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BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

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

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

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

I. INTRODUCTION

Pursuant to the Commission's Entry of August 20, 2008, Ohio Edison Company ("Ohio Edison"), The Cleveland Electric Illuminating Company ("CEI") and The Toledo Edison Company ("Toledo Edison") (collectively, the "Companies"), hereby file their comments to the proposed Rules for Alternative and Renewable Energy Technologies and Resources, and Emission Control Reporting Requirements, and Amendment of Chapters 4901:5-1, 4901:5-3, 4901:5-5, and 4901:5-7 of the Ohio Administrative Code.

The language in Am. Sub. S.B. 221 was carefully crafted amid much concern and strongly held positions about the electric industry in Ohio. As is always the case, and especially here, the Commission's rules must closely reflect the express language of the statute and may not vary from or go beyond the Ohio legislature's intent as delineated in the words used in Am. Sub. S.B. 221. In certain cases the proposed rules go well beyond not only the words, but also the intent, of the statute. The Commission's promulgation of

rules that are in conflict with the language or intent of the statute or are incapable of implementation are unlawful and unreasonable. The words in Am. Sub. S.B. 221 reflect the legislative balance chosen as to the substantive criteria and requirements for the provisions contained therein. To the extent that the rules expand on a substantive requirement or impose criteria on a utility more stringent than the statute, the Commission has exceeded its statutory authority and the effect is to impose a requirement different than, and hence in conflict with, the statute and its intent. The Commission, as a creature of statute, is not empowered to act in conflict with legislative intent and the statutes enacted by the legislature. Unfortunately, as pointed out in a number of the Companies' comments below, the Commission has done just that. Therefore, such rules would be improper and subject to invalidation.

Nevertheless, the Companies appreciate Staff's extraordinary efforts that are reflected in the proposed rules and appreciate the opportunity to offer their comments. The Companies look forward to working with the Staff and other interested parties in creating reasonable rules that effectively implement Am. Sub. S.B. 221.

With that in mind, and for the reasons set forth below, the Companies respectfully request the Commission consider their responses and comments and appropriately modify the proposed rules.

II. COMMENTS TO STAFF'S PROPOSED RULES

A. New Chapter 4901:1-39, "Energy Efficiency and Demand Reduction Benchmarks"

1. General comments.

Pursuant to R.C. 4928.66(A)(2)(d), a utility may implement energy-efficiency programs including "transmission and distribution infrastructure improvements that reduce line losses." The proposed rules of 4901:1-39 do not make it clear that improvements to transmission infrastructure owned and operated by a utility affiliate (such as American Transmission Systems, Incorporated ("ATSI"), an affiliate of the Companies) also qualify, either on a stand alone basis or as part of a utility program to reduce line losses. The Ohio legislature surely did not intend that the Commission should not consider improvements to ATSI transmission facilities, and there are several practical reasons why utility programs geared towards energy efficiency ("EE") improvements of ATSI-owned assets and facilities should count towards meeting the utility's energy-efficiency goals. Such clarification should be set forth in the proposed rules.

The statute expressly contemplates that energy savings resulting from utility EE programs will be based, in part, upon the facilities and efforts of third parties.[1] The statutory language does not condition or tie EE programs to ownership or control of the assets involved in achieving EE goals, and such assets and facilities may be owned by either a third party or the utility as evidenced by the language of 4928.66. Likewise, the language of R.C. 4928.66(A)(2)(d) authorizing these programs is written inclusively, not exclusively. *Id.* ("Programs implemented by a utility may *include* . . . .") Based upon

[1] *See, e.g.*, 4928.66(A)(2)(c) ("Compliance with divisions (A)(1)(a) and (b) of this section shall be measured by including the effects of all demand-response programs for mercantile customers of the subject electric distribution utility and all such mercantile customer-sited energy efficiency and peak demand reduction programs . . . .").

this stated intent, ownership of such assets by an affiliated entity does not preclude a utility from counting energy savings arising from energy efficiency efforts by that affiliated entity.

Furthermore, if 4928.66(A)(2)(d) does not apply to transmission assets ("transmission and distribution infrastructure improvements") such as those owned by an entity like ATSI, then what would "transmission assets" apply to? There is no language in the statute indicating an intent to exclude improvements to transmission assets based on ownership. Moreover, there was no specific intent to exclude the transmission system that serves the FirstEnergy Companies, but permit such programs for all other EDUs in the state. Such a result is inconsistent with the statute's stated goal of improving EE, and EDUs should be encouraged to implement energy efficiency programs designed to decrease transmission line losses regardless of ownership. Such loss reductions represent true reductions in energy production for the same usage at the customer level, and also offer one of the best values for energy efficiency.

Indeed, inclusion of such ATSI-owned assets both directly and indirectly benefits end use customers. Customers directly benefit from reductions in line losses because ultimately such reductions lower transmission rates, and such rates are directly passed through to retail customers. Indirectly, electricity generation will be reduced at the generation plant due to lower line losses, thereby resulting in lower emissions from those plants, and a reduction in the amount of natural resources required to meet the needs of customers.

Thus, for significant legal and practical reasons, improvements of ATSI-owned facilities must qualify under the rules, and the Commission should provide clarity on this issue.

2. Rule 4901:1-39-01, "Definitions."

Section (B): The definition of "Energy efficiency" should be revised to state, "means programs or measures that reduce or manage the consumption of energy, while maintaining or improving the end-use customer's existing level of functionality, or while maintaining or improving the utility system functionality." This definition is clearer and thus easier to apply.

Section (H): The following section should be added:

> "Energy efficiency credit" means the fully aggregated attributes associated with one avoided megawatt hour of electricity resulting from the development of projects possessing energy efficiency qualities as defined in 4901:1-39-01(B). These credits can be represented as partial megawatt hour quantities.

3. Rule 4901:1-39-03, "Filing and review of the benchmark report."

Section (C): This section states in part, "If staff finds that an electric utility has not demonstrated compliance with the annual sales reductions required by division (A) of section 4928.66 of the Revised Code . . . ." The Companies note that R.C. 4928.66 does not require the Companies to achieve "annual sales reductions requirements" but rather to "achieve energy savings." *See* R.C. 4928.66(A)(1)(a). Requiring "sales reductions" is inconsistent with the language of the statute and may be interpreted to have a meaning different from the statutory requirement of "energy savings"; the statutory language should be used in the proposed rules to avoid this type of confusion and to better ensure consistency with the statutory intent.

4. Rule 4901:1-39-04, "Benchmark report requirements."

Section (A)(3): The Companies propose removal of the words "considered and." Including actions that have been "considered" is unnecessary and ambiguous. Determining what was "considered" would be next to impossible to determine, track, and record on a consistent basis, and its meaning would most likely vary from party to party.

Section (B)(1): The baseline for measuring energy savings should be based on the three preceding calendar years as reported in the utility's "most recent forecast report," not the "*three* most recent forecast reports." The most recent forecast contains all of the required information for the "preceding three years", so there is no need to require the information from the three most recent forecast reports.

Section (B)(2): The Companies recommend deletion of the existing paragraph and replacement with the following:

> The baseline for peak demand reduction shall be the hourly integrated peak demand coincident with the peak of the transmission owner's control area peak from the past three calendar years. The three coincident peaks shall be averaged together.

Section (B)(5): The Companies propose removal of the words "considered and." Including actions that have been "considered" is unnecessary and ambiguous. Determining what was "considered" would be next to impossible to determine, track, and record on a consistent basis, and its meaning would most likely vary from party to party.

Section (B)(5)(b): The Companies recommend that additional language is needed to clarify that the measurements and verification "may include, but are not limited to, the methods listed," or that "each of the methods listed may be used, but not all are required."

Section (B)(5)(c): The Companies propose removing this section entirely. The rules do not state the purpose of this requirement, and the purpose is not self evident. Nor does it seem practical. The EPA's portfolio manager database is a competitive service offered by energy marketers and consultants to mercantile customers for a fee. This information should be provided by customers at their discretion.

Section (B)(6): The benchmark report and program budget projection should be for a five-year projection, not ten. Ten years is simply too long a period to effectively or reliably predict what the Companies will be doing. Such a report would be increasingly less reliable to users with each additional year included. A five-year reporting period, updated annually, is far more meaningful to better ensure foresight and apprise interested parties.

Section (B)(7): This section should be removed. In addition to providing little direction or explanation regarding the goal or purpose of the required "assessment and market valuation," this requirement is not authorized by statute. Moreover, the terms "assessment and market valuation" as used in this context, are vague and so overly broad as to be virtually meaningless.

Section (B)(8): A new section should be added clarifying that energy efficiency savings that amount to more than the benchmark in the current year can be carried forward to subsequent years to count towards future benchmarks. Without this change, Companies will be incented to not over-comply in any given year, because the cost and effort associated with such overcompliance would be lost. This proposed change is also consistent with the final, "cumulative" goal established in R.C. 4928.66(A)(1)(a).

Section (B)(9): A new section should be added stating that customer-sited initiatives that occurred before 2009 shall count towards meeting energy-efficiency and demand-response benchmarks.

Section (C): In regards to the second sentence authorizing Staff-published guidelines and requiring compliance, the Companies generally have no objection assuming that they are given sufficient notice and time to comply with such guidelines if they are published.

Section (C)(1): This section, which does not allow EDUs to count technologies or measures mandated by law, should be removed. To begin with, the phrase "mandated by law" is remarkably ambiguous and overbroad and could effectively be used to disqualify virtually everything the Companies do to achieve energy savings, particularly given that R.C. 4928.66 requires such measures. And in any event, even if the measures are mandated by law, they nevertheless achieve energy savings. Such savings are mandated by statute, and recognizing the savings is consistent with public policy. Disallowing such savings serves no good purpose.

Section (C)(2): This section, requiring the sharing of certain customer information with the U.S. EPA portfolio manager database, should be removed. First, the rule is not consistent with the requirements of proposed Rule 4901:1-39-06(B). Further, the statute does not institute any such requirement on EDUs. And it does not make sense to place this requirement on EDUs. The EPA's portfolio manager database is a competitive service offered by energy marketers and consultants to mercantile customers for a fee. This information should be provided by customers at their discretion.

Section (D)(1): The Companies propose adding Section (D)(1) to clarify that affiliated EDUs, such as the FirstEnergy Operating Companies, may utilize a total Ohio benchmark instead of an EDU-by-EDU benchmark. The Companies propose the following language:

> Affiliated EDUs within the State may use a single, consolidated Ohio benchmark from which to measure the energy savings required by R.C. 4928.66, as opposed to multiple, EDU-specific benchmarks.

5. Rule 4901:1-39-05, "Recovery mechanism."

Section (A): The Companies recommend deleting the phrase, "Upon approval of an electric utility's long-term forecast and benchmark reports as set forth in Chapter 4901:1-5-1 of the Administrative Code, and this chapter . . . ." Cost recovery should be approved in an application separate from forecast and benchmark report proceedings. Also, the word "potential" should be removed from "potential shared savings" and replaced with "actual," thus reading "actual shared savings." Since shared savings will be known, the calculation does not and should not involve any "potential" amount.

Section (A)(1): The Companies recommend removing the phrase, "is limited to the portion of those investments that are attributable to energy efficiency purposes as opposed to reliability or market purposes." All things equal, the Company should be entitled to recover investments achieving energy savings, regardless of the purpose for which the investments were made. Assuming double-recovery is avoided, the Company should not be deterred from achieving multiple benefits with single investments. Further, R.C. 4928.66 simply requires that such improvements "reduce line losses". The Commission may not, by proposed rule, make this provision significantly more prescriptive and narrow than what is set forth by statute. In addition, it will be very

difficult to determine the "portion of those investments that are attributable to energy efficiency purposes."

Section (C): The Companies propose the addition of Section (C), which should read, "Cost recovery approved under this section is non-bypassable except for the mercantile-customer exemption provided under Rule 4901:1-39-06." All customers will enjoy the benefits of achieving energy savings, so all customers should bear the cost, except as otherwise specifically provided in the statute.

Section (D): The Companies propose the addition of Section (D), which should read, "Cost recovery approved under this section may be allocated across all customers of the companies within the same holding company system." This change is consistent with the proposed new section 4901:1-39-04(D)(1).

6. Rule 4901:1-39-06, "Commitment for integration by mercantile customers."

Section (B): The Companies recommend removing the following sentence, "In order to be eligible for such exemption, the mercantile customer must consent to providing data on its facilities to the United States environmental protection agency's portfolio manager as described in rule 4901:1-39-04." This requirement would deter customers from participating in energy efficiency. The EPA's portfolio manager database is a competitive service offered by energy marketers and consultants to mercantile customers for a fee. This information should be provided by customers at their discretion; the exemption should not be conditioned on such a requirement.

7. New Section –Rule 4901:1-39-07, "Energy efficiency credit."

The Companies propose the adoption of Section 4901:1-39-07, as follows:

(A) An electric utility or electric services company may use energy efficiency credits to satisfy energy efficiency benchmarks.

(1) To be eligible for use towards satisfying a benchmark, an energy efficiency credit must originate from a facility or project that meets the definition of energy efficiency.

(2) To use energy efficiency credits as a means of achieving partial or complete compliance, an electric utility or electric services company must be a registered member in good standing of at least one of the following:

(a) The PJM generation attributes tracking system.

(b) The midwest renewable energy tracking system.

(c) Another credible tracking system as shown by the electric utility or another tracking system that is subsequently approved for use by the commission.

(3) An energy efficiency credit may be used for compliance any time for the life of the initiative or project.

The basis for establishing energy efficiency credits is that it would provide a tangible and "trackable" system that allows flexibility and functionality for EDUs in meeting the statutory requirements for energy efficiency. The creation of an "EEC" or Energy Efficiency Credit, much like that of Renewable Energy Credits or RECs, would enhance the process of tracking and reporting compliance under S.B. 221's energy-efficiency requirements by way of standard reporting tools such as PJM EIS' Generator Attribute Tracking System ("GATS"). Moreover, the creation of EECs ensures that energy efficiency efforts which go beyond the statutory requirements are not unnecessarily stranded in that year. Using a system such as GATS, where a serial number for each EEC is created against specific customer- or Company-sited projects, further provides EECs that are only counted once through the retirement of that EEC and ensures energy efficiency efforts are not double counted.

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

1. Rule 4901:1-40-01, "Definitions."

Section (I): The Companies recommend clarification to the definition of "Deliverable into this state" to make the definition more workable, and therefore propose that the definition be restated to cover electricity originating from states contiguous to Ohio "or originating from a source located in an RTO that serves Ohio."

Section (M): The Companies recommend deletion of the definition of "Double counting." This concept has no place in the rules. First, there is no statutory prohibition against using a single resource (such as a solar panel) to meet more than one requirement (such as those pertaining to energy efficiency and renewable energy). The Commission, therefore, is not authorized to impose such a limitation. Second, there is no good reason for this limitation. The statutory goals are not mutually exclusive but support one another, and if more requirements can be satisfied with less investment, that should be encouraged, not discouraged.

Section (U): The Companies oppose the definition of "Fully aggregated." To be consistent with a number of other states, a renewable energy credit should be a separate attribute from energy, capacity, and ancillary services, and any other current or future attribute associated with the MWh of renewable energy that resulted in the renewable energy credit's creation.

Section (DD): The Companies propose an alternate definition of "Renewable energy credit" that is clearer and offers more flexibility:

> A renewable energy credit represents one MWh of qualified renewable energy generation, whether self-generated, purchased along with the commodity or separately through a tradable instrument.

2. Rule 4901:1-40-03, "Requirements."

Section (B): This section discusses calculation of the baseline. The Companies believe that further clarification and specificity is necessary as much is left for interpretation. For example, it is possible that the baseline calculation could create a void as suppliers move in and out of serving in various locations. The rules do not address this possibility, such as whether there would be a default party. Further, these provisions spread the responsibility for compliance unfairly to companies that have been operating in the state, especially if significant shopping has occurred. For this reason the Companies make the following recommendations:

Section(B)(1): The last sentence of the paragraph should be restated to read "in that electric utility's RTO billing statements, SSO invoices, or forecast reports or reporting forms."

Section(B)(1)(a): The Companies propose adding the following section:

> The baseline shall be adjusted to reflect customers that have shopped with an electric services company and shall be prorated for the amount of time the customer has been served by the electric service company.

Section(B)(2): The Companies recommend restating the last sentence of the first paragraph as follows, "the electric services company's RTO billing statements or most recent quarterly market monitoring reports or reporting forms."

Section(B)(2)(a): The existing paragraph should be deleted and restated as follows:

> An electric services company shall only be responsible for compliance in the year the electric services company served the customer.

Section(B)(2)(b): The existing paragraph should be deleted and restated as follows:

The baseline for an electric services company shall be prorated to reflect the time the customer was served in the reporting year.

To support the above revisions regarding the need to account for shopping customers, see the illustration below:

Alternative Energy Baseline (Accounting for Shopping ONLY)

EDU	2006	2007	2008		
Customer 1	500	505	502		
Customer 2	1,000	1,100	900		
Customer 3	770	780			
TOTAL	2,270	2,385	1,402		
Normlize for Customer Shopping	(770)	(780)	0		
Baseline Values	1,500	1,605	1,402	**1,502**	[illegible]

Energy Services Supplier	2006	2007	2008		
Customer 1					
Customer 2					
Customer 3			790		
Normlize for Customer Shopping	770	780	0		
Baseline Values	770	780	790	**780**	[illegible]

Remaining 50% reverts back to utility

Started Service 50% through the year

Section (C): This section states that each utility and electric services company shall annually submit to staff a plan for compliance with future annual advanced energy and renewable energy benchmarks utilizing a fifteen-year planning horizon. The Companies object to this requirement for several reasons. First, there is no statutory basis for such an annual filing. While an annual review of compliance with "the most recent applicable benchmark" has a statutory basis in R.C. 4928.64 (and is appropriately

included in the proposed rules at 4901:1-40-05), the statute neither requires nor contemplates the proposed long-term planning requirement found in this section. Moreover, such extensive long-term filing requirements poses a significant burden to the Companies, for little apparent value given the distant nature of the projections. Lastly, information regarding an electric service company's supply portfolio is confidential and should not be made public.

3. Rule 4901:1-40-04, "Qualified resources."

Section (A)(8): This section sets forth the requirements for a storage facility. The language of the proposed rule, however, contains limitations not found in the corresponding statutory definition, and therefore as written would be inconsistent with the authorizing statute. R.C. 4928.64(A)(1)(c) defines "[s]torage technology" as technology "that allows a mercantile customer more flexibility to modify its demand or load and usage." Contrast this flexible definition with the limited one promulgated by Staff, which only recognizes a storage facility "if it complies" with certain, non-statutory requirements.[2]

This section introduces an overly restrictive definition and requirement of storage facility that is inconsistent with the language of Am. Sub. S.B. 221 and should be deleted. This section should mirror and conform to the actual, expressly stated statutory language and should not attempt to expand upon the authorizing language of the statute. These restrictions not only go beyond, but conflict with, the express language of the statute. The statutory language cannot be revised by Commission rule to create additional

[2] Namely, "The electricity used to pump the resource into a storage reservoir must qualify as a renewable energy resource," and "The amount of energy that may qualify from a storage facility is the amount of electricity dispatched from the storage facility and shall exclude the amount of energy required to initially pump the resource into the storage reservoir."

provisions or give the Commission greater latitude. The Commission's rules may not vary from the clear language or intent of the statute, and the Companies' comments focus on the need to repeat the statutory language and thereby match the intent of the Ohio legislature.

The concept that a storage facility can only be regarded as a "qualified resource for meeting renewable energy source benchmarks" if it is pumped (charged) by a renewable energy resource is overly narrow and restrictive. This concept does not recognize the true value of storage as a multifaceted enabler of the development, construction, and implementation of renewable energy resources. The statute explicitly defines a "Renewable energy resource" as a "storage facility that will promote the better utilization of a renewable energy resource that primarily generates off peak." R.C. 4928.01(A)(35). Wind is clearly a renewable generation asset that primarily generates off peak and since a storage facility has the unique capability to move generation in time (*i.e.*, from an off-peak period to an on-peak period), it clearly provides for better and more effective renewable energy utilization. It should also be noted that the existence of a storage facility will "promote the better utilization of renewable energy resource that primarily generates off peak" in several ways:

- A storage facility provides control for a facility that, without storage, would be an undependable source of energy that would only provide power to the grid when the wind was available to power the asset.
- The value of a wind energy resource is much enhanced by the fact that, with storage, it can be delivered to the marketplace not only at a time when it is needed, but also at a time when it has more value to customers as well as to the renewable energy resource owner.
- In addition, the mere existence of storage would create a situation where more wind developers would likely invest in a region that had storage assets available as opposed to a region that did not. Therefore, a storage facility not only promotes better utilization of existing renewable energy resource, but it

would also promote the development of additional new renewable energy resources.

The proposed rule regarding "Storage Facility" improperly restricts the definition in the statute which is intended to be much broader in scope and application. Again, the clear and unambiguous language in the statute may not be usurped by rule. The proposed rule needs to be modified to ensure compliance and consistency with the authorizing statute.

Section (C): This section states that "qualified resources may be used for meeting electric utilities' annual renewable energy resource benchmarks or advanced energy resource benchmarks, as applicable, provided that it does not constitute double-counting for any other regulatory requirement and . . . ." The phrase "that it does not constitute double-counting for any other regulatory requirement" should be deleted for two reasons: First, there is no statutory prohibition against using a single resource (such as a solar panel) to meet more than one requirement (such as those pertaining to energy efficiency and renewable energy). The Commission, therefore, is not authorized to impose such a limitation. Second, there is no good reason for this limitation. The goals are not mutually exclusive but support one another, and if multiple requirements can be satisfied with single investments, that should be encouraged, not discouraged.

Section (D): This section states, "An electric utility or electric services company may also use renewable energy credits (REC) to satisfy all or part of a renewable energy resource benchmark, including a solar energy resource benchmark." The proposed rule is unclear in several respects and raises several questions: Are RECs a separate category from Advanced and Renewables? Or do all categories result in RECs? And does this mean a company may use RECs without using the energy to meet retail load? Again, it is

the Companies' position that an REC should not be fully aggregated and that RECs should be separate, unique, and tradeable instruments as they are in other states.

4. **4901:1-40-07, "Cost cap."**

Sections (A) & (B): R.C. 4928.64(C)(3) provides as follows:

> An electric distribution utility or an electric services company need not comply with a benchmark under division (B)(1) or (2) of this section to the extent that its reasonably expected cost of that compliance exceeds its reasonably expected cost of otherwise producing or acquiring the requisite electricity by three per cent or more.

First, the proposed rules would compare the EDU's expected compliance costs with "its reasonably expected generation rate," whereas the statute uses EDU's "reasonably expected cost of otherwise producing or acquiring the requisite electricity." The language of the rule should track the statutory language.

Further, this section provides a single cap applicable to the costs of complying with advanced and renewable benchmarks. If the total cost exceeds three per cent, the Companies are excused from compliance. Sections (A) and (B) of the proposed rule, however, provide for two independent cost caps, effectively driving the trigger for the cost cap up to six per cent. As a creature of statute, the Commission may not modify the statutory cost cap in this way.

Section (C): This section is inconsistent with the language of Am. Sub. S.B. 221 and implies that the Companies should compare their total generation rate with alternative energy resource expenditures to that rate without alternative energy resource expenditures in order to calculate the three per cent cost cap. Importantly, the phrase "cost of otherwise producing . . . the ***requisite*** electricity" in R.C. 4928.64(C)(3) is clear and confirms that the three per cent cost should measure the difference in costs on the specific generation required to meet the benchmark, not between total generation with

and without alternative energy resources. This provision in the statute is not procedural nor does it require interpretation by the Commission. This provision is substantive, clearly written and the product of much legislative discussion – the resolution of which is expressed in specific statutory language that requires strict adherence.

Section (E): This section states that the Commission may enforce compliance "with each benchmark up to the point that the three per cent increment would be reached for each benchmark." This is inappropriate and inconsistent with the statutory language, which states that if the three per cent cap is reached, the utility need not comply with the benchmarks. There is no legislative contemplation of an "up to" standard for the cost cap and the Commission has no power to modify the application of the statute.

Section (F): This section states, "The commission retains the right to increase a future year's compliance obligation by the amount of any under-compliance in a previous year that is attributed to the three per cent cost cap provision." There is absolutely no statutory authorization for such adjustments; in fact, the statute expressly provides a remedy for non-compliance (*i.e.*, compliance payments, *see* R.C. 4928.64(C)(2)), which refutes the notion the Commission is authorized to craft its own remedies. A Commission rule which extends or abrogates a statutory directive regarding compliance conflicts with the clear legislative language and intent and must be revised or deleted.

5. Rule 4901:1-40-08, "Compliance payments."

Section (3)(a): To ensure due process requirements are met, the Companies suggest adding the following language, "If such action is taken, the Commission shall give sufficient notice to electric utilities and/or electric service companies."

C. New Chapter 4901:1-41, "Greenhouse Gas Reporting and Carbon Dioxide Control Planning"

1. Rule 4901:1-41-02, "Greenhouse gas reporting and carbon dioxide control planning."

Section (A): The proposed rules provide in Section (A), "Any person which owns or operates an electric generating facility within Ohio shall become a participating member in the climate registry . . . and shall report greenhouse gas emissions according to the protocols approved by the climate registry . . . ." The proposed rules also provide in Section (B), "Any person which owns or operates an electric generating facility within Ohio shall file with the commission . . . an environmental control plan, including carbon dioxide control planning."

It is important to note that the Companies own no operating generating facilities within Ohio. As a result, the reporting requirements noted above would fall to the Companies' unregulated affiliate as the owner of such facilities. Imposing such participation and reporting requirements on an unregulated affiliate is not within the Commission's jurisdiction, exceeds the Commission's statutory authority, and is inconsistent with the language of Am. Sub. S.B. 221. As fixed by the General Assembly in R.C. 4928.68 is quite specific, stating:

> To the extent permitted by federal law, the public utilities commission shall adopt rules establishing greenhouse gas emission reporting requirements, including participation in the climate registry, and carbon dioxide control planning requirements for each electric generating facility that is located in this state, *is owned or operated by a public utility that is subject to the commission's jurisdiction* . . . . (emphasis added)

Clearly, the requirements provided in the proposed rules should only apply to public utilities that are subject to the Commission's jurisdiction, and the Ohio legislature did not intend to impose such requirements on entities that are beyond the Commission's

jurisdiction. A Commission rule which extends or abrogates these mandates conflicts with the clear legislative language and intent and must be revised.

It is also important to note that The Climate Registry ("TCR") is not a federal program, it's a consortium of interested groups who elect to pool their expertise and share ideas and information among themselves. The Companies believe that the TCR's General Reporting Protocol requires further public participation and follow-up public workshops prior to any "required membership" in the TCR. Existing protocols such as the SOx, NOx and CO2 continuous emission monitoring protocol under Title IV of the Clean Air Act and the EIA 1605(b) program have had extensive public involvement through notice, comment and workshops. Such activities help stakeholders better understand the reporting requirements and in essence provides a more useful end product, which represents a quality program that is fair, verifiable, transparent, and vetted through channels consistent with the Regulatory Procedures Act.

If the intent of this section is to obtain greenhouse gas inventories, the Commission should acknowledge that the data requested is currently available from the EPA. Emissions data or otherwise referred to as Scope 1 (direct) emissions are submitted under EPA requirements (fossil fuel combustion units equipped with Continuous Emissions Monitoring Systems) and are scrutinized and reviewed by the federal agency. The activity to report Scope 1 emissions through the TCR, which carries no regulatory jurisdiction, would be redundant and potentially inconsistent for those entities subject to the proposed requirement. In fact, the Ohio Environmental Protection Agency does not plan to require reporting to TCR. Participation would be voluntary for Ohio entities.

Thus, for legal and practical reasons this provision should be modified to conform to the actual, expressly stated statutory criteria or alternatively deleted from the proposed rules. The statutory language cannot now be revised by Commission rule to create additional provisions or give the Commission any greater latitude than the express words in R.C. 4928.68. The Commission's rules may not vary from the clear language or intent of the Revised Code, and the Companies' comments on this section focus on the need to repeat the statutory language and thereby match the intent of the Ohio legislature.

Lastly, Section (C) states:

> The environmental control plan shall include all relevant technical information on the current conditions, goals, and potential actions based upon the most current scientific and engineering design capability of any facility that has been designed to have the capability to control the emissions of criteria pollutants and carbon dioxide within the parameters of economically feasible best technology.

Regarding the issue of controlling emissions of carbon dioxide within the parameters of economically feasible best technology, there currently are no cost effective, commercially demonstrated, or available control technologies. Nor are there any binding requirements that would substantiate the very significant cost to the economy of limiting carbon dioxide for the utility sector. The issue of legislative or regulatory timing does not match technology development.

D. Revised Chapter 4901:5-3, "Filing and Fees for Long-Term Forecast Reports."

1. Rule 4901:5-3-01 Definitions

Section (E)(1): The Companies note that the reference to "4905:5-3-03" should be changed to "4905:5-3-04."

E. Revised Chapter 4901:5-5, "Electric Utility Forecast Report Filing Requirements."

1. Rule 4901:5-5-01, "Definitions."

Section (H): The Companies recommend removing the last sentence of the definition, "It consists of both energy conservation effects which reduce customer energy use directly and effects which cause customers to switch to or from utility-provided electricity." The Companies cannot know all the reasons that cause customers to switch to competitive retail electric service providers ("CRES"). In addition, customers could move load from on-peak to off-peak without switching to a CRES.

2. Rule 4901:5-5-02, "Forecast report requirements for electric utilities and transmission owners."

Section (A): The Companies suggest revising the sentence to read, "describing the utility's forecast of loads and, when applicable, the resource plan to meet . . . ."

Section (C)(2)(b): The proposed revision requiring Companies to "provide a discussion of the impacts of . . . factors" identified by the Commission is burdensome and unnecessary. Such discussions, when required, should be initiated through formal or informal discovery requests, but should not be the subject of a standing order to respond.

3. Rule 4901:5-5-03, "Forecasts for electric transmission owners."

Sections (B)(4)(b)-(f), (E)(5)-(6): The information required in these sections is not calculated, posted, maintained, or otherwise within the responsibility of the Companies. This information is more appropriately required from RTOs such as MISO.

III. CONCLUSION

Again, the Companies commend the Staff for its hard work in producing proposed rules in such an expeditious fashion. For the reasons stated above, the Companies

respectfully request the Commission consider their responses and comments and modify the rules accordingly.

Respectfully submitted,

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