

**BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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

**Case No. 08-888-EL-ORD**

**PUCO**

**2009 MAY 15 PM 3:54**

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**Request for Rehearing and  
Memorandum in Support of  
The Dayton Power and Light Company**

The Dayton Power and Light Company ("DP&L"), pursuant to Revised Code ("R.C.") section 4903.10 and the Public Utilities Commission of Ohio ("Commission" or "PUCO") Rule 4901:1-35, hereby respectfully requests rehearing of the Commission's Opinion and Order of April 15, 2009, in the above-captioned proceeding.

In support of its request for rehearing, DP&L's memorandum in support is as follows:

**Memorandum in Support**

**I. INTRODUCTION**

It is not surprising that the rulemaking process to finalize regulations to implement of SB 221 still has steps to take. SB 221 is an extraordinarily complex piece of legislation and its provisions on renewable energy, alternative energy, demand reduction and energy efficiency are among its most complex elements. Moreover, while the emphasis placed within the legislation on insuring broad participation among the many different interests and constituencies within Ohio is salutary, it necessarily results in an extensive process for the development of regulations.

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DP&L recognizes and commends the efforts that all participants, including the Commission and Staff, have made to move this process to conclusion. Its comments here are not intended to be critical of that effort. However, it is fact that we are already five months into the first year in which Ohio utilities are supposed to meet new legislative requirements by implementing new programs for energy efficiency and demand reduction and by obtaining new sources of generation from renewable resources. Utilities are now faced with the daunting challenge of actually implementing programs within the remaining seven months of the year that will comply with targets designed for a 12-month period. This challenge will only be heightened by the fact that these regulations may further change on rehearing and will ultimately be confirmed through the Joint Committee on Agency Rule Review ("JCARR") process no earlier than late summer or perhaps significantly later.

In light of the complexity of the task at hand, both in terms of finalizing these regulations and in developing the programs to comply with them, DP&L is proposing that the Commission implement some changes on an interim basis to address two particularly difficult areas. The use of this interim approach will allow the Commission to study the issues further prior to finalizing the policies that may be employed on a more permanent basis.

These interim proposals are designed to recognize the enormous practical difficulties of creating demand response and energy efficiency programs, marketing and attracting customers to those programs, and actually achieving some measurable results by the end of the year. Interim proposals are also made to respond to difficulties arising in connection with efforts to identify and make real potential opportunities in renewable resource projects. In this first year in particular, there needs to be flexibility and far less regulatory complexity.

DP&L's rehearing request discusses these interim proposals in detail. In the latter portion of this rehearing request, additional recommendations on other issues are also made.

II. TWO PRE-EMINENTLY IMPORTANT ISSUES NEED TO BE RESOLVED FOR 2009 and 2010.

A. What are the Practical Difficulties of a "Case by Case" Determination as to Whether or Not a Mercantile Customer's Participation in Demand Response Programs Administered By PJM will Count Towards a Utility's Targets?

1. PJM Programs Have Been a Key Element of DP&L's Compliance Plans for Months.

DP&L may be uniquely situated among Ohio's investor-owned utilities in that its legal obligations to have capacity and demand response available to meet its peak load requirements are defined by the requirements of PJM and PJM's tariffs approved by the FERC. AEP is also a member of PJM, but it has opted out of the Reliability Pricing Model ("RPM") capacity program in which the rest of PJM, including DP&L, participates. Because DP&L is uniquely situated as an Ohio utility that is a member of PJM participating in the RPM capacity program, it is uniquely harmed by the proposed rules that fail to recognize the positive benefits achieved through existing PJM demand response and energy efficiency programs.

DP&L, along with its affiliate DPL Energy Resources, Inc., proactively and aggressively moved to implement a whole suite of programs designed to comply with its understanding of SB 221. Even before the legislation had finished working its way through the General Assembly, DP&L had assembled teams of its internal staff and outside consultants to develop a comprehensive approach to promote demand response, energy efficiency, and utility infrastructure modernization. That comprehensive set of programs was then supported by testimony and incorporated within the six volume Electric Security Plan ("ESP") filing made on October 10, 2008, in Docket Nos. 08-1094-EL-SSO, et al. An irreplaceable component of that

overall plan was the active participation in demand reduction and energy efficiency programs that PJM had already developed and initiated.

After the legislation was enacted and consistent with the ESP filing, DP&L and its affiliate DPL Energy Resources, Inc., has worked hard to identify and enroll customer accounts into these PJM programs. Within DP&L's service territory alone there are over 160 customer accounts already enrolled to participate in such programs for the upcoming summer. At this date, well into 2009, the work done and the resources expended should not be disregarded by excluding the benefits of participation in these programs from compliance towards the 2009 and 2010 targets.

The Commission has stated that it will consider this topic generically at some undefined future date and, in the meantime, will consider whether participation in PJM programs will count "on a case-by-case" basis. Order at 23. See also Rule 4901:1-39-07(A)(2) [requiring integration with the utility's program] and Rule 4901:1-39-08 [defining the mercantile customer integration commitments]. DP&L feels compelled to ask whether the Commission really has time this year to review potentially hundreds of individual applications by customers who are currently participating in these PJM programs. This is a cornerstone of DP&L's compliance effort. DP&L respectfully requests that the Commission implement a more flexible approach with respect to these PJM programs for 2009 and 2010, which will give the Commission time for further review and consideration of this issue and give DP&L sufficient time to make and implement any appropriate modifications to its future compliance plans.

2. Specific Action Requested.

In this rehearing request and with respect to this key issue, DP&L specifically asks the Commission:

To find on an interim basis for 2009 and 2010 and without requiring individual filings that the “integration” provisions of Rule 4901:1-39-07(A)(2) and Rule 4901:1-39-08 shall be interpreted to include the demand response and energy efficiency programs administered by PJM.

3. DP&L Has Concurrent Obligations to PJM that Fulfill SB 221 Objectives.

A primary objective of SB 221 is to minimize the need for the construction of additional generation capacity. Demand reductions through customer-owned distributed generation or other commitments to reduce utility’s peak load obligations and commitments by customers to reduce energy usage are effective means of accomplishing this goal. Demand response programs within PJM further fulfill the objective of SB 221 in that the benefits of these programs have been integrated into the system. Integration occurs in that the generation capacity procured by PJM for DP&L in order to meet DP&L’s peak load obligation is reduced by the amount of capacity savings that is procured through the load reduction programs. Going forward, there will also be a capacity adjustment to reflect a portion of energy efficiency programs that, in the aggregate, reduce overall capacity needs.

DP&L was and is required by Ohio law to be a member of a qualifying transmission entity, and in order to join PJM, it was required to execute agreements under which it is legally obligated to have capacity and demand response available that is sufficient to meet its peak load obligations as determined by PJM.<sup>1</sup> At page 16 of its Opinion and Order, the Commission correctly notes that SB 221 refers to a utility’s peak load, but that provision does not compel the Commission to use a particular method for determining what DP&L’s peak load is. For DP&L,

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<sup>1</sup> R.C. § 4928.12; PJM Reliability Assurance Agreement. PJM Rate Schedule FERC No. 44,

as a member of PJM that obtains capacity through PJM's Reliability Pricing Model, its "peak load" and its obligations to meet peak load are as established under PJM rules. As a member of PJM, DP&L and its customers benefit greatly from the vastly enhanced pool of capacity available and the amount of generation needed, collectively, is considerably smaller than would be required if each utility member were operating independently. But part of the quid-pro-quo to obtain this significant benefit is that DP&L is no longer a separate "Control Area" and a peak load measured solely with reference to usage within the DP&L zone during some summer hour is no longer relevant to any reliability requirement that DP&L currently has.

Of note, an Ohio program that did not "count" for PJM purposes would yield little or no tangible benefits. Consider the scenario where DP&L initiated interruptions of its customers under a program that operated differently from PJM's and reduced usage during some hour that was associated with a DP&L zonal peak but did not reduce usage during the hours used by PJM in calculating DP&L's peak load obligations. The result of that would be that PJM would acquire through its capacity resource auction process the same amount of capacity for DP&L that it would if DP&L had no demand response program at all. DP&L and its customers would incur the same costs as if the program did not exist at all.

#### 4. Additional Background on the PJM Programs.

PJM launched demand response programs several years ago. These programs have been encouraged and supported by FERC and most State Commissions. PJM has been viewed as a leader among Regional Transmission Organizations ("RTOs") and Independent System Operators ("ISOs") in this area. In 2002, PJM created and still administers a Demand Response Energy Market under which over \$45 million annually is paid to Curtailment Service Providers ("CSPs") who have gone through certification and creditworthiness processes. CSPs, in turn, are

marketers that take the initiative and spend the money necessary to identify potential customers. PJM administers a peak load reduction program under which 4,620 MW of demand response was committed for the June 2008- May 2009 PJM year. This program has several components including aggregation rights and the ability to commit to load reduction either on an economic or an emergency-only basis.<sup>2</sup> PJM also has a program under which CSPs enroll and compensate end-use customers who agree to reduce kWh consumption when kWh prices are projected in the day-ahead market to be high.<sup>3</sup> PJM has even developed programs with additional training and equipment requirements that allow entities with the ability to modify their demand to participate in day-ahead scheduling, regulation, and synchronized reserve markets.<sup>4</sup>

Over time participation in such programs has been significant and growing, but development of these programs does not stop. Each year, through its stakeholder process that involves input from utilities, energy users, state commissions and consumer's counsels, PJM seeks to make improvements to those programs. Many of these improvements have been aimed at properly valuing and verifying the resource. Where Rule 4901:1-39-05(C) sets forth a page of general principles and the minimum components of a filing required to show the performance of peak-load and energy efficiency programs, PJM has a 44 page manual on "measurement and verification" ("M&V") requirements that must be met in order to bid energy efficiency program installations into PJM's capacity auctions.<sup>5</sup> In fact, new testing requirements are being

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<sup>2</sup> <http://www.pjm.com/markets-and-operations/demand-response/dr-capacity-market.aspx>

<sup>3</sup> <http://www.pjm.com/markets-and-operations/demand-response/dr-energy-market.aspx>

<sup>4</sup> See <http://www.pjm.com/markets-and-operations/demand-response/dr-da-scheduling.aspx> ;  
<http://www.pjm.com/markets-and-operations/demand-response/dr-synchro-reserve-mkt.aspx> ;  
<http://www.pjm.com/markets-and-operations/demand-response/dr-regulation-market.aspx>

<sup>5</sup> See PJM's 44 page Manual 18B on "Energy Efficiency Measurement and Verification." These requirements must be met in order to bid energy efficiency installations into PJM's four year forward RPM market.  
<http://www.pjm.com/~media/documents/manuals/m18b.ashx> Revisions to the program and this manual are

implemented in lieu of a called interruption event beginning with the 2009/2010 delivery year. In addition, penalties for non-compliance have been raised. Beginning with the auction taking place this year for the 2012/2013 delivery year, demand resources offered as capacity will participate in the same capacity bidding process as generation, subjecting CSPs and customer participants to the same market risks and credit requirements as generators.

5. The Benefits of the PJM Programs to Ohio Are Substantial.

Significant benefits accrue to DP&L's customers from PJM Demand Response programs. Some of these benefits occur even if no interruption events are called. PJM has the legal right and option to activate demand response. This option has inherent value just as financial options have value even if they are never exercised. None of these benefits are tied to whether the interruption event occurs during a DP&L zonal peak. The zonal peak becomes largely irrelevant in a large power pool or RTO, where one of primary objectives and benefits is the reduction in peak load requirements that occurs as the result of sharing an aggregated and lower reserve margin spreading the risk of outages and the ability to share an overall reserve margin. Among the significant benefits of these PJM programs to DP&L and its customers are:

- DP&L customers benefit from the joint planning that PJM does for capacity. DP&L is required to buy less capacity because it is responsible only for its contribution to the coincident PJM peak.
- DP&L benefits from the lower impact of unit loss on loss of load probability in a large system like PJM vs. an individual system.
- DP&L DR customers allow less new generation to be built regardless of the timing of any physical interruptions.
- Counting PJM program compliance towards SB 221 targets allows our customers to take full advantage of the benefits of PJM participation and to achieve SB 221 goals in a least cost manner. PJM's costs to administer these programs are

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ongoing through the stakeholder process and to comply with a FERC order issued earlier this year that requires updated data to be submitted each year in order to continue receiving payments through the PJM RPM market for the capacity benefit of these energy efficiency installations.



already being charged to DP&L and it would be wasteful to disregard the savings that the programs achieve and to require that a second layer of costs be incurred to reinvent the same types of programs under a different administrator.

- A stand-alone demand reduction program that is not registered through PJM would not “count” towards DP&L’s obligations to PJM. The costs associated with such a program would be largely wasted in that they would not affect the timing of when PJM would determine when new generation or transmission lines would be needed.

DP&L is aware that some informal objections have been raised to PJM programs based on the view that PJM has rarely called on customers to interrupt or curtail service. We do not believe that that is a valid criticism. The above PJM programs provide benefits to Ohio customers regardless of how many physical interruptions occur or whether any physical interruptions take place at the time of the utility’s individual peak. Additionally, PJM is currently considering and will likely implement changes so that going forward, DP&L customers who participate in PJM demand reduction programs will reduce DP&L’s share of PJM’s capacity requirements when interruption events are called by PJM in order to reduce PJM’s peak load. That in turn will reduce DP&L’s capacity obligation.

The PJM programs provide significant benefits to Ohio and further the aims of SB 221. Participation in these programs should count towards compliance with the SB 221 targets.

6. DP&L Agrees with the Commission’s Policy Regarding Proportionality for Mercantile Customers to Avoid Utility Charges.

DP&L agrees with the Commission’s finding, Opinion and Order at 22, that some proportionality is necessary so that a small amount of savings by a mercantile customer does not totally exempt the customer from costs that would otherwise be charged. The Commission’s finding in this should be expanded slightly to clarify that while a customer participating in a PJM demand response program should be given credit against a portion or all of that part of its retail bill that would be otherwise billed with respect to costs incurred by a utility to meet the load

reduction targets, it would not be appropriate to give any credit to that mercantile customer for costs incurred by DP&L to meet energy efficiency targets. Similarly, participation in a PJM energy efficiency program would not qualify for exemption from utility charges associated with demand reduction programs, except to the limited extent that the energy efficiency savings may also have an effect of reducing demand.

7. Conclusion with Respect to PJM Demand Response Programs.

Since PJM demand response programs are already designed, operational, and accepted by participants in this market, the PUCO should explicitly recognize and use these existing programs to meet Ohio's legislative goals of promoting energy efficiency and demand reduction. Specifically, to the extent a customer participates in PJM demand response programs, the results of that participation should qualify as demand response in Ohio and should allow that customer to meet all or a proportionate portion of the mercantile opt-out provisions of SB 221 with respect to DP&L's costs for demand response programs. Additionally and for the same reasons, demand reduction within the utility's service territory should qualify to meet the utility's demand response benchmark in SB 221 regardless of which curtailment service provider is chosen by the customer.

SB 221 imposes certain requirements on the utility, but the objective of SB 221 is not the imposition of targets. That is only the means to the objective, which is to lower the overall electric demands of consumers in Ohio. That objective is served by PJM's demand response programs and they already exist. This Commission should avoid regulatory actions that, in effect, penalize utilities and discourage participation in PJM demand response programs and which would increase programs costs by creating duplicative and potentially competing programs. Instead, this Commission should take this opportunity to encourage utilities to work

with third parties to deliver the positive benefits of the PJM demand response programs to Ohio consumers.

Recognizing that the Commission may prefer to gather additional information to become more certain that it has fully examined the ramifications of permitting participation in PJM programs to count towards the utility requirements, DP&L proposes that the Commission should should permit PJM program to count towards the requirements on an interim basis for the 2009 and 2010 targets. This finding would then be subject to prospective change after the Commission gathers more information about how these programs operate to further the objectives of SB 221.

**B. What are the Practical Difficulties in Procuring 2009 and 2010  
Renewable Resources including Renewable Energy Certificates ("RECS")?**

SB 221 Certified RECs do not exist. It is impossible to buy one. That is because creating the legal instrument known as a REC requires a state certification program that has not yet been established in Ohio.<sup>6</sup> What can be purchased, however, are RECs certified by other nearby States that are associated with generation using technologies that clearly qualify under Ohio law. Of these, wind energy is the technology that in the near term is most available and growing fastest. Wind energy resources that are available today vary widely in price from about \$9/MWh (REC) in Indiana (an adjacent state within MISO) to about \$2/MWh (REC) in North Dakota (a non-adjacent state also within MISO).

The April 15, 2009 rules, however, jeopardize the ability to obtain the lesser cost supply by imposing a requirement to file a special deliverability or load flow study in order to prove

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<sup>6</sup> For definitional purposes, it is important to recognize that within the power marketing business a "Pennsylvania REC" means that the resource meets Pennsylvania's requirements and does not mean the resource is located in Pennsylvania. The resource could be located in Ohio and still create Pennsylvania RECs. In fact, the same resource may "generate" RECs qualified in several states, but the PJM GATS registry and the equivalent system within MISO assure that the REC is sold only once. This rehearing request uses the term SB 221 Certified RECs rather than Ohio RECs to avoid the potential to misinterpret the latter term as meaning a REC from a facility located in Ohio.

that, for example, the RECs from a North Dakota wind generator is associated with electricity that is deliverable into Ohio. At some point in the future, once Ohio's certification program is up and running, we believe that these generators may apply for certification and may present whatever information is then deemed necessary to prove that the resource qualifies under Ohio law. But on an interim basis, recognizing that we are already well into 2009, the Commission should take three actions.

1) At least for 2009 and 2010, the Commission should find that there will be a rebuttable presumption that any generator interconnected with a utility that is a member of the Mid-West Independent Transmission System Operator, Inc. ("MISO") or PJM Interconnection, LLC ("PJM") produces power that is deliverable into the state.

2) The Commission should direct its Staff to work with MISO, PJM, and Ohio utilities to prepare a generic report on deliverability and/or power flows within MISO and PJM. DP&L is confident that such a report will demonstrate that all generation within these Regional Transmission Organizations ("RTOs") is deliverable throughout the RTOs including Ohio. This is because the feasibility and impact studies conducted by the RTOs already determine what, if any, additional facilities are needed in order to allow for

the interconnection and operation of any new generator that is interconnecting with the transmission system. If the report reaches the conclusion that DP&L believes it will reach, the result will significantly reduce the administrative burden on renewable energy generators to prepare and the Commission to review what could be hundreds of "deliverability studies."

3) At least for a transitional period, any REC certification program or other resource qualification decision made under Rule 4901:1-40-05(E) should explicitly make the qualifying determinations retroactive at least to July 1, 2008, consistent with the statutory starting date and as set forth in Rule 4901:1-40-04(D)(6).

At the onset, DP&L would note that this issue of "deliverable into the state" is separate from and unrelated to the issue of how PJM allocates the costs of large new transmission lines. The vast majority of the new resources that will be available over the next few years will be interconnected with existing facilities. Many will be small scale projects that will actually interconnect at distribution line voltage levels and the resulting impacts on higher voltage transmission lines would be so miniscule that PJM and MISO would not even have to prepare a

feasibility and impact study. Proximity to existing transmission lines would be a significant factor in allowing any larger scale projects to be placed in service within the next few years. The interim period proposed here by DP&L will be over before any significant cost impacts could occur with respect to new large transmission lines that might be associated with truly large new renewable resource projects. Moreover, the restriction in the Ohio rules relating to “deliverable into the State” would not act as a disincentive for the construction of such transmission lines and may even encourage such construction in order to prove deliverability.

Interim rules as proposed above are necessary. While it may be patently obvious that a windmill located in Ohio or one of these other states is generating electricity from a resource that would also meet Ohio’s definition of a renewable resource, neither the generator owner nor the holder of the REC associated with that production, will indemnify or certify to a buyer that the REC will ultimately be certified as an SB 221 Qualifying REC. By the time such a REC may actually exist as a legal instrument, the 2009 compliance year, measured from January through December, may be over or nearly so.

A rebuttable presumption is appropriate because there will be very few instances where the question of deliverability could even legitimately arise and without it there would be a flood of separate applications and studies that would have to be filed and reviewed by the Commission. As noted above, the vast majority of renewable energy projects will come in the form of dozens or hundreds of small-scale projects that will get interconnected with utility systems within PJM and MISO and even the local utilities may need to make only minimal reviews to ensure that the interconnections are compliant with the National Electric Safety Code and their own requirements. To the extent that the potential injection of electric energy is large enough or at a voltage high enough to warrant any PJM or MISO involvement, those Regional Transmission

Organizations (“RTOs”) fulfill their obligations by performing an analysis that is focused on ensuring that the injection of new power from the resources can be received into the existing transmission system and become part of the indistinguishable electrons transmitted and deliverable throughout the entire system, without creating significant congestion or reliability problems at any point within the system. To the extent that additional interconnection facilities may be needed to accommodate the new injection of power, those will be ordered by the RTO.

Further support for the conclusion that a rebuttable presumption can be made regarding deliverability can be found in current annual reports submitted by Ohio utilities that document Available Transfer Capabilities and Total Transfer Capabilities to move power reliability between their systems and other parts of the applicable Regional Transmission Organization.

There is an economic reason as well for implementing a rebuttable presumption of deliverability in the state for resources built within PJM and MISO. Differences in prices of REC’s are significant based on geography. DP&L, its customers and the Commission have a common interest in meeting SB 221 objectives and requirements in a manner that is at the lowest reasonable cost for its customers, consistent with reliability and other objectives. Uncertainty regarding what is “deliverable” and delays in certification create a climate where utilities may pay more for RECs to insure against the risks of non-compliance in the event some subsequent finding is made that the RECs were not created from qualifying resources that generated electricity that was deliverable into Ohio. Clarity, certainty and simplicity are in the best interests of Ohio customers and Ohio utilities.

The proposal to direct Staff to prepare a report is designed to provide the Commission the information that it may need to form a final judgment that the output generation located within PJM and MISO is deliverable and that there should be no ongoing requirement for some special

type of deliverability study or power flow study. In this regard, DP&L would note that the rules appear to contemplate individual studies of a hypothetical flow from a generating facility to an Ohio load. But there is no physical significance to studying a hypothetical flow from a generating facility to a load within the RTO region. This is not how physical energy flows in reality and, therefore, it is not the limiting factor in determining the deliverability of energy from generator to load. The Commission should recognize that PJM and MISO indirectly deal with the issue of deliverability through their planning processes and through the feasibility and impact studies they routinely perform to determine what facilities might need to be constructed to allow the new generator to be interconnected with and integrated into the transmission system. All energy and the associated REC's from generators located within PJM or MISO should be considered deliverable without need of any special review or study.

Another way to understand this issue might be to view it from another State's perspective. This Commission and its Staff led the development of the procedures used in Ohio to streamline the process for small renewable resources to allow them to interconnect with Ohio utilities and sell their power into retail and wholesale markets.<sup>7</sup> For the most part, these small generators can be interconnected with little or no additional construction needed beyond the point of interconnection. Similar processes are in place in other States. It is virtually impossible to create a scenario where the output of one of these small generators would overload transmission lines and not be "deliverable" anywhere within or between MISO and PJM. The Pennsylvania Public Utilities Commission should not need a special power flow study or deliverability study to determine that the power from a 15 MW landfill gas-to-electric generator located in Ohio and interconnected with the PJM system through DP&L is "deliverable into"

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<sup>7</sup> See generally Rule 4901:1-22 "Interconnection Services;" and with respect to the sale into wholesale markets, Rule 4901:1-22-04(E)(2).

Pennsylvania. Of course it is. Under no conceivable circumstance is this 15 MW of power going to overload transmission circuits within PJM. Such a generator is unlikely to be tied in directly to high-voltage lines and probably would not even have a significant impact on the lower-voltage distribution circuits to which it is interconnected. Even if there were an impact, DP&L and the generator would build whatever additional facilities were necessary to accommodate the interconnection. In the same way, renewable energy generation located in North Dakota, Indiana, Pennsylvania or elsewhere within PJM and MISO can be presumed to be deliverable into Ohio without the need for any special studies, unless there is some unique aspect involved that causes deliverability to be called into question.<sup>8</sup>

There is also a fundamental disconnect between how REC markets operate and the 60 day qualification process set forth Rule 4901:1-40-05(E) or the process envisioned by the Commission's interpretation of its rules to require that a "power flow" or "deliverability study" be necessary. RECs are purchased by an individual within a company calling one or several brokers and asking if they have any RECs available and at what price. A standard form transaction agreement is faxed or e-mailed and the entire process typically takes less than 48 hours. It is unlikely that any willing seller could be found who would sell a REC to an Ohio utility subject to a condition that a deliverability study be done and 60 days or so pass before the transaction is finalized.

DP&L recognizes that there may be some degree of discomfort in reaching a conclusion today that all generation within MISO and PJM is "deliverable" into Ohio. DP&L strongly urges the Commission to establish a rebuttable presumption on an interim basis so that utilities have a

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<sup>8</sup> The only circumstance that DP&L can currently envision where deliverability might be questionable for facilities located within PJM or MISO is a very large scale operation of say 600 MW that PJM or MISO determines will require significant transmission upgrades and, contrary to all expectations and normal practices, the generation is built and generating power locally prior to the time the transmission upgrades are complete.



clear path forward for compliance with these rules for 2009 and 2010. The proposed report on deliverability to be prepared by Staff in collaboration with MISO, PJM, and Ohio utilities will provide more comprehensive analysis that the Commission can use to determine whether to make the rebuttable presumption a permanent part of the rules.

### III. ADDITIONAL COMMENTS

DP&L's remaining comments are presented in order as they arise within the regulations rather than in order of significance.

#### A. Rule 4901:1-39-01 Definitions.

1. Rule 4901:1-39-01(C) "Energy baseline." DP&L in its initial and reply comments to the proposed regulations proposed modifications to this language and suggested specific types of adjustments that should be taken into account in determining the baseline. DP&L continues to believe that absent appropriate adjustments to the baselines, there will be a compounding effect that results in targets in excess of the statutory requirement. With that as a preface, however, the Commission has made clear that there will be a reasonable opportunity to propose appropriate adjustments to the baseline. Rule 4901:1-39-05(B). DP&L will attempt to work within that framework and in its individual filings will propose appropriate adjustments to the baseline that will account for the effects of prior year savings.

2. Rule 4901:1-39-01(L) "Independent program evaluator." DP&L strongly opposes this provision. If there is to be a consultant who is directed solely by Commission Staff, then the Commission should go through normal State requirements necessary to hire such an individual. If the Commission then wants to assess utilities for the costs of that consultant, it has the power to do that as well. But DP&L believes that this is not a cost-effective or appropriate approach.

The regulation sets up an inherently confrontational process. Each utility will likely want to hire its own program evaluator. But if there are multiple evaluators for each utility, there will be duplicative expenses and possibly conflicting sets of recommendations. That will only drive up costs and drain resources that could better be used to fund programs to achieve demand response and energy efficiency savings.

Moreover, DP&L submits that the Commission and its Staff should not seek to take over the day-to-day management of measurement and verification and processes of all the Ohio utilities.<sup>9</sup> DP&L would instead recommend the use of a different approach that is certainly familiar to the Commission. These activities should be managed in the same way that utilities direct the activities of their outside and independent auditing firms. As long as DP&L uses a fair process to select a vendor, hires one with a good reputation, and meets the necessary reporting requirements, then it should have the ability to direct the firm's activities.

In addition, while an ongoing or annual independent evaluation of how energy savings are measured and verified may be appropriate, Rule 4901:1-39-01(L) also appears to contemplate some form of continuous ongoing management audit process that is referred to as a "program process evaluation." This program process evaluation process should be performed once initially and then only initiated in the future if there are reasons to believe that a management audit is necessary; there should not be some form of ongoing annual process review.

**B. The Perfect Storm of April 15 – Too Many Reports on the Same Day.**

The Commission may have looked at many of these provisions individually and not adequately reviewed them as a group. These rules now require each electric utility to submit six

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<sup>9</sup> This process also raises potential legal issues regarding whether state contracting practices are being circumvented and the power to order companies to hire specific individuals who are not then subject to direction by their "employers." The consultant may also be placed in an ethical dilemma in terms of who is the "client."

different new reports on April 15<sup>th</sup> of each year. Having the same deadline for multiple reports will be burdensome, particularly given that this is the same day that the massively time-consuming FERC Form 1 filing is due. DP&L urges the Commission to consider staggering some of these dates and making some of these reports due every two years instead of annually. Reports that are forward looking over a 10-year period are obvious candidates for a biennial filing requirement. The list of new April 15 reporting requirements include:

- Updated portfolio plans for energy efficiency and demand reduction. Rule 4901:1-39-04 (begins 2013);
- Portfolio status report with an extensive list of requirements to address performance of all approved energy efficiency and peak-demand reduction programs, descriptions of all activities and improvements, measurement and verification, and recommendations for new, modified, or to eliminate programs, Rule 4901:1-39-5(C) (begins 2010)
- 10-year compliance forecast plans filed each year for advanced, renewable and solar energy benchmarks with baseline data, supply portfolio projections, descriptions of compliance options, and impediments. Rule 4901:1-40-03(C) (begins 2010).
- Annual status reports for compliance with and review of advanced, renewable and solar energy benchmarks. Rule 4901:1-40-05(A) (begins 2010).
- Annual Environmental Control plan, including carbon dioxide control planning that is to contain all relevant technical information on current conditions, goals, and potential actions for resource planning and environmental compliance. Rule 4901:1-41-03(C) (begins 2010).
- Long-term forecasts of supply and demand by electric and gas companies, including integrated resource plans, peak and annual loads, demand side management, energy-price relationships with consumption, transmission data, and other statistical information. Rule 4901:5-3-01 (existing filing requirement with expanded information required).

C. Rule 4901:1-39-05(C)(2)(c); The Flexibility to Fund Successful Programs, Modify Programs, and Eliminate Unsuccessful Programs Should Be Encouraged, Not Subjected to Regulatory Lag.

This regulatory provision unduly restricts the ability of utilities to adjust to changing circumstances or to respond quickly as they learn what works and what does not work. The provisions appears to make permanent any program and program element that has been reviewed and approved for cost recovery, subject to modification only after a new filing has been made and some regulatory process to review and approve the modification is undertaken. Utilities are also precluded from shifting funds from a failed program to a successful one unless they petition the Commission or its Staff.<sup>10</sup> There is also an undue emphasis on ensuring that funding for programs across customer classes remains essentially unchanged absent a regulatory proceeding, even if doing so would be uneconomic relative to what could be saved if additional funds were applied to programs that were working well.

DP&L submits that substantially greater flexibility and a more streamlined approach is necessary, particularly in the first few years of these programs. It is the utilities that are subject to the mandatory targets and they need to have the ability to move quickly at any time during the year to modify programs that are not working and to shift more resources into programs that appear to be working well and away from programs that are not working. It is unclear even whether there is a de minimis rule allowing minor modifications without going through this

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<sup>10</sup> DP&L has not fully analyzed the legal implications of rules that appear to give the Staff the ultimate decision-making authority to approve shifts in funds up to 25%. The issue of the validity of subdelegation of power by an administrative agency to its Staff or from a Director of an Agency to lower level personnel is primarily a question of statutory interpretation as to whether the subdelegation of power is consistent with the legislative grant of authority. See *State of Ohio v. Craig S. Cooper*, 120 Ohio App. 3d 284; 697 N.E.2d 1049; (10<sup>th</sup> App. Div. 1997), citing, *In re Vermont Marble Co.* (Vt. 1994), 162 Vt. 355, 648 A.2d 381, 383, 385; *In re Advisory Opinion to Governor* (R.I. 1993), 627 A.2d 1246, 1248; *Brown Group, Inc. v. Administrative Hearing Commn.* (Mo. 1983), 649 S.W.2d 874, 878; *United States v. Giordano*, 416 U.S. 505, 512-523, 94 S. Ct. 1820, 1825-1830, 40 L. Ed. 2d 341 (1974).

process, e.g., can a utility unilaterally modify an application form or does even a change like that require a filing and approval?

It would be particularly unjust to hold utilities accountable for a failure to meet a target that could have been met absent the regulatory delays required by this provision. DP&L requests that on rehearing the Commission delete section Rule 4901:1-39-05(C)(2)(c) and insert instead a reporting requirement that the utility identify and explain the reasons for any modifications and any funding shifts that it made during the prior year.

D. Rule 4901:1-39-05(D); Non-Compliance Should Not  
Be Pre-Ordained By Excluding Whole Categories of Energy Savings.

Rule 4901:1-39-05(D) virtually guarantees that these load reduction and energy efficiency targets will not be met in the future by prohibiting utilities from counting energy efficiency results that its customers achieve in order to comply with other legislative or regulatory requirements. The Commission states that it “sees no reason to credit electric utilities for benefits of measures that would have happened regardless of their efforts” and specifically notes that while compact lighting program results would count now, they will not after such measures become required under the Energy Independence and Security Act of 2007. Opinion and Order, p. 20.

The reason for counting such results is simple – SB 221 is designed to reduce consumption and to enhance energy efficiency in Ohio. Establishing utility targets and penalties for non-compliance are tools to promote that goal, not objectives in and of themselves. It is virtually certain that over the next 10 years or more, there will be a steady stream of new energy efficiency mandates arriving from Washington, D.C., Columbus, and local governments. It is not hard to predict that at some point in the near future there will be requirements to install higher efficiency lighting including compact fluorescents and LEDs, in all governmental

facilities including schools, and then it is a short step to predict similar requirements for street lighting uses, billboards, and in new private construction. To achieve the goals of SB 221, utilities, the government, business, and individual consumers should be working together. But this regulation guarantees future conflict. Under this regulation, a utility is virtually compelled to oppose any future legislation or regulation that would promote or require enhanced energy efficiency – in the absence of such legislation or regulation, the utility can implement such measures and the results will count towards its target. But, as soon as a requirement becomes law, any efficiencies obtained through such equipment no longer count and the utility would become subject to penalties going forward for not meeting its targets.

The Commission's discussion of this issue also raises the very real possibility that the gradually increasing targets set forth in SB 221 will be replaced with an unscaleable wall. It is not clear from the Commission's discussion whether it is the savings from projects implemented after the legislative or regulatory change that would be excluded, or whether the Commission also intends to exclude the future savings of projects that were put in place prior to the legislative or regulatory changes. At a minimum, the Commission should clarify that ongoing savings resulting from installations and projects that occurred prior to a change in law or regulation will continue to be counted. For example, a utility program that it had developed with business customers might have resulted in 100 installations of energy efficiency equipment that provided 5% savings in 2014 and are projected to save 5% each year for 2015 and several years thereafter. Suppose that in 2015 a new government mandate requires businesses to implement such programs. It would be unjust and punitive for this Commission regulation to then be triggered and to require that the utility not only meet the scheduled incremental change in requirement

from 2014 to 2015, but also to find an additional 5% in that year to make up for the 2015 savings that were expected from installations made in 2014 or earlier.

In reviewing the issue on rehearing, the Commission should consider the metaphor of “low hanging fruit.” Some energy efficiency programs will be relatively easy and cheap to implement, while others will be costly and require an enormous technological and/or marketing effort to achieve. We may ultimately find that there simply is not enough fruit on the tree to achieve the aggressive targets in SB 221 even if one looks under every leaf. But we can be quite certain that there will not be enough fruit on the tree to allow utilities to meet these targets, if all the low-hanging, easier to reach fruit gets picked for other reasons and is not counted towards the targets.

E. Rule 4901:1-39-05(E) and Rule 4901:1-40-04(B)(7)  
Demand-Side Management Results Are Explicitly Required to Be  
Counted towards the Advanced Energy Requirement.

Rule 4901:1-39-05(E) and Rule 4901:1-40-04(B)(7) contain similar provisions that are contrary to the explicit language of SB 221 and must be modified. In both provisions, the Commission has created a requirement that excludes from compliance with the advanced energy resource target any demand response and energy efficiency program results, except for that portion that exceeds the statutory requirements for demand response and energy efficiency.

There is no such limitation anywhere within SB 221. SB 221 is absolutely clear and unambiguous in defining seven categories of technologies and programs that qualify towards the advanced energy resource target. SB 221, adding R.C. section 4928.01(34), states that “Advanced energy resource” means any of the following: . . . (g) Demand-side management and any energy efficiency improvement.” Nowhere within that statutory definition is there a limitation so that only the excess above some other set of targets is counted towards the

requirement. The Commission is without authority to impose a requirement that is simply non-existent in the statute.

F. Rule 4901:1-39-08  
The Mercantile Integration Requirements Are Entirely Too Complex,  
Intrusive and Burdensome for Most Potential Mercantile Customers.

In the first section of this rehearing request, DP&L discussed how the Commission should recognize and embrace the benefits provided by PJM programs under which curtailment service providers and load serving entities have signed up end-users to reduce load and improve energy efficiency.

This section of the rehearing request addresses other aspects of Rule 4901:1-39-08, which impose the kind of requirements that utilities may be used to seeing, but will be unfamiliar to most industrial companies. The regulations impose an extensive set of filing requirements that will likely cause many companies to lose interest immediately. Among other things, the regulations ask for cost information that may regarded as commercially sensitive by an industrial concern. Rule 4901:1-39-08(B)(6). These customers are not companies subject to the Commission's ratemaking jurisdiction and the amount of money they determine is appropriate to spend on demand reduction or energy efficiency projects should be of no concern to the Commission or its Staff.

Perhaps the most significant problem however is that these regulations invite and apparently compel the filing of hundreds of individual cases. This is absolutely the wrong approach to take to get compliance with statutory requirements that are already in effect. At least on an interim basis, the Commission needs a streamlined approach where the utility reports to the Commission the kind of equipment that was installed by mercantile customers and how



much energy and peak load reductions ordinarily would be achieved by such equipment relative to what it replaced.

G. Rule 4901:1-39-08(B)(4)  
Net Metered Customers Should Not Be Penalized and  
Savings on Early Retirements of Equipment Should Be Fully Realized.

The final rules incorrectly penalize all mercantile customers and utilities that have responded to prior Commission initiatives and economic pressures to install distributed generation in a net metering configuration. The Commission should modify the sentence in Rule 4901:1-39-08(B)(4) that excludes from “counting” the peak load reductions that occur when back-up generation is used to reduce a mercantile customer’s net load. While the mere ownership of net-metered, customer-sited generation may be legitimately excluded from “counting” with respect to opting out of energy efficiency program costs or the utility’s energy efficiency targets, the actual use and running of back-up generation is absolutely and unquestionably a legitimate and, in fact, Commission-encouraged tool to reduce utility peak loads and associated costs for the benefit of all customers. So long as the output of the generation is measured and verifiable and it meets the other criteria of being integrated with utility plans, the use of back-up generation in a net meter configuration should “count” for mercantile opt-out purposes and for purposes of meeting the interconnected utility’s load reduction targets.

Rule 4901:1-39-08(B)(4) also inappropriately limits in all circumstances the quantified energy and demand savings for mercantile projects by comparing the energy and demand results of the project against some imputed and estimated result that would have occurred if customer had installed industry standard new equipment or used standard practices. The regulations should compare the customer’s applicable energy and demand prior to the project with the

expected applicable energy and demand after the implementation of the project. The regulation as currently stated does not reflect the actual energy and demand savings created by the replacing an older but still operating inefficient machine or practice with a new higher efficiency machine or practice.

H. Rule 4901:1-40-01 Definitions

1. “Deliverable into the State”

This definition is discussed at length in the first section of this request for rehearing.

2. “Double-Counting”

The Commission’s discussion in Opinion and Order at 29, helps considerably in clarifying that the prohibitions against double-counting are not intended to add an additional layer of compliance requirements on a utility in the event that federal renewable energy standards are imposed that overlap or are duplicative of Ohio’s. Unfortunately, the language of the regulation itself is still overly broad and insufficiently defined. Rule 4901:1-40-01(M) should itself be modified to make that clarification. DP&L recommends adding a sentence that states: “The prohibition against double-counting does not preclude a single entity from counting generation or associated RECs which it owns or controls towards meeting the requirements set forth herein and towards meeting the requirements of any other federal or state requirement that establishes a target or objective for a specified amount or percentage of generation from renewable or alternative energy resources.”

In addition, on rehearing the Commission should reconsider its discussion at Opinion and Order, p. 29, which wrongly excludes renewable energy that a utility may be purchasing under a separate green pricing program where customers sign up to pay a little more on their utility bills to have RECs purchased on their behalf. The regulation as applied in this context is not

preventing double-counting. It prevents counting the benefit even once. This is similar to the problem discussed above in connection with demand response programs. In both instances, the regulations appear to have lost sight of that fact that the goal is to promote the programs; not to penalize utilities and certainly not to create incentives for utilities to oppose others from working to further the objective. Obviously, if a utility's green pricing program costs are being recovered through a separate tariff rider, there should be no double-recovery of program costs. But that does not mean that the green energy purchased through that program should be excluded from counting towards the targets. The Commission should be encouraging utilities to promote these programs. This rule discourages that and, in fact, creates an incentive for utilities to terminate such programs. When there is a limited availability of RECs (again, DP&L notes that there are no SB 221 Certified RECs at present), why should a utility compete against itself by buying RECs on behalf of participating customers if they do not count towards the utility's renewable target, when the utility instead could buy those RECs for its own account and have them count? DP&L urges the Commission to revise its definition of "double-counting" to permit any qualifying resource or REC purchased by the utility or its customers to count towards the SB 221 objective. That counts the resource or REC once, but only once.

### 3. "Geothermal"

The definition of "geothermal energy" within the regulations is unduly restrictive and, in fact, appears likely to exclude every form of geothermal energy that exists in Ohio. DP&L is unaware of any potential reservoir within Ohio where significant amounts of hot water or steam can be extracted from the Earth's crust and used for electric generation. Electricity from geothermal energy that is more likely to be usable in Ohio will rely on a closed cycle system that captures temperature differences between the surface and underground from cycling water or

some other liquid through pipes underground. The temperature differences are then captured by heat exchangers that then provide that usable heat to boilers for electric generation. The definition should read: “Geothermal energy” means energy used for electricity generation that is in the form of hot water or steam extracted from geothermal reservoirs in the earth’s crust or captured and made usable through differences between temperatures underground and at the surface.”

I. Rule 4901:1-40-03(A)(2)(a)  
There is No Statutory Requirement that 50%  
of Solar Energy Be Generated In-State.

The Commission, Opinion and Order at 30, noted DP&L’s position that the statutory requirement that 50% of renewable energy be from in-state sources did not mean that each type of qualifying resource, including the separate solar target, had to meet the 50% in-state requirement. The Commission never presented its rationale for rejecting that argument. The final regulations still impose a 50% requirement on the solar energy target even though the statute clearly and unambiguously imposes the requirement on the aggregated target for renewable energy resources and not on the specific subset of the solar energy requirements.

The 50% in-state requirement appears in R.C. section 4928.64(B)(3) immediately under a table in R.C. section 4928.64(B)(2) that contains three columns – the Year, the Renewable Energy Resources target percentages by year, and the Solar Energy Resource target percentages by year. R.C. section 4928.64(B)(3) explicitly states that the 50% of the renewable energy resources shall be met from resources in the State. Thus, the statutory provision explicitly references the second column in the table immediately above it. There simply is no statutory basis for importing the 50% in-state requirement to the third column that lists the solar energy targets by year. The regulations should be changed to comport with the statute.

The problem posed by a lack of statutory basis for this 50% in-state requirement for solar power is heightened by the fact that there appears to be an inadequate number of solar resources in Ohio to produce the in-state solar REC's that would be needed for Ohio utilities to meet 2009 targets as now defined in the Commission's Opinion and Order. Because the year is nearly half over and the targets are based on annual kWh, a multiple of the capacity that would otherwise be needed would have to be constructed in the next few months to produce sufficient RECs during 2009 to meet this newly created in-State solar energy/REC requirement.

J. Rule 4901:1-40-03(A)(3)  
The Bypassability Language Is Overly Broad.

This regulatory provision should be modified on rehearing to recognize that there is an exception to bypassability that arises if the renewable energy resource or advanced energy resource is constructed in conformance with R.C. section 4928.143(B)(2)(c), which relates to utility plant that is constructed through a competitive bid process and as a result of a finding of need for the facility pursuant to the utility resource plan. The existing sentence in the regulations should be modified to add at the end: “. . . , except that those costs incurred in conformance with the requirements of R.C. section 4928.143(B)(2)(c) shall not be avoidable.”

K. Technical Change to Rule 4901-40-03(C).

The word “annual” should be moved such that the sentence refers to a “plan for compliance with future ~~annual~~ advanced- and annual renewable-energy benchmarks . . .” As the Commission noted in another context, Opinion and Order at 37, the advanced energy benchmark is a 2024 requirement and there are no annual advanced energy benchmarks.

L. Rule 4901:1-40-04(E)  
Certification Process;

It is unclear from the language of this provision whether this certification process is intended to create regulatory assurances that a particular resource qualifies as a renewable resource or whether the Commission intends that nothing qualifies until it has been certified. DP&L would strongly oppose the second interpretation, noting that we are already several months into 2009 and there is no certification process in place. In the first portion of this rehearing request, DP&L urged that any certifications be made retroactive to July 1, 2008, consistent with the statutory starting date and as set forth in Rule 4901:1-40-04(D)(6). The Commission may also want to consider prorating any requirement for 2009 and perhaps for 2010 as well, depending on when the certification process is in place. This would be a step taken in recognition of the facts that there are no SB 221 Certified RECs currently in existence and that it will become increasingly difficult to comply with an annual kWh target measured against total kWh distributed during the year, if the delayed certification process makes it difficult to get renewable energy commitments in place until the latter portion of 2009 or 2010.

M. Cost Cap

1. Rule 4901:1-40-07  
There Is Only One Cost Cap.

The Commission recognizes correctly that the advanced energy resource requirement only applies as of 2024 and, thus, for all practical purposes, there is only one cost cap in effect until that date.<sup>11</sup> The Commission errs, however, in interpreting the statute to say that in 2024 there will be two cost caps of 3% each, one 3% cap applied for renewable resources and a second 3% cap for advanced energy resources. The Commission relies on the fact that SB 221 uses the word “or” when it states a utility need not comply with the requirements under division B(1)

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<sup>11</sup> Opinion and Order at 37.

[relating to advanced energy] or B(2) [relating to renewable] if the 3% limit is reached. DP&L believes that this interpretation misconstrues the ordinary meaning of the word “or.” There is only a single sentence in SB 221 that refers to the 3% cap and it applies to both division B(1) and B(2) together. The utility is being excused from compliance from either or both requirements if the 3% cost cap would be breached. “Or” in its ordinary meaning in this context is referring to a power to avoid penalties for non-compliance under either division, and is not a substantive provision that establishes two cost caps to be separately applied.

2.       Some Interim Guidance Should Be Given Regarding  
          Prudence of Excessively Priced RECs or Renewable Supplies.

As described by the Commission, the cost cap will become an issue only once the costs get close to 3% of a utility’s existing generation costs. Because the renewable energy requirements in 2009 and for the first few years are a relatively small percentage of the total kWh that will be generated or purchased by a utility, this appears to mean that the utility has no “statutory out” if faced with renewable energy offered only at exorbitant prices. The regulations should provide a more clear mechanism to permit a utility to seek a waiver of the requirement when prices are too high, even if the 3% of total generation costs has not yet been breached.

N.       Rule 4901:1-41-03  
          Climate Registry.

The Commission should clarify that the phrase “or as otherwise directed by the Commission” applies to the both the requirement to become a member in the climate registry and to report emissions, and not just to report emissions in a particular format. The Commission should also explicitly add to the rule a provision that clarifies that in the event that a federal program is initiated under which utilities are required to collect data and report on greenhouse gases, then meeting the federal requirements will be deemed to be sufficient to meet the

requirements of this regulation. Such a rule will avoid wasteful and duplicative reporting requirements that may otherwise be imposed where essentially the same data is collected and reported in slightly different formats.

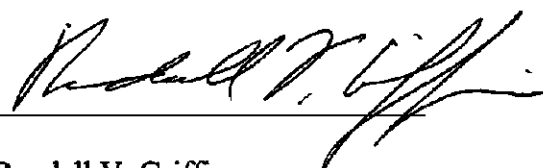
#### IV. CONCLUSION

From a high-level perspective, DP&L urges the Commission to recognize that we are at the beginning of a long process that is intended to achieve very ambitious goals established by the legislature. In the early years of this process, we will all be learning what works for Ohio and electric consumers and what does not. The statute may not be a model of clarity and there are many different policy decisions and approaches that the Commission could take on various issues that would still be consistent with the statute. Whenever a choice needs to be made between more restrictions and less, the choice should be towards the less restrictive approach that is still consistent with the statute. Over time, as more information and understanding is obtained, the regulations can be revisited and, if necessary and useful, the regulations can become more proscriptive. But in these early years, flexibility and workability should be the cornerstone principles employed by the Commission.



The Dayton Power and Light Company respectfully requests that the Commission on rehearing modify its regulations consistent with the recommendations made herein.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Randall V. Griffin", written over a horizontal line.

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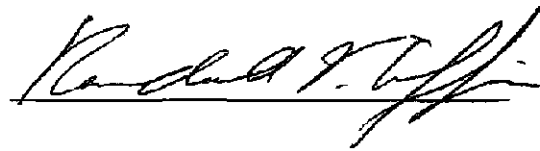
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A handwritten signature in black ink, appearing to read "Daniel J. Neilsen", written over a horizontal line.