

FILE

**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,)
4901:5-5, 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

REPLY COMMENTS OF INDUSTRIAL ENERGY USERS-OHIO

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REPLY COMMENTS OF INDUSTRIAL ENERGY USERS-OHIO

I. INTRODUCTION AND BACKGROUND

Industrial Energy Users-Ohio ("IEU-Ohio") herein provides its reply comments for the Commission's consideration in response to initial comments submitted in this proceeding on the last of three sets of rules proposed by the Staff of the Public Utilities Commission of Ohio ("Commission") to implement the recently passed Amended Substitute Senate Bill 221 ("SB 221").

The Commission received a substantial volume of initial comments regarding the proposed rules, many of which provide well thought out suggestions. However, there are also a number of issues and recommendations raised that: 1) are contrary to law (SB 221 or otherwise); 2) would diminish the flexibility the Commission, the electric distribution utilities ("EDUs") and interested parties have before there is any useful experience with standard service offer ("SSO") cases; 3) would not benefit customers or anyone else, or; 4) are otherwise not crafted in a way that the recommendations could

be practically implemented. IEU-Ohio addresses those comments below. The failure of IEU-Ohio to specifically address every issue raised in the initial comments of other parties should not be construed as endorsement or agreement with those comments.

II. REPLY COMMENTS

A. General Comments

The Kroger Company ("Kroger") suggests that rather than having electric EDUs administer demand response and energy efficiency programs, the Commission should facilitate the creation of a not-for-profit corporation with the responsibility for implementing demand response and energy efficiency programs state-wide.¹ IEU-Ohio opposes Kroger's suggestion inasmuch as implementation of the proposed rule would violate the law as the Commission lacks the statutory authority to administer demand response and energy efficiency programs as Kroger suggests.

B. Proposed Chapter 4901:1-39 – Energy Efficiency and Demand Reduction Benchmarks

(1) 4901:1-39-01 – Definitions

Several parties suggest revised definitions within this subsection of the proposed rules. For example, several parties propose revising the definition of "Peak demand reduction" in proposed subsection (E). Nucor Marion Steel ("Nucor") suggests revising this definition to "make explicit reference to interruptible rates in order to ensure that such rates are properly recognized as peak demand reduction mechanisms."² Section 4928.66(A)(2)(c), Revised Code, provides that EDU peak demand baselines are to be adjusted to exclude the effects of all customer-sited peak demand reduction programs

¹ Kroger Initial Comments at 2-4 (September 9, 2008).

² Nucor Initial Comments at 3 (September 9, 2008).

that are committed by mercantile customers towards EDU peak demand reduction obligations. Thus, Section 4928.66(A)(2)(c), Revised Code, implicitly recognizes interruptible loads, as well as all other customer-sited capabilities that can contribute towards peak demand reduction. Therefore, while IEU-Ohio does not believe Nucor's suggested revision to the definition is inconsistent with the statute, it does not appear necessary to explicitly recognize interruptible loads in this definition, while omitting references to other capabilities that can contribute to peak demand reductions. Nevertheless, the final rules should make it clear that the full amount of each customer's interruptible capacity and other demand response capabilities specified by contract or other documents implementing a rate schedule, if committed to the EDU, counts towards satisfying the EDU's peak demand reduction target. As was and is the case with the design of interruptible rates, the peak demand reduction benefit of an interruptible rate must be measured by the potential amount of interruption or demand response that can occur pursuant to the rate schedule or contract recognizing that the actual amount of interruptions or demand response will depend on conditions over time. Also, the rule should make it clear that the full potential amount of interruptible supply and demand response committed to an EDU counts towards satisfying the EDU's target even though the participating interruptible or demand response customers may turn to other sources of electricity (back-up generation or buy-through suppliers) when responding to the EDU's request.

Ohio Consumer and Environmental Advocates³ ("OCEA") proposes to include within the proposed rules a definition of "Collaborative," as being a committee of parties and other interested persons as approved by the parties that is responsible for managing the energy efficiency and demand reduction programs of a utility.⁴ SB 221 did not delegate the management of EDU programs to a Collaborative. As such, the inclusion of this definition in the proposed rules is not appropriate.⁵ Likewise, references to the Collaborative in other proposed definitions is also not appropriate, as these references assume authority for the Collaborative that does not exist within SB 221.⁶

The Great Lakes Energy Development Task Force ("GLEDTF") suggests a modification to the definition of Renewable Energy Credit ("REC"), as proposed in subsection (F), such that the first 50 MW of output of a wind power pilot project in Lake Erie receive four RECs for each unit of output.⁷ GLEDTF claims this change is supported by the law, but provides no citation support.⁸ GLEDTF's proposed definitional change is not consistent with SB 221 and should not be adopted.

³ OCEA includes the Office of the Ohio Consumers' Counsel ("OCC"), City of Toledo, Ohio Partners for Affordable Energy ("OPAE"), 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 comment to Ohio Adm. Code Chapters 4901:1-39, 4901:1-40 and 4901:1), Environment Ohio (signing on for comments to Ohio Adm. Code Chapters 4901:1-39, 4901:1-40 and 4901:5), Midwest Energy Efficiency Alliance (signing on for comment to Ohio Adm. Code Chapters 4901:1-39 and 4901:1-40), Natural Resources Defense Council, and AARP (signing on for comments to Ohio Adm. Code Chapters 4901:1-39, 4901:1-40 and 4901:5).

⁴ OCEA Initial Comments at 5 (September 9, 2008).

⁵ IEU-Ohio addresses the intended role of this collaborative later in these reply comments.

⁶ OCEA's proposed definition of "Program" limits activities to measures that are approved by the Collaborative.

⁷ GLEDTF Initial Comments at 1-2.

⁸ *Id* at 2.

(2) 4901:1-39-02 – Purpose and Scope

Kroger argues that the existing language in this proposed section “indicates that a mercantile customer’s investments to achieve energy savings and demand reductions will be recognized in EDU programs as contributing to specific levels of energy savings and demand reduction,” and as such, an “EDU should not receive credit or benefit from a mercantile customer’s investments in energy efficiency and demand reduction that have or will occur irrespective of the EDU’s initiatives.”⁹

Section 4928.66(A)(2)(c), Revised Code, provides an opportunity for customers that commit their customer-sited capabilities towards EDU portfolio requirements to be exempted from EDU programs if the Commission finds that the exemption encourages customers to commit their capability. However, this section also identifies that compliance with portfolio obligations will be measured by including the effects of all mercantile customer-sited energy efficiency and demand response capabilities. IEU-Ohio observes that, as a practical matter, customer-sited energy efficiency and demand response that physically exists, irrespective of whether such capabilities are committed to an EDU, will be reflected in actual peak demands and sales. Further, to the extent customer-sited energy efficiency and demand response physically exists but are not committed to an EDU, the EDU may have no knowledge of their existence. Thus, on a practical level, Kroger’s suggestion is not capable of implementation.

(3) 4901:1-39-04 – Benchmark Report Requirements

Several parties provide comments on how the baseline computations used within the annual benchmarking report should be calculated. In its initial comments, Dayton

⁹ Kroger Initial Comments at 5.

Power & Light (“DP&L”) observed that the baseline computations set forth in proposed subsections (B)(1) and (2), along with Section 4928.66(A)(2)(a), Revised Code, are ambiguous. DP&L provides a specific mathematical example to demonstrate how such ambiguity could lead to compounded and over-compliance with energy efficiency requirements, and offers what appears to be a reasonable approach to calculating baseline energy usage.¹⁰ IEU-Ohio agrees that it would be appropriate to clarify the proposed rules.

DP&L offers a similar technical clarification for calculation of baseline peak demand. However, DP&L also suggests that for utilities that are members of PJM, their peak demand baseline be determined based upon the EDU’s capacity obligation in the three prior years as determined by PJM.¹¹

It is IEU-Ohio’s understanding that PJM derives EDU capacity obligations based upon a 5-CP average. Thus, DP&L’s suggested approach to rely upon PJM determinations would be inconsistent with SB 221, which implicitly relies upon 1-CP to determine each year’s contribution to peak demand.

(4) Proposed New Section 4901:1-39-05 – Program Planning Process

OCEA proposes to include a new section 4901:1-39-05 to the rules titled “Program Planning Process.”¹² OCEA’s proposed new section describes in detail the information that OCEA proposes to be submitted as part of each EDU’s annual compliance filing, and specifies that the annual filing include measures of cost-

¹⁰ DP&L Initial Comments at 2-5 (September 9, 2008).

¹¹ *Id.* at 6.

¹² OCEA Initial Comments at 15 (September 9, 2008).

effectiveness based upon the Total Resource Cost Test in the California Standard Practice Manual.¹³ Within this section of its proposed rule, OCEA has specified that no less than 40 percent of the demand side management ("DSM") program's savings shall come from the residential class. In a footnote, OPAE includes language targeting activities within the residential class to low-income households.¹⁴ Neither suggestion is consistent with SB 221 and should not be adopted inasmuch as SB 221 does not contemplate any set-asides or mandates for any particular customer class.

OCEA also suggests in its proposed new section of the rules that Staff would issue a report by the first of August each year on each EDU's annual filing.¹⁵ As proposed, OCEA's proposed rule contemplates Staff approving the annual filing or the changes needed to achieve approval. IEU-Ohio believes this is an inappropriate delegation of authority. While it is certainly appropriate for the Staff to recommend approval or changes to achieve approval, the authority to issue any such approval should rest with the Commission.

(5) Proposed New Section 4901:1-39-06 – Evaluation, Measurement and Verification Requirements

OCEA also proposes a new section of the rules addressing evaluation, measurement and verification requirements.¹⁶ OCEA's proposal contemplates a significant role for the suggested Collaborative, also proposed by OCEA, to include

¹³ *Id.* at 15-18.

¹⁴ *Id.* at 16, fn 5.

¹⁵ *Id.* at 18.

¹⁶ *Id.* at 19-22.

hiring third party evaluators to perform process and impact evaluations on all EDU energy efficiency and peak demand reduction programs.¹⁷

As IEU-Ohio has previously noted, SB 221 did not contemplate delegating EDU management functions regarding energy efficiency and peak demand portfolio obligations to an independent Collaborative. Further, OCEA's suggestions in this regard raises significant issues. For example, OCEA proposes to delegate significant management responsibilities to its proposed Collaborative, but does not propose that the Collaborative would have any accountability. Thus, OCEA would make any EDU energy efficiency programs subject to approval by its Collaborative, but the Collaborative holds no responsibility to ensure the portfolio obligations are in fact met. Consequently, the EDU could be held financially responsible for what, in retrospect, may be poor management decisions by the Collaborative since EDUs are subject to forfeitures for failing to comply with the energy efficiency and peak demand reduction portfolio requirements of SB 221.¹⁸ IEU-Ohio believes that OCEA's proposed Collaborative is a concept that is both inconsistent with SB 221 and will hinder, rather than assist, compliance with SB 221. IEU-Ohio therefore recommends that OCEA's proposals regarding the Collaborative not be adopted.

(6) Proposed New Section 4901:1-39-07 – Filing and Review of the Energy Efficiency and Demand Response Achievement Reports

OCEA also proposes to add a new section to the rules that would prescribe information that must be included in an EDU's annual long-term forecast report ("LTFR"), such as descriptions of all activities undertaken to satisfy energy efficiency

¹⁷ *Id.*

¹⁸ See Section 4928.66(C), Revised Code.

and peak demand reduction portfolio requirements.¹⁹ As proposed, the information that OCEA seeks to have included would be customer-specific, and list company names as well as a detailed description of the methods taken to save energy.²⁰

IEU-Ohio believes that submitting this level of detail to the Commission is both administratively burdensome and far beyond the information necessary to determine EDU compliance. Determining compliance requires documenting the actual energy efficiency improvements and peak demand reductions that have occurred. How these reductions have been achieved is a secondary matter and not necessarily information needed to determine compliance. More problematic, however, is the fact that much of this information may be commercially sensitive and classified as trade secret or otherwise proprietary information for commercial and industrial customers. Consequently, providing the detailed descriptions of specific methods and processes employed to create energy efficiency may negate the ability of the customer to maintain the secrecy of this information and compete in the global marketplace. Maintaining the confidentiality of such information may be difficult, if not impossible, to the extent the information is shared with other entities such as OCEA's proposed Collaborative, which is OCEA's apparent preference.²¹

IEU-Ohio therefore submits that providing this level of detail in the EDU's LTFR is unnecessary and urges the Commission to not adopt OCEA's proposed rule. To the extent the Commission requires such information in the rules, IEU-Ohio urges that the

¹⁹ OCEA Initial Comments at 22-27.

²⁰ The Ohio Environmental Counsel ("OEC") advocates filing similar descriptions of the specific activities undertaken to produce energy efficiency improvements and peak demand reductions, but stops short of requesting specific customers be identified. OEC Initial Comments at 14-15 (September 9, 2008).

²¹ OCEA Initial Comments at 31-32.

rules recognize and afford the flexibility to seek and maintain the confidentiality of such information, including prohibiting the sharing of any such information with entities such as the Collaborative who may not be capable of maintaining confidentiality.

(7) 4901:1-39-05 – Recovery Mechanism

OCEA suggests modifications to this proposed rule that would limit the types of costs that a mercantile customer may seek an exemption from, as a result of committing customer-sited energy efficiency and peak demand reduction capabilities to an EDU.²² Specifically, OCEA would foreclose a customer from being exempted from EDU lost revenues, utility incentives and monitoring and verification costs necessitated by that customer class.²³ OCEA's proposal seeks rule limitations that are inconsistent with SB 221. The Commission's proposed rule, which affords the Commission flexibility to address this issue on a case-by-case basis, should be maintained.

(8) 4901:1-39-06 – Commitment for Integration by Mercantile Customers

DP&L suggests modifying the proposed rule such that an EDU would accrue the benefit of the mercantile customer's energy efficiency measures through opportunities to participate in PJM's or the Midwest Independent System Operator's ("MISO") demand response programs, or any other markets in which the mercantile customer's customer-sited capabilities have value.²⁴ It is not unreasonable for a customer and an EDU to mutually agree that the EDU will accrue any value associated with the customer's capabilities that may be obtained through participation in RTO demand

²² *Id* at 27-29.

²³ *Id.* at 28-29.

²⁴ DP&L Initial Comments at 14 (September 9, 2008) and Supplemental page 14 (September 10, 2008).

response opportunities. This is a factor that both the customer and EDU will evaluate as part of their overall consideration of the agreement committing the customer's capabilities towards the EDU's portfolio obligations. While the Commission has approved arrangements in which customers have agreed that the EDU will accrue such benefits,²⁵ mandating this result through the Commission's rules is not appropriate.

There is no provision in SB 221 that compels an EDU to accept any particular customer's offer to commit its customer-sited capabilities towards an EDU's portfolio obligations. Nor is there any provision in SB 221 that dictates the terms and conditions under which a customer may commit its customer-sited capabilities towards an EDU's portfolio obligations. Further, the opportunity for an exemption from the EDU's energy efficiency cost recovery mechanism is an option, not a mandate. Thus, the terms and conditions under which a customer commits its capabilities towards an EDU's portfolio obligations are to be freely negotiated between the EDU and mercantile customers, subject to Commission approval. DP&L's proposed rule modification should not be adopted.²⁶

In addition, OCEA proposes to modify this rule such that only customer projects completed during the same years as those used to establish the EDU's baseline would be eligible.²⁷ OCEA's proposed rule change should be rejected as it directly conflicts

²⁵ *In the Matter of the Application for Approval of a Contract for Electric Service Between Columbus Southern Power Company and Solsil, Inc.* Case No. 08-883-EL-AEC, Finding and Order (July 31, 2008).

²⁶ DP&L similarly suggests that proposed rule 4905:1-39-05(A)(2) be modified such that customers may apply for a partial exemption in proportion to the load they have saved relative to EDU targets. DP&L Initial Comments at 12-13. EDUs are able to negotiate towards this result if they deem it appropriate. However, it is not appropriate to mandate this outcome through the Commission's rules. OCEA advocates a similar rule modification that should not be accepted. OCEA Initial Comments at 30-31.

²⁷ OCEA Initial Comments at 32-33.

with SB 221. Section 4928.64(A)(1), Revised Code, specifies that customer-sited advanced energy resources, whether new or existing, may be committed towards an EDU's demand response, energy efficiency or peak demand reduction programs under Section 4928.66(B)(2)(b), Revised Code. Thus, customer-sited capabilities cannot be restricted to projects completed during the years used to establish the EDU's baseline.

C. Proposed Chapter 4901:1-40 – Alternative Energy Portfolio Standard

(1) 4901:1-40-01 – Definitions

Numerous parties propose revisions to the definition of “Deliverable into this state” set forth in subsection (I) of the proposed rule. The majority of these comments suggest that the rule be modified to state that any generation resource interconnected to either PJM or MISO will be deemed deliverable into this state under the rule.

It is probably a physical fiction to deem any generation resource, whether existing or yet to be built, as being universally deliverable into Ohio, although IEU-Ohio is not aware of any provision in SB 221 that forecloses this outcome.²⁸ However, based upon the wide range of comments submitted on this issue, IEU-Ohio agrees that this is an aspect of the proposed rules that warrants further clarification.

(2) 4901:1-40-03 – Requirements

Duke Energy Ohio (“Duke”) suggests that the language in proposed subsection (A)(3), which states that all costs incurred by an EDU in complying with the requirements of the alternative energy portfolio standard are avoidable by customers who exercise choice of electric suppliers, should be modified such that only energy

²⁸ MISO maintains lists of generation resources that are deemed deliverable throughout MISO as well as a list of generation resources that are not universally deliverable. This information is posted on MISO's website at: http://www.midwestmarket.org/publish/Folder/3e2d0_106c60936d4_-76810a48324a?rev=1 (last accessed September 23, 2008).

costs be avoidable.²⁹ Duke argues that the only statutory requirement is that EDUs and certified retail electric service ("CRES") providers supply energy from alternative energy resources.³⁰ Duke also states that while all energy costs should be avoidable, nothing in the statute mandates avoidability of capacity costs.³¹

Duke's proposed rule change would require shopping customers to subsidize an EDU's compliance with SB 221's portfolio standards. CRES providers are required to comply with portfolio standards just like EDUs. Therefore, costs associated with a CRES's portfolio compliance may be reflected in their generation offer price. Duke's proposed rule change would require shopping customers to subsidize Duke's supply of generation service, in contradiction to the state's policies embodied in Section 2928.02, Revised Code. Duke's proposed rule change should not be adopted.

(3) 4901:1-40-04 – Qualified Resources

Competitive Suppliers³² suggest that the rules regarding qualified resources be modified to recognize that mercantile customer-sited capabilities can be relied upon to meet an electric services company's renewable resource benchmarks or advanced energy resource benchmarks.³³ IEU-Ohio agrees with this suggested clarification, as the ability for an electric services company to rely upon customer-sited capabilities to

²⁹ Duke Initial Comments at 7-8 (September 9, 2008).

³⁰ *Id.*

³¹ *Id.*

³² Competitive Suppliers consist of Constellation NewEnergy, Inc., Direct Energy Services, LLC, and Integrys Energy Services, Inc.

³³ Competitive Suppliers' Initial Comments at 7 (September 9, 2008).

meet benchmark obligations is specifically provided under Section 4928.64(B), Revised Code.

Vertus Technologies, Inc. ("Vertus") suggests that proposed rule 4901:1-40-04(C)(2) be modified such that the Commission establish minimum standards for requirements for advanced energy resources from mercantile customers,³⁴ although Vertus does not offer any specific standards for the Commission's consideration. Vertus does, however, recognize that time constraints may make it impossible for the Commission to establish reasonable standards as part of its initial rules. As IEU-Ohio has continued to state with respect to the establishment of customer-sited opportunities, the Commission should remain flexible so as to ensure that the widest range of opportunities are made available for meeting and achieving Ohio's advanced energy portfolio standards. Further, proposed rule 4901:1-40-04(E), which would allow an entity to seek certification of a resource as a qualified resource, provides the Commission and customers the flexibility to adopt to changing technologies.

In addition, OCEA suggests a modification to the proposed rule that would require the Commission to hold a public hearing before it acts to classify a new technology as an advanced energy resource or renewable energy resource.³⁵ Section 4928.64(A)(2), Revised Code, however, does not require the Commission to hold a hearing before acting to classify a new technology as an advanced energy resource or renewable energy resource. As such, OCEA's recommended rule change is inconsistent with SB 221 and should not be adopted.

³⁴ Vertus Initial Comments at 8 (September 8, 2008).

³⁵ OCEA Initial Comments at 48-49.

Numerous parties recommend a change that would require any incremental increase in generating capacity seeking to qualify as an advanced energy resource accomplish a net reduction in the generating facilities' total annual carbon dioxide emissions. IEU-Ohio supports Staff's initially proposed rule, which would require any incremental increase in generating capacity seeking to qualify as an advanced energy resource result in no increase in the rate of carbon dioxide emissions.

(4) 4901:1-40-07 – Cost Cap

Duke suggests that when applying the 3% cost cap, the cost for renewable energy (and capacity if applicable) be compared to the wholesale market cost of a portfolio held by an EDU.³⁶ Duke believes the price of renewable energy may fare better under such a comparison.³⁷

Duke's suggestion is inconsistent with the requirements of SB 221 and should not be adopted. SB 221 requires the 3% cost cap to be tested against the EDU's expected cost of producing or acquiring electricity. Thus, for an EDU such as Duke, which owns generating assets, the cost comparison will be in reference to Duke's cost to produce electricity, supplemented as necessary by power purchases when Duke's generation resources are not sufficient to serve its Ohio customers. IEU-Ohio therefore opposes Duke's suggestion and recommends that it not be adopted.

³⁶ Duke Initial Comments at 11.

³⁷ *Id.*

(5) 4901:1-40-10 – RECs for Small Customer-Sited Installations

Several parties suggest a broad interpretation for the opportunity for selling RECs by small customer-sited projects. OCEA and Joint Commenters,³⁸ for example, propose that the Commission create a fixed, public price for RECs in the case of low or no-fuel cost renewables such as solar and wind.³⁹ Additionally, Joint Commenters recommend the Commission direct electric utilities and electric service companies to develop standard offers for smaller customer-owned, customer-sited renewable energy systems.⁴⁰ In the alternative, Joint Commenters propose an additional subsection (10) to proposed rule 4901:1-40 that would require electric utility companies to request proposals for RECs from solar and wind installations larger than 100KW in capacity, and offer long term contracts for the purchase of RECs from net metered and small customer installations less than 100KW in capacity.⁴¹ As stated throughout these reply comments and in IEU-Ohio's initial comments, the Commission should remain flexible and open in determining how customer-sited opportunities are used, but cautions against prescribing early standards for pricing and evaluating such opportunities before gaining experience with the matters at issue. As such, the Commission should refrain from setting forth any prescriptions in its rules that might actually limit the ability for Ohio to achieve its energy efficiency and alternative portfolio standards at the lowest reasonable cost.

³⁸ Joint Commenters consist of The American Wind Energy Association, Wind on the Wires, Ohio Advanced Energy and Environment Ohio.

³⁹ OCEA Initial Comments at 61, and Joint Commenters' Initial Comments at 22-25 (September 9, 2008).

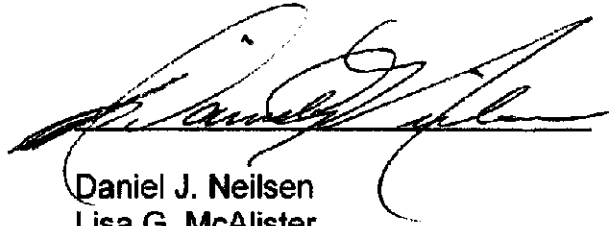
⁴⁰ Joint Commenters' Initial Comments at 24-25.

⁴¹ *Id.* at 25.

III. CONCLUSION

For the reasons discussed herein, IEU-Ohio respectfully requests that the Commission incorporate IEU-Ohio's suggestions in its initial and reply comments into the proposed rules.

Respectfully submitted,

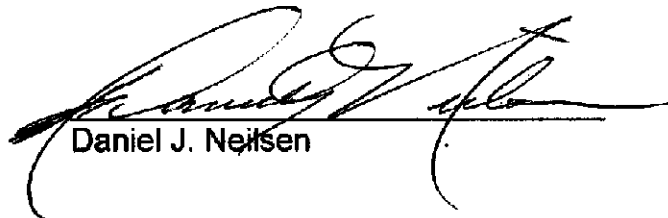


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CERTIFICATE OF SERVICE

I hereby certify that a copy of the *Reply Comments of Industrial Energy Users-Ohio* has been served, by regular U.S. Mail, postage prepaid, upon Langdon D. Bell, Bell & Royer Co., LPA, 33 South Grant Avenue, Columbus, OH 43215, and David Marchese, Haddington Ventures, LLC, 2603 August, Suite 900, Houston, TX 77057 this 26th day of September, 2008.



Daniel J. Neilsen