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**Legal Department**

**Phone: (937) 259-7802**
**Fax: (937) 259-7178**
**E-Mail: jenna.johnson-holmes@dplinc.com**

September 9, 2008

**Via Fed Ex**
Public Utilities Commission of Ohio
Docketing Division
180 East Broad Street
Columbus, OH 43215-3793

**Re:** 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**

Dear Sir/Madam:

Enclosed please find for filing the original and (11) eleven copies of the Initial Comments and Objections of The Dayton Power and Light Company.

Please time-stamp and return the extra copy in the self addressed stamped envelope provided. If you have any questions, please call Judi L. Sobecki at 937-259-7171.

Sincerely,

Jenna Johnson-Holmes

Jenna Johnson-Holmes
Administrative Assistant

Enclosures

**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** |

# INITIAL COMMENTS AND OBJECTIONS OF THE DAYTON POWER AND LIGHT COMPANY

## I. INTRODUCTION

On August 20, 2008 The Public Utilities Commission of Ohio ("Commission") issued an Entry seeking comments on the Commission Staff's ("Staff") proposed Amendment of Chapters 4901:5-1, 4901:5-3, 4901:5-5, and 4901:5-7 of the Ohio Administrative Code and new rules in connection with Ohio Administrative Code Chapters 4901:1-39 through 4901:1-41. The Dayton Power and Light Company ("DP&L") respectfully submits the following objections and comments for the Commission's consideration pursuant to that Entry.

## II. GENERAL OBJECTION

As a general observation with respect to the proposed rules, DP&L objects to any rule which would diminish or eliminate any of the rights granted to DP&L under the revised code. "The purpose of administrative rulemaking is to facilitate an administrative agency's placing into effect the public policy embodied in legislation to be administered by the agency."[1]

1 Amoco Oil Co. v. Petroleum Underground Storage Tank Release Compensation Bd., 89 Ohio St., 3d 477, 484, 2000-Ohio-224, 733 N.E.2d 592 ("Amoco Oil").

Administrative rules are invalid and unenforceable if they are "unreasonable or in conflict with the statutory enactment covering the same subject matter."[2] Specific objections to specific provisions of the proposed rules where appropriate are found throughout the remainder of DP&L's comments.

## III. 4901:1-39 ENERGY EFFICIENCY AND DEMAND REDUCTION BENCHMARKS

### A. Section 4901:1-39-04 Benchmark Report Requirements

#### 1. Baseline Computations For 2006-2008 Should Be Made and Consistently Employed.

At any point in time, one can measure actual peak demand and actual energy usage. But, in order to calculate the benchmarks for energy savings and peak demand reductions, it is essential to start with a baseline computation against which to compare the energy usage and peak demand. Realistically, the only baseline computation that makes sense to use would be one that is established prior to the implementation of the programs designed to save energy and reduce peaks. Revised Code section 4928.66(A)(2)(a) refers to a baseline computed as the average of the kilowatt hours sold and the average peak demand experienced in the preceding three years. The proposed regulations in 4901:1-39-04(B)(1) and (2) contain similar language requiring computations to be made with respect to the three preceding years.

Both the statute and the regulations are ambiguous as to whether or not the baseline for each of these requirements (energy savings and peak demand reductions) is to be computed for a single period such as 2006-2008 or is to be recalculated every year using a rolling three year period. DP&L strongly urges that the PUCO adopt regulations that clarify that the 2006-2008

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2 Id. at 484; Columbus & Southern Ohio Elec. Co. v. Indus. Comm'n of Ohio, 64 Ohio St. 3d 119, 122, 1992 Ohio 112, 592 N.E.2d 1367 ("C&S Ohio Elec.")

period is to be used to compute these baselines. A rolling three-year average would create a compounding effect that would make already aggressive targets virtually impossible to meet.

The statute contemplates that each year additional increments of energy savings and demand reductions would be achieved relative to a baseline. But if the Year 4 calculation of actual energy usage is compared to baseline sales that have already been reduced in the three prior years due to achieving the targets applicable in those years, the Year 4 and beyond reduction targets become compounded. Over time, targets based on rolling averages would become impossible to achieve. The following table illustrates the point.

| | 2006-08 Baseline | % Savings Required | Target Savings with 2006-08 Baseline | Energy Usage | Rolling Average Baseline | % Savings Required | Target Savings with Rolling Baseline | Energy Usage | Compounded Savings Relative to 2006-08 Usage |
|---|---|---|---|---|---|---|---|---|---|
| 2006 | 1,000,000 | | | | | | | | |
| 2007 | 1,000,000 | | | | | | | | |
| 2008 | 1,000,000 | | | | | | | | |
| 2009 | 1,000,000 | 0.30% | 3,000 | 997,000 | 1,000,000 | 0.30% | 3,000 | 997,000 | 0.30% |
| 2010 | | 0.80% | 8,000 | 992,000 | 999,000 | 0.80% | 7,992 | 991,008 | 0.90% |
| 2011 | | 1.50% | 15,000 | 985,000 | 997,003 | 1.50% | 14,955 | 982,048 | 1.80% |
| 2012 | | 2.30% | 23,000 | 977,000 | 993,683 | 2.30% | 22,855 | 970,828 | 2.92% |
| 2013 | | 3.20% | 32,000 | 968,000 | 988,944 | 3.20% | 31,646 | 957,297 | 4.27% |
| 2014 | | 4.20% | 42,000 | 958,000 | 982,661 | 4.20% | 41,272 | 941,389 | 5.86% |
| 2015 | | 5.20% | 52,000 | 948,000 | 974,672 | 5.20% | 50,683 | 923,989 | 7.60% |
| 2016 | | 6.20% | 62,000 | 938,000 | 965,198 | 6.20% | 59,842 | 905,356 | 9.46% |
| 2017 | | 7.20% | 72,000 | 928,000 | 954,229 | 7.20% | 68,705 | 885,525 | 11.45% |
| 2018 | | 8.20% | 82,000 | 918,000 | 941,798 | 8.20% | 77,227 | 864,571 | 13.54% |
| 2019 | | 10.20% | 102,000 | 898,000 | 927,999 | 10.20% | 94,656 | 833,343 | 16.67% |
| 2020 | | 12.20% | 122,000 | 878,000 | 909,790 | 12.20% | 110,994 | 798,796 | 20.12% |
| 2021 | | 14.20% | 142,000 | 858,000 | 889,531 | 14.20% | 126,313 | 763,218 | 23.68% |
| 2022 | | 16.20% | 162,000 | 838,000 | 867,002 | 16.20% | 140,454 | 726,548 | 27.35% |
| 2023 | | 18.20% | 182,000 | 818,000 | 841,956 | 18.20% | 153,236 | 688,720 | 31.13% |
| 2024 | | 20.20% | 202,000 | 798,000 | 815,085 | 20.20% | 164,647 | 650,438 | 34.96% |
| 2025 | | 22.20% | 222,000 | 778,000 | 786,465 | 22.20% | 174,595 | 611,870 | 38.81% |

(1) Using 2006-08 Energy Sales as the starting point and for simplicity assuming no load growth or customer losses and no other adjustments over time.

For illustrative purposes, all data assume that there is no load growth or other adjustments necessary. The "Target Savings with 2006-08 Baseline" column shows that, with a 2006-08 baseline sales of 1,000,000 MWh before any energy efficiency programs are implemented, the amount of energy savings to be achieved in 2025 is 222,000 MWh, or 22.2%, which is consistent with the SB 221 target. But if a rolling average is used, then the 2022 – 2024 sales used to calculate the base line will already reflect energy savings achieved in those years and imposing a new 22.2% requirement on top of those already achieved savings has a compounding effect shown in last Column "Compounded Savings". The result would be the equivalent of imposing a requirement for a reduction of nearly 39% from the 1,000,000 MWh sales level that would exist absent any energy efficiency programs.

To avoid this compounding effect and to require compliance with the actual targets established by SB 221, DP&L therefore proposes that the regulations for energy savings be modified to read:

> The baseline for energy savings shall be the average of the total kilowatt hours purchased by the electric utility's Ohio distribution customers in the preceding three calendar years as reported in the utility's three most recent forecast reports prior to the first target year, years 2006, 2007 and 2008.

The regulations for peak demand savings should reflect the same additional language establishing a 2006-08 baseline.

**2. Alternatively, Adjustments Should Be Made To Eliminate the Effects of Prior Years Energy Savings and Peak Demand Reductions.**

To the extent the PUCO may interpret the statute as requiring baselines to be recomputed annually using a three-year rolling average mechanism, the PUCO should also recognize that the statute gives it the authority to make all appropriate adjustments to the baselines. The PUCO can establish an end-result using a three-year rolling average that again avoids the compounding effect and achieves the energy savings levels and peak demand reductions set forth in SB 221 by explicitly requiring that the rolling average baselines be adjusted to eliminate the effects of savings and peak demand reductions achieved during the three year period used to compute the baselines.

Under this approach, the proposed regulation on energy savings baseline should read:

> The baseline for energy savings shall be the average of the total kilowatt hours purchased by the electric utility's Ohio distribution customers in the preceding three calendar years as reported in the utility's three most recent forecast reports, <u>adjusted to eliminate the effects of energy savings that were achieved during the preceding three calendar years.</u>

The proposed regulation on the peak demand reduction baseline would contain a similar adjustment.

### 3. Section 4901:1-39-04(B)(2)

In addition to the language proposed to establish either a 2006-08 baseline or to make an adjustment to reflect prior years' reductions, two technical amendments are proposed. The beginning of the first sentence should be modified to read as:

> The baseline for peak demand reduction shall be <u>the average of</u> the highest seasonal hourly integrated peak demand in each of the <u>preceding</u> ~~past~~ three calendar years . . . "

This language clarifies that it is the average of the peaks in the three preceding years that is applied and uses the word "preceding" rather than "past" in order to conform with the same term used in subsection (B)(1).

Additionally, a sentence should be added to the end of subsection (B)(2) to clarify for utilities that are members of PJM that the utility's peak demand should be set at the level determined by PJM for billing purposes. By using a consistent value for peak demand, the demand reductions targets established here will be reflected in reduced costs associated with peak demand.

> For utilities that are members of PJM, the baseline shall be determined with reference to the utility's peak capacity obligation in the preceding three calendar years as determined by PJM.

**4. Section 4901:1-39-04(A)**

The word "calendar" should be inserted at the end of section 4901:1-39-04(A)(1) so that it reads ". . demand for the current calendar year" to make this section consistent with subsection (A)(2) immediately below, which contains the "calendar" modifier.

Subsection (A)(3) should be modified to reads as follows:

> A description of ~~all~~ actions evaluated ~~considered~~ and taken to comply with the adjusted benchmarks for the prior calendar year.

To require a description of "all" actions even considered is simply an impossible requirement to meet, given the vagueness of the term "considered." The provision as written could be construed so broadly as to require the description of handwritten notes by lower echelon employees of ideas that are never seriously pursued. The proposed modification better describe the most useful information—the potential alternatives that the utility seriously evaluated.

**5. Section 4901:1-39-04(B)(3)**

A clarifying amendment should be made to ensure that future disputes do not arise regarding the standard for adjustments to the baseline that are proposed under subsection (B)(3). The first sentence should be modified to read:

> "An electric utility may propose adjustments to its baselines, which will be reviewed for consistency with statutory requirements and the public interest."

**6. Section 4901:1-39-04(B)(4)**

The "exhaustion" standard for amendments to a baseline set forth in subsection (B)(4) is unduly restrictive on both the utility and in limiting the Commission's authority to approve appropriate amendments. It is also inconsistent with SB 221, section 4928.66(A)(2)(b), which requires a finding by the Commission that the "utility cannot reasonably achieve the benchmarks due to regulatory, economic, or technological reasons beyond its reasonable control."

It would be virtually impossible for a utility to prove that it had "exhausted" all compliance efforts and if the Commission should be inclined to approve an amendment, it would similarly be difficult for it to defend a finding of "exhaustion" if some entity appealed such a finding to the Ohio Supreme Court. Because SB 221 does not explicitly create a ceiling on cost impacts for energy efficiency and demand reduction programs like the 3% cap applied with respect to renewable energy resources, it is particularly important that the Commission retain sufficient flexibility to permit an amended benchmark when the public interest and the rule of reason demands it. DP&L proposes amending this provision to read as follows:

> An electric utility may apply to amend the benchmarks due to regulatory, economic, or technological reasons beyond the electric utility's reasonable control. In any such proposal, the electric utility shall demonstrate that ~~it has exhausted all compliance options.~~ <u>it cannot reasonably achieve the benchmarks due to regulatory, economic, or technological reasons beyond its reasonable control.</u>

**7. Section 4901:1-39-04(B)(5)(c)**

This subsection should be deleted in its entirety. The United States EPA portfolio manager database is designed to be a consumer tool, not a standard against which a utility's performance is to be measured. The database is not designed for the purpose contemplated by this rule and as such the rule is fraught with the risk of providing unpredictable outcomes.

**8. Section 4901:1-39-04(B)(7)**

The phrase "and market valuation" should be deleted from this requirement to prepare an assessment and benchmark report to be filed with the PUCO. The term "market valuation" is unclear and probably unknowable in the absence of an active competitive market where multiple vendors are seeking to provide demand reduction or energy efficiency resources. It is highly speculative to look five- or ten-years out even to project energy prices. It is heaping speculation onto speculation to then try to set a market value on savings based on uncertain estimates of market penetration for certain types of resources, the uncertain estimates of the amount of energy that will actually be saved by customers that do use such resources, and the uncertain estimates of energy prices.

**9. Proposed Additional Section 4901:1-39-04(B)(8)**

DP&L recommends the addition of a subsection (B)(8) that would allow for the banking of over-compliance with the energy efficiency and peak demand reduction targets to be used in future years to meet benchmarks. By adding such language, the PUCO will promote over-compliance and aggressive implementation of programs as early as possible. The absence of such language, in contrast, promotes a regime where "just barely" compliance may be the norm. The following language implements this recommendation:

> <u>(8) An electric utility may use any energy efficiency or peak demand reduction amount that exceeded the benchmark in the previous year to count toward the utility's compliance with the current year benchmark.</u>"

**10. Section 4901:1-39-04(C)**

DP&L recommends that the second sentence in section (C) be amended to read as follows:

> "<u>Subject to the review and approval of the Commission,</u> Staff may publish guidelines for program measurement and verification of compliance . . ."

In the absence of Commission review and approval, such guidelines could be construed as the equivalent of regulations that are not promulgated in accordance with law and pursuant to an improper sub-delegation of the authority granted solely to the Commission by statute.

DP&L objects to Subsection (C)(1) of 4901:1-39-04. It should be deleted in its entirety. The provision states that an electric utility shall not count towards compliance with the energy savings or demand reduction targets any technologies or measures that are mandated by law. This restriction does not appear in SB 221, is contrary to various provisions regarding mercantile customers within SB 221 and would have the unintended consequence of putting utilities in the position where they would not be active partners in any efforts to promote non-utility energy efficiency programs.

That last point bears repeating and an explanation in the form of an example. Suppose that a utility plans an aggressive campaign to promote compact florescent light bulbs as one of its programs developed to meet its energy savings targets. But two years from now, some members of the Ohio General Assembly introduce legislation that all State-owned buildings should be fitted with compact florescent light bulbs. In the absence of this regulatory provision, the utility would probably actively support such legislation. The effect of 4901:1-39-04(C)(1) if permitted to stand, however, would be that the energy saved as a result of this State mandate would be excluded from the computation of savings achieved within a utility's service territory. This, in effect, steals a tool from the utility that might have been one of its more cost-effective tools to meeting the energy savings targets, making it far more difficult to achieve the targets. While active opposition to the legislation might not occur, there is no incentive whatsoever for the utility to promote or endorse such legislation. The same situation would arise in the context of city-sponsored programs or new building code proposals that would enhance energy efficiency.

Section 4928.66(A)(2)(c), specifically states that mercantile customer-sited energy efficiency and peak demand reduction programs are to be counted toward compliance by the utility. The proposed regulation, however, creates an unwarranted exception contrary to the statute that would exclude the savings for compliance purposes if the mercantile customer were required by law or regulation to apply an energy savings resource. The proposed regulation again makes utilities by-standers or even active opponents of any proposal coming from any governmental entity that would impose an efficiency requirement on any customer, as it would have the effect of making it even more difficult for the utility to meet its targets.

DP&L also proposes that a clarifying amendment be made to another part of this subsection. Section 4901:1-39-04(C)(2) is unclear as drafted in that it first specifies that customer consent will be required prior to the utility turning over data about customer bills, usage and demand, to a U.S. governmental agency, but then states that customers will have the ability to "opt-out" of this sharing of information. Customer silence (a failure to opt-out) is not the same as customer consent. DP&L recommends that either the second sentence be amended to be in the form of an "opt-in" consent, or that the "subject to customer consent" phrase be deleted in the first sentence. DP&L further notes that some customers could view the release of this kind of data to a U.S. governmental entity as a sensitive civil liberties issue and suggests that the Commission take that into consideration in determining whether or not to retain this provision in the regulations.

**B. Section 4901:1-39-05 Recovery mechanism**

**1. Deletion of the First Phrase in Section 4901:1-39-05**

Proposed Regulation 4901:1-39-05(A) provides that the utility may file an application for cost recovery upon "approval of an electric utility's long-term forecast and benchmark reports."

There is no provision in the Ohio Revised Code that permits the Commission to condition recovery upon approval of those items. This provision would set up a regulatory structure that is unlawful in that the utility is required to initiate programs to meet targets that are in effect beginning in only a few months, but would be unable to even file for recovery of costs for such programs until some unspecified future date when a long-term forecast is approved or, even worse, some period that is more than a year from now when the first benchmark report is filed. Moreover, the provision suggests the possibility that narrowly missing a benchmark target, which could result in a "disapproval" of the benchmark report, could then result in a total disallowance of all costs that were incurred in the utility's attempt to achieve the target.

A separate and independent reason that the proposed rule is invalid is that it violates R.C. section 4928.143(D), which provides that "the commission may approve, modify and approve, or disapprove subject to division (C) of this section, provisions for the incremental recovery or the deferral of any costs that are not being recovered under the rate plan and that the utility incurs during that continuation, to comply with . . . division (A) of § 4928.66 of the Rev. Code." The Staff's proposed rule—which diminishes DP&L's right to recover its costs—is invalid.

### 2. Section 4901:1-39-05 (A)(1)

This provision creates an unnecessary potential for future debates to arise on how to allocate certain types of transmission and distribution costs between energy efficiency and other purposes such as reliability. R.C. section 4928.66(A)(2)(d), permits transmission and distribution infrastructure investments that reduce line losses to be part of a program to meet energy savings targets. The regulation, however, seemingly invites potential litigants to argue that while these investments reduced line losses, they also enhanced reliability and therefore only some portion of the costs should be recovered through an energy savings and demand reduction rider. Presumably, the litigants would not be opposed to enhanced reliability and would not propose a disallowance, but rather recovery of the remainder through base rates.

Moreover, the proposed rule as written is inconsistent with R.C. section 4928.143 (B)(2)(h) which allows a distribution utility to request single issue ratemaking treatment for infrastructure modernization, and specifically states as part of its determination in approving the plan "the commission shall examine the reliability of the electric distribution utility's distribution system." (emphasis added) Therefore, the legislature clearly expected that infrastructure modernization plans would have an impact on the reliability of the delivery system. To disallow recovery of infrastructure modernization investments that relate to reliability of the grid is contrary to the express language of the statute.

To avoid these potential disputes over costs that would be recoverable one way or another, and to harmonize this regulation with SB 221, DP&L recommends that the phrase "limited to the portion of those investments that are attributable to energy efficiency purposes as opposed to reliability or market purposes" be deleted and the following phrase inserted:

"if such investments are found to reduce line losses."

### 3. Section 4901:1-39-05(A)(2)

This provision should be amended to read as follows:

> Mercantile customers commit their peak demand reduction . . . . may apply for all or partial exemption from such recovery as set forth in rule 4901:1-39-06 of the Administrative Code in proportion to the amount of their load they have saved in relation to the then current annual energy efficiency and demand reduction target.

If a mercantile customer implements an energy efficiency program that saves 10 kWh over a 1 MWH load (0.001%), it should not be allowed to avoid the entire energy efficiency program charge assessed by the utility each year. A mercantile customer's opportunity to avoid the charge should be proportional to the amount of energy and demand saved which it is providing to the utility to help meet the target. The proportion of the charge avoided should never be greater than 100%.

### C. Section 4901:1-39-06 Commitment for integration by mercantile customers

Section 4928.66 (A)(2)(c) uses the phrase "commit...for integration into the electric distribution utility's demand-response...programs" to describe what a mercantile customer must do with its energy efficiency resources in order to gain exemption from the EDU's energy efficiency cost recovery mechanism. The integration of these programs is also addressed in the Staff's Proposed Rule 4901:1-39-06. DP&L believes this commitment should explicitly apply with respect to participation in PJM's demand response programs. A mercantile customer or a supplier to it should be able to obtain the benefit of payments from PJM for participation in a PJM demand reduction program **<u>or</u>** avoid paying a share of costs associated with the EDU's demand reduction programs, but not both. The mercantile customer's avoidance of the EDU's energy efficiency cost recovery provides ample compensation to the mercantile customer and that customer should not be entitled to further compensation—for the same EDU committed resources—in the PJM market. To clarify this point, DP&L proposes to amend 4901:1-39-06 (A) to read as follows:

> A mercantile customer may enter into a special arrangement with an electric utility, pursuant to division (A)(2)(d) of section 4928.66 of the Revised Code, to commit the customer's demand reduction, demand response, or energy efficiency programs for integration with the electric utility's demand reduction, demand response, and energy efficiency programs, <u>provided that the EDU shall control and accrue the benefit from the mercantile customer's committed energy efficiency resources in any and all PJM and MISO demand response or other programs or markets where the mercantile customer's committed energy efficiency resources have value.</u> Such <u>special</u> arrangement shall:..

In addition, Staff should put in place in additional subsection(s) to this rule a structure for identifying how the customer-provided impacts will be measured and valued – and this should be consistent with the measurement and valuation process applicable to the EDU. Also, to the extent the EDU relies on customer-provided impacts to meet its target, if such customer-provided impacts are less than the anticipated level, this should not trigger a penalty to the utility for not meeting the target. Finally, the amount of any financial benefit given to a customer pursuant to this section should not exceed the product of the energy efficiency surcharge and the customer's baseline usage. These subsection(s) should be consistent with the related provisions proposed by DP&L in its July 22, 2008 comments to OAC 4901:1-38-04(B).[3]

## IV. 4901:1-40 ALTERNATIVE ENERGY PORTFOLIO STANDARD

### A. Section 4901:1-40-01 Definitions

#### 1. Section 4901:1-40-01(I) "Deliverable into this State"

The Commission should adopt the most expansive definition possible of "deliverable into this State" in order to maximize the number of potential suppliers of alternative energy at the most economical cost to consumers. Consistent with that objective, DP&L proposes a modification to the definition set forth in the proposed regulations that would read:

> "Deliverable into this state" means that the electricity or Renewable Energy Certificate originates from a facility that is interconnected to electric distribution and transmission systems such that the electricity from such a facility could be transmitted to this State. Any electricity from a facility sited in Ohio, a contiguous State, or interconnected with an electric transmission company that is a member of the PJM Interconnection, LLC, or the Mid-West Independent Transmission System, Inc. shall be deemed to be "Deliverable into this state." For facilities sited elsewhere, a showing is required that the power from such a facility could be delivered into this state pursuant to one or more transmission agreements, but it shall not be required that transmission agreements actually be executed.

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[3] DP&L proposed the same additions in section IV(C)(2) of its July 22, 2008 comments filed in Case No. 08-777-EL-ORD

The addition of the phrase "Renewable Energy Certificate" in the first sentence is to harmonize this definition with proposed regulations section 4901:1-40-04(D)(1), which requires that RECs used to meet the renewable requirement originate from a facility that meets the definition of a renewable energy resource, which, in turn, has a "deliverability" requirements.

The second sentence of the proposed definition is appropriate for administrative convenience: there should be no requirement for a showing to establish something that the Commission already knows – electricity from facilities sited within PJM or MISO are deliverable into Ohio. Both PJM and MISO require a study to be performed prior to the time that any generation resource is interconnected to the systems that they operate. That study is designed to determine the extent to which the output of the proposed generator can be transmitted across the grid using existing facilities or whether transmission upgrades are necessary to ensure that the output can be transmitted across the grid. All market participants within PJM or MISO rely on these studies and know that once the new generation facility is authorized to interconnect, its output is deliverable throughout PJM or MISO, subject only to emergencies and congestion pricing. It would be a waste of Commission resources to require a separate proceeding to review and find that PJM or MISO resources are deliverable into Ohio.

The third sentence is designed to maximize opportunities to promote new alternative energy resources in the most cost-effective manner by clarifying what kind of showing must be made to meet the requirement. The Staff proposed definition, that a showing be made that the electricity "could" be "physically delivered" into the State, appears to be on the right track here in that it does not appear to require that transmission agreements be executed such that the electricity actually get delivered to Ohio. However, it is not clear what "physical" means in this context, because one cannot "paint the electrons." That is, electricity physically flows along paths of least resistance to consumers irrespective of how contracts are established among generators, utilities, and consumers. With the prevailing flow of power from west to east, for example, one could not demonstrate that the electrons from a renewable resource in New York actually physically flowed backwards toward Ohio. However, power purchase contracts are routinely written that specify receipt points and delivery points that create a "contract path" that is counterflow. The result of such a contract in the context of an integrated transmission system like PJM is that the electrons from all the different interconnected generators and loads "physically" flow along lines of least resistance in a way that maximizes efficiency, while for contract and billing purposes the power is deemed to start at the generator (for example, a receipt point at the generator's bus bar within the New York Power Pool which has transmission ties to PJM) and end at the designated delivery point (in this case, a point in Ohio).

DP&L's proposal clarifies the showing that is necessary by explicitly stating what appears to be implied within the Staff proposed language; that is, a showing should be made that a contract path could be established, even if, in reality, no such transmission contract is executed. The modified definition promotes the least-cost and most efficient option for procuring renewable power. If the least-cost option is wind energy from North Dakota or solar power from Arizona, the utility should be able to procure such power to meet its obligations under SB 221; but the cost-effectiveness of those options will drop considerably and the ultimate costs to consumers will rise considerably if there is additional requirement that transmission agreements be entered into to create a contract path to Ohio.

The benefits of an expansive definition are easily demonstrable. The current cost of a 2008 National Green-E REC is in the range of $2.50 to $3.10. On the other hand, RECs located within specific states—including contiguous states—can vary widely. For instance Pennsylvania Tier 1 2008 RECs are currently priced around $8.50.

The expansive definition of "Deliverable into the state" proposed here by DP&L is also consistent with the reality of how RECs are bought, sold, and retired. SB 221 contemplates the procurement of RECs as one mechanism to meet a renewable energy obligation. Because RECs are often sold independently from the actual power that is generated, there would never be a requirement that a transmission contract path actually be established to procure a REC. RECs are paper transactions and flow through the mail, computer systems, and facsimile. Both the RECs and the power from a facility should be subject to the same required showing that the power "could" be delivered to the state under one or more transmission agreements, but without the requirement that such agreements be executed and the associated transmission costs be incurred.

**2. Section 4901:1-40-01(M) Double-Counting**

A prohibition against double-counting is appropriate to make sure that the same resource is not counted towards compliance by two different entities. That is a primary justification, for example, for a RECs tracking system such as is required under proposed regulation 4901:1-40-04(D)(2). The double counting definition as applied to regulatory requirements should be clarified, however, to ensure that it does not apply to prohibit a utility or electric services company from counting an advanced energy resource towards compliance with multiple requirements that may be imposed by different governmental entities. For example, if the federal government were to impose a renewable portfolio requirement that calls for 5% of a utility's generation portfolio to be from renewable resources by 2020, and an Ohio utility is providing 8.5% in 2020 in compliance with SB 221, then the Ohio utility should be found to be complying with both state and federal law. It would be inappropriate to apply that federal law and this proposed definition to reach the conclusion that the utility now has to provide 5% + 8.5% in order to meet both the federal and Ohio targets.

Additionally, the term "double-counting" is used in the proposed regulations only in the context of meeting regulatory requirements. It is unclear, therefore, why the proposed definition also references the support of voluntary product offerings or marketing claims. To the extent that these references are intended to preclude the use of RECs to meet the SB 221 requirement and to offer green power to customers directly through a green energy tariff, the intention is misplaced. Certainly, there should be no double collection of costs. That is, if a utility buys a REC and is compensated for that cost through a green energy tariff, the costs would not also be recoverable through whatever rider is established to recover costs of compliance with SB 221. But there is no rational basis for excluding that REC from counting towards a utility's obligations under SB 221. SB 221 establishes renewable energy targets to meet as a percentage of utility sales but does not compel any particular method for meeting those targets. If a utility could meet the targets solely through the voluntary participation of customers willing to pay for RECs under a green energy tariff program, that should be an outcome that would be applauded, not barred. The targets set within SB 221 would be met through the voluntarily participation of customers and no unwilling customer would be charged.

DP&L, therefore, recommends that the proposed definition be modified to read:

> "'Double-counting' means utilizing renewable energy, renewable energy credits or energy efficiency savings <u>by a utility, energy services company, or mercantile customer that is subject to an Ohio requirement, if such renewable energy, renewable energy credits or energy efficiency savings is also being used or applied for the account of some other entity</u>."

### 3. Section 4901:1-40-01 (U) Fully aggregated

RECs are a separate product from capacity and energy that might also be sold from a renewable resource and DP&L does not believe that the regulation is intended to bar the purchase of RECs as a separate product. Instead, the intent of the regulation appears to be to avoid the separation of a single renewable MWH into separately sold $SO_2$ RECs, NOx RECs, carbon RECs, etc. Therefore, this section should be modified to read as follows:

> "Fully aggregated" means that the renewable energy credit shall retain all of its environmental attributes, including those pertaining to air emissions, and that specific environmental attributes are not separated from the renewable energy credit and sold individually.

The recommended insertion of the word "environmental" will facilitate that intent, without creating a question as to whether a REC can be purchased separately from the energy output.

## B. Section 4901:1-40-03 Requirements

### 1. Section 4901:1-40-03(A)

DP&L proposes a technical amendment to ensure that this provision is not read to be in conflict with the requirement that the alternative energy resources be deliverable to Ohio. This provision states that 25% of retail sales "are supplied with electricity from alternative energy resources," which could be read to "paint the electrons" or to require deliverability to the particular utility zone rather than just to Ohio. The intent of the provision can be better met with the following language:

> All electric utilities and affected electric services companies shall ensure that, by the end of the year 2024 and each year thereafter, electricity from alternative energy resources equals at least twenty-five percent of their retail electric sales in the state. ~~at least twenty-five per cent of their retail electric sales in the state are supplied with electricity from alternative energy resources.~~

### 2. Section 4901:1-40-03(A)(2)(a)

This provision is ambiguously drafted and could be interpreted as adding a new mandate beyond that specified by SB 221 to require that half of the solar energy requirement be from a facility located in Ohio. SB 221 requires that only that half of the renewable energy resources be from a facility located in Ohio and further includes as a subset of the renewable energy resources requirement a solar energy requirement. There is, however, no statutory requirement that half of the solar energy come from facilities located in Ohio. The phrase ", including solar energy resources," should be deleted from this subsection.

**3. Section 4901:1-40-03(A)(3)**

The provision that requires that compliance costs for renewable resources be avoidable is in potential conflict with SB 221, section 4928.143(B)(2)(c), which provides for a non-bypassable charge for any type of generation resource that is found to be needed pursuant to an integrated resource plan and meets other criteria. This proposed regulation should start with the phrase: "<u>Except as provided in Revised Code section 4928.143(B)(2)(c),</u> . . . "

**4. Section 4901:1-40-03(B)(1)**

Similar to the discussion above related to the baseline for energy efficiency targets, the baseline for advanced energy targets should be fixed based on the preceding three years prior to when SB 221 was enacted. Therefore, this provision should be modified as follows:

> (1) For electric utilities, the baseline shall be computed as an average ~~from the three preceding calendar years~~ of the total annual number of kilowatt hours of electricity sold under its standard service offer to any and all retail electric customers whose electric load centers are service by that electric utility and are located within the electric utility's certified territory <u>prior to the first target year, years 2006, 2007 and 2008</u>.

**5. Section 4901:1-40-03(B)(2)(b)**

The provision that permits an electric services company without previous sales in the State to evade any renewable or alternative energy requirement provides an inappropriate advantage to new marketers, some of whom may even be existing marketers under a newly formed entity created for the sole purpose of being able to evade these requirements. DP&L would suggest that this provision be modified to require that:

> For an electric services company with no retail electric sales in the state during the preceding three calendar years, its baseline shall ~~equal zero~~ be initially established at the level of sales that it projects will be made in its first year of sales in Ohio and updated each year thereafter until such time as it has three years of sales in Ohio.

#### 6. Section 4901:1-40-03(C)

The 15-year planning horizon is too long and would provide little information of value, at least in the initial years where renewable energy resources activities are just underway and some of the forms of alternative energy resources are not yet even commercially feasible. DP&L would suggest that a 5-year planning horizon be required for the first several plans, increasing to a 10-year planning horizon beginning in 2015.

### C. Section 4901:1-40-04 Qualified resources

#### 1. Section 4901:1-40-04(B)(7)

This subsection defines as a qualifying advanced energy resource only that portion of the demand side management and energy efficiency programs that are "above and beyond that used to comply with any other regulatory standard or program." SB 221 contains no such restriction. Revised Code section 4928(34) defines alternative energy resources and in subpart (g) specifies that alternative energy resource includes: Demand-side management and any energy efficiency improvement. (Emphasis supplied.) There is no statutory limitation that only that portion of any such program that exceeds the standards set forth in 4928.66 would qualify and the Commission has not been given the authority to redefine what qualifies as an advance energy resource. The phrase "above and beyond that used to comply with any other regulatory standard or programs" must be deleted.

2. **Section 4901:1-40-04(G)**

A new subsection G is proposed in order to promote aggressive implementation of programs, including the potential for over-compliance.

<u>(G) An electric utility may use any advance energy resource amount that exceeded the benchmark in the previous year to count toward meeting the electric utility's compliance with the current year benchmark.</u>

**D. Section 4901:1-40-07 Cost cap**

Subsections (A) and (B) of 4901:1-40-07 relating to the 3% cost cap limitation must be clarified. As written, they appear to apply separate 3% caps, one to advanced energy and one to renewable energy resources. This could be read to permit up to a 6% increase before the cost cap limitation would apply. DP&L has carefully reviewed SB 221, section 4928.64(C)(3) and recognizes that the statutory language is somewhat ambiguous in this regard. As a participant in the legislative process, however, DP&L submits that its understanding of the 3% cap was that it was always a single cap applied with respect to the costs of both categories. DP&L's interpretation is also consistent with the fact that renewable energy resources and alternative energy resources are not two separate items under SB 221. Instead, there is an overall alternative energy resources requirement and renewable energy is a subset of alternative energy resources.

DP&L recommends that the two subsections be combined into one subsection and clarified to apply the 3% cap on the rate effects for the combined alternative energy and renewable energy programs. Additionally, DP&L recommends that the phrase "generation rate" be amended to read "generation rate for customers in the aggregate" to clarify that this is one unified set of calculations and does not vary customer class by customer class.

The proposed discretionary power found in section 4901:1-40-07(F) to increase a future year's obligation to include some past year's "undercompliance" due to the three percent cap is unsupported by SB 221 and should be deleted. First, in such a circumstance, there is no "undercompliance." The utility fully complied with the SB 221 requirement. Part of the obligation was excused due to the adverse rate impacts that would otherwise occur, but that does not mean there was an undercompliance. There is therefore no justification to impose an even larger requirement than SB 221 imposes in a future year. Second, it would create a significant amount of adverse financial uncertainty if a utility had to report that, as a result of the three percent cap, it fully met its obligations under SB 221, but now has a potential regulatory liability in the form of an undefined future obligation that may be imposed at some undefined future date to provide even more alternative energy than is required by statute.

**E. Section 4901:1-40-08(D) Annual compliance payments**

This proposed regulation includes a provision that a compliance payment that is ordered be accompanied by an attestation that the utility or electric services company will not seek recovery from consumers. This is not a requirement set forth in SB 221 and is potentially unlawful to the extent it seeks to effectuate a waiver of rights. DP&L would expect that any entity that becomes subject to a compliance payment would want to reserve all its rights to challenge the appropriateness of the compliance payment order and the legality of the statutory and regulatory structure. It is unlikely that any entity in this situation would agree to sign such an attestation, but instead would make the compliance payment under protest. The provision already bars recovery. The attestation requirement therefore adds no substantive protection and appears likely only to create additional conflict. DP&L would recommend that the requirement of a separate attestation be deleted from the proposed regulations.

## V. Section 4901:1-41-02 GREENHOUSE GAS REPORTING AND CARBON DIOXIDE CONTROL PLANNING

DP&L is investigating the implications of proposed regulation 4901:1-41-02(A), which would require it to become a participating member in an international climate registry. Currently, it is DP&L's understanding that participation in such a registry requires certain membership fees to be paid to the registry and may subject it to additional costs with respect to the data tracking and reporting requirements. At the present time, DP&L has not quantified the costs associated with these requirements and reserves the opportunity to supplement its comments if it determines that the costs are significant. Additionally, DP&L believes that membership in the registry does not in and of itself carry with it any substantive obligations to buy or trade $CO_2$ emissions allowance, or otherwise incur costs to control $CO_2$ emissions. If further investigation indicates that there are substantive obligations associated with becoming a member of the climate registry, DP&L may supplement its comments here to raise any concerns that it may have with respect to such obligations or costs associated with such obligations.

DP&L urges the Commission to suspend the implementation of subsections (B) and (C) of proposed regulation 4901:1-41-02, and to direct Staff to convene a series of technical workshops and other proceedings to develop appropriate parameters for carbon dioxide control planning. This entire field is still in its infancy and DP&L would respectfully submit that the proposed regulations are overly broad and undefined. As drafted, it appears that each utility would need to independently employ a host of outside consultants to identify, engineer, and make cost estimates for technologies that are themselves still speculative. Additionally, it appears that these studies would need to be made year after year even if there is little or no change in commercial availability or costs associated with technologies that could control carbon dioxide emissions at existing power plants.

DP&L would submit that the better approach would be to convene technical workshops that could better define the scope of the issue and coordinate the response. In particular, it appears likely that a reasonably comprehensive study focused on retrofit technologies for controlling $CO_2$ emissions at existing power plants could be funded by the utilities jointly. Once that study is performed, the Commission and the utilities would have far better information that could be used to develop additional requirements.

The statutory basis for these proposed regulations is a single sentence within SB 221, calling for greenhouse gas reporting and carbon dioxide planning requirements. But subsection (B) of proposed regulation 401:2-14-02 appears to be requiring a far more extensive and undefined filing of an "environmental control plan, including carbon dioxide planning." Surely the Commission is not proposing to require utilities to rewrite or duplicate the extensive sets of filings that have been made over the decades before the U.S. EPA, Ohio EPA, or Ohio's regional environmental authorities with respect to sulfur emissions ($SO_2$ and $SO_3$), nitrous oxide emissions ($NO_x$), particulate emissions (overall and with respect to 2.5 micron and below), ozone ($O_3$), water and waste emissions. Nor does it seem likely that the Commission is intending to duplicate or supplant the functions of these environmental agencies, which develop, authorize, or review State Implementation Plans, permits and other legally enforceable mechanisms with respect to these areas. But the scope of the term "environmental control plan" is undefined and excessively broad. At a minimum, the regulation should be modified to focus on carbon dioxide control planning as specified in SB 221.

Subsection (C) is also excessively broad and ill-defined. The requirement to file a plan that includes "all technical information" on the "most current scientific and engineering design capability" to control the emission of "criteria pollutants and carbon dioxide" appears to be inviting the filing of truckloads of emissions data, engineering schematics, and engineering studies performed in the past with respect to all existing control technologies that have been constructed. The requirement to identify all "potential actions" appears to require another truckload of documents that would cover every control technology ever considered (or even those not considered at the time but available today). The requirement to provide all this information within the parameters of "economically feasible best technology" raises a host of other issues, including the potential need to create another truckload of data to develop cost estimates for each technology.

For the foregoing reasons, DP&L respectfully urges the PUCO not to implement subsections (B) and (C) at this time and instead convene technical conferences that can better define what information should be developed and filed.

## VI. Section 4901:5-5-01 ELECTRIC UTILITY FORECAST REPORTS FILING REQUIREMENTS

Section 4901:5-5-05 (E)(2)(b) should be deleted in its entirety. This information would be provided in a utility's fuel clause audit and would be duplicative if also required in the IRP filing.

Section 4901:-5-05(E)(5)(c)(ii) should be deleted in its entirety. The IRP process is a planning process. It is premature to know how the projects and plans in the future will impact the cost to a utility and how those costs will be translated into rates and bill of customers.

## VI. CONCLUSION

DP&L appreciates the opportunity to provide these comments relative to the proposed rules implementing SB 221. With respect to its objections, DP&L has endeavored to limit itself in its objections to focusing only upon those proposed rules which will at best prove to be wholly unworkable and at worst may be contrary to law. The vast majority of its comments are intended to clarify and improve the proposed regulations. DP&L urges the Commission to adopt the proposed amendments to the rules as set forth herein.

Respectfully submitted,

Judi L. Sobecki
Randall V. Griffin
Attorneys for The Dayton Power and Light Company
1065 Woodman Drive
Dayton, OH 45432
937-259-7171
Judi.Sobecki@DPLINC.com
Randall.Griffin@DPLINC.com