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, 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

REPLY COMMENTS BY THE OHIO CONSUMER AND ENVIRONMENTAL ADVOCATES

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REPLY COMMENTS
BY THE
OHIO CONSUMER AND ENVIRONMENTAL ADVOCATES

I. INTRODUCTION

The Ohio Consumer and Environmental Advocates[1] (collectively, "OCEA") jointly submit these reply comments regarding rules proposed in the Entry issued in this proceeding on August 20, 2008. OCEA requests that the Public Utilities Commission of Ohio ("PUCO" or "Commission") adopt the revisions to the proposed rules as set forth by OCEA. Utilities exist to serve the public and the public interest. In return for that service, they are entitled to reasonable compensation. In order to assure that a proper balance is maintained – the public as the provider of compensation to the utilities and the

[1] OCEA includes the Office of the Ohio Consumers' Counsel, City of Toledo, Ohio Partners for Affordable Energy, Ohio Interfaith Power and Light, Appalachian People's Action Coalition, Citizen Power, Northwest Ohio Aggregation Coalition, Edgemont Neighborhood Coalition of Dayton, Sierra Club Ohio Chapter (signing on for comments to Ohio Adm. Code Chapters 4901:1-39, 4901:1-40, 4901:1-41, and 4901:5), Environment Ohio (signing on for comments to Ohio Adm. Code Chapters 4901:1-39, 4901:1-40 and 4901:1-41); Midwest Energy Efficiency Alliance (signing on for comments to Ohio Adm. Code Chapters 4901:1-39); Natural Resources Defense Council; Sun Edison, NOPEC, AARP-Ohio (signing on for comments to Ohio Adm. Code Chapters 4901:1-39, and 4901:5), Citizens for Fair Utility Rates, Neighborhood Environmental Coalition, Cleveland Housing Network, Empowerment Center for Greater Cleveland, Counsel for Citizens Coalition, United Clevelanders Against Poverty, Communities United for Action and Ohio Farmers Union.

Commission as the entity that determines the amount that is appropriate for customers to pay are entitled to full and complete data. Utilities have the burden of proving that their requests are justified and this requires sufficient information to justify its claims. These rules are instrumental in setting forth the minimal requirements to satisfy these objectives.

The statutory requirements for rulemaking have imposed an extremely compressed process upon rulemaking and the subsequent filing of plans. OCEA believes that the PUCO should develop an explicit review process in advance of the obligatory five-year review of these rules as part of the final rulemaking, so parties can anticipate and perhaps fine tune the outcome of this process in a more thoughtful proceeding that gives better access to the dialogue for entities who have more complex review processes or who lack the capability to examine multiple hundred-page drafts in a matter of hours. We recommend an annual review process for the next two years followed by a biennial review process thereafter.

As the Commission deliberates on these rules, OCEA members urge the Commission to keep in the forefront the public interest and the utilities' duty to serve that interest in a just and reasonable manner. In its simplest form, the message is: Remember the public interest.

II. ENERGY EFFICIENCY AND DEMAND REDUCTION BENCHMARKS – CHAPTER 4901:1-39

General Comment on Demand Response Benchmarks

Chapter 4901:1-39 01-06 established the rules for demand response benchmark filing requirements, report requirements, cost recovery mechanisms, and integration by mercantile customers. Columbus Southern Power Company and Ohio Power Company

(hereinafter "AEP") propose several changes that would permit it to take the load of a customer and bid that load into PJM Interconnection, LLC, ("PJM") Demand Response Programs and prevent the direct participation of its retail customers into the PJM programs. For example, AEP comments that it should not be required to conduct measurement and verification *itself* (e.g., could rely upon PJM measurement and verification):

> Subdivision (A)(3) seems to suggest that a utility would always be involved in measurement and verification of customer-sited energy savings. Although it may be wise to provide for that possibility, it should not be generally presumed. Instead, the language should provide flexibility.[2]

Another example is AEP's proposed rule change to Rule 4901:1-39-01 where AEP proposes that demand response be defined as meaning:

> PROVIDING ELECTRICITY CUSTOMERS IN BOTH RETAIL AND WHOLESALE ELECTRICITY MARKETS WITH A CHOICE WHEREBY THEY CAN RESPOND TO DYNAMIC OR TIME-BASED PRICES…[3]

AEP's proposed changes to the definition of Energy Efficiency does not acknowledge that AEP's retail customers may shortly be able to bid Energy Efficiency into PJM's capacity market. This filing is expected to be made by PJM at the Federal Energy Regulatory Commission ("FERC") for approval.

These, and other examples in AEP's comments, raise an important issue that the Commission must decide: whether it will permit AEP or other utilities to block retail (and mercantile) customers' participation in wholesale demand response programs or whether Ohio will join the ranks of other state Commissions and let the customer choose what

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[2] AEP comments at 8.

[3] AEP comments at 2-3.

program it participates in. This Commission must also decide whether AEP can take load reduction credit for demand response of customers that participate in wholesale programs. For customers that are not permitted to participate in wholesale demand response programs and are only permitted to participate in AEP demand response programs, will AEP include those loads in its benchmark reports and request cost recovery for those loads? How will the financial benefit AEP receives for bidding this load into wholesale energy and capacity demand response programs be treated by this Commission?

OCEA does not support AEP's efforts to block retail customer's participation in wholesale demand response programs. The Commission should not create any barriers to entry for retail customers' participation in demand response whether it is in retail or wholesale demand response programs. This can only be accomplished after being fully knowledgeable about the operation of wholesale programs when making retail program decisions[4] and by dovetailing the regulation of retail and wholesale programs.

OCEA requests that the Commission allow retail customers to participate in the demand response program that is most beneficial to them – wholesale or retail. Information about the PJM Demand Response Program, what they are, how they operate, and who they are open to, is attached to these Reply Comments as Exhibit A, Affidavit of Dr. Paul M. Sotkiewicz of PJM.

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[4] For example, Rule 4901:1-39-06 (7) requires "A copy of the formal declaration or agreement that commits the mercantile customer's programs for integration." Under current FERC case law , even when wholesale demand response programs are open to all customers – retail or wholesale – they will become unavailable to retail customers when "that participation in such programs ***violate[s] state law or *state jurisdictional contracts*" (Emphasis added), FERC Docket No. EL05-93, AEP Answer (May 19. 2005).

4901:1-39-01 Definitions

Comments about Section 4901:1-39-01(B)

Nucor Steel Marion, Inc.'s ("Nucor Steel") proposes to include recycled materials in the definition of energy efficiency.[5] This is a fundamental error and is opposed by OCEA. The purpose of SB 221 and the implementing rules is to provide for utility DSM programs or customer-sited efficiency improvements that reduce the long-run cost of service. Unless a facility can utilize recycling as a method to reduce the energy intensity of its processes in a manner that can be evaluated under appropriate protocols, it fails to achieve the purposes of the statute.

4901:1-39-04 Benchmark Report Requirements

Dayton Power & Light Company ("DP&L") expresses concern about a compounding of savings requirements if a rolling average is used to calculate the baseline.[6] The Company provides an example that indicates that by year 2025, the effective savings requirement is closer to 39 percent rather than the 22.2 percent required by law.[7] Finally, DP&L argues that "[0]ver time, targets based on rolling averages would become impossible to achieve."[8] The problem with DP&L's table containing their numerical example is that for simplicity they assume no load growth. In reality, there will be load growth. Load growth in the electricity sector in Ohio has recently been

[5] Nucor Steel comments at 3.

[6] DP&L comments at 3.

[7] Id.

[8] Id.

estimated at an average of three-quarters of a percent for the 2008-2025 time period.[9] If this load growth were to be introduced to the DP&L table, the compound effect they alarmingly reference would be drastically reduced. Therefore, OCEA recommends that the energy efficiency baseline be defined as a rolling three-year average. Rather than freezing a three-year average based on 2006-2008 electricity consumption and having the benchmark bear no relationship with annual real world growth. A rolling three year average will be responsive to actual changes in demand from now through 2025. In like manner, DP&L's recommendation that in the alternative, the effects of the prior year energy efficiency savings be eliminated from the prior year forecasts should be rejected.[10]

Comments about 4901:1-39-04(A)

DP&L and a number of other utilities recommend that Subsection (A)(3) be modified to remove a description of "all actions" taken to comply with the benchmark.[11] OCEA disagrees with the proposed rewording of Subsection (A)(3). A continuing problem with utility DSM program design is the failure to consider potentially cost effective measures or programs. A further concern is the improper screening of measures or programs. If the measures and programs considered and rejected are not reported, then there is no transparency in the evaluation process. Entrusting the development of the plan to a collaborative as recommended by OCEA in its initial comments would eliminate the concerns of all parties regarding the development of an appropriate set of programs and measures.

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[9] "Ohio Long Term Forecast of Energy Requirements 2008-2027," A report by the Staff of the Public Utilities Commission of Ohio, August 15, 2008, page 44.

[10] DP&L comments at 5.

[11] DP&L comments at 6, AEP comments at 3-6.

Comments about 4901:1-39-04(B)(3)

OCEA is in agreement with DP&L's proposed modification to proposed rule 4901:1-39-04(B)(3) which states that any adjustments made to the baseline by an electric utility should be consistent with "statutory requirements and the public interests." [12] This recommendation is similar to the comments made by OCEA in its original comments.

Comments about 4901:1-39-04(B)(6)

AEP proposes eliminating the inclusion of a ten-year projection and five-year action plan in the benchmark report because it is burdensome and of little value.[13] OCEA disagrees with AEP in that the benchmarking reporting requirements integrate with the long term forecasts and integrated resource plan requirements in Chapters 4901:5-1, 4901:5-3, and 4901:5-5 and ensures that Ohio's electric utilities are taking the energy efficiency portfolio standard as serious as the planning for a major generation source. It is not possible to accurately reflect that growth in demand and need for new generation if reductions in demand are not concurrently accounted for.

Comments about 4901:1-39-04(B)(7)

A number of Ohio's electric utilities argue that the phrase "and market valuation" be deleted from this section.[14] This is not necessary given the clarifying modifications to this section on technical potential and market assessment studies proposed by OCEA in its first set of comments.

[12] DP&L comments at 6.

[13] AEP comments at 5.

[14] DP&L comments at 7-8, Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company ("FE") comments at 7.

Comments about 4901:1-39-04(B)(8)

DP&L's proposed banking of "peak demand reduction amount" language should be rejected or modified because of the nature of peak demand reductions. You can bank energy efficiency reductions (and demand reductions that come from an energy efficiency measure) but it is however nonsensical to bank non-energy efficiency derived demand reductions. The reason for this is that peak demand reductions that are intended to meet the three-year average benchmark are specific to a point in time (a utility's annual peak hour or hours). Take for example, a utility that implements an interruptible program that exceeds the peak megawatt benchmark in year one by ten percent. Suppose the next year the utility misses the peak megawatt benchmark by ten percent. Allowing the utility to use the ten percent credit banked in the earlier year will not assist the utility in meeting its peak demand because those peak savings will not materialize for the utility on their peak hour.

Comments about 4901:1-39-04(C)

A number of electric utilities want section (C)(1) deleted in its entirety.[15] OCEA opposes the elimination of this section. Utilities should not get credit for energy savings for customer-installed measures, appliances or equipment that are mandated by law. The intent of the legislation is for the energy efficiency requirements to be additive to anything else in the law that mandates levels of efficiency. This is a basic principle of DSM; programs cannot take credit for actions they do not cause. The corollary is that no cost-recovery be allowed for the implementation of such measures. Instead, OCEA recommends that the savings for any measures implemented by the utilities (or mercantile customers) that exceed energy codes and standards be counted for their reasonable

[15] DPL comments at 9, Duke Energy comments at 4-5, FE comments at 8.

lifetimes but that in no instance shall credit be given to a measure that when implemented does not exceed the legal mandate. OCEA further suggests that the PUCO have discretion on crediting savings to measures that exceed the legal code but are already "business as usual" in a utility's service territory. For example, if 90 percent of new homes are being built to exceed code savings by 10 percent without any utility incentive, then it is logical that no utility incentive is needed to attain those savings. As stated in OCEA's initial comments to the first set of rules, paramount to the energy efficiency crediting process is the important principle that reductions in energy use must be established above and beyond the efficiency obtained under a business-as-usual scenario.[16] As noted in OCEA's initial comments:

> For energy efficiency projects that meet the former principle, credit should only be given for energy savings achieved that exceed applicable building energy codes, state and federal appliance standards, existing industry standards, or place the manufacturing facility in the upper energy savings tier of an independently produced industry specific benchmarking study. [17]

4901:1-39-05 Recovery Mechanism

Comments about 4901:1-39-05 (A)

A number of Ohio utilities seek to remove the draft rule requirement that "approval of an electric utility's long-term forecast and benchmark reports," are a prerequisite of cost recovery. [18] OCEA does not agree with the elimination of this condition. As highlighted in OCEA's initial comments, it follows logically that the Electric Security Plan ("ESP") is the ratemaking tool for electric generation and that the Long Term Forecast review is

[16] In DSM parlance, only net to gross savings that adjust for free riders, free drivers and other factors should be credited.

[17] OCEA comments, at 12 and 13.

[18] DP&L comments at 10-11, AEP comments at 7-8, FE comments at 9.

the proper planning venue for integrated resource planning. OCEA recommends that a comprehensive integrated resource plan be filed by all Ohio electric utilities every year, or at a minimum a major filing every other year.[19] Moreover, utility cost recovery for new generation sources or for long term power purchase contracts identified by electric utilities in their ESP plans should not be approved pending a demonstration that such resources are least cost and reasonable risk resources as determined in the formal long term forecast and integrated resource planning process and result in compliance with benchmark provisions of SB 221. Without the cost recovery provision, the long term forecast and integrated resource planning process would have no "teeth" and become more of an academic exercise. Given the expedited nature of the various utility Electricity Security Plans, approval of those plans should not commit Ohio ratepayers to long term resource acquisitions without the benefit of review of a utility's long term forecast and integrated resource plan requirements contained in Chapters 4901:5-1, 4901:5-3, and 4901:5-5.

Comments about 4901:1-39-05 (A)(1)

Ohio utilities recommend that the conditional statement in section (A)(1) concerning transmission and distribution investments and the phrase "limited to the portion of those investments that are attributable to energy efficiency purposes as opposed to reliability or market purposes" and "if such investments are found to reduce line losses" be eliminated. [20] OCEA disagrees with this proposed revision. Instead, for simplicity and practicality, OCEA recommends that all transmission and distribution

[19] Duke Energy suggests that utilities should file annual updates to the previous filings to properly track applicable benchmarks, Duke Energy comments at 2.

[20] DP&L comments at 12, FE comments at 4, 9-10.

investments be recovered in a traditional distribution rate case or as permitted in Ohio Revised Code Section ("R.C.") 4928.143(B)(2)(h) under an infrastructure modernization plan, but that recovery of those investments not appear in any energy efficiency rider or energy efficiency cost category.

Comments about 4901:1-39-05 (A)(2)

DP&L recommended changes to this section concerning mercantile customers' energy efficiency and demand reduction.[21] These comments are consistent with OCEA's position on this matter.

4901:1-39-06 Commitment for Integration by Mercantile Customers

Comments about 4901:1-39-06(B) and (C)

OCEA generally agrees with AEP that any agreements with mercantile customers "will be forward-looking in nature and relate to future energy reductions and demand reductions associated with customer-sited capabilities and resources."[22] In fact, "existing" savings should apply only to measures implemented between the date the bill was enacted and 2009, or in the alternative, measures implemented during the three years of the baseline period. However, in order to maintain consistency in the measurement of savings between utility implemented programs and mercantile-initiated projects, the last sentence in (C) should be retained and not eliminated as recommended by AEP.[23]

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[21] DP&L comments at 12-13.

[22] AEP comments at 8-9.

[23] AEP comments at 9.

Removal of this language[24] would seriously impair the integrity of the mercantile energy savings, instituting a regime where 'apples to apples' comparisons are impossible.

ADDITIONAL COMMENTS:

Proposed New Section -- 4901:1-39-07

FE recommends the addition of "energy efficiency credits" analogous to the RECs in the alternative energy rules.[25] This proposal has merit, but is not well defined and could lead to numerous problems. It might even be read to allow the utility to count savings from another state. OCEA recommends that the "White Tag" proposal be considered as part of a new rule-making that would start from scratch with workshops tasked to explore the implications.[26]

Non-Profit Independent Program Administrator

Kroger Co. makes a strong case in its comments for a non-profit third party program administrator informed by a collaborative process like the Oregon Energy Trust.[27] OCEA agrees that the Commission should consider this model in either this proceeding or a generic proceeding given the relatively little experience Ohio electric distribution utilities have with DSM.

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[24] The language in question is "The application should also identify and explain all deviations from any guidelines which may be published by the staff for program measurement and verification of compliance."

[25] FE comments at 10.

[26] It is OCEA's understanding that the National Renewable Energy Laboratory ("NREL") is currently working on a report on "white tags" that should be issued by the end of 2008.

[27] Kroger Co. comments at 2-4.

FE's General Comments on the Qualification of Utility Affiliates for Energy Efficiency Improvements.

FE seeks inclusion of energy efficiency improvements to transmission infrastructure owned and operated by a utility affiliate toward a utility's energy-efficiency goals.[28] This may not be a bad idea, *per se*, but raises a number of serious concerns. For one, the example used by FE, the American Transmission Systems, Incorporated ("ATSI") is a sister corporation of the FE operating companies, not a subsidiary. To the extent ATSI facilities serve more than Ohio load, it could be hard to determine how much of any demonstrated savings on ATSI facilities benefits Ohio ratepayers. Further, there can be difficult questions about allocation of costs for the recovery provisions of the Rule. Strong language, and/or an independent collaborative with adequate authority to review plans and programs is needed to protect Ohio ratepayers from self-dealing and ephemeral energy efficiency.

ENERNOC's Request that PJM Administered Programs Qualify for Utility Benchmarks.

EnerNOC, Inc. ("EnerNOC") recommends that third party peak demand reductions and energy efficiency savings that result from PJM administered program count towards utility benchmarks.[29] There is nothing wrong with what third party curtailment providers do under the PJM programs, but they are compensated by PJM under their current business model. Because these savings are accounted for and paid for by another entity, it owns the efficiency, not an Ohio-based distribution utility. Again,

[28] FE comments at 3-4.

[29] EnerNOC comments at 1-2.

such proposals could be considered by an independent collaborative possessing adequate authority.

COSE's Proposed New Section on Utility Review of New Energy Efficient Technologies and Programs.

Proposed new section, 4901:39-04(B)(5)(d) requiring utilities to analyze all new energy efficient technologies and programs and adopt it or explain why they are not adopting it, is a good idea and is supported by OCEA. [30]

III. ALTERNATIVE ENERGY PORTFOLIO STANDARD – CHAPTER 4901:1-40

4901:1-40-01 Definitions

Comments about 4901:1-40-01(E) - Biomass Energy

OCEA stresses its support for the comments of Vertus Technologies Industrial LLC ("Vertus"), which proposes excluding forest and agricultural crops from the definition of "biomass energy" in proposed Rule 4901:1-40-01(E). As Vertus points out, "If the definition of 'biomass energy' does not exclude agricultural or tree crops, the Alternative Energy Portfolio Standard ("AEPS") will have the unintended consequence of contributing to higher food prices and encouraging tree cutting for the sole purpose of energy production."[31]

Borrowing from the definition of "biomass energy" set forth in R.C. 4728.01(A)(35), proposed Rule 4901:1-40-01(E) defines the term similarly, but adds "forestry waste and residues," "vegetation waste," and "right of way trimmings" among other wastes and by-products. OCEA does not object to the inclusion of these additional

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[30] COSE comments at 3.

[31] Vertus comments at 2.

potential fuel sources. However, in order to avoid creating a perverse incentive to clear cut forests or protected lands and to encourage unsustainable land-use practices, OCEA emphasizes that this rule should not create a market incentive to clear natural areas. Therefore, the definition of "biomass energy" should *exclude* forest and agricultural crops. Taking the recommendation of Vertus a step further, OCEA also proposes excluding forest and agricultural crop residues or byproducts derived from federal lands or from land that were not cleared prior to enactment of SB 221. To this end, OCEA recommends the definition of "biomass energy" set forth in its initial comments.

Comments about 4901:1-40-1(F) - Clean Coal Technology

Ohio Revised Code Section 4928.01(A)(34)(c) defines "Clean coal technology" as including any technology with the:

> *** design capability to control or prevent the emission of carbon dioxide, **which design capability the commission shall adopt by rule*****. (Emphasis added).

Thus, the General Assembly has required the Commission to establish specific design capability standards to govern whether a given coal technology application should be designated "clean coal." As noted in its original comments, however, OCEA finds the proposed definition to be inadequate because it fails to include any design capability standards whatsoever.

OCEA supports the comments of Global Energy, Inc. which explains that a "clean coal" facility with the "design capability to remove" pollutants does not by itself require the facility to actually capture or sequester carbon dioxide or other such pollutants in order to meet the standard. The Staff's proposed language ignores the Commission's legislative mandate to define this term with particularity. Without modification, the

proposed definition will undoubtedly result in conventional coal facilities being inappropriately labeled "clean coal" with only minimal additional "design capability." As such, OCEA stands by the definition of "clean coal" submitted in its original comments.

Comments about 4901:1-40-01(G) – Co-firing

"Co-firing" is defined in proposed Rule 4901:1-40-01(G) as "simultaneously using multiple fuels in the generation of electricity." Rather than be broadened as Duke Energy advocates, this definition must be clarified to specify exactly what portion of the output from a co-firing facility qualifies toward the alternative energy targets.

As suggested in other provisions of the proposed rules, such as proposed Rule 4901:1-40-04(A)(6), the definition of "co-firing" necessarily limits qualifying output to the proportion of fuel input attributable to an advanced or renewable energy resource. In essence, the fuel source ought to dictate what proportion of electricity output from the co-firing facility qualifies as advanced or renewable energy. The proposed rules should be clarified to state:

> (G) "Co-firing" means simultaneously using multiple fuels in the generation of electricity. THE PROPORTION OF FUEL INPUT ATTRIBUTABLE TO ADVANCED OR RENEWABLE ENERGY RESOURCES SHALL DICTATE THE PROPORTION OF ELECTRICITY OUTPUT FROM THE FACILITY THAT CAN BE CONSIDERED ADVANCED OR RENEWABLE ENERGY.

This language parallels the Commission's proposed qualification on the use of biomass energy as a qualifying renewable energy resource in proposed Rule 4901:1-40-04(A)(6).

Comments about 4901:1-40-1(K) – Demand-side Management

OCEA agrees with and supports Nucor Steel technical modification to the definition of "demand-side management" set forth in proposed Rule 4901:1-40-01(K). The reference to a purported definition of demand-side management in proposed Rule 4901:1-39-01 appears to be incorrect because that rule does not include such a definition. The only definition of "demand-side management" found in any existing or proposed rule is found in proposed Rule 4901:5-5-01(F). OCEA supports Nucor Steel's comments that proposed Rule 4901:1-40-01(K) should use the definition found in Rule 4905:5-5-01. As such, OCEA proposes the following modification:

PROPOSED RULE CHANGE

> (K) "Demand-side management" has the meaning set forth in rule ~~4901:1-39-01~~ <u>4901:5-5-01(F)</u> of the Administrative Code.

Comments about 4901:1-40-1(M) – Double-counting

FE advocated removing the definition of "double-counting" from the proposed rules. AEP, DP&L, or Duke Energy agree that a definition is appropriate.[32] In fact, AEP recognizes that the "concept of prohibiting double counting for RECs may be reasonable in order to ensure that a particular certificate is only used once."[33] DP&L recognizes that a "prohibition against double-counting is appropriate to make sure that the same resource is not counted toward compliance by two different entities."[34] OCEA concurs and urges the Commission to adopt rules preventing inappropriate "gaming" of the AEPS.

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[32] Although each of these parties proposes modifications to this definition, none propose deleting the definition in its entirety.

[33] AEP comments at 9. As explained in greater detail below, OCEA opposes AEP's comments challenging the applicability of double-counting to both energy efficiency and renewable energy.

[34] DP&L comments at17.

i. Double-counting, Energy Efficiency

Proposed Rule 4901:1-40-01(M) defines "Double-counting" as:

> Utilizing renewable energy, renewable energy credits, or **energy efficiency savings** to (1) satisfy multiple regulatory requirements, (2) support multiple voluntary product offerings, (3) substantiate multiple marketing claims, or (4) some combination of these. (Emphasis added.)

The reason the phrase "energy efficiency savings" is included in the definition of double-counting is that SB 221 allows "energy efficiency" to contribute toward compliance with both the energy efficiency and advanced energy benchmarks. However, proposed Rule 4901:1-40-04(B)(7) limits qualifying advanced energy resources to "energy efficiency, **above and beyond** that used to comply with" the energy efficiency benchmarks. (Emphasis added.) In essence, the combined effect of proposed Rules 4901:1-40-01(M) and 4901:1-40-04(B)(7) prohibits a utility from counting the same energy efficiency program toward compliance with both the energy efficiency and the advanced energy benchmarks.

All of the utilities commenting on this proposed rule opposed the "above and beyond" limitation. The energy efficiency benchmarks require utilities to implement energy efficiency programs that achieve gradual efficiency-based energy reductions that total 22% or more by 2025. During that same time period, the advanced energy benchmarks require at least 12.5% of a utility's "total, annual average, and normalized kilowatt-hour sales" to be derived from advanced energy resources. Double-counting would let a utility satisfy its <u>entire</u> advanced energy benchmark (12.5%) solely through the use of energy efficiency measures.

If the Commission adopts the utilities' recommendation and permits double-counting of energy efficiency savings, it is absolutely critical that proposed Rule 4901:1-40-07 (setting forth the cost cap calculation) is clarified. For purposes of calculating the advanced energy cost cap, the Commission must specify that this calculation will not merely include the up-front cost of implementing the energy efficiency program. Instead, the calculation also shall take into account "net" costs relating to energy savings. In this way, energy efficiency will actually bring down the cost of "advanced energy" for purposes of the cost cap.

For example, assume that a utility implements a new energy efficiency program that has an up-front cost of $1 million. Again, assume that this $1 million investment will "pay itself off" in just three years based on the utility's corresponding energy savings. In year four, this energy efficiency program will lower overall costs and the cost cap calculation should recognize that.

ii. Double-counting, Voluntary Offerings

As noted above, proposed Rule 4901:1-40-01(M) defines "Double-counting" as:

> Utilizing renewable energy, renewable energy credits, or energy efficiency savings to (1) satisfy multiple regulatory requirements, **(2) support multiple voluntary product offerings**, (3) substantiate multiple marketing claims, or (4) some combination of these.

DP&L claims that the reference to voluntary product offerings is misplaced if "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."[35] DP&L then argues that if a "utility could meet the [AEPS] targets solely through the voluntary participation of

[35] DP&L comments at 18.

customers willing to pay for RECs under a green tariff program, that should be an outcome that would be applauded, not barred."[36] This argument is unpersuasive.

OCEA has no objection to voluntary programs whereby utilities allow consumers to purchase RECs. But allowing the utilities to credit these RECs to the mandatory requirements of the AEPS has the potential to be unfair and deceptive because no reasonable consumer would voluntarily pay increased rates merely to cover the costs of a utility's compliance with the mandatory renewable energy standard. Rather, consumers participate in voluntary REC programs with the reasonable understanding that their contribution will result in additional renewable energy, above and beyond that required by law which the utilities will build anyway. Under the DP&L proposal, even aggregated, these voluntary consumer payments would not result in a single additional solar panel, wind turbine, or "green electron." This is not a result to be "applauded."

OCEA notes that DP&L's proposal would violate a number of best practice guidelines, including the National Association of Attorneys General's environmental marketing guidelines. Published in 1999, these guidelines expressly recognize that "if the same electricity or its attributes are sold more than once to consumers, the claim is deceptive."[37] In other states, attorneys general have even determined that advertising the sale of RECs to a customer implicitly promises renewable energy investment. Thus, if the utility then uses customers' resources merely to meet its statutory obligation, this

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[36] Id.

[37] http://www.eere.energy.gov/greenpower/markets/pdfs/naag_0100.pdf, p. 4.

misrepresentation could violate consumer protection laws.[38] In fact, by a customer participating in a green pricing program that requires the payment of an additional fee above the tariff rate, the customer is thereby purchasing the REC which has an intrinsic value. It is an unlawful taking of property for the utility to claim that REC. The Commission should not sanction this practice and instead should support the position outlined in the proposed rule.

iii. Double-counting, Federal/State Requirements

Both AEP and DP&L suggest that the definition of "double-counting" should be clarified 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 government entities."[39] While it may or may not be appropriate to count state alternative energy portfolio standard requirements toward any hypothetical federal requirements, that decision will be made at the federal level.

Of course, OCEA adamantly opposes the use of "double-counting" by the same utility in more than one state. For example, a utility should not be allowed to use the same REC for compliance purposes under the respective standards of both Pennsylvania and Ohio.

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[38] Further support is derived from a 2005 report of the National Renewable Energy Laboratory entitled "Emerging Markets for Renewable Energy Certificates: Opportunities and Challenges." This report noted that, "[f]or consumer protection, tracking systems make it easier to prevent double sales of RECs, or double use (using the same REC to satisfy a mandate, for example, and selling the same REC to consumers in a voluntary market)." http://apps3.eere.energy.gov/greenpower/resources/pdfs/37388.pdf, p. 41.

[39] DP&L comments at 17.

4901:1-40-02 Purpose and Scope

Comments about 4901:1-40-02(B)

OCEA emphasizes its continuing opposition to proposed Rule 4901:1-40-02(B), which appears to give the Commission blanket authority to waive any requirement of the AEPS for unspecified "good cause." This overly broad language clearly oversteps the specific and comprehensive method for excused compliance that the General Assembly specifically sets forth in R.C. 4928.64, and may increase the cost of implementing the AEPS by decreasing the predictability of the standard. Support for this position is also found in the comments of the Greenfield Steam & Electric Co.[40]

4901:1-40-03 Requirements

4901:1-40-03(C)

OCEA supports proposed Rule 4901:1-40-03(C) which requires utilities to submit annual alternative energy compliance plans based on a "fifteen-year planning horizon," the same duration as the AEPS. While this 15-year horizon is for planning purposes only and will not be binding on the utility companies, it will allow the Commission to forecast how those utilities are preparing to satisfy the AEPS and help the advanced and renewable energy industries develop long-term strategies.

4901:1-40-04 Qualified Resources

Comments about 4901:1-40-04(A)

Proposed Rule 4901:1-40-04(A) sets out the list of technologies that qualify as "renewable energy," and thus are eligible for the renewable tier of the alternative energy portfolio standard. Among these resources are "fuel cells" in proposed Rule 4901:1-40-

[40] Greenfield Steam & Electric comments at 1.

04(A)(7), and a "[s]torage facility" that complies with the two requirements set forth in proposed Rule 4901:1-40-04(A)(8).

i. Fuel Cells

Proposed Rule 4901:1-40-04(A)(7) identifies as a renewable resource the energy from a "fuel cell for which the feedstock is a renewable resource." This distinction among types of fuel cells appears necessary because SB 221 classifies "fuel cells" as both advanced and renewable energy. The source of energy used for the fuel cell is therefore critical in determining in which category a project belongs. While OCEA strongly supports the development of fuel cell technologies, it does not support the comments of both Rolls-Royce Fuel Cell Systems and the Ohio Fuel Cell Coalition which recommend eliminating the distinctions.[41] Such an interpretation apparently would result in one fuel cell producing energy credits under either or both the advanced and renewable standards. OCEA does not believe SB 221 intended for such "double credit," and support resolving this ambiguity in accord with the proposed rule. Moreover, the defining point of whether a fuel cell is a renewable or advanced energy source should depend, as Staff sets forth in its rule, on the source of the feedstock.

ii. Storage Facilities

FE's assertions that the requirements imposed on storage facilities under proposed Rule 4901:1-40-04(A)(8) are inconsistent with the reference to "storage technology" set forth in R.C. 4928.64(A)(1)(c).[42] OCEA strongly disagrees and believe FE's proposal inappropriately undermines the AEPS.

[41] Ohio Fuel Cell Coalition comments at 1-2; Rolls-Royce Fuel Cell Systems comments at 1-2.

[42] FE Comments at 15.

Ohio Revised Code Section 4928.01(A)(35) identifies as a renewable energy resource any "storage facility that will promote the better utilization of a renewable energy resource that primarily generates off peak." Consistent with this statutory reference, proposed Rule 4901:1-40-04(A)(8) identifies certain storage facilities as qualifying renewable energy resources. Under this proposed rule, a storage facility qualifies as a renewable energy resource if the following requirements are satisfied:

> (a) The electricity used to pump the resource into a storage reservoir must qualify as a renewable energy resource.
>
> (b) 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.

Such requirements are entirely consistent with the statutory requirement that a "storage facility" only qualify if it is used to "promote the better utilization of a renewable energy resource that primarily generates off peak."

FE's proposal, however, seeks to modify the proposed rule to break any functional connection between the storage facility and the renewable energy resource it supports.[43] In fact, FE proposes that a storage technology *anywhere* on the grid, and which stores energy from any source whatsoever (renewable or otherwise), should be eligible for the sole reason that its existence could facilitate the integration of intermittent resources onto the grid.[44] This contention is simply inconsistent with the renewable energy prong of SB 221.

[43] FE comments at 15-18.

[44] Id.

If the Commission adopts FE's argument, the entire output of a fossil-fuel generation facility would qualify as renewable energy resource if it simply mediated electricity through a "storage facility" before being put into the grid. For example, assume that a coal generation facility pumps the excess water used in its operations to a storage facility on a hill. Whenever the coal generation facility needs to balance its load (i.e. peak periods of electricity usage), it allows the stored water to fall down the hill and generate electricity. Under FE's proposal, the use of this "storage facility" would satisfy the renewable energy benchmark despite using no renewable energy resource in the process. As such, OCEA strongly opposes FE's recommendation because it is irreconcilable with SB 221's intent to promote the use of renewable energy.

Comments about 4901:1-40-04(A)

AMP-Ohio and the City of Hamilton recommend allowing *all* existing renewable energy facilities in the state of Ohio to be credited to the renewable energy requirements of SB 221.[45] However, this argument contravenes R.C. 4928.64(A) [and proposed Rule 4901:1-40-04(A)], which specifically defines alternative energy (of which renewable energy is a subset) as facilities placed in service after January 1, 1998.

The General Assembly included January 1, 1998, placed-in-service criterion in the statute after much deliberation and painstaking negotiation among stakeholders (including members of OCEA) to strike a balance whereby the law would encourage new renewable energy generation but not "penalize" individuals who built renewable energy facilities in the recent past. Thus, the 1998 date was meant to include Ohio's only utility

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[45] American Municipal Power-Ohio, Inc. ("AMP-Ohio") comments at 5; and, City of Hamilton, Ohio ("Hamilton") comments at 3-4.

scale wind farm, AMP-Ohio's 4-turbine wind project in Bowling Green, Ohio,[46] but not count other projects that may have been built decades ago which, if counted, could moot the first several benchmarks in the legislation and delay the creation of a renewable and advanced energy marketplace.

Therefore, the January 1, 1998, placed-in-service date must remain in the proposed rule in order to remain consistent with the statutory mandate in R.C. 4928.64(A) and the underlying goals of SB 221.

Comments about 4901:1-40-04(C)

OCEA strongly opposes Nucor Steel's recommendation to add a "facility that recycles"[47] to the examples of qualifying mercantile customer-sited resources set forth in proposed Rule 4901:1-40-04(C)(2).

Nucor Steel appears to propose that a facility which uses fossil fuels to reprocess steel be considered a renewable energy resource. Using this logic, any number of other facilities that use conventional energy to accomplish laudable public purposes would be transformed into generators of renewable energy. This idea, however, lacks any support whatsoever in SB 221.

Furthermore, a condition precedent for eligibility under the alternative energy portfolio standard is that a facility produces electricity. Based upon Nucor Steel's comments, it is not clear these recycling facilities even produce electricity. Without a clear statement that the recycling facility produces electricity, Nucor Steel's argument is unpersuasive.

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[46] This facility was placed-in-service in November 2007. *See* http://www.greenenergyohio.org/page.cfm?pageId=103.

[47] Nucor Steel comments at 8.

Comments about 4901:1-40-04(D)(3)

The General Assembly provided some guidance about the life of a REC, stating that a utility may utilize a REC "in any of the five calendar years following the date of its purchase or acquisition."[48] The proposed rule, however, merely reiterates the statutory language. Like OCEA, both FE and AEP recommend clarifying the proposed rule.[49]

As emphasized by OCEA in its initial comments,[50] the Commission must clarify the event triggering the five-year clock. OCEA reiterates that this event should be *upon the generation of the renewable energy*, since this is the point when the REC is "first acquired" by the owner of the generating system, or first purchased under a power purchase agreement. If so modified, this rule would allow market actors to easily calculate the expiration date of a REC and avoid the result apparently suggested by FE and AEP where a REC could virtually never expire.

4901:1-40-06 Force Majeure

Comments about 4901:1-40-06(A)

SB 221 contains a *force majeure* provision that gives the Commission discretion in some cases to waive all, or part, of a utility's compliance with the renewable energy benchmarks.[51] The statute identifies the procedure by which a utility may request the Commission review its compliance with the renewable energy benchmarks and sets forth the standard by which the Commission determines whether a utility must comply with

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[48] R.C. 4828.65.

[49] FE comments at 17-18; and AEP comments at 14-15.

[50] OCEA comments at 50-52.

[51] See, R.C. 4928.64(C)(4)(b).

those benchmarks—namely whether "renewable energy resources are reasonably available in the marketplace in sufficient quantities for the utility to comply with the benchmark."

In making this determination, the Commission should also consider the utility's efforts to engage "customer-sited capabilities" to comply with the benchmark.[52] Though not developed fully in its initial comments, OCEA concurs with comments of the Industrial Energy Users-Ohio ("IEU-Ohio") with respect to customer-sited capabilities. OCEA would also recommend a focus on the cases that emerged as a result of result in Case No. 05-1500-EL-COI which are designed to remove the barriers to customer-cited generation so that it can be constructed in the first place.

4901:1-40-07 Cost Cap

Comments about 4901:1-40-07(A) and (B)

While SB 221 set forth an annual schedule of renewable energy benchmarks and an advanced energy target in 2025, it also contains a mechanism to protect ratepayers from potential price spikes: the so-called "3% cost caps." The comments of FE and DP&L challenge proposed Rule 4901:1-40-07(A) and (B) for recognizing "two independent"[53] or "separate"[54] 3% caps: one for advanced energy and one for renewable energy. However, the creation of two separate and independent 3% cost caps is exactly what SB 221 sought to achieve, as evidenced by the language of the statute and the policy underlying the AEPS.

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[52] Industrial Energy Users-Ohio comments at 14.

[53] FE comments at 18.

[54] DP&L comments at 22.

The cost cap language states an electric distribution utility or an electric services company "need not comply **with a benchmark** under division (B)(1)[advanced energy] or (2) [renewable energy] 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."(Emphasis added).

The reference to benchmarks is critical because renewable energy benchmarks are annual and therefore compared to the cost cap every year. Assuming that FE and DP&L are correct, and there is only a single 3% cost cap, the statutory reference to "benchmarks" suggests the advanced energy calculation is not even performed until *2025* because *the advanced energy standard contains no other interim benchmarks*. Therefore, for the years 2009-2024, the 3% cost cap would have virtually no applicability. The proposed rule adopts the only logical interpretation of the statute: there are two separate caps for the two different tiers of the AEPS.

There is additional textual evidence in the statute that the General Assembly intended to create two separate caps. Pursuant to R.C. 4928.64(C)(3), an electric distribution utility or an electric services company "need not comply with a benchmark **under division (B)(1)[advanced energy] or (2) [renewable energy]** 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." (Emphasis added.)

The General Assembly chose to separate the tiers of the AEPS in the statute with the word "or," which has been defined by the Ohio Supreme Court as a "function word

indicating an alternative between different and unlike things."[55] Continuing on, the Court explained that the "General Assembly's use of the disjunctive 'or,' as opposed to the conjunctive 'and,' indicates that the classifications are intended to be read separately from each other."[56] In reading these two provisions separately from one another, it is clear that the statute intends for two, separate 3% costs caps to apply—one for advanced energy and one for renewable energy.

This interpretation also supports the overall purpose of the AEPS. In setting separate cost caps, the General Assembly understood that certain advanced energy technologies, such as advanced nuclear or IGCC coal plants, could cost billions of dollars and increase overall rates significantly.[57] Under these circumstances, the General Assembly sought to place renewable energy under its own cost cap so that it could be judged on its own merits and not be held hostage to the high costs and frequent cost overruns associated with other technologies.

For these reasons, OCEA strongly supports the framework of the proposed rule which is consistent with R.C. 4928.64.

Comments about 4901:1-40-07(B)

OCEA recognizes that in a proceeding involving the calculation of the 3% cost cap, there may be a need for certain information to remain confidential. But, issues of confidentiality are better addressed on a case-by-case basis using the Commission's current procedures for confidential treatment.

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[55] *Columbia Gas Transmission Corp. v. Levin* (2008), 117 Ohio St.3d 122, 125.

[56] Id.

[57] See Indiana example where 15% rate increase approved for IGCC coal plant.

Comments about 4901:1-40-07(C)

Proposed Rule 4901:1-40-07(C) states:

> Calculations involving the cost cap *may* consist of comparing the projected generation rate of an electric utility or electric services company, exclusive of any reasonable costs associated with satisfying an alternative energy portfolio requirement, to the projected generation rate of an electric utility or electric services company including any reasonable costs of satisfying an alternative energy portfolio standard requirements. (Emphasis added).

OCEA asserts that the substantive test laid out by the proposed rule—comparing generation rates with and without the alternative energy portfolio standard—is a straightforward implementation of the statutory provision and appears to offer a clear test for the application of the cap.

Both FE and Duke Energy challenge the 3% cost cap calculation. FE claims that the cost cap calculation 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."[58] (Emphasis omitted.) OCEA opposes this standard, as it lacks a statutory basis and appears designed to trigger the cost cap prematurely and inappropriately so that the utilities need not invest in alternative energy technologies. The purpose of the cost cap is to protect ratepayers from significant increases in their electric bills, and the fairest way to accomplish this is to assess the cost to ratepayers overall rather than isolating "specific generation" associated with meeting a benchmark.

Comments about 4901:1-40-07(D)

The comments of IEU-Ohio make the point that the PUCO Staff should modify this proposed rule to state that "if full cost recovery is being achieved through one

[58] FE comments at 18-19.

mechanism, it shall not be available through any other mechanism."[59] OCEA agrees with this recommendation.

Proposed Rule 4901:1-40-07(D) states:

> (D) …[a]ny costs included in a commission-approved unavoidable surcharge for construction expenditures or environmental expenditures of generation resources may be excluded from consideration as a cost of compliance under the terms of the alternative energy portfolio standard.

OCEA emphasizes that this provision suggests if the Commission approves an unavoidable, non-bypassable surcharge to pay for costs associated with environmental upgrades to existing coal plants (such as scrubbers or carbon sequestration), those costs would be *simply ignored* when determining the cost of conventional energy generation.

This would, of course, have the effect of artificially masking the actual cost of generating conventional energy—concealing the billions of dollars that may be required to clean coal or capture and sequester carbon underground. By comparison, the cost of generating renewable energy would seem artificially and unfairly much more costly, causing the 3% cost cap to be prematurely triggered.

There is no statutory basis for discounting the actual costs of conventional energy in this manner, ignoring environmental and construction costs. Therefore, this section should be deleted in its entirety.

Comments about 4901:1-40-07(D)

The proposed "cost cap" rule requires utilities to "pursue all reasonable compliance options" prior to requesting relief under the cap. Implicit in the requirement that a utility pursue all reasonable compliance options is a requirement that the utility procure renewable energy through competitive selection to ensure the least cost, thereby

[59] Industrial Energy Users-Ohio comments at 15.

maximizing renewable energy investments before triggering the cost cap. OCEA agrees with and supports the comments of LS Power Associates, L.P. in this regard.

As OCEA stated in its initial comments, utilities should have the option to "self-build" renewable energy, but only after a fair and transparent competitive selection process in which the utility demonstrates it can produce the renewable energy at the most competitive price.[60]

Comments about 4901:1-40-07(E)

OCEA strongly supports proposed Rule 4901:1-40-07(E), which states:

> If the Commission makes a determination that a three percent provision is triggered, the electric utility or electric services company shall comply with each benchmark **up to the point** that the three per cent increment would be reached for each benchmark. (Emphasis added.)

The principle clearly established in this section is that of "partial compliance"—meaning that a utility must comply with whatever portion of a benchmark can be satisfied prior to the 3% cost cap being triggered.

FE unreasonably claims that the principle of partial compliance is "inappropriate and inconsistent with the statutory language, which states that if the three per cent cap is reached, the utility <u>need not comply</u> with the benchmarks."[61] In essence, FE claims that as soon as the Commission-determined cost cap would be triggered in a given year, the utility no longer has to comply with <u>any</u> portion of the benchmark. For example, if a utility's costs of complying with the renewable energy benchmark exceeded the cost of otherwise producing the electricity by 3.0001% (thereby triggering the 3% cap), FE states

[60] OCEA comments at 57.

[61] FE comments at 19.

<u>zero</u> renewable energy resources should have to be implemented.[62] This illogical assertion flies in the face of SB 221.

The statute referenced in FE's comments is R.C. 4928.66(C)(3), which states:

> 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. (Emphasis added.)

By selectively quoting from the statute, FE rests its argument on the phrase "need not comply." FE ignores the specific and unambiguous mandate <u>in the same sentence</u> is that a utility need not comply with a benchmark "<u>to the extent</u>" that doing so triggers the 3% cost cap. Thus, compliance is mandated up to the point (i.e. "to the extent") the cost cap would be triggered and the utility "need not comply" with one hundred percent of the benchmark. The proposed rule is clearly consistent with the statute and the proposed rule implements the statute in a straightforward manner.

Comments about Rule 4901:1-40-07(F)

OCEA strongly supports proposed Rule 4901:1-40-07(F), which states:

> The Commission retains the right to **increase** a future year's compliance obligation **by the amount of any undercompliance in a previous year** that is attributed to the three per cent cost cap provision. (Emphasis added).

Commonly referred to as a "catch up," this rule allows the Commission flexibility to "increase a future year's compliance" to account for the prior year's under compliance if the cost cap were triggered. Of course, any such increase also would be subject to the cost cap. In this way, the utilities remain on target with the benchmarks established in SB 221 and the cost cap continues to protect consumers.

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[62] FE comments at 19.

FE, AEP, and DP&L all oppose allowing the Commission to require a "catch up" on the ground that it is "not consistent with"[63] or "unsupported by"[64] SB 221. DP&L also claims that the "catch up" imposes an "undefined future obligation that may be imposed at some undefined future date to provide even more alternative energy than is required by statute."[65] This is nonsense. The General Assembly locked the year-end alternative energy benchmarks into the statute. This proposed rule does not require a utility to generate even one more additional kilowatt of renewable energy than what is mandated by SB 221. Instead, it simply requires a utility to "catch up" to the required percentage of advanced and renewable energy provided the cost cap is not triggered.

For example, in 2017, a utility must generate 5½ percent of its electricity using renewable energy resources. Even assuming that the cost cap were triggered in the prior two years (meaning the benchmarks did not have to be fully satisfied in 2015 or 2016), the statute continues to mandate that the utility generate 5½ percent from renewable energy resources in 2017. The percentages each year are set in stone by statute, and the utilities may not modify them through specious arguments.

FE also claims that the statute provides an exclusive remedy for under compliance in the form of compliance payments.[66] However, the statutory compliance payments apply only to "<u>avoidable</u> under compliance" as determined in a Commission proceeding. Compliance payments are in effect a statutory penalty. The proposed "catch-up," however, does not trigger a compliance payment. It merely provides that where there is

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[63] AEP comments at 15.

[64] DP&L comments at 23.

[65] Id.

[66] See, R.C. 4928.64(C)(2).

unavoidable under compliance—the inability to satisfy the benchmarks as a result of the 3% cost cap—the utility must catch up in future years. The proposed rule properly addresses this subject.

IV. GREENHOUSE GAS REPORTING AND CARBON DIOXIDE CONTROL PLANNING – CHAPTER 4901:1-41

General Comments

Several utilities, notably Dayton Power and Light and First Energy, appear to be reading the applicability of control plans to ***only*** address a particular electric generating unit.[67] The comments ignore the system-wide phrase that appears in the same section. ((A), "and a system-wide scale over five, ten, and twenty-year periods." FE's comments assert that "there is no known means to reduce carbon dioxide" from a stack, and suggest that the PUCO hold a series of workshops to help stakeholders to better understand the requirements and provide further input.[68] OCEA does not agree with the assertion that there are no known means to reduce carbon dioxide emissions. From a ***system-wide*** perspective, there are several ways to cost-effectively develop plans to reduce carbon dioxide emissions: energy efficiency, renewable energy, increased efficiency of existing generation, and combined heat and power. Moreover, if a cap and trade program is adopted, over-compliance at one unit where emissions controls are feasible can be counted toward another unit's under-compliance.

[67] DP&L comments at 24-26; FE comments at 20-22

[68] FE comments at 22.

4901:1-41-02 Greenhouse Gas Reporting and Carbon Dioxide Control Planning

Comments about 4901:1-41-02(A)

The Climate Registry ("TCR") comments regarding section (A) indicates the process necessary to submit data to TCR. Comments from Duke Energy, urge caution because of an ongoing EPA rulemaking effort to develop reporting and record keeping requirements TCR's suggested approach to revise the section makes sense since they are the keeper of the Registry. Duke Energy, on the other hand, asks the Commission to defer regulating Ohio law because of the potential that EPA might issue regulations. This is nonsense. As any observer of the federal process is aware, EPA regulations tend to take a significant amount of time, sometimes years, from the time they are proposed and once issued, they are subjected to endless appeals by plant owners, states, and other organizations. In addition, federal statutes and regulations tend to grandfather state compliance mechanisms or allow compliance under those rules to be translated into the federal standard for compliance purposes. Ohio should not wait to gather this information and provide it to the TRC under existing protocols. This will protect utilities and customers from future regulatory schemes while ensuring that prompt action can be taken to control emissions.

The section could be revised per TCR's suggestion as:

PROPOSED RULE CHANGE:

> Any person which owns or operates an electric generating facility within Ohio shall ~~become a participating member in the climate registry for at least scope 1 (direct) greenhouse gas emissions, and shall~~ report AT LEAST SCOPE 1 DIRECT greenhouse gas emissions TO THE STATE OF OHIO according to the protocols approved by the climate registry, or as otherwise directed by the commission.

AEP commented that the requirements of the "carbon dioxide control planning" should be limited to carbon dioxide only.[69] OCEA disagrees with this limitation. Utilities have many opportunities to reduce SF6 sulfur hexafluoride ("SF6"), for example, which has a global warming potential 23,000 times that of carbon dioxide. The electric power industry is responsible for about 80% of all the SF6 used globally. SF6 is used in switchgear, circuit breakers, and other electrical equipment. Methane ("CH4") has a global warming potential 23 times that of carbon dioxide. Utilities that develop projects to capture and combust gases produced from landfills and agricultural processes can significantly reduce methane emissions and generate electricity at the same time.

Comments about 4901:1-41-02

AEP recommends that sections (B) and (C) be limited only to carbon dioxide, expressing concerns that the plans may require them to also address criteria pollutants.[70] Development of a comprehensive control plan could reveal benefits for several pollutants, not just carbon dioxide, and these benefits might be more cost-effective than a plan that focuses only on criteria pollutants or only on carbon dioxide. OCEA asserts that the legislative intent in the statute does permit a broader scope for plans, and therefore, AEP's comment should not be adopted, since it could unnecessarily limit the scope of environmental compliance plans, continuing to promote a piecemeal, pollutant-by-pollutant approach rather than a single comprehensive approach.

Buckeye Power recommends replacing "person" with "public utility" in the definition section, proposed Ohio Adm. Code sections 4901:1-41-01(F) and, then in

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[69] AEP comments at 16.

[70] AEP comment at 17.

sections 4901:1-41-02(B) and (C).[71] Industrial Energy Users-Ohio also suggested tightening the definition.[72] The comments of both Buckeye Power and the Industrial Energy Users-Ohio go to the intended scope of the rule and what companies are subject to it. Per the generally applicable comments above, what constitutes the intended universe of sources is a crucial determination. If, as the utilities argue, only those under the direct authority of PUCO may be subjected to its requirements, then the rule appears to have limited coverage. Such an interpretation would be contrary to the legislative intent in terms of monitoring greenhouse gases. Under this kind of interpretation, the very power plants that the legislation seeks to monitor could be removed from the Commission's purview. If the legislature intended that the greenhouse gas rules apply to all utilities, the definition of a covered facility will need to be revised to reflect this intent.

V. LONG-TERM FORECAST REPORTS – CHAPTER 4901:5-1

Most of the utility comments centered on clarifying existing definitions but some also sought to limit the frequency of the forecast, or the information requirements. OCEA takes issue with most of these comments as discussed below.

4901:5-1-01 Definitions

Comments about Definition (I) -- "Substantial Change"

AEP proposed to replace 'delivery' which has been in the rules for sometime, with 'consumption' citing an unspecified statute.[73] The assertion should be rejected. OCEA supports the annual review requirements as originally proposed by the PUCO

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[71] Buckeye Power comments at 4.

[72] Industrial Energy Users-Ohio comments at 16-17.

[73] AEP comments, at 18.

Staff. Similarly, AEP's suggestion to add additional language to subparagraph (2) is also unnecessary as it would serve to delay the filing of an LTFR. Given the benchmarks for efficiency and alternative energy, there will soon need to be an annually updated LTRF simply because of the changes in how Ohioans produce and use, or don't use, energy. Filing an application for new generation is not the only change that warrants filing an LTFR.

4901:5-1-03 Long-term Forecast Reports Requirements

Comments about 4901:5-1-03(C)

AEP's proposed comments regarding C(1), again request adding the language "Prior to filing it next long-term forecast report."[74] As stated above, this language attempts to restrict the number of times the Companies are required to file an LTFR and therefore OCEA opposes the change. OCEA supports the language as originally drafted.

Additionally, AEP proposes a similar change to (C)(2),[75] which would restrict the resource planning informational requirement to only the year the "plant is authorized" rather than for the "life of the plant."[76] OCEA is supportive of the rules as originally proposed, requiring the utilities to provide information on all active generation resources every year as they represent the resources available to meet forecasted demand. Regulators and utilities must regard the LTFR process expansively. It's not just about generation anymore.

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[74] Id.

[75] Id.

[76] Id.

4901:5-3-01 Definitions

Comments about Definition (E) -- "Substantial Change"

OCEA has the same comments to this definition as it did to the definition of "substantial change" in Ohio Adm. Code 4901:5-1-01. AEP again recommends a change similar to that discussed above and the suggestion should be rejected here as well. OCEA supports the annual review requirements as originally proposed by the PUCO Staff. This is critical in an era where there is a convergence of concerns over affordability and least-cost planning, energy independence and fuel source diversity, and global warming and environmental compliance costs, among other issues.

VI. 4901:5-5 ELECTRIC UTILITY FORECAST REPORT FILING REQUIREMENTS

4901:5-5-02 Forecast Report Requirements for Electric Utilities and Transmission Owners

Comments about 4901:5-5-02(C)

FE states that the requirement in (C)(2)(b) that the "reporting person shall provide a discussion of the impacts of such factors and how it has taken these factors into account" is "burdensome and unnecessary" and therefore should be removed.[77] The Commission should reject FE's recommendation because the required discussion is important qualitative and in some instances quantitative information that will contribute to the accuracy of the forecast reports. The language would also require the utilities to account for changes such as new legislation or regulations that will affect the forecast going forward. In addition, to the extent that energy policy deliberations are ongoing, information from the reporting person regarding potential impacts may aid the

[77] FE comment at 23.

commission, and other parties, in those deliberations. The Commission must require this information.

4901:5-5-03 Forecasts for Electric Transmission Owners.

Comments about 4901:5-5-03(A) through (F)

AEP asserts that sections (A) through (F) require the Company to file information about the Companies planned and existing electric transmission systems that may contain information that makes the Companies energy infrastructure vulnerable to "vandalism or worse."[78] AEP's proposed language to address the security issue excludes parties, like OCC, from the opportunity to review this information. Security issues must be substantial, not mere 'vandalism'. OCEA recommends that OCC and other parties be allowed to review information under seal and that the grant of confidentiality be as limited as possible.

FE asserts that the transmission information requested in sections (B)(4)(b) – (f), (E)(5)-(6) is not "maintained" by the Companies.[79] However, this information directly relates to the Companies operations and can easily be retrieved by the Companies from their respective RTOs. This provision can also apply directly to RTOs which, while they cannot be regulated by the Ohio Commission, are doing business in Ohio and thus are subject to reporting requirements for Ohio-based assets. The same is true of holding company subsidiaries which 'own' transmission facilities.

[78] AEP comments at 24.

[79] FE comments at 23.

4901:5-5-05 Resource Plans for Electric Distribution Utilities

Comments about 4901:5-5-05(A)

AEP asserts that subdivision (A) should be deleted, in part because the Companies do not believe that integrated resource plans should be included in the filings throughout the life of an electric generating facility.[80] OCEA does not support AEP's recommended change from the "life of the plant." As addressed above in comments to a number of Ohio Adm. Code Chapter 4901:5-5 sections, the intent of the PUCO Staff is for an annual review of the integrated resource plans. OCEA supports the annual review requirements of these plans as originally proposed by the PUCO Staff.

Comments about 4901:5-5-05(C)

AEP also recommends that section (C)(1) should be deleted, because it asks, in part, for a "summary narrative of the electric generating systems…", it "contradicts Am. Sub. No. 221" and the information may be "commercially sensitive."[81] OCEA does not support AEP's position. The information required by (C)(1) is a "brief summary" and is important for determining whether the utility resource plan is the least cost option. If the information is competitively sensitive then it can be filed under seal. AEP's comment that S.B. 221 does not adopt cost of service principles does not preclude the Commission from making a decision on the SSO based on all underlying cost of service and wholesale market pricing information.

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[80] AEP comments at 25.

[81] AEP comments 26.

The Industrial Energy Users-Ohio advocate for the Companies' long-term forecast reports to include the customer-cited capabilities that the Companies intend to incorporated.[82] OCEA supports this recommendation.

Comments about 4901:5-5-05(E)

AEP and DP&L state that the information requested in paragraph (E)(2)(b) is already provided in a utility's fuel clause audit and therefore the requirement should be deleted.[83] OCEA disagrees. This information should be required as part of an integrated resource plan regardless of whether aspects of it are considered in fuel adjustment cost proceedings. The integrated resource process outlined by the PUCO Staff is intended to be a comprehensive review of a utility's resource plan and eliminating any of the parts would defeat the purpose of the planning exercise.

AEP also requests that the Commission delete the first sentence of (E)(3).[84] AEP states that the sentence's "focus on 'cost-effectiveness,' 'revenue requirement' and 'rate impacts' bears no relationship to the establishment of an electric security plan (ESP) under §4928.143, Ohio Rev. Code."[85] AEP is wrong. The projected rate impacts and cost-effectiveness of the plant over a ten year forecast horizon of revenue requirements period is critical to any integrated resource planning process. AEP's attempt to move away from reasonable rates and providing data that could produce least cost outcomes should not be sanctioned.

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[82] Industrial Energy Users-Ohio comments at 20.

[83] AEP comments at 26; and DP&L comments at 26.

[84] AEP comments at 26.

[85] Id.

Finally, DPL requests the deletion of section (E)(5)(c)(ii), stating that the "IRP is a planning process" and that it is premature to know the effects of these projects and plans.[86] DP&L's recommendation that this section be deleted should be rejected. "Potential rate and customer bill impacts of the plan" represents critical information that any resource plan should give adequate consideration to. The rate information is a key piece of information of any planning and financial model and the bill impacts, if not part of the model, can be easily calculated through a post-processing spreadsheet.

VII. CONCLUSION

OCEA appreciates the opportunity to reply to comments filed in response to the rules proposed in an Entry dated August 20, 2008. OCEA requests that the Commission carefully consider these comments and adopt OCEA's recommendation.

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[86] DP&L comments at 26.

Respectfully submitted,

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I hereby certify that, on this 26th day of September 2008, the foregoing Reply Comments by the Ohio Consumer and Environmental Advocates have been served via First Class Mail, postage prepaid, to the following persons who previously submitted comments in response to the Public Utility Commission of Ohio's requests for comments on the adoption of proposed rules regarding the implementation of S.B. 221.

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