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November 23, 2009

Ms. Renee J. Jenkins
Director, Administration Department
Secretary to the Commission
Docketing Division
The Public Utilities Commission of Ohio
180 East Broad Street
Columbus, OH 43215-3793

Dear Ms. Jenkins:

Re: ***Case No. 08-888-EL-ORD***
Memorandum Contra of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company of the Application for Rehearing Submitted by Ohio Consumer and Environmental Advocates

Enclosed for filing, please find the original and twelve (12) copies of the Memorandum Contra of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company. Please file the enclosed in the above-referenced docket, time-stamping the two extras and returning them to the undersigned.

Thank you for your assistance in this matter. Please contact me if you have any questions concerning this matter.

Very truly yours,

Kathy J. Kolich/jms

kag
Enclosures

cc: Parties of Record

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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, and Emission Control Reporting Requirements, and Amendment of Chapters 4901:5-1, 4901:5-3, 4901:5-5, and 4901:5-7 of the Ohio Administrative Code, Pursuant to Chapter 4928, Revised Code, to Implement Senate Bill No. 221.	)	**Case No. 08-888-EL-ORD**

MEMORANDUM CONTRA OF OHIO EDISON COMPANY, THE CLEVELAND ELECTRIC ILLUMINATING COMPANY, AND THE TOLEDO EDISON COMPANY OF THE APPLICATION FOR REHEARING SUBMITTED BY OHIO CONSUMER AND ENVIRONMENTAL ADVOCATES

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I. Introduction

Pursuant to R.C. § 4903.10 and Rule 4901-1-35(B), O.A.C., Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company (collectively, "Companies") hereby submit their memorandum contra application for rehearing ("AFR"), submitted in the above-referenced proceeding by Ohio Consumer and Environmental Advocates ("OCEA"). In their AFR, OCEA challenges several rules dealing with mercantile customer projects, renewable energy credits, storage facilities and forecast reports. For the reasons more fully discussed below, these challenges are without merit and OCEA's application for rehearing should be summarily rejected.[1]

[1] While this memorandum contra addresses most of OCEA's challenges, failure to address an argument should not be construed as agreement with the positions taken by OCEA.

II. Arguments

A. OCEA's interpretation of R.C. 4928.66 is in error and, accordingly, its conclusions that are based on such interpretation are wrong.

In its AFR, OCEA challenges the Commission's proposed Rule 4901:1-39-05(F), which provides in pertinent part:

> A mercantile customer's energy savings and peak-demand reductions shall be measured by including the effects of all demand-response programs of the mercantile customer and all mercantile customer-sited energy efficiency 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.

As the Companies have explained in several of their applications for rehearing[2], R.C. 4928.66(A)(2)(c) allows for the inclusion of the effects of *all* mercantile customer-sited projects, providing:

> 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.]

Both the Commission and OCEA emphasize the fact that the above statute allows only the effects of energy efficiency and peak demand reduction ("EEDR") *programs* to be included for purposes of complying with the statutory benchmarks. (Entry on Rehearing at 13 (October 15, 2009); OCEA AFR, pp. 2-3). Such emphasis is misplaced at the mercantile customer level. EEDR programs are designed by the utilities.[3] In this instance, at least with regard to the Companies, the utilities have developed a *program* to accumulate the effects of individual EEDR

[2] *See e.g.*, Companies' May 15, 2009 AFR, pp. 9-11; Companies' July 17, 2009 AFR, pp. 4-16.
[3] OCEA correctly recognizes this in its AFR, stating, "The proper, lawful standard is applied to utility programs...." (OCEA AFR, p. 4.)

projects that have been put in place by mercantile customers since January 1, 2006. The effects of this program are the cumulative energy savings and/or peak demand reductions that have occurred as a result of these *projects*. Indeed, it is the Commission that has created a review at the customer level, by requiring mercantile customers to file applications with the Commission on an individual basis. (Rule 4901:1-39-05(G)). In so doing, the Commission, and not the utility, has in essence created the *program* on an individual customer basis. It is not the Commission's place to develop *any* EEDR program; rather, it is its place to review such programs to ensure that the programs designed by the utility comply with the law. And in this case, the law allows the effects of *all* mercantile customer sited EEDR programs to be included for purposes of complying with statutory EEDR benchmarks. (R.C. 4928.66(A)(2)(C)).

OCEA also takes issue with the Commission's modification to Rule 4901:1-39-05(H), claiming that the removal of the requirement that equipment not yet be fully depreciated could *potentially* create a class of free-riders and result "in no net new energy efficiency as was intended in S.B. 221." (OCEA AFR, p. 4.) As a preliminary matter, *speculation* as to whether a program will create "free riders" is not evidence to justify a change in a proposed rule. Indeed, the Commission, in Docket No. 09-512-GE-UNC, indicated that it would evaluate performance of utility programs on a gross savings basis[4]. (Case No. 09-512-GE-UNC, October 15, 2009 Order, p. 5.) In this same docket, the Commission further explained its intention "to address the issue of moving toward program evaluation on a net savings basis as experience with energy efficiency program implementation and evaluation is gained." (Id.) Inasmuch as the Commission has decided to defer its resolution of free ridership until it rightfully gains more

[4] The Commission defines "gross savings" as "the change in energy consumption that results directly from program-related actions taken by consumers, regardless of the extent that their behavior is actually influenced by the program." (Order, p. 4, fn. 1.) "Net savings", on the other hand, is defined as "the change in energy use directly attributable to program-related actions, taking into account free-riders and spill over. (Id. at fn. 2.)

experience in the areas of program evaluation, OCEA's comments regarding this topic in this proceeding are misplaced. Moreover, its objection to the Commission's removal of a depreciation measurement ignores reality. There is no evidence that would support a finding that a piece of equipment has no further useful life simply because it is fully depreciated. Depreciation is an accounting tool for tax and financial reporting purposes and the Commission is correct not to rely on such a tool to determine if equipment is still operational. Such a position by OCEA ignores the fact that there are various methods for calculating depreciation -- both for tax and financial reporting purposes – methods that may not necessarily reflect actual useful life.[5] OCEA's focus on depreciation is misplaced. A clear objective of the legislature when enacting S.B. 221 was to reduce energy consumption. If a customer replaces functioning equipment (regardless of whether it is fully depreciated), with more energy efficient equipment, there is a reduction in energy consumption (assuming all other variables remain constant). Assuming the customer otherwise meets the requirements as a mercantile customer, the results of such a replacement can be included in a utility's compliance plan. (R.C. 4928.66(A)(2)(c)).

In sum, there are many variables surrounding a customer's choice to proceed with any given project. There is no way to be certain whether and to what degree energy efficiency and/or demand response results entered into that decision. Clearly the General Assembly recognized that it was not its place to delve into this decision making process as evidenced by the fact that it decided to include the effects of *all* such mercantile customer programs for purposes of complying with statutory EEDR benchmarks. Inasmuch as the General Assembly elected not to

[5] Many times depreciation rates for tax purposes are established for other reasons, such as to provide incentives for certain types of investments. In these situations, the goal to create such incentives does not necessarily align with the actual determination of the period in which the equipment will operate.

second guess Ohio's businesses, neither should the Commission. Accordingly, the constraints on mercantile customer projects proposed by OCEA should be rejected.[6]

B. OCEA's suggested modifications to the Commission's position on "double counting" are unsupported by facts and would be unnecessarily costly to Ohio consumers.

In its AFR, OCEA suggests that allowing a REC to satisfy a state renewable energy requirement and a federal regulatory requirement "has the potential of allowing the federal renewable requirements to define a ceiling for renewable production in Ohio." As a preliminary matter, OCEA cannot know the actual effects of the Commission's position on this issue, given the fact that there is no federal legislation at this point. It is pure conjecture on its part, as evidenced by its statement that Ohio's utilities "*will likely* end up with excess federal RECs ..." and such a position "has the *potential*" to create certain results. (OCEA AFR, p.14)(emphasis added.) Policy should not be based on speculation and, therefore, OCEA's suggested changes to the double counting concept should be summarily rejected. Moreover, it is absurd to think that Ohio's General Assembly intended to exponentially increase the benchmarks that it established in S.B. 221, through *future* federal legislation, the effects of which could not be known by the legislature at the time S.B. 221 was enacted. It would be irresponsible for them to do so, and equally irresponsible for the Commission to presume so. Therefore, unless the General Assembly revisits the compliance benchmarks as set forth in S.B. 221 and expressly states that they should be adjusted for Federal requirements, the Commission is without authority to do so. *Canton Storage and Transfer Co. v. Pub. Util. Comm.* (1995), 72 Ohio St. 3d 1, 5. And finally, if OCEA's position is adopted, there will be a substantial increase in compliance costs that will ultimately have to be paid by Ohio consumers. It is time that OCEA's members recognize that

[6] As explained in detail in the Companies' applications for rehearing, the Commission's other constraints on the eligibility of mercantile customer projects incorporated into the rules should also be removed. *See e.g.*, Companies' May 15, 2009 AFR, pp. 7-12; Companies' July 17, 2009 AFR, pp. 4-16.

compliance with S.B. 221 will not be paid for with "Monopoly" money, but rather, with actual money that is much less readily available for most Ohioans during this current economic crisis. This -- unlike OCEA's speculative "sky is falling" claims -- is a fact. Therefore, for all of the above reasons, OCEA's suggestion to disallow a REC to count towards both state and federal regulations should be rejected.

C. OCEA's assignment of error related to the disaggregation of RECs is unsupported in law and is contrary to public policy.

OCEA argues that the Commission's removal of the definition of "fully aggregated" "may lead the parties into thinking that they can use a REC as both an offset and a REC." (OCEA AFR, p. 10.) Again, OCEA *speculates* as to potential outcomes without the benefit of having specific facts in which to address the issue. Energy efficiency legislation, both on a state and federal level, is relatively new, with additional legislation in interrelated areas, such as environmental compliance, still developing. As the Commission noted in its October 15, 2009 Entry on Rehearing (at 19), it may revisit the REC disaggregation issue "in the future if carbon regulations and related markets develop." In light of the continuing development of state and federal legislation, the Commission's "wait and see" approach is prudent. OCEA fails to cite any authority demonstrating why such an approach is unreasonable or unlawful and, therefore, its arguments related to REC disaggregation should be summarily rejected.

While this should be dispositive of OCEA's assignment of error on this issue, OCEA's position is also contrary to public policy. The change in the rule clarifies that the carbon allowance will remain separate, thus maintaining the separate value of both the REC and its environmental attribute. This change is appropriate and consistent with S. B. 221, which provides no authority for the Commission to constrain the other attributes that may or may not accompany a REC. Moreover, by preserving the independent attributes, the REC should have

more value to a developer, which should provide additional incentives to the developer and spread the cost of these facilities across a broader spectrum that would include purchasers of RECs as well as purchasers of other related attributes. In the end, this makes the renewable resource more viable, encourages their development and should mitigate costs that might otherwise have to be paid by Ohioans.

D. The Commission's October 15th Entry clearly supports the legislative intent for the construction of storage facilities to promote renewable energy.

The Commission's change to Rule 4901:1-40-04(A)(8) fully reflects the intent of the General Assembly in its support of the development of storage facilities for electricity found in R.C. Section 4928.01(A)(35). As is plain from the language of the statute, the intent was to encourage the development of storage facilities, recognizing that the existence of such facilities has the potential to create a significant off-peak demand, when certain renewable energy resources tend to generate, and by virtue thereof providing an incentive to construct and operate, or as stated in the statute "promote the better utilization of", of renewable energy resources that primarily generate off-peak.

The statute does not, however, require a direct, physical electrical tie between a renewable energy resource and the storage facility, as suggested by OCEA. The definition of a renewable energy resource includes the following: "storage facility that will promote the better utilization of a renewable energy resource that primarily generates off peak". Nowhere in this language is a requirement that the power used to pump the resource into a storage reservoir must be tied directly to a renewable energy resource. If that had been the legislative intent, the statute would have simply said so, and it does not. The General Assembly recognized the "chicken and egg" nature of this situation and solved it by determining to encourage the construction of a

storage facility which will in turn promote the construction and utilization of off-peak renewable energy resources by creating an off-peak demand for power. But to fulfill this legislative intent, the power to pump the resource could not be limited to renewable energy resources, as those are the very resources the development of the storage facility is designed to encourage. The change to the rule made by the Commission in their October 28 Entry paves the way toward meeting this legislative intent, OCEA's argument serves to undermine it.

For OCEA's position to be correct, there would first have to be sufficient and available physical capacity of off-peak renewable energy resources constructed and proven to operate and generate the amount of megawatt hours (MWh) necessary to pump the resource into the reservoir. Until such time as such capacity exists and is available, it is extremely unlikely that anyone would construct a storage facility of any significant size. And without the demand for off-peak power created by the storage facility, renewable energy resources that primarily generate off-peak would be less likely to be constructed.

From the phrasing and language used by OCEA in its Application for Rehearing, it is clear that OCEA philosophically opposes the classification of a storage facility as a renewable energy resource, and they recognize that the previous version of the rule would serve as a significant, if not complete, barrier to the development of such facilities. But suggesting, as OCEA does at page 16, that purchasing RECs to pump the resource during an off-peak period will not promote the better utilization of renewable energy resources that operate primarily off-peak really misses the mark, and is short-sighted on the part of OCEA. If you want to promote the construction and utilization of renewable energy resources that operate primarily off-peak, then there has to be load to be served during that off-peak period, which is precisely the type of load the storage facility creates. OCEA's insistence that there exist a direct tie between a

renewable energy resource and a storage facility is not part of the statute and would undermine legislative intent. The Commission should reject OCEA's proposed change to Rule 4901:1-40-04(A)(8)(a).

E. OCEA's suggestions to modify Rule 4901:5-5-06 are contrary to law.

OCEA argues that "[t]he Commission's modification to its originally approved rule [4901:5-5-06] is an unreasonable action because the rule reduces the frequency of required submissions to as little as once every five years." (OCEA AFR p. 18.) As has already been explained in the Company's May 15, 2009 Application for Rehearing (at 30-32), the Commission is without authority to require any such reporting, whether it be annually as suggested by OCEA or every five years, as currently required in Rule 4901:5-5-06.

As part of its changes to the long term forecast report ("LTFR") rules, the Commission elected to reinsert Rule 4901:5-5-06, which requires the filing of an integrated resource plan ("IRP") by electric utilities. Such an insertion was purportedly done to comply with a mandate of S.B. 221. (April 15, 2009 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 LTFRs, let alone the type of significant changes that would be necessary to support the reinstitution of a mandatory IRP process, even with the Commission's changes made in its October 15th Entry. 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 authority to reinstate IRP Rules. As a creature of statute, the Commission derives its authority solely from that given by the General Assembly. *Tongren v. Pub. Util. Comm.* (1999), 85 Ohio St. 3d. 88. A review of Chapter 4935 demonstrates that no such power was

conferred upon the Commission and therefore it is unlawful for the Commission to adopt Rule 4901:5-5-06 at all.

III. Conclusion

Based upon the foregoing, OCEA's arguments are without merit and, accordingly, its application for rehearing should be denied.

Respectfully submitted,

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On behalf of Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company

CERTIFICATE OF SERVICE

Copies of the foregoing Memorandum Contra OCEA Application for Rehearing was served by first class United States Mail, postage prepaid (with copies provided electronically), to the persons on the attached Service List on this 23rd day of November, 2009.[1]

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