FILE

36

KRAVITZ, BROWN & DORTCH, LLC

Attorneys at Law
65 East State Street - Suite 200
Columbus, Ohio 43215-4277
614.464.2000
fax 614.464.2002
mdortch@kravitzllc.com

Janet Kravitz
Paula Brown
Michael D. Dortch
Christa D. Deegan
Lori A. Catalano
Kristopher A. Haines
Richard R. Parsons

Max Kravitz (1946-2007)

Of Counsel:
William H. Bluth*

*Also Admitted in NY

August 6, 2008

RECEIVED-DOCKETING DIV
2008 AUG -6 PM 4: 35
PUCO

Ms. Renee Jenkins
Chief, Docketing Division
Public Utilities Commission of Ohio
180 East Broad Street
13th Floor
Columbus, OH 43215

Subject: In the Matter of the Adoption of Rules for Standard Service Offer, Corporate Separation, Reasonable Arrangements, and Transmission Riders for Electric Utilities Pursuant to Sections 4928.14, 4928,17 and 4905.31 Ohio Revised Code, as amended by Amended Substitute Senate Bill No. 221

Case No. 08-777

Dear Ms. Jenkins:

Enclosed please find an original and thirteen copies of the Reply Comments of Duke Energy Ohio for filing in the above captioned docket. Please accept the original and eleven copies of each document for the Commission's files, and after file-stamping the remaining two copies of each, return them to the individual who delivers the documents to you. You may call me if you have any questions concerning this filing. As always, your attention is appreciated.

Very truly yours,

Michael D. Dortch

BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Adoption of Rules for Standard Service Offer, Corporate Separation, Reasonable Arrangements, and Transmission Riders for Electric Utilities Pursuant to Sections 4928.14, 4928,17 and 4905.31 Ohio Revised Code, as amended by Amended Substitute Senate Bill No. 221	:	Case No. 08-777-EL-ORD

THE REPLY COMMENTS OF DUKE ENERGY OHIO

In general, the rules proposed by the Public Utilities Commission of Ohio's (Commission) Staff have thoughtfully balanced the competing interests of the actors that will be affected by the implementation of Am. Sub. S.B. No. 221 (S.B. 221) as well as the competing policy goals of the bill. Some parties' comments to these rules reflect an appreciation for the Staff's efforts. Other commentators have taken the position that the Commission should use its rule making powers to mandate a return to an era of comprehensive rate-of-return regulation. This, of course, is beyond the intent of S.B. 221, and beyond the appropriate exercise of authority by the Commission.

Duke Energy Ohio (DE-Ohio) reiterates its support, generally, for approaches that preserve flexibility to the Commission, to stakeholders, and to the electric utilities regulated by the Commission.

I. DE-Ohio's Reply To The Initial Responses To The Commission's Six Specific Questions.

A. Should the rules on the competitive bidding process (Proposed Rule 4901:1-35-03, Appendix A, Part (B)) provide for consideration of alternative products and approaches to competitive bidding?

In its initial comments,[1] DE-Ohio responded to the Commission's first question by asserting that it was not necessary to expressly provide for alternative products and approaches within the rules regarding the competitive bidding process (CBP). Instead, DE-Ohio urged the Commission to simply adopt rules concerning the CBP that would permit maximum flexibility, pointing out that no one approach to the process has been proven effective for all certified territories, for example, and noting that the elements and requirements ultimately included within each utility's requests for bids will have significant impact on the results.

A deeply revealing aspect of the comments submitted in response to the Commission's first question is that – without regard to whether the sponsor of the particular response answered the Commission's question affirmatively or negatively – virtually every entity submitting such comments similarly urges the Commission to preserve the flexibility of which DE-Ohio is a proponent. Columbus Southern Power Company and Ohio Power Company (together, AEP), for example, join DE-Ohio in advocating a flexible approach. AEP suggests only that the rules recognize that companies be permitted to *propose* alternative products and approaches.[2] Dayton Power & Light (DP&L) and The Toledo Edison Co., The Ohio Edison Co. and The Cleveland Electric Illuminating Co. (the First Energy companies) also appeal to the Commission for flexibility, even though both also responded (contrary to AEP and DE-Ohio's response) that the

[1] Initial Comments of Duke Energy Ohio (hereinafter, DE-Ohio's Comments), pp. 2-3.
[2] Initial Comments of Columbus Southern Power Company and Ohio Power Company (hereinafter, AEP's Comments), p. 22.

bid rules should expressly consider alternative products and approaches. Similarly, Ohio Energy Group (OEG) and the Industrial Energy Users of Ohio (IEU), entities composed of large industrial consumers of electric power, both suggest that the rules ultimately adopted should preserve a flexible approach, even though OEG answered the Commission's question affirmatively and IEU answered that same question negatively.

The Association for Real Energy Options (AREO) notes, however, that clear understandable bid procedures are necessary. DE-Ohio agrees. Such procedures need not be written into rules, however. Such procedures may properly be proposed by the utilities, studied and commented upon by Staff and others, and modified for clarity by the Commission, as needed.

In the end, comments by the Ohio Consumer and Environmental Advocates (OCEA), alone, suggest the Commission should reject the flexible approach advocated by practically every other entity commenting upon the proposed rules.[3] OCEA argues in favor of the Commission's rejection of a flexible approach and its adoption, instead, of a proscriptive "command and control" approach, expressly mandating for example that procurement plans be based upon a "least cost approach"[4] and urging the Commission to require a utility to manage its supplies of generation over no less than a five-year and preferably a ten-year planning horizon. At the same time, OCEA would have the Commission compel a utility to "identify assumptions for, and evaluate the effect of, any new generation that might enter the market on a merchant basis during the study term"[5] as part of its proposed CBP.

[3] Initial Comments of Ohio Consumers and Environmental Advocates (hereinafter OCEA Comments), p. 4.
[4] Despite urging a flexible approach, OEG joins OCEA in urging that the Commission expressly mandate least-cost generation supplies. See Initial Comments of Ohio Energy Group (hereinafter OEG's Initial Comments), p. 12.
[5] Id, p. 6.

Similarly, while OCEA asserts support for the introduction of advanced metering technologies, two-way communication capabilities and real-time rate structures, it frets at the same time that the costs of the necessary infrastructure to support such technologies will "entrench"[6] the "monopoly providers of generation service" by allowing them to rely entirely upon metering systems belonging to the distribution utility[7] to achieve energy efficiency goals.

DE-Ohio reiterates the importance of rules that preserve to the Commission the flexibility to make adjustments, as the Commission determines appropriate, to the CBP. DE-Ohio recognizes, for example, both the economic significance and the intuitive appeal of requiring least cost supplies of generation. Even so, the pace of technological advancement is inherently unpredictable, and consistent with the express goals of S.B. 221, the Commission may find for example that – in a surprisingly near future time frame – it wishes to encourage investment in a particularly attractive source of "green" energy over a lower cost, but less "green," alternative. It should not write rules that may later hinder it from exercising the discretion granted it by the Ohio General Assembly, or impede its ability to balance the public policy goals established by the Ohio General Assembly.

Similarly, the Commission should not mandate five- or ten-year planning horizons through its rules – nor should it mandate "short term" one- to three-year horizons, for that matter. DE-Ohio recognizes, as it already noted in its comments that, generally, the longer the term, the greater the security.[8] Thus, DE-Ohio acknowledges that there are times when very long-term wholesale power supply contracts may be advantageous to Ohio consumers of electric power. At the same time, markets are inherently flexible and times will also certainly exist when shorter-

[6] OCEA does not explain its belief that a distribution utility's metering technologies will create such an "entrenchment."
[7] Id, p. 4.
[8] DE-Ohio's Comments, p. 3.

term contracts offer recognizable value when compared to longer term contracts. Rather than a mandated preference for longer term contracts or for any particular mix of long- and short-term contracts, DE-Ohio urges the Commission to simply ensure flexibility in its approach to the CBP and to evaluate the particular process as proposed on a case-by-case basis.

B. Should the Commission require consideration of the value of lost load in ensuring that customers' and the electric utility's expectations are aligned as required by Section 4928.143(B)(2)(h), Revised Code?

In its initial comments, DE-Ohio asserted that the expectations of the electric utility and its customers are aligned so long as the utility meets the Commission's reliability standards. Moreover, DE-Ohio asserted that the value of lost load was immaterial to proper distribution mechanisms.[9]

Generally, the comments of others appear to support DE-Ohio's position. OCEA, for example, agrees that "'lost load' is not a factor in the proper functioning of distribution systems."[10] IEU-Ohio expresses agreement, and further notes its concern that consideration of lost load will create federal/state jurisdictional concerns. First Energy contends that consideration of lost load is absolutely inappropriate, but suggests that the Commission may wish to make its question clearer, noting that the term lost load is not defined by either statute or rule.[11]

AEP suggests that "lost load" might be considered when evaluating and justifying additional investments in distribution facilities, but appears to believe that it is otherwise irrelevant. Similarly, OEG points out that the value of lost load is measured differently by

---

[9] DE-Ohio's Comments, p. 4.
[10] OCEA's Comments, p. 8.
[11] Initial Comments of The Toledo Edison Co., The Ohio Edison Co., and The Cleveland Electric Illuminating Co. (hereinafter First Energy's Comments), p. 3.

different customers – suggesting that the value of lost load might be used to justify distribution investments, or perhaps somehow allocate the costs of distribution facilities.

DE-Ohio reiterates its initial position. Lost load is immaterial to proper distribution mechanisms. The Commission should deem the value of lost load irrelevant for purposes of Ohio Rev. Code §4928.143(B)(2)(h).

C. **Should the Commission by rule invite an electric utility to identify in an ESP specific long-term objectives (e.g., objectives related the implementation of state policies or meeting standards contained in S.B. 221), together with milestones and metrics for measuring progress? If so, are there specific topics which should be addressed?**

In its initial comments upon the Commission's proposed rules, DE-Ohio urged the Commission not to attempt to write rules incorporating specific metrics and milestones, noting the differences among the Ohio utilities would almost certainly mean that specific metrics and milestones could not simply be applied across the board.[12] DE-Ohio urged instead that the Commission revise its rules to permit the Commission to obtain information as necessary to measure progress toward the goals contained in Ohio's public policy on a case-by-case basis.[13]

Sponsors of comments appear to agree, generally, with DE-Ohio. At a minimum, they admit – implicitly or explicitly – the difficulty inherent in writing such milestones into rules. Not one of the electric utilities, for example, favor such rules. DP&L urges the Commission to maintain flexibility within its rules, so as not to find itself prescribed by changes in market conditions or federal regulations.[14] AEP expressed concern that such an effort, in conjunction with certain proposed rules, would impermissibly increase the burdens borne by Ohio's utilities.[15] First Energy asserts that long-term objectives may be impossible to define, given that

[12] DE-Ohio's Comments, pp. 4-5.
[13] Id., p. 5.
[14] Initial Comments of Dayton Power & Light (hereinafter DP&L's Comments), p. 16.
[15] AEP's Comments, pp. 6, 18, and 23.

electric security plans (ESPs) have no set duration, and may have durations as short as one year.[16] First Energy notes, moreover, that S.B. 221 itself establishes required milestones and metrics, including energy efficiency targets, peak load reductions, and periodic excessive earnings evaluations.[17]

OEG concurs with the utilities, noting that the ESP plans are more than sufficiently complicated as it is, without imposing arbitrary milestones or metrics.[18] Moreover, OEG asserts that the fourteen state policies set forth in Ohio Rev. Code §4928.02 are so broad and varied that they defy ongoing measurement.[19] IEU disclaimed any specific response to the question, but noted general support for some means of measurement.[20] The sponsors of each of these sets of comments seem to be aware of the difficulties inherent in determining – today – how to measure progress through an uncertain future toward certain goals.

Nucor Steel Marion, Inc. (Nucor) and Ormet Primary Aluminum Corp. (Ormet) both suggest, on the other hand, that knowing how utilities intend to meet statutory requirements may help Ohio industries engaged in their own long-term planning efforts. The City of Cincinnati (Cincinnati) and Counsel of Small Enterprises (COSE) claim generally that specific milestones and metrics are necessary to measure a utility's progress toward S.B. 221 goals. Consistent with its preference for a "command and control" approach, OCEA urges the employment of specific milestone. OCEA further argues that the states of Ohio's economy and of First Energy's distribution system are somehow indicative of a lack of such specific milestones in the past.[21]

Unsurprisingly, not one of the sponsors of comments in support of rules containing express "metrics and milestones" offered any suggestion as to what those metrics and milestones

[16] First Energy's Comments, p. 4.
[17] Id.
[18] OEG's Comments, p. 13.
[19] Id.
[20] IEU's Comments, p. 20.
[21] OCEA's Comments, pp. 9-10.

should be, nor suggestions how success should be awarded or lack of success remedied. DE-Ohio asserts that this silence alone reinforces its position. The Commission should ensure that its rules expressly provide it with access to information necessary on a case-by-case basis to measure progress toward the goals contained in Ohio's public policy.

D. **With respect to an energy efficiency schedule based on a reduction in electricity consumption (Proposed §4901:1-38-04(B), O.A.C.), how should the rules define the baseline levels of customer energy consumption from which a reduction should be measured?**

In its initial comments, DE-Ohio urged the Commission to adopt a "bright line" test regarding baseline determinations by employing a three-year average of aggregate consumption, adjusted as necessary for documented changes in load growth or circumstances.[22]

Again, numerous sponsors of comments also endorse this approach. OEG also proposed a three-year average of aggregate consumption, and DP&L proposed a three-year average be applied to mercantile customers.[23] OEC states it is willing to endorse a three-year average (as well as a number of other methods it also finds reasonable), provided that once a particular method is selected and employed, a customer may not later switch among the methods.[24] AREO proposes the baseline be measured by one to three years worth of consumption.

The sponsors[25] of a number of other comments proposed, on the other hand, that the Commission not select any particular method, but instead permit a utility's customers to propose the baseline and then support that proposal. IEU-Ohio suggests that statutory provisions provide enough guidance regarding baseline measurement that rules doing so are inappropriate.[26] DP&L

[22] DE-Ohio's Comments, pp. 5-6.
[23] DP&L's Comments, p. 17. DP&L also suggests that engineering estimates be accepted for non-mercantile customers.
[24] OEC's Comments, pp. 5-6.
[25] First Energy, AEP, OEG, Nucor, and the Farm Bureau
[26] IEU Ohio's Comments, pp. 19-20.

(for non-mercantile customers) and Cincinnati both proposed that efficiencies be measured by *engineering criteria* alone.

Finally, OCEA argues that only efficiencies created after the effective date of S.B. 221, and only efficiencies that *exceed* applicable energy efficiency standards should be considered for energy efficiency credit.[27] At the same time OCEA would disqualify verified, achieved efficiencies if those efficiencies would have been undertaken even without the incentives contained in S.B. 221. But OCEA does not explain how it would verify whether such energy efficiencies would have been undertaken in any event. Consistent with its proscriptive approach to the rules, OCEA identifies a large number of bases upon which it maintains a utility should be permitted to reject a proposed energy efficiency project.[28]

DE-Ohio again urges the Commission to expressly support one or more bright-line tests. It concedes that a number of bright-line tests may be appropriate, depending upon specific customer characteristics. Moreover, DE-Ohio also concedes that, consistent with the flexibility DE-Ohio endorses, customers should be given an opportunity to demonstrate energy efficiencies in ways not currently contemplated by DE-Ohio.

Even so, DE-Ohio agrees with OEC that once a test has been employed with regard to a particular customer and incentives have begun to flow to that customer, the customer should not be permitted to change to a different criterion absent extraordinary circumstances, in order to avoid "gaming" the program.

DE-Ohio also supports OCEA's suggestion that only those energy efficiency projects undertaken after the effective date of S.B. 221 should qualify, but cannot support the remainder of OCEA's positions. Specifically, there is no ground, in logic or in the statute, to disqualify

[27] OCEA Comments, pp. 11-12.
[28] Id. at pp. 13-14.

projects that meet, but fail to exceed, applicable energy standards when those projects nonetheless result in real energy efficiencies. Similarly, there are no grounds within the statute to disqualify projects that provide energy efficiencies but would have been undertaken in any event – and protracted disputes over the issue of whether the project would have been undertaken or not are inherent within the suggestion. Again, DE-Ohio suggests the Commission adopt rules that are flexible and that allow customers to sponsor and pursue energy efficiency projects that are unique to the customers' situation. At the same time, DE-Ohio reiterates its recommendation that a "bright line" test be employed for purposes of establishing the baseline against which the success of such proposals should be measured.

E. Should special arrangements provided for in Chapter 4901:1-38 be applicable only to customers of an electric utility providing service pursuant to an electric security plan?

No sponsor of comments, save only OCEA, supports limiting special arrangements to ESP customers alone. OCEA suggests that special arrangements be limited to ESP customers simply because it is consistent with hostility toward special arrangements in general. DE-Ohio reiterates its position. Arrangements intended to permit utilities to achieve statutory mandates should be available no matter whether the particular utility is operating through a market rate offer (MRO) or an ESP.

F. Should there be a cap on the level of incentives for special arrangements authorized pursuant to Chapter 4901:1-38?

DE-Ohio and most other sponsors of comments upon the subject, including First Energy, IEU-Ohio, Nucor, Ormet, and the Ohio Farm Bureau Federation (OFBF) concur that there should be no pre-determined cap on special arrangements authorized pursuant to Chapter 38 of the Commission's proposed rules. OEG also agrees that there should be no cap placed on the level of incentives a utility can provide system-wide, although it suggests that an individual customer's eligibility for incentives might be limited.

DP&L suggests a cap would be appropriate, in conjunction with its concern that the State of Ohio should provide guidance as to industries in need of support, and a clear statement that delta revenues should be non-bypassable. OCEA argues that a cap should be imposed, that incentives should be for expressly limited terms, and that the process by which incentives are to be granted should be as transparent as possible.

DE-Ohio again urges the Commission to establish no pre-determined cap on special arrangements authorized pursuant to Chapter 38 of the Commission's proposed rules. Instead, any proposed special arrangement should be considered on its merits, which should be measured by considering the costs of the arrangement against the benefits anticipated to flow to the State of Ohio and its residents from the arrangement. Theoretically, incentives should be available up to a figure equal to the value of demonstrable direct and indirect benefits to residents of the State of Ohio.

II. DE-Ohio's Reply To The Initial Comments Regarding Chapter 35 Of The Proposed Rules.

A. 4901:1-35-02: Purpose and scope

AREO proposes that this rule be modified to explicitly prevent a standard service offer (SSO) from impairing governmental aggregation or retail customers' ability to buy from a certified retail electric service provider (CRES). Such a modification could be highly problematic. The required ESP component of the SSO, by its nature, threatens to create a hurdle to governmental aggregation efforts and to all retail customers' ability to seek energy from a CRES provider.

The ESP price is a price that is and will be below the market price (barring technological revolution). From a basic economic perspective, introducing a suppressed price in a free market is likely to divert sales from other participants in the market. Thus, by definition, an ESP is at least somewhat antagonistic toward governmental aggregation and retail customers' ability to buy from CRES providers. It, therefore, does not make sense to require electric utilities to "prove" something contrary to reality. In addition, the promotion of governmental aggregation is only one of the goals of S.B. 221.[29] Nothing in S.B. 221 suggests that the Commission should favor governmental aggregation over all other goals set forth in the legislation, which is just what AREO's proposed amendment to this rule could be perceived to do. Therefore, the Commission should not adopt AREO's proposed amendments to this rule.

B. 4901:1-35-03: Filing and contents of applications

AEP and First Energy filed comments under this rule that concur with DE-Ohio's request that an electric utility not be required to refile its SSO if, once these rules are officially promulgated, the SSO has to be modified to comply with the rules. The General Assembly has required[30] the electric utilities' SSOs to be in effect on January 1, 2009. Ohio Rev. Code 2948.143(C) provides that the Commission "shall issue an order . . . [regarding an electric utility's SSO application] not later than one hundred fifty days after the application's filing date... ." To comply with the General Assembly's mandate that the SSOs be in effect on January 1, 2009, the electric utilities must be permitted to amend, rather than refile, their SSOs to conform to the final rules, if necessary. To require refiling would start the one hundred fifty day clock for approval anew and frustrate the General Assembly's intent that the SSOs be implemented on January 1, 2009.

[29] *See* Ohio Rev. Code §§4928.20(K); 4928.02(A)–(N).
[30] Ohio Rev. Code §2948.141(A).

Toward this end, DE-Ohio specifically endorses AEP's proposal that the Commission provide a time period, *e.g.*, 14 days, after the final rules are promulgated to allow a utility to conform its application to the final rules, if necessary. This procedure would avoid the necessity of refiling and thus restarting the one hundred fifty day time clock for approval. DE-Ohio also endorses AEP's request that denial of a corporate separation plan waiver not require refiling of the SSO application, to again avoid restarting the approval clock. Instead, the applicant should be provided some time period to supplement or amend its application in the face of a denial. These modifications to the proposed rules will ensure that the electric utilities' SSOs are implemented in a timely fashion as contemplated by S.B. 221.

Next, DE-Ohio endorses First Energy's comments regarding the Commission's use of 4928.02(A)–(N) in this section. As DE-Ohio stated in its initial comments, the policies set forth in Ohio Rev. Code 4928.02(A)–(N) are aspirational and, often times, in direct tension with one another. Moreover, there is no statutory requirement that the corporate separation plans demonstrate that they "achieve" the policies in Ohio Rev. Code 4928.02(A)–(N). The Commission should therefore delete the reference to Ohio Rev. Code 4928.02(A)–(N) in proposed rule 4901:1-35-03(E).

Third, AEP agrees with DE-Ohio's comment that submission of electronic work papers should only be required where practical, as electronic versions of work papers not created by the utility may not be accessible to the electric utility.

Fourth, there is no statutory authority to support OFBF's contention that the electric utilities should be required to make data available to interested parties to allow those parties to create a "hypothetical" ESP. It is also unclear what purpose would be served, if any, by the calculation of hypothetical ESPs. Indeed, as OFBF itself recognizes, once a MRO is approved pursuant to R.C. 4928.142(F), subsequent ESPs need not be filed. Therefore, DE-Ohio opposes this modification to the proposed rules.

Fifth, OCEA would require the electric utilities to submit new corporate separation plans, while discontinuing all waivers of past corporate separation agreements. The Commission has already approved current corporate separation plans and waivers, which continue to function effectively at this time. Implementation of S.B. 221 will be difficult enough without adding to the burdens of those responsible for that implementation, or to the number of areas where disagreements will arise. There has been no suggestion from any quarter that the present corporate separation plans are problematic in any way. There is no practical or logical reason to require a wholesale resubmission of the plans and waivers at this point in time. OCEA's proposals in this regard should be rejected.

C. Appendix A to 4901:1-35-03

DE-Ohio agrees with AEP's and First Energy's position that there is no statutory basis to include the requirements in Section (A)(3) to Appendix A that publicly available pricing information be: (1) independent and reliable; (2) available for any product or service necessary for a winning bidder; (3) relevant to the electric utility's market; and (4) updated monthly. Moreover, S.B. 221 does not require that "any" product and service be publicly available, but rather requires that "traded electricity on- and off-peak energy products" be publicly available.[31] Thus, this section should be modified to more closely conform to S.B. 221.

DE-Ohio also agrees with AEP's suggestion that Sections (B)(2) and (3) to Appendix A be modified to require only that the CBP contain projected and pro forma information related to generation operations. This is a proper modification because the MRO price will not vary from the ESP price based on transmission and distribution costs. In addition, DE-Ohio agrees with

[31] Ohio Rev. Code §4928.142(B)(3).

First Energy's observation under these sections that the requirement to provide pro forma projections in the MRO of the impact of the CBP plan on the utilities' affiliates is not authorized by S.B. 221. This requirement should therefore be removed. DE-Ohio endorses First Energy's position that Section (B)(12) to Appendix A be modified to allow utilities to recover the cost of consultants the Commission may hire to review the automatic adjustments.

DE-Ohio opposes NOPEC's request that the electric utilities be required to demonstrate how their MROs would encourage and promote governmental aggregation. Again, nothing within S.B. 221 suggests that the Commission should favor governmental aggregation over all other goals. Moreover, S.B. 221 only requires an electric utility to demonstrate five things in its MRO: (1) an appropriate CBP; (2) membership in a RTO or other nondiscriminatory access to the grid; (3) the RTO has a market-monitor function or a similar market monitor function exists; (4) a published source of information is available identifying pricing information; and (5) compliance with blending requirements.[32] Not one of these requirements refers to a demonstration that the MRO promotes governmental aggregation. Moreover, the very nature of a MRO — that is, a market price — would presumably promote governmental aggregation. To require the electric utilities to demonstrate what is a necessary result of implementing a MRO is wasteful of resources and time. Therefore, the Commission should not adopt this request.

Under Appendix A, NOPEC would also require the electric utilities to prove that necessary support services are available to aggregators. Again, this proposed requirement has no basis in existing law and does not fall under one of the five categories that an electric utility must address in its MRO application. Therefore, the Commission should decline this request.

OCEA would add a large list of extra-statutory requirements to Appendix A. First, it would include various provisions to effectuate its "portfolio management planning" program and

[32] Ohio Rev. Code §4928.142.

ten-year procurement plan proposals. (It would also add these same provisions to Appendix B.) Nowhere does S.B. 221 authorize the implementation of such programs or require the utilities to propose such programs in their SSO applications. The reasonableness of the utilities' SSO applications should be evaluated on their faces by the Commission. The rules should not be used to dictate the utilities' long-term business plans. The Commission is charged with determining the reasonableness of those plans. The Commission should therefore reject all of OCEA's amendments to the rules regarding its proposed "portfolio management planning" program and mandated long-term procurement plan. OCEA remains free, of course, to urge whatever it perceives to be the merits of such programs as the Commission evaluates the reasonableness of the proposals.

OCEA next contends that Section (B) to Appendix A should require a "unified approach" to competitive bidding in Ohio. OCEA is apparently suggesting that the Commission should promulgate a one-size-fits-all CBP that is then to be used by all the electric utilities. The General Assembly, however, nowhere indicated a desire to implement a rigid CBP. Instead, Ohio Rev. Code §4928.142(A) endorses a highly flexible approach to the CBP, demonstrating that the General Assembly recognized that differences in the electric utilities and their customer bases and the markets in which each may participate will require flexibility in the CBP. Thus, while the rules ought to, and do, provide a common method of creating, reviewing, approving and implementing the CBP, the rules also recognize that the CBP itself must be tailored to each utility's particular structure and particular customer base. As a result, the Commission should not adopt this suggestion of OCEA.

OCEA also contends that Ohio Rev. Code §4928.143(C) provides the proper "test" for approval of a MRO and suggests that the Commission has not implemented that test properly.

Ohio Rev. Code §4928.143(C) contains the test for approval of an ESP, not the test for approval of an MRO, as clearly indicated by the fact that Section 4928.143 governs the ESP application process while Section 4928.142 governs the MRO application process.

D. <u>Appendix B to 4901:1-35-03</u>

DE-Ohio adopts AEP's request under "flush" Section (B) to Appendix B that pro forma projections only be required for ESPs that last more than three years. This change is consistent with Ohio Rev. Code §4928.143(E).

Second, under "flush" Section (H) to Appendix B, DE-Ohio, First Energy, and AEP are in agreement that it is not appropriate to require the electric utilities to demonstrate how their proposed ESPs achieve the goals of Ohio Rev. Code §4928.02. The appropriate standard of review for an ESP is whether it "is more favorable in the aggregate as compared to the expected results that would" be incurred under an MRO. "Flush" Section (H) to Appendix B should therefore be deleted as not authorized by S.B. 221. The Commission will, in the absence of this language, nonetheless have the obvious authority to evaluate the General Assembly's statements regarding Ohio public policy.

Under "Specific Information" Section (A)(1) to Appendix B, DE-Ohio endorses AEP's view that there is no need to include plant and procurement information related to fuel/purchased power/other costs recovery in quarterly filings as this information will be contained in the annual audits. DE-Ohio also endorses First Energy's and AEP's comments suggesting that "Specific Information" Section (A)(2) to Appendix B be deleted. An offset for benefits available as a result of cost-based adjustments would not be known at the time of filing of an ESP.

DE-Ohio also agrees with First Energy's and AEP's comments under "Specific Information" Section (C)(1) that, to some degree, the ESP will adversely affect shopping, a fact implicit within S.B. 221. Unavoidable charges will not affect shopping however, as properly designed and implemented unavoidable charges will be competitively neutral.

DE-Ohio also endorses AEP's position that "Specific Information" Section (D) is unnecessary because a utility should not have to demonstrate that its proposed automatic increases/decreases in components are reasonable. Instead, the excessive earnings test is a sufficient check on such proposed automatic adjustments. Indeed, the General Assembly already determined that automatic increases/decreases in components are reasonable by allowing for such adjustments subject to the excessive earnings test, and further justification is not needed.

DE-Ohio agrees with AEP's expressed position that requiring a cost-benefit analysis for proposals relating to government mandates is a curious requirement when the General Assembly has already determined that such mandates are appropriate. DE-Ohio suggests that it would therefore also be appropriate to delete this requirement.

Under "Additional Required Information" Section (A) to Appendix B, DE-Ohio agrees with other utilities' comments, generally, that functionalized information on generation, transmission, and distribution is not required by S.B. 221, as the excessive earnings test contemplates examination of the utility's earnings, not component pieces of those earnings. This provision should therefore be deleted.

The final comment from the utilities is an especially important one. Under Appendix B, "Additional Required Information" Section (A), First Energy observed that the Commission has changed the standard of review of the electric utilities' earnings by removing the modifier "significantly" before the term "excessive earnings." Therefore, to conform to the language provided in S.B. 221, this section must be amended to use "significantly excessive earnings" as the operative language for the electric utilities' earnings test.

DE-Ohio next notes that IEU-Ohio's comment that Appendix B should be slimmed down to communicate only information necessary to identify (and potentially resolve) procedural and substantive issues is quite insightful. DE-Ohio agrees that once there is greater experience under S.B. 221, the Commission can consider rules that may better effectuate the process contemplated by S.B. 221. There is no need to create requirements at this point in time when it cannot be predicted whether the cost of complying with those requirements will provide any benefit to the actors involved in this process.

DE-Ohio also agrees with OEG's suggestions that Appendix B be amended to allow electric utilities to recover ESP fuel costs for plants that they do not own. OEG's recommendations that the electric utilities be required to submit the equivalent of FERC Form 1 information and provide testimony at their yearly excessive earnings proceedings, however, are without specific statutory authorization. Adopting these suggestions would merely add cost to the providing of electric services.

As in Appendix A, NOPEC again argues that the utilities' filing requirements should require each to demonstrate how its ESP encourages and promotes governmental aggregation. In addition, NOPEC proposes various programs to promote governmental aggregation. As noted above, governmental aggregation is only one policy goal of S.B. 221 and should not receive preference over other policy goals. Moreover, none of NOPEC's requested programs find authorization in S.B. 221. The Commission should therefore disregard NOPEC's comments.

The Ohio Association of School Business Officials, The Ohio School Boards Association, and the Buckeye Association of School Administrators (the School Groups) suggest under "Specific Information" Sections (C)(1) and (3) that the electric utilities should be required to provide a comprehensive quantitative justification for components that inhibit customer shopping. As noted above, because an ESP is a below market price, it will inherently inhibit customer shopping to some degree. To require the utilities to demonstrate the impossible is not useful, and the Commission should therefore reject the School Groups' comments.

OCEA has proposed a litany of additions and revisions to Appendix B, with the apparent goal of returning Ohio to an era of comprehensive, rate-of-return regulation. For example, OCEA would require that applications for construction work in progress recoveries be subject to full hearings and not be allowed until 75% of the subject facility is completed. Ohio Rev. Code 4928.143(B)(2)(b), however, specifically provides that the costs of construction work in progress are recoverable, without imposing the requirement of a full evidentiary hearing. Thus, this request, like almost all of OCEA's requests, is without statutory authority and represents a regulatory regime that no longer exists. OCEA's proposals related to securitization, recovery of surcharges by affiliates, blending proposals, additional automatic rate adjustments justifications, and review of returns on equity would all impose burdensome, and extra-statutory, requirements on the electric utilities in pursuit of this same impermissible goal. As such, they should be rejected.

In other places, OCEA makes requests that only add redundancy to the SSO process. For example, OCEA would require that alternatives sources of energy be explored before potential surcharges are imposed for construction of facilities even though Appendix A already requires submission of data to allow the Commission to evaluate the need for new facilities.

OCEA also proposes that the Commission allow – by rule – the recovery of no more than 50% of delta revenues. Once again, this request is wholly without statutory authority. Moreover, this proposal is clearly contrary to the General Assembly's determination regarding appropriate public policy. Quite simply, if delta recoveries are limited as OCEA would mandate, there will be no economic development deals, negating a remarkable tool the General Assembly expressly chose to create for the Commission's use.

OCEA would also require the utility to provide a calculation of its actual return on equity for fiscal years 1999, 2005, and 2008. Again, this request is without statutory authorization. Moreover, OCEA appears to be attempting to obtain discovery through means of a rulemaking process. If OCEA eventually wishes to challenge the electric utilities' SSOs based on a profits comparison, it is free to do so. At that time, OCEA can seek discovery of the utilities' annual profit data under the appropriate discovery devices.

OCEA next objects to the existence of corporate affiliates as frustrating the participation of CRES providers in the market. OCEA specifically refers to DE-Ohio's rate stabilization plan, Case No. 03-93-EL-ATA, to allege that the competitive market supply of generation collapsed due to activities of DE-Ohio's affiliates. As the Commission well knows, the market in DE-Ohio's service territory "collapsed" upon the end of shopping credits DE-Ohio made available as part of its Electric Transition Plan case, and not because DE-Ohio's CRES affiliate pursued business on its own behalf.

In any event, S.B. 221 in no way makes the existence of CRES affiliates impermissible. If OCEA would like to prohibit utilities from being affiliated with CRES providers, it should lobby the General Assembly for new legislation. The Commission should reject OCEA's proposed changes regarding this issue.

E. <u>4901:1-35-04: Service of Application</u>

DE-Ohio agrees with First Energy's suggestion that Section (B) of this rule is unnecessary due to the availability of the SSO applications on the Commission's docket. DE-

Ohio also endorses First Energy's position that the electric utilities only be required, if at all, to provide SSO applications in electronic format to avoid waste.

OCEA was the only other party to comment on this section, again providing suggestions that will only add additional cost to the SSO process. The Commission should therefore reject OCEA's proposed amendments and additions to Section (A) and (B) of this rule to require increased disclosure of work papers as unnecessary and redundant of other provisions in Chapter 35. The Commission should also reject OCEA's requests to increase notice and availability requirements of the SSO. There is already sufficient publicity surrounding the SSOs.

F. 4901:1-35-05: Technical conference

DE-Ohio opposes OCEA request to mandate that the utilities' personnel be present and respond to every question posed at a technical conference. It is impossible to anticipate every question that might be asked and who might be required to be present to answer it.

G. 4901:1-35-06: Hearings

DE-Ohio again highlights that the electric utilities are largely in agreement that proving a SSO's compliance with 4928.02(A)-(N) is not appropriate for the reasons already stated. DE-Ohio would, however, endorse the Commission providing that the R.C. 4928.02 policies should be given *consideration* during review of the SSO.

H. 4901:1-35-07: Discoverable agreements

DE-Ohio endorses AEP's request that the term "relevant to the proceedings" be further defined to reduce the probability of discovery disputes. Thus, only agreements **relating to electric service**, along with any other agreements that may have been entered into pursuant to Ohio Rev. Code §§4928.141 to 4928.144, should be considered "relevant to the proceedings."

DE-Ohio, therefore, opposes Nucor's suggestion to make any proceedings "related to" an SSO discoverable. Adding this term would make the current rule vague and would be likely to lead to unnecessary discovery litigation.

DE-Ohio also opposes Nucor's and OCEA's proposals to broaden the language of this rule to make specific additional classes of contracts and agreements discoverable. These requests are without statutory authority and lead to a situation where the language of this rule would vary from the language of its enabling statute, Ohio Rev. Code §4928.145.

I. **<u>4901:1-35-08: Competitive bidding process requirements and use of independent third party</u>**

DE-Ohio endorses AEP's and First Energy's comments under Section (D) of this rule that an order on the winning bidder(s) should be issued before the third calendar day following the conclusion of the CBP, pursuant to Ohio Rev. Code §4928.142(C). DE-Ohio does not believe, however, that any changes the independent party makes to the CBP should be submitted to all stakeholders for review and comment prior to implementation, as Kroger suggests. Following such a procedure is not required by S.B. 221 and would only add cost and delay to the proceedings.

DE-Ohio also opposes Nucor's suggested requirement under Section (A) that the Commission review and approve of the selection of the independent third party. This requirement would only delay and add cost to the proceedings. Moreover, it is not authorized by S.B. 221. In addition, Nucor requests that the Commission be permitted to reject the results of the CBP process if it was not competitive. Nucor would also allow for a hearing to be set upon *anyone's* motion, in addition to the Commission's. These requirements would only delay and add cost to the proceedings. Moreover, the CBP necessarily results in just and reasonable rates because it results in the market price. Finally, and most importantly, these requirements are not authorized by S.B. 221.

Finally, OCEA would require independent third party changes to the CBP to be filed at the Commission and further seeks a hearing and opportunity to comment as part of the review process. These requirements would only delay and add cost to the proceedings and could very well prove unworkable. Moreover, these additional procedures are not authorized by S.B. 221.

J. <u>4901:1-35-09: Electric security plan fuel and purchased power adjustments</u>

DE-Ohio and First Energy agree under section (D) of this rule that electric utilities should be permitted to recover the cost of consultants the Commission hires to review the automatic adjustments through the automatic adjustments.

DE-Ohio also opposes IEU-Ohio's additions to sections (B) and (C) of this rule that would allow for comments and a hearing regarding the annual prudence review. These additional requirements will only add cost and delay to the proceedings.

Finally, DE-Ohio opposes the "new" regulatory scheme that OCEA proposes in place of this rule (*i.e.*, its proposed rules 12–20 under this Chapter). OCEA admits that these additional rules are largely a restatement of the electric fuel component (EFC) rules from the past. OCEA's proposed rules are wholly without statutory authorization and ignore the structural changes imposed at the wholesale level by FERC. Once again, OCEA's proposals represent a return to a "command and control" regulatory scheme that has been rejected by the General Assembly. OCEA's proposed "new" EFC rules are simply archaic and unrealistic in the current environment and must be rejected.

K. 4901:1-35-10: Annual review of electric security plan

DE-Ohio endorses First Energy's and AEP's requests under section (A) of this rule to add the word "significantly" before "excessive earnings" to conform to Ohio Rev. Code §4928.143(F).

DE-Ohio also endorses DP&L's request under Section (A) to make clear that the annual excessive earnings report is only required where an ESP actually results in adjustments. This change would remove the inconsistency between the rule as written and the language of Ohio Rev. Code §4928.143(F), which provides that "the commission shall consider, following the end of each annual period of the plan, **if any such adjustments resulted in excessive earnings... .**" (Emphasis added.) As a matter of logic, no annual filing is required if the Commission has not authorized any rate adjustment for the electric utility. In addition, "Additional Requested Information" Section (A) to Appendix B to should also be amended to conform to the quoted language from Ohio Rev. Code §4928.143(F).

DE-Ohio, however, opposes Nucor's requests that the utility demonstrate whether the ESP produced just and reasonable rates and for a related hearing. This is not the test for review of the ESP provided in R.C. §4928.143(C) and should therefore be rejected.

L. 4901:1-35-11: Competitive bidding process ongoing review and reporting requirements

DE-Ohio endorses AEP's request to delete section (C)(4) under this rule because S.B. 221 did not create or contemplate a mechanism for retrospective earnings evaluations. DE-Ohio also adopts AEP's request to delete Section (C)(8) because market condition tests are only to be applied once. In addition, the Commission should adopt DP&L's comment under Section (B)(3) that the earnings test provisions no longer apply once the blending period is complete or the electric distribution utility (EDU) no longer owns generation facilities. The Commission should also adopt DP&L's comment under Section (B)(5) to allow electric utilities to seek relief for an emergency situation at any time, not just at the filing of the annual report.

DE-Ohio opposes, however: (1) OFBF's request that the Commission review the CBP transition process annually; (2) Ormet's request to require the utility to allocate its least cost generation to retail customers when providing power in a blended situation; (3) Nucor's request to allow any person to have the ability to conduct discovery on, file comments on, or petition for a hearing on the CBP report; (4) OEG's request under Section (C)(4) to require return of excessive earnings to consumers; and (5) OEG's request to add a prospective earnings test regarding excessive earnings. These requests are without statutory authority.

Finally, OCEA proposes several extra-statutory alterations to the proposed rule. Once again, OCEA's proposals are "command and control" restrictions that reject any sort of flexible approach in favor of unnecessary process. For example, OCEA would (1) allow any party to "disapprove" of the utility's quarterly adjustment; (2) require an annual cost report; (3) require opportunity for public comment on the prudence report; (4) require that the CBP status report 'unify' least cost planning and the portfolio plan; (5) require an "accounting" in the CBP status report; (6) require additional information in the CBP status report regarding excess earnings; and (7) require the CBP status report to be set for hearing. The Commission should reject these suggestions by OCEA as being without statutory authority and as only tending to add cost and delay to the MRO process. S.B. No. 221 was designed to further the growth of competitive markets in Ohio while protecting Ohioans against market abuse. It was not designed to allow OCEA or other actors to demand a return to the era of rate-of-return regulation to be imposed through the rules of the Commission.

III. DE-Ohio's Reply To The Initial Comments Regarding Chapter 36 (Transmission Cost Recovery) Of The Proposed Rules

A. 4901:1-36-02: Purpose and scope

OCEA's conceptual approach to transmission cost recovery is outdated and wrong. OCEA apparently urges the State of Ohio and the Commission to return to the EFC Rules. Those rules were written at a time when Regional Transmission Organizations (RTOs) had yet to be created and prior to FERC's requirements of open access, market based, tariffs. As a result, OCEA's suggested changes to Proposed Rule 4901:1-36-02(A) are largely inappropriate.

OCEA is correct that RTOs and utilities can only charge FERC-approved rates.[33] OCEA is incorrect, however, in its attempts to change the language proposed by the Staff, which is more specific and more in-line with the Commission's obligations under S.B. 221. In addition, OCEA's proposed insertion of the word "directly" would merely invite dispute as to what charges are incurred in providing transmission service, when the charges have already been determined by FERC.[34] Thus, the word "directly" should not be inserted.

DE-Ohio agrees with AREO's suggestion that congestion costs be removed from Proposed Rule 4901:1-36-02(A) on the basis that congestion costs are "energy" costs and not transmission costs.[35] DE-Ohio moved congestion costs into its Fuel and Purchased Power (FPP) rider several years ago for this reason. DE-Ohio agrees that recovery of these costs through the PTC-FPP rider proposed within DE-Ohio's ESP case is appropriate.

Kroger, OEG, and IEU-Ohio propose that language should be added that would require the utility to offset against transmission cost recovery any revenues that the utility receives from the transmission of electricity. The suggested language should not be added. The utilities are

[33] OCEA's Comments, p. 59.
[34] Id.
[35] AREO's Comments, p. 21.

already required to do exactly what is suggested under FERC's formula rate[36] for determining transmission revenue requirement. It would not merely be redundant to impose a new Ohio rule requiring the performance of an act that is already required and performed due to federal rules, it also risks future conflict between the Commission's rules and those promulgated by FERC in the event of changes in those rules.

OCEA proposes, in addition, that the Commission require a hearing to determine whether transmission cost recovery is appropriate. Such a hearing would not generally appear necessary, and should not be mandated through the rules. OCEA concedes that FERC approved charges are the basis upon which transmission cost recovery should be determined,[37] and utilities will pursue recovery of those charges through rates approved by the Commission. The Commission, however, will already have approved the particular rate design, even if the ultimate rate itself changes. Thus, mandatory hearings would appear to be an unnecessary and expensive step when, in essence, rates will have already been set.

DE-Ohio agrees with First Energy's statement that, should the Commission *request* a hearing on the transmission cost recovery for any reason, then transmission charges should be conditionally approved during the time period before a decision has been reached.[38] Once a decision has been issued, the appropriate parties can receive reconciliation or a rebate, and since the rule also contemplates a carrying cost on over- or under-recovery, neither consumers nor utilities should be harmed if these revenues are recovered conditionally.

[36] DE-Ohio's formula rate is in the form of its Attachment O filed with MISO and subject to FERC approval.
[37] OCEA's Comments, p. 59.
[38] First Energy's Comments, p. 27.

IV. DE-Ohio's Reply To The Initial Comments Regarding Chapter 37 (Special Arrangements) Of The Proposed Rules.

A. 4901:1-37- 01: Definitions

DE-Ohio repeats its suggestion that the definition of "electric service company" be changed so as to include governmental aggregators. DE-Ohio opposes the suggestion of AREO that definitions be added for "Administrative support" and "Corporate support." AREO's purpose in proposing these definitions is explained by its proposed addition to 4901:1-37-04, O.A.C., which would prohibit an electric utility and its affiliates from sharing "administrative" support, while permitting "corporate" support to be shared. DE-Ohio respectfully asserts that the distinctions are confusing and entirely unnecessary. DE-Ohio is already required, by federal and state law, to fully allocate the total costs of any intercompany services, products and personnel to the entity that incurs those costs. DE-Ohio must account for such transactions as require by law, and its accounts are subject to audit.

B. 4901:1-37-04: General provisions

DE-Ohio reaffirms its support for the proposed changes it suggested in its initial comments to proposed section 4901:1-37-04. Express language requiring all electric services companies to treat as confidential all information obtained from an electric utility is appropriate to protect consumers.

DP&L and AEP each joined DE-Ohio in expressing concern with the language proposed by Staff for subsection (D)(7). Changing the standard of "ensure" to one requiring "reasonable efforts to ensure," appropriately addresses the concerns of each utility that they should not (and cannot) guarantee the conduct of third parties over which they have no control.

Changing the language of (D)(10)(d) to require "substantial" rather than "strict" compliance with published tariffs is consistent with the historic responsibility of a utility and would reduce the likelihood of disputes between a utility and others over differences in interpretations of tariff language.

OCEA's proposed changes to (A)(1) and (C) are too vague and confusing and should not be adopted. OCEA's suggestion regarding (A)(5) is also too vague, suggesting in effect that the Commission create an as yet unidentified test that would permit arguments whether fully allocated costs do or do not reflect the benefits of a shared employee. Moreover, this proposal is inconsistent with existing federal and state laws applicable to electric utilities , and is even inconsistent with OCEA's own proposed (A)(6) in which it argues utilities should be compelled to demonstrate their compliance with federal and state regulatory rules. In short, federal and state public policy on the topic of resources shared between a regulated utility and its unregulated affiliates is already well established. At both the federal and state level, the sharing of employees is expressly permitted, subject to full cost allocation to the cost incurring entity. The appropriate "check" on this permission is in place as the utilities are required by federal and state law to fully allocate and account for such costs, and the utilities are subject to audit requirements to confirm their compliance with those laws.

DE-Ohio also opposes OCEA's and AREO's suggested limitations on shared marketing by corporate affiliates and suggests that the Commission reject those proposals. OCEA's proposed changes to (D)(7) would prohibit an electric utility from even indicating that another electric service provider is an affiliate. As proposed, OCEA's suggestion would seemingly preclude affiliates from even the use of common trademarks and service marks, and could even be construed so as to prohibit any similarity in corporate names. AREO's proposed new rule (D)(12) prohibits joint marketing by affiliates but expressly recognizes exceptions for the use of corporate names, trademarks, logos, etc. Although this proposal is somewhat better defined than OCEA's proposed rule, it is equally inappropriate.

C. <u>4901:1-37-05: Application</u>

DE-Ohio suggested in its initial comments that the Commission change the language of (B)(13)(a)-(f) so as to allow non-attorney customer service representatives to monitor, record, track, and respond to complaints regarding corporate separation requirements. OCEA joins DE-Ohio in arguing that it is inappropriate to require legal counsel to be responsible for monitoring and responding to these corporate separation requirements, but argues instead that the Board of Directors or a delegated subcommittee of the Board should have such responsibility.

DE-Ohio reiterates its suggestion that one or more non-attorney customer service representatives be permitted, in the first instance, to assume responsibility for this function. The designated individual can be identified by the compliance officer, internally, and vested with the discretion to bring an alleged violation to the attention of corporate counsel or even to the Board, when appropriate. Mandating either counsel or the Board's involvement in every such complaint is unnecessary.

D. <u>4901:1-37-07: Access to books and records</u>

OCEA proposes a section (D) in order to permit any person to file a complaint regarding a failure to comply with corporate separation requirements, arguing market participants are just as likely to identify a violation as staff. OCEA's amendment is unnecessary. Any person or entity that can demonstrate an injury due to violation of the Commission's rules already has access to the Commission's complaint procedures via Ohio Rev. Code §§4905.26 and 4905.35.

E. 4901:1-37-08: Cost allocation manual

OCEA's statement that the cost of transferred assets must be based upon the lower of fully allocated costs or book value is not supported anywhere within the statute. Similarly, OCEA's proposed new rule 4901:1-37-09(B)(4) requiring that the transfer of a generation asset between affiliates must be valued at the higher of fair market value or book value is unsupported.

F. 4901:1-37-09: Sale or transfer of generation assets

OCEA's proposals in (D) (mandatory hearings regarding all generation transfer applications) and (F) (provide parties the same access as staff to books, accounts etc. related to a transfer or sale of generation assets) are unnecessary. The rules as written permit the Commission to decide whether a hearing is necessary regarding a proposed sale or transfer, and in the event the Commission requires hearings on the subject, interested parties have the traditional powers of intervention and discovery available to them pursuant to the Commission's Rules of Practice.[39] Similarly, AREO has not suggested that the Commission's existing complaint procedures are in any inadequate, and thus its proposed new 4901:1-37-10 is unnecessary.

V. DE-Ohio's Reply To The Initial Comments Regarding Chapter 38 (Special Arrangements) Of The Proposed Rules.

A. 4901:1-38-01: Definitions

OCEA's proposed change to the definition of (F) "Energy efficiency production facilities" is objectionable, as it adds a requirement that a particular product or application exceed (rather than simply meet) applicable energy codes and standards. Such a limitation does not exist within the statute itself. Moreover, there is no conceivable reason to define energy efficiency production facilities so as to disqualify those that "merely" meet applicable standards when the investment

[39] Ohio Admin. Code §4901-1 et seq.

in those facilities nonetheless provides real energy efficiency savings when compared to the facilities that pre-existed the particular investment.

B. 4901:1-38-03: Economic development schedule

DE-Ohio agrees with First Energy's comments to subsections (A) and (B). The applicable statutory language is permissive, not mandatory. Thus, a utility cannot be compelled to file an economic development schedule. The utility must choose for itself whether to file such a schedule for the Commission's consideration. DE-Ohio also agrees with AEP's, OEG's and OFBF's comments to subsections (A) and (B). The Commission and the Department of Development should work in conjunction to guide (or at least provide guidance to) electric utilities regarding concerning desirable economic development candidates.

DE-Ohio agrees with those comments of OCEA that require accountability by the economic development customers, but would leave the determination of how that accountability will be demonstrated to the customer to propose and to the Commission to approve. DE-Ohio sees no reason to make the Office of Ohio Consumers' Counsel (OCC) or any other entity an automatic recipient of information regarding economic development customers, particularly when such "automatic" disclosure rules will inherently create concerns regarding the treatment of confidential information belonging to the customer.

OCEA's proposed rule limiting a utility's recovery of delta revenues to 50% of those revenues must be rejected. The statute contains no such limitation, nor could it. The Ohio General Assembly exercised its authority to determine that, subject to acquiescence by the utility and approval by the Commission, it is wise public policy to invest tax payer dollars to encourage economic development deals. Neither the Ohio General Assembly nor this Honorable

Commission, however, has any authority to determine whether it is or is not wise to invest dollars belonging to the shareholders of a utility in such deals.

DE-Ohio agrees with AREO's suggested change to (A)(1) in order that it be made expressly clear that the customer seeking special terms is responsible for filing the application with the Commission, but does not agree that S.B. 221 requires a commitment to seek lowest cost generation, including generation from CRES providers. DE-Ohio does not agree that an economic development schedule should be limited to three years by rule.

D. 4901:1-38-07: Level of incentives

DE-Ohio disagrees with OCEA's proposed new (E) capping incentives paid for by classes not eligible for the incentive. The General Assembly has made the determination that incentives should be available and that such incentives are to be recovered among all rate classes.

E. 4901:1-38-08: Revenue recovery

DE-Ohio recognizes that the Commission is vested with the discretion to approve or disapprove an application for special arrangements. Once approved by the Commission, however, the utility's recovery of delta revenues is mandatory pursuant to the statute. Language proposed by DE-Ohio, or that proposed by AEP, should be included within the rules.

Respectfully submitted,

Michael D. Dortch (0043897)
KRAVITZ, BROWN & DORTCH, LLC
145 East Rich Street
Columbus, Ohio 43215
Tel: 614-464-2000
Fax: 614-464-2002
E-mail: mdortch@kravitzllc.com
Attorneys for
DUKE ENERGY OHIO

Rocco D'Ascenzo

Paul A. Colbert (0058582)
Associate General Counsel
Rocco O. D'Ascenzo (0077651)
Senior Counsel
Duke Energy Business Services, Inc.
139 E. Fourth Street, Rm 2500 AT II
Cincinnati OH 45201
Tel: 614- 221-7551
E-mail: paul.colbert@duke-energy.com
rocco.d'ascenzo@duke-energy.com
Attorneys for DUKE ENERGY OHIO