BEFORE THE
PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Commission's Review of its Rules for Energy Efficiency Programs Contained in Chapter 4901:1-39 of the Ohio Administrative Code.	)))))	**Case No. 13-651-EL-ORD**
In the Matter of the Commission's Review of its Rules for the Alternative Energy Portfolio Standard Contained in Chapter 4901:1-40 of the Ohio Administrative Code.	))))))	**Case No. 13-652-EL-ORD**
In the Matter of the Amendment of Ohio Administrative Code Chapter 4901:1-40, regarding the Alternative Energy Portfolio Standard, to Implement Am. Sub. S.B. 315.	)))))	**Case No. 12-2156-EL-ORD**

REPLY COMMENTS OF OHIO EDISON COMPANY,
THE CLEVELAND ELECTRIC ILLUMINATING COMPANY AND
THE TOLEDO EDISON COMPANY

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I. INTRODUCTION

On March 3, 2014, nineteen parties filed initial comments on the proposed rules governing energy efficiency and peak demand reduction requirements as set forth in Ohio Adm. Code 4901:1-39 and Alternative Energy Portfolio Standards as set forth in Ohio Adm. Code 4901:1-40, including certain amendments to incorporate combined heat and power ("CHP") projects and Waste Energy Recovery ("WER") projects consistent with Am. Sub. S.B. 315. By Entry dated March 7, 2014, the Commission extended the reply comment period to March 24, 2014. Pursuant to this Entry, Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company (collectively, "Companies") hereby submit their reply to the following parties' comments: Ohio Power Company ("AEP Ohio"),

Ohio Partners for Affordable Energy ("OPAE"), The Dayton Power and Light Company ("DP&L"), Environmental and Consumer Advocates ("ECA"),[1] Nucor Steel Marion, Inc. ("Nucor"), Duke Energy Ohio, Inc. ("Duke"), Office of the Ohio Consumers' Counsel ("OCC"), Ohio Manufacturers Association Energy Group ("OMAEG"), Ohio Advanced Energy Economy ("OAEE"), Alliance for Industrial Efficiency ("AIE"), Midwest Co-generation Association ("MCA") and Ohio Coalition for Combined Heat & Power ("OCCHP"). Also, while the Companies address all of the major issues raised in the various reply comments, their decision not to respond to any specific argument made by a party should not be construed as the Companies' agreement with, or opposition to, such argument.

II. CHAPTER 4901:1-39: ENERGY EFFICIENCY AND PEAK DEMAND REDUCTION RULES

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

1. Subparagraph 4901:1-39-01 (E)

In its Comments, Duke recommends that the Commission delete the specific time referenced in the definition of coincident peak demand savings.[2] While the Companies agree that the peak could occur at an hour other than the proposed period, the Companies, in their initial comments, suggested that the rule be modified to be consistent with the PJM definition by changing the start of the period from 3:00 PM to 2:00 PM or, alternatively, by modifying the period to reflect "hours ending."[3] A reference to specific hours for coincident peak demand savings is appropriate as that enables electric distribution utilities ("EDUs") to count coincident peak demand savings from energy efficiency programs using a defined period consistent with industry standards (in this case PJM standards) supporting a deemed approach. For that reason,

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[1] This group is comprised of Environmental Law & Policy Center, Ohio Environmental Council, Sierra Club, Natural Resource Defense Council, Environmental Defense Fund and Citizens Coalition.
[2] Duke Comments, p. 2.
[3] Companies Comments, p. 3.

the Commission should accept the Companies' recommendation. Or, in the alternative, in order to accommodate Duke's concern, the rule could be further modified to provide the EDU with an opportunity to demonstrate that the peak period occurred outside of the designated hours.

2. Subparagraph 4901:1-39-01 (X)

This section is new and adds a definition of "Shared Savings." OCC contends that Staff's proposed definition is inadequate because: i) it does not reflect Commission precedent regarding shared savings in energy efficiency portfolios because it does not exclude transmission and distribution or mercantile projects from those that can be considered when determining shared savings; ii) it should include a three-year measure life; and iii) it should exclude banked savings. OCC, therefore, proposes the following modification to the definition:

> net savings do not include any savings related to mercantile programs, transmission and distribution infrastructure projects and banked savings. The energy and/or peak demand savings from each measure will be calculated using the methodology found in the Ohio technical reference manual and with a three-year measure life.[4]

The Commission should reject OCC's proposed modifications to the definition for several reasons. First, this modification would not take into account the Companies' shared savings mechanism already approved by the Commission in Case No. 12-2190-EL-POR, *et al.*, which provides for the inclusion of net benefits of mercantile customer projects installed on or after March 23, 2011 and transmission and distribution projects that provide energy efficiency benefits. Second, for shared savings purposes, measure lives should not be limited to three years. Rather, they should be the actual length of time applicable to the specific technology in accordance with industry standards as defined in the technical reference manual ("TRM") unless an EDU has a specific and justifiable basis for using an alternative value. The wholesale definitional change suggested by OCC is an arbitrary limitation of shared savings. Rules,

[4] OCC Comments, pp. 16-17.

however, are not intended to codify single scenarios, but rather are crafted to apply to a broad spectrum of potential scenarios. For the reasons discussed above, the Commission should reject OCC's suggested definition of shared savings.

In its comments, OPAE recommends that the Commission delete the word "distribution" from the definition of "avoided costs" because EDUs supposedly recover lost distribution revenues, thus, making distribution costs not avoided.[5] OPAE's recommendation should be rejected because it confuses the two concepts. Lost distribution revenue is the revenue required to make the utility whole by allowing it to earn a proper return on its prior investments. Avoided distribution costs, on the other hand, are the dollars that were not spent to expand the capacity of the distribution system to accommodate new load.

3. Subparagraph 4901:1-39-01 (AA)

Subparagraph (AA) provides a definition of the "total resource cost ('TRC') test." Duke asserts that the previous test included an *ex post* analysis rather than an *ex ante* analysis as set forth in Staff's proposed definition.[6] The Companies disagree as previous TRC tests were not based on *ex post* analysis but rather on the *ex ante* values counted towards compliance. Staff has appropriately included clarification that *ex ante* values should be used to determine cost effectiveness of programs under the TRC test.

OPAE again argues that the term "distribution" should be excluded from the TRC test for the same reasons that it suggests this word be excluded from the "shared savings" definition.[7] The term "distribution" should remain in the TRC definition for the same reason that it should remain in the definition of shared savings and, accordingly, OPAE's recommendation should again be rejected.

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[5] OPAE Comments, pp. 2-3.
[6] Duke Comments, p. 4.
[7] OPAE Comments, p. 3.

4. Subparagraph 4901:1-39-01 (BB)

OCC proposes a change to the definition of "verified savings" by limiting savings to only that provided for in the TRM as follows:

> an annual reduction of energy usage or peak demand from an energy efficiency or peak demand reduction program directly measured or calculated using ~~reasonable~~ statistical and/or engineering methods ~~consistent with approved measurement and verification guidelines~~ AS FOUND IN THE OHIO TECHNICAL RESOURCE MANUAL."[8]

While the TRM is a valid method for determining verified savings, the definition should not be limited to just the TRM as there could be other appropriate methods available for verifying savings. As stated in the Commission's July 31, 2013 Entry on Rehearing in Case No. 09-512-GE-UNC: "[a]lthough we strongly encourage the electric utilities and gas utilities to utilize the TRM, we emphasize again that no provision within the TRM shall be considered binding on any party, including Staff, in any Commission proceeding."[9] The Entry rightfully leaves open the possibility for other measurement and verification protocols with the TRM being the "safe harbor." Additionally, the Commission found that the TRM "should be approved and regarded as a set of guidelines rather than a mandate."[10] For these reasons, the Commission should reject OCC's suggestion.

5. Proposed Addition to 4901:1-39-01: "Utility Cost Test"

The Companies agree with Ohio AEE, Duke and OHA that this term should be defined[11] and propose the following definition: "Utility cost test" means:

> a test to determine the net benefits of an energy efficiency or peak demand reduction program based on the costs and benefits of the program to the electric distribution utility, including incentive costs and administrative costs. The utility

[8] OCC Comments, pp. 17-18. OCC mistakenly referred to the TRM as the "Technical Resource Manual" instead of the "Technical Reference Manual."
[9] *In the Matter of Protocols for the Measurement and Verification of Energy Efficiency and peak Demand Reduction Measures*, Case No. 09-512-GE-UNC, Entry on Rehearing, p. 33 (July 31, 2013).
[10] *Id.*
[11] Ohio AEE Comments, p. 4; Duke Comments, p. 4; OHA Comments, p. 3;

cost test excludes any net costs or benefits incurred by the customer participating in the program. The following apply for the purposes of a utility cost test: (1) "Benefits" means the following resulting from the Program: (a) Avoided supply costs of energy and demand; (b) The reduction in transmission, distribution, generation, or capacity costs for the periods when load is reduced. (2) "Costs" means the electric distribution utility's costs of implementing the policy, behavior, practice, or program, including the incentives paid to customers, and the increased supply costs for the periods when load is not reduced through the operation of the policy, behavior, practice, or program. (3) "Net benefits" means the net present value of the difference between the benefits and costs as part of a utility cost test.

6. Proposed Addition: "Gross Savings"

The Companies agree with the definition of "Gross Savings" proposed by AEP Ohio and agree with AEP Ohio that such a recommendation should be added to the proposed rules.[12]

B. Rule 4901:1-39-02: Purpose and Scope

Staff proposed a change to Subparagraph (B) which allows the Commission to waive a rule *sua sponte*. OCC and the ECA oppose this change.[13] OCC would make each and every waiver by the Commission, no matter how small or insignificant, a litigated case. Indeed, OCC argues that for every single rule waiver, interested stakeholders should "have the opportunity to present their views on the waiver request."[14] The Commission, in its own discretion, certainly has the capability to determine whether it is appropriate to waive its own rules and whether additional input from other parties is necessary. Minor waiver requests can, and should, be permitted without the need for a delayed and costly proceeding. ECA argues that the Commission has no authority whatsoever to waive its own rules.[15] However, the Supreme Court of Ohio has held that the Commission may waive its own rules so long as a statute does not

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[12] AEP Ohio Comments, p. 3.
[13] OCC Comments, pp. 18-19; ECA Comments, pp. 43-44.
[14] OCC Comments, p. 19.
[15] ECA Comments, p. 43.

require the rule.[16] Since neither OCC nor the ECA have cited to a statute requiring any of the rules included in Chapter 4901:1-39, their objections to Staff's proposed change should be rejected.

C. <u>Rule 4901:1-39-03: Program Planning Requirements</u>

Staff proposed a modification to this rule that only requires an EDU to conduct a market potential study at least once every five years, absent significant changes in the market. Proposed rule 4901:1-39-03 also outlines the criteria that must be included in the program portfolio. OCC comments that five years is too long to assess market potential, and despite the cost to customers, favors an annual market potential study, or at least one every three years.[17] The ECA prefers to keep the current timeline to allow interested parties more frequent opportunities to review changing circumstances and evaluate new technologies.[18]

As the Companies discussed in their initial comments, requiring a market potential study at least once every five years is sufficient to assess market potential as it better manages time, resources and ratepayer dollars.[19] Moreover, Staff included in the proposed rule the possibility that a market potential report could be required within the five year period and/or updated as market conditions warrant. Therefore, the proposed rule accommodates the ECA's concerns should circumstances change and new technologies emerge to the degree that justifies the additional cost of an interim study.

ECA also suggests that the program planning requirements should modify the provision for an EDU to consider "commercially available measures" by expressly including "operational

[16] *See e.g. Ohio Consumers' Counsel v. Pub. Util. Comm'n*, 111 Ohio St. 3d 300, 314 (2005) (finding no error in Commission's waiver of certain rules).
[17] OCC Comments, p. 20.
[18] ECA Comments, p. 32
[19] Companies' Comments, pp. 6-7.

practices and design improvements."[20] Such a modification is unnecessary. The rules should be written with sufficient flexibility to accommodate all types of scenarios that have occurred, or may occur in the future. The rule as proposed does this by incorporating *all* "commercially available measures" for consideration. There is no need to selectively list only certain measures or specific measures, especially when these rules are generally in effect for five years.

ECA also suggests modifications to the list of factors that should be considered under Proposed Rule 4901:1-39-03(B) when an EDU evaluates various programs for inclusion in its portfolio plan. Specifically they ask that: (i) Proposed Rule 4901:1-39-03(B)(8) be modified to expressly include gas utilities as potential partners for energy efficiency programs;[21] (ii) on-bill financing and on bill repayment programs be included as an additional factor for consideration under this rule; [22] and (iii) the potential for energy efficiency and demand response resources from the program to be bid into PJM also be added as a factor for consideration.[23]

Like its request to only list two specific measures as "commercially available measures" under the market potential study, ECA's suggestion to specifically list these additional considerations is unnecessary. The rule, as proposed, encompasses all utilities, of which gas utilities are a subset. Therefore this recommendation should be rejected. ECA's recommendation to consider the potential for on-bill financing and on bill repayment programs (collectively "On-bill Financing") should also be rejected for the same reason. Furthermore, there currently is no requirement for an EDU to include either an on-bill financing or on-bill repayment program as part of its portfolio. Since On-bill Financing not required, it is inappropriate for an EDU to be mandated to consider these types of programs when evaluating

[20] ECA Comments, p. 33.
[21] *Id*.
[22] *Id*. at 34.
[23] *Id*. at 36.

the program options for inclusion in its portfolio plan. If an EDU desires to offer such On-bill Financing, then it is unnecessary for the EDU to be mandated by rule to consider what they have already considered. Accordingly, ECA's recommendation to specifically consider On-bill Financing should be rejected.

ECA's comments appear to go beyond including On-bill Financing as only one of many factors to be considered when evaluating programs and, instead, appear to be advocating for mandating these specific types of programs. To the extent that the latter is ECA's intent, its comments are misplaced and beyond the scope of this rulemaking and should be summarily rejected. However, since ECA raised the issue, the Companies are compelled to briefly explain why any recommendation to mandate such On-Bill Financing should be rejected.

First, on-bill financing should be provided by entities that have this as their core business. Indeed, there are numerous entities that presently are in the business of offering these services including, among others, sustainable energy funds, energy services companies, state-funded programs, and banks. It is not appropriate for EDUs to be forced to compete with these entities or for non-participating utility customers to be forced to subsidize the financing of projects for other customers. Second, it would be difficult for EDUs to structure these types of programs with third party investors and then develop a tariff that would address and properly allocate all of the costs and risks under all of the potential scenarios that could arise under a program of this type. Third, on-bill financing and on-bill repayment programs require EDUs to incur additional costs to implement and manage them, and raise complex credit, accounting, and regulatory (utility and financial) issues that would have to be thoroughly evaluated and resolved before any such program could reasonably be designed. Fourth, On-bill Financing creates risks of default that would be shifted to non-defaulting customers, and create difficulties in collecting such defaults as part of an electric bill. Therefore, based upon the foregoing, any suggestion of creating On-bill Financing through the proposed energy efficiency rules should be rejected.

OPAE also suggests a modification to Proposed Rule 4901:1-39-03(A)(2) to make the Utility Cost Test the threshold test for program approval and cost recovery.[24] OPAE fails to explain why the UCT is superior to the Total Resource Cost ("TRC") test that is currently being used to evaluate programs on both an individual and portfolio basis. The Commission made a policy decision to use the TRC test as its threshold cost effectiveness test. Nothing in OPAE's comments warrants a change in this policy. While Proposed Rule 4901:1-39-01(H) allows the UCT to be used to determine cost effectiveness "as applicable," as the Companies indicated in their initial comments, the Commission should clarify the circumstances under which such test should be applied.[25] And, such circumstances should not include the use of the UCT for the sole purpose of shoe horning measures that otherwise are not cost effective into the cost effective category.

D. Rule 4901:1-39-04 Program Portfolio Plan and Filing Requirements

1. Pre-Approval Process

Proposed Rule 4901:1-39-04 attempts to eliminate the pre-approval process that is currently in place. None of the commenters that addressed this issue appears to endorse this concept. As AEP-Ohio noted and the Companies agree, from the EDU's perspective, there must be certainty of cost recovery for the portfolio of programs prior to these utilities incurring hundreds of millions of dollars to implement them.[26] Without such certainty, there is unnecessary regulatory risk, which could affect the perception of potential lenders and investors, which in turn would increase the cost of capital. From the intervening parties' perspective, they

[24] OPAE Comments, p. 4.
[25] Companies' Comments, p. 11.
[26] AEP Ohio Comments, p. 5.

desire an opportunity for their positions to be heard and decided should consensus not be reached with the utility.[27]

ECA goes further and suggests that the Commission should not only hold hearings in the pre-approval process, but should also do so during the *ex post* verification phase.[28] Inasmuch as each EDU hires an independent third party consultant to annually perform evaluation, measurement and verification ("EMV") of each of the energy efficiency and peak demand reduction programs that the EDU has implemented, and the Commission retains an Independent Evaluator to annually verify the savings results reported by each of the EDUs there is absolutely no need to further increase the costs of compliance, which are be borne by customers, by holding evidentiary hearings on matters that have already been checked twice.

If the Commission endorses the Staff's approach and discontinues the pre-approval process, then, as the Companies indicated in their initial comments, there is no need for Proposed Rule 4901:1-39-04.[29] However, if the Commission rightfully rejects Staff's approach and retains the pre-approval process, the Commission should focus on streamlining this annual process in an effort to reduce the expense of litigation and the amount of time and resources currently devoted by all to this process. In their initial comments, the Companies proposed several recommendations for such streamlining, including: (i) an automatic approval process, absent a stay by the Commission or attorney examiner; (ii) a limitation on the issues to be litigated to only those raised through the comment process; and (iii) a pre-set procedural schedule that could

[27] See e.g. ECA Comments, pp. 7-8 (the proposed rule deprives parties from having the cases heard by the Commission.); AEP Ohio Comments, p. 5 (proposed rule eliminates a process for reaching an adjudicatory resolution); OMAEG Comments, p. 5 (If contested issues exist, an opportunity for a hearing on the plans is imperative prior to the implementation of the plan.)
[28] ECA Comments, p. 10.
[29] Companies' Comments, p. 7.

always be modified by the Attorney Examiner for cause.[30] The Companies urge the Commission to adopt these streamlining suggestions or variations thereof.

2. PJM Bidding

Several of the commenting parties ask that the rules be modified to incorporate a mandate for the EDUs to bid into the PJM base residual auctions ("BRAs") a certain percentage of the EDU's existing and projected energy efficiency and peak demand reduction attributes that are eligible under PJM bidding rules. OCC suggests 75%; ECA 85%; and OPAE, 100%.[31] As more fully discussed below, it is inappropriate to codify this proposal from either a legal or practical perspective.

The bidding of energy efficiency and peak demand resources into the PJM auctions should be a management decision, based on the financial, operational and corporate strategies of the individual EDU. As a creature of statute, the Commission is limited in its authority to the powers conferred upon it by the legislature.[32] Nowhere in the Revised Code is there a provision that authorizes the Commission to mandate the bidding of energy efficiency and peak demand resources into the PJM auctions. Moreover, there is already in place a process that would address the EDU's PJM bidding strategies without the need for codification. Not only does the Commission review the justness and reasonableness of the costs of each EDU's portfolio plan – costs that are offset by revenues received through the PJM auction – but as the Commission

[30] While the Companies are not wed to the procedural timeline proposed in their initial comments, the Companies urge the Commission to adopt a procedural schedule of some sort so as to allow all parties to better plan for any hearing process, should one be necessary, thus minimizing the need for continuances which further delay the process.
[31] OCC Comments, p. 20; ECA Comment, p. 31; OPAE Comments, p. 9.
[32] *Columbus Southern Power Co. v. Pub. Util. Comm.*, 67 Ohio St. 3d 535, 537, 620 N.E.2d 835 (1993); *Tongren v. Pub. Util. Comm.*, 85 Ohio St. 3d 87, 88, 706 N.E.2d 1255 (1999).

noted in its July 17, 2013 Entry on Rehearing in the Companies' last portfolio case,[33] it also reviews the prudence with which an EDU manages its assets.[34] Inasmuch as these processes are already in place, there is no need to codify a specific mandate in the Commission rules.

Moreover, such a mandate is impractical. There are legitimate factors that could affect the EDU's ability to meet PJM requirements to deliver excessive commitments offered into the auction pursuant to a codified bidding requirement, and, in turn, have negative consequences on the reliability of the electrical system. For example, certain programs, such as behavioral programs, count towards compliance with Ohio's statutory energy efficiency and peak demand reduction benchmarks, but cannot be bid into the PJM auction. For this reason alone, OPAE's suggestion to bid all resources should be rejected. Each EDU's portfolio is comprised of a variety of programs.

The amount of energy efficiency and peak demand reduction resources available for bidding is different depending on the nature of the program mix. Therefore, there should be no uniform percentage bidding mandate in the rules. Further, the rules for participating in the BRAs at PJM are constantly under review and subject to change. Ohio's energy efficiency requirements are currently under review by the General Assembly and could potentially be modified after bids are submitted to PJM. Given that these bids are made three years in advance of delivery, changes, especially in Ohio law, could significantly affect the amount of resources that can be delivered in the future. With these issues in a relatively constant state of flux, and the possibility that any such changes could affect the EDU's ability to deliver the amount of resources mandated by rule, potentially impacting system reliability, thus triggering penalties

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[33] *In re the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company For Approval of Their Energy Efficiency and Peak Demand Reduction Program Portfolio Plans for 2013 through 2015,* Case No. 12-2190-EL-POR et al.
[34] Id. at 6.

through PJM, the Commission should refrain from adopting a recommendation to mandate a bidding strategy with such specificity. Finally, and while not conceding the Commission's authority to do so, should the Commission incorporate such a bidding mandate and force an EDU to utilize the PJM capacity market, not for reliability as it was designed, but as a money maker to offset program costs that are unnecessarily high due to arbitrary rules, then at a minimum, the rule should be further modified to expressly allow for recovery of any all costs and penalties incurred by the EDU attempting to comply with such a mandate.

E. Rule 4901:1-39-05 Annual performance verification / Rule 4901:1-39-01(O) Definition of Independent Program Evaluator

1. Subparagraph 4901:1-39-05 (A)(1): Portfolio Performance Report – Compliance Determination

Rule 4901:1-39-05 was amended to allow EDUs to file their annual portfolio performance report by May 15 each year. Under the proposed rule, which contains similar requirements as the current rule, the reports must detail an EDU's achieved annualized energy savings, achieved demand reductions, and the demand reductions that its programs were reasonably designed to achieve, relative to its corresponding energy and peak demand reduction baselines. The rule, among other things:

- requires a comparison of the annualized energy savings and peak demand reductions achieved by EDU programs with the benchmarks and allows for that savings to be counted using the "as found" method; and

- Provides for an application to amend its benchmarks if an EDU determines that it is unable to meet a benchmark due to regulatory, economic or technological reasons beyond its reasonable control.

a. "As Found" Method

Proposed subparagraph (A)(1)(b) provides that an EDU:

> may count in meeting any statutory benchmark, the adoption of measures that are required to comply with energy performance standards set by law or regulation,

> including but not limited to, those embodied in the Energy Independence and Security Act of 2007, or an applicable building code.

The Companies agree with this revision to the rules. However, as the Companies indicated in their initial comments, this rule must be modified to allow the full "as found" method to be applied.[35] Specifically, the rule must also address replacement equipment similar to the approach taken by Staff in Proposed Rule 4901:1-39-07(B)(3). In that rule, the Staff added the provision "If a customer replaces non-functioning equipment or initially installs new equipment, the electric utility may count savings based on the efficiency of the replaced equipment." As the Companies indicated in their initial comments, this same provision must be added to Proposed Rule 4901:1-39-05.

OMAEG, OPEA, OAEE and ECA are philosophically opposed to the use of the "as found" methodology, claiming that energy savings results should not count if the project was done in a manner that only meets current law, regulation or code. [36] This position is contrary to the plain meaning of R.C. 4928.66 and should, therefore, be rejected. R.C. 4928.66(A)(1)(a) and (b) requires EDUs to meet clearly defined statutory benchmarks that are based on decreasing the amount of energy sold or achieving peak demand reductions in comparison to the average energy sales and peak demand for the preceding three calendar years. These subsections simply require an EDU to implement programs that achieve these benchmarks. The General Assembly's goal in subsections (A)(1)(a) and (b), as shown by the plain meaning, is to have measurable energy savings and peak demand reductions at increasing levels over time. What energy savings and peak demand reductions may be counted toward achieving the benchmarks is specifically addressed in the following subsections – R.C. 4928.66(A)(1)(c) and (d).

R.C. 4928.66(A)(1)(c) addresses energy efficiency and peak demand reduction programs

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[35] Companies' Initial Comments, p. 25.
[36] OMAEG Comments, pp. 5-6; OPEA Comments, pp. 10-11; OAEE Comments, p. 9; ECA Comments, pp. 38-39.

implemented by mercantile customers and expressly states that the EDU may count "the effects" of "*all* demand response programs for mercantile customers of the subject [EDU], *all* waste energy recovery systems and *all* combined heat and power systems, and *all* such mercantile customer-sited energy efficiency, including waste energy recovery and combined heat and power, and peak demand reduction programs…." (Emphasis added.) This provision is telling for several reasons. First, the plain meaning must be read to include *all* mercantile programs and projects that come within the list set forth above, regardless of the reason for their implementation. "All means all."[37] It does not mean "*all but those implemented to meet the requirements of another law, regulation or building code.*" Second, the legislature chose to include "the effects" of all such projects and programs. Effects are the result of all actions, regardless of the reason. If the General Assembly was concerned about the underlying motivation for a mercantile customer implementing a program or project, it would have qualified the nature of the effects it intended to be counted. It did not.

Similarly, R.C. 4928.66(A)(1)(d) provides examples of the types of programs sponsored by the EDU that may be counted towards compliance, including programs beyond those implemented by customers, such as projects that improve transmission and distribution infrastructure and cost effective smart grid investment programs. Both of these types of programs include specific prerequisites for purposes of complying with the statutory benchmarks. Smart grid projects can only be counted if they are cost effective; transmission and distribution projects must reduce line losses. Inasmuch as both types of projects could conceivably be implemented in order to comply with future laws or regulations, it is telling that the General Assembly did not include the caveat being advocated by OMAEG, OPEA, OAEE

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[37] *State ex rel. Bott Law Grp. LLC v. Ohio Dept. Natural Res.*, 10th Dist. Franklin No. 12-AP-448, 2013-Ohio-5219, ¶ 21; *Weiner v. Am. Cancer Soc.*, 8th Dist. Cuyahoga No. 80308, 2002-Ohio-2718, ¶ 55.

and ECA that the energy savings resulting from the project not be counted if the project is undertaken to comply with any other law, regulation or code. If the position of OMAEG, OPEA, OAEE and ECA is adopted, the proposed rule would be contrary to the plain meaning of R.C. 4928.66.

Further, without the change, maintaining the current rule makes it more difficult for an EDU to achieve the desired results and more costly for its customers by shrinking the pool of available programs and projects a utility may rely on to meet the statutory benchmarks. It also prohibits the use of popular and effective energy efficiency measures merely because some other governmental entity – federal, state or local – also determined that the measures should be put to widespread use.

The adoption of the concept that allows comparisons between newly installed equipment with equipment being replaced, rather than some hypothetical industry standard is also prudent. By adopting the modifications being proposed by Staff, savings is based on a logical and rational comparison between actual use and demand before and after a project is implemented, rather than by making an artificial, speculative comparison between energy use and peak demand associated with a customer's project prior to installation to the estimated use and demand that would have occurred had the customer used "industry standard new equipment or practices." Without the proposed changes, actual energy savings and demand reductions are ignored, thus, forcing the EDU to incur additional costs to implement additional programs so as to substitute savings from these additional programs for already existing savings resulting from the installation of the equipment.

The Companies agree with the "as found" methodology as proposed in Proposed Rule 4901:1-39-07 dealing with mercantile customers. Inasmuch as the above principles equally apply to non-mercantile projects, the same "as found" methodology proposed for mercantile customers should be incorporated into Proposed Rule 4901:1-39-05 and the comments of OMAEG, OPEA, OAEE and ECA should be rejected.

b. Reporting Standards

ECA suggests making status reports consistent complaining only that the Companies report on a cumulative, rather than incremental savings basis.[38] The contents of the status reports are compiled using the requirements contained in the Rule. EDU systems have been in place well before the enactment of R.C.4928.66. Similarly, each of the EDUs have had in place for at least the past five years any additional software or systems that the EDU believed were necessary to properly monitor its energy efficiency and peak demand reduction results. In light of this, the EDUs may not be in a position to report all information in the same manner. As for the Companies' specific reporting, they report their results on a cumulative basis because the benchmarks required by law are cumulative. Indeed, the Commission has specifically found that the statute does not require EDUs to achieve incremental savings targets:

> The Commission finds that Section 4928.66(A)(1)(a), Revised Code, is clearly worded to require calculation of the additional incremental annual baseline by using the difference in yearly cumulative benchmarks, as argued by the Companies. The Commission disagrees with the Environmental Advocates' argument that the statute requires utilities to achieve an additional amount of energy efficiency each year to be measured by adding the specified percentage of prior three-year average sales.[39]

Since the reports are filed to demonstrate compliance with the statutory benchmarks, the rule should be modified to expressly require reports be presented on a cumulative basis. Alternatively, the reporting requirements should remain unchanged and ECA's recommendation should be rejected.

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[38] ECA Comments, p. 28.

[39] *In re Application of [the Companies] for Approval of Their Energy Efficiency and Peak Demand Reduction Program Plans for 2013 to 2015*, Case Nos. 12-2190-EL-POR, *et al.*, Opinion and Order at 10 (March 20, 2013).

2. Subparagraph 4901:1-39-05(A)(2): Program Performance Assessment

Subparagraph (A)(2)(a)(iii) requires a utility to include in its portfolio performance report a description of all transmission and distribution infrastructure improvements made by the electric utility that reduce line losses to the extent the EDU is using the reduction to meet applicable benchmarks. OPAE recommends the deletion of transmission from this rule.[40] R.C. 4928.66(A)(1)(d) specifically provides:

> Programs implemented by a utility may include demand-response programs, smart grid investment programs, provided that such programs are demonstrated to be cost-beneficial, customer-sited programs, including waste energy recovery and combined heat and power systems, and <u>transmission</u> and distribution infrastructure improvements that reduce line losses. [Emphasis added]

The Commission has also held that these types of programs may be counted for energy efficiency purposes.[41] Accordingly, OPAE's recommendation should be rejected.

3. Subparagraph 4901:1-39-05(B): Independent Program Evaluator Report and Subparagraph 4901:1-39-01(O) Definition of Independent Program Evaluator

ECA recommends that the Commission add a new subsection 4901:1-39-05(B)(5) to require the independent program evaluator ("IPE") to utilize certain metrics to evaluate an EDU's portfolio performance report.[42] They do not cite to any other jurisdiction that requires these types of metrics, nor do they explain why these metrics are necessary. Programs vary among the EDUs and evaluation issues can evolve over time conflicting with the rigidity of codified rules. Each of these EDUs retain an independent consultant to perform the EMV function annually. These consultants are intimately familiar with the programs that they evaluate and are in a better position to determine the metrics best suited to evaluate each program. These

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[40] OPAE Comments, pp. 12-13.
[41] *In re Application of [the Companies] to Include Transmission and Distribution Projects in their Energy Efficiency and Peak Demand Reduction Program Portfolios*, Case Nos. 10-3023, *et al*., Finding and Order (August 7, 2013).
[42] ECA Comments, p. 25.

independent consultants discuss their EMV approach with the Commission's independent evaluator prior to performing the evaluation resulting in the EDU's evaluator and the statewide evaluator being in agreement on the EMV approach that is to be taken prior to the work being done. Therefore, there is no need to prescribe each and every metric to be used in the EMV process. By mandating that each program be evaluated under specific metrics the rule may create unnecessary work. There may be a metric better suited for evaluation – one that may be more cost effective to perform – which would have to be foregone in order to comply with the rule. In light of the above, ECA's recommendation should be rejected.

4. Subparagraph 4901:1-39-05 (C): Comments on Portfolio Performance Reports

ECA claims that the 30 day review period after the EDU issues its portfolio performance report is insufficient.[43] ECA misconstrues the draft rule which states: "[a]ny person may file comments regarding an electric utility's annual portfolio performance report and the independent program evaluator's report filed pursuant to this chapter within thirty days <u>after the filing of the independent program evaluator's</u> report." (Emphasis added). Parties have much longer than 30 days to review the report. The review period spans the point in time when the EDU files its performance report on May 15th through the entire evaluation period of the IPE, plus thirty days. ECA's recommendation should be summarily rejected and the Staff's proposed changes should be adopted.

[43] ECA Comments, pp. 28-29.

5. Subparagraph 4901:1-39-05 (E): Technical Reference Manual

Many parties commented that the Commission should make changes to the TRM on a periodic basis as well as docket any of those changes and provide for a comment period.[44] The Companies agree that any proposed changes to the TRM should be docketed and open for comment and, as stated in the Companies' initial comments, TRM reviews should coincide with the period of time that the portfolio plans are in effect.[45] The Companies agree with both DP&L and Duke that approved portfolio plans should supersede energy and load values associated with measures in the TRM, and any changes in the TRM should be used to inform future program design and not apply retroactively or be used to adjust currently approved programs with approved savings values.[46] The Companies also agree with AEP Ohio that the TRM should be approved one full year before it is incorporated into program planning.[47] This will allow adequate time for program planning and development, and reasonable assurance that the budgets and cost effectiveness calculations can be relied upon without the fear of retroactive adjustments.

6. Net to Gross Measurement

The ECA urges the Commission to require a net savings approach and include a net-to-gross analyses in the IPE activities.[48] AEP Ohio comments that, as is currently Commission practice, a gross savings definition should be added and codified in the rules to reflect the current practice in counting energy efficiency savings.[49] The Companies agree with AEP Ohio that this is the "most efficient and least costly method of determining savings because it reasonably

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[44] See e.g., Companies Comments, p. 21 (Changes to the TRM should be addressed in a separate docket in which interested parties have an opportunity to participate); AEP Ohio Comments, p. 9 (If a TRM is to be set as the basis for compliance reporting, it requires a more substantial process with input from all parties); DP&L Comments, p. 4 (Changes to the TRM should be addressed in a separate docket); OPAE Comments, p. 16 (The TRM should be updated every three years).
[45] Companies' Comments, p. 21.
[46] DP&L Comments, p. 5; Duke Comments, p. 8.
[47] AEP Comments, p. 2.
[48] ECA Comments, pp. 25-27.
[49] AEP Ohio, p. 3.

assumes that the impacts of those program participants that would have made the decision to complete energy efficiency projects without utility support is equal to the impacts that non-participants provide through awareness about utility programs, utility energy efficiency education and utility customer outreach."[50] Moreover, ECA fails to recognize that if a net savings approach is evaluated, it must also calculate free-drivers and spillover effects. As discussed above, R.C. 4928.66 is broad and the General Assembly intended that <u>all</u> energy savings count towards achieving an EDU's benchmarks regardless of a customer's motive in implementing energy efficiency measures. For these reasons, the Commission should reject ECA's recommendation.

F. <u>Rule 4901:1-39-06 Recovery Mechanism</u>

In the proposed rule, Staff appropriately modified the rule to include shared savings and lost distribution revenue because they are <u>specifically</u> permitted under R.C. 4928.143 (h): "providing for the utility's recovery of costs, including lost revenue, shared savings..." Both IEU and OCC contend that shared savings should not be included[51], even though eliminating them would clearly contradict the statute and prior Commission precedent.[52]

OCC also recommends that the Commission put restrictions on the recovery of shared savings by only allowing it if the EDU bids a certain percentage of energy efficiency savings into the PJM BRA auctions.[53] As discussed in Section I (D)(2) above, there are reasons why mandates involving PJM bidding should be avoided. Moreover, shared savings should not be

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[50] *Id.*
[51] OCC Comments, pp. 14-15; IEU Comments, p. at 10.
[52] *See, e.g., In the Matter of the Application of The Cleveland Electric Illuminating Company, Ohio Edison Company, and The Toledo Edison Company for Approval of Their Energy Efficiency and Peak Demand Reduction Program Plans for 2013 through 2015.* Case No. 12-2190-EL-POR et. al, Opinion and Order (March 20, 2013) pg 16. *In the Matter of The Cleveland Electric Illuminating Company, Ohio Edison Company, and The Toledo Edison Company for Authority to Provide for a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan.* Case No. 12-1230-EL-SSO et. al, Opinion and Order (February 18, 2012) pg 13.
[53] OCC Comments, p. 14

tied to the PJM BRA auctions. These are two entirely different issues and there is no logical reason for the two to be tied. Shared savings is a mechanism designed to incent EDUs to achieve energy efficiency savings – not to incent EDUs to bid resources into a PJM auction. OCC's recommendation should also be rejected because current shared savings mechanisms are the result of comprehensive portfolio plans that have been reviewed and approved by the Commission, and in many cases the result of negotiations between stakeholders and stipulated agreements. These mechanisms were designed based on a balancing of the interests of numerous parties. To place arbitrary restrictions in the rules without consideration of other factors is not appropriate.

Last, the Companies agree with Nucor's suggested edit that clarifies that a utility "may" instead of "shall" propose a rate adjustment mechanism for recovery of costs incurred when implementing its energy efficiency, peak-demand reduction, and demand response programs because there may be other dockets in which the issue may be addressed.[54] For example, in Case Nos. 12-2190-EL-POR, *et al.*, the Commission found that issues involving Rider DSE2 rate design, which is the rider through which the Companies energy efficiency and peak demand reduction costs are recovered, are better addressed in the Companies' next SSO proceeding.[55]

G. Rule 4901:1-39-07 Historic Mercantile Customer Programs, Combined Heat and Power or Waste Energy Recovery Systems

1. "As Found" Method

Staff added in proposed subparagraph (B)(3) that EDUs can count savings based on the "as found" method. Like Rule 4901:1-39-05, ECA again argues that the "as found" method should not be used in this rule either. For the reasons discussed in Section I (E)(1)(a) above, the

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[54] Nucor Comments, p. 5.

[55] *In the Matter of the Application of The Cleveland Electric Illuminating Company, Ohio Edison Company, and The Toledo Edison Company for Approval of Their Energy Efficiency and Peak Demand Reduction Program Plans for 2013 through 2015.* Case No. 12-2190-EL-POR et. al, Opinion and Order, p 42 (March 20, 2013).

Commission should approve not only the modifications incorporated into proposed Rule 4901:1-39-07(B)(3), but should also modify Rule 4901:1-39-05(A)(1)(b).

2. Timing of Mercantile Annual Reporting

Duke and DP&L request clarification on the timing of mercantile annual reporting and other deadlines.[56] In the mercantile pilot program Case No. 10-834-EL-POR the Companies commented that the annual true-up be required only after the first 24 months of the exemption period, and annually after that.[57] The Companies also recommended that all customer annual reporting be done in the same timeframe and suggested that the reports be due to the Staff by April 30 of each year. The Companies believe that this approach would be the most administratively efficient for all involved.

3. CHP and WER Systems

The Commission Staff developed two standard templates for use with applications involving CHP and WER systems. These templates set a maximum incentive level of $0.005/kWh. Virtually every party with a self interest in having one of these systems built claims that this incentive is too low.[58] Many of these same commenters suggest that the Commission's rules should require an EDU to provide up-front cash payments for design and engineering of these systems and much higher overall incentives with a specified length of the

[56] Duke Comments, p. 9; DP&L Comments, p. 5.
[57] *In the Matter of the Application for Approval of a Pilot Program Regarding Mercantile Applications,* Case No. 10-834-EL-POR, Companies' Comments, p. 3 (March 27, 2013).
[58] *See e.g.* AIE Comments, p. 2 ("we are concerned that the maximum incentive available is too low to be effective"); MCA Comments, p. 4 ("The Commission's proposed incentive level of $0.005 is far too low"); OCCHP Comments, p. 6 ("Increase the allowable per kilowatt hour incentive of $0.005/kWh").

incentive payment stream.[59] In essence, these commenters are attempting through their comments to design by rule an EDU's energy efficiency program.

As a preliminary matter, there are rightfully no rules governing the design of any other of the EDU's energy efficiency and peak demand reduction programs; nor should there be one for CHP and WER programs. R.C. 4928.66(A)(1)(a) requires an *electric distribution utility* to "*implement* energy efficiency programs" that achieve certain annual energy savings benchmarks. This provision states that "[a]n energy efficiency program *may* include a combined heat and power system … or a waste energy recovery system…" (Emphasis added) and that if such a program is implemented, the EDU may count the energy savings as determined by the Commission.[60] R.C. 4928.66 places the burden on the EDU to meet these statutory benchmarks and, accordingly, it is up to the EDU to decide the mix of programs that are consistent with the EDU's compliance strategy. The Commission lacks the authority to mandate through rule any of the specific programs that should be included in the EDU's portfolio mix. Per R.C. 4928.66(B), the Commission is charged with *verifying*, not *designing*, the EDU's programs that achieve the annual levels of energy efficiency and peak demand reductions.

These same commenters claim that S.B. 315 was enacted to promote the development of CHP and WER projects.[61] While S.B. 315 provided opportunities that enhance the possibility of

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[59] *See e.g.* MCA Comments, p. 2 (it is recommended that "the Commission include in its regulations an option for utilities to adopt a 'split incentive' program specifically designed for CHP and WER projects."); OCCHP Comments, p. 2 ("It would be highly desirable to allow for compensation during this preliminary design and engineering phase"); AIE Comments, p. 2 (The Commission "should revise the rules to explicitly allow for the division of the cash incentive, to allow for some upfront cash payment."); ECA Comments, p. 18 ("We recommend that the Draft Rules allow for CHP and WER systems to be eligible for incentive payments for at least eleven years").

[60] R .C. 4928.66(A)(1)(a) and (A)(2)(c).

[61] *See e.g.*, ECA Comments, p. 16 (The intent of S.B. 315 was "to spur CHP and WER projects forward that wouldn't have otherwise been built"); MCA Comments, p. 4 (there is a widespread expectation that the adoption of S.B. 315 "would be a catalyst for significant CHP/WER project development in Ohio."); OCCHP Comments, p. 2 (questioning whether the $0.005/kWh incentive is sufficient "to promote new projects in Ohio as envisaged by S.B. 315".)

developing CHP and WER projects, it did not do so by requiring an EDU to subsidize the development of these generating systems through energy efficiency incentive payments. Instead, the General Assembly created through R.C. 4928.62 the advanced energy program and charged the director of development with its oversight. Through this statute, the director "may authorize the use of moneys in the advanced energy fund for financial, technical, and related assistance for advanced energy projects in this state of for economic development assistance.…" This is the source of funds that should be used to "buy down" the cost of either a CHP or WER project if such funding is necessary to meet the developer's payback criteria.[62] Similarly, the General Assembly mandated through R.C. 4928.64 that EDUs and electric service companies provide a portion of their electric supply from alternative energy resources, such as WER projects. This mandate provides additional opportunities for WER system owners to offer the output of these systems into the market on a long term supply basis, which should provide them with a revenue stream to help obtain the necessary financing to develop the project. And, finally, R.C. 4928.66 allows the EDU to include, *at its discretion*, CHP and WER programs whose energy savings as determined by the Commission may count toward the EDU's statutory energy efficiency benchmarks. This provision provides the EDU with additional options to consider when developing its compliance strategies, thus providing more opportunities for CHP and WER systems to be developed.

There is no enabling statute that allows the Commission to design an EDU's energy efficiency programs or programs that favor one program over another, let over another. By mandating a CHP and/or WER program and establishing the amount level, length and structure of the incentive payment, the Commission is doing both. The CHP and WER projects are

[62] To provide an incentive of this magnitude under the guise of an "energy efficiency project" is nothing more than a hidden tax on customers, who would not only contribute to this advanced energy program through their tax dollars, but would also pay through the EDU's energy efficiency recovery mechanism.

generation projects. WER projects have been classified as renewable resources. As generation sources, they are similar to other new generation resources, none of which are subsidized through the energy efficiency program.

In light of the foregoing, the Commission should refrain from developing any rules governing the design of an EDU's program and CHP or WER program, including the amount, length or structure of the incentive payment, should the EDU decide to implement such a program. This is the role of the EDU. However, as discussed below, the Commission should establish guidelines for determining how the savings from one of these projects should be counted.

R.C. 4928.66(A)(1)(a) charges the Commission with the task of determining how savings from CHP and WER projects should be determined for purposes of counting towards an EDU's compliance with the statutory benchmarks. The Staff recommendation does not specifically address this. It appears that every party who provided comments on this issue agrees that the Commission should address the methodology to be used to determine savings levels from these types of projects.[63] This, however, is where the agreement ends because none of the commenting parties appear to agree on how such savings should be determined. IEU recommends the insertion of language that allows for the commitment (or counting) of the output and converting (the presumably non-electric output) to equivalent electric energy using a standard BTU to kWh conversion factor.[64] The AIEE recommends that the methodology involve a calculation of a customer's baseline electrical usage prior to the installation of a system and comparing usage

[63] *See e.g.*, Companies' Comments, p. 26 (Provisions surrounding the calculation of efficiency savings should be added to the rules.); Energy Resource Comments, p. 2 ("The Commission is unclear on what or how electrical savings will be determined for CHP systems."); IEU Comments, p. 11 ("[T]he proposed rules fail to provide any specific guidance on how to count the output of either a waste energy recovery system or CHP system."); MCA Comments, p. 7 ("A method for determining energy savings should be clearly stated in the Commission's regulations.")
[64] IEU Comments, p. 12.

after the system is brought online, thus allowing all of the difference to count as savings.[65] The MCA endorses a concept that pays an incentive for all of the electric energy produced by the CHP system[66], while the ECA recommends the "Threshold/Tiered Approach" to counting that starts with electricity generated and applies "tiered" discounts based on the efficiency of the CHP system.[67] AEP Ohio also recommends a counting methodology based on the electrical output, discounted proportionately according to efficiency levels.[68]

The Companies disagree with each of these parties' approaches to determining the level of savings from a CHP project because none of the suggested approaches take into account the efficiency of the grid supplied energy. All other energy efficiency programs determine savings by comparing the new technology with existing technology which, in this case, is the grid-supplied electricity. Savings from CHP projects should be determined no differently. Counting the metered generation without subtracting the energy from the grid, even in the case where a discount factor is used, may overstate efficiency savings. The Companies also disagree with the AIEE's recommendation because there are many variables that affect a customer's baseline electrical usage, such as weather, occupancy levels, production levels, and other equipment efficiency degradation or improvements, to name a few, thus making it very burdensome from a measurement and verification perspective to incorporate this methodology.

As the Companies (and Duke) indicated in their initial comments, only the electrical and incremental efficiency gains (above and beyond that produced through the grid) should be counted for purposes of complying with the statutory energy efficiency benchmarks.[69] This methodology automatically incentivizes higher efficiency projects, thus making it unnecessary to

[65] AIE Comments, p. 2.
[66] MCA Comments, p. 7.
[67] ECA Comments, p. 16.
[68] AEP Ohio Comments, p. 11.
[69] Companies Comments, p. 27; Duke Comments, p. 10.

implement a "tiered discount approach." Moreover, this methodology is easy to calculate and to administer, especially if the TRM incorporates algorithms with deemed assumptions for grid supplied power which are updated periodically to account for fundamental changes affecting generation mix in the area and factor in transmission and distribution line losses.

III. CHAPTER 4901:1-40: ALTERNATIVE ENERGY RULES

A. Rule 4901:1-40-03(B)(3): Definition of New Economic Growth

Staff requested comments on adding a definition of "new economic growth" in terms of Rule 4901:1-40-03(B)(3). Staff specifically wanted to know what should constitute "economic growth" and for what duration should it be considered "new." In its Comments, AEP Ohio commented that the Commission should exclude load associated with reasonable arrangements approved under R.C. 4905.31.[70] While the Companies agree with AEP Ohio in that load associated with reasonable arrangements should be excluded from baselines, this should not be the only economic growth that is excluded from the baseline. Load associated with reasonable arrangements is only one element of load associated with economic growth. For example, a large commercial customer can complete a significant expansion (with load that should be excluded due to economic growth) and never have a reasonable arrangement implemented. For those reasons, the Companies do not believe a definition for new economic growth is necessary and that what constitutes new economic growth should be decided on a case-by-case basis.

B. Rule 4901:1-40-04: Qualified Resources

1. Subparagraph (A)(8)

Staff amended Subparagraph (A)(8) to: "[a] storage facility, if it promotes the better utilization of a renewable energy resource." OPAE commented that this sentence is unclear and proposed the deletion of the language "if it promotes the better utilization of a renewable energy

[70] AEP Ohio Comments, p. 15.

resource."[71] OPAE's suggestion should be rejected as Staff's proposed definition is identical to the definition contained in R.C. 4928.01(37)(a)(ix).

C. Rule 4901:1-40-05(A)(4): Alternative Energy Status Reports

1. Cost Data

In its Comments, DP&L comments that that a tracking system such as GATS should not be utilized for cost information.[72] AEP Ohio comments that the cost data should be part of the annual report from the EDUs and that Staff should not rely on GATS for this information because the cost data entered into GATS is unverified and voluntary.[73] ECA comments that the Commission should make all REC data public.[74] While the Companies agree with DP&L and AEP Ohio that cost data from tracking systems, such as GATS, is not the most accurate and should not be used, as the Companies discussed in their initial comments, cost data should be kept confidential. The one Commission decision cited by ECA, Case No. 13-1912-EL-ACP, did not hold that REC cost data should be public, rather that a company's compliance baseline and compliance payment information is not confidential. In light of the cases cited by the Companies, namely, Case Nos. 11-5201-EL-RDR, 12-2668-EL-ACP and 13-1909-EL-ACP, whereby the Commission held that REC cost data is confidential, the Commission should modify proposed Subparagraph (A)(4) to read:

> The alternative energy portfolio status reports filed by each electric utility and electric services company shall include at least the following content, <u>and, with the exception of sections (b) below,</u> ~~that~~ shall be made publicly available, for the applicable compliance year. <u>Electric utilities and electric services companies should redact the information requested in section (b) and submit the information requested in section (b) to the Staff on a confidential basis.</u>

[71] OPAE Comments, pp. 14-15.
[72] DP&L Comments, pp. 6-7.
[73] AEP Ohio Comments, p. 14.
[74] ECA Comments, pp. 44-46.

2. Affiliate Transactions

In their Comments, ECA recommends that the Commission add a new subsection (A)(4)(g) to identify affiliate transactions used to meet the alternative energy portfolio standard compliance requirements.[75] ECA opines that [t]his will enable the Commission and stakeholders to determine whether the terms of the transactions were reasonable or whether the utility acted imprudently."[76] As an initial matter, Staff and the Commission have the ability to request and receive all of this information without the addition of a new rule. It is the Staff and the Commission who have the responsibility to monitor EDU activity and to determine whether the transactions were reasonable – not the stakeholders. Moreover, transaction information such as cost and supplier names, is, and has been held to be, confidential.[77] Again, REC cost data and supplier information must be protected from public disclosure as a trade secret.[78] Further, some third party suppliers may not participate in the Ohio market if their information is disclosed to the public. This requirement would also put affiliates at a disadvantage to other suppliers by requiring their information to be public, while other suppliers' information will not be. This is not competitively neutral. Reducing the number of suppliers in the Ohio market could lead to higher prices for customers while ECA has not given any reason why they think they must have this information. For that reason, the Commission should reject ECA's recommendation.

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[75] ECA Comments, pp. 46-47.
[76] *Id.* at p. 47.
[77] *See e.g.* Case No. 11-5201-EL-RDR.
[78] The definition of a "trade secret" is set forth in the Uniform Trade Secrets Act: "Trade secret" means information, including the whole or any portion or phase of any scientific or technical information, design, process, procedure, formula, patter, compilation, program, device, method, technique, or improvement, or any business information or plans, financial information or listing of names, addresses, or telephone numbers, that satisfies both of the following: (1) It derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and (2) It is the subject of efforts that are reasonable under the circumstances to maintain its secrecy. R.C. § 1333.61(D).

D. <u>Rule 4901:1-40-07: Cost Cap</u>

1. "Mandatory" Cap

In its Comments, Nucor supports Staff's proposed calculation of the three percent cost provision contained in R.C. 4928.64(C)(3).[79] DP&L suggests that the Commission modify Subparagraph (A)(5) to state that "the electric utility or electric services company <u>shall</u> not be required to fully comply with that specific benchmark."[80] As the Companies discussed in their initial comments, both Nucor and DP&L's suggestions are not consistent with the plain language of R.C. 4928.64(C)(3), which provides that an electric utility "***need not comply***" with a statutory benchmark if a company's cost of complying with the statutory requirements exceeds three percent of "its reasonably expected cost of otherwise producing or acquiring the requisite electricity." The statute does not provide that a company "shall not" comply with the statutory benchmarks, or that it will be denied cost recovery if its costs exceed the three percent provision. The provision here is discretionary to the EDU. For all of those reasons, the Commission should not accept Nucor or DP&L's suggestions.

2. Price Suppression

ECA recommends that the Commission include in the three percent cost provision the benefits from renewable energy price suppression on the whole sale market.[81] As the Commission found in Case No. 11-5201-EL-RDR, the addition of price suppression benefits "add[s] a subjective element to an objective calculation."[82] A review of the study[83] cited by ECA also demonstrates this subjective element. The study specifically states:

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[79] Nucor Comments, pp. 6-7.
[80] DP&L Comments, p. 7.
[81] ECA Comments, pp. 48-49.
[82] Case No. 11-5201-EL-RDR, Opinion and Order, p. 33 (August 7, 2013).
[83] The Public Utilities Commission of Ohio, "Renewable Resources and Wholesale Price Suppression" (August 2013).

> It is important to note that this study only attempts to quantify the price suppression effects that are associated with new utility-scale renewable projects and does not purport to comprise an overall cost-benefit analysis of these projects. While PROMOD IV is the industry standard in modeling production cost scenarios, it is not the proper tool to use when conducting least-cost capacity expansion analysis or integrated resource planning. To conduct such an analysis, it would be necessary to consider additional variables such as capital and capacity costs, renewable energy credit (REC) prices, and transmission upgrade expenses. (emphasis added)[84]

The study also states:

> The total load cost benefits that arise from lower wholesale clearing prices are calculated below for each utility transmission area and the state as a whole. For these savings to be ultimately realized by customers, one must assume that retail rates are themselves a function of wholesale prices, an assumption that is consistent with Ohio's transition towards a competitive model of generation procurement. (emphasis added)[85]

The "assumptions" and "attempt" to calculate price suppression benefits does exactly what the Commission cautioned against in its Order in Case No. 11-520-EL-RDR by making what is otherwise an objective calculation a subjective one.

Notwithstanding the fact that this calculation cannot be done precisely, there is simply no support under R.C. 4928.64 to include this calculation. Finally, a price suppression benefit may result in increased costs to customers. For all of those reasons, the Commission should reject ECA's suggestion to add price suppression benefits to the three percent cost provision.

3. Subparagraph 4901:1-40-07(A)(4)

ECA recommends clarifying Subparagraph (A)(4) by requiring an EDU to demonstrate that it had pursued all compliance options, not just all reasonable compliance options before pursing an exemption under the three percent cost provision.[86] This suggestion is problematic. First, it would be nearly impossible for an EDU to avail itself of this mechanism if all compliance options were required. For example, under this suggestion an EDU would be

[84] *Id.* at p. 3.
[85] *Id*. at p. 6.
[86] ECA Comments, pp. 49-50.

required to build expensive generation (as the Environmental and Consumer Advocates elude to in their comments), enter into imprudent long term contracts or even canvas door-to-door for RECs. Second, while proposed Rule 4901:1-40-07(4) and (5) do contemplate the potential for some form of relief if costs exceed three percent, the manner in which those rules were drafted implies that the Commission may not grant the relief if an EDU did not use "all reasonable compliance options." The prospective review of the three percent calculation in the second quarter of a compliance year will not give the EDU enough information to determine whether it will exceed the three percent threshold as an EDU could be buying RECs through the end of the compliance year. It is not clear how a company could successfully show that it had pursued "all reasonable compliance options" if the compliance year had not lapsed and there was time to pursue such options. The Commission should reject ECA's suggestion.

IV. CONCLUSION

Based upon the foregoing, Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company respectfully request that the modifications to Chapters 4901:1-39 and 4901:1-40, Ohio Admin. Code, as proposed by Staff, be further modified consistent with their comments and reply comments.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing Reply Comments of Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company was electronically filed with the Public Utilities Commission of Ohio through its Docketing Information System on this 24th day of March 2014 and sent via electronic mail to:

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