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**

APPLICATION OF OHIO EDISON COMPANY,
THE CLEVELAND ELECTRIC ILLUMINATING COMPANY, AND
THE TOLEDO EDISON COMPANY FOR REHEARING

Pursuant to R.C. § 4903.10 and Rule 4901-1-35, O.A.C., Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company (collectively, the "Companies") hereby apply for rehearing of the Commission's April 15, 2009 Opinion and Order ("Order") issued in the above-captioned case, because it is unreasonable and unlawful in the following respects:

1. Through the adoption of Rule 4901:1-39-05(D), the Order unreasonably and unlawfully excludes energy related projects put in place to comply with performance standards established by law, regulation or building code.

2. Through the adoption of Rule 4901:1-39-08(B)(4) the Order unreasonably and unlawfully excludes the amount of energy savings and peak demand reduction arising from mercantile customer on-site generation projects.

3. Through the adoption of Rule 4901:1-39-08(B)(4), the Order unreasonably and unlawfully understates the effects of an energy related project or program by requiring that such effects be determined based on a comparison to industry standard new equipment or practices, rather than the actual situation existing prior to the implementation of the project or program.

4. The Commission unreasonably and unlawfully exceeded its administrative authority by requiring adjustments to baseline calculations for energy efficiency and peak demand reductions during "negative economic growth."

5. The Commission unreasonably and unlawfully exceeded its statutory authority by requiring the use of a three year rolling average that does not factor out a compounding effect that increases compliance requirements beyond those contemplated in the law.

6. The Companies request clarification on the requirements for compliance with the demand reduction benchmarks set forth in R.C. 4928.66(A)(1)(b).

7. The Order unreasonably and unlawfully fails to recognize the deliverability of energy transmitted through regional transmission organizations when defining energy "deliverable into this state" as used in Rules 4901:1-40-01(I) and 4901:1-40-04(D).

8. The Commission unreasonably and unlawfully exceeded its statutory authority and imposed standards not supported by law by establishing a definition of "double counting" in Rule 4901:1-40-01(M) that unreasonably precludes the use of a single resource to meet multiple energy related benchmarks set forth in S.B. 221.

9. The Commission unreasonably and unlawfully exceeded its statutory authority and imposed standards not supported by law by establishing a burdensome requirement in Rule 4901:1-40-03(C) for filing a 10-year compliance plan that will be highly speculative and provide no public benefit.

10. The Commission unreasonably and unlawfully exceeded its statutory authority and imposed standards not supported by law by establishing a definition of "qualified resources" in Rule 4901:1-40-04(A)(8) that improperly: (a) limits the use of storage facilities to satisfy the statutory requirements and (b) imposes geographic and temporal limitations on eligible RECs that are arbitrary and contrary to law.

11. In adopting Rule 4901:1-40-07, the Commission unreasonably and unlawfully exceeded its statutory authority and imposed standards not supported by law by: (a) establishing a cost cap that directly conflicts with R.C. 4928.64(C)(3); and (b) reserving for the Commission the authority to impose a "catch up" upon application of the cost cap that is not authorized by R.C. 4928.64.

12. The Rules related to alternative energy resources unreasonably and unlawfully fail to reflect the amendments to R.C. 4928.64 and R.C. 4928.65, as signed into law by the Governor on April 1, 2009.

13. In adopting Rule 4901:5-5-06, the Commission unreasonably and unlawfully exceeded its statutory authority and imposed requirements 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.

14. Rule 4901:1-39-07(A) unreasonably and unlawfully ties recovery of properly incurred cost to the approval of an EDU's portfolio plan.

15. It is unreasonable and unlawful for the Commission to establish a process that places the EDU at risk of penalties for non-compliance in 2009 when the Commission has yet to provide final rules as guidance for such compliance as of the date of this filing.

16. The Commission unreasonably and unlawfully created the definition of "substantial change" in Rule 4901:5-1-01(L) that is inconsistent with that included in the statutory definition for the same term as set forth in R.C. 4935.04(D)(3)(c).

17. The Companies seek clarification on the use of the word "Plan" in Rule 4901:5-1-01(M), believing that the word should be "Plant."

18. The Companies seek clarification on the reference to Rule 4901:1-39-09 in Rule 4901:1-39-07(A)(2), believing that such reference should be to Rule 4901:1-39-08.

19. The Companies seek clarification on the reference to Rule 4901:1-39-08 included in Rule 4901:1-39-08(B), believing that such reference should be to Rule 4901:1-390-07.

For these reasons, and as set forth in greater detail in the Companies' Memorandum in Support, which is attached hereto and incorporated herein by reference, the Companies respectfully request that the Commission grant a rehearing and issue an Entry on Rehearng consistent with this filing.

Respectfully submitted,

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ATTORNEYS FOR APPLICANTS, OHIO EDISON COMPANY, THE CLEVELAND ELECTRIC ILLUMINATING COMPANY, AND THE TOLEDO EDISON COMPANY

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 IN SUPPORT OF THE APPLICATION FOR REHEARING OF OHIO EDISON COMPANY, THE CLEVELAND ELECTRIC ILLUMINATING COMPANY, AND THE TOLEDO EDISON COMPANY

I. INTRODUCTION

The Commission's April 15, 2009 Opinion and Order ("Order") oversteps in many material respects the bounds of Am. Sub. S.B. 221 ("S.B. 221"). While Ohio Edison Company ("Ohio Edison"), The Cleveland Electric Illuminating Company ("CEI") and The Toledo Edison Company ("Toledo Edison") (collectively, the "Companies") recognize the time pressures placed on the Commission to promulgate rules that carry out the energy efficiency, peak demand reduction and alternative energy mandates of S.B. 221, the unlawful and unreasonable provisions of the Order warrant the Commission's further attention and correction. Furthermore, these "oversteps" by the Commission will result in costs of compliance higher than otherwise necessary to meet the statutory requirements, thus contradicting, and therefore violating, the stated policy of S.B. 221 to "[e]nsure the availability to consumers of adequate, reliable, safe, efficient, nondiscriminatory and *reasonably priced electric service*." R.C. 4928.02(A) (emphasis added.) Thus, the Companies respectfully request a rehearing on the issues discussed herein so as to bring the Rules into compliance with the plain language of S.B. 221 and create a workable framework through which compliance can be achieved in a reasonable and cost effective manner.

II. ARGUMENTS

Throughout both the era of regulation and the era of electric industry restructuring, the Commission has always attempted to develop least-cost, practical solutions to the issues faced by the electric industry and its customers. Without explanation, it appears, based on the rules adopted in this proceeding ("Rules"), that the Commission has done a total about face. A basic theme runs throughout the Rules: when faced with a choice, the Commission, in almost every instance, chose the option that makes it not only more difficult but also more costly for Ohio's electric distribution utilities ("EDUs") to comply with S.B. 221's statutory benchmarks for energy efficiency, demand reduction and alternative energy resources. As a result, the Commission has created obstacles that will guarantee either non-compliance or compliance that Ohioans cannot afford. In fact, these obstacles could increase the cost of compliance by hundreds of millions of dollars over what was anticipated (or necessary) to meet the law's stated requirements, often with very little if any incremental benefit over the foregone lesser cost option. With each new requirement or exception added into the Rules, the Commission has whittled away the pool of projects and programs that will qualify for compliance under S.B. 221, thus either creating the need to substitute new, more costly projects for those project previously approved that no longer comply, or forcing the implementation of projects at a greater cost than otherwise would be necessary. Pursuant to statute and Commission-approved rate plans, the increased costs associated with these projects will be passed along directly to customers. While costs unnecessarily incurred should never be acceptable, there is certainly no place for them during the current economic crisis faced by Ohioans.

Through S.B. 221, the Ohio General Assembly addressed complex issues with carefully crafted language that was designed to help Ohioans more efficiently and effectively manage their electricity consumption, portions of which, when practical, should be generated through alternative energy resources. At the cornerstone of this vision is a policy that "[e]nsures [consumers] the availability … of adequate, reliable, safe, efficient, nondiscriminatory, *and reasonably priced retail electric service*." R.C. 4928.02(A) (emphasis added.) Clearly many of the Rules as now crafted have lost sight of this last criterion. Moreover, many of these same Rules are unlawful in that they extend beyond what the law permits.

The Commission is a creature of statute and may exercise only that jurisdiction conferred upon it by the General Assembly. *Columbus Southern Power Co. v PUCO*, 67 Ohio St. 3d 535, 537 (1993); *Tongren v. PUCO*, 85 Ohio St. 3d 87, 88 (1999). As an administrative agency, the Commission possesses only such rule-making powers as are delegated by statute. *Kelly v. Accountancy Board of Ohio*, 88 Ohio App.3d 453, 458 (1993). Any parts of Commission rules that conflict with existing statutes are invalid, and hence must fail. *Id*; *Athens Home Telephone Co. v. Peck*, 158 Ohio St. 557, 574 (1953).

The Commission's authority to implement the Rules stems from the enabling statutes set forth in S.B. 221. As discussed below, in numerous instances, the Commission, by what amounts to a substitution of itself for the legislature, has adopted Rules that are in conflict with S.B. 221. Accordingly, in each such instance, the Rules must either be modified or eliminated so as to remain consistent with the law as enacted by Ohio's lawmakers.

A. New Chapter 4901:1-39

1. Through the adoption of Rule 4901:1-39-05(D), the Order unreasonably and unlawfully excludes energy-related projects put in place to comply with performance standards established by law, regulation or building code.

Rule 4901:1-39-05(D) 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.

As currently worded, Rule 4901:1-39-05(D) virtually guarantees non-compliance with energy savings benchmarks and peak load reduction requirements. Given concerns surrounding the environment and the nation's dependence on foreign oil, it is certainly expected that new energy efficiency and consumption mandates will be passed in the next several years. This would occur over the same time frame in which statutory mandates become more stringent. As such mandates become effective, a greater number of programs and projects, whether or not already implemented, will be disqualified for compliance with S.B. 221 benchmarks.[1]

Rule 4901:1-39-05(D) serves no useful purpose. Not only does it reduce the number of projects that can be used to qualify for inclusion under S.B. 221, but it also creates a larger deficit for future compliance that must be overcome with new projects and programs. Surely this could not have been the intent of the legislature when it

[1] The American Council for an Energy-Efficient Economy, a nonprofit, 501(c)(3) organization dedicated to advancing energy efficiency as a means of promoting economic prosperity, energy security, and environmental protection, recently issued a report entitled Shaping Ohio's Energy Future: Energy Efficiency Works (ACEEE Report Number E092, March 2009). Analysis of that report shows that even this advocacy group needed to include the energy efficiency savings attained through implementation of performance standards established by law, regulation or building code in order to achieve Ohio's statutory mandates.

enacted S.B. 221. If Rule 4901:1-39-05(D) is not removed, compliance, assuming that it even remains feasible, will become more costly.

As an example, in its Order, the Commission indicated that compact lighting program results, which would today count towards compliance, will not count after the Energy Independence and Security Act of 2007 becomes effective. (Order, p. 20.) Carrying this directive to its logical conclusion, an EDU that implements a program for early replacement of light bulbs that will have actual, measurable energy savings effects well into the future, will not be permitted to continue to include these actual energy savings results once a new energy standard becomes effective. As a preliminary matter, this rule is impractical and would require an EDU to track each and every building code, statute and regulation on the federal, state, and political-subdivision levels within the EDU's certified territory. Moreover, it creates a presently unknown and unknowable compliance deficit that, as the years go by, will become more difficult to overcome as more and more projects, both past and future, get eliminated from consideration. As a result, customers would be responsible not only for the costs associated with previously approved and implemented programs, even though the results of such programs would no longer count towards compliance as a result of the supervening energy standards, but also for the costs of new programs needed in order to overcome the deficit -- assuming new programs could be developed and implemented faster than new standards are mandated.

In its Order, the Commission saw "no reason to credit electric utilities for benefits of measures that would have happened regardless of their efforts." (Order, p. 20.) [2] The reason is simple – it is good public policy that avoids unnecessary barriers to compliance and minimizes electric bills.

In addition to the foregoing public policy concerns, the Rule is inconsistent with the law and must therefore be modified or eliminated. Revised Code Section 4928.66(A)(2)(c) 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 programs*…. [Emphasis added.]

In light of the foregoing, the legislature made it clear that *all* mercantile customer projects (as opposed to all mercantile projects except for those excluded by the Commission) may be included as part of a utility's compliance strategy. Moreover, R.C. 4928.66(A)(2)(d) describes the types of programs that an EDC may include as part of its compliance plan, stating, " Programs implemented by a utility may include demand response programs, customer sited programs, and transmission and distribution infrastructure improvements that reduce line losses.

Nowhere in either of the above-referenced statutory provisions (or elsewhere in Ohio law for that matter) are there exclusions for projects implemented "to comply with

[2] Running throughout the Rules is a sub-theme in which the Commission views the mandatory benchmarks as an end unto themselves. The benchmarks with which the EDUs must comply are simply one of the many tools the General Assembly put in place to accomplish its greater goal of a more energy efficient, consumption conscious, environmentally friendly Ohio. These tools are not mutually exclusive and should be embraced for what they are – a comprehensive strategy to make the General Assembly's vision a reality. Neither the EDU nor its customers should be penalized simply because Ohio's legislature or some other governmental body sees the need for additional energy mandates in order to accomplish its objectives. Indeed, the Commission should encourage these types of cost effective programs that achieve compliance on multiple fronts.

energy performance standards set by law or regulation … or an applicable building code", and the Commission is without the authority to, in essence, amend the statute in order to create them.[3] Accordingly, because Rule 4901:1-39-08(D) is unlawful, unreasonable, excessively costly and virtually impossible to administer, it should be removed in its entirety.

2. Through the adoption of Rule 4901:1-39-08(B)(4) the Order unreasonably and unlawfully excludes the amount of energy savings and peak demand reduction arising from mercantile customer on-site generation projects.

Rule 4901:1-39-08(B)(4) expressly excludes mercantile customer's on-site generation projects from inclusion in an EDU's compliance strategy:

> Kilowatt hours of energy and kilowatts of capacity provided by electric generation sited on a mercantile customer's side of an electric utility's meter shall not be considered energy savings or reductions in peak demand.

Without explanation, the Commission, yet again, through this one provision, eliminated a source for valuable programs that provide cost effective demand reduction and energy efficiency opportunities that will now have to be replaced with new programs at an additional cost to customers. For all of the reasons previously discussed, this Rule as proposed is contrary to public policy and, as discussed below is also inconsistent with the express provisions set forth in the law.

R.C. 4928.66(A)(2)(c) 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

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[3] Inconsistencies between clear legislative intent and the Rules as adopted by the Commission do not stop here. Revised Code Section 4928.66(A)(1)(a) unequivocally mandates that an EDU "shall implement energy efficiency programs that achieve energy savings…." The legislature, whose role it is to write the laws, placed no limits on the types of projects that qualify for compliance with this statutory mandate. Therefore, the Commission, whose role it is to implement the laws *as passed*, is without the authority to add provisions that conflict with the law, regardless of its beliefs.

> distribution utility and *all* such mercantile *customer-sited energy efficiency and peak demand reduction programs*…. [Emphasis added.]

The legislature's use of the word "all" in the above provision clearly demonstrates its intent to broadly define the scope of projects that could be included within an EDU's compliance strategy. This is also consistent with R.C. 4928.66(A)(1)(a), which unequivocally, without limitation, mandates that an EDU "shall implement energy efficiency programs that achieve energy savings…." Because the legislature intended that *all* mercantile customer projects (rather than "all except customer-sited generation projects") qualify for purposes of meeting the statutory benchmarks, the Commission's exclusion of customer-sited generation projects is contrary to the plain meaning of RC 4928.66(A)(2)(c) and is, therefore, unlawful and unreasonable and must be removed from the Rules.

3. Through the adoption of Rule 4901:1-39-08(B)(4), the Order unreasonably and unlawfully understates the effects of an energy related project or program by requiring that such effects be determined based on a comparison to industry standard new equipment or practices, rather than the actual situation existing prior to the implementation of the project or program.

The Commission adopted Rule 4901:1-39-08(B)(4) which sets forth the method for determining energy savings:

> A mercantile customer's energy savings and peak-demand reductions shall be calculated by subtracting the energy [use] and peak demand associated with the customer's projects from the estimated energy use and peak demand that would have occurred *if the customer had used industry standard new equipment or practices* to perform the same functions in the industry in which the mercantile customer operates. [Emphasis added.]

Revised Code Section 4928.66(A)(2)(c) requires energy savings to be determined "by including **the effects** of all … programs." (Emphasis added.) The true effects of any program can only be determined by comparing *actual conditions* both before and after a project is implemented. This means that post project implementation results must be compared to the actual equipment replaced and/or the actual practices that were changed. Comparisons to industry standard new equipment that was never installed or practices that were never implemented does nothing more than understate the actual energy savings based on a hypothetical scenario. The use of hypothetical scenarios does not reflect the *effects of a program* and, accordingly, the Rule, as currently written, is contrary to law and must be modified[4]. The Commission should grant rehearing and modify Rule 4901:1-39-08(B)(4) so that energy savings is based on a comparison of actual conditions and consumption both before and after implementation of the project or program.

4. The Commission unreasonably and unlawfully exceeded its administrative authority by requiring adjustments to baseline calculations for energy efficiency and peak demand reductions during a "negative economic growth" period.

In its Order, the Commission acknowledged its authority to reduce both the economic efficiency and demand reduction benchmarks for "positive economic growth." However, it then went on to unlawfully expand its authority to include the ability to require adjustments to baselines based on "negative economic growth" as well. (Order, p. 18.) This is another example of the Commission unlawfully seeking to alter the plain meaning of the statute, thus overriding legislative intent and usurping the legislature's authority, and in the process, unilaterally increasing statutorily mandated percentage reduction targets and thrusting additional costs onto customers.

[4] Senate Bill 221 also requires energy savings reductions t o be based on annual average, and normalized kWh sales for the preceding 3 years. R.C. 4928.66(A)(1)(a). Clearly historic sales are based on actual consumption through equipment actually in place. This a further indication of the legislature's intent to calculate savings based on actual conditions, rather than industry standard equipment.

R.C. 4928.66(A)(2)(a) provides:

> 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.

Although the Commission is correct in noting its authority to reduce baselines for positive economic growth, a review of R.C. 4928.66(A)(2)(a) makes clear that its authority stops there. Nowhere in this Rule is the Commission authorized to adjust the baseline for negative economic growth. Thus, the Commission's expectation that baselines will be increased to reflect negative economic growth is an unlawful expansion of its statutory authority. Moreover, the purpose for the adjustment for economic growth does not exist during an economic downturn. As the Commission noted in its Order, "We expect that any baseline adjustments made to account for economic growth typically will be temporary, and will address circumstances in which unanticipated increases in the overall rate of growth *have made full compliance infeasible*." (Order, p. 18)(Italics added.) Presumably in an economic downturn, compliance is still feasible, thus requiring no adjustment to the baseline. And finally, a requirement that increases the baseline during an economic downturn would have the effect of requiring the EDU to over-comply with its otherwise required benchmarks, thus increasing costs to customers at a time when they can least afford them. It is absurd to think that the General Assembly intended such a result.

In light of the foregoing, requirements to increase the baseline during economic downturns is unreasonable, unlawful and contrary to public policy. Accordingly this requirement should be eliminated.

5. The Commission unreasonably and unlawfully exceeded its statutory authority by requiring the use of a three year rolling average that does not factor out a compounding effect that increases compliance requirements beyond those contemplated in the law.

On page 16 of its Order, the Commission addressed another issue dealing with the calculation of the baseline, finding "that the use of a 'rolling [three year] average' when determining the statutory baselines is the most reasonable interpretation, consistent with the goals of SB 221…." During the comment period, numerous parties submitted comments and reply comments addressing the issue of whether the use of a rolling average is appropriate. As the Commission noted in its Order (at page 16):

> The electric utilities argue that the use of a rolling average would result in a compounding effect which would, over time, make the targets impossible to achieve. DP&L provides an example that indicated that by year 2025, the effective savings requirement is closer to 39 percent rather than the 22.2 percent required by law. In the alternative, DP&L argues that the Commission could use a rolling three year period but make adjustments to eliminate the compounding effect.

Although the Commission acknowledged the above arguments, it never discussed their impact on the required level of compliance or any reason why these meritorious arguments should be ignored, instead simply finding that the use of a three year rolling average "is the most reasonable interpretation, consistent with the goals of S.B. 221." There is absolutely no basis for this conclusion especially if such an interpretation results in an overall increase in the compliance requirements set forth in R.C. 4928.66(A)(1)(a) of approximately 17 percentage points (which represents a 76% increase over the 222% benchmark) as explained in DP&L's comments.[5] Accordingly, the Companies ask the Commission to clarify that the rolling three year average is to be calculated adjusting for any compounding effects.

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[5] Rather than reiterate these comments and calculations, the Companies incorporate herein by reference pages 2-4 of DP&L's initial comments.

Alternatively, if it is the Commission's intent to ignore such compounding effects, then the Companies seek rehearing on the basis that the Commission has exceeded its statutory authority and has unlawfully modified S.B. 221 to expand the benchmark requirements beyond those intended by the legislature.

6. The Companies request clarification on the requirements for compliance with the demand reduction benchmarks set forth in R.C. 4928.66(A)(1)(b).

Revised Code Section 4928.66(A)(1)(b) requires a utility, starting in 2009, to "implement peak demand reduction programs designed to achieve a one per cent reduction in peak demand in 2009 and an additional seventy-five hundredths of one per cent reduction each year through 2018." For purposes of at least 2009 compliance, the Companies intend to utilize their newly authorized optional ("OLR") and economic ("ELR") load response programs. In both instances, customers served under the programs must reduce or interrupt their load under specified conditions. The ability to interrupt this load consistent with their tariff provisions means that the Companies need not provide specified MISO designated company resources for that load.

The Rules are silent on what EDUs must demonstrate in order to be considered as in compliance with the peak reduction mandates set forth in R.C. 4928.66(A)(1)(b). However, in *Columbus Southern Power Company, et al.* Docket No. 08-917-EL-SSO ("AEP Case"), the Commission stated "that interruptible load should not be counted in the Companies' determination of its [energy efficiency and peak demand reduction] compliance requirements unless and until the load is actually interrupted." (Id. Opinion and Order (Mar. 18, 2009) at p. 46.)

If the Commission intends to apply the plain meaning of the law and simply require EDUs to demonstrate the ability to reduce peak demand to requisite levels, then the Companies ask that the Commission clarify this requirement so as to allow EDUs to properly plan their compliance strategy for the quickly approaching summer season. If, on the other hand, the Commission intends to apply the requirements as set forth in the AEP Case, *supra*, then the Companies seek rehearing on the grounds that such a requirement is contrary to the plain meaning of R.C. 4928.66(A)(1)(b) as well as public policy.

As the Commission recognized in the case of *WorldCom, et al. v. Toledo*, Case No. 02-3210-EL-PWC (Opinion & Order, May 14, 2003), in a statutory interpretation case, "determining the intention of the legislative branch [is] of primary importance." *Id.* at 12. The Commission in *WorldCom,* relying on a litany of Ohio Supreme Court cases, concluded that if this intent "is discernable from the face of the statute, using the words either based on their ordinary meaning or based on their technical or statutory meaning, [the Commission] need go no farther." *Id.* at 11.

In this instance, the meaning is clear. The law requires only that an EDU demonstrate that its program "is designed to achieve" the necessary results. If the legislature intended for the utility to demonstrate actual peak reductions under R.C. 4928.66(A)(1)(b), the requirement would not be addressed as a design issue, but rather would be a demonstrable mandate. This is further supported by comparing R.C. 4928.66(A)(1)(a) with R.C. 4928.66(A)(1)(b). In subparagraph (a), which addresses energy efficiency requirements, the statute expressly states that the EDU must "implement energy efficiency programs *that achieve* energy savings equivalent to at least three-tenths of one percent…. (emphasis added), while in subparagraph (b), which addresses peak demand reductions, the legislature only requires an EDU to implement "peak demand reduction programs *designed to achieve* a one per cent reduction…

(emphasis added.) Clearly the legislature made a distinction between the need to demonstrate actual results and the need to design programs that could achieve, if necessary, the desired results. Based on basic rules of statutory interpretation, which requires the Commission to "breathe sense and meaning into [the statute]; [ ] give effect to all of its terms and provisions; and [ ] *render it compatible with other and related enactments whenever and wherever possible*" *Commonwealth Loan Co. v. Downtown Lincoln Mercury Co.* (1st Dist. 1964), 4 Ohio App. 2d 4, 6 (emphasis added), R.C. 4928.66(A)(1)(b) must be interpreted to only require an EDU to demonstrate that it has designed programs with the ability to achieve the statutory peak reduction targets. This is further supported by another statutory interpretation principle that requires the Commission to presume that the General Assembly would not enact a law that produces an unreasonable or absurd result. *State ex rel. Webb v. Bliss,* 99 Ohio St. 3d 166, 170, 2003-Ohio-3049, ¶ 22. Requiring peak load reductions while capacity is available on the grid to meet customer demand serves no useful purpose and will unnecessarily disrupt operations for major businesses and/or other customers participating in EDU sponsored peak reduction programs.[6] Such a result could not have been what the General Assembly had in mind when enacting the demand reduction requirements.

In light of the foregoing, and given that the summer season is quickly approaching, the Companies respectfully ask the Commission to clarify that, for purposes of complying with R.C. 4928.66(A)(1)(b), an EDU need only demonstrate that it has programs in place that could, if necessary, reduce peak load to the mandated levels.

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6 The Companies' ability to interrupt or reduce load by tariff lowers the required capacity that they must acquire to serve the resultant lower customer demand and, as a result, produces savings to all customers. There is no incremental benefit resulting from actual interruptions that the Companies do not already have simply by having the ability to interrupt.

B. New Chapter 4901:1-40, "Alternative Energy Portfolio Standard."

7. The Order unreasonably and unlawfully fails to recognize the deliverability of energy transmitted through regional transmission organizations when defining energy "deliverable into this state" as used in Rules 4901:1-40-01(I) and 4901:1-40-04(D).

Rather than relying on practical and rational bases to specify how renewable energy resources can be "shown to be deliverable into this state" as provided by R.C. 4928.64(B)(3), the Commission's Order instead places an unreasonable and unnecessary burden on EDUs to justify the obvious. Except for electricity originating in Ohio or an adjoining state, Rule 4901:1-40-01(I) requires a "demonstration" that electricity could be physically delivered to Ohio. The Commission's Order explains that EDUs will be required to prepare and file a "demonstration of delivery via a power flow study and/or deliverability study" even where the energy is transmitted through a regional transmission organization ("RTO"). Order, p. 28. However, a power flow or deliverability study for energy transmitted through RTOs is redundant, will provide no additional value and will only further burden EDUs, their customers, and renewable resource developers.

In order for a potential new generating facility to participate in either the MISO or the PJM Interconnect, the potential generator owner must complete an extensive process of application termed under each respective RTO Open Access Transmission Tariff ("OATT") as the "Generation Interconnection Process". In these processes, the potential generator owner describes the asset to be constructed and, the RTO in turn takes the submitted information and conducts both a "Feasibility Study" and an "Impact Study." The studies are used to evaluate the potential impacts of the insertion of the generator into the transmission grid. Items such as impacts to congestion, short circuit capability and load flow analysis are inspected and evaluated. If the addition of the potential generator passes the criteria the studies are designed to evaluate, the generator is deemed to be approved to begin construction, and upon completion, produce energy deliverable to the entire RTO. Thus, to the extent an RTO transmits electricity into Ohio, as both PJM and MISO do, the analysis purportedly required by the Order is redundant and unreasonably burdensome. Such a process will only lead to higher costs and greater inefficiencies related to incorporating renewable energy into the State's supply. The requirement of conducting a redundant power flow study also may unnecessarily limit the number of potential alternative energy suppliers and reduce price competition for such energy.

Under the Commission's proposed Rules, in order for energy from a renewable resource to be deemed deliverable to the State, the resource must meet additional hurdles of deliverability imposed by the State which infer that unless there is a directly connected physical transmission line from the resource to the border and into Ohio, then that resource will be deemed to be undeliverable to Ohio. This concept is contrary to the principles of "Open Access Transmission" and the market concepts providing all generators access to the same market and participation for the purposes of serving load.

Thus, the Commission should grant rehearing and find that a power flow or deliverability study for renewable energy resources is unnecessary if sourced from MISO or PJM or, as already provided, from a state adjoining Ohio.

8. The Commission unreasonably and unlawfully exceeded its statutory authority and imposed standards not supported by law by establishing a definition of "double counting" in Rule 4901:1-40-01(M) that unreasonably precludes the use of a single resource to meet multiple energy related benchmarks set forth in S.B. 221.

The Commission justifies a prohibition of "double-counting" a single resource to meet both energy efficiency requirements under R.C. 4928.66 and renewable energy requirements under R.C. 4928.64 in the Rules based only on its determination that it is "appropriate." (Order, p. 29.) This unsupported conclusion is not surprising given that S.B. 221 provides no justification or authority for the Commission to turn to, nor is there any logical explanation for such a concept. The Order defines "double-counting," which is later precluded in various sections of Chapter 4901:1-40, as an EDUs' use of renewable energy, RECs, or energy efficiency savings to satisfy multiple requirements. *See* Rule 4901:1-40(M). Not only did the General Assembly fail to authorize such a prohibition, but to the extent EDUs are able to provide energy to their customers that qualifies as both efficient and renewable, this is exactly the type of resource that the General Assembly sought to promote in S.B. 221.

S.B. 221 includes goals for EDUs to incorporate different types of energy resources into their portfolios of electricity. For example, R.C. 4928.64 sets forth alternative and renewable energy requirements, and R.C. 4928.66 addresses energy efficiency requirements to help customers better manage their overall electricity usage. The State, EDUs, and their customers would only benefit from energy products that can simultaneously achieve multiple energy related goals. Rather than embracing these projects as cost effective solutions, the Commission created a framework that does the opposite.

The Commission is contorting the incentives put in place by the General Assembly and, as a result, the Order as it relates to this issue is unreasonable and unlawful.

9. The Commission unreasonably and unlawfully exceeded its statutory authority and imposed standards not supported by law by establishing a burdensome requirement in Rule 4901:1-40-03(C) for filing a 10-year compliance plan that will be highly speculative and provide no public benefit.

S.B. 221 anticipates that EDUs will submit certain annual compliance filings for the Commission's review. *See* R.C. 4928.64(C)(1); *see also* R.C. 4928.66(B), (C). The Commission's Order significantly exceeds the General Assembly's express mandate, and instead requires EDUs to make yet another annual filing – not to report on the EDUs' compliance with the statutory requirements as contemplated by S.B. 221, but to somehow project each EDU's plan for future compliance over the next 10 years. *See* Rule 4901:1-40-03(C). The Commission's Order appears to recognize the futility and purely speculative nature of such an exercise in that it notes that the plan is "nonbinding" and that EDUs' "[c]ompliance with the alternative energy portfolio standard requirements is expected to be dynamic." (Order, p. 32.) However, the Commission pointlessly maintains such a requirement anyway.

The 10-year plan will pose a significant burden on EDUs that far outweighs the acknowledged minimal value that the plans will provide. EDUs face significant challenges in achieving the near-term mandates of S.B. 221, in, among other things, adjusting their portfolios and tracking and assessing their usage and associated costs. The 10-year plan, therefore, is simply a distraction that will require EDUs and their customers to incur additional costs while providing little to no value. Indeed, the Commission is only inviting further acrimony by creating a process that will allow parties to complain that an EDU's speculation as to how it will meet advanced and renewable benchmarks ten years in the future is insufficiently detailed guesswork. The Order's requirement for a 10-year plan is unreasonable and unlawful.

10. The Commission unreasonably and unlawfully exceeded its statutory authority and imposed standards not supported by law by establishing a definition of "qualified resources" in Rule 4901:1-40-04(A)(8) that improperly: (a) limits the use of storage facilities to satisfy the statutory requirements; and (b) imposes geographic and temporal limitations on eligible RECs that are arbitrary and contrary to law.

a. <u>The Order's definition of qualified resources" unreasonably and unlawfully limits the use of storage facilities.</u>

S.B. 221 provides an explicit definition of storage technology that qualifies as an "alternative energy resource," which the Commission ignored. R.C. § 4928.64(A)(1)(c) defines such storage technology as technology "that allows a mercantile customer more flexibility to modify its demand or load and usage." Similarly, R.C. 4928.01(A)(35) includes within the definition of "alternative energy resource" a "storage facility that will promote the better utilization of a renewable energy that primarily generates off peak." These definitions reflect the General Assembly's understanding that a wide variety of storage technologies may allow EDUs to achieve S.B. 221's alternative energy goals. Unfortunately, the Commission distorted the General Assembly's workable definition for storage technology and, instead, placed unreasonably strict constraints on qualifying storage facilities.

Rule 4901:1-40-04(A)(8) defines qualifying storage facilities as *only* those facilities that meet two requirements:

> (a) The electricity used to pump the resource into a storage reserve must qualify as a renewable energy resource.

> (b) The amount of energy that may qualify from a storage facility is the amount of electricity dispatched from the storage facility and shall exclude the amount of energy required to initially pump the resource into the storage reservoir.

Neither of these requirements is found in S.B. 221, and they only serve to overly restrict the otherwise valuable resource that storage facilities represent and that the General Assembly appreciated. Storage facilities allow for more efficient utilization of renewable energy resources, such as wind energy, which may generate energy during off-peak times. Through storage technology, renewable resources generated off-peak can be saved and later released during on-peak times, thus increasing the efficiency of such renewable resources. Storage facilities, indeed, benefit EDUs, their customers, and renewable energy generators in promoting the cost-efficient use of renewable energy resources and the further development of renewable energy resources in areas that might not otherwise be sustainable. The Commission's unauthorized limits on storage facilities that satisfy as "qualified resources" only hamper the true value of storage facilities in achieving the goals of S.B. 221. The General Assembly specifically did not mandate such overly-restrictive constraints on qualifying storage facilities of the type the Commission erroneously applies in its Order. The Order is, therefore, both unreasonable and unlawful.

b. <u>The Commission's Order imposes geographic and temporal limitations on eligible RECs that are arbitrary and contrary to law.</u>

As set forth in the Order, Rule 4901:1-40-04(D)(6) provides that RECs used to satisfy the renewable energy resource benchmark "must be associated with electricity that was generated no earlier than July 31, 2008." The Commission also commented in the Order, but did not provide clarifying language in the Rules themselves, that RECs would be limited to those associated with electricity originating in Ohio or deliverable into Ohio as defined in Rule 4901:1-40-01(I). Both limitations on qualifying RECs are unreasonable and unlawful.

Statutory authority for REC usage is found in R.C. § 4928.65, which contains one and only one temporal limitation and one and only one geographic limitation on the use of RECs. The temporal limitation is clear – RECs may be used any time in the five calendar years following the date of their purchase or acquisition from any entity. The geographic limitation also is clear and narrow in scope – if credits are purchased from an owner or operator of a hydroelectric generating facility, such credits only count if the facility is located "within or bordering this state or within or bordering an adjoining state." When the General Assembly lists criteria to be applied or considered, the intent is that other criteria shall not be applied or considered – *expressio unius est exclusio alterius*. *Vincent v. Civil Service Comm'n*, 54 Ohio St. 3d 30, 33 (1990). Thus, except for these two limitations expressly set forth in R.C. § 4928.65, RECs qualify for compliance as renewable energy resource requirements.

The Order provides no statutory basis for the July 31, 2008 cutoff date other than the fact that July 31, 2008 is the effective date of S.B. 221. *See* Order, p. 35. Use of this cutoff date flies in the face of S.B. 221's goals of promoting the efficiency of electricity utilized in Ohio. Under the Commission's Rule, there is no incentive to utilize RECs generated prior to the July 2008 date and, thus, those RECs, including any that may have already purchased by an EDU, may be wasted. S.B. 221's effective date has no bearing on whether the RECs satisfy the statute's requirements and RECs generated prior to that date are no less cost- or energy-efficient than those generated after the July 2008 date. Instead, EDUs will be required to incur more costs and expend more resources in seeking only RECs that are generated after the artificial deadline. The Order's use of an arbitrary date for eligibility of RECs is unlawful and unreasonable.

Likewise, the Commission's "interpretation" in the Order that "the use of RECs be limited to those associated with electricity originating in Ohio, or deliverable into this state, as defined in Rule 01(I)" also is unreasonable and unlawful. *See* Order, p. 34. Not only has the General Assembly not authorized such a limitation on REC eligibility, but the General Assembly has expressly provided a specific, limited geographic limitation with which the Commission's interpretation conflicts. Because the General Assembly has determined that all RECs are eligible for the purpose of complying with the renewable energy and solar energy resource requirements, except those RECs related to a hydroelectric generating facility that is not within or bordering this state or within or bordering an adjoining state, the Commission lacks the authority to impose its own geographic limitation on REC eligibility.

The Commission should grant rehearing to eliminate these two limitations on REC eligibility that are contrary to law.

11. In adopting Rule 4901:1-40-07, the Commission unreasonably and unlawfully exceeded its statutory authority and imposed standards not supported by law by: (a) establishing a cost cap that directly conflicts with R.C. 4928.64(C)(3); and (b) reserving for the Commission the authority to impose a "catch up" upon application of the cost cap that is not authorized by R.C. 4928.64.

a. <u>The Order adopts a cost cap that directly conflicts with Ohio law.</u>

The Commission's Rule eliminates customer cost protections provided by the General Assembly. Senate Bill 221 recognized the potentially adverse economic impact of the advanced and renewable energy benchmarks imposed by statute and established a reasonable ceiling for the additional costs of those requirements. R.C. § 4928.64(C)(3) mandates that EDUs be excused from complying with the statute's alternative energy portfolio requirements if the costs of complying with those standards exceeds by 3% or more the costs that EDUs and their customers would otherwise incur to acquire the requisite energy. However, the Commission failed to follow the explicit statutory terms of the General Assembly's cost cap and, instead, set up an unlawful and wholly unreasonable cost cap of its own that looks at the cost impact on an EDU's entire portfolio instead of the impact, as required by statute, on the supply acquired to meet the benchmark. The Commission should grant rehearing to conform Rule 4901:1-40-07(C) to R.C. § 4928.64(C)(3).

The numerator and denominator used to calculate whether the costs rise above the 3% cap are critical to ensuring that it serves its protective goal. As described in R.C. 4928.64(C)(3), the numerator is the "reasonably expected cost of *that* compliance," referencing the earlier stated compliance "with a benchmark under division (B)(1) or (2)." The denominator is the "reasonably expected cost of otherwise producing or acquiring the *requisite* electricity." *Id.* (emphasis added). The cost of acquiring the "requisite" electricity can only mean the cost of acquiring the same amount of electricity that EDUs must reserve for advanced or renewable energy. This is the only way to establish an apples-to-apples comparison and allow EDUs and the Commission to assess the impact of the costs of compliance. Thus, for example, assuming an EDU's total standard service offer portfolio is 50 million MWh annually and applying the renewable energy benchmark for 2011 of 1%, the test compares the EDU's cost of acquiring 500,000 MWh of renewable energy to its expected cost of acquiring 500,000 MWh of energy from other sources. If the cost of renewable energy exceeds the cost of the energy from other sources by more than 3%, then the cap applies and the EDU's customers should not be forced to pay the higher price for renewable energy resources.

In contrast, the Commission veered from S.B. 221's mandated baseline and, in doing so, set up a meaningless comparison. The Commission's Order purports to implement a cost cap by comparing the costs of compliance to an EDU's overall cost of producing or acquiring its entire SSO load. *See* Order, p. 37; Rule 4901:1-40-07(C). Under this erroneous construction and using 2011 alternative energy targets, the total costs of acquiring an entire Standard Service Offer ("SSO") portfolio that includes 1% renewable energy and 99% least-cost energy would be compared to the total costs of acquiring 100% least-cost energy for the entire SSO portfolio. R.C. § 4928.64(B)(2). It is hard to imagine that the impact of such a small percentage of alternative energy cost would ever exceed by 3% the costs of 100% of an EDU's load.[7] Thus, the cost cap would likely never provide any protection against excessive costs for consumers that the General Assembly included in S.B. 221.

The Commission makes clear in the Order that it believes the 3% cap actually selected by the General Assembly could "prematurely" trigger the cap – meaning, the statutory cap could apply before the Commission believes it should apply. Yet the Commission lacks the authority to second-guess the carefully crafted language included in S.B. 221. The General Assembly selected a cap that looks directly at the difference

[7] Using a 50 million MWh portfolio and the 1% benchmark for 2011, the difference between the statutory formula and the Commission's formula is made obvious when we assume an extreme example using a standard or least-cost energy price of $62/MWh and an alternative energy price of $100/MWh. Using the R.C. 4928.64(C)(3) formula, the EDU's reasonably expected cost of that compliance (500,000 x $100) exceeds its reasonably expected cost of otherwise acquiring the requisite electricity (500,000 x $62) by 36%. Using the Commission's unlawful formula set forth in Rule 4901:1-40-07, the EDU's expected cost of its SSO load ((49.5 million x $62) + (500,000 x $100)) exceeds its expected cost of otherwise acquiring its SSO load (50 million x $62) *by only 0.6%.* For the cost of alternative energy to exceed the 3% cap using the Commission's formula, the price of alternative energy would have to approximate $248/MWh. It was never the General Assembly's intent to burden consumers with alternative energy costing *up to 4 times more* than the market cost of energy.

between the cost of acquiring a certain percentage of renewable energy and the expected cost of acquiring the same percentage of electricity from another source. Nowhere in R.C. 4928.64(C)(3) is there language that authorizes the Commission to fold these costs into the overall cost of acquiring an SSO portfolio. Thus, the Commission should grant rehearing to make Rule 4901:1-40-07(C) consistent with R.C. 4928.64(C)(3).

b. <u>The Order applies a catch-up penalty in circumstances the General Assembly did not find were appropriate for such a penalty.</u>

While the Rules are silent, the Commission's Order purports to reserve the right, "on a case-by-case basis," to require that EDUs increase their level of compliance in future years by any amount of under-compliance due to the 3% cost cap. (Order, p. 38.) This essentially imposes a new form of penalty on the utility that was neither contemplated in, nor permitted by, Ohio law. However, not only is the statute also silent on this point, S.B. 221 explicitly applies a penalty (in the form of compliance payments) only in the event of *force majeure*. *See* R.C. § 4928.64(C)(1), (2). If the General Assembly intended to apply a penalty when an EDU's costs triggered the cost cap, it would have so stated. The Commission has again unlawfully imposed additional criteria beyond those set out by the General Assembly, thus imposing criteria which are inconsistent with that expressed in S.B. 221 and expanding its scope. The Commission is not authorized to reserve a right not granted it by statute. As such, the Commission's Order is unreasonable and unlawful.

12. The Rules related to alternative energy resources unreasonably and unlawfully fail to reflect the amendments to R.C. 4928.64 and R.C. 4928.65, as signed into law by the Governor on April 1, 2009.

On April 1, 2009 as part of Am. Sub. H.B. 2 ("H.B. 2"), certain amendments to R.C. 4928.64 and 4928.65 were enacted that affected the definition of alternative energy resources and the amount of renewable energy credits derived from certain generating facilities. These amendments are not reflected in the Commission's Rules. These amendments go into effect on July 1, 2009. Therefore, they will be in effect before the Commission's Rules in this proceeding go into effect following the JCARR process. Such rules must be modified so as to give clear effect to the General Assembly's amendments to these statutory provisions.

The amendment in H.B. 2 to the definition of alternative energy resources requires that adopted Rule 4901:1-40-04 be modified. The specific amendment to R.C. 4928.64(A)(1) is as follows:

> **Sec. 4928.64.** (A)(1) As used in sections 4928.64 and 4928.65 of the Revised Code, "alternative energy resource" means an advanced energy resource or renewable energy resource, as defined in section 4928.01 of the Revised Code that has a placed-in-service date of January 1, 1998, or after; a renewable energy resource created on or after January 1, 1998, by the modification or retrofit of any facility placed in service prior to January 1, 1998; or a mercantile customer-sited ~~advance~~ advanced energy resource or renewable energy resource, whether new or existing, that the mercantile customer commits for integration into the electric distribution utility's demand-response, energy efficiency, or peak demand reduction programs as provided under division ~~(B)~~(A)(2)~~(b)~~(c) of section 4928.66 of the Revised Code, including, but not limited to, any of the following:

Therefore, adopted Rule 4901:1-40-04(A) must be modified by inserting after the phrase "or after," the following: "or if they were created on or after January 1, 1998, by the modification or retrofit of any facility placed in service prior to January 1, 1998," so as to bring such rule into compliance with the newly amended statute. Without this change, the rules will conflict with R.C. 4928.64(A)(1).

The second amendment in H.B. 2 that affects the Commission's Rules in this proceeding addressed how renewable energy credits will be derived from generating facilities that meet certain criteria. Specifically, the following underlined language was added to R.C. 4928.65:

The public utilities commission shall adopt rules specifying that one unit of credit shall equal one megawatt hour of electricity derived from renewable energy resources, except that, for a generating facility of seventy-five megawatts or greater that is situated within this state and has committed by December 31, 2009, to modify or retrofit its generating unit or units to enable the facility to generate principally from biomass energy by June 30, 2013, each megawatt hour of electricity generated principally from that biomass energy shall equal, in units of credit, the product obtained by multiplying the actual percentage of biomass feedstock heat input used to generate such megawatt hour by the quotient obtained by dividing the then existing unit dollar amount used to determine a renewable energy compliance payment as provided under division (C)(2)(b) of section 4928.64 of the Revised Code by the then existing market value of one renewable energy credit, but such megawatt hour shall not equal less than one unit of credit.

This underlined language should be added to the definition of Renewable Energy Credit in adopted Rule 4901:1-40-01(CC) so as to conform the definition with the newly-amended statutory language. Without this modification, the Commission's rules would be inconsistent with and contradict R.C. 4928.65.

C. Chapter 4901:5 - Long Term Forecast Report

13. In adopting Rule 4901:5-5-06, the Commission unreasonably and unlawfully exceeded its statutory authority and imposed requirements 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.

As part of its changes to the long term forecast report ("LTFR") rules, the Commission elected to reinsert in wholesale fashion proposed Rule 4901:5-5-06, which requires the filing of an integrated resource plan ("IRP") by electric utilities. Such an insertion was purportedly to comply with a mandate of S.B. 221. (Order, pp. 4, 41.) Senate Bill 221 contains no such mandate. In fact, S.B. 221 made no amendments at all to Ohio Revised Code Chapter 4935 -- the chapter related to long term forecast reports -- let alone the type of significant changes that would support the reinstitution of a required IRP process. The Commission's authority to implement changes to the LTFR rules stems from that granted to it by R.C. 4935.04. Neither S.B. 221 nor R.C. 4935.04 granted the

Commission the authority to reinstate IRP rules. As a creature of statute, the Commission derives its authority solely from that given by the General Assembly. *See Tongren v. Pub. Util. Comm., supra* at 88 *Columbus Southern Power Co., supra,* at 537. A review of Chapter 4935 demonstrates that no such power was conferred upon the Commission and therefore, it was unlawful for the Commission to adopt Rule 4901:5-5-06.

By way of background, IRP rules were in place prior to the enactment of Am. Sub. S.B. 3 ("S.B.3") in 1999. Senate Bill 3 expressly eliminated those portions of Chapter 4935 dealing with resource planning and generation. Attached as Exhibit 1 is an excerpt of S.B. 3 showing such changes to Chapter 4935. As indicated on attached Exhibit 1, the then existing IRP rules were repealed. Senate Bill 3 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). Nothing in S.B. 221 reinstated that provision or anything similar to it. Similarly, S.B. 3 deleted references to the siting of generation plants, anticipated generating capacity, and the addition or cancellation of generating facilities throughout R.C. 4935.04. And probably most telling was 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*". The Commission's rulemaking authority as it relates to generation facilities and resources, was expressly deleted by S.B. 3. And, as previously discussed, the Commission is precluded from reinstating such authority through its rulemaking process. Rule 4901:5-5-06 should be deleted in its entirety from the Commission's adopted rules.

No authority to implement an annual IRP filing for all electric utilities may be found in S.B. 221. As stated, S.B. 221 made no changes to Chapter 4935. Equally, S.B. 221 did not authorize the Commission to promulgate IRP rules. In fact, While it is true that S.B. 221 did impose alternative energy and energy efficiency requirements upon electric utilities, it also specified the amount and timing of the implementation of those requirements. No annual IRP filing can change those statutory requirements, and no support may be found in those statutes for the Commission's adoption of IRP rules. Further, meeting those requirements is the subject of two full chapters of new rules also a part of this rulemaking proceeding, Chapters 4901:1-39 and 4901:1-40. In addition to being unlawful and unreasonable, an IRP isn't needed or warranted.

There is no support for the Commission's position that S.B. 221 mandates the reinstatement of the preexisting IRP rules. To the contrary, the reinstatement of such rules well exceeds any authority the Commission may have been granted under S.B. 221, and directly flies in the face of the 1999 changes made by the General Assembly to Chapter 4935 as part of S.B. 3. As a result, the Commission's Order establishing the rules in 4901:5-5-06 is unreasonable and unlawful.

14. Rule 4901:1-39-07(A) unreasonably and unlawfully ties recovery of properly incurred costs to the approval of an EDU's portfolio plan.

Rule 4901:1-39-07(A) allows an EDU to file with its proposed program portfolio plan a request for recovery of an approved rate adjustment mechanism. However, under the Rule, such a mechanism cannot become effective until after the EDU's portfolio plan is approved. Inasmuch as the Companies already have in place such a recovery mechanism rider already approved by this Commission in the Companies' Electric Security Plan filing (Case No. 08-935-EL-SSO), there is no valid reason to require the

Companies to wait until its portfolio plan is approved. Not only must any costs sought to be recovered through this rider pass scrutiny at the time a request for recovery is filed, but the rider is subject to reconciliation with any over-collection being subject to carrying costs. Therefore such a delay in recovery is not necessary.[8] In light of the foregoing, it is unreasonable to create an unnecessary regulatory lag that postpones recovery of costs properly incurred by the Companies. Moreover it is inconsistent with the intent underlying the creation of the rider already approved by the Commission. Accordingly the prerequisite of plan approval before recovery should be removed from the Rules.

15. It is unreasonable and unlawful for the Commission to establish a process that places the EDU at risk of penalties for non-compliance in 2009 when the Commission has yet to provide final rules as guidance for such compliance as of the date of this filing.

Pursuant to R.C. 4928.66, the Companies must meet the 2009 energy efficiency and demand reduction targets set forth therein. The Commission was directed to issue rules related to such targets. Based on the issues raised in this Application for Rehearing, the Companies still have no binding guidance as to compliance requirements. Moreover, Pursuant to Rule 4901:1-39-05(C), the Companies' status report on 2009 compliance is not due until April 15, 2010. Clearly given the concerns raised herein, the Companies are reluctant to proceed without pre-approval on its 2009 compliance plans. At a minimum to avoid the violation of the Companies' due process rights, the Rules should include a pre-approval process, at least for the 2009 compliance period, especially given the fact that as the Rules currently read, recovery of costs is not permitted until the Companies first portfolio plan is approved.

[8] Given that there is no requirement placed on the Commission to rule on the filing within a specified time period, the regulatory lag in recovery could create unnecessary significant cash flow issues.

16. The Commission unreasonably and unlawfully created the definition of "substantial change" in Rule 4901:5-1-01(L) that is inconsistent with that included in the statutory definition for the same term as set forth in R.C. 4935.04(D)(3)(c).

In Rule 4901:5-1-01(L) the Commission defines the term "substantial change" as including by not limited to:

> **(1)** A change in forecasted peak loads or energy delivery over the forecast period of greater than an average of one-half of one percent per year as calculated in rule 4905:5-3-03 of the Administrative Code.
>
> **(2)** The addition of a generating facility or facilities in an electric utility's supply plans.
>
> **(3)** Demonstration of good cause to the commission by an interested party.

Revised Code Section 4935.04(D)(3)(c), on the other hand does not include subpart 2 of the above definition, thus creating a natural inconsistency in how it is to be determined if a substantial change has occurred. Inasmuch as Rule 4901:5-1-04 requires an EDU to provide notice of a substantial change, it is imperative that the rule and the statute are consistent. The Commission, as an administrative agency, can only enact Rules consistent with statutes. *Kelly v. Accountancy Board of Ohio*, 88 Ohio App.3d 453, 458 (1993); *Athens Home Telephone Co. v. Peck*, 158 Ohio St. 557, 574 (1953). Therefore, Rule 4901:5-1-01(L) should be modified to be consistent with the statutory definition of the same term as set forth in R.C. 4935.04(D)(3)(c).

17. The Companies seek clarification on the use of the word "Plan" in Rule 4901:5-1-01(M), believing that the word should be "Plant."

18. The Companies seek clarification on the reference to Rule 4901:1-39-09 in Rule 4901:1-39-07(A)(2), believing that such reference should be to Rule 4901:1-39-08.

19. The Companies seek clarification on the reference to Rule 4901:1-39-08 included in Rules 4901:1-39-08(B), believing that such reference should be to Rule 4901:1-39-07.

CONCLUSION

Throughout the Rules the Commission has substituted its judgment for that of the General Assembly, in essence, unlawfully amending S.B. 221 through additions and limitations set forth in the Rules that were not contemplated by the legislature. In so doing, the Commission has burdened all customers with excessive costs, thus violating a major tenet of S.B. 221 to provide reasonably priced electric service.

The significant goals of the energy efficiency, peak demand reduction and alternative energy mandates of S.B. 221 arise from extensive discussions by the General Assembly and interested parties. The language of S.B. 221 was carefully crafted to further those goals and express the General Assembly's intentions for EDUs as they strive to achieve the goals. Therefore, the Commission's rejection of its defined authority and the General Assembly's intent cannot be sustained. The Commission's Order has unlawfully and unreasonably exceeded and contradicted its authority under S.B. 221 in a number of respects, as set forth above. The Companies, thus, request rehearing in order to insure that the Commission's rules comply with the express language of S.B. 221 and the General Assembly's intent in passing that legislation.

Respectfully submitted,

____
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CERTIFICATE OF SERVICE

Copies of the foregoing *Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Rehearing* and the *Memorandum in Support* thereof were served by first class United States Mail, postage prepaid (with copies provided electronically), to the persons on the attached Service List on this ____ day of May, 2009.[1]

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