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THE PUBLIC UTILITIES COMMISSION OF OHIO

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In the Matter of the Commission's Review of )  
 Chapters 4901:5-17, 4901:5-18, 4901:5-21, ) Case No. 06-1201-AU-ORD  
 4901:5-23, 4901:5-25, 4901:5-29, 4901:5-33, )  
 4901:5-35, and 4901:5-37 of the )  
 Ohio Administrative Code. )

REPLY COMMENTS OF  
DUKE ENERGY OHIO

I. INTRODUCTION:

Pursuant to Ohio Revised Code (R.C.) § 119.032, the Public Utilities Commission of Ohio (Commission) conducted a review of the current rules contained in Ohio Administrative Code (O.A.C.) Chapters 4901:5-17 through 4901:5-37. In its Entry dated October 11, 2006, the Commission proposed revisions and amendments to Chapters 4901:5-17 through 4901:5-37.

On or about December 15, 2006, interested parties submitted initial comments regarding the Commission's proposed rule revisions. The Commission now seeks reply comments from interested parties concerning its recommendations. Accordingly, Duke Energy Ohio (DE-Ohio) respectfully submits the following reply comments regarding O.A.C. Chapter 4901:5-17, 4901:5-18, 4901:5-21, 4901:5-23, 4901:5-25, 4901:5-29, 4901:5-33, 4901:5-35 and 4901:5-37. DE-Ohio appreciates the opportunity to participate in the Commission's review of these highly important procedural provisions.

II. GENERAL COMMENTS:

A. Commission Jurisdiction

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The scope of the Commission's authority to develop emergency energy rules is significant given the breadth of powers the Commission seeks to assume through its proposed rule revisions. Many of the stakeholders who filed comments in the above-captioned proceeding raised the issue of the Commission's jurisdiction and actual authority to implement and enforce certain emergency energy rules both prior to and following the declaration of an emergency.<sup>1</sup> The Commission should carefully consider the points raised by the various parties concerning the scope of its jurisdiction and the indirect implications of its proposed rules. The Commission's authority to promulgate emergency rules is expressly limited to what is set forth in R.C. 4935.03<sup>2</sup>, *i.e.* the promulgation of rules defining levels of energy emergency and rules and procedures *following the declaration of an emergency*. Accordingly, DE-Ohio believes the Commission should strike the proposed pre-emergency rules entirely. DE-Ohio respectfully suggests that, at the very least, any rule requiring pre-emergency actions should be limited in context to situations in anticipation of an imminent emergency, as suggested in the Initial Comments of Ohio Power and Columbus Southern Power.<sup>3</sup>

### **B. Restructured Energy Markets**

As stated in its Initial Comments and as echoed in the comments of many of the stakeholders, the Commission's proposed rule revisions with respect to electric generation need to be re-examined to recognize the competitive nature of Ohio's electric generation market. Moreover, the proposed emergency rule revisions need to be further

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<sup>1</sup> See *e.g.* Initial Comments of Ohio Oil and Gas Association at 3, Ohio Coal Association at 3, AMP Ohio at 7.

<sup>2</sup> See *e.g.* Initial Comments of the Ohio Gas Marketers Group at 4.

<sup>3</sup> Initial Comments of Columbus Southern Power Company and Ohio Power Company, at 8.

reviewed and reconciled to the regional nature of the energy market and the role of ISO/ RTOs in maintaining the reliability of Ohio's electric infrastructure.

Concepts such as burn days and energy emergency levels based upon fuel inventory supplies are not nearly as relevant as they once were, prior to the restructuring of the electric energy markets. The ISO/ RTOs already have protocols in place with respect to declaring emergencies and appropriate responses. To maintain their effectiveness, the Commission's rules pertaining to an electric emergency need to be consistent with RTO/ISO emergency protocols. Moreover, in the event of an actual emergency, coordination with RTO/ ISOs is imperative given the regional nature of the energy markets. For instance, ordering an electric utility or competitive retail supplier to increase its generation output to satisfy the needs of a neighboring utility's/ supplier's load without RTO/ ISO coordination and approval is likely to compound rather than resolve the emergency condition. In a declared emergency, if the RTO/ ISO orders are in conflict with a Commission directive to increase output, the generation provider will be in the position of being in violation of either the RTO/ISO protocol or a Commission Order. As members of the respective RTO/ ISOs, generation suppliers must follow the RTO/ISO directives to balance the grid to maintain reliability and alleviate congestion on a region wide level. Not complying with the RTO/ISO directive will not only adversely affect the reliability of the transmission system within Ohio's borders, but is likely to ripple outward into neighboring states.

### **C. Upstream natural gas suppliers**

DE-Ohio agrees with the comments submitted by Ohio Oil and Gas Association,

Columbia Gas, and Ohio Gas Marketing Group, which express concerns regarding the Commission's proposed broad definition of "gas supplier." This expansion of the definition results in upstream suppliers having notice and disconnection requirements during a declared energy emergency.<sup>4</sup> DE-Ohio agrees that the upstream suppliers should not be responsible for communicating the energy emergency information to consumers following the declaration of an emergency. LDCs are in the best position to ensure that all consumers in the respective service territories are receiving accurate and consistent information. Consumers should not be subjected to multiple notices from several entities, which may potentially include conflicting data. Moreover, LDCs should be the only entity responsible for disconnection during an emergency. The Commission's rules should be clarified in this respect.

#### **D. Monitoring of Consumer Curtailment**

The Commission's emergency rule revisions require energy suppliers to police individual consumer consumption levels and non-priority uses of electricity and gas to varying degrees during the respective emergency levels. Such a requirement is unreasonable. DE-Ohio suspects that no utility or energy supplier in the state of Ohio has the necessary infrastructure or resources to monitor individual consumer consumption levels of priority use compliance, or percentage reductions in total consumption, in any real time and meaningful manner. Accordingly, the Commission should reject these rule provisions. In the alternative, DE-Ohio suggests that the Commission espouse the recommendation provided by Dayton Power & Light in its initial comments. Consumers

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<sup>4</sup> See e.g. Initial Comments of Ohio Oil and Gas Association at 3, Columbia Gas at 1, Ohio Gas Marketing Group at 2.

should be required to maintain adequate records to document their reduction in total energy use.<sup>5</sup>

### **E. Industry Wide Forum and Workshop**

In reviewing the various comments of the interested stakeholders, it is apparent that all commentors recognize the importance and necessity of the energy emergency rules. Additionally, with few exceptions, nearly all interested parties have raised the same or similar concerns regarding the emergency rule revisions. Several parties indicated a preference for an industry wide forum and workshop to flesh out issues regarding the emergency rule revisions. Given the nature of the parties' concerns and the importance of having functional emergency protocols, DE-Ohio agrees that a rule-making workshop is appropriate. Absent a workshop, the reply comments will be the last opportunity for stakeholders to comment on this important subject prior to the Commission issuing an Opinion and Order. Given the nature of the Initial Comments and the concerns raised, it is likely that the Commission will be inundated with Applications for Rehearing before any final order is issued.

The Commission's proposed revisions are an excellent starting point to begin discussions among all stakeholders. A workshop will allow all stakeholders to participate in drafting rules that facilitate the scope of Commission oversight with respect to all energy providers, municipalities, upstream suppliers, as well as the coordination between the Commission, stakeholders and RTO/ ISOs.

## **III. Specific Comments**

### **A. OCC**

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<sup>5</sup> Comments of Dayton Power & Light, at 10.

The majority of the OCC's comments to the Commission's proposed rules center on the OCC's continuing desire to be intimately involved in all inner workings of all of Ohio's utilities and competitive suppliers. In the event of an emergency whereby the Commission orders specific updates regarding fuel supplies, energy positions, etc, OCC desires that the Commission also require each energy supplier to provide all reports to the OCC. DE-Ohio respectfully objects to any such requirement, especially during the course of an emergency. First, OCC is not a regulatory agency with such reporting oversight. Second, the reports referenced in the Commission's emergency rules will contain sensitive confidential and proprietary information regarding the fuel and market positions of utilities and competitive suppliers. This information will need adequate protection to prevent its public release. It would be impossible to pre-negotiate a blanket protective agreement prior to an actual emergency, which would adequately protect this sensitive information and cover every reporting requirement the Commission could possibly mandate. This is especially true given that the rules themselves do not (nor could they) provide clear instruction and limitation as to what information the Commission will require, or how often the Commission will require it, during an actual emergency. Energy suppliers should not be compelled to negotiate a protective agreement with the OCC each time the Commission mandates an emergency reporting update. This is especially true when, during a declared and severe energy emergency, the supplier's resources will be already strained. Third, even if a blanket protective agreement could be pre-drafted, this information should not be given to OCC as a matter of course, because it would make this information subject to public information requests even if OCC agrees to enter into a protective agreement. As a public agency, OCC will

not, and could not, enter into a protective agreement that will perpetually and unconditionally keep this sensitive market and fuel position information protected from public dissemination. If the information is provided under a protective agreement, it is highly likely that OCC will be in a position, whether through a public information request or on its own initiative, to seek to make the information public. This will likely put both the energy provider(s) and this Commission, and possibly the Courts, in the position to litigate the public release of this information during the throes of an energy emergency. No stakeholder should be in such a position.

OCC's justification for this proposal is that in the event of an actual emergency, OCC believes that there will be abuse in the allocation of energy supplies.<sup>6</sup> If following the declaration of such an emergency, which requires a level of curtailment and reallocation of fuel supplies, the OCC is concerned that there has been an abuse it is free to file a complaint at the Commission. OCC could obtain the desired information through discovery. There is simply no need to provide this information to OCC as a prerequisite during a declared emergency. Accordingly, the Commission should reject this proposal.

The OCC also requests that the Commission amend its proposed rule revisions so that energy suppliers also provide OCC with the same notification/ updates pertaining to energy supplies and conservation or curtailment requirements as they give to their consumers. DE-Ohio does not object to such a requirement. In fact, such a requirement would likely be beneficial to consumers who may have questions regarding the specific notices. Unlike the sensitive information contained in the reporting requirements

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<sup>6</sup> See OCC Initial Comments at 4.

discussed above, these notices will not contain proprietary trade secret information and will be in the public view. Adding OCC to the list of consumers who will be receiving such notices will not likely be overly burdensome. Therefore, DE-Ohio does not oppose copying OCC on any public notification given during a declared energy emergency.

OCC also suggests that Proposed Rule 4901:5-19-02(I) which describes the Commission's Fuel Source Advisory Counsel be amended to include a representative from Commission Staff, OCC, Ohio Emergency Management Agency and industry representatives.<sup>7</sup> DE-Ohio agrees with this proposal.

Lastly, OCC proposes that the Commission conduct an emergency simulation to test its emergency rules. DE-Ohio believes that an emergency simulation is unnecessary and onerous. First, as stated above, the electric market is regional in nature and any kind of emergency simulation would not only require coordination among all of Ohio's jurisdictional energy suppliers, but the full participation of the RTOs and ISOs. This would require the involvement of energy providers outside Ohio's borders and spanning from Montana to New Jersey. Creating an energy simulation of such a magnitude will cause all participants to incur significant expense in terms of time spent to create the simulation and to react to the emergency simulation. It is unreasonable to force participants to engage in emergency simulations and force to them to absorb the exorbitant costs. Absent a cost recovery and tracking mechanism, DE-Ohio objects to any requirement that it engage in such a simulation. The Commission should reject OCC's proposal.

#### **B. Columbus Southern Power Company and Ohio Power Company**

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<sup>7</sup> OCC Initial Comments at 7.

In general, DE-Ohio supports and agrees with the comments submitted by the Ohio Power Company (OPC) and Columbus Southern Power (CSP). As mentioned above, DE-Ohio agrees that the membership of the Commission's Fuel Source Advisory Counsel should be comprised of public utility industry representatives and consulted prior to the declaration of an energy emergency.

DE-Ohio also concurs with the points raised by CSP/ OPC regarding the usefulness of proposed rule 4901:5-19-02(G) enabling the Governor to order electric power producers to increase energy sales, given the development of the ISO/ RTO reliability protocols.

Additionally, DE-Ohio agrees with the CSP/ OPC's suggested change for Rule 4901:5-19-02, which would designate information provided pursuant to the rule as confidential subject to ruling by a court. Any proprietary business data requested by the Commission as part of its energy emergency reporting requirements, relating to daily usage, energy purchases, fuel deliveries, and especially information regarding unregulated activities, should be treated as confidential by rule.<sup>8</sup> This will allow the free flow of information without putting energy providers in the position of having to negotiate protective agreements and potentially litigate the proprietary nature of its business data while in the middle of an energy emergency. This proposed rule change is reasonable.

### **C. Dayton Power and Light (DP&L)**

DE-Ohio also generally agrees with the comments submitted by DP&L. Specifically, DE-Ohio agrees with DP&L's suggestion that the priority use list contained

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<sup>8</sup> CSP Comments at 6.

in 4901:5-19-01 be amended to reflect different tiers of priority. Such a revision would make customer notice and targeting more efficient. Additionally, a tiered priority approach will likely reduce the potential for conflicts, which may arise in the event of a catastrophic energy emergency and drastic curtailment initiatives are necessary. DE-Ohio also echoes DP&L's suggestion that the Commission consider the actual fuel inventory levels of the state's power producers before arbitrarily setting target levels and burn day requirements. DP&L raises a valid point that there should be a distinction between the inventories of the various types of fuel (e.g. coal and natural gas) used by generating stations.<sup>9</sup>

As discussed above, the Commission's emergency rule revisions do not adequately reflect the current electric generating market and the development and responsibilities of ISOs and RTOs. DE-Ohio shares in DP&L's suggestion, that to the extent the following of the Commission rules mandating an increase in sales of electric energy would create a conflict with RTO/ ISO operating protocols, there needs to be a provision to permit the recovery of any penalties assessed by the RTO/ ISO.

Additionally, DE-Ohio agrees with and supports DP&L's suggestion that a safety disclaimer be incorporated into 4901:5-19-02(D).<sup>10</sup> Protecting plant personnel and equipment is essential to maintaining the integrity of Ohio's energy supplies. No energy supplier should be faced with the choice of whether or not to intentionally violate a Commission directive or gubernatorial declaration or create an unreasonable risk of harm to plant personnel or equipment. DP&L's suggestion is reasonable given the unknown level of risk in an energy emergency.

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<sup>9</sup> DP&L Initial Comments at 5.

<sup>10</sup> DP&L Initial Comments at 6.

Setting aside issues regarding the Commission's authority to enact and enforce pre-emergency rules under R.C. 4935.33, DP&L raises valid concerns regarding the Commission's pre-emergency actions and the likely adverse affect on consumers. Pre-emergency actions by their very nature will cause consumer confusion, and over time, apathy towards pre-emergency notices that do not result in actual energy emergencies. More importantly, any pre-emergency notice or declaration will likely cause fuel prices to spike ultimately harming both energy suppliers and consumers. Accordingly, the Commission should strike the various sections addressing pre-emergency actions.

Lastly, DE-Ohio concurs with DP&L's sentiment that utilities should be able to recover costs associated with penalties or lost opportunity costs if it is ordered by the State to cease operation of environmental equipment. Utilities should not be penalized for complying with a State mandate.

#### **D. Ohio Gas Marketers Group (OGMG)**

In addition to the issues surrounding the Commission's over inclusive definition of gas supplier, DE-Ohio shares OGMG's concerns regarding the forced reallocation of gas supplies upstream and the reimbursement of suppliers during an emergency. The Commission's rules in this respect do not provide clear guidance and should be clarified. In addition, DE-Ohio supports OGMG's proposal for a "chain of command" during a declared emergency. The Commission should work through the utilities to marshal the supplies of available gas, facilitate conservation plans, prioritize consumer classifications, and assure that supplies to Ohio are not being cut while supplies to more profitable areas of the country continue to flow. The utilities should then coordinate with the upstream suppliers to ensure compliance with the Commission's directives and gas is delivered.

### **E. Stand Energy**

DE-Ohio takes issue with the incorrect allegations raised by Stand Energy Corporation (SEC), claiming that DE-Ohio uses marketer deliveries to balance its system. This assertion is incorrect. DE-Ohio uses its own supply and storage contracts with interstate pipelines to balance its system and to provide daily balancing for marketers. However, during times of extreme weather, DE-Ohio is limited in the amount of balancing it can provide for marketers and must force marketers to deliver sufficient quantities for their customers in proportional amounts to both the northern and southern ends of DE-Ohio's system to avoid incurring penalties from the storage service providers. DE-Ohio believes that it is incorrect to characterize this as utilizing marketer deliveries to balance its system.

### **IV. CONCLUSION:**

Once again, DE-Ohio appreciates this opportunity to provide comments related to the Commission's proposed modification to Chapters 4901:5-17 through 4901:5-37 of the Ohio Administrative Code. For all the foregoing reasons, DE-Ohio respectfully requests that the Commission revise its Proposed Rules in accordance with DE-Ohio's suggestions herein and clarify each of the provisions as identified by DE-Ohio.

Respectfully submitted,



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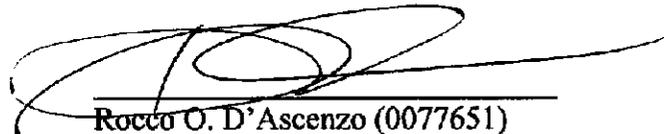
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