

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

**REPLY COMMENTS TO THE
APPLICATIONS FOR REHEARING
BY
CONSTELLATION NEWENERGY, INC.,
DIRECT ENERGY SERVICES, LLC, AND
INTEGRYS ENERGY SERVICES, INC.**

I. Introduction

Now come Constellation NewEnergy, Inc., Direct Energy Services, LLC, and Integrys Energy Services, Inc. (hereinafter collectively referred to as the “Competitive Suppliers”) and in accordance with the Attorney Examiner’s Entry of May 21, 2009 submit the following Reply Comment. On May 15, 2009 some fifteen petitions for rehearing were filed. One commentator suggested that Rule 4901:1-40 (A)(3) which states that all costs incurred by an electric distribution utility to comply with Section 4928.64, Revised Code be by-passable be amended to add “...except that those costs incurred in conformance with the requirements of R.C. section 4928.143(B)(2)(c) shall be avoidable”¹.

The Competitive Suppliers believe that Rule 4901:1-40-03 (A) (3) is accurate, clear and concise, as written and that proposed modifications could instead create unnecessary ambiguity.

¹ See Request for Rehearing of the Dayton Power and Light Company p. 29

Thus, the Competitive Suppliers urge the Commission not to grant rehearing as to Rule 4901:1-40-03-(A)(3).

II. Rule 4901:1-40-03(A) (3)

The statutory scheme of Senate Bill 221 via Section 4928.64, Revised Code creates a mandate that all energy supplies provided to retail customers in this State meet a portfolio standard in which a minimum percentage of the energy delivered comes from renewable and/or advanced sources. Since electric service companies, which includes all competitive retail electric service providers, governmental aggregation providers, brokers and marketers², must meet the renewable \ advanced energy portfolio standards, Section 4928.64 (E), Revised Code states in part:

All costs incurred by an electric distribution utility in complying with the requirements of this section shall be by-passable by any consumer that has exercised choice of supplier under section 4928.03 of the Revised Code.

Section 4928.64(E), Revised Code thus protects retail customers who exercise their right to shop for energy from having to pay for renewable or advanced generation they do not receive. Rule 4901:1-40-03(A) (3) is virtually a restatement of Section 4928.64(E), Revised Code, and as such any amendment to the Rule must be carefully scrutinized to insure that the intent of the General Assembly is not being thwarted.

The Commentator seeking re-hearing suggests that Rule 4901:1-40-03(A) (3) be amended by adding an exemption for Section 4928.143(B)(2)(c), Revised Code. Section 4928.143(B)(3)(c), Revised Code however does not pertain to renewable or advanced energy. Section 4928.143(B)(3)(c) permits the electric utility to impose a non by-passable charge if the charge is needed to support the construction of new generation – brown or green – where the

utility has applied for and the Commission has found: 1) additional generation is needed; 2) the new generation will come from new plants; 3) the new plants will be dedicated to the public; and 4) the new plants will be publicly bid. Since the Rule in question only addresses compliance with the portfolio requirements in Section 4928.64, Revised Code, it would be confusing and create ambiguity to add a reference to Section 4928.143(B)(3)(c), Revised Code when that Code Section does not refer to Section 4928.64, Revised Code in general or the portfolio standards in particular.

III. Conclusion

WHEREFORE, the Competitive Suppliers request that the Commission not grant re-hearing on Rule 4901:1-40-03(A) (3).

Respectfully submitted,

CONSTELLATION NEWENERGY, INC.
DIRECT ENERGY SERVICES, LLC
INTEGRYS ENERGY SERVICES, INC.

s/M. Howard Petricoff

M. Howard Petricoff
VORYS, SATER, SEYMOUR AND PEASE LLP
52 East Gay Street
P.O. Box 1008
Columbus, Ohio 43216-1008
Telephone: (614) 464-5414
Facsimile: (614) 719-4904
E-mail: mhpeticoff@vorys.com

Counsel for Constellation NewEnergy, Inc.; Direct
Energy Services, LLC; and Integrys Energy
Services, Inc.

² Section 4928.01 (A)(9), Revised Code

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Application For Rehearing was served upon the following persons this 27th day of May, 2009 via electronic mail or via U.S. first class mail, postage prepaid.

s/M. Howard Petricoff

M. Howard Petricoff

Dona R. Seger-Lawson
Dayton Power and Light Company
1065 Woodman Drive
Dayton, OH 45432
dona.seger-lawson@dplinc.com

Marvin I. Resnik
AEP Service Corp
1 Riverside Plaza
Columbus, OH 43215-2355
miresnik@aep.com

Leigh Herington, Executive Director
NOPEC
31320 Solon Rd., Ste. 20
Solon, OH 44139
nopec@windstream.net

Gregory E. Hitzhusen, MDIV, Ph.D.
Executive Director
Ohio Interfaith Power and Light
PO Box 26671
Columbus, OH 43226
ohioipl@gmail.com

Ellis Jacobs
333 W. First St., Ste. 500
Dayton, OH 45402
Ejacobs@ablelaw.org

Joseph Logan
Ohio Farmers Union
20 S. Third St., Ste. 130
Columbus, OH 43215
j-logan@ohfarmersunion.org

Gene Krebs
Greater Ohio
846½ E. Main Street
Columbus, OH 43205

Amy Gomberg
Environment Ohio
203 E. Broad St., Ste. 3
Columbus, OH 43215
agomberg@environmentOhio.org

Theodore Robinson
Citizen Power
2424 Dock Road
Madison, OH 44057
robinson@citizenpower.com

Tim Walters
United Clevelanders Against Poverty
4115 Bridge Avenue
Cleveland, OH 44113
Trane22222@aol.com

Brandi Whetstone
Sierra Club, Ohio Chapter
131 N. High Street, Ste. 605
Columbus, OH 43215

Joseph Meissner
The Legal Aid Society of Cleveland
1223 West Sixth Street
Cleveland, OH 44113
jpmeissn@lasclv.org

David C. Rinebolt
Colleen L. Mooney
Ohio Partners for Affordable Energy
231 West Lima St.
PO Box 1793
Findlay, OH 45839-1793
drinebolt@aol.com
cmooney2@columbus.rr.com

Lance M. Keiffer
Lucas County/NOAC
711 Adam Street, 2nd Floor
Toledo, OH 43624-1680
lkeiffer@co.lucas.oh.us

Leslie A. Kovacik
Dep. Of Law
City of Toledo/NOAC
420 Madison Ave., 4th Fl.
Toledo, OH 43604
Leslie.kovacik@toledo.oh.gov

Joseph G. Strines
DPL Inc.
1065 Woodman Drive
Dayton, OH 45432
joseph.strines@DPLInc.com

Gary A. Jeffries
Dominion Resources Services, Inc.
501 Martindale Street, Suite 400
Pittsburgh, PA 15212-5817
gary.a.jeffries@dom.com

Mark S. Yurick
Chester, Willcox & Saxby
65 E. State Street, Suite 1000
Columbus, OH 43215-4213
myurick@cwsllaw.com

Noel M. Morgan
Communities United for Action
Legal Aid Society of Southwest Ohio
215 E. Ninth Street
Cincinnati, OH 45202
nmorgan@lascinti.org

Michael R. Smalz
Joseph Maskovyak
Ohio State Legal Services Association
555 Buttles Ave.
Columbus, OH 43215
msmalz@oslsa.org
jmaskovyak@oslsa.org

Steve Millard
Council of Smaller Enterprises
The Higbee Building
100 Public Square, Suite 210
Cleveland, OH 44113
smillard@cose.org

Richard L. Sites
Ohio Hospital Association
155 E. Broad Street, 15th Floor
Columbus, OH 43215-3620
ricks@ohanet.org

Barth E. Royer
Bell & Royer
33 S. Grant Avenue
Columbus, OH 43215-3927
barth.royer@aol.com

John W. Bentine
Chester, Willcox & Saxby
65 E. State Street, Suite 1000
Columbus, OH 43215
jbentine@cwsllaw.com

James S. Russell
NAIOP
470 Olde Worthington Road, Suite 200
Westerville, OH 43082
jrussell@pizzuti.com

Steven T. Nourse
AEP 1 Riverside Plaza
Columbus, OH 43215
snourse@aep.com

Dale R. Arnold
Ohio Farm Bureau Federation
280 N. High Street
P. O. Box 182383
Columbus, OH 43218-2383
darnold@ofbf.org

Jason B. Keyes
Keyes & Fox, LLP
1721 21st Avenue East
Seattle, WA 98112
jkeyes@keyesandfox.com

James W. Burk
FirstEnergy Services Company
76 S. Main Street
Akron, OH 44308
burkj@firstenergycorp.com

Joseph M. Clark
McNees, Wallace & Nurick
21 E. State Street, 17th Floor
Columbus, OH 43215-4228
jclark@mwncmh.com

Amy Ewing
Greater Cincinnati Health Council
2100 Sherman Avenue, Suite 100
Cincinnati, OH 45212
aewing@gchc.org

Thomas L. Froehle
McNees Wallace & Nurick, LLC
21 E. State Street, 17th Floor
Columbus, OH 43215-4228
tfroehle@mwncmh.com

Terrence O'Donnell
Bricker & Eckler
100 S. Third Street
Columbus, OH 43215
todonnell@bricker.com

Glenn Krassen
E. Brett Breitschwerdt
Bricker & Eckler
100 S. Third Street
Columbus, OH 43215
gkrassen@bricker.com
ebreitschwerdt@bricker.com

Greg Dunn
Schottenstein, Zox & Dunn Co., LPA
250 West Street
Columbus, OH 43215
gdunn@szd.com

James Burk
Ebony L. Miller
FirstEnergy Corp.
76 S. Main Street
Akron, OH 44308
burkj@firstenergycorp.com
elmiller@firstenergycorp.com

Sam Randazzo
Lisa McAlister
Dan Neilsen
McNees, Wallace & Nurick
21 E. State Street, 17th Floor
Columbus, OH 43215-4228
sam@mwncmh.com
lmcaster@mwncmh.com
dneilsen@mwncmh.com

Paul Colbert
Duke Energy Ohio
155 E. Broad Street, Suite 21
Columbus, OH 43215
pcolbert@cinergy.com

Jeffrey Small
Richard Reese
Terry Etter
Maureen Grady
Gregory Poulos
Anne Hotz
Larry Sauer
Office of Ohio Consumers' Counsel
10 W. Broad Street, Suite 1800
Columbus, OH 43215-3485
small@occ.state.oh.us
reese@occ.state.oh.us
etter@occ.state.oh.us
grady@occ.state.oh.us
poulos@occ.state.oh.us
hotz@occ.state.oh.us
sauer@occ.state.oh.us

This foregoing document was electronically filed with the Public Utilities

Commission of Ohio Docketing Information System on

5/28/2009 3:11:01 PM

in

Case No(s). 08-0888-EL-ORD

Summary: Memorandum The attached pleading was filed on May 27, 2009, in Case No. 08-888 in paper copy form at docketing. It is being re-filed electronically today at the request of Attorney Examiner Richard Bulgrin. electronically filed by Mr. W Jonathan Airey on behalf of Constellation NewEnergy, Inc. and Direct Energy Services, LLC and Integrys Energy Services, Inc.