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**

MEMORANDUM CONTRA APPLICATIONS FOR REHEARING BY THE OHIO ENVIRONMENTAL COUNCIL

The Public Utilities Commission of Ohio ("Commission" of "PUCO") has done a commendable job given the complexity of the rules required in order to implement S.B. 221, and the brief amount of time allotted to accomplish it. The rulemaking process has allowed for considerable input from parties representing all points of views; resulting in recommendations to the Commission which argue vigorously and often opposed interpretations of S.B. 221. The Ohio Environmental Council is opposed to a rehearing on Chapter 39 of these rules.

A continuous rulemaking proceeding is not the best forum for further refinement of these rules. The implementation of the rules as proposed will allow the parties to gain knowledge which only results from time and operating under the rules. Clearly these rules were not meant to be final regulatory word, and the Commission can intercede can make changes prior to the required 5 year review schedule if parts of the rules are unworkable.

The Commission rightly has promulgated a "flexible framework that meets the statutory obligations." [1] With this framework in place, the utilities and other constituencies can begin the process of shaping the requirements through on-going collaboratives, workshops, and other forums.

Objections to provisions in Chapter 39 regarding concurrent federal or state standards:

Several interveners argue that Rule 4901:1-39-05 (D) is improperly designed and in conflict with underlying statute. Rule 4901:1-39-05 (D) states: "An electric utility shall not count in meeting any statutory benchmark the adoption of measures that are required to comply with energy performance standards set by law or regulation, including but not limited to those embodied in the Energy Independence and Security Act of 2007, or an applicable building code."

Dayton Power and Light (DP&L), the Ohio Manufacturing Association (OMA), the Ohio Hospital Association (OHA), Industrial Energy Users of Ohio (IEU), the Ohio Energy Group (OEG), American Electric Power (AEP), and First Energy (FE) all express objections to 4901:1-39-05 (D).

IEU claims this rule is illegal and improper, and is not consistent with Senate Bill 221.[2] IEU states that the commission has no power to determine those activities that qualify as energy efficiency measures cannot be utilized for compliance purposes, regardless of the operation of federal or building codes. IEU also flatly states that the rule "unreasonably and arbitrarily diminishes the value of energy efficiency…"

IEU's arguments are unsupported by any reference to statutory language in SB221 that prohibits the commission from determining what can and should qualify as energy efficiency for the purposes of SB221 compliance. Additionally, IEU's argument that even though an energy

[1] Order, page 4.
[2] IEU, 11-12

efficiency initiative or measure is required by a separate federal law it must count towards SB221 compliance is similarly unsupported. Literally, IEU offers no statutory support for this conclusion; IEU simply states this legal conclusion as fact.

Undoubtedly, the commission has the power and duty to make determinations concerning activity that will and will not be sufficient for SB221 compliance. Not only does SB221 clearly suggest this throughout, but the precise role of the commission in rulemaking actions is the determination of complex, statutorily undefined terms and regulatory operation.

Furthermore, the implicit proposal of IEU, DP&L, OMA, OHA, OEG, AEP, and FE that the Commission must allow any measure to count towards SB221, regardless of weather or not it is compelled by a separate regulation, would create significant problems, problems which the Commission's current rule works to avoid and elevate. First among these concerns is unjustified cost recovery and free rider-ship.

All customers paying an energy efficiency rider on their bill has a right to expect that their dollars are being utilized to create new savings that fulfills statutory utility obligations and produces the broad system benefits associated with new energy efficiency measures. But, if a utility program simply allows and facilitates certain participant customers to meet current energy technology requirements they are already compelled to follow by law, then the program amounts to little more than a direct and unjustified subsidy to the program participant.

It is entirely justified, legal, and reasonable that utilities should not be compensated or benefited as businesses and individuals make process and energy systems changes already mandated by law. As the commission correctly stated, "We see no reason to credit electric utilities for benefits of measures that would have happened regardless of their efforts."[3] This is the crux of the concern. In return for completing energy efficiency projects, programs, and

[3] Opinion and Order at 20.

initiatives, utilities are offered cost recovery, and depending on the utility, even an incentive payment. No cost recovery, much less an incentive payment, should be made to a utility for the achievement of standards that must be achieved irregardless of the mandate of SB221, and disassociated with its cost and revenue recovery provisions.

This is particularly true where coming standards are known and expected, as is the case with the provisions of the Energy and Security Act of 2007. Of course, this legislation was passed in 2007, Senate Bill 221 was passed in 2008, and utilities began preparing for compliance immediately. Though the Energy and Security Act of 2007 was not effective immediately, its effective date is well known and established. Utilities could plan for this date and design programs accordingly. Because of this clear notice, the Commission's rule with regard to known and established legislation, including legislation passed or regulatory action known but not implemented is entirely justified, appropriate, reasonable and legal.

Though the case against the Commission's well considered rule is weak when it comes to known regulatory requirements with clear start dates, such as the Energy and Security Act of 2007 and new building codes, some concerns do persist regarding legislation not yet passed. In designing and proposing energy efficiency measures and programs, utilities and others will look to a variety of savings periods; commiserate with the life or reasonable use of the installed measure. A cost test will examine this savings period, the savings created, and the cost of the measure to determine its appropriateness. Sometimes, the planning horizon for these measures is long, as the equipment to be installed is particularly durable.

It is conceivable that the prospect of future regulatory action could deter utilities from implementing programs with long savings horizons, because the savings and cost recovery numbers could be suddenly and dramatically altered by regulatory action. This would be an

unfortunate result; good energy efficiency initiatives involve a variety of long and short horizon programs. Though it is entirely justified that a utility take into account current law with clear effective dates, and in the case of programs with short horizons be subject to new regulatory requirements that make their actions moot, for longer term programs that have a wider planning horizon, some of the arguments of interveners are justified.

AEP's Objection to an Independent Staff Directed Evaluator:

AEP objects to Rule 4901:1-39-01(L), which requires an independent program evaluator hired by the utility at the direction of Commission staff.[4] This objection is currently unjustified, and the Commission's rule should remain unaltered. AEP contends that this rule requires a utility to spend twice to accomplish the work of one evaluator, because AEP will have to hire an extra, day to day evaluator independent of the evaluator working at the direction of the Commission staff. Though duplicative efforts should be avoided, at this time AEP's argument is unjustified; it has not shown, only asserted, that working with the staff-directed evaluator will be burdensome and require the hiring of an additional evaluator. To effectively make this claim, AEP must first demonstrate that working with the staff directed evaluator is burdensome, inefficient, and ineffective. Currently, California has a similar evaluation system to the one proposed by the Commission.

Kroger and IEU Objections to Mercantile Customer Opt-Out Provisions:

Kroger lays out several objections to the mercantile opt out provisions adopted by the Commission. A general objection is made to reporting requirements, labeling the disclosure of pricing, program, and savings data as "unnecessary."[5] Kroger's objections in this regard are largely unwarranted. Although it is undoubtedly true that import information useful to

[4] AEP, 9
[5] Kroger, at 6

competitors could be disclosed if traditional methods for the protection of trade data at the Commission are ignored or not properly followed as a part of basic reporting on savings for mercantile customers, Kroger proposes no viable alternative. Verification and evaluation are at the heart of an effective energy efficiency requirement, and are absolutely necessary to ensure savings and compliance. If evaluation and verification is sacrificed for any reason, then the energy efficiency requirements of SB221 amount to little more a legislative encouragement to utilities and large customers to save energy.

As Kroger notes, the purpose of SB221, and its opt-out provision, is energy savings; without proper evaluation and verification, it is impossible to tell if savings have occurred. The opt-out provisions in SB221 are optional, not mandatory for mercantile customers; therefore as a matter of law mercantile customers have no right to expect that the data necessary to properly evaluate asserted savings will not be requested and should not be provided. If a mercantile customer does not feel it would be prudent to release such data, that mercantile customer does not have to opt out of the modest energy efficiency charge, and would then be eligible to participate in utility-led customer programs.

Kroger's assertion that verification and evaluation data not be disclosed is hard to justify in the context of Kroger's argument that a mercantile customer should not have to apply jointly to the Commission for opt-out. If no utility will be working with a mercantile customer on an application, it is doubly important that commission staff and independent evaluators have all the data they need to ensure that savings at the required level have occurred. Though the OEC believes the concept of a solo application to the Commission by a mercantile customer for opt-out is commiserate with the explicit language of SB221, if this route is taken it becomes absolutely essential that independent evaluators have proper and full data.

IEU also has several arguments against the Commission adopted mercantile customer requirements. Some echo Kroger's; particularly the arguments on reporting and joint application with utilities. While the OEC agrees that IEU's argument on joint applications is grounded in statutory language, we object to the concept that customer-sited reporting is improper and unwarranted. Evaluation and verification is central to effective energy efficiency programs. IEU does make a reasonable request, that when and where appropriate the Commission act to keep propriety information safe from public scrutiny.

DP&L's Objections to the Mercantile Customer Opt-Out Provisions:

DP&L also makes similar broad arguments against the mercantile customer opt-out provisions as currently proposed. It is true that the potential mercantile customer must provide a considerable amount of data concerning their energy efficiency project to the Commission in order to gain the benefit of a waiver. It is also true that some of this information may be of a commercially sensitive nature to the mercantile customer. However it is hard to imagine a company which would qualify under the definition of a mercantile customer[6] as being too unsophisticated as to have trouble with the meager reporting requirements under these rules.

Further, as mentioned above, the potential mercantile customer is under absolutely no obligation to apply for the exemption to the cost recovery mechanism. These potential mercantile customers are sophisticated, ongoing business concerns, who are unlikely to lightly spend their capital on an energy efficiency project without first thoroughly researching the implications, potential savings, and cost benefit of the project. The data which they need to

[6] R.C. § 4928.01(19) "Mercantile customer" means a commercial or industrial customer if the electricity consumed is for nonresidential use and the customer consumes more than seven hundred thousand kilowatt hours per year or is part of a national account involving multiple facilities in one or more states.

provide in support of their application is not burdensome, and much of it should by readily available from the company's own research into the viability of the project.

DP&L further argues that the Commission would be overwhelmed with the sheer number of applications of mercantile customers seeking to integrate customer demand response and energy efficiency programs with those of the utility. Because of this, they would like the Commission to delegate its oversight of these programs for 2009 and 2010 to PJM. Surely the filing requirements would not be overly burdensome, if DP&L speculates that the Commission will be over-run with applications. While the PJM programs can serve as one successful model, the Commission should not delegate the oversight of projects offered by a mercantile customer for integration with the utility's programs to PJM.[7]

The requirements under proposed Rule 4901:1-39-08 are well designed to insure that the projects undertaken by the mercantile customer will result in energy efficiency. It is vital that the industrial customers in Ohio participate in the drive to meet the demand response and energy efficiency goals found in S.B. 221; either through their own projects or through contributing through the utilities' cost recovery mechanisms.

Duke Energy's "double counting" Objection:

Duke Energy Ohio, Inc.'s (DE-Ohio) argument for rehearing on the Commission's stance on "double counting" is misplaced and unfounded. DE-Ohio argues that the Commission is setting "the bar far higher than is possible to reach" for EDUs.[8] However, at this stage, merely six months into the inaugural year of the program, it is untimely and inappropriate to make that determination.

[7] It is odd that DP&L argues for the delegation of power by the Commission to PJM, but is so concerned about the delegation of power by the Commission to its own staff. See footnote 10, DP&L motion for rehearing.
[8] DE-Ohio, 3.

While it is true that the statutory definition of "Advanced Energy" includes demand side management and energy efficiency, the statute is silent on the issue of whether savings from energy efficiency or DSM attributable to the energy efficiency in ORC §4928.66 is permitted to count toward the "advanced energy " tier of the alternative energy standard. As the parties and the Commission are aware, there was debate over this very issue during the SB 221 deliberations. Because the General Assembly chose, after this debate, not to expressly permit an EDU to count the same kwh of energy savings from energy efficiency and DSM for both the energy efficiency standard and as advanced energy, then it is completely within the Commission's rule making authority to make the determination.

This is justified first by determining what better serves the objective of SB 221 and to progress the development and utilization of advanced energy resources. While OEC believes that energy efficiency is the cleanest and cheapest energy resource we have, we too understand that we must utilize all energy options to meet environmental protection, energy independence, and consumer savings goals. Counting energy efficiency and demand side management in the "Advanced Energy" definition of SB 221 was not meant to allow EDUs to do the minimum and receive twice the credit, but to allow EDUs with exemplary and overachieving energy efficiency programs and who choose to put resources into those programs instead of building a nuclear power plant or coal gasification plant, to benefit from that decision.

Whether or not an EDU is permitted to "double-count" energy efficiency or demand side management for both its energy efficiency resource standard and advanced energy resource totals is better resolved not through rehearing of the original rule package but after the plans are put in effect, reported, measured and verified. Neither the statute nor the commission's rules developed benchmarks and corresponding penalties for the "Advanced Energy" portion of the "Alternative

Energy Resource Standard." See ORC §4928.64. Since there are no benchmarks nor corresponding penalties for not reaching the "advanced energy" standard, neither the EDUs nor any other parties will be prejudiced.

IEU's Blanket Rehearing Objection and Argument:

IEU-Ohio's overarching argument is that rehearing is appropriate because the Commission's Order and Opinion and final rules differ greatly from those proposed by the Commission Staff, and thus the parties are essentially commenting on a new set of rules.[9] In the opinion of the OEC, re-opening the entire process is an inappropriate reaction to the Commission order. The Commission took the comments of nearly 40 parties, incorporated many of the recommended changes and clarifications recommended by the commenting parties, and developed well reasoned and balanced rules that move us toward cleaner and cheaper energy for all customer classes.

IEU-Ohio argues for the Commission to grant rehearing to issue a blanket waiver for the SB 221 mandatory 2009 compliance under ***force majeure***. However, the Commission cannot lawfully waive compliance with statutory mandates.[10] The Commission cannot allow for a blanket waiver based merely on speculation, one entire year before the first year reports are due, that these demands cannot be met. This especially is not the case on ***force majeure*** grounds. ***Force Majeure,*** according to Black's Law Dictionary, is an event or effect that can neither be anticipated nor controlled.[11] Using this base definition, the energy efficiency requirements are clearly anticipated, and compliance can be controlled.

Final Commission rules were not a prerequisite to developing and implementing energy efficiency programs. Senate Bill 221 set the benchmarks over one year ago. All EDUs

[9] IEU, 5
[10] Order, 4-5
[11] BLACK'S LAW DICTIONARY, Seventh Edition, West Group Publishers (1999).

developed a plan to meet those benchmarks for the first three years through Commission approved Electricity Security Plan (ESP). All EDUs have or soon will be convening stakeholder collaborative groups to develop the programs to reach their short term and long term mandates of SB 221. And for that matter, all EDUs have experience with such programs in some capacity and to varying degrees.

Furthermore, IEU-Ohio broadly states that rehearing is in order because the rules are unconstitutionally vague and thus violate the Due Process Clause of the 14th Amendment.[12] To defend this claim, IEU-Ohio cites federal court caselaw stating that "A statute meets the standard of certainty required by the Constitution if its language conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices" and "that a statute is void when it is vague as to what persons fall within the scope of the statute, what conduct is forbidden, or what punishment may be imposed." ID. At 9. Yet, IEU-Ohio's lone example of unconstitutional vagueness, Rule 4901:1-39-05(D), clearly passes the aforementioned test.

Rule 4901:1-39-05(D) defines the scope of persons affected ("an electric utility"); what conduct is forbidden (counting the adoption of measures that are required to comply with energy performance standards set by law); and what punishment may be imposed (not meeting benchmarks results in statutory penalties referenced in ORC §§4928.64 and 4928.66). This argument should be rejected.

OEG Objection to a Rolling 3 Year Baseline Average:

OEG argues that using a "rolling" three year average to calculate the baseline for energy savings, which would change the three year base period each year, would constantly result in over compliance due to "compounding." However, the Commission's judgment to calculate a

[12] IEU, 8-11

baseline for energy savings based on a three year rolling average is a reasonable interpretation that reflects the intent of R.C. 4928.66(A)(2)(a) (Order, p.20.) R.C. 4928.66(A)(2)(a) only provides that the baseline "shall be the average of the total kilowatt hours…sold in the preceding three calendar years." Further, using a rolling average is not likely to produce different results. For example, an annual adjustment for load growth, number of customers, and number of sales will, theoretically, bring a rolling average back to the initial three year baseline.

Conclusion:

The Ohio Environmental Council praises the Commission for drafting rules that comport with the spirit and letter of S.B. 221's energy efficiency provisions. Overall, these rules reflect the unambiguous intent of S.B. 221, which has the goal of promoting the use of advanced and renewable energy resources and increasing energy efficiency measures in Ohio. Many of the arguments raised in the applications for rehearing, therefore, are not properly directed at the Commission's rulemaking, but at the wisdom of the Ohio General Assembly. Thus, OEC supports the rules as written and respectfully requests that the Commission deny the above-mentioned applications for rehearing.

Respectfully submitted,

s/NOLANMOSER
Nolan Moser
Staff Attorney, Air & Energy Program Manager
The Ohio Environmental Council
1207 Grandview Avenue, Suite 201
Columbus, Ohio 43212-3449

(614) 487-7506 – Telephone
(614) 487-7510 – Fax
nmoser@theOEC.org – Email

Trent A. Dougherty
Director of Legal Affairs
The Ohio Environmental Council
1207 Grandview Avenue, Suite 201
Columbus, Ohio 43212-3449
(614) 487-7506 – Telephone
(614) 487-7510 – Fax
trent@theOEC.org – Email

Todd M. Williams
Attorney & Counselor at Law
PO Box 6885
Toledo, OH 43612
(419) 215-7699
williams.toddm@gmail.com – Email

Will Reisinger
Staff Attorney
The Ohio Environmental Council
1207 Grandview Avenue, Suite 201
Columbus, Ohio 43212-3449
(614) 487-7506 – Telephone
(614) 487-7510 – Fax
will@theOEC.org – Email

Summary: Memorandum Memorandum Contra Applications For Rehearing electronically filed by Mr. Nolan M Moser on behalf of The Ohio Environmental Council