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BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Adoption of Rules for Alternative and Renewable Energy Technologies and Resources, Emission Control Reporting Requirements, and Amendment of Chapters 4901:5-1, 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

INDUSTRIAL ENERGY USERS-OHIO'S APPLICATION FOR REHEARING OR, IN THE ALTERNATIVE, REQUEST FOR CLARIFICATION, AND MEMORANDUM IN SUPPORT

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November 16, 2009

Attorneys for Industrial Energy Users-Ohio

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Pursuant to Section 4903.10, Revised Code, and Rule 4901-1-35, Ohio Administrative Code ("O.A.C."), Industrial Energy Users-Ohio ("IEU-Ohio") submits this Application for Rehearing from the October 15, 2009 Second Entry on Rehearing and October 28, 2009 Entry issued by the Public Utilities Commission of Ohio ("Commission") regarding rules to implement the energy efficiency/peak demand reduction ("EE/PDR") benchmarks and alternative energy portfolio standards ("AEPS") found in Amended Substitute Senate Bill 221 ("SB 221") (collectively, the "Green Rules"). As explained in more detail in the attached Memorandum in Support, the Commission's October 15, 2009 Entry on Rehearing and its October 28, 2009 Entry in this case is unlawful and unreasonable for the following reasons:

A. Prohibiting actual energy efficiency gains and peak demand reductions by mercantile customers from counting towards compliance with the portfolio benchmarks is unlawful and unreasonable.

B. Prohibiting an electric utility from counting cost-effective EE/PDR measures against their portfolio benchmarks simply because the measure may also be undertaken to comply with another law or regulation or building code is unlawful. In the alternative, the Commission should modify this rule to incorporate the clarifying statements the Commission made about this rule in its various orders in this proceeding.

C. Requiring a mercantile customer's EE/PDR program to pass the total resource cost ("TRC") test or another cost-benefit test in order for a mercantile customer to obtain an exemption from the cost recovery mechanism for an EDU's EE/PDR programs is both unlawful and unreasonable.

D. The definitions in Chapter 4901:1-39, O.A.C., regarding calculation of the peak demand reduction benchmark and measurement of peak demand reductions are unlawful and unreasonable.

E. Prohibiting customer-sited capabilities from counting against multiple individual portfolio benchmarks where a cost-effective customer-sited measure increases energy efficiency or reduces peak demand through the use of technologies or practices that also qualify as alternative energy resources is unlawful and unreasonable.

F. The restrictions that remain in Rule 4901:1-40-04(D), O.A.C., on the use of renewable energy credits ("REC") to comply with the annual renewable energy resource requirements that remain in Rule 4901:1-40-04(D), O.A.C., are unlawful.

G. The rules adopted by the Commission violate the Due Process Clause of the Fourteenth Amendment to the United States Constitution by establishing requirements that, if not fulfilled, may lead to financial and criminal penalties and which either forbid or require the doing of an act in terms so vague that persons of common intelligence must necessarily guess at their meaning.

IEU-Ohio requests that the Commission grant this Application for Rehearing for the reasons explained in this Application for Rehearing as well as in the Memorandum in Support.

Respectfully submitted,

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MEMORANDUM IN SUPPORT

I. INTRODUCTION

On August 20, 2008, the Commission issued proposed rules in this docket for comments. Extensive initial and reply comments were filed on September 9, 2008 and September 26, 2008, respectively, by interested parties. On April 15, 2009, the Commission issued its Opinion and Order that adopted the original Green Rules. Several parties filed Applications for Rehearing from the Commission's April 15, 2009 Opinion and Order and on June 17, 2009 the Commission issued its first Entry on Rehearing in this proceeding, denying the vast majority of requests to modify the unlawful and unreasonable Green Rules adopted by the Commission's Opinion and Order. The Commission also released an Entry *nunc pro tunc* on June 24, 2009 to clarify certain rules, correct errors, or sync-up the June 17, 2004 Entry on Rehearing with the modified Green Rules.

Second Applications for Rehearing were filed by FirstEnergy and Nucor Steel Marion and the Commission issued its Second Entry on Rehearing on October 15, 2009, modifying some of the Green Rules but again largely denying the

Applications for Rehearing. On October 28, 2009, the Commission issued a subsequent Entry making additional modifications to its Green Rules. IEU-Ohio's instant Application for Rehearing requests modifications related to the Green Rules adopted in both the October 15, 2009 Second Entry on Rehearing and the October 28, 2009 Entry.

IEU-Ohio continues to believe that the public interest would be well served by adopting rules that are flexible, especially since the rules and compliance with the SB 221 mandates are new to all parties. Unfortunately, the rules attached to October 15, 2009 Second Entry on Rehearing and the October 28, 2009 Entry continue to bundle rigid prohibitions that unlawfully or unreasonably preclude compliance opportunities with unlawfully vague guidance on what actions might be taken to comply with the portfolio requirements of SB 221.

IEU-Ohio respectfully requests the Commission grant its Application for Rehearing or clarify the rules for the reasons set forth below.

II. ASSIGNMENTS OF ERROR

A. Prohibiting actual energy efficiency gains and peak demand reductions by mercantile customers from counting towards compliance with the portfolio benchmarks is unlawful and unreasonable.

In its October 15, 2009 Entry on Rehearing, the Commission moved former Rule 4901:1-39-08(D), O.A.C, regarding the counting of mercantile customer-sited measures towards an electric distribution utility's ("EDU") EE/PDR benchmarks to Rule 4901:1-39-05(F), O.A.C. The Commission also modified this rule to include brand new language that distinguished how EE/PDR savings would be counted depending on whether the mercantile replaced existing equipment or installed new equipment. In its

October 28, 2009 Entry, the Commission further modified this rule to clarify how the effects of mercantile customer-sited EE/PDR programs will count towards the EE/PDR benchmarks. Thus, as modified by the October 28, 2009 Entry, Rule 4901:1-39-05(F) reads (in pertinent part) as follows:

> A mercantile customer's energy savings and peak-demand reductions shall be presumed to be the effect of a demand response, energy efficiency, or peak-demand reduction program **to the extent they involve the early retirement of fully functioning equipment, or the installation of new equipment that achieves reductions in energy use and peak demand that exceed the reductions that would have occurred had the customer used standard new equipment or practices where practicable.** Electric utilities may make an alternative demonstration that mercantile customer energy savings or peak demand reductions are effects of such a program. (Emphasis added).

Rule 4901:1-39-05(F), O.A.C., continues to place illegal restrictions on what mercantile customers' EE/PDR capabilities count towards an EDU's EE/PDR benchmarks. Section 4928.66(A)(2)(c), Revised Code is clear – the gross effects of all mercantile-customer sited programs must count towards an EDU's benchmark compliance effort and the Commission cannot legally constrain this opportunity by rule or otherwise.

SB 221 does not give the Commission authority to place restrictions upon the mercantile customer's efficiency gains and peak demand reductions associated with the replacement of existing equipment that can be counted towards an EDU's benchmarks. Nor can the Commission only count energy efficiencies or peak demand reductions from new equipment that are greater than what could be achieved with "standard new equipment or practices where practicable." SB 221 never mentions the "standard new equipment or practices where practicable" guideline created by the Commission and SB 221 does not give the Commission the authority to adopt this restriction. This rule is also certainly inconsistent with the legislature's directive that the Commission facilitate the integration of mercantile customer EE/PDR capabilities into an EDU's benchmark compliance efforts through reasonable arrangements.[1]

Finally, this rule conflicts with the very definition it sets up to measure compliance in the case of mercantile customers. The Commission's definition of "energy efficiency" in Rule 4901:1-39-01, O.A.C., includes actions that "reduce the consumption of energy while maintaining or improving the end-use customer's existing level of functionality, or while maintaining or improving the utility system functionality." Thus, even if a mercantile customer's capabilities meet the definition of "energy efficiency," Rule 4901:1-39-05(F), O.A.C., works to curb the extent to which those capabilities may count, which conflicts with Rule 4901:1-39-01, O.A.C.

The Commission should grant IEU-Ohio's Application for Rehearing and remove the provisions of this rule that unlawfully and unreasonably restrict the opportunities to count mercantile customer-sited EE/PDR measures towards an EDU's EE/PDR benchmarks.

B. Prohibiting an electric utility from counting cost-effective EE/PDR measures against their portfolio benchmarks simply because the measure may also be undertaken to comply with another law or regulation or building code is unlawful. In the alternative, the Commission should modify this rule to incorporate the clarifying statements the Commission made about this rule in its various orders in this proceeding.

Rule 4901:1-39-05(H), O.A.C., states "An electric utility shall not count in meeting any statutory benchmark the adoption of measures that are required to comply with energy performance standards set by law or regulation, including but not limited to, those embodied in the Energy Independence and Security Act of 2007, or an applicable

[1] Section 4928.66(A)(2)(d), Revised Code.

building code."[2] Thus, Rule 4901:1-39-05(H), O.A.C., excludes from the portfolio compliance measurement process any measures that are required by other laws, regulations, or applicable building codes.

This provision is unlawful inasmuch as this restriction exceeds the authority delegated to the Commission in SB 221 and is contrary to the intent of SB 221. SB 221 did not give the Commission authority to make energy efficiency and peak demand reduction gains ineligible for compliance with the portfolio requirements. The Commission's rule effectively removes the word "all" from this statutory section and replaces it with the word "some." The Commission's rule then effectively works to delegate authority to itself to define what is meant by the word "some." Further, this rule runs contrary to the legislature's directive in Section 4928.66(A)(2)(d), Revised Code, that the Commission facilitate the commitment of mercantile customer-sited measures towards the EDUs' benchmark compliance efforts.

If the functional consequence of an action results in energy efficiency, the Commission cannot, in the future and without additional authority from the General Assembly, elect to ignore the functional consequence for purposes of measuring compliance simply because the action might become involuntary or be compelled at some time in the future by some other "regulator." The Commission is required to count the all energy efficiencies and peak demand reductions achieved by mercantile customer programs and the Commission does not possess the discretion to exclude efficiencies or peak demand reductions that may be required by another law or regulation or local building code.

[2] As explained below, this provision was formerly located at Rule 4901:1-39-05(D), O.A.C., until the Commission moved it to subsection (H) in its October 15, 2009 Second Entry on Rehearing.

The compliance disability imposed by Rule 4901:1-39-05(H), O.A.C. also unlawfully and unreasonably transforms the portfolio requirements adopted by the General Assembly into a standardless trap thereby violating the United States Constitution. As written the rule effectively delegates authority which the Commission does not have to other units of government (including those having the authority to adopt building codes) and to, in the future, render noncompliant an act that qualifies for compliance purposes today. Even if this scheme was somehow lawful, it would unreasonably require constant monitoring of every governmental authority (including authorities with the power to adopt building codes) to identify the compliance obligation. The net effect of these legal and other defects is to produce a compliance obligation that cannot be known or satisfied in any sensible way thereby driving up the costs that will ultimately land on customers.

In the alternative, if the Commission does not grant rehearing, it should incorporate into the text of the rule the clarifying statements the Commission made about this rule in its various orders in this proceeding. In its April 15, 2009 Opinion and Order, the Commission explained that measures not yet required by law, regulation, or building code will count until those measures are required by another law, regulation, or building code.[3] For example, the Commission observed that that the replacement of incandescent lighting with compact florescent lighting ("CFL") would count now, but not after such measures become required under the Energy Independence and Security Act of 2007. In its June 17, 2009 Entry on Rehearing the Commission observed that this provision "narrowly applies to standards set by law or regulation that create specific

[3] Opinion and Order at 20 (April 15, 2009).

technical performance standards and do not apply to general mandates or benchmarks for energy efficiency and peak-demand reduction like those contained in SB 221. Additionally, if federal energy efficiency standards are adopted that are not technology- or device-specific, but rather specify percentage savings objectives with regard to a baseline, impacts from electric utility programs should be counted towards both state and federal standards."[4] And, in its October 15, 2009 Second Entry on Rehearing, the Commission observed that it does not intend to unfairly or retroactively apply regulatory or building code changes to established and approved energy efficiency or peak demand reduction programs.[5] However, the Commission again expressed its unwillingness to allow prospective credit "for measures that a federal mandate or building code would require to be made regardless of an existing approved program."[6]

Accordingly, if the Commission does not grant rehearing, it should clarify the rule as follows:

> Except as otherwise provided, Aan electric utility shall not count in meeting any statutory benchmark the adoption of measures that are required to comply with energy performance standards set by law or regulation, including but not limited to, those embodied in the Energy Independence and Security Act of 2007, or an applicable building code. Where applicable, this limitation shall not be applied retroactively. Compliance with any energy efficiency or peak demand reduction benchmarks imposed by federal law or regulation shall be coordinated to count towards compliance with the Ohio energy efficiency and peak demand reduction benchmarks and shall not be treated as additional requirements to be met by the electric distribution utilities. (Emphasis added.)

[4] Entry on Rehearing at 11 (June 17, 2009). The Commission issued an Entry *nunc pro tunc* on June 24, 2009 explaining that its June 17, 2009 Entry on Rehearing incorrectly reflected a change to the wording of this rule and inaccurately indicated that a modification was being made on rehearing and mistakenly noted the rule itself was being changed when the Commission determined no change was necessary. Entry *nunc pro tunc* at 1-2 (June 24, 2009).

[5] Second Entry on Rehearing at 12 (October 15, 2009). The Commission also noted at page 16 that it will not revisit already-approved programs that were selected and vetted through the Commission review process and that "We certainly do not foresee an occasion where a program or measure would be retroactively invalidated due to a regulatory or building code change."

[6] Id.

C. Requiring a mercantile customer's EE/PDR program to pass the TRC test or another cost-benefit test in order for a mercantile customer to obtain an exemption from the cost recovery mechanism for an EDU's EE/PDR program is both unlawful and unreasonable.

In its October 15, 2009 Entry on Rehearing, the Commission for the first time inserted into the Green Rules a provision that forbids a mercantile customer from receiving an exemption from an EDU's charge to recover its EE/PDR costs unless its EE/PDR program passes the TRC test. The Commission further revised this provision in its October 28, 2009 Entry to permit a mercantile customer to receive an exemption if its EE/PDR program passed a TRC test <u>or</u> if the EDU's avoided cost exceeds the cost to the EDU for the mercantile customer's program. The Commission should grant IEU-Ohio's Application for Rehearing and remove the requirement that a mercantile customer's EE/PDR program meet a TRC or other cost-benefit test to qualify for an exemption from the EDU's rider inasmuch as the rule is unlawful as well as unreasonable and unfair.

First, Rule 4901:1-39-08(A), O.A.C., is unlawful inasmuch as it exceeds the Commission's authority and violates the General Assembly's intent to grant mercantile customers the opportunity to obtain an exemption from paying for an EDU's EE/PDR program when the mercantile customer can help the EDU meet the EE/PDR benchmarks through the integration of its own EE/PDR measures into the EDU's benchmark compliance efforts. The Commission's rule flies in the face of SB 221's clear text and intent to permit the EDUs to utilize <u>**all**</u> the EE/PDR capabilities and measures of mercantile customers to meet their EE/PDR benchmarks as well as the provision in Section 4928.66, Revised Code, that requires the Commission to facilitate the commitment of mercantile customer-sited capabilities towards the EDUs' benchmark compliance efforts through the use of reasonable arrangements. Further, there is no TRC test or other cost-benefit test in SB 221 and the Commission cannot lawfully require a mercantile customer's EE/PDR capabilities to meet or exceed any such test to receive the statutorily-granted exemption from an EDU's charge to recover its EE/PDR benchmark compliance costs.

Additionally, it is unreasonable and unfair to hold mercantile customer programs to a higher standard than non-mercantile customer programs. In its October 15, 2009 Finding and Order providing policy guidance for the technical reference manual, the Commission explicitly determined that it will <u>not</u> require other individual EE/PDR programs of <u>non</u>-mercantile customers to meet the TRC test.[7] Further, Rule 4901:1-39-04(B), O.A.C., states "Each electric utility shall demonstrate that its program portfolio plan is cost-effective on a portfolio basis. In general, each program proposed within a program portfolio plan must also be cost-effective, although each measure within a program need not be cost-effective. However, an electric utility <u>may</u> include a <u>program</u> within its program portfolio plan that is <u>**not cost-effective**</u> when that program provides substantial nonenergy benefits." (Emphasis added.)

The Commission's rule is fundamentally unfair to Ohio's mercantile customers inasmuch as it does not impose similar restrictions on <u>non</u>-mercantile customer EE/PDR capabilities. The General Assembly could not have intended that such an inequity apply to mercantile customers when it provided several explicit opportunities in SB 221 for mercantile customers to help the EDUs meet their benchmarks.

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[7] *In the Matter of Protocols for the Measurement and Verification of Energy Efficiency and Peak Demand Reduction Measures*, Case No. 09-512-GE-UNC, Finding and Order at 12 (October 15, 2009).

The Commission should grant IEU-Ohio's rehearing request and entirely remove subsection (A) from Rule 4901:1-39-08, O.A.C. inasmuch as it is unlawful and unreasonable.

D. The definitions in Chapter 4901:1-39, O.A.C., regarding calculation of the peak demand reduction benchmark and measurement of peak demand reductions are unlawful and unreasonable.

The Commission's October 15, 2009 Entry on Rehearing removed a prohibition on counting the interruptible portion of customers' service towards an EDU's PDR benchmark unless the customer's service was actually interrupted. The October 15, 2009 Entry on Rehearing also adopts brand new definitions for "coincident peak demand savings"[8] and "peak demand."[9]

The Commission defines "peak demand" differently for benchmark compliance calculation purposes than for peak demand reduction measurement purposes. "Peak demand" is defined for the purposes of calculating the baseline with reference to a sixty-minute integrated clock hour[10] whereas "peak demand" for benchmark compliance purposes is the average maximum hourly electricity usage during the highest 100 hours on the electric utility's system in a calendar year. Making things even more confusing, the Commission also throws in an entirely different definition for "coincident peak-demand savings" to define when an energy efficiency measure may count towards

[8] "Coincident peak-demand savings" means the demand savings for energy efficiency measures that are expected to occur during the summer on-peak period which is defined as June through August on weekdays between 3:00 p.m. and 6:00 p.m. Rule 4901:1-39-01(D), O.A.C.

[9] "Peak-demand", when measuring reduction programs means the average maximum hourly electricity usage during the highest 100 hours on the electric utility's system in a calendar year. Rule 4901:1-39-01(R), O.A.C.

[10] The definition of "peak-demand baseline" calculates an EDU's peak demand by referring to the EDU's most recent long-term forecast report. The definition of "peak demand," as used in Rule 4901:5-5-01, O.A.C, for long-term forecast reporting, is "the electric transmission owner's or electric utility's maximum sixty-minute integrated clock hour predicted or actual load for the year."

a peak demand reduction benchmark. The differing definitions are unreasonable inasmuch as they needlessly conflict with each other and only serve to inject confusion into the peak demand reduction baseline setting process and peak demand reduction benchmark compliance efforts.

Further, the definition of "peak demand" in Rule 4901:1-39-01(R), O.A.C., does not actually capture a utility's peak demand. By definition, it is an average of the highest 100 hours and is not based on the utility's actual peak demand for a calendar year. Additionally, at odds with the definition of "peak demand" in Rule 4901:5-5-01, O.A.C., the definition of "peak demand" in Rule 4901:1-39-01(R), O.A.C., fails to prescribe how to calculate the "maximum hourly electricity usage." The definition of "peak demand" in Rule 4901:1-39-01(R), O.A.C., is unreasonable inasmuch as EDUs and customers are left wondering whether the "maximum hourly electricity usage" is based on a tabulation of the highest single instantaneous points in the highest 100 hours or whether it is based on an integrated demand measured during the hour. The Commission should grant IEU-Ohio's rehearing request and clarify these ambiguities surrounding an important piece of the SB 221 compliance obligations.

Additionally, in its October 15, 2009 Entry on Rehearing, the Commission adopted rules that permit the counting of the demand response capabilities of interruptible customers towards an EDU's peak demand reduction obligations as required by SB 221. But the Commission's definition of "demand response" conflicts with Rule 4901:1-39-05, O.A.C. The definition of "demand response" appears to require an interruptible customer to "change" its behavior (i.e. actually interrupt its operations) for its demand response capabilities to count towards an EDU's peak demand reduction benchmark while the substantive rule no longer requires an interruptible customer to "change" its behavior. Thus, the definition of demand response is unlawful and unreasonable inasmuch as it conflicts with the substantive provisions in Rule 4901:1-39-05, O.A.C. Finally, on this same note, the definition of "peak demand benchmark" should be modified to comport with the Commission's decision to permit interruptible customers' load to count towards the PDR benchmarks. The "an electric utility's system must achieve" language should be deleted from this rule accordingly.

The Commission should grant IEU-Ohio's Application for Rehearing to correct the unlawful and unreasonable definitions contained in Rule 4901:1-39-01, O.A.C.

E. Prohibiting customer-sited capabilities from counting against multiple individual portfolio benchmarks where a cost-effective customer-sited measure increases energy efficiency or reduces peak demand through the use of technologies or practices that also qualify as alternative energy resources is unlawful and unreasonable.

In its October 15, 2009 Second Entry on Rehearing, the Commission modified its definition of "double counting." The Commission observed that a single measure should be able to count for both energy efficiency and peak demand reduction compliance, but should not be able to count towards both energy efficiency and advanced energy statutory requirements.[11] The Commission also added language to the rule that prohibits a renewable energy resource, renewable energy credit, or energy efficiency savings from satisfying "multiple Ohio state renewable energy requirements or such requirements for more than one state."

For compliance measurement purposes, the Commission's rule continues to work to degrade the value of a customer-sited measure that may have multiple benefits

[11] Second Entry on Rehearing at 19.

and qualify as both an EE/PDR measure and an alternative energy resource. This value is degraded by the Commission's determination that a customer-sited measure that produces the functional outcomes mandated by SB 221 may not be eligible for the compliance count. The Commission attempts to rationalize this unlawful value degradation by indicating that it is preventing double counting. But the real effect of the Commission's rule is to arbitrarily and unlawfully restrict the positive value that might be derived from a measure that meets both the EE/PDR and alternative energy requirements. The Commission's prohibition on double counting is actually an unlawful directive to miscount the full value of cost-effective measures.

Section 4928.64(A)(1), Revised Code, states that an alternative energy resource includes those renewable energy resources and advanced energy resources that are committed for integration into an electric utility's demand response, energy efficiency, or peak demand reduction programs. Thus, Section 4928.64(A)(1), Revised Code, specifically recognizes and enables the cross functionality that may be attributable to a measure that qualifies as **both** an EE/PDR measure and an alternative energy technology. Further, Section 4928.01(A)(34)(g), Revised Code, defines "advanced energy resource" to include "(g) Demand-side management **and** any energy efficiency improvement." (Emphasis added.) In other words, SB 221 specifically includes energy efficiency gains in its list of measures that qualify as an "alternative energy resource" and Rule 4901:1-40-01, O.A.C. conflicts with SB 221's specific inclusion.

Prohibiting the results of customer-sited measures from being applied to measure compliance with all requirements that may be satisfied by such measures is also unreasonable. For example, solar electricity has been shown to be a viable means of providing double benefits – especially when installed on an end-user's facility. In this instance, solar electricity reduces the demand that needs to be satisfied by the EDU. Also, the line and transformation losses that occur when electricity is supplied to an end user from a centralized system of generators and a delivery network are avoided in the case of customer-sited or distributed solar generation. The Commission's rule precludes the recognition of the avoided losses (less energy required to achieve the same functional outcome) and the potential of a customer-sited solar capability to also reduce peak demand when accompanied by a passive or active storage capability.

Where a measure produces the energy efficiency, peak demand reduction or renewable resource outcomes required by SB 221, it must be eligible for being counted for purposes of measuring compliance with each portfolio requirement. Any business (or regulator) making a determination of the best value available from competing technologies or solutions will strive to pick the option that provides the broadest range of benefits for each unit of cost incurred. The Commission's prohibition on the recognition of multiple benefits that are derived from particular measures violates SB 221 and discourages implementation actions that provide the best bang for the buck.

The Commission's modifications to the definition of "double counting" remain unlawful and unreasonable. The Commission should modify this definition to remedy these illegal defects.

F. The restrictions that remain in Rule 4901:1-40-04(D), O.A.C., on the use of RECs to comply with the annual renewable energy resource requirements are unlawful.

In its October 15, 2009 Entry on Rehearing, the Commission modified Rule 4901:1-40-04(D), O.A.C., to remove a provision requiring a REC to be "fully aggregated" to be applied towards compliance with the renewable energy resource requirements of Section 4928.64, Revised Code.[12] The Commission also modified this subsection of Rule 4901:1-40-04, O.A.C., to require a utility-grade meter for renewable energy resource facilities with generating capacity of more than six kilowatts. The Commission's October 28, 2009 Entry further modified this rule to address the use of storage facilities to meet the renewable energy resource benchmarks. As explained below, Rule 4901:1-40-04(D), O.A.C., should be modified further to remedy the unlawful provisions of this rule that remain despite these recent changes to the rule.

Section 4928.65, Revised Code, states "The rules also shall provide for this state a system of registering renewable energy credits by specifying which of any generally available registries shall be used for that purpose and not by creating a registry. That selected system of registering renewable energy credits ... shall allow customer-sited projects or actions the broadest opportunities to be eligible for obtaining renewable energy credits." Rule 4901:1-40-04(D)(2), O.A.C., does not fulfill the directive contained in Section 4928.65, Revised Code and the Commission's failure to designate a REC registry violates SB 221.

While Rule 4901:1-40-04(D)(2), O.A.C., addresses the registry to which an EDU must belong in order to use RECs to meet the AEPS requirements, the Commission has not specified which registry must be used by an owner/operator of a renewable energy resource to register their RECs so that they can be used by an electric utility or competitive generation supplier to meet the renewable energy requirements. The Commission must establish a system that allows RECs to be obtained and for the obtained REC to count for purposes of measuring compliance with SB 221's

[12] Second Entry on Rehearing at 19 (October 15, 2009).

benchmarks. In doing so, it must identify the single registry that will be used as part of that system and that can be uniformly used by all participants in helping meet the alternative energy benchmarks.

Additionally, Rule 4901:1-40-04(D)(5), O.A.C., prohibits the use of RECs associated with electricity that was generated prior to July 31, 2008, the effective date of SB 221. This rule directly conflicts with Section 4928.65, Revised Code, which states that "An electric distribution utility or electric services company may use renewable energy credits any time in the five calendar years following the date of their purchase or acquisition from any entity." The Commission has illegally rewritten SB 221 to preclude the use of RECS that existed prior to July 31, 2008 even within the 5-year utilization window specified by SB 221.

The Commission's modifications to this rule in its October 15, 2009 Entry on Rehearing and its October 28, 2009 Entry fail to remedy all of the unlawful provisions of this rule and the Commission must change this rule to comport to the directives in SB 221.

G. The rules adopted by the Commission violate the Due Process Clause of the Fourteenth Amendment to the United States Constitution by establishing requirements that, if not fulfilled, may lead to financial and criminal penalties and which either forbid or require the doing of an act in terms so vague that persons of common intelligence must necessarily guess at their meaning.

While the specific deficiencies of the rules are discussed in detail above, generally and as highlighted by specific examples, the rules adopted by the Commission offend the Constitutional prohibitions against vagueness.

Pursuant to the Due Process Clause of the Fourteenth Amendment to the United States Constitution, a criminal statute is unconstitutional if it "... either forbids or requires the doing of an act in terms so vague that [persons] of common intelligence must necessarily guess at its meaning .... ."[13] The concept of unconstitutional vagueness is derived from a basic notion of fairness; each person must be given fair warning before being held culpable for conduct deemed to be criminal.[14] A statute is void when it is vague either as to what persons fall within the scope of the statute, what conduct is forbidden, or what punishment may be imposed. A statute meets the constitutional standard of certainty if its language conveys a sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices.[15] Principles of criminal law are relevant here since Sections 4903.25 and 4903.99, Revised Code, make failure to comply with a Commission order or direction a fourth degree felony.

The wording of the rules adopted by the Commission leave utilities and customers uncertain to such a degree that the rules continue to amount to an unconstitutional trap. For example, Rule 4901:1-39-08(C), O.A.C. requires the annual report provided by mercantile customers to be eligible to avoid the EE/PDR rider to recognize "that programs may have diminishing effects over time as technology evolves or equipment degrades." However, the Commission provides no guidance as to how to quantify or account for these diminishing effects despite the fact that a mercantile customer's exemption hangs in the balance. As another example, and as explained above, the Commission's conflicting and inconsistent definitions of "peak demand" and

[13] *Connally v. General Constr. Co.*, 269 U.S. 385, 391, 46 S.Ct. 126, 127, 70 L.Ed. 322 (1926).

[14] *Colten v. Kentucky*, 407 U.S. 104, 110, 92 S.Ct. 1953, 1957, 32 L.Ed.2d 584 (1972); *Grayned v. City of Rockford*, 408 U.S. 104, 108, 92 S.Ct. 2294, 2298-99, 33 L.Ed.2d 222 (1972).

[15] *United States v. Wise*, 550 F.2d 1180, 1186 (9th Cir.), cert. denied, 434 U.S. 929, 98 S.Ct. 416, 54 L.Ed.2d 290 (1977).

other terms surrounding PDR benchmark compliance renders Rule 4901:1-39-01, O.A.C., unconstitutional. These rules are so vague that we must guess at their meaning while there are significant civil and criminal penalties attached to not complying with the rules.

The Commission must rectify the Constitutional problems created by the various rules, including Rules 4901:1-38-05 and 4901:1-39-01, O.A.C., that are so vague that their meanings cannot reasonably be determined.

III. CONCLUSION

IEU-Ohio respectfully requests the Commission grant rehearing or in the alternative clarify its rules for the reasons discussed herein.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *Industrial Energy Users-Ohio's Application for Rehearing or, in the Alternative, Request for Clarification, and Memorandum in Support* has been served by regular mail, postage prepaid, this 16th day of November 2009, upon the parties listed below.

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