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BEFORE THE
PUBLIC UTILITIES COMMISSION OF OHIO

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| 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 |

# MOTION FOR LEAVE TO INTERVENE AND APPLICATION FOR REHEARING OF FIRSTENERGY SOLUTIONS ASSOCIATES



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*pending admission *pro hac vice*

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| 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 |

## MOTION FOR LEAVE TO INTERVENE OF FIRSTENERGY SOLUTIONS ASSOCIATES

Pursuant to Section 4903.221 of the Ohio Revised Code, and Section 4901-1-11 of the Commission's rules (O.A.C. § 4901-1-11), FirstEnergy Service Company, on behalf of its associate companies FirstEnergy Solutions Corp., FirstEnergy Generation Corp., FirstEnergy Nuclear Generation Corp., and FirstEnergy Nuclear Operating Company (collectively, the "FirstEnergy Solutions Affiliates"), moves to intervene in this proceeding.

Respectfully submitted,

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## MEMORANDUM IN SUPPORT OF FIRSTENERGY SOLUTIONS ASSOCIATES MOTION TO INTERVENE

The FirstEnergy Solutions Associates satisfy the criteria for intervention as a party in this proceeding. The Commission therefore should grant the FirstEnergy Solutions Associates' motion to intervene as a party in this proceeding.

The criteria for intervention are that a party:

- have a real and substantial interest in the proceeding that will, as a practical matter, be affected by the Commission's disposition of the proceeding;[1]
- demonstrate that grant of its intervention will not prolong or delay the proceeding unduly;[2]
- demonstrate that its participation will contribute significantly to full development and equitable resolution of the issues that are in play in the proceeding;[3] and
- demonstrate that its interests are not represented by any other party to the proceeding.[4]

The FirstEnergy Solutions Associated have a real and substantial interests that will, as a practical matter, be affected by the Commission's disposition of this proceeding.[5] Specifically, the April 15th text for Rule 4901:1-41-03 would purport to impose the Commission's new "greenhouse gas" rules on certain of the FirstEnergy Solutions Associates, meaning that these Associates will be affected by the outcome of

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[1] O.A.C. § 4901-1-11(A)(2).

[2] O.A.C. § 4901-1-11(B).

[3] *Id.*

[4] *Id.*

[5] O.A.C. § 4901-1-11(A)(2).

this proceeding.[6] Moreover, The FirstEnergy Solutions Associates are "persons" as that term is defined within the April 15, 2009 text of Chapters 4901:5-1, 4901:5-3 and 4901:5-5, and therefore will be affected by the outcome of this proceeding because the April 15, 2009 text of the cited rules would impose new long-term forecasting and integrated resource planning requirements on the FirstEnergy Solutions Associates.

Grant of the requested intervention will not delay or prolong the proceeding unduly.[7] The FirstEnergy Solutions Associates are willing to accept the record as it exists as of the date that this intervention is filed. Consequently, authorizing the Associates to intervene in this proceeding will not delay or unduly prolong this proceeding.

Participation by the FirstEnergy Solutions Associates in this proceeding will contribute significantly to full development and equitable resolution of the issues that are in play in this proceeding.[8] As explained, below, the Associates contend that the Commission should grant limited rehearing in this proceeding for the purpose of: (1) narrowing the scope of Rule 4901:1-41-03 so that the rule applies only to public utilities that are subject to the Commission's jurisdiction; and (2) withdrawing in their entirety the April 15, 2009 changes to the text of Chapters 4901:5-1, 4901:5-3 and 4901:5-5 of the Ohio Administrative Code. The Associates muster facts and law – particularly case law

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[6] These companies are: FirstEnergy Generation Corp. (which generally owns and operates the "FirstEnergy" fossil-fuel plants in Ohio); FirstEnergy Nuclear Generation Corp. (which owns the FirstEnergy nuclear generating plants in Ohio); and FirstEnergy Nuclear Operating Company (which operates the FirstEnergy nuclear generating plants in Ohio).

[7] O.A.C. § 4901-1-11(B).

regarding the scope of the Commission's rule-making authority – that will assist the Commission in evaluating and resolving these issues. As such, grant of the requested intervention will contribute significantly to full development and equitable resolution of the issues that are in play.

The interests of the FirstEnergy Solutions Associates are not represented by any other parties to this proceeding. Accordingly, the Associates are the only entities that can represent adequately their interests in this proceeding.[9]

To the extent that the Commission were to deem the FirstEnergy Solutions Associates' intervention as untimely, grant of party status to the Associates is compelled by the following extraordinary circumstances.[10] On September 9 and 26, 2008, certain other associate companies of the FirstEnergy Solutions Associates – specifically, the Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company – filed comments in this proceeding. The comments of these other associate companies identified issues and raised arguments that are similar to the arguments and analysis presented in the enclosed Application for Rehearing; although the other associates did not identify the precise issues or present the specific analysis – particularly the analysis of case law regarding the scope of the Commission's rule-making authority – that is presented in the enclosed materials. The FirstEnergy Solutions Associates reviewed the comments that were filed by their other associate

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[8] O.A.C. § 4901-1-11(B).

[9] *See* O.A.C. § 4901-1-11(B).

[10] O.A.C. § 4901-1-11(F).

companies and believed that the matters were addressed such that the Commission's time and resources need not be stretched further to review further comments by the Associates and, instead, could be put to other better uses.

As described herein, the FirstEnergy Solutions Associates believe that the April 15, 2009 text of Rule 4901:1-41-03 and of Chapters 4901:5-1, 4901:5-3 and 4901:5-5 exceeds the Commission's rule-making authority, and suffers from other flaws as described in the Application for Rehearing. Moreover, the Associates believe that this is a matter of accident or oversight that can be remedied by the Commission on rehearing. Nevertheless, the April 15, 2009 text of Rule 4901:1-41-03 and of Chapters 4901:5-1, 4901:5-3 and 4901:5-5 will affect the FirstEnergy Solutions Associates, and the Associates therefore assert that this unexpected result, and the affect on the Associates, constitute extraordinary circumstances that justify the Associates' intervention.

Dated: Akron, Ohio
May 15, 2009

Respectfully submitted,

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## APPLICATION FOR REHEARING OF FIRSTENERGY SOLUTIONS ASSOCIATES

The Commission should grant limited rehearing in this proceeding for the purpose of: (1) narrowing the scope of Rule 4901:1-41-03 so that the rule applies only to public utilities that are subject to the Commission's jurisdiction; and (2) withdrawing in their entirety the April 15, 2009 changes to the text of Chapters 4901:5-1, 4901:5-3 and 4901:5-5 of the Ohio Administrative Code.

The Commission should narrow the scope of Rule 4901:1-41-03 so that the rule applies only to public utilities that are subject to the Commission's jurisdiction. As explained below, the April 15, 2009 rule text calls for the Commission's greenhouse gas emissions reporting requirements to apply to all "persons" that own or operate electric generation facilities that are larger than 50 mW. Section 4928.68 of the Revised Code, however, authorizes the Commission to create "greenhouse gas" emission rules only for public utilities that are subject to the Commission's jurisdiction. As such, the rule as written exceeds the Commission's statutory jurisdiction.

Certain of the FirstEnergy Solutions Associates own or operate electric generation facilities that are located in Ohio and that exceed 50 mW in generating capacity[11] and therefore will be affected the outcome of this proceeding. These FirstEnergy Solutions Associates are not "public utilities" and therefore are not subject to the Commission's jurisdiction under Ohio law. Nevertheless, the April 15th text for Rule 4901:1-41-03 would purport to impose the Commission's "greenhouse gas" rules on these FirstEnergy Solutions Associates, meaning that these Associates will be affected by the outcome of this proceeding.

Because application of these rules to the FirstEnergy Associates is unlawful, the Commission should narrow the scope of Rule 4901:1-41-03 so that the rule applies only to public utilities that are subject to the Commission's jurisdiction, and thereby relieve the FirstEnergy Solutions Associates of any compliance obligations under Rule 4901:1-41-03.

The Commission should withdraw in their entirety the April 15, 2009 changes to the text of Chapters 4901:5-1, 4901:5-3 and 4901:5-5 of the Ohio Administrative Code. As explained below, these changes exceed the Commission's statutory authority to impose long-term forecast reporting and integrated resource planning requirements on Ohio's public utilities that are in the electric industry. Moreover, the April 15th text is shot through with contradictions and inconsistencies to such a degree as to render the

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[11] These companies are: FirstEnergy Generation Corp. (which generally owns and operates the "FirstEnergy" fossil-fuel plants in Ohio); FirstEnergy Nuclear Generation Corp. (which owns the FirstEnergy nuclear generating plants in Ohio); and FirstEnergy Nuclear Operating Company (which operates the FirstEnergy nuclear generating plants in Ohio).

text unreasonable and unlawful. The FirstEnergy Solutions Associates are "persons" as that term is defined within the April 15, 2009 text of Chapters 4901:5-1, 4901:5-3 and 4901:5-5, and therefore will be affected by the outcome of this proceeding. The FirstEnergy Solutions Associated will be affected by the outcome of this proceeding because, absent grant of the relief requested herein, the Associates would be subject to the new long-term forecasting and integrated resource planning requirements. Nevertheless, because the April 15, 2009 text of Chapters 4901:5-1, 4901:5-3 and 4901:5-5 is unlawful, the Commission should withdraw the April 15th text and thereby relieve the FirstEnergy Solutions Associates of any compliance obligations under the revised regulations.

## MEMORANDUM IN SUPPORT OF APPLICATION FOR REHEARING

1. **The Commission should narrow the scope of Rule 4901:1-41-03 so that the rule applies only to public utilities that are subject to the Commission's jurisdiction.**

Parts of Commission rules that conflict with statutory limits on the Commission's rule-making authority are invalid.[12] Section 4928.68 of the Ohio Revised Code directs the Commission to adopt rules regarding greenhouse gas emissions reporting requirements for public utilities. The Commission's has adopted a rule that applies to public utilities, *and* to persons that are not public utilities. Will that part of the Commission's rule that applies to persons that are not public utilities be invalidated?

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[12] E.g., *Athens Home Telephone Co. v. Peck*, 158 Ohio St. 557, 574 (1953); *Kelly v. Accountancy Board of Ohio*, 88 Ohio App.3d 453, 458 (1993).

The Commission is a creature of statute and may exercise only that jurisdiction conferred upon it by the General Assembly.[13] As an administrative agency, the Commission possesses only such rule-making powers as are delegated by statute.[14] And any parts of Commission rules that conflict with existing statutes are invalid, and hence must fall.[15]

The General Assembly directed the Commission to adopt rules establishing greenhouse gas emission reporting requirements for each green-house gas emitting facility that is located in Ohio and that is owned or operated by a *public utility* that is subject to the Commission's jurisdiction.[16] The General Assembly did not authorize the Commission to establish green house gas emission reporting requirements for facilities that are owned by anyone other than public utilities. Indeed, and as is relevant to this proceeding, the Commission's statutory jurisdiction extends only to "public utilities."[17]

Notwithstanding this statutory limitation on its jurisdiction, the Commission has chosen to draft adopt "greenhouse gas" rules that apply to any "person" who owns or operates an electric generating facility within Ohio.[18] The fatal flaw is that the term

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[13] *Columbus Southern Power Co. v PUCO*, 67 Ohio St.3d 535, 537 (1993); *and Tongren v. PUCO*, 85 Ohio St.3d 87, 88 (1999).

[14] *Kelly*, 88 Ohio App.3d at 458.

[15] *Id.; Athens Home Telephone*, 158 Ohio St.3d at 562.

[16] O.R.C. § 4928.68 (emphasis added).

[17] O.R.C. § 4905.04. Specifically, the Commission's jurisdiction extends only to public utilities and to the facilities that are owned by public utilities that lie within the state. *Id., also* O.R.C. § 4905.05.

[18] O.A.C. § 4901:1-41-03(A), (B).

"person" is defined in the "greenhouse gas" rule to include a class of entities that are not "public utilities" and, as such, are not subject to the Commission's jurisdiction. Specifically, the Commission's "greenhouse gas" rules apply to "persons" who are defined as individuals, corporations, business trusts, associations, estates, trusts, partnerships, or any other entity.[19]

The problem lies in the fact that the class of people that fall within the Commission's jurisdiction to regulate as "public utilities" is smaller than the class of entities that fall within the Commission's "greenhouse gas" rules. As applicable here, a "public utility" that is subject to the Commission's jurisdiction is defined narrowly as "an electric light company, when engaged in the business of supplying electricity for light, heat, or power purposes to consumers" within Ohio.[20] This is a much smaller class of entities than the expansive class of "individuals, corporations, business trusts, associations, estates, trusts, partnerships, or any other entity" that the Commission tries to bring into its "greenhouse gas" rules.

Interestingly, there is no support for an argument that O.R.C. Section 4928.68 is intended to be read broadly. The General Assembly was careful not only to use the term "public utility" - but also to clarify that the "greenhouse gas" rules would apply to

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[19] O.A.C. § 4901:1-41-01(F), *incorporating by reference* O.R.C. § 4906.01(A). Strangely, and notwithstanding that the Commission allegedly was acting pursuant to Chapter 4928 of the Revised Code, the rule fails to adopt the definition of person that is provided in Chapter 4928 of the Revised Code. (*Compare* O.R.C. § 4928.1(A)(24) ("person" defined for purposes of Chapter 4928) *with* O.A.C. § 4901:1-41-01(F) ("person" defined for Commission's "greenhouse gas" rule by incorporation by reference of the O.R.C. § 4906.01(A) Power Siting Law definition of "person").

[20] O.R.C. § 4905.2, *incorporating by reference* O.R.C. § 4905.3(A)(4).

a public utility *that is subject to the Commission's jurisdiction.*[21] The clause "subject to the Commission's jurisdiction" is a limitation, and surely harks back to the one place in Ohio's statutes that define the Commission's jurisdiction over public utilities; namely O.R.C. Section 4905.05.

Nevertheless, the Commission, in its Opinion and Order approving the "greenhouse gas" rules, gamely tries to justify its expansive application of the rule. After noting the statutory objections raised by other parties, the Commission suggests that "yielding" to its rule "is in the best interests of Ohio and its citizens" and that the Commission's broad interpretation of its is necessary for its oversight of integrated resource planning (IRP) and advanced energy portfolio standards.[22]

However, neither the "best interests of Ohio and its citizens" – nor an alleged need for oversight of IRP or advanced energy portfolio standards – authorize the Commission to go beyond its statutory limits. The rule is iron: the Commission is a creature of statute.[23] As such, it possesses only those rule-making powers that are delegated by the legislature. And any part of a Commission rule that conflicts with a statute is invalid and must fall.[24]

There may be some who, with the purest intentions of imposing their version of what is in "the best interests of Ohio and its citizens" may feel to disregard this analysis.

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[21] O.R.C. § 4928.68.

[22] Case No. 08-888-EL-ORD, *supra*, Opinion and Order, p. 41.

[23] *Columbus Southern Power*, 67 Ohio St.3d at 537; *and Tongren*, 85 Ohio St.3d at 88.

[24] *Kelly*, 88 Ohio App.3d at 458; *Athens Home Telephone*, 158 Ohio St.3d at 562.

It therefore might be worthwhile to explore the guidance that Ohio's courts have identified when considering similar questions about statutory interpretation of the scope of agency rule-making authority.

The *Kelly* case is instructive. There, the court affirmed the long-standing rules on the limits of regulatory agency rulemaking. Then the court provided its analysis of how to interpret statutory limits on agency rule-making authority. First, the court looks to the language of the statute to determine legislative intent. The words of the statute are to be effected and, absent clear indication to the contrary, meanings must not be modified by deleting or inserting words. And parts of rules that are in derogation of some express provision in the statute will be stricken.[25]

This guidance informs any analysis of Section 4928.68 of the Revised Code. First, the General Assembly was careful ensure that the "greenhouse gas" rules would apply only to a "public utility" - a term that is defined elsewhere in the Commission's statutes. Next, the General Assemble was careful to add yet more limiting language: the "greenhouse gas" rules would apply to a "public utility *that is subject to the Commission's jurisdiction*." As noted above, this language refers back to Commission's jurisdiction over "public utilities" as defined in Section 4905.05 of the Revised Code.

As such, it is likely that the reviewing court will read the statute to mean that the greenhouse gas" rules were to apply to the public utilities that are defined in Section 4905.05 as falling within the Commission's jurisdiction; namely, electric light companies that are engaged in the business of supplying electricity to consumers in Ohio. And it is

difficult to see how arguments about the "best interests of Ohio and its citizens" and some purported mandate for oversight of IRP and advanced energy portfolio standards will overcome the limiting language in the statute.

In short, the Commission would be well advised to grant the rehearing requested herein, and to narrow the scope of Rule 4901:1-41-03 to apply only to "public utilities that are subject to the Commission's jurisdiction."

**2. The Commission should withdraw in their entirety the O.A.C. Chapters 4901:5-1, 4901:5-3, and 4901:5-5 described in the April 15, 2009 Opinion and Order until such time as the fatal flaws and language inconsistencies found therein are cured.**

The Commission claims that "SB 221" is the statutory basis for the Commission's April 15, 2009 amendments to O.A.C. Chapters 4901:5-1, 4901:5-3 and 4901:5-5.[26] Contrary to the Commission's claim, there is no basis in the SB 221 amendments to the Ohio Revised Code that compels, or even justifies, the amendments to Chapters 4901:5-1, 4901:5-3 and 4901:5-5 of the Ohio Administrative Code. In fact, SB 221 scarcely mentions resource planning at all.

SB 221 touches on resource planning in only two places: O.R.C. § 4928.143(B)(2)(b) and O.R.C. § 4928.143(B)(2)(c). In both places, the term is used in the context of an electric distribution utility's discretionary submission of a resource planning projection as part of an "electric security plan" filing. Specifically, an electric

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[25] *Kelly*, 88 Ohio App.3d at 458-59.

[26] Case No. 08-888-EL-ORD, *supra*, Opinion and Order, p. 4 (we will limit changes [to O.A.C. Chapters 4901:5-1, 4901:5-3 and 4901:5-5] in this proceeding to those required by SB 221), p. 41 (the Commission's forecast rules are being modified to restore the IRP requirements...in response to SB 221... [The Commission's] modifications focus on those required by SB 221).

distribution utility's electric security plan *may* provide for or include recovery of certain costs associated with a resource plan that was filed with the Commission.[27] In neither case is the electric distribution utility required to submit a resource plan. And in neither case is the Commission authorized to compel an electric distribution utility, *or any other person*, to file a resource plan.

So much for the Commission's purported statutory justification (in amended SB 221) for the modifications to O.R.C. Chapters 4901:5-1, 4901:5-3 and 4901:5-5.

In fact, certain of the modifications have no basis in any statute. For example, Rule 4901:5-1-02 purports to obligate any "person" who furnishes electricity to more than fifteen thousand customers within the sate to file an annual long-term forecast report to the Commission. There is no basis in any of the statutes that describe the Commission's functions that would authorize this requirement. In fact, there are statutes, such as O.R.C. § 4928.05(A)(1) that expressly excuse "electric utilities" and "electric service companies" from filing long-term forecast reports.

Still other statutory provisions suggest that the General Assembly intends for resource planning to go in another direction. Specifically, O.R.C. Chapter 4935 describes the General Assembly's direction about who is to file an annual long-term forecast report, but this statute limits the requirement to "persons" that own or operate electric transmission lines and associated facilities that are rated at or above 125 kV.[28] Interestingly, until 1999, Chapter 4935 applied a long-term forecasting and reporting

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[27] O.R.C. § 4928.143(B)(2) (emphasis added).

[28] O.R.C. § 4935.04(C).

obligation to a much broader class of entities in the electric industry. However, the text of the statute was amended in 1999 to narrow the long-term forecast requirement to the narrow class of Ohio entities that own electric transmission facilities that are rated 125 kV or higher.[29] Given this statute, and the 1999 SB3 amendments, it is apparent that the General Assembly's intended that only persons that own or operate the select electric transmission lines and associated facilities be required to file long-term forecast reports of any kind. And the Commission is unable to point to any other statute that suggests otherwise.

These considerations – together with the limitations on the Commission's rule-making authority described above[30] – are such that Commission's efforts to expand the long-term forecast requirement to virtually all entities within Ohio's electric industry will fail in the courts. As such, the Commission should withdraw the April 15, 2009 amendments to O.A.C. Chapters 4901:5-1, 4901:5-3 and 4901:5-5 until such time as the necessary corrections can be made.

Withdrawal of the amendments also is compelled on separate grounds. The problem is that the April 15, 2009 amendments to O.A.C. Chapters 4901:5-1, 4901:5-3 and 4901:5-5 are filled with contradictions and drafting errors of such magnitude as to render parts of the rules completely unreasonable. The Commission's rules are valid and enforceable unless they are unreasonable.[31] Here, the drafting errors in the

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[29] 1999 Ohio Laws File 47 (SB 3), § 1 (amending O.R.C. § 4928.05).

[30] *Kelly*, 88 Ohio App.3d at 458; *Athens Home Telephone*, 158 Ohio St.3d at 562.

[31] *See Curry v. Industrial Commission*, 58 Ohio St.2d 268, 269 (1979).

Commissions rules are of such magnitude as to support a finding that the Commission acted arbitrarily and capriciously in enacting the rules.[32]

One example of drafting error is the inconsistency between Section 4901:5-1-02 (that apply the long-term forecast reporting requirement broadly) and Chapter 4901:5-1-3 (that prescribe the long-term forecast reporting requirement only in terms of a limited class of entities). As noted above, Section 4901:5-1-02 purports to obligate a large class of Ohio's electric industry to submit long-term forecast reports. As is relevant to Ohio's electric industry, however, Chapter 4901:5-3 applies only to "electric utilities" and "electric transmission owners."[33] This means that, even if one were to assume for argument's sake that the April 15, 2009 amendments to O.A.C. Chapters 4901:5-1, 4901:5-3 and 4901:5-5 apply to practically all entities within Ohio's electric industry, the language in Chapter 4901:5-3 that limits the chapter's application to "electric utilities" and "electric transmission owners" means that entities such as "electric services companies" that own no transmission lines and that are not "electric light companies" would have no guidance or specificity as to when their Chapter 4901:5-3 long-term forecast report is due,[34] the fees that are to be paid,[35] or the means to estimate changes in their respective rates of load growth.[36]

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[32] *See Hi Rise, Inc. v. Ohio Liquor Control Commission*, 106 Ohio App.3d 151, 154 (1995).

[33] E.g., O.A.C. §§4901:5-3-01(A, C), 4901:5-3-02(A, E), 4901:5-3-03(A-C). Note that under O.R.C. § 4928.05(A)(1) "electric utilities" are excused from filing long-term forecast reports.

[34] O.A.C. § 4901:5-3-01.

[35] O.A.C. § 4901:5-3-02.

[36] O.A.C. § 4901:5-3-03.

At best, the inconsistencies between Section 4901:5-1-02 (that apply the long-term forecast reporting requirement broadly) and Chapter 4901:5-1-3 (that prescribe the long-term forecast reporting requirement only in terms of a limited class of entities) are an example of careless or even shoddy drafting that will not pass review by Ohio's courts. It also reflects incredibly poorly on the Commission, which otherwise enjoys a high reputation for the quality of its regulatory product.

Unfortunately, there are other examples of problems in the Commission's April 15, 2009 amendments to O.A.C. Chapters 4901:5-1, 4901:5-3 and 4901:5-5. One is that Chapter 4901:5-5 perpetuates the "electric utility" and "electric transmission owner" limitations on regulations that in other places are defined to apply to a broader class of entities. In addition, Chapter 4901:5-5 goes onto the prescribe new absurdities, such as requiring "electric services companies" to describe their energy efficiency, demand response and demand reductions programs. This requirement is unreasonable, if not farcical, because "electric services companies" may not have any or all of these programs (why should a competitive retail electric supplier have any energy efficiency or demand response programs?!). The rule gets even more absurd because the electric services company's information is to be submitted by a "reporting person," [37] who by definition is not an electric services company.[38] Still more examples of inconsistent language could be cited.

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[37] O.A.C. § 4901:5-5-03(C)(3).

[38] O.A.C. § 4901:5-1-01(K).

Let us draw the curtain of charity over the rest of this scene.[39] The simple fact is that even if the amendments to O.A.C. Chapters 4901:5-1, 4901:5-3 and 4901:5-5 were justified by statute, and they are not, the text of the amendments is so riddled with inconsistency and error that the Commission would be well served to withdraw the amendments until such time as the text has been cleaned up.

## CONCLUSION

WHEREFORE, for the reasons explained herein, the Commission should grant rehearing in this proceeding for the purpose of: (1) narrowing the scope of Rule 4901:1-41-03 so that the rule applies only to public utilities that are subject to the Commission's jurisdiction; and (2) withdrawing in their entirety the April 15, 2009 changes to the text of Chapters 4901:5-1, 4901:5-3 and 4901:5-5 of the Ohio Administrative Code

Dated: Akron, Ohio
May 15, 2009

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[39] Mark Twain, *Tom Sawyer*, ch. 4, last line.

## CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *Motion to Intervene and Application for Rehearing of FirstEnergy Solutions Associates,* together with all supporting documents, was served upon the following parties on the attached Service List this 15th day of May, 2009 by first class mail, postage prepaid.

Morgan E. Parke

**CERTIFICATE OF SERVICE**

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