is to be a consultant who is directed solely by Commission Staff, then the Commission should go through normal State requirements necessary to hire such an individual. If the Commission then wants to assess utilities for the costs of that consultant, it has the power to do that as well. But DP&L believes that this is not a cost-effective or appropriate approach.

The regulation sets up an inherently confrontational process. Each utility will likely want to hire its own program evaluator. But if there are multiple evaluators for each utility, there will be duplicative expenses and possibly conflicting sets of recommendations. That will only drive up costs and drain resources that could better be used to fund programs to achieve demand response and energy efficiency savings.

Moreover, DP&L submits that the Commission and its Staff should not seek to take over the day-to-day management of measurement and verification and processes of all the Ohio utilities.[9] DP&L would instead recommend the use of a different approach that is certainly familiar to the Commission. These activities should be managed in the same way that utilities direct the activities of their outside and independent auditing firms. As long as DP&L uses a fair process to select a vendor, hires one with a good reputation, and meets the necessary reporting requirements, then it should have the ability to direct the firm's activities.

In addition, while an ongoing or annual independent evaluation of how energy savings are measured and verified may be appropriate, Rule 4901:1-39-01(L) also appears to contemplate some form of continuous ongoing management audit process that is referred to as a "program process evaluation." This program process evaluation process should be performed once initially and then only initiated in the future if there are reasons to believe that a management audit is necessary; there should not be some form of ongoing annual process review.

B. <u>The Perfect Storm of April 15 – Too Many Reports on the Same Day.</u>

The Commission may have looked at many of these provisions individually and not adequately reviewed them as a group. These rules now require each electric utility to submit six

[9] This process also raises potential legal issues regarding whether state contracting practices are being circumvented and the power to order companies to hire specific individuals who are not then subject to direction by their "employers." The consultant may also be placed in an ethical dilemma in terms of who is the "client."

different new reports on April 15th of each year. Having the same deadline for multiple reports will be burdensome, particularly given that this is the same day that the massively time-consuming FERC Form 1 filing is due. DP&L urges the Commission to consider staggering some of these dates and making some of these reports due every two years instead of annually. Reports that are forward looking over a 10-year period are obvious candidates for a biennial filing requirement. The list of new April 15 reporting requirements include:

- Updated portfolio plans for energy efficiency and demand reduction. Rule 4901:1-39-04 (begins 2013);

- Portfolio status report with an extensive list of requirements to address performance of all approved energy efficiency and peak-demand reduction programs, descriptions of all activities and improvements, measurement and verification, and recommendations for new, modified, or to eliminate programs, Rule 4901:1-39-5(C) (begins 2010)

- 10-year compliance forecast plans filed each year for advanced, renewable and solar energy benchmarks with baseline data, supply portfolio projections, descriptions of compliance options, and impediments. Rule 4901:1-40-03(C) (begins 2010).

- Annual status reports for compliance with and review of advanced, renewable and solar energy benchmarks. Rule 4901:1-40-05(A) (begins 2010).

- Annual Environmental Control plan, including carbon dioxide control planning that is to contain all relevant technical information on current conditions, goals, and potential actions for resource planning and environmental compliance. Rule 4901:1-41-03(C) (begins 2010).

- Long-term forecasts of supply and demand by electric and gas companies, including integrated resource plans, peak and annual loads, demand side management, energy-price relationships with consumption, transmission data, and other statistical information. Rule 4901:5-3-01 (existing filing requirement with expanded information required).

C. Rule 4901:1-39-05(C)(2)(c); The Flexibility to Fund Successful Programs, Modify Programs, and Eliminate Unsuccessful Programs Should Be Encouraged, Not Subjected to Regulatory Lag.

This regulatory provision unduly restricts the ability of utilities to adjust to changing circumstances or to respond quickly as they learn what works and what does not work. The provisions appears to make permanent any program and program element that has been reviewed and approved for cost recovery, subject to modification only after a new filing has been made and some regulatory process to review and approve the modification is undertaken. Utilities are also precluded from shifting funds from a failed program to a successful one unless they petition the Commission or its Staff.[10] There is also an undue emphasis on ensuring that funding for programs across customer classes remains essentially unchanged absent a regulatory proceeding, even if doing so would be uneconomic relative to what could be saved if additional funds were applied to programs that were working well.

DP&L submits that substantially greater flexibility and a more streamlined approach is necessary, particularly in the first few years of these programs. It is the utilities that are subject to the mandatory targets and they need to have the ability to move quickly at any time during the year to modify programs that are not working and to shift more resources into programs that appear to be working well and away from programs that are not working. It is unclear even whether there is a de minimis rule allowing minor modifications without going through this

[10] DP&L has not fully analyzed the legal implications of rules that appear to give the Staff the ultimate decision-making authority to approve shifts in funds up to 25%. The issue of the validity of subdelegation of power by an administrative agency to its Staff or from a Director of an Agency to lower level personnel is primarily a question of statutory interpretation as to whether the subdelegation of power is consistent with the legislative grant of authority. *See State of Ohio v. Craig S. Cooper*, 120 Ohio App. 3d 284; 697 N.E.2d 1049; (10th App. Div. 1997), *citing, In re Vermont Marble Co.* (Vt. 1994), 162 Vt. 355, 648 A.2d 381, 383, 385; *In re Advisory Opinion to Governor* (R.I. 1993), 627 A.2d 1246, 1248; *Brown Group, Inc. v. Administrative Hearing Commn.* (Mo. 1983), 649 S.W.2d 874, 878; *United States v. Giordano*, 416 U.S. 505, 512-523, 94 S. Ct. 1820, 1825-1830, 40 L. Ed. 2d 341 (1974).

process, e.g., can a utility unilaterally modify an application form or does even a change like that require a filing and approval?

It would be particularly unjust to hold utilities accountable for a failure to meet a target that could have been met absent the regulatory delays required by this provision. DP&L requests that on rehearing the Commission delete section Rule 4901:1-39-05(C)(2)(c) and insert instead a reporting requirement that the utility identify and explain the reasons for any modifications and any funding shifts that it made during the prior year.

D. Rule 4901:1-39-05(D); Non-Compliance Should Not <u>Be Pre-Ordained By Excluding Whole Categories of Energy Savings.</u>

Rule 4901:1-39-05(D) virtually guarantees that these load reduction and energy efficiency targets will not be met in the future by prohibiting utilities from counting energy efficiency results that its customers achieve in order to comply with other legislative or regulatory requirements. The Commission states that it "sees no reason to credit electric utilities for benefits of measures that would have happened regardless of their efforts" and specifically notes that while compact lighting program results would count now, they will not after such measures become required under the Energy Independence and Security Act of 2007. Opinion and Order, p. 20.

The reason for counting such results is simple – SB 221 is designed to reduce consumption and to enhance energy efficiency in Ohio. Establishing utility targets and penalties for non-compliance are tools to promote that goal, not objectives in and of themselves. It is virtually certain that over the next 10 years or more, there will be a steady stream of new energy efficiency mandates arriving from Washington, D.C., Columbus, and local governments. It is not hard to predict that at some point in the near future there will be requirements to install higher efficiency lighting including compact fluorescents and LEDs, in all governmental facilities including schools, and then it is a short step to predict similar requirements for street lighting uses, billboards, and in new private construction. To achieve the goals of SB 221, utilities, the government, business, and individual consumers should be working together. But this regulation guarantees future conflict. Under this regulation, a utility is virtually compelled to oppose any future legislation or regulation that would promote or require enhanced energy efficiency – in the absence of such legislation or regulation, the utility can implement such measures and the results will count towards its target. But, as soon as a requirement becomes law, any efficiencies obtained through such equipment no longer count and the utility would become subject to penalties going forward for not meeting its targets.

The Commission's discussion of this issue also raises the very real possibility that the gradually increasing targets set forth in SB 221 will be replaced with an unscaleable wall. It is not clear from the Commission's discussion whether it is the savings from projects implemented after the legislative or regulatory change that would be excluded, or whether the Commission also intends to exclude the future savings of projects that were put in place prior to the legislative or regulatory changes. At a minimum, the Commission should clarify that ongoing savings resulting from installations and projects that occurred prior to a change in law or regulation will continue to be counted. For example, a utility program that it had developed with business customers might have resulted in 100 installations of energy efficiency equipment that provided 5% savings in 2014 and are projected to save 5% each year for 2015 and several years thereafter. Suppose that in 2015 a new government mandate requires businesses to implement such programs. It would be unjust and punitive for this Commission regulation to then be triggered and to require that the utility not only meet the scheduled incremental change in requirement from 2014 to 2015, but also to find an additional 5% in that year to make up for the 2015 savings that were expected from installations made in 2014 or earlier.

In reviewing the issue on rehearing, the Commission should consider the metaphor of "low hanging fruit." Some energy efficiency programs will be relatively easy and cheap to implement, while others will be costly and require an enormous technological and/or marketing effort to achieve. We may ultimately find that there simply is not enough fruit on the tree to achieve the aggressive targets in SB 221 even if one looks under every leaf. But we can be quite certain that there will not be enough fruit on the tree to allow utilities to meet these targets, if all the low-hanging, easier to reach fruit gets picked for other reasons and is not counted towards the targets.

E. Rule 4901:1-39-05(E) and Rule 4901:1-40-04(B)(7) Demand-Side Management Results Are Explicitly Required to Be Counted towards the Advanced Energy Requirement.

Rule 4901:1-39-05(E) and Rule 4901:1-40-04(B)(7) contain similar provisions that are contrary to the explicit language of SB 221 and must be modified. In both provisions, the Commission has created a requirement that excludes from compliance with the advanced energy resource target any demand response and energy efficiency program results, except for that portion that exceeds the statutory requirements for demand response and energy efficiency.

There is no such limitation anywhere within SB 221. SB 221 is absolutely clear and unambiguous in defining seven categories of technologies and programs that qualify towards the advanced energy resource target. SB 221, adding R.C. section 4928.01(34), states that "Advanced energy resource" means any of the following: . . . (g) Demand-side management and any energy efficiency improvement." Nowhere within that statutory definition is there a limitation so that only the excess above some other set of targets is counted towards the requirement. The Commission is without authority to impose a requirement that is simply non-existent in the statute.

F. Rule 4901:1-39-08
The Mercantile Integration Requirements Are Entirely Too Complex, Intrusive and Burdensome for Most Potential Mercantile Customers.

In the first section of this rehearing request, DP&L discussed how the Commission should recognize and embrace the benefits provided by PJM programs under which curtailment service providers and load serving entities have signed up end-users to reduce load and improve energy efficiency.

This section of the rehearing request addresses other aspects of Rule 4901:1-39-08, which impose the kind of requirements that utilities may be used to seeing, but will be unfamiliar to most industrial companies. The regulations impose an extensive set of filing requirements that will likely cause many companies to lose interest immediately. Among other things, the regulations ask for cost information that may regarded as commercially sensitive by an industrial concern. Rule 4901:1-39-08(B)(6). These customers are not companies subject to the Commission's ratemaking jurisdiction and the amount of money they determine is appropriate to spend on demand reduction or energy efficiency projects should be of no concern to the Commission or its Staff.

Perhaps the most significant problem however is that these regulations invite and apparently compel the filing of hundreds of individual cases. This is absolutely the wrong approach to take to get compliance with statutory requirements that are already in effect. At least on an interim basis, the Commission needs a streamlined approach where the utility reports to the Commission the kind of equipment that was installed by mercantile customers and how much energy and peak load reductions ordinarily would be achieved by such equipment relative to what it replaced.

G. Rule 4901:1-39-08(B)(4)
Net Metered Customers Should Not Be Penalized and
Savings on Early Retirements of Equipment Should Be Fully Realized.

The final rules incorrectly penalize all mercantile customers and utilities that have responded to prior Commission initiatives and economic pressures to install distributed generation in a net metering configuration. The Commission should modify the sentence in Rule 4901:1-39-08(B)(4) that excludes from "counting" the peak load reductions that occur when back-up generation is used to reduce a mercantile customer's net load. While the mere ownership of net-metered, customer-sited generation may be legitimately excluded from "counting" with respect to opting out of energy efficiency program costs or the utility's energy efficiency targets, the actual use and running of back-up generation is absolutely and unquestionably a legitimate and, in fact, Commission-encouraged tool to reduce utility peak loads and associated costs for the benefit of all customers. So long as the output of the generation is measured and verifiable and it meets the other criteria of being integrated with utility plans, the use of back-up generation in a net meter configuration should "count" for mercantile opt-out purposes and for purposes of meeting the interconnected utility's load reduction targets.

Rule 4901:1-39-08(B)(4) also inappropriately limits in all circumstances the quantified energy and demand savings for mercantile projects by comparing the energy and demand results of the project against some imputed and estimated result that would have occurred if customer had installed industry standard new equipment or used standard practices. The regulations should compare the customer's applicable energy and demand prior to the project with the expected applicable energy and demand after the implementation of the project. The regulation as currently stated does not reflect the actual energy and demand savings created by the replacing an older but still operating inefficient machine or practice with a new higher efficiency machine or practice.

H. Rule 4901:1-40-01 Definitions

1. "Deliverable into the State"

This definition is discussed at length in the first section of this request for rehearing.

2. "Double-Counting"

The Commission's discussion in Opinion and Order at 29, helps considerably in clarifying that the prohibitions against double-counting are not intended to add an additional layer of compliance requirements on a utility in the event that federal renewable energy standards are imposed that overlap or are duplicative of Ohio's. Unfortunately, the language of the regulation itself is still overly broad and insufficiently defined. Rule 4901:1-40-01(M) should itself be modified to make that clarification. DP&L recommends adding a sentence that states: "The prohibition against double-counting does not preclude a single entity from counting generation or associated RECs which it owns or controls towards meeting the requirements set forth herein and towards meeting the requirements of any other federal or state requirement that establishes a target or objective for a specified amount or percentage of generation from renewable or alternative energy resources."

In addition, on rehearing the Commission should reconsider its discussion at Opinion and Order, p. 29, which wrongly excludes renewable energy that a utility may be purchasing under a separate green pricing program where customers sign up to pay a little more on their utility bills to have RECs purchased on their behalf. The regulation as applied in this context is not preventing double-counting. It prevents counting the benefit even once. This is similar to the problem discussed above in connection with demand response programs. In both instances, the regulations appear to have lost sight of that fact that the goal is to promote the programs; not to penalize utilities and certainly not to create incentives for utilities to oppose others from working to further the objective. Obviously, if a utility's green pricing program costs are being recovered through a separate tariff rider, there should be no double-recovery of program costs. But that does not mean that the green energy purchased through that program should be excluded from counting towards the targets. The Commission should be encouraging utilities to promote these programs. This rule discourages that and, in fact, creates an incentive for utilities to terminate such programs. When there is a limited availability of RECs (again, DP&L notes that there are no SB 221 Certified RECs at present), why should a utility compete against itself by buying RECs on behalf of participating customers if they do not count towards the utility's renewable target, when the utility instead could buy those RECs for its own account and have them count? DP&L urges the Commission to revise its definition of "double-counting" to permit any qualifying resource or REC purchased by the utility or its customers to count towards the SB 221 objective. That counts the resource or REC once, but only once.

3. "Geothermal"

The definition of "geothermal energy" within the regulations is unduly restrictive and, in fact, appears likely to exclude every form of geothermal energy that exists in Ohio. DP&L is unaware of any potential reservoir within Ohio where significant amounts of hot water or steam can be extracted from the Earth's crust and used for electric generation. Electricity from geothermal energy that is more likely to be usable in Ohio will rely on a closed cycle system that captures temperature differences between the surface and underground from cycling water or some other liquid through pipes underground. The temperature differences are then captured by heat exchangers that then provide that usable heat to boilers for electric generation. The definition should read: "Geothermal energy" means energy used for electricity generation that is in the form of hot water or steam extracted from geothermal reservoirs in the earth's crust or captured and made usable through differences between temperatures underground and at the surface."

I. Rule 4901:1-40-03(A)(2)(a)
There is No Statutory Requirement that 50%
<u>of Solar Energy Be Generated In-State.</u>

The Commission, Opinion and Order at 30, noted DP&L's position that the statutory requirement that 50% of renewable energy be from in-state sources did not mean that each type of qualifying resource, including the separate solar target, had to meet the 50% in-state requirement. The Commission never presented its rationale for rejecting that argument. The final regulations still impose a 50% requirement on the solar energy target even though the statute clearly and unambiguously imposes the requirement on the aggregated target for renewable energy resources and not on the specific subset of the solar energy requirements.

The 50% in-state requirement appears in R.C. section 4928.64(B)(3) immediately under a table in R.C. section 4928.64(B)(2) that contains three columns – the Year, the Renewable Energy Resources target percentages by year, and the Solar Energy Resource target percentages by year. R.C. section 4928.64(B)(3) explicitly states that the 50% of the <u>renewable energy resources</u> shall be met from resources in the State. Thus, the statutory provision explicitly references the second column in the table immediately above it. There simply is no statutory basis for importing the 50% in-state requirement to the third column that lists the solar energy targets by year. The regulations should be changed to comport with the statute.

The problem posed by a lack of statutory basis for this 50% in-state requirement for solar power is heightened by the fact that there appears to be an inadequate number of solar resources in Ohio to produce the in-state solar REC's that would be needed for Ohio utilities to meet 2009 targets as now defined in the Commission's Opinion and Order. Because the year is nearly half over and the targets are based on annual kWh, a multiple of the capacity that would otherwise be needed would have to be constructed in the next few months to produce sufficient RECs during 2009 to meet this newly created in-State solar energy/REC requirement.

J. Rule 4901:1-40-03(A)(3)
<u>The Bypassability Language Is Overly Broad</u>.

This regulatory provision should be modified on rehearing to recognize that there is an exception to bypassability that arises if the renewable energy resource or advanced energy resource is constructed in conformance with R.C. section 4928.143(B)(2)(c), which relates to utility plant that is constructed through a competitive bid process and as a result of a finding of need for the facility pursuant to the utility resource plan. The existing sentence in the regulations should be modified to add at the end: ". . . , except that those costs incurred in conformance with the requirements of R.C. section 4928.143(B)(2)(c) shall not be avoidable."

K. <u>Technical Change to Rule 4901-40-03(C)</u>.

The word "annual" should be moved such that the sentence refers to a "plan for compliance with future ~~annual~~ advanced- and <u>annual</u> renewable-energy benchmarks . . ." As the Commission noted in another context, Opinion and Order at 37, the advanced energy benchmark is a 2024 requirement and there are no annual advanced energy benchmarks.

L. Rule 4901:1-40-04(E)
<u>Certification Process;</u>

It is unclear from the language of this provision whether this certification process is intended to create regulatory assurances that a particular resource qualifies as a renewable resource or whether the Commission intends that nothing qualifies until it has been certified. DP&L would strongly oppose the second interpretation, noting that we are already several months into 2009 and there is no certification process in place. In the first portion of this rehearing request, DP&L urged that any certifications be made retroactive to July 1, 2008, consistent with the statutory starting date and as set forth in Rule 4901:1-40-04(D)(6). The Commission may also want to consider prorating any requirement for 2009 and perhaps for 2010 as well, depending on when the certification process is in place. This would be a step taken in recognition of the facts that there are no SB 221 Certified RECs currently in existence and that it will become increasingly difficult to comply with an annual kWh target measured against total kWh distributed during the year, if the delayed certification process makes it difficult to get renewable energy commitments in place until the latter portion of 2009 or 2010.

M. <u>Cost Cap</u>

1. Rule 4901:1-40-07
<u>There Is Only One Cost Cap</u>.

The Commission recognizes correctly that the advanced energy resource requirement only applies as of 2024 and, thus, for all practical purposes, there is only one cost cap in effect until that date.[11] The Commission errs, however, in interpreting the statute to say that in 2024 there will be two cost caps of 3% each, one 3% cap applied for renewable resources and a second 3% cap for advanced energy resources. The Commission relies on the fact that SB 221 uses the word "or" when it states a utility need not comply with the requirements under division B(1)

[11] Opinion and Order at 37.

[relating to advanced energy] or B(2) [relating to renewable] if the 3% limit is reached. DP&L believes that this interpretation misconstrues the ordinary meaning of the word "or." There is only a single sentence in SB 221 that refers to the 3% cap and it applies to both division B(1) and B(2) together. The utility is being excused from compliance from either or both requirements if the 3% cost cap would be breached. "Or" in its ordinary meaning in this context is referring to a power to avoid penalties for non-compliance under either division, and is not a substantive provision that establishes two cost caps to be separately applied.

2. Some Interim Guidance Should Be Given Regarding <u>Prudence of Excessively Priced RECs or Renewable Supplies</u>.

As described by the Commission, the cost cap will become an issue only once the costs get close to 3% of a utility's existing generation costs. Because the renewable energy requirements in 2009 and for the first few years are a relatively small percentage of the total kWh that will be generated or purchased by a utility, this appears to mean that the utility has no "statutory out" if faced with renewable energy offered only at exorbitant prices. The regulations should provide a more clear mechanism to permit a utility to seek a waiver of the requirement when prices are too high, even if the 3% of total generation costs has not yet been breached.

N. Rule 4901:1-41-03 <u>Climate Registry.</u>

The Commission should clarify that the phrase "or as otherwise directed by the Commission" applies to the both the requirement to become a member in the climate registry and to report emissions, and not just to report emissions in a particular format. The Commission should also explicitly add to the rule a provision that clarifies that in the event that a federal program is initiated under which utilities are required to collect data and report on greenhouse gases, then meeting the federal requirements will be deemed to be sufficient to meet the requirements of this regulation. Such a rule will avoid wasteful and duplicative reporting requirements that may otherwise be imposed where essentially the same data is collected and reported in slightly different formats.

IV. CONCLUSION

From a high-level perspective, DP&L urges the Commission to recognize that we are at the beginning of a long process that is intended to achieve very ambitious goals established by the legislature. In the early years of this process, we will all be learning what works for Ohio and electric consumers and what does not. The statute may not be a model of clarity and there are many different policy decisions and approaches that the Commission could take on various issues that would still be consistent with the statute. Whenever a choice needs to be made between more restrictions and less, the choice should be towards the less restrictive approach that is still consistent with the statute. Over time, as more information and understanding is obtained, the regulations can be revisited and, if necessary and useful, the regulations can become more proscriptive. But in these early years, flexibility and workability should be the cornerstone principles employed by the Commission.

The Dayton Power and Light Company respectfully requests that the Commission on rehearing modify its regulations consistent with the recommendations made herein.

Respectfully submitted,

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EXHIBIT F

RIDER AER
Alternative Energy Resource Rider

APPLICABILITY:

Applicable to any customer that takes electric service under the Company's rate schedules. The Alternative Energy Resource Rider (AER) is not applied to customers during the period the customer takes electric generation service from a certified supplier. The following charges will apply, by rate schedule, effective for service rendered beginning July 1, 2011, for all kWhs per kWh:

RATE:

RS	0.2832¢
GS	0.2832¢
GP	0.2734¢
GSU	0.2657¢
GT	0.2654¢
STL	0.2832¢
TRF	0.2832¢
POL	0.2832¢

PROVISIONS:

The charges set forth in this Rider recover costs incurred by the Company associated with securing compliance with the alternative energy resource requirements in Section 4928.64, Revised Code. The costs initially deferred by the Company and subsequently fully recovered through this Rider will be all costs associated with securing compliance with the alternative energy resource requirements including, but not limited to, all Renewable Energy Credits costs, any reasonable costs of administering the request for proposal, and applicable carrying costs.

RIDER UPDATES:

The charges contained in this Rider shall be updated and reconciled on a quarterly basis. No later than December 1st, March 1st, June 1st and September 1st of each year, the Company will file with the PUCO a request for approval of the Rider charges which, unless otherwise ordered by the PUCO, shall become effective on a service rendered basis on January 1st, April 1st, July 1st and October 1st of each year, beginning October 1, 2009.

EXHIBIT G

FILE

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BEFORE THE
PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Adoption of Rules for Alternative and Renewable Energy Technologies and Resources, and Emission Control Reporting Requirements, and Amendment of Chapters 4901:5-1, 4901:5-3, 4901:5-5, and 4901:5-7 of the Ohio Administrative Code, Pursuant to Chapter 4928, Revised Code, to Implement Senate Bill No. 221.	)	**Case No. 08-888-EL-ORD**

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APPLICATION OF OHIO EDISON COMPANY, THE CLEVELAND ELECTRIC ILLUMINATING COMPANY, AND THE TOLEDO EDISON COMPANY FOR REHEARING

Pursuant to R.C. § 4903.10 and Rule 4901-1-35, O.A.C., Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company (collectively, the "Companies") hereby apply for rehearing of the Commission's April 15, 2009 Opinion and Order ("Order") issued in the above-captioned case, because it is unreasonable and unlawful in the following respects:

1. Through the adoption of Rule 4901:1-39-05(D), the Order unreasonably and unlawfully excludes energy related projects put in place to comply with performance standards established by law, regulation or building code.

2. Through the adoption of Rule 4901:1-39-08(B)(4) the Order unreasonably and unlawfully excludes the amount of energy savings and peak demand reduction arising from mercantile customer on-site generation projects.

3. Through the adoption of Rule 4901:1-39-08(B)(4), the Order unreasonably and unlawfully understates the effects of an energy related project or program by requiring that such effects be determined based on a comparison to industry standard new equipment or practices, rather than the actual situation existing prior to the implementation of the project or program.

4. The Commission unreasonably and unlawfully exceeded its administrative authority by requiring adjustments to baseline calculations for energy efficiency and peak demand reductions during "negative economic growth."

5. The Commission unreasonably and unlawfully exceeded its statutory authority by requiring the use of a three year rolling average that does not factor out a compounding effect that increases compliance requirements beyond those contemplated in the law.

6. The Companies request clarification on the requirements for compliance with the demand reduction benchmarks set forth in R.C. 4928.66(A)(1)(b).

7. The Order unreasonably and unlawfully fails to recognize the deliverability of energy transmitted through regional transmission organizations when defining energy "deliverable into this state" as used in Rules 4901:1-40-01(I) and 4901:1-40-04(D).

8. The Commission unreasonably and unlawfully exceeded its statutory authority and imposed standards not supported by law by establishing a definition of "double counting" in Rule 4901:1-40-01(M) that unreasonably precludes the use of a single resource to meet multiple energy related benchmarks set forth in S.B. 221.

9. The Commission unreasonably and unlawfully exceeded its statutory authority and imposed standards not supported by law by establishing a burdensome requirement in Rule 4901:1-40-03(C) for filing a 10-year compliance plan that will be highly speculative and provide no public benefit.

10. The Commission unreasonably and unlawfully exceeded its statutory authority and imposed standards not supported by law by establishing a definition of "qualified resources" in Rule 4901:1-40-04(A)(8) that improperly: (a) limits the use of storage facilities to satisfy the statutory requirements and (b) imposes geographic and temporal limitations on eligible RECs that are arbitrary and contrary to law.

11. In adopting Rule 4901:1-40-07, the Commission unreasonably and unlawfully exceeded its statutory authority and imposed standards not supported by law by: (a) establishing a cost cap that directly conflicts with R.C. 4928.64(C)(3); and (b) reserving for the Commission the authority to impose a "catch up" upon application of the cost cap that is not authorized by R.C. 4928.64.

12. The Rules related to alternative energy resources unreasonably and unlawfully fail to reflect the amendments to R.C. 4928.64 and R.C. 4928.65, as signed into law by the Governor on April 1, 2009.

13. In adopting Rule 4901:5-5-06, the Commission unreasonably and unlawfully exceeded its statutory authority and imposed requirements not supported by law and that conflict with R.C. 4935.04 by mandating that electric utilities must file an annual integrated resource plan as part of a long term forecast report.

14. Rule 4901:1-39-07(A) unreasonably and unlawfully ties recovery of properly incurred cost to the approval of an EDU's portfolio plan.

15. It is unreasonable and unlawful for the Commission to establish a process that places the EDU at risk of penalties for non-compliance in 2009 when the Commission has yet to provide final rules as guidance for such compliance as of the date of this filing.

16. The Commission unreasonably and unlawfully created the definition of "substantial change" in Rule 4901:5-1-01(L) that is inconsistent with that included in the statutory definition for the same term as set forth in R.C. 4935.04(D)(3)(c).

17. The Companies seek clarification on the use of the word "Plan" in Rule 4901:5-1-01(M), believing that the word should be "Plant."

18. The Companies seek clarification on the reference to Rule 4901:1-39-09 in Rule 4901:1-39-07(A)(2), believing that such reference should be to Rule 4901:1-39-08.

19. The Companies seek clarification on the reference to Rule 4901:1-39-08 included in Rule 4901:1-39-08(B), believing that such reference should be to Rule 4901:1-390-07.

For these reasons, and as set forth in greater detail in the Companies' Memorandum in Support, which is attached hereto and incorporated herein by reference, the Companies respectfully request that the Commission grant a rehearing and issue an Entry on Rehearng consistent with this filing.

Respectfully submitted,

Kathy J. Kolich / JTS

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ATTORNEYS FOR APPLICANTS, OHIO EDISON COMPANY, THE CLEVELAND ELECTRIC ILLUMINATING COMPANY, AND THE TOLEDO EDISON COMPANY

BEFORE THE
PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Adoption of Rules for Alternative and Renewable Energy Technologies and Resources, and Emission Control Reporting Requirements, and Amendment of Chapters 4901:5-1, 4901:5-3, 4901:5-5, and 4901:5-7 of the Ohio Administrative Code, Pursuant to Chapter 4928, Revised Code, to Implement Senate Bill No. 221.	)	**Case No. 08-888-EL-ORD**

MEMORANDUM IN SUPPORT OF THE APPLICATION FOR REHEARING OF OHIO EDISON COMPANY, THE CLEVELAND ELECTRIC ILLUMINATING COMPANY, AND THE TOLEDO EDISON COMPANY

I. INTRODUCTION

The Commission's April 15, 2009 Opinion and Order ("Order") oversteps in many material respects the bounds of Am. Sub. S.B. 221 ("S.B. 221"). While Ohio Edison Company ("Ohio Edison"), The Cleveland Electric Illuminating Company ("CEI") and The Toledo Edison Company ("Toledo Edison") (collectively, the "Companies") recognize the time pressures placed on the Commission to promulgate rules that carry out the energy efficiency, peak demand reduction and alternative energy mandates of S.B. 221, the unlawful and unreasonable provisions of the Order warrant the Commission's further attention and correction. Furthermore, these "oversteps" by the Commission will result in costs of compliance higher than otherwise necessary to meet the statutory requirements, thus contradicting, and therefore violating, the stated policy of S.B. 221 to "[e]nsure the availability to consumers of adequate, reliable, safe, efficient, nondiscriminatory and *reasonably priced electric service.*" R.C. 4928.02(A) (emphasis added.) Thus, the Companies respectfully request a rehearing on the issues discussed herein so as to bring the Rules into compliance with the plain language of S.B. 221 and create a workable framework through which compliance can be achieved in a reasonable and cost effective manner.

II. ARGUMENTS

Throughout both the era of regulation and the era of electric industry restructuring, the Commission has always attempted to develop least-cost, practical solutions to the issues faced by the electric industry and its customers. Without explanation, it appears, based on the rules adopted in this proceeding ("Rules"), that the Commission has done a total about face. A basic theme runs throughout the Rules: when faced with a choice, the Commission, in almost every instance, chose the option that makes it not only more difficult but also more costly for Ohio's electric distribution utilities ("EDUs") to comply with S.B. 221's statutory benchmarks for energy efficiency, demand reduction and alternative energy resources. As a result, the Commission has created obstacles that will guarantee either non-compliance or compliance that Ohioans cannot afford. In fact, these obstacles could increase the cost of compliance by hundreds of millions of dollars over what was anticipated (or necessary) to meet the law's stated requirements, often with very little if any incremental benefit over the foregone lesser cost option. With each new requirement or exception added into the Rules, the Commission has whittled away the pool of projects and programs that will qualify for compliance under S.B. 221, thus either creating the need to substitute new, more costly projects for those project previously approved that no longer comply, or forcing the implementation of projects at a greater cost than otherwise would be necessary. Pursuant to statute and Commission-approved rate plans, the increased costs associated with these projects will be passed along directly to customers. While costs unnecessarily incurred should never be acceptable, there is certainly no place for them during the current economic crisis faced by Ohioans.

Through S.B. 221, the Ohio General Assembly addressed complex issues with carefully crafted language that was designed to help Ohioans more efficiently and effectively manage their electricity consumption, portions of which, when practical, should be generated through alternative energy resources. At the cornerstone of this vision is a policy that "[e]nsures [consumers] the availability ... of adequate, reliable, safe, efficient, nondiscriminatory, *and reasonably priced retail electric service.*" R.C. 4928.02(A) (emphasis added.) Clearly many of the Rules as now crafted have lost sight of this last criterion. Moreover, many of these same Rules are unlawful in that they extend beyond what the law permits.

The Commission is a creature of statute and may exercise only that jurisdiction conferred upon it by the General Assembly. *Columbus Southern Power Co. v PUCO,* 67 Ohio St. 3d 535, 537 (1993); *Tongren v. PUCO,* 85 Ohio St. 3d 87, 88 (1999). As an administrative agency, the Commission possesses only such rule-making powers as are delegated by statute. *Kelly v. Accountancy Board of Ohio,* 88 Ohio App.3d 453, 458 (1993). Any parts of Commission rules that conflict with existing statutes are invalid, and hence must fail. *Id*; *Athens Home Telephone Co. v. Peck,* 158 Ohio St. 557, 574 (1953).

The Commission's authority to implement the Rules stems from the enabling statutes set forth in S.B. 221. As discussed below, in numerous instances, the Commission, by what amounts to a substitution of itself for the legislature, has adopted Rules that are in conflict with S.B. 221. Accordingly, in each such instance, the Rules must either be modified or eliminated so as to remain consistent with the law as enacted by Ohio's lawmakers.

A. New Chapter 4901:1-39

1. Through the adoption of Rule 4901:1-39-05(D), the Order unreasonably and unlawfully excludes energy-related projects put in place to comply with performance standards established by law, regulation or building code.

Rule 4901:1-39-05(D) states:

> [a]n electric utility shall not count in meeting any statutory benchmark the adoption of measures that are required to comply with energy performance standards set by law or regulation ... or an applicable building code.

As currently worded, Rule 4901:1-39-05(D) virtually guarantees non-compliance with energy savings benchmarks and peak load reduction requirements. Given concerns surrounding the environment and the nation's dependence on foreign oil, it is certainly expected that new energy efficiency and consumption mandates will be passed in the next several years. This would occur over the same time frame in which statutory mandates become more stringent. As such mandates become effective, a greater number of programs and projects, whether or not already implemented, will be disqualified for compliance with S.B. 221 benchmarks.[1]

Rule 4901:1-39-05(D) serves no useful purpose. Not only does it reduce the number of projects that can be used to qualify for inclusion under S.B. 221, but it also creates a larger deficit for future compliance that must be overcome with new projects and programs. Surely this could not have been the intent of the legislature when it

[1] The American Council for an Energy-Efficient Economy, a nonprofit, 501(c)(3) organization dedicated to advancing energy efficiency as a means of promoting economic prosperity, energy security, and environmental protection, recently issued a report entitled Shaping Ohio's Energy Future: Energy Efficiency Works (ACEEE Report Number E092, March 2009). Analysis of that report shows that even this advocacy group needed to include the energy efficiency savings attained through implementation of performance standards established by law, regulation or building code in order to achieve Ohio's statutory mandates.

enacted S.B. 221. If Rule 4901:1-39-05(D) is not removed, compliance, assuming that it even remains feasible, will become more costly.

As an example, in its Order, the Commission indicated that compact lighting program results, which would today count towards compliance, will not count after the Energy Independence and Security Act of 2007 becomes effective. (Order, p. 20.) Carrying this directive to its logical conclusion, an EDU that implements a program for early replacement of light bulbs that will have actual, measurable energy savings effects well into the future, will not be permitted to continue to include these actual energy savings results once a new energy standard becomes effective. As a preliminary matter, this rule is impractical and would require an EDU to track each and every building code, statute and regulation on the federal, state, and political-subdivision levels within the EDU's certified territory. Moreover, it creates a presently unknown and unknowable compliance deficit that, as the years go by, will become more difficult to overcome as more and more projects, both past and future, get eliminated from consideration. As a result, customers would be responsible not only for the costs associated with previously approved and implemented programs, even though the results of such programs would no longer count towards compliance as a result of the supervening energy standards, but also for the costs of new programs needed in order to overcome the deficit -- assuming new programs could be developed and implemented faster than new standards are mandated.

In its Order, the Commission saw "no reason to credit electric utilities for benefits of measures that would have happened regardless of their efforts." (Order, p. 20.)[2] The reason is simple – it is good public policy that avoids unnecessary barriers to compliance and minimizes electric bills.

In addition to the foregoing public policy concerns, the Rule is inconsistent with the law and must therefore be modified or eliminated. Revised Code Section 4928.66(A)(2)(c) states:

> Compliance with [the energy efficiency and demand reduction benchmarks] shall be measured by including the effects of *all* demand response programs for mercantile customers of the subject electric distribution utility and *all* such mercantile *customer-sited energy efficiency and peak demand reduction programs*…. [Emphasis added.]

In light of the foregoing, the legislature made it clear that *all* mercantile customer projects (as opposed to all mercantile projects except for those excluded by the Commission) may be included as part of a utility's compliance strategy. Moreover, R.C. 4928.66(A)(2)(d) describes the types of programs that an EDC may include as part of its compliance plan, stating, " Programs implemented by a utility may include demand response programs, customer sited programs, and transmission and distribution infrastructure improvements that reduce line losses.

Nowhere in either of the above-referenced statutory provisions (or elsewhere in Ohio law for that matter) are there exclusions for projects implemented "to comply with

[2] Running throughout the Rules is a sub-theme in which the Commission views the mandatory benchmarks as an end unto themselves. The benchmarks with which the EDUs must comply are simply one of the many tools the General Assembly put in place to accomplish its greater goal of a more energy efficient, consumption conscious, environmentally friendly Ohio. These tools are not mutually exclusive and should be embraced for what they are – a comprehensive strategy to make the General Assembly's vision a reality. Neither the EDU nor its customers should be penalized simply because Ohio's legislature or some other governmental body sees the need for additional energy mandates in order to accomplish its objectives. Indeed, the Commission should encourage these types of cost effective programs that achieve compliance on multiple fronts.

energy performance standards set by law or regulation ... or an applicable building code", and the Commission is without the authority to, in essence, amend the statute in order to create them.[3] Accordingly, because Rule 4901:1-39-08(D) is unlawful, unreasonable, excessively costly and virtually impossible to administer, it should be removed in its entirety.

2. Through the adoption of Rule 4901:1-39-08(B)(4) the Order unreasonably and unlawfully excludes the amount of energy savings and peak demand reduction arising from mercantile customer on-site generation projects.

Rule 4901:1-39-08(B)(4) expressly excludes mercantile customer's on-site generation projects from inclusion in an EDU's compliance strategy:

> Kilowatt hours of energy and kilowatts of capacity provided by electric generation sited on a mercantile customer's side of an electric utility's meter shall not be considered energy savings or reductions in peak demand.

Without explanation, the Commission, yet again, through this one provision, eliminated a source for valuable programs that provide cost effective demand reduction and energy efficiency opportunities that will now have to be replaced with new programs at an additional cost to customers. For all of the reasons previously discussed, this Rule as proposed is contrary to public policy and, as discussed below is also inconsistent with the express provisions set forth in the law.

R.C. 4928.66(A)(2)(c) states:

> Compliance with [the energy efficiency and demand reduction benchmarks] shall be measured by including the effects of *all* demand response programs for mercantile customers of the subject electric

[3] Inconsistencies between clear legislative intent and the Rules as adopted by the Commission do not stop here. Revised Code Section 4928.66(A)(1)(a) unequivocally mandates that an EDU "shall implement energy efficiency programs that achieve energy savings...." The legislature, whose role it is to write the laws, placed no limits on the types of projects that qualify for compliance with this statutory mandate. Therefore, the Commission, whose role it is to implement the laws *as passed*, is without the authority to add provisions that conflict with the law, regardless of its beliefs.

> distribution utility and *all* such mercantile *customer-sited energy efficiency and peak demand reduction programs*. . .. [Emphasis added.]

The legislature's use of the word "all" in the above provision clearly demonstrates its intent to broadly define the scope of projects that could be included within an EDU's compliance strategy. This is also consistent with R.C. 4928.66(A)(1)(a), which unequivocally, without limitation, mandates that an EDU "shall implement energy efficiency programs that achieve energy savings...." Because the legislature intended that *all* mercantile customer projects (rather than "all except customer-sited generation projects") qualify for purposes of meeting the statutory benchmarks, the Commission's exclusion of customer-sited generation projects is contrary to the plain meaning of RC 4928.66(A)(2)(c) and is, therefore, unlawful and unreasonable and must be removed from the Rules.

3. **Through the adoption of Rule 4901:1-39-08(B)(4), the Order unreasonably and unlawfully understates the effects of an energy related project or program by requiring that such effects be determined based on a comparison to industry standard new equipment or practices, rather than the actual situation existing prior to the implementation of the project or program.**

The Commission adopted Rule 4901:1-39-08(B)(4) which sets forth the method for determining energy savings:

> A mercantile customer's energy savings and peak-demand reductions shall be calculated by subtracting the energy [use] and peak demand associated with the customer's projects from the estimated energy use and peak demand that would have occurred *if the customer had used industry standard new equipment or practices* to perform the same functions in the industry in which the mercantile customer operates. [Emphasis added.]

Revised Code Section 4928.66(A)(2)(c) requires energy savings to be determined "by including **the effects** of all ... programs." (Emphasis added.) The true effects of any program can only be determined by comparing *actual conditions* both before and after a project is implemented. This means that post project implementation results must be compared to the actual equipment replaced and/or the actual practices that were changed. Comparisons to industry standard new equipment that was never installed or practices that were never implemented does nothing more than understate the actual energy savings based on a hypothetical scenario. The use of hypothetical scenarios does not reflect the *effects of a program* and, accordingly, the Rule, as currently written, is contrary to law and must be modified[4]. The Commission should grant rehearing and modify Rule 4901:1-39-08(B)(4) so that energy savings is based on a comparison of actual conditions and consumption both before and after implementation of the project or program.

4. The Commission unreasonably and unlawfully exceeded its administrative authority by requiring adjustments to baseline calculations for energy efficiency and peak demand reductions during a "negative economic growth" period.

In its Order, the Commission acknowledged its authority to reduce both the economic efficiency and demand reduction benchmarks for "positive economic growth." However, it then went on to unlawfully expand its authority to include the ability to require adjustments to baselines based on "negative economic growth" as well. (Order, p. 18.) This is another example of the Commission unlawfully seeking to alter the plain meaning of the statute, thus overriding legislative intent and usurping the legislature's authority, and in the process, unilaterally increasing statutorily mandated percentage reduction targets and thrusting additional costs onto customers.

[4] Senate Bill 221 also requires energy savings reductions t o be based on annual average, and normalized kWh sales for the preceding 3 years. R.C. 4928.66(A)(1)(a). Clearly historic sales are based on actual consumption through equipment actually in place. This a further indication of the legislature's intent to calculate savings based on actual conditions, rather than industry standard equipment.

R.C. 4928.66(A)(2)(a) provides:

> The baseline for energy savings under division (A)(1)(a) of this section shall be the average of the total kilowatt hours the electric distribution utility sold in the preceding three calendar years, and the baseline for a peak demand reduction under division (A)(1)(b) of this section shall be the average peak demand on the utility in the preceding three calendar years, except that the commission may reduce either baseline to adjust for new economic growth in the utility's certified territory.

Although the Commission is correct in noting its authority to reduce baselines for positive economic growth, a review of R.C. 4928.66(A)(2)(a) makes clear that its authority stops there. Nowhere in this Rule is the Commission authorized to adjust the baseline for negative economic growth. Thus, the Commission's expectation that baselines will be increased to reflect negative economic growth is an unlawful expansion of its statutory authority. Moreover, the purpose for the adjustment for economic growth does not exist during an economic downturn. As the Commission noted in its Order, "We expect that any baseline adjustments made to account for economic growth typically will be temporary, and will address circumstances in which unanticipated increases in the overall rate of growth *have made full compliance infeasible.*" (Order, p. 18)(Italics added.) Presumably in an economic downturn, compliance is still feasible, thus requiring no adjustment to the baseline. And finally, a requirement that increases the baseline during an economic downturn would have the effect of requiring the EDU to over-comply with its otherwise required benchmarks, thus increasing costs to customers at a time when they can least afford them. It is absurd to think that the General Assembly intended such a result.

In light of the foregoing, requirements to increase the baseline during economic downturns is unreasonable, unlawful and contrary to public policy. Accordingly this requirement should be eliminated.

5. **The Commission unreasonably and unlawfully exceeded its statutory authority by requiring the use of a three year rolling average that does not factor out a compounding effect that increases compliance requirements beyond those contemplated in the law.**

On page 16 of its Order, the Commission addressed another issue dealing with the calculation of the baseline, finding "that the use of a 'rolling [three year] average' when determining the statutory baselines is the most reasonable interpretation, consistent with the goals of SB 221...." During the comment period, numerous parties submitted comments and reply comments addressing the issue of whether the use of a rolling average is appropriate. As the Commission noted in its Order (at page 16):

> The electric utilities argue that the use of a rolling average would result in a compounding effect which would, over time, make the targets impossible to achieve. DP&L provides an example that indicated that by year 2025, the effective savings requirement is closer to 39 percent rather than the 22.2 percent required by law. In the alternative, DP&L argues that the Commission could use a rolling three year period but make adjustments to eliminate the compounding effect.

Although the Commission acknowledged the above arguments, it never discussed their impact on the required level of compliance or any reason why these meritorious arguments should be ignored, instead simply finding that the use of a three year rolling average "is the most reasonable interpretation, consistent with the goals of S.B. 221." There is absolutely no basis for this conclusion especially if such an interpretation results in an overall increase in the compliance requirements set forth in R.C. 4928.66(A)(1)(a) of approximately 17 percentage points (which represents a 76% increase over the 222% benchmark) as explained in DP&L's comments.[5] Accordingly, the Companies ask the Commission to clarify that the rolling three year average is to be calculated adjusting for any compounding effects.

[5] Rather than reiterate these comments and calculations, the Companies incorporate herein by reference pages 2-4 of DP&L's initial comments.

Alternatively, if it is the Commission's intent to ignore such compounding effects, then the Companies seek rehearing on the basis that the Commission has exceeded its statutory authority and has unlawfully modified S.B. 221 to expand the benchmark requirements beyond those intended by the legislature.

6. The Companies request clarification on the requirements for compliance with the demand reduction benchmarks set forth in R.C. 4928.66(A)(1)(b).

Revised Code Section 4928.66(A)(1)(b) requires a utility, starting in 2009, to "implement peak demand reduction programs designed to achieve a one per cent reduction in peak demand in 2009 and an additional seventy-five hundredths of one per cent reduction each year through 2018." For purposes of at least 2009 compliance, the Companies intend to utilize their newly authorized optional ("OLR") and economic ("ELR") load response programs. In both instances, customers served under the programs must reduce or interrupt their load under specified conditions. The ability to interrupt this load consistent with their tariff provisions means that the Companies need not provide specified MISO designated company resources for that load.

The Rules are silent on what EDUs must demonstrate in order to be considered as in compliance with the peak reduction mandates set forth in R.C. 4928.66(A)(1)(b). However, in *Columbus Southern Power Company, et al.* Docket No. 08-917-EL-SSO ("AEP Case"), the Commission stated "that interruptible load should not be counted in the Companies' determination of its [energy efficiency and peak demand reduction] compliance requirements unless and until the load is actually interrupted." (Id. Opinion and Order (Mar. 18, 2009) at p. 46.)

If the Commission intends to apply the plain meaning of the law and simply require EDUs to demonstrate the ability to reduce peak demand to requisite levels, then the Companies ask that the Commission clarify this requirement so as to allow EDUs to properly plan their compliance strategy for the quickly approaching summer season. If, on the other hand, the Commission intends to apply the requirements as set forth in the AEP Case, *supra*, then the Companies seek rehearing on the grounds that such a requirement is contrary to the plain meaning of R.C. 4928.66(A)(1)(b) as well as public policy.

As the Commission recognized in the case of *WorldCom, et al. v. Toledo*, Case No. 02-3210-EL-PWC (Opinion & Order, May 14, 2003), in a statutory interpretation case, "determining the intention of the legislative branch [is] of primary importance." *Id.* at 12. The Commission in *WorldCom*, relying on a litany of Ohio Supreme Court cases, concluded that if this intent "is discernable from the face of the statute, using the words either based on their ordinary meaning or based on their technical or statutory meaning, [the Commission] need go no farther." *Id.* at 11.

In this instance, the meaning is clear. The law requires only that an EDU demonstrate that its program "is designed to achieve" the necessary results. If the legislature intended for the utility to demonstrate actual peak reductions under R.C. 4928.66(A)(1)(b), the requirement would not be addressed as a design issue, but rather would be a demonstrable mandate. This is further supported by comparing R.C. 4928.66(A)(1)(a) with R.C. 4928.66(A)(1)(b). In subparagraph (a), which addresses energy efficiency requirements, the statute expressly states that the EDU must "implement energy efficiency programs *that achieve* energy savings equivalent to at least three-tenths of one percent.... (emphasis added), while in subparagraph (b), which addresses peak demand reductions, the legislature only requires an EDU to implement "peak demand reduction programs *designed to achieve* a one per cent reduction...

(emphasis added.) Clearly the legislature made a distinction between the need to demonstrate actual results and the need to design programs that could achieve, if necessary, the desired results. Based on basic rules of statutory interpretation, which requires the Commission to "breathe sense and meaning into [the statute]; [ ] give effect to all of its terms and provisions; and [ ] *render it compatible with other and related enactments whenever and wherever possible*" *Commonwealth Loan Co. v. Downtown Lincoln Mercury Co.* (1st Dist. 1964), 4 Ohio App. 2d 4, 6 (emphasis added), R.C. 4928.66(A)(1)(b) must be interpreted to only require an EDU to demonstrate that it has designed programs with the ability to achieve the statutory peak reduction targets. This is further supported by another statutory interpretation principle that requires the Commission to presume that the General Assembly would not enact a law that produces an unreasonable or absurd result. *State ex rel. Webb v. Bliss,* 99 Ohio St. 3d 166, 170, 2003-Ohio-3049, ¶ 22. Requiring peak load reductions while capacity is available on the grid to meet customer demand serves no useful purpose and will unnecessarily disrupt operations for major businesses and/or other customers participating in EDU sponsored peak reduction programs.[6] Such a result could not have been what the General Assembly had in mind when enacting the demand reduction requirements.

In light of the foregoing, and given that the summer season is quickly approaching, the Companies respectfully ask the Commission to clarify that, for purposes of complying with R.C. 4928.66(A)(1)(b), an EDU need only demonstrate that it has programs in place that could, if necessary, reduce peak load to the mandated levels.

[6] The Companies' ability to interrupt or reduce load by tariff lowers the required capacity that they must acquire to serve the resultant lower customer demand and, as a result, produces savings to all customers. There is no incremental benefit resulting from actual interruptions that the Companies do not already have simply by having the ability to interrupt.

B. New Chapter 4901:1-40, "Alternative Energy Portfolio Standard."

7. The Order unreasonably and unlawfully fails to recognize the deliverability of energy transmitted through regional transmission organizations when defining energy "deliverable into this state" as used in Rules 4901:1-40-01(I) and 4901:1-40-04(D).

Rather than relying on practical and rational bases to specify how renewable energy resources can be "shown to be deliverable into this state" as provided by R.C. 4928.64(B)(3), the Commission's Order instead places an unreasonable and unnecessary burden on EDUs to justify the obvious. Except for electricity originating in Ohio or an adjoining state, Rule 4901:1-40-01(I) requires a "demonstration" that electricity could be physically delivered to Ohio. The Commission's Order explains that EDUs will be required to prepare and file a "demonstration of delivery via a power flow study and/or deliverability study" even where the energy is transmitted through a regional transmission organization ("RTO"). Order, p. 28. However, a power flow or deliverability study for energy transmitted through RTOs is redundant, will provide no additional value and will only further burden EDUs, their customers, and renewable resource developers.

In order for a potential new generating facility to participate in either the MISO or the PJM Interconnect, the potential generator owner must complete an extensive process of application termed under each respective RTO Open Access Transmission Tariff ("OATT") as the "Generation Interconnection Process". In these processes, the potential generator owner describes the asset to be constructed and, the RTO in turn takes the submitted information and conducts both a "Feasibility Study" and an "Impact Study." The studies are used to evaluate the potential impacts of the insertion of the generator into the transmission grid. Items such as impacts to congestion, short circuit capability and load flow analysis are inspected and evaluated. If the addition of the potential generator passes the criteria the studies are designed to evaluate, the generator is deemed to be approved to begin construction, and upon completion, produce energy deliverable to the entire RTO. Thus, to the extent an RTO transmits electricity into Ohio, as both PJM and MISO do, the analysis purportedly required by the Order is redundant and unreasonably burdensome. Such a process will only lead to higher costs and greater inefficiencies related to incorporating renewable energy into the State's supply. The requirement of conducting a redundant power flow study also may unnecessarily limit the number of potential alternative energy suppliers and reduce price competition for such energy.

Under the Commission's proposed Rules, in order for energy from a renewable resource to be deemed deliverable to the State, the resource must meet additional hurdles of deliverability imposed by the State which infer that unless there is a directly connected physical transmission line from the resource to the border and into Ohio, then that resource will be deemed to be undeliverable to Ohio. This concept is contrary to the principles of "Open Access Transmission" and the market concepts providing all generators access to the same market and participation for the purposes of serving load.

Thus, the Commission should grant rehearing and find that a power flow or deliverability study for renewable energy resources is unnecessary if sourced from MISO or PJM or, as already provided, from a state adjoining Ohio.

8. The Commission unreasonably and unlawfully exceeded its statutory authority and imposed standards not supported by law by establishing a definition of "double counting" in Rule 4901:1-40-01(M) that unreasonably precludes the use of a single resource to meet multiple energy related benchmarks set forth in S.B. 221.

The Commission justifies a prohibition of "double-counting" a single resource to meet both energy efficiency requirements under R.C. 4928.66 and renewable energy requirements under R.C. 4928.64 in the Rules based only on its determination that it is "appropriate." (Order, p. 29.) This unsupported conclusion is not surprising given that S.B. 221 provides no justification or authority for the Commission to turn to, nor is there any logical explanation for such a concept. The Order defines "double-counting," which is later precluded in various sections of Chapter 4901:1-40, as an EDUs' use of renewable energy, RECs, or energy efficiency savings to satisfy multiple requirements. *See* Rule 4901:1-40(M). Not only did the General Assembly fail to authorize such a prohibition, but to the extent EDUs are able to provide energy to their customers that qualifies as both efficient and renewable, this is exactly the type of resource that the General Assembly sought to promote in S.B. 221.

S.B. 221 includes goals for EDUs to incorporate different types of energy resources into their portfolios of electricity. For example, R.C. 4928.64 sets forth alternative and renewable energy requirements, and R.C. 4928.66 addresses energy efficiency requirements to help customers better manage their overall electricity usage. The State, EDUs, and their customers would only benefit from energy products that can simultaneously achieve multiple energy related goals. Rather than embracing these projects as cost effective solutions, the Commission created a framework that does the opposite.

The Commission is contorting the incentives put in place by the General Assembly and, as a result, the Order as it relates to this issue is unreasonable and unlawful.

9. The Commission unreasonably and unlawfully exceeded its statutory authority and imposed standards not supported by law by establishing a burdensome requirement in Rule 4901:1-40-03(C) for filing a 10-year compliance plan that will be highly speculative and provide no public benefit.

S.B. 221 anticipates that EDUs will submit certain annual compliance filings for the Commission's review. *See* R.C. 4928.64(C)(1); *see also* R.C. 4928.66(B), (C). The Commission's Order significantly exceeds the General Assembly's express mandate, and instead requires EDUs to make yet another annual filing – not to report on the EDUs' compliance with the statutory requirements as contemplated by S.B. 221, but to somehow project each EDU's plan for future compliance over the next 10 years. *See* Rule 4901:1-40-03(C). The Commission's Order appears to recognize the futility and purely speculative nature of such an exercise in that it notes that the plan is "nonbinding" and that EDUs' "[c]ompliance with the alternative energy portfolio standard requirements is expected to be dynamic." (Order, p. 32.) However, the Commission pointlessly maintains such a requirement anyway.

The 10-year plan will pose a significant burden on EDUs that far outweighs the acknowledged minimal value that the plans will provide. EDUs face significant challenges in achieving the near-term mandates of S.B. 221, in, among other things, adjusting their portfolios and tracking and assessing their usage and associated costs. The 10-year plan, therefore, is simply a distraction that will require EDUs and their customers to incur additional costs while providing little to no value. Indeed, the Commission is only inviting further acrimony by creating a process that will allow parties to complain that an EDU's speculation as to how it will meet advanced and renewable benchmarks ten years in the future is insufficiently detailed guesswork. The Order's requirement for a 10-year plan is unreasonable and unlawful.

10. The Commission unreasonably and unlawfully exceeded its statutory authority and imposed standards not supported by law by establishing a definition of "qualified resources" in Rule 4901:1-40-04(A)(8) that improperly: (a) limits the use of storage facilities to satisfy the statutory requirements; and (b) *imposes geographic and temporal limitations on eligible* RECs that are arbitrary and contrary to law.

a. The Order's definition of qualified resources" unreasonably and unlawfully limits the use of storage facilities.

S.B. 221 provides an explicit definition of storage technology that qualifies as an "alternative energy resource," which the Commission ignored. R.C. § 4928.64(A)(1)(c) defines such storage technology as technology "that allows a mercantile customer more flexibility to modify its demand or load and usage." Similarly, R.C. 4928.01(A)(35) includes within the definition of "alternative energy resource" a "storage facility that will promote the better utilization of a renewable energy that primarily generates off peak." These definitions reflect the General Assembly's understanding that a wide variety of storage technologies may allow EDUs to achieve S.B. 221's alternative energy goals. Unfortunately, the Commission distorted the General Assembly's workable definition for storage technology and, instead, placed unreasonably strict constraints on qualifying storage facilities.

Rule 4901:1-40-04(A)(8) defines qualifying storage facilities as *only* those facilities that meet two requirements:

> (a) The electricity used to pump the resource into a storage reserve must qualify as a renewable energy resource.

> (b) The amount of energy that may qualify from a storage facility is the amount of electricity dispatched from the storage facility and shall exclude the amount of energy required to initially pump the resource into the storage reservoir.

Neither of these requirements is found in S.B. 221, and they only serve to overly restrict the otherwise valuable resource that storage facilities represent and that the General Assembly appreciated. Storage facilities allow for more efficient utilization of renewable energy resources, such as wind energy, which may generate energy during off-peak times. Through storage technology, renewable resources generated off-peak can be saved and later released during on-peak times, thus increasing the efficiency of such renewable resources. Storage facilities, indeed, benefit EDUs, their customers, and renewable energy generators in promoting the cost-efficient use of renewable energy resources and the further development of renewable energy resources in areas that might not otherwise be sustainable. The Commission's unauthorized limits on storage facilities that satisfy as "qualified resources" only hamper the true value of storage facilities in achieving the goals of S.B. 221. The General Assembly specifically did not mandate such overly-restrictive constraints on qualifying storage facilities of the type the Commission erroneously applies in its Order. The Order is, therefore, both unreasonable and unlawful.

b. The Commission's Order imposes geographic and temporal limitations on eligible RECs that are arbitrary and contrary to law.

As set forth in the Order, Rule 4901:1-40-04(D)(6) provides that RECs used to satisfy the renewable energy resource benchmark "must be associated with electricity that was generated no earlier than July 31, 2008." The Commission also commented in the Order, but did not provide clarifying language in the Rules themselves, that RECs would be limited to those associated with electricity originating in Ohio or deliverable into Ohio as defined in Rule 4901:1-40-01(I). Both limitations on qualifying RECs are unreasonable and unlawful.

Statutory authority for REC usage is found in R.C. § 4928.65, which contains one and only one temporal limitation and one and only one geographic limitation on the use of RECs. The temporal limitation is clear – RECs may be used any time in the five calendar years following the date of their purchase or acquisition from any entity. The geographic limitation also is clear and narrow in scope – if credits are purchased from an owner or operator of a hydroelectric generating facility, such credits only count if the facility is located "within or bordering this state or within or bordering an adjoining state." When the General Assembly lists criteria to be applied or considered, the intent is that other criteria shall not be applied or considered – *expressio unius est exclusio alterius*. *Vincent v. Civil Service Comm'n*, 54 Ohio St. 3d 30, 33 (1990). Thus, except for these two limitations expressly set forth in R.C. § 4928.65, RECs qualify for compliance as renewable energy resource requirements.

The Order provides no statutory basis for the July 31, 2008 cutoff date other than the fact that July 31, 2008 is the effective date of S.B. 221. *See* Order, p. 35. Use of this cutoff date flies in the face of S.B. 221's goals of promoting the efficiency of electricity utilized in Ohio. Under the Commission's Rule, there is no incentive to utilize RECs generated prior to the July 2008 date and, thus, those RECs, including any that may have already purchased by an EDU, may be wasted. S.B. 221's effective date has no bearing on whether the RECs satisfy the statute's requirements and RECs generated prior to that date are no less cost- or energy-efficient than those generated after the July 2008 date. Instead, EDUs will be required to incur more costs and expend more resources in seeking only RECs that are generated after the artificial deadline. The Order's use of an arbitrary date for eligibility of RECs is unlawful and unreasonable.

Likewise, the Commission's "interpretation" in the Order that "the use of RECs be limited to those associated with electricity originating in Ohio, or deliverable into this state, as defined in Rule 01(I)" also is unreasonable and unlawful. *See* Order, p. 34. Not only has the General Assembly not authorized such a limitation on REC eligibility, but the General Assembly has expressly provided a specific, limited geographic limitation with which the Commission's interpretation conflicts. Because the General Assembly has determined that all RECs are eligible for the purpose of complying with the renewable energy and solar energy resource requirements, except those RECs related to a hydroelectric generating facility that is not within or bordering this state or within or bordering an adjoining state, the Commission lacks the authority to impose its own geographic limitation on REC eligibility.

The Commission should grant rehearing to eliminate these two limitations on REC eligibility that are contrary to law.

11. In adopting Rule 4901:1-40-07, the Commission unreasonably and unlawfully exceeded its statutory authority and imposed standards not supported by law by: (a) establishing a cost cap that directly conflicts with R.C. 4928.64(C)(3); and (b) reserving for the Commission the authority to impose a "catch up" upon application of the cost cap that is not authorized by R.C. 4928.64.

a. <u>The Order adopts a cost cap that directly conflicts with Ohio law.</u>

The Commission's Rule eliminates customer cost protections provided by the General Assembly. Senate Bill 221 recognized the potentially adverse economic impact of the advanced and renewable energy benchmarks imposed by statute and established a reasonable ceiling for the additional costs of those requirements. R.C. § 4928.64(C)(3) mandates that EDUs be excused from complying with the statute's alternative energy portfolio requirements if the costs of complying with those standards exceeds by 3% or more the costs that EDUs and their customers would otherwise incur to acquire the requisite energy. However, the Commission failed to follow the explicit statutory terms of the General Assembly's cost cap and, instead, set up an unlawful and wholly unreasonable cost cap of its own that looks at the cost impact on an EDU's entire portfolio instead of the impact, as required by statute, on the supply acquired to meet the benchmark. The Commission should grant rehearing to conform Rule 4901:1-40-07(C) to R.C. § 4928.64(C)(3).

The numerator and denominator used to calculate whether the costs rise above the 3% cap are critical to ensuring that it serves its protective goal. As described in R.C. 4928.64(C)(3), the numerator is the "reasonably expected cost of *that* compliance," referencing the earlier stated compliance "with a benchmark under division (B)(1) or (2)." The denominator is the "reasonably expected cost of otherwise producing or acquiring the *requisite* electricity." *Id.* (emphasis added). The cost of acquiring the "requisite" electricity can only mean the cost of acquiring the same amount of electricity that EDUs must reserve for advanced or renewable energy. This is the only way to establish an apples-to-apples comparison and allow EDUs and the Commission to assess the impact of the costs of compliance. Thus, for example, assuming an EDU's total standard service offer portfolio is 50 million MWh annually and applying the renewable energy benchmark for 2011 of 1%, the test compares the EDU's cost of acquiring 500,000 MWh of renewable energy to its expected cost of acquiring 500,000 MWh of energy from other sources. If the cost of renewable energy exceeds the cost of the energy from other sources by more than 3%, then the cap applies and the EDU's customers should not be forced to pay the higher price for renewable energy resources.

In contrast, the Commission veered from S.B. 221's mandated baseline and, in doing so, set up a meaningless comparison. The Commission's Order purports to implement a cost cap by comparing the costs of compliance to an EDU's overall cost of producing or acquiring its entire SSO load. *See* Order, p. 37; Rule 4901:1-40-07(C). Under this erroneous construction and using 2011 alternative energy targets, the total costs of acquiring an entire Standard Service Offer ("SSO") portfolio that includes 1% renewable energy and 99% least-cost energy would be compared to the total costs of acquiring 100% least-cost energy for the entire SSO portfolio. R.C. § 4928.64(B)(2). It is hard to imagine that the impact of such a small percentage of alternative energy cost would ever exceed by 3% the costs of 100% of an EDU's load.[7] Thus, the cost cap would likely never provide any protection against excessive costs for consumers that the General Assembly included in S.B. 221.

The Commission makes clear in the Order that it believes the 3% cap actually selected by the General Assembly could "prematurely" trigger the cap – meaning, the statutory cap could apply before the Commission believes it should apply. Yet the Commission lacks the authority to second-guess the carefully crafted language included in S.B. 221. The General Assembly selected a cap that looks directly at the difference

[7] Using a 50 million MWh portfolio and the 1% benchmark for 2011, the difference between the statutory formula and the Commission's formula is made obvious when we assume an extreme example using a standard or least-cost energy price of $62/MWh and an alternative energy price of $100/MWh. Using the R.C. 4928.64(C)(3) formula, the EDU's reasonably expected cost of that compliance (500,000 x $100) exceeds its reasonably expected cost of otherwise acquiring the requisite electricity (500,000 x $62) by 36%. Using the Commission's unlawful formula set forth in Rule 4901:1-40-07, the EDU's expected cost of its SSO load ((49.5 million x $62) + (500,000 x $100)) exceeds its expected cost of otherwise acquiring its SSO load (50 million x $62) *by only 0.6%.* For the cost of alternative energy to exceed the 3% cap using the Commission's formula, the price of alternative energy would have to approximate $248/MWh. It was never the General Assembly's intent to burden consumers with alternative energy costing ***up to 4 times more*** than the market cost of energy.

between the cost of acquiring a certain percentage of renewable energy and the expected cost of acquiring the same percentage of electricity from another source. Nowhere in R.C. 4928.64(C)(3) is there language that authorizes the Commission to fold these costs into the overall cost of acquiring an SSO portfolio. Thus, the Commission should grant rehearing to make Rule 4901:1-40-07(C) consistent with R.C. 4928.64(C)(3).

b. <u>The Order applies a catch-up penalty in circumstances the General Assembly did not find were appropriate for such a penalty.</u>

While the Rules are silent, the Commission's Order purports to reserve the right, "on a case-by-case basis," to require that EDUs increase their level of compliance in future years by any amount of under-compliance due to the 3% cost cap. (Order, p. 38.) This essentially imposes a new form of penalty on the utility that was neither contemplated in, nor permitted by, Ohio law. However, not only is the statute also silent on this point, S.B. 221 explicitly applies a penalty (in the form of compliance payments) only in the event of *force majeure*. *See* R.C. § 4928.64(C)(1), (2). If the General Assembly intended to apply a penalty when an EDU's costs triggered the cost cap, it would have so stated. The Commission has again unlawfully imposed additional criteria beyond those set out by the General Assembly, thus imposing criteria which are inconsistent with that expressed in S.B. 221 and expanding its scope. The Commission is not authorized to reserve a right not granted it by statute. As such, the Commission's Order is unreasonable and unlawful.

12. The Rules related to alternative energy resources unreasonably and unlawfully fail to reflect the amendments to R.C. 4928.64 and R.C. 4928.65, as signed into law by the Governor on April 1, 2009.

On April 1, 2009 as part of Am. Sub. H.B. 2 ("H.B. 2"), certain amendments to R.C. 4928.64 and 4928.65 were enacted that affected the definition of alternative energy resources and the amount of renewable energy credits derived from certain generating facilities. These amendments are not reflected in the Commission's Rules. These amendments go into effect on July 1, 2009. Therefore, they will be in effect before the Commission's Rules in this proceeding go into effect following the JCARR process. Such rules must be modified so as to give clear effect to the General Assembly's amendments to these statutory provisions.

The amendment in H.B. 2 to the definition of alternative energy resources requires that adopted Rule 4901:1-40-04 be modified. The specific amendment to R.C. 4928.64(A)(1) is as follows:

> **Sec. 4928.64.** (A)(1) As used in sections 4928.64 and 4928.65 of the Revised Code, "alternative energy resource" means an advanced energy resource or renewable energy resource, as defined in section 4928.01 of the Revised Code that has a placed-in-service date of January 1, 1998, or after; a renewable energy resource created on or after January 1, 1998, by the modification or retrofit of any facility placed in service prior to January 1, 1998; or a mercantile customer-sited ~~advance~~ advanced energy resource or renewable energy resource, whether new or existing, that the mercantile customer commits for integration into the electric distribution utility's demand-response, energy efficiency, or peak demand reduction programs as provided under division ~~(B)~~(A)(2)~~(b)~~(c) of section 4928.66 of the Revised Code, including, but not limited to, any of the following:

Therefore, adopted Rule 4901:1-40-04(A) must be modified by inserting after the phrase "or after," the following: "or if they were created on or after January 1, 1998, by the modification or retrofit of any facility placed in service prior to January 1, 1998," so as to bring such rule into compliance with the newly amended statute. Without this change, the rules will conflict with R.C. 4928.64(A)(1).

The second amendment in H.B. 2 that affects the Commission's Rules in this proceeding addressed how renewable energy credits will be derived from generating facilities that meet certain criteria. Specifically, the following underlined language was added to R.C. 4928.65:

The public utilities commission shall adopt rules specifying that one unit of credit shall equal one megawatt hour of electricity derived from renewable energy resources, except that, for a generating facility of seventy-five megawatts or greater that is situated within this state and has committed by December 31, 2009, to modify or retrofit its generating unit or units to enable the facility to generate principally from biomass energy by June 30, 2013, each megawatt hour of electricity generated principally from that biomass energy shall equal, in units of credit, the product obtained by multiplying the actual percentage of biomass feedstock heat input used to generate such megawatt hour by the quotient obtained by dividing the then existing unit dollar amount used to determine a renewable energy compliance payment as provided under division (C)(2)(b) of section 4928.64 of the Revised Code by the then existing market value of one renewable energy credit, but such megawatt hour shall not equal less than one unit of credit.

This underlined language should be added to the definition of Renewable Energy Credit in adopted Rule 4901:1-40-01(CC) so as to conform the definition with the newly-amended statutory language. Without this modification, the Commission's rules would be inconsistent with and contradict R.C. 4928.65.

C. Chapter 4901:5 - Long Term Forecast Report

13. In adopting Rule 4901:5-5-06, the Commission unreasonably and unlawfully exceeded its statutory authority and imposed requirements not supported by law and that conflict with R.C. 4935.04 by mandating that electric utilities must file an annual integrated resource plan as part of a long term forecast report.

As part of its changes to the long term forecast report ("LTFR") rules, the Commission elected to reinsert in wholesale fashion proposed Rule 4901:5-5-06, which requires the filing of an integrated resource plan ("IRP") by electric utilities. Such an insertion was purportedly to comply with a mandate of S.B. 221. (Order, pp. 4, 41.) Senate Bill 221 contains no such mandate. In fact, S.B. 221 made no amendments at all to Ohio Revised Code Chapter 4935 -- the chapter related to long term forecast reports -- let alone the type of significant changes that would support the reinstitution of a required IRP process. The Commission's authority to implement changes to the LTFR rules stems from that granted to it by R.C. 4935.04. Neither S.B. 221 nor R.C. 4935.04 granted the

Commission the authority to reinstate IRP rules. As a creature of statute, the Commission derives its authority solely from that given by the General Assembly. *See Tongren v. Pub. Util. Comm., supra* at 88 *Columbus Southern Power Co., supra,* at 537. A review of Chapter 4935 demonstrates that no such power was conferred upon the Commission and therefore, it was unlawful for the Commission to adopt Rule 4901:5-5-06.

By way of background, IRP rules were in place prior to the enactment of Am. Sub. S.B. 3 ("S.B.3") in 1999. Senate Bill 3 expressly eliminated those portions of Chapter 4935 dealing with resource planning and generation. Attached as Exhibit 1 is an excerpt of S.B. 3 showing such changes to Chapter 4935. As indicated on attached Exhibit 1, the then existing IRP rules were repealed. Senate Bill 3 specifically deleted the language "An electric generating plant and associated facilities designed for, or capable of, operation at a capacity of fifty megawatts or more" from the definition of "major utility facility" in R.C. 4935.04(A)(1)(a). Nothing in S.B. 221 reinstated that provision or anything similar to it. Similarly, S.B. 3 deleted references to the siting of generation plants, anticipated generating capacity, and the addition or cancellation of generating facilities throughout R.C. 4935.04. And probably most telling was S.B. 3's modification to R.C. 4935.04 wherein the Commission's LTFR rulemaking authority was changed from establishing criteria for evaluating the long-term forecast needs for "*electric power*", to evaluating the needs for "*electric transmission service*". The Commission's rulemaking authority as it relates to generation facilities and resources, was expressly deleted by S.B. 3. And, as previously discussed, the Commission is precluded from reinstating such authority through its rulemaking process. Rule 4901:5-5-06 should be deleted in its entirety from the Commission's adopted rules.

No authority to implement an annual IRP filing for all electric utilities may be found in S.B. 221. As stated, S.B. 221 made no changes to Chapter 4935. Equally, S.B. 221 did not authorize the Commission to promulgate IRP rules. In fact, While it is true that S.B. 221 did impose alternative energy and energy efficiency requirements upon electric utilities, it also specified the amount and timing of the implementation of those requirements. No annual IRP filing can change those statutory requirements, and no support may be found in those statutes for the Commission's adoption of IRP rules. Further, meeting those requirements is the subject of two full chapters of new rules also a part of this rulemaking proceeding, Chapters 4901:1-39 and 4901:1-40. In addition to being unlawful and unreasonable, an IRP isn't needed or warranted.

There is no support for the Commission's position that S.B. 221 mandates the reinstatement of the preexisting IRP rules. To the contrary, the reinstatement of such rules well exceeds any authority the Commission may have been granted under S.B. 221, and directly flies in the face of the 1999 changes made by the General Assembly to Chapter 4935 as part of S.B. 3. As a result, the Commission's Order establishing the rules in 4901:5-5-06 is unreasonable and unlawful.

14. Rule 4901:1-39-07(A) unreasonably and unlawfully ties recovery of properly incurred costs to the approval of an EDU's portfolio plan.

Rule 4901:1-39-07(A) allows an EDU to file with its proposed program portfolio plan a request for recovery of an approved rate adjustment mechanism. However, under the Rule, such a mechanism cannot become effective until after the EDU's portfolio plan is approved. Inasmuch as the Companies already have in place such a recovery mechanism rider already approved by this Commission in the Companies' Electric Security Plan filing (Case No. 08-935-EL-SSO), there is no valid reason to require the

Companies to wait until its portfolio plan is approved. Not only must any costs sought to be recovered through this rider pass scrutiny at the time a request for recovery is filed, but the rider is subject to reconciliation with any over-collection being subject to carrying costs. Therefore such a delay in recovery is not necessary.[8] In light of the foregoing, it is unreasonable to create an unnecessary regulatory lag that postpones recovery of costs properly incurred by the Companies. Moreover it is inconsistent with the intent underlying the creation of the rider already approved by the Commission. Accordingly the prerequisite of plan approval before recovery should be removed from the Rules.

15. It is unreasonable and unlawful for the Commission to establish a process that places the EDU at risk of penalties for non-compliance in 2009 when the Commission has yet to provide final rules as guidance for such compliance as of the date of this filing.

Pursuant to R.C. 4928.66, the Companies must meet the 2009 energy efficiency and demand reduction targets set forth therein. The Commission was directed to issue rules related to such targets. Based on the issues raised in this Application for Rehearing, the Companies still have no binding guidance as to compliance requirements. Moreover, Pursuant to Rule 4901:1-39-05(C), the Companies' status report on 2009 compliance is not due until April 15, 2010. Clearly given the concerns raised herein, the Companies are reluctant to proceed without pre-approval on its 2009 compliance plans. At a minimum to avoid the violation of the Companies' due process rights, the Rules should include a pre-approval process, at least for the 2009 compliance period, especially given the fact that as the Rules currently read, recovery of costs is not permitted until the Companies first portfolio plan is approved.

[8] Given that there is no requirement placed on the Commission to rule on the filing within a specified time period, the regulatory lag in recovery could create unnecessary significant cash flow issues.

16. The Commission unreasonably and unlawfully created the definition of "substantial change" in Rule 4901:5-1-01(L) that is inconsistent with that included in the statutory definition for the same term as set forth in R.C. 4935.04(D)(3)(c).

In Rule 4901:5-1-01(L) the Commission defines the term "substantial change" as including by not limited to:

(1) A change in forecasted peak loads or energy delivery over the forecast period of greater than an average of one-half of one percent per year as calculated in rule 4905:5-3-03 of the Administrative Code.

(2) The addition of a generating facility or facilities in an electric utility's supply plans.

(3) Demonstration of good cause to the commission by an interested party.

Revised Code Section 4935.04(D)(3)(c), on the other hand does not include subpart 2 of the above definition, thus creating a natural inconsistency in how it is to be determined if a substantial change has occurred. Inasmuch as Rule 4901:5-1-04 requires an EDU to provide notice of a substantial change, it is imperative that the rule and the statute are consistent. The Commission, as an administrative agency, can only enact Rules consistent with statutes. *Kelly v. Accountancy Board of Ohio*, 88 Ohio App.3d 453, 458 (1993); *Athens Home Telephone Co. v. Peck*, 158 Ohio St. 557, 574 (1953). Therefore, Rule 4901:5-1-01(L) should be modified to be consistent with the statutory definition of the same term as set forth in R.C. 4935.04(D)(3)(c).

17. The Companies seek clarification on the use of the word "Plan" in Rule 4901:5-1-01(M), believing that the word should be "Plant."

18. The Companies seek clarification on the reference to Rule 4901:1-39-09 in Rule 4901:1-39-07(A)(2), believing that such reference should be to Rule 4901:1-39-08.

19. The Companies seek clarification on the reference to Rule 4901:1-39-08 included in Rules 4901:1-39-08(B), believing that such reference should be to Rule 4901:1-39-07.

CONCLUSION

Throughout the Rules the Commission has substituted its judgment for that of the General Assembly, in essence, unlawfully amending S.B. 221 through additions and limitations set forth in the Rules that were not contemplated by the legislature. In so doing, the Commission has burdened all customers with excessive costs, thus violating a major tenet of S.B. 221 to provide reasonably priced electric service.

The significant goals of the energy efficiency, peak demand reduction and alternative energy mandates of S.B. 221 arise from extensive discussions by the General Assembly and interested parties. The language of S.B. 221 was carefully crafted to further those goals and express the General Assembly's intentions for EDUs as they strive to achieve the goals. Therefore, the Commission's rejection of its defined authority and the General Assembly's intent cannot be sustained. The Commission's Order has unlawfully and unreasonably exceeded and contradicted its authority under S.B. 221 in a number of respects, as set forth above. The Companies, thus, request rehearing in order to insure that the Commission's rules comply with the express language of S.B. 221 and the General Assembly's intent in passing that legislation.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Copies of the foregoing *Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Rehearing* and the *Memorandum in Support* thereof were served by first class United States Mail, postage prepaid (with copies provided electronically), to the persons on the attached Service List on this 15th day of May, 2009.[1]

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Kathy J. Kolich / JTS

Kathy J. Kolich

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Exhibit 1

AN ACT

Amended Substitute Senate Bill No. 3
123rd General Assembly*
of Ohio

**Restructure Electric Industry-
Permit Competition**

(2) *Assessments to assist in the support of the operations of the PUCO and the office of the consumers' counsel that have been in effect since 1912 and 1977, respectively."*

Nothing in this section shall be construed to mean ~~either~~ that an electric ~~light~~ DISTRIBUTION company ~~operated not for profit or one that is owned or operated by a municipal corporation is subject to this section or that an electric light company~~ subject to this section may not cause such appearance or distribute such statement on a more frequent basis.

Sec. 4933.81. As used in sections 4933.81 to 4933.90 of the Revised Code:

(A) "Electric supplier" means any electric light company as defined in section 4905.03 of the Revised Code, including electric light companies organized as nonprofit corporations, but not including a municipal ~~corporation~~ CORPORATIONS or other ~~unit~~ UNITS of local government that ~~provides~~ PROVIDE electric service.

(B) "Adequate facilities" means distribution lines or facilities having sufficient capacity to meet the maximum estimated electric service requirements of its existing customers and of any new customer occurring during the year following the commencement of permanent electric service, and to assure all such customers of reasonable continuity and quality of service. Distribution facilities and lines of an electric supplier shall be considered "adequate facilities" if such supplier offers to undertake to make its distribution facilities and lines meet such service requirements and ~~can~~, *in the determination of the public utilities commission*, CAN do so within a reasonable time.

(C) "Distribution line" means any electric line ~~having a design voltage below thirty-five thousand volts phase to phase which~~ THAT is being or has been used primarily to provide electric service directly to electric load centers by the owner of such line.

(D) "Existing distribution line" means any distribution line of an electric supplier which was in existence on January 1, 1977, or under ~~construction~~ CONSTRUCTION *on* ~~such~~ THAT date.

(E) "Electric load center" means all the electric-consuming facilities of any type or character owned, occupied, controlled, or used by a person at a single location, which facilities have been, are, or will be connected to and served at a metered point of delivery and to which electric service has been, is, or will be rendered.

(F) "Electric service" means retail electric service furnished to an electric load center for ultimate consumption ~~and does not include~~, BUT EXCLUDES *furnishing electric power or energy at wholesale for resale.* IN THE CASE OF A FOR-PROFIT ELECTRIC SUPPLIER AND BEGINNING ON THE STARTING DATE OF COMPETITIVE RETAIL ELECTRIC SERVICE AS DEFINED IN SECTION 4928.01 OF THE REVISED CODE, "ELECTRIC SERVICE" ALSO EXCLUDES A COMPETITIVE RETAIL ELECTRIC SERVICE. IN THE CASE OF A NOT-FOR-PROFIT ELECTRIC SUPPLIER AND BEGINNING ON THAT STARTING DATE, "ELECTRIC SERVICE" ALSO EXCLUDES ANY SERVICE COMPONENT OF COMPETITIVE RE-

TAIL ELECTRIC SERVICE THAT IS SPECIFIED IN AN IRREVOCABLE FILING THE ELECTRIC SUPPLIER MAKES WITH THE PUBLIC UTILITIES COMMISSION FOR INFORMATIONAL PURPOSES ONLY TO ELIMINATE PERMANENTLY ITS CERTIFIED TERRITORY UNDER SECTIONS 4933.81 TO 4933.90 OF THE REVISED CODE AS TO THAT SERVICE COMPONENT. THE FILING SHALL SPECIFY THE DATE ON WHICH SUCH TERRITORY IS SO ELIMINATED. NOTWITHSTANDING DIVISION (B) OF SECTION 4928.01 OF THE REVISED CODE, SUCH A SERVICE COMPONENT MAY INCLUDE RETAIL ANCILLARY, *METERING*, OR BILLING AND COLLECTION SERVICE IRRESPECTIVE OF WHETHER THAT SERVICE COMPONENT HAS OR HAS NOT BEEN DECLARED COMPETITIVE UNDER SECTION 4928.04 OF THE REVISED CODE. UPON RECEIPT OF THE FILING BY THE COMMISSION, THE *NOT-FOR-PROFIT* ELECTRIC SUPPLIER'S CERTIFIED TERRITORY SHALL BE ELIMINATED PERMANENTLY AS TO THE SERVICE COMPONENT SPECIFIED IN THE FILING AS OF THE DATE SPECIFIED IN THE FILING. AS USED IN THIS DIVISION, "COMPETITIVE RETAIL ELECTRIC SERVICE" AND "RETAIL ELECTRIC SERVICE" HAVE THE SAME MEANINGS AS IN SECTION 4928.01 OF THE REVISED CODE.

(G) "Certified territory" means a geographical area the boundaries of which have been established pursuant to sections 4933.81 to 4933.90 of the Revised Code within which an electric supplier is authorized and required to provide electric service.

(H) "Other unit of local government" means any governmental unit or body that may come into existence after ~~the effective date of this section~~ JULY 12, 1978, with powers and authority similar to those of a municipal corporation, or ~~which~~ THAT is created to replace or exercise the relevant powers of any one or more municipal corporations.

Sec. 4935.03. (A) The public utilities commission shall *adopt*, and may amend or rescind, rules in accordance with section 111.15 of the Revised Code, with the approval of the governor, defining various foreseen types and levels of energy emergency conditions for critical shortages or interruptions in the supply of electric power, natural gas, coal, or individual petroleum fuels and specifying appropriate measures to be taken at each level or for each type of energy emergency as necessary to protect the public health or safety or prevent unnecessary or avoidable damage to property. The rules may prescribe *different* measures for each different type or level of declared energy emergency, and for any type or level shall empower the governor to:

(1) Restrict the energy consumption of state and local government offices and industrial and commercial establishments;

(2) Restrict or curtail public or private transportation or require or encourage the use of car pools or mass transit systems;

(3) Order, during a declared energy emergency, any electric light, *natural gas or gas, or pipeline company;* ANY SUPPLIER SUBJECT TO CERTIFICATION UNDER SECTION 4928.08 OF THE REVISED CODE; electric power or gas utility that is owned by a municipal corpora-

tion or not for profit; coal producer or supplier; ELECTRIC POWER PRODUCER OR MARKETER; or petroleum fuel producer, refiner, wholesale distributor, or retail dealer to sell electricity, gas, coal, or petroleum fuel in order to alleviate hardship, or if possible to acquire or produce emergency supplies to meet emergency needs;

(4) Order, during a declared energy emergency, other energy conservation or emergency energy production or distribution measures to be taken in order to alleviate hardship;

(5) Mobilize emergency management, national guard, law enforcement, or emergency medical services.

The rules shall be designed to protect the public health and safety and prevent unnecessary or avoidable damage to property. They shall encourage the equitable distribution of available electric power and fuel supplies among all geographic regions in the state.

(B) The governor may, after consultation with the chairman of the commission, declare an energy emergency by filing with the secretary of state a written declaration of an energy emergency at any time he finds that the health, safety, or welfare of the residents of this state or of one or more counties of this state is so imminently and substantially threatened by an energy shortage that immediate action of state government is necessary to prevent loss of life, protect the public health or safety, and prevent unnecessary or avoidable damage to property. The declaration shall state the counties, utility service areas, or fuel market areas affected, or its statewide effect, and what fuels or forms of energy are in critically short supply. An energy emergency goes into immediate effect upon filing and continues in effect for the period prescribed in the declaration, but not more than thirty days. At the end of any thirty-day or shorter energy emergency, the governor may issue another declaration extending the emergency. The general assembly may by concurrent resolution terminate any declaration of an energy emergency. The emergency is terminated at the time of filing of the concurrent resolution with the secretary of state. When an energy emergency is declared, the commission shall implement the measures which it determines are appropriate for the type and level of emergency in effect.

(C) Energy emergency orders issued by the governor pursuant to this section shall take effect immediately upon issuance, and the person to whom the order is directed shall initiate compliance measures immediately upon receiving the order. During an energy emergency the attorney general or the prosecuting attorney of the county where violation of a rule adopted or order issued under this section occurs may bring an action for immediate injunction or other appropriate relief to secure prompt compliance. The court may issue an ex parte temporary order without notice which shall enforce the prohibitions, restrictions, or actions that are necessary to secure compliance with the rule or order. Compliance with rules or orders issued under this section is a matter of statewide concern.

(D) During a declared energy emergency the governor may use the services, equipment, supplies, and facilities of existing departments, offices, and agencies of the state and of the political subdivisions thereof to the maximum extent practicable and necessary to meet the energy emer-

gency, and the officers and personnel of all such departments, offices, and agencies shall cooperate with and extend such services and facilities to the governor upon request.

(E) During an energy emergency declared under this section, no person shall violate any rule adopted or order issued under this section. Whoever violates this division is guilty of a minor misdemeanor on a first offense, and a misdemeanor of the first degree upon subsequent offenses or if the violation was purposely committed.

Sec. 4935.04. (A) As used in this chapter:

(1) "Major utility facility" means:

(a) ~~An electric generating plant and associated facilities designed for, or capable of, operation at a capacity of fifty megawatts or more;~~

~~(b)~~ An electric transmission line and associated facilities of a design capacity of one hundred twenty-five kilovolts or more;

~~(c)~~ (b) A gas or natural gas transmission line and associated facilities designed for, or capable of, transporting gas or natural gas at pressures in excess of one hundred twenty-five pounds per square inch.

"Major utility facility" does not include electric, gas, or natural gas distributing lines and gas or natural gas gathering lines and associated facilities as defined by the public utilities commission; facilities owned or operated by industrial firms, persons, or institutions that produce or transmit gas~~,~~ OR natural gas, or electricity primarily for their own use or as a byproduct of their operations; gas or natural gas transmission lines and associated facilities over which an agency of the United States has certificate jurisdiction; facilities owned or operated by a person furnishing gas or natural gas directly to fifteen thousand or fewer customers within this state.

(2) "Person" has the meaning set forth in section 4906.01 of the Revised Code.

(B) Each person owning or operating a gas or natural gas transmission line and associated facilities within this state over which an agency of the United States has certificate jurisdiction shall furnish to the commission a copy of the energy information filed by the person with that agency of the United States.

(C) Each person owning or operating a major utility facility within this state, or furnishing gas, natural gas, or electricity directly to more than fifteen thousand customers within this state annually shall furnish a report to the commission for its review. The report shall be termed the long-term forecast report and shall contain:

(1) A year-by-year, ten-year forecast of annual energy demand, peak load, reserves, and a general description of the resource plan to meet demand;

(2) A range of projected loads during the period;

(3) A description of major utility facilities planned to be added or taken out of service in the next ten years, including ~~prospective sites for generating plants and~~, to the extent the information is available, PROSPECTIVE SITES for transmission line locations;

(4) For gas and natural gas, a projection of anticipated supply, supply prices, and sources of supply over the forecast period;

(5) ~~For electricity, a range of projected loads and a projection of annual energy demand, anticipated generating capacity, and system seasonal peak demand for a twenty-year period;~~

~~(6)~~ A description of proposed changes in the transmission system planned for the next five years;

~~(7)~~ (6) A month-by-month forecast of both energy demand and peak load for electric utilities, and gas sendout for gas and natural gas utilities, for the next two years. The report shall describe the major utility facilities that, in the judgment of such person, will be required to supply system demands during the forecast period. The report from a gas or natural gas utility shall cover the ten- and five-year periods next succeeding the date of the report, and the report from an electric utility shall cover the twenty-, ten-, and five-year periods next succeeding the date of the report. Each report shall be made available to the public and furnished upon request to municipal corporations and governmental agencies charged with the duty of protecting the environment or of planning land use. The report shall be in such form and shall contain such information as may be prescribed by the commission.

Each person not owning or operating a major utility facility within this state and serving fifteen thousand or fewer gas~~,~~ OR natural gas, or electric customers within this state shall furnish such information as the commission ~~may require~~ REQUIRES.

(D) The commission shall:

(1) Review and comment on the reports filed under division (C) of this section, and make the information contained ~~therein~~ IN THE REPORTS readily available to the public and other interested government agencies;

(2) Compile and publish each year the ~~general locations of the proposed power plant sites and~~ general locations of proposed and existing transmission line routes within its jurisdiction as identified in the reports filed under division (C) of this section, identifying the general location of such sites and routes and the approximate year when construction is expected to commence, and to make such information readily available to the public, to each newspaper of daily or weekly circulation within the area affected by the proposed site and route, and to interested federal, state, and local agencies;

(3) Hold a public hearing:

(a) On the first long-term forecast report filed after January 11, 1983;

(b) At least once in every five years, on the latest report furnished by any person subject to this section;

(c) On the latest report furnished by any person subject to this section if the report contains a substantial change from the preceding report furnished by that person. "Substantial change" includes, but is not limited to:

(i) ~~The addition or cancellation of a generating facility of fifty megawatts or more in the report furnished pursuant to division (C) of this section;~~

~~(ii)~~ A change in forecasted peak loads or energy consumption over the forecast period of greater than an average of one-half of one per cent per year;

~~(iii)~~ (ii) Demonstration of good cause to the commission by an interested party.

The commission shall fix a time for the hearing, which shall be not later than ninety days after the report is filed, and publish notice of the date, time of day, and location of the hearing in a newspaper of general circulation in each county in which the person furnishing the report has or intends to locate a major utility facility and will provide service during the period covered by the report. The notice shall be published not less than fifteen nor more than thirty days before the hearing and shall state the matters to be considered.

Absent a showing of good cause, the commission shall not hold hearings under division (D)(3) of this section with respect to persons who, as the primary purpose of their business, furnish gas~~,~~ OR natural gas, or electricity directly to fifteen thousand or fewer customers within this state solely for direct consumption by those customers.

(4) Require such information from persons subject to its jurisdiction as necessary to assist in the conduct of hearings and any investigation or studies it may undertake;

(5) Conduct any studies or investigations that are necessary or appropriate to carry out its responsibilities under this section.

(E)(1) The scope of the hearing held under division (D)(3) of this section shall be limited to issues relating to forecasting. The power siting board, the office of consumers' counsel, and all other persons having an interest in the proceedings shall be afforded the opportunity to be heard and to be represented by counsel. The commission may adjourn the hearing from time to time.

(2) The hearing shall include, but not be limited to, a review of:

(a) The projected loads and energy requirements for each year of the period;

(b) The estimated installed capacity and supplies to meet the projected load requirements.

(F) Based upon the report furnished pursuant to division (C) of this section and the hearing record, the commission, within ninety days from the close of the record in the hearing, shall determine if:

(1) All information relating to current activities, facilities agreements, and published energy policies of the state has been completely and accurately represented;

(2) The load requirements are based on substantially accurate historical information and adequate methodology;

(3) The forecasting methods consider the relationships between price and energy consumption;

(4) The report identifies and projects reductions in energy demands due to energy conservation measures in the industrial, commercial, residential, transportation, and energy production sectors in the service area;

(5) Utility company forecasts of loads and resources are reasonable in relation to population growth estimates made by state and federal agencies, transportation, and economic development plans and forecasts, and make recommendations where possible for necessary and reasonable alternatives to meet forecasted electric power demand;

(6) The report considers plans for expansion of the regional power grid and the planned facilities of other utilities in the state;

(7) All assumptions made in the forecast are reasonable and adequately documented.

(G) The commission shall adopt rules under section 111.15 of the Revised Code to establish criteria for evaluating the long-term forecasts of needs for gas and electric ~~power~~ TRANSMISSION SERVICE, to conduct hearings held under this section, to establish reasonable fees to defray the direct cost of the hearings and the review process, and such other rules as are necessary and convenient to implement this section.

(H) The hearing record produced under this section and the determinations of the commission shall be introduced into evidence and shall be considered in determining the basis of need for power siting board deliberations under division (A)(1) of section 4906.10 of the Revised Code. The hearing record produced under this section shall be introduced into evidence and shall be considered by the public utilities commission in its initiation of programs, examinations, AND findings~~, investigations, and remedies~~ under section 4905.70 of the Revised Code, and shall be considered in ~~their~~ THE COMMISSION'S determinations with respect to the establishment of just and reasonable rates under section 4909.15 of the Revised Code and financing utility facilities and authorizing issuance of all securities under sections 4905.40, 4905.401, 4905.41, and 4905.42 of the Revised Code. The forecast findings also shall serve as the basis for all other energy planning and development activities of the state government where electric and gas data are required.

(I)(1) No court other than the supreme court shall have power to review, suspend, or delay any determination made by the commission under this section, or enjoin, restrain, or interfere with the commission in the performance of official duties. A writ of mandamus shall not be issued against the commission by any court other than the supreme court.

(2) A final determination made by the commission shall be reversed, vacated, or modified by the supreme court on appeal, if, upon consideration of the record, such court is of the opinion that such determination was unreasonable or unlawful.

The proceeding to obtain such reversal, vacation, or modification shall be by notice of appeal, filed with the commission by any party to the proceeding before it, against the commission, setting forth the determination appealed from and errors complained of. The notice of appeal shall be served, unless waived, upon the commission by leaving a copy at the office of the ~~chairman~~ CHAIRPERSON of the commission at Columbus. The court may permit an interested party to intervene by cross-appeal.

(3) No proceeding to reverse, vacate, or modify a determination of the commission is commenced unless the notice of appeal is filed within sixty days after the date of the determination.

Sec. 5117.01. ~~(A)~~ As used in ~~this chapter~~ SECTIONS 5117.01 TO 5117.12 OF THE REVISED CODE:

~~(1)~~ (A) "Credit" means the credit on utility heating bills granted under division (A) of section 5117.09 of the Revised Code.