BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Adoption of Rules for Alternative and Renewable Energy Technology, Resources, and Climate Regulations, and Review of Chapters 4901:5-1, 4901:5-3, 4901:5-5, and 4901:5-7 of the Ohio Administrative Code, Pursuant to Chapter 4928.66, Revised Code, as Amended by Amended Substitute Senate Bill No. 221.	))))))))	Case No. 08-888-EL-ORD

MEMORANDUM CONTRA APPLICATIONS FOR REHEARING BY THE OHIO CONSUMER AND ENVIRONMENTAL ADVOCATES

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I. INTRODUCTION

The undersigned members of the Ohio Consumer and Environmental Advocates (collectively "OCEA")[1] jointly submit this Memorandum Contra multiple Applications for Rehearing filed on May 15, 2009 with the Public Utilities Commission of Ohio ("PUCO" or "Commission"). The undersigned members of OCEA address some of the most disconcerting statements by other parties in the other 17 applications for rehearing. The absence of argument by the undersigned members of OCEA to any sections of the applications for rehearing should not be taken as a concession regarding those arguments.

[1]The undersigned members of OCEA include the Office of the Ohio Consumers' Counsel, Northwest Ohio Aggregation Coalition (City of Toledo and Lucas County), Ohio Partners for Affordable Energy, Citizens for Fair Utility Rates, Neighborhood Environmental Coalition, Cleveland Housing Network, Empowerment Center for Greater Cleveland, Counsel for Citizens Coalition, Citizen Power, Natural Resources Defense Council, Edgemont Neighborhood Coalition of Dayton, Sierra Club Ohio Chapter, and Environment Ohio, and as to the alternative energy portfolio standards and long-term forecast reporting rules only the Ohio Environmental Council.

The electric utilities and mercantile customers make a number of requests that would weaken the energy efficiency and renewable energy requirements. The rules as proposed are a balanced and reasonable implementation of Ohio's electric energy law regarding energy efficiency and renewable energy. The undersigned members of OCEA urge the Commission to keep in the forefront the public interest and the utilities' duty to serve that interest in a fair and reasonable manner that establishes energy efficiency and renewable energy requirements that will thrive in Ohio while protecting utility consumers.

II. ARGUMENT

A. The Applications for Rehearing Failed to Establish that the Commission's Order Approving rules for Energy Efficiency and Demand Reduction Benchmarks (Ohio Adm. Code Chapter 4901:1-39) were Unreasonable or Unlawful.

The Commission identified its authority for adopting these rules as R.C. 4905.70, R.C. 4928.02(D), and R.C. 4928.66.

R.C. 4905.70 directs the Commission to:

> Initiate programs that will promote and encourage conservation of energy and a reduction in the growth rate of energy consumption, promote economic efficiencies, and take into account long-run incremental costs* * *.

R.C. 4928.02(D) clarifies that it is a policy in this state to:

> Encourage innovation and market access for cost-effective supply and demand-side management, time-differentiated pricing, and implementation of advanced metering infrastructure.

R.C. 4928.66(B) requires the Commission to adopt rules that will assist the Commission to verify "annual levels of energy efficiency and peak demand reductions achieved by each electric distribution utility."

Also "the public utilities commission has general supervision over all public utilities within its jurisdiction as defined in section 4905.05" under R.C. 4905.06. Under that provision the Commission has the authority to "prescribe any rule or order that the commission finds necessary for protection of the public safety."

1. The Commission has an obligation to ensure that public utilities and electric suppliers meet the benchmarks that are specifically required of them under R.C. 4928.66(B) and not allow utilities and suppliers to include the energy savings required of not just electric suppliers but also other persons and/or organizations under other laws, regulations or codes to meet the electric provider benchmarks under R.C. 4928.66(B). Accordingly the Commission should retain Ohio Adm. Code 4901:1-39-05(D) and 4901:1-39-08(B)(4).

Applications for rehearing filed by the utilities and large customers complained about a variety of limitations that the Commission placed upon the energy savings that may contribute to the utilities' compliance with the energy savings benchmarks in R.C. 4928.66(B). Those commenters complained about utilities and suppliers not being permitted to include energy savings related to the mercantile customers' replacement of equipment or assets that are more energy efficient because the replacement equipment or assets must be more energy efficient due to other laws, regulations or applicable building codes.

At R.C. 4928.02(D), the General Assembly specifically identified that one clear policy of Ohio was to do the following throughout the state:

> Encourage innovation and market access for cost-effective supply and demand-side retail electric service including, but not limited to, demand-side management, time-differentiated pricing, and implementation of advanced metering infrastructure.

Moreover, to underline their commitment and to effectuate that policy the General Assembly directed utilities to implement energy efficiency programs that achieve very specific amounts of energy savings and demand reductions under R.C. 4928.66 (A) and (B).

Ohio Edison Company, The Cleveland Illuminating Company, and The Toledo Edison Company (collectively "FirstEnergy"),[2] the Ohio Energy Group ("OEG"),[3] the Ohio Hospital Association ("OHA"),[4] the Ohio Manufacturer's Association ("OMA"),[5] the Industrial Energy Users–Ohio ("IEU"),[6] and Dayton Power and Light Company ("DP&L")[7] asserted that R.C. 4928.66 does not allow the Commission to limit the applicability of energy savings to the benchmarks as required by Rule 4901:1-39-05. Yet, nothing in R.C. 4928.66 states that the Commission must allow utilities to count all energy savings achieved through any programs listed under R.C. 4928.66(A)(2)(c). In fact the presence of the baseline calculation under R.C. 4928.66(A)(2)(a), which will not permit the utility to count most of the energy savings achieved before 2009, shows that the General Assembly did not intend utilities to count energy savings the utility or supplier may have achieved through previous requirements or commitments.

The legislature did not pass the energy efficiency portions of Amended Substitute Bill No. 221 ("S.B. 221") in order to initiate an elaborate accounting exercise whereby utilities measure the effects of equipment changes that would have happened without the bill. Instead, the legislature created an energy efficiency resource standard in order to

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[2] *See* FirstEnergy Application for Rehearing at 7-8.

[3] *See* OEG Application for Rehearing at 3-4.

[4]*See* OHA and OMA Application for Rehearing at 5.

[5] *See* Id.

[6] *See* IEU Application for Rehearing at 11-12.

[7] *See* DP&L Application for Rehearing at 4-5.

increase energy efficiency beyond what would have occurred absent legislative action. The Commission rightly used that logic when it formulated Rule 4901:l-39-05(D), which states:

> [a]n 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 ... or an applicable building code.

Moreover, the Commission should only allow the utilities and suppliers to apply energy savings they achieve that are above the amounts that not just electric providers but also other persons and/or organizations must achieve under other laws, regulations or codes addressing other types of energy savings. The Commission should ensure that energy savings are achieved by utilities and electric suppliers above and beyond those amounts already required by law, regulation or practices external to S.B. 221, except those specific and narrow exceptions where customers commit specific savings also above codes, minimum standards or laws independent to S.B. 221.

FirstEnergy[8] unreasonably asserts that the rule as stated above "virtually guarantees non-compliance with energy savings benchmarks and peak load reduction requirements." FirstEnergy has not conducted a potential study that would verify the technical, economic, and achievable energy efficiency resource available in their service territory. Accordingly, FirstEnergy's argument is simply rhetorical, not based on fact.

[8] FirstEnergy Application for Rehearing at 7.

FirstEnergy[9] cites an American Council for an Energy-Efficient Economy ("ACEEE")[10] study that it claims shows that Ohio will not meet its energy efficiency mandates if the electric providers cannot include energy use reduction and demand reductions achieved through other laws, regulations and codes. But the report showed that only 10% of the cost effective savings necessary to meet the mandate is predicated on implementation of "building energy codes" and "state-level appliance standards."[11] Under self-described conservative assumptions, the ACEEE report shows that even by removing the effects of codes and standards, the utilities can get 95% of the way toward full compliance by 2025. While existing efficiency technologies may be tapped out or subsumed by codes or standards, new technologies will become available and price relationships will change. FirstEnergy's argument, similar to DP&L's,[12] is entirely premature.

FirstEnergy turns R.C. Section 4928.66(A)(2)(c) inside out to argue that Ohio Adm. Code 4901:l-39-05(D) is inconsistent with it. R.C. Section 4928.66(A)(2)(c) actually states:

> Compliance with [the energy efficiency and demand reduction benchmarks] shall be measured by including the effects of all demand response programs for mercantile customers of the subject electric distribution utility and all such mercantile customer-sited energy efficiency and peak demand reduction program * * *.

FirstEnergy argues that this section's use of the phrase "all demand response programs" requires that the Commission recognize "all the effects of" demand response programs.

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[9] *See* Id.

[10] American Council for an Energy-Efficient Economy, *Shaping Ohio's Energy Future: Energy Efficiency Works*, No. E-092 (March 2009).

[11] Id. at 83.

[12] *See* DP&L Application for Rehearing at 21.

This analysis changes the position of the word "all," which changes the meaning of the sentence. FirstEnergy also conveniently disregards that customers would have brought equipment up to code without the presence of an energy efficiency program. Codes and standards practices are the minimum required. The effect of the S.B. 221 programs are savings beyond minimum requirements.[13]

FirstEnergy[14] and DP&L[15] complain that the Rule would require them to follow and oppose each and every standard that governments institute. The utilities, however, will largely not be responsible for the day-to-day implementation of programs: they are hiring consultants to do this. These consultants are knowledgeable about the trends affecting their preferred energy-savings technologies, and the Department of Energy and Environmental Protection Agency update appliance standards on predictable and public schedules.

To use the example of compact florescent lights: utilities should be planning for the lighting standard changes that will take place in 2011. If a standard truly comes out of nowhere—for example, in legislation—then the utility should still be able to count the "impacts of an approved program," but only for the life of the related equipment or assets. The Commission should make this determination on a case-by-case basis. If other American utilities or energy efficiency experts have anticipated the change, Ohio utilities shouldn't be allowed to play dumb. Under no circumstances should utilities plan programs to capture savings that have already been captured by codes and standards.

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[13] *See* FirstEnergy's argument referencing Revised Code Section 4928.66(A)(2)(c) is similar to the argument it and others (OEG Application for Rehearing 1) use to oppose Rule 4901:l-39-08(B)(4), which holds that mercantile project energy savings are calculated by comparing the project's energy use to code or standard practice.

[14] *See* FirstEnergy Application for Rehearing at 8.

[15] *See* DP&L Application for Rehearing at 22.

The only practical approach to addressing future requirements under other laws, regulations or codes is to allow utilities or suppliers to retain projects that have been lawfully committed to the benchmarks for the life of the related assets. But once another law is passed that requires more generic energy savings such as one that would permit only the sale of efficient light bulbs, the utility or supplier should no longer be permitted to commit a project related to efficient light bulbs to meet the compliance benchmark. This limitation should apply to all future laws, rules or codes that require energy savings of any persons or organizations beyond public utilities and energy suppliers. As with the Federal light bulb standards, new standards are likely to affect one specific product, but leave many other available for program implementation. The Federal light bulb standards only affect three basic configurations out of several dozens available on the market today.

But, if parallel legislation is enacted at a different political level with its own energy savings benchmark requirements of only public utilities and suppliers, public utilities and suppliers should be permitted to apply energy savings to both benchmarks. Federal legislators have proposed a provision to provide that energy savings projects intended to meet state energy savings benchmarks may be used to meet the federal energy savings benchmark requirements.

Arguments over Ohio Adm. Code 4901:1-39-08(B)(4) are similar. Energy savings that are achieved by the industry standard new equipment are energy savings that are already required under enacted laws with implementation schedules and are required of any person who purchases new equipment or buildings.[16] These energy savings are

[16] *See* Federal Appliance Standards and State Building Codes.

not the savings intended to be achieved through S.B. 221. Only S.B. 221 addresses the electric provider energy savings and provides for specific utility and supplier energy savings benchmarks. IEU,[17] FirstEnergy,[18] OEG,[19] OHA,[20] and OMA[21] argue otherwise.

The provisions of R.C. 4928.66 apply only to energy savings specific to electric providers. It does not address energy savings that are required of non-electric providers also. The reference to "new or existing" under R.C. 4928.66(A)(2)(c) applies only to demand-response and customer-sited energy efficiency that "the commission determines that exemption reasonably encourages such customers to commit those capabilities to those programs." If a mercantile customer is already required to purchase equipment or assets that meet certain energy-efficiency standards the exemption does not encourage the customer to commit the capability to the program. The exemption to not have to pay the energy efficiency/ peak reduction rider is not needed to encourage the mercantile customer to purchase energy efficient assets that are already required by law. S.B. 221 was never intended to replicate laws and energy efficiency requirements that are applied to not just energy providers but everyone.

[17] *See* IEU Application for Rehearing at 14-16.

[18] *See* FirstEnergy Application for Rehearing at 11-12.

[19] *See* OEG Application for Rehearing at 2.

[20] *See* OHA Application for Rehearing at 2-3.

[21] *See* OMA Application for Rehearing at 2-3.

2. The Commission should not permit *potential* peak demand reduction projects or programs to be counted towards compliance of the peak reduction benchmark requirements of R.C. 4928.66 but should require electric providers to include solely *actual* peak demand reductions.

The Commission appropriately limited Columbus Southern Power Company and Ohio Power Company (Collectively "AEP") to include only actual peak reductions in the AEP electric security plan case.[22] Accordingly, the Commission should extend the same decision in this case to include all utilities and electric suppliers.

FirstEnergy,[23] AEP,[24] and OEG[25] argued that they should be permitted to include a hypothetical amount of energy savings for which an interruptible program is "designed" to achieve. S.B. 221 did not include a policy under R.C. 4928.02 that would ensure discounted rates to large customers in exchange for the possibility that they may be interrupted. Rather S.B. 221(D) included a policy that is to:

> Encourage innovation and market access for cost-effective supply and demand-side retail electric service including, but not limited to, demand-side management, time-differentiated pricing, and implementation of advanced metering infrastructure.

The provisions of S.B. 221 were intended to create cost-effective peak reductions under the R.C. 4928.66 benchmarks. In other words, if a project does not actually reduce demand it was not designed to meet the demand reductions that are required under R.C. 4928.66.

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[22] *See* Case No. 08-917-EL-SSO, Opinion and Order (March 18, 2009) at 46.

[23] *See* FirstEnergy Application for Rehearing at 5-17.

[24] *See* AEP Application for Rehearing at 12.

[25] *See* OEG Application for Rehearing at 5

Utilities cannot know whether a program is correctly designed to meet demand reductions unless the program actually reduces demand. An electric provider cannot accurately design an interruptible program or project that will meet certain demand reduction goals because its customers may have alternative sources of power during interruptions. If the electric provider interrupts such a customer during peak, the customers may draw and consume electric generation from another source and thus the interruption will not produce the demand reduction the utility depended upon. For this reason, the electric providers should apply only actual peak reductions to meet its requirement.

In defending their attempt to count "designed" demand savings, the utilities toss a red herring: that requiring actual demand reductions would force utilities to curtail customers when not necessary from a system perspective simply to prove that demand reductions are actual. This is absurd. There are many types of programs that electric providers can rely on to reduce peak demand. For example, peak time rebates, time of use rates, including critical peak pricing. The solution to the utilities' supposed problem is obviously procuring additional cost-effective demand resources, not capriciously shutting down industrial facilities critical to Ohio's economy.

3. The Commission cannot verify energy savings as required under R.C. 4928.66(B) without an independent program evaluator that is not hired by the party whose energy savings are being verified.

R.C. 4901:1-39-01(L) requires that the independent program evaluator be hired by the Commission but paid by the utility. AEP[26] and DP&L[27] argue that this approach is

[26] *See* AEP Application for Rehearing at 9-10.

[27] *See* DP&L Application for Rehearing at 17-18.

inefficient. But the Commission is charged with verifying that energy savings and peak demand reductions are met. The program evaluator will likely have to make many evaluation decisions that will affect the degree to which an electric provider meets the benchmarks. For that reason, the program evaluator cannot be independent if hired and under the control of the parties that must meet the benchmarks.

4. The Commission should not adjust the baseline because if there is a compounding effect, the General Assembly intended it be based upon requirements in R.C.4928.66(A)(2)(a).

R.C. 4928.66(A)(2)(a) requires that:

> The baseline for energy savings under division (A)(1)(a) of this section shall be the average of the total kilowatt hours the electric distribution utility sold in the preceding three calendar years and the baseline for a peak demand reduction under division (A)(1)(b) of this section shall be the average peak demand on the utility in the preceding three calendar years, except that the commission may reduce either baseline to adjust for new economic growth in the utility's certified territory.

The Commission's prescription of a three-year period is necessary under the law. The law did not direct the Commission to make adjustments to the three-year baseline period. Therefore, adjustments to any compounding effects are patently inconsistent with the law. Additionally, load growth would offset any compounding affect. For those reasons, the Commission should disregard FirstEnergy's,[28] OEG's,[29] and DP&L's requests to adjust the baseline amounts for a compounding affect.

[28] *See* FirstEnergy Application for Rehearing at 14-15.

[29] *See* OEG Application for Rehearing at 5.

FirstEnergy[30] argued that the rolling average “results in an overall increase in compliance requirements.” This assumes no load growth during the compliance period, which is unlikely.

Contrary to FirstEnergy’s complaint that the Commission had no basis to state that the three-year rolling average ‘is the most reasonable interpretation consistent with the goals of S.B. 221,” it is the most legitimate interpretation. For example, R.C. 4928.66(A)(1)(a) states:

> **Beginning in 2009**, an electric distribution utility shall implement energy efficiency programs that achieve energy savings equivalent to at least three-tenths of one per cent of the total, annual average, and normalized kilowatt-hour sales of the electric distribution utility during the preceding three calendar years to customers in this state. (emphasis added)

This statutory language indicates the legislature realized that establishing a baseline against which energy savings and demand reductions could be measured was a continuous, ongoing process rather than a one-time calculation that would be relied upon throughout the period of the energy efficiency and demand reduction programs. If the legislature wished to base the targets on 2006-2008 kilowatt-hour sales, they could easily have substituted “2006-2008” for “the preceding three calendar years” in the above-referenced section of S.B. 221. Accordingly the Commission should not revise Ohio Adm. Code 4901:1-39-01(C).

[30] FirstEnergy Application for Rehearing at 14.

5. The Commission can confirm energy savings and peak reduction amounts only by requiring electric providers and exempted mercantile customers to provide all information needed for a proper evaluation especially if the Commission perceives that it might adjust baselines or amend benchmarks under R.C. 4928.66(A)(2)(b).

The Commission stated that it might adjust baselines when requested by an electric utility upon the filing of its baseline report.[31] Also R.C. 4928.66(A)(2)(b) allows the Commission to amend benchmarks if "the commission determines that the amendment is necessary because the utility cannot reasonably achieve the benchmarks due to * * * reasons beyond its reasonable control."

In order for the Commission to do this, the Commission must not simply look at information about energy efficiency and peak demand programs the electric provider is relying upon but also about programs that the electric provider chose not to rely upon. For that reason, the Commission should require electric providers to include in their reports measures considered but not selected despite AEP's[32] complaint. For similar reasons, the Commission should require mercantile customers to submit all the information required under the rules.

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[31] *See* Opinion &Order (April 15, 2009) at 16.

[32] *See* AEP Application for Rehearing at 8-9.

6. The Commission should require mercantile customers to file all the information currently required by Ohio Adm. Code 4901:1-39-08 if mercantile customers are to be granted an exemption from the energy efficiency recovery mechanisms of the utilities.

Kroger[33] argues that it should not have to file its communication procedures and intervals with the utility, baseline information, energy saved by project, or energy savings or peak reductions put into place before 2009. Concerns about misinterpretations of metrics are not a problem if the requirements of R.C. 4928.66(A)(2)(c) are met:

> The baseline also shall be normalized for changes in numbers of customers, sales, weather, peak demand, and other appropriate factors so that the compliance measurement is not unduly influenced by factors outside the control of the electric distribution utility.

Other difficulties with measurements can be clarified by submitting additional explanatory information. Concerns about vague requirements can be clarified through process. Concerns about regulatory costs must be balanced against the cost of no exemption.

In any case, the information required under the rule is necessary for the Commission to accurately confirm energy savings and peak reductions claimed by the mercantile customers. The Commission cannot confirm the baseline as required under R.C. 4928.66(A)(2)(c) without all the information required under Ohio Adm. Code 4901:1-39-08.

[33] *See* Kroger Application for Rehearing at 12-13.

7. The Commission should retain its ability to adjust the baseline to account for negative economic growth.

FirstEnergy[34] argues wrongly that the Commission has no basis in law to adjust the baseline in periods of negative economic growth. The Commission has authority under its general supervisory authority, R.C. 4905.06. And the Commission should use that authority to adjust the baseline under circumstances of negative economic growth.

FirstEnergy[35] argues that a requirement that the utility adjust its baseline during an economic downturn would increase costs to customers at the worst possible time. This is false, and indicates the extent to which FirstEnergy still does not understand the nature of cost-effective energy efficiency. Energy efficiency programs approved by the Commission will have passed the TRC test: that is, benefits will exceed costs. Requiring additional energy efficiency in a downturn will help consumers by lowering energy bills and creating jobs. The U.S. Congress recognizes this; the American Recovery and Reinvestment Act contains billions of dollars of investments in energy efficiency. Adjusting the baseline in times of economic downturn is a prudent, compassionate response to the needs of customers.

[34] *See* FirstEnergy Application for Rehearing at 12-13.

[35] *See* Id. at 13.

B. The Applications for Rehearing Failed to Establish that the Commission's Order Approving rules for the Alternative Energy Portfolio Standards (Ohio Adm. Code Chapter 4901:1-40) were Unreasonable or Unlawful.

1. The Undersigned Members of OCEA agree with the Commission modifications to the definition of "deliverable into the State" that require a demonstration that the power can flow into the state.

Various Commenters[36] urged the Commission to modify its definition of "deliverable into the state"[37] to include any generation in the MISO and PJM footprints provided an available transmission path can be demonstrated. The undersigned members of OCEA oppose this modification and appreciate that the Commission declined to make this change to Ohio Adm. Code 4901:1-40-01(I). Such an expansion would be overly broad, incorporating nearly half of the United States and part of Canada and stretch the definition of "deliverable" beyond a reasonable definition.

In addition, the Commission did clarify the definition in the following respects:

a. signed contracts for power are not required; and

b. demonstration of delivery via a power flow study and/or deliverability study should be necessary.

The undersigned members of OCEA support the Commissions' clarification that there should be a demonstration that the power can actually flow into the state. This satisfies the requirement that it be "deliverable into the state," and clarifies how this can be established.

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[36] *See* FirstEnergy Application for Rehearing at 18; Duke Application for Rehearing at 7; and DP&L Application for Rehearing at 26; and AEP Application for rehearing at 19.

[37] *See* Opinion and Order at 27, 28 (April 15, 2009).

2. The Applications for Rehearing failed to establish that the adopted definition of "double counting" (Ohio Adm. Code 4901:1-40-01(M)) is unlawful or unreasonable.

AEP,[38] FirstEnergy,[39] and Duke[40] propose that a single resource, such as a solar panel, be counted towards both the 22% energy efficiency mandate and the 25% renewable energy mandate. AEP, FirstEnergy, and Duke argue that there is no statutory authority for the PUCO's limitation. These companies fail to recognize that the Commission has very broad authority to establish rules: "the public utilities commission has general supervision over all public utilities within its jurisdiction as defined in section 4905.05"[41]. Under R.C. 4905.06 the Commission has the authority to "prescribe any rule or order that the commission finds necessary for protection of the public safety." In addition, AEP, FirstEnergy, and Duke fail to acknowledge that there is also no statutory authority permitting double counting. In establishing these mandates, the General Assembly could easily have explained that double-counting was permitted. It did not. The undersigned members of OCEA oppose double counting, and it is inconsistent with the law.

3. The requirement that the annual renewable benchmarks are based on Ohio Resources is consistent with the statutory requirements of R.C. 4928.64(B)(3) and the economic development policies of the State of Ohio.

AEP asserts that the Ohio Adm. Code 4901:1-40-03(A)(2)(a) is unreasonable because it requires half of the annual renewable energy resources to be met through

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[38] *See* AEP Application for Rehearing at 19.

[39] *See* FirstEnergy Application for Rehearing at 20.

[40] *See* Duke Application for Rehearing at 7.

[41] R.C. 4905.06.

electricity generated by facilities in Ohio.[42] AEP asserts that the Commission's interpretation of R.C. 4928.64(B)(3) is unreasonable.[43] The undersigned members of OCEA support the Commission's interpretation of R.C. 4928.64(B)(3) and the renewable resource requirement and the recognition that in order to prevent a significant and immediate wealth transfer from Ohio consumers to renewable resource rich states, the state must support in-state development of renewable resources. In addition, the approved rule supports the governor's economic development initiative, and encourages long-term renewable resource development in coal-dependent Ohio – right now. In order to mitigate the economic impacts that will face Ohio consumers in light of pending carbon legislation, an in-state requirement starting in 2009 is a long-term necessity.

Finally, as parties move forward implementing, monitoring, or regulating compliance with the State's long-term alternative energy resource mandates it is important that the statutes and rules maintain a consistent framework. The requirement in Ohio Adm. Code 4901:1-40-03(A)(2)(a) that half of the *annual* renewable energy resources shall be met through electricity generated by facilities within Ohio does just that. The annual Ohio mandate maintains the framework of the annual benchmarks required by R.C. 4928.64(B)(3) by simply mandating that half of the annual requirement be accomplished through electricity generated by facilities within Ohio. Without this consistent framework, both monitoring and regulating compliance with the Ohio mandate would be illusory.

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[42] *See* AEP Application for Rehearing at 19.

[43] *See* Id.

4. The Applications for Rehearing incorrectly assert that Ohio Revised Code 4928.64 establishes only one 3% cost cap rather than two and therefore the Commission should not make any changes to its approved definition in Ohio Adm. Code 4901:1-40-07.

The undersigned members of OCEA agree with the Commission's conclusion that R.C. 4928.64 (B)(1) or (2) establishes two 3% cost caps and not one 3% cost cap.[44] A simple reading of the statute with the disjunctive "or" separating section B(1) and (2) supports the Commissions' determination. The undersigned members of OCEA also agree with the Commission's rejection of Duke's argument[45] that the comparison cost should be calculated by including capacity costs and then taking the utilities' average portfolio cost. Similarly FirstEnergy is wrong that the cost should be measured by its cost instead of the market costs. The undersigned members of OCEA disagree with AEP[46] and DP&L[47] that there is only one cost cap provided in the statute. The undersigned members of OCEA assert that the Commission is correct that the cost of compliance of benchmarks will be based upon the market value of the REC.

[44] *See* Opinion and Order (April 15, 2009) at 36.

[45] *See* Duke Application for Rehearing at 9.

[46] *See* AEP Application for Rehearing at 25.

[47] *See* DP&L Application for Rehearing at 30.

C. The Applications for Rehearing Failed to Establish that the Commission's Order Approving Rules for the Filing of Long-Term Forecast Reports and Integrated Resource Reports by Electric Utilities Serving over Fifteen Thousand Customers in the State (Ohio Adm. Code Chapter 4901:5) are Unreasonable or Unlawful.

1. The Commission has broad powers to promulgate rules regarding the submittal of Long-Term Forecast Reports and Integrated Resource Reports.

Three electric utilities have argued in their applications for rehearing that certain newly promulgated rules in Ohio Adm. Code Chapter 4901:5 were unreasonable or unlawful. AEP's Application for Rehearing contends that R.C. 4935.04(C) "does not provide the legal authority for compelling the annual filing of an IRP [Integrated Resource Plan] [pursuant to Ohio Adm. Code 4901:5-5-06], particularly one as detailed as the commission has proposed,"[48] and suggests that the Commission should refrain from requiring that the IRP be filed annually.[49] Instead, AEP asserts, the IRP should be "submitted to the Commission for its Staff's analysis and recommendations."[50] AEP suggests that this "submittal" process will avoid a "continuous" litigation process.[51] AEP contends that this litigation will duplicate several other formal proceedings involving information required to be in the IRP.[52]

FirstEnergy contends that "[i]n adopting Rule 4901:5-5-06, the Commission unreasonably and unlawfully exceeded its statutory authority and imposed requirements

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[48] AEP Application for Rehearing at 26.

[49] *See* Id at 28.

[50] Id.

[51] Id.

[52] *See* Id. at 29.

not supported by law and that conflict with R.C. 4935.04 by mandating that electric utilities must file an annual integrated resource plan as part of a long term forecast report."[53] FirstEnergy further states, "Neither S.B. 221 nor R.C. 4935.04 granted the Commission the authority to reinstate IRP rules" that FirstEnergy argues were repealed by Senate Bill 3.[54] In support, FirstEnergy asserts that "Senate Bill 3 expressly eliminated those portions of [R.C.] Chapter 4935 dealing with resource planning and generation" when it "specifically deleted the language 'an electric generating plant and associated facilities designed for, or capable of, operation at a capacity of fifty megawatts or more from the definition of 'major utility facility' in R.C. 4935.04(A)(1)(a).'"[55]

FirstEnergy Solutions Associates,[56] ("FirstEnergy Solutions") argues that 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 "until such time as the fatal flaws and language inconsistencies found therein are cured."[57] Similar to FirstEnergy and AEP, FirstEnergy Solutions contends that "there is no basis in the S.B. 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

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[53] FirstEnergy Application for Rehearing at 30.

[54] FirstEnergy Application for Rehearing at 30-31.

[55] Id. at 31.

[56] FirstEnergy Service Company filed a pleading on behalf of the "FirstEnergy Associates." A group that includes FirstEnergy Solutions Corp., FirstEnergy Generation Corp., FirstEnergy Nuclear Generation Corp., and FirstEnergy Nuclear Operating Company. (May 15, 2009) at 1.

[57] FirstEnergy Solutions Application for Rehearing at Heading to Section 2.

Code[,]"[58] and that "SB 221 scarcely mentions resource planning at all."[59] FirstEnergy Solutions further argues that there is "no basis in any statute" for the requirement of Ohio Adm. Code 4901:5-1-02 that a "person" who furnishes electricity to more than fifteen thousand customers within the state must file an annual long-term forecast report.[60]

Contrary to the arguments of FirstEnergy, AEP and FirstEnergy Solutions discussed above, the statutory basis for IRP is provided in R.C. 4935.04(C), which states:

> **Each person** owning or operating a major utility facility within this state, or **furnishing** gas or natural gas or **electricity directly to more than fifteen thousand customers within this state annually** shall furnish a report to the commission for its review. The report shall be termed the long-term forecast report and shall contain * * *. (Emphasis added.)

Therefore, any person who furnishes electricity to more than fifteen thousand customers within this state annually must furnish a long-term forecast report to the Commission. Each of the utilities arguing in opposition to the newly promulgated rules in Ohio Adm. Code Chapter 4901:5 meets these criteria.

FirstEnergy Solutions contends that R.C. 4935.04(C) is limited only to "persons that own or operate electric transmission lines and associated facilities that are rated at or above 125 kV."[61] However, the statute applies to persons owning a major facility, such as FirstEnergy Solutions describes, **or** persons furnishing electricity directly to more than fifteen thousand customers in the state.

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[58] Id..

[59] Id.

[60] Id.

[61] FirstEnergy Solutions Application for Rehearing at Section 2.

Under R.C. 4935.04(C), even "person[s] not owning or operating a major utility facility in this state and serving fifteen thousand or fewer * * * electric customers within the state shall furnish such information as the commission requires."[62] Thus, the Commission has clear authority to require persons owning or operating a major utility facility or furnishing natural gas to more than fifteen thousand customers in the state to comply with the Long-term Forecast Report ("LTFR") requirements as issued. Accordingly, Ohio Adm. Code 4901:5-1-02, which mirrors R.C. 4935.04(C), is lawful and reasonable.

FirstEnergy points to "S.B. 3's modification to R.C. 4935.04 wherein the Commission's LTFR rulemaking authority was changed from establishing criteria for evaluating the long-term forecast needs for "electric power," to evaluating the needs for "electric transmission service," as proof that the Ohio Legislature meant to repeal the LTFR requirements as to electric generating utilities.[63] This argument ignores the plain language of R.C. 4935.04 as discussed above.

FirstEnergy also contends:

> The Commission's rulemaking authority as it relates to generation facilities and resources, was expressly deleted by S.B. 3. And, * * * the Commission is precluded from reinstating such authority through its rulemaking process. Rule 4901:5-5-06 [regarding "Integrated resource plans for electric utilities"] should be deleted in its entirety from the Commission's adopted rules[64]

This argument ignores the PUCO's broad statutory power to promulgate rules under R.C. 111.15, the general supervision power over all public utilities pursuant to R.C. 4905.06,

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[62] R.C. 4935.04(C).

[63] FirstEnergy Application for Rehearing, at 31.

[64] Id.

and the PUCO's authority to promulgate rules to implement S.B. 221 under R.C. 4928.06(A), which states:

> Beginning on the starting date of competitive retail electric service, the public utilities commission shall ensure that the policy specified in Section 4928.02 of the Revised Code is effectuated. To the extent necessary, the commission shall adopt rules to carry out this chapter.[65]

The policy justification for resource planning is explained in the Commission's April 15, 2009 Opinion and Order, which states:

> * * * [W]e are now convinced that each electric utility should include a resource plan with its annual LTFR in order for this Commission to make informed decisions dependent upon the status of Ohio's energy industries and markets.

While the ESP or the market-based option are the two methods established by S.B. 221 for the Commission to set generation rates, the LTFR will be the tool used by the Commission to assess the reasonableness of the demand and supply forecasts based on anticipated population and economic growth in the state in accordance with Section 4935.04(F)(5), Revised Code.

The undersigned members of OCEA recommend that a resource plan be included with all annual forecast reports, and we will adopt this suggestion. Although the adopted rules did not have an annual requirement, it is essential that each electric utility file an Integrated Resource Plan ("IRP") with its annual forecast report in order for this Commission to develop an accurate view of

[65] R.C. 4928.06(A).

Ohio's energy industries and markets, particularly in light of the efficiency and alternative energy requirements imposed by S.B. 221.[66]

2. Integrated Resource Plan requirements for electric utilities under Ohio Adm. Code Rule 4901:5-5-06 are critical to the Commission's function under S.B. 221.

Arguments that the Commission lacks authority to require that electric utilities file Integrated Resource Plans (IRP) with their annual forecasts[67] ignore both the overall policy and specific provisions of S.B. 221. IRP is the critical, and only, context in which the Commission can determine whether the actions of the utilities under Revised Code sections 4928.64 and 4928.66 will ensure the "availability to consumers of adequate, reliable, safe, efficient, nondiscriminatory and reasonably priced electric service."[68]

3. The advanced energy resource and energy efficiency requirements of S.B. 221 are minimums.

Both sections 4928.64 and 4928.66 of the Revised Code are clear that the requirements established therein are minimum requirements an electric utility must meet. R.C. 4928.64(B) states that "nothing in the section precludes a utility or company from providing a greater percentage" of energy from advanced energy resources.[69] Section 4924.66(A) expresses its energy efficiency requirement in terms of "at least" the amount stated.[70]

To accept FirstEnergy's argument that IRPs are unnecessary because S.B. 221 states what is required and when it is required, would imply that one read these phrases

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[66] *See* Opinion and Order (April 15, 2009) at 42-43.

[67] *See* FirstEnergy Application for Rehearing at 30, AEP Application for Rehearing at 26.

[68] R.C. 4928.02(A).

[69] R.C. 4928.64(B).

[70] R.C. 4928.66(A).

out of the law. S.B. 221 allows for more advanced energy resources and more cost-effective energy efficiency because both may be the only path to ensure a critical component of the overall policy of S.B. 221: reasonably priced electric service.

The substitution of cost-effective energy efficiency for retail electric service is, by definition, most cost-effective for consumers. Similarly, advanced energy resources may, within the next decades, offer consumers the highest likelihood of long-term stable reasonably priced electricity. IRP is the only process and document from which the Commission can fulfill this policy directive of S.B. 221.

4. IRPs perform important functions in assessing the availability of and planning to acquire all cost-effective energy efficiency.

The Commission's Opinion and Order explains that it will rely on the annual IRP filing to develop an accurate view of industries and markets, assessing changes in how Ohioans produce and use, or do not use, energy.[71] This view is a necessary context for evaluating utility energy efficiency programs and plans, and the Commission is correct to require that utilities maintain a fresh and current perspective on it. Driven by powerful demographic and world market forces, the coming years could bring many changes in how people, in their lives and livelihoods, apply energy. Annual IRPs will be an indispensable window on these changes. Moreover, IRPs will provide the foundation from which the utilities and Commission maintain a current view of what is cost-effective. Cost-effectiveness calculations require projecting the costs of the energy that consumers will apply to do work under scenarios of greater and lesser efficiency. These are not short-term projections, because consumer energy application decisions – such as

[71] *See* Opinion and Order (April 15, 2009) at 43.

the purchase of major HVAC equipment, design of structures, or development of industrial processes – are not short-term decisions. Cost-effectiveness requires the long-term data, assumptions, and analysis that an IRP provides.

5. The Amendments to Ohio Adm. Chapters 4901:5-1, 4901:5-3 and 4901:5-5 are reasonable, necessary and proper.

FirstEnergy Solutions argues that withdrawal of the amendments to Ohio Adm. Chapters 4901:5-1, 4901:5-3 and 4901:5-5 is compelled by "contradictions and drafting errors of such magnitude as to render parts of the rules completely unreasonable"[72] and "of such magnitude as to support a finding that the Commission acted arbitrarily and capriciously in enacting the rules."[73] The undersigned members of OCEA do not share FirstEnergy Solution's view and support the rules as issued by the PUCO.

6. The definition of "substantial change" set forth in Ohio Adm. Code 4901:5-1-01(L) is reasonable and lawful.

AEP contends that the definition of "substantial change" in Ohio Adm. Code 4901:5-1-01(L) refers to energy "delivery," whereas the definition of "substantial change" in R.C. 4935.04(D)(3)(c)(i) refers to energy "consumption."[74] AEP proposes that using the statutory language will avoid confusion.

This proposal should be rejected. The undersigned members of OCEA support the annual review requirements as adopted by the PUCO.

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[72] FirstEnergy Solutions Application for Rehearing at Section 2.

[73] Id.

[74] AEP Application for Rehearing at 24.

III. CONCLUSION

The undersigned members of OCEA request that the Commission deny portions of the Applications for Rehearing as stated above. The Commission should, however, make changes to the rules stated in the April 15, 2009 Order as set out in OCEA's Application for Rehearing.

Respectfully submitted,

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I hereby certify that the foregoing Memorandum Contra Applications for Rehearing has been served via First Class U.S. Mail, postage prepaid, to the following persons this 27th day of May, 2009.

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