BEFORE THE
PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company For Approval of Their Energy Efficiency and Peak Demand Reduction Program Portfolio Plans for 2010 through 2012 and Associated Cost Recovery Mechanism.	Case Nos.	09-1947-EL-POR 09-1948-EL-POR 09-1949-EL-POR
In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company For Approval of Their Initial Benchmark Reports.	Case Nos.	09-1942-EL-EEC 09-1943-EL-EEC 09-1944-EL-EEC
In the Matter of the Energy Efficiency and Peak Demand Reduction Program Portfolio of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company.	Case Nos.	09-580-EL-EEC 09-581-EL-EEC 09-582-EL-EEC

APPLICATION FOR REHEARING OF INDUSTRIAL ENERGY USERS-OHIO AND MEMORANDUM IN SUPPORT

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October 7, 2011

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APPLICATION FOR REHEARING

Pursuant to Section 4903.10, Revised Code, and Rule 4901-1-35, Ohio Administrative Code ("O.A.C."), the Industrial Energy Users-Ohio ("IEU-Ohio") hereby applies for rehearing of the Public Utilities Commission of Ohio's ("Commission") September 7, 2011 Entry on Rehearing ("*Entry*") issued in the above-captioned cases, because it is unreasonable and unlawful in the following respects:

1. The Commission exceeded its authority under Section 4928.66, Revised Code, by establishing a new compliance standard that, as stated by the Commission, obligates an electric distribution utility ("EDU") to achieve compliance based on all available cost-effective energy efficiency opportunities.

2. Even if within the Commission's power to do so, the Commission's directive that an EDU comply with Section 4928.66, Revised Code, by implementing all available cost-effective energy efficiency opportunities is so vague that it amounts to an illegal standardless standard and otherwise unreasonable because it perpetuates a pattern of conflicting and confusing action and inaction by the Commission with regard to the means by which compliance with Section 4928.66, Revised Code, may be safely achieved.

For these reasons, and as set forth in greater detail in IEU-Ohio's Memorandum in Support, which is attached hereto and incorporated herein by reference, IEU-Ohio respectfully requests that the Commission grant rehearing and issue an Entry on Rehearing correcting the errors identified herein.

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MEMORANDUM IN SUPPORT

I. INTRODUCTION

IEU-Ohio, a party in these proceedings, respectfully requests that the Commission grant rehearing with regard to the issues discussed herein and that the Commission modify its *Entry* to remedy the errors discussed below as recommend below.

II. ARGUMENT

In its *Entry*, the Commission exceeded its statutory authority by ordering that "[i]n the absence of any regulatory, economic, or technological reasons beyond the Companies' reasonable control, the Companies should seek to provide to their

customers all available cost-effective energy efficiency opportunities."[1] The Commission further expanded the statutory benchmarks included in Section 4928.66(A)(1)(a), Revised Code, by including a least-cost criterion that does not exist: "When energy efficiency can be delivered for less than the cost of energy, utilities must provide it as a retail electric service option to their customers."[2] As more fully discussed below, IEU-Ohio believes that the Commission misinterprets Section 4928.66(A)(1)(a), Revised Code, and exceeds its statutory authority by expanding an EDU's statutory energy efficiency obligations beyond those established by the General Assembly. Moreover, even assuming *arguendo* that the Commission was within its power to impose such a requirement, the Commission's directive is so vague that it amounts to an illegal standardless standard and otherwise unreasonable because it perpetuates a pattern of conflicting and confusing action and inaction by the Commission with regard to the means by which compliance with Section 4928.66, Revised Code, may be safely achieved. Accordingly and as more fully discussed below, the Commission should issue an Entry on Rehearing in which it removes any requirement for an EDU to exceed the statutory energy efficiency benchmarks as set forth in Section 4928.66, Revised Code.

A. The Commission exceeded its authority under Section 4928.66, Revised Code, by establishing a new compliance standard that, as stated by the Commission, obligates an electric distribution utility ("EDU") to achieve compliance based on all available cost-effective energy efficiency opportunities.

[1] *Entry* at 6.

[2] *Id*. at 5.

Section 4928.66(A)(1)(a), Revised Code, states:

> Beginning in 2009, an electric distribution utility shall implement energy efficiency programs that achieve energy savings equivalent to at least three-tenths of one per cent of the total, annual average, and normalized kilowatt-hour sales of the electric distribution utility during the preceding three calendar years to customers in this state. The savings requirement, using such a three-year average, shall increase to an additional five-tenths of one per cent in 2010, seven-tenths of one per cent in 2011, eight-tenths of one per cent in 2012, nine-tenths of one per cent in 2013, one per cent from 2014 to 2018, and two per cent each year thereafter, achieving a cumulative, annual energy savings in excess of twenty-two per cent by the end of 2025.

The Commission's *Entry* interprets the above statute to require an EDU to meet a compliance standard that is tied to ***all*** available cost-effective energy efficiency opportunities, regardless of whether the EDU has met or exceeded the statutory benchmarks. Nowhere in Section 4928.66, Revised Code, or the balance of Chapter 4928, Revised Code, has the General Assembly empowered the Commission to subject an EDU to an "all" compliance standard or, as importantly, to subject consumers to compliance costs based on such a standard.

The Commission is a creature of statute and has no authority to expand its delegated authority as the Commission has done in this case. *Canton Storage and Transfer Co. v. Pub. Util. Comm*., (1995) 72 Ohio St. 3d 1. When the Court (or Commission) is called on to interpret a statute, it must "breathe sense and meaning into it; [ ] 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. It should not insert words not included by the legislature (*State ex rel. Cassels v. Dayton City Sch. Dist. Bd. of Educ.* (1994), 69 Ohio St. 3d 217, 220), nor should it presume that the

General Assembly intended to 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.

The Commission's reading of Section 4928.66, Revised Code, for purposes of measuring the compliance obligation established by such section, violates the fundamental legal principles that define the scope of the Commission's authority and how such delegated authority can be exercised by the Commission. Nowhere in Section 4928.66, Revised Code, has the General Assembly given the Commission authority to hold EDUs accountable to the compliance obligation established by the Commission in the *Entry*. To interpret Section 4928.66, Revised Code, as the Commission has done in the *Entry* ignores the benchmark requirements established by the General Assembly, thus failing to give effect to all of the statute's terms and provisions, again violating Ohio's rules of statutory interpretation. By ignoring the compliance math specified by the General Assembly, the Commission has done more than illegally affect the compliance math for EDUs. The Commission's *Entry* may also be read to affect the compliance math under the "benchmark standard" that is used to determine how and to what an extent a mercantile customer may be eligible for an exemption from the compliance cost recovery mechanism by contributing customer-sited capabilities. The combined effect of this offense raises the cost of compliance for an EDU which in turn raises the cost of compliance that is passed on to customers while perpetuating confusion or worse regarding the statutory options available to mercantile customers.

Although Section 4928.66, Revised Code, includes the words "at least" before expressing the percent-of-baseline benchmarks, clearly these words do give the

Commission the power to raise the compliance bar or (as discussed further below) to express the compliance obligation through a conceptual and abstract ***all*** available cost-effective energy efficiency opportunities yardstick.

In its *Entry*, the Commission states that if energy efficiency can be delivered for less than the cost of energy (a generation supply function and "competitive retail electric service"), an EDU must provide energy efficiency as a retail electric service option to its customers.[3] The Commission goes on to state that EDUs "may not preferentially push electrons over energy savings opportunities on their customers"[4] suggesting that EDUs have any control over the supply-side choices made by customers. In effect, the Commission has established an energy efficiency compliance obligation for EDUs that requires EDUs to displace the generation supply EDUs can only lawfully provide as a default supplier under Sections 4928.14 or 4928.141, Revised Code, by requiring EDUs to push ***all*** available cost-effective energy efficiency opportunities on their customers.

As indicated above, generation supply is a competitive retail electric service and the General Assembly has limited the generation supply role of an EDU to a default supplier. In addition, the Commission has limited jurisdiction over the generation supply function. An EDU cannot push electrons on any customer and, increasingly, EDUs are not responsible for providing generation supply as customers migrate to "competitive retail electric service" ("CRES") suppliers. In other words, the predicate for the Commission's adoption of the ***all*** available cost-effective energy efficiency opportunities

[3] *Entry* at.5.

[4] *Id*. at 6.

yardstick is an illegal and fictional predicate and also violates the "customer choice" foundation of Chapter 4928, Revised Code.

In sum, the Commission's interpretation and application of Section 4928.66, Revised Code, rewrites Ohio law by unlawfully inserting words not included by the General Assembly. Thus, the Commission should grant rehearing and modify its *Entry* accordingly.

B. Even if within the Commission's power to do so, the Commission's directive that an EDU comply with Section 4928.66, Revised Code, by implementing all available cost-effective energy efficiency opportunities is so vague that it amounts to an illegal standardless standard and otherwise unreasonable because it perpetuates a pattern of conflicting and confusing action and inaction by the Commission with regard to the means by which compliance with Section 4928.66, Revised Code, may be safely achieved.

Even assuming that the General Assembly has given the Commission authority to impose an ***all*** available cost-effective energy efficiency opportunities compliance obligation on EDUs, the Commission has done so without providing the required guidance on how EDUs can determine and satisfy such compliance or on how mercantile customers can position themselves to contribute their customer-sited capabilities so as to obtain an exemption from the compliance cost recovery mechanism pursuant to Section 4928.66, Revised Code. Instead, the *Entry* only indicates that an EDU "should seek to provide to [its] customers all available cost effective energy efficiency opportunities", and "must seek the least cost means to achieve this standard."[5]

Assuming for the sake of argument that the Commission is within its statutory authority to adopt an ***all*** available cost-effective energy efficiency opportunities

[5] *Entry* at 6.

compliance yardstick, the Commission has acted unreasonably and unlawfully by failing to identify how compliance can be achieved with the specificity required by the United States Constitution.

The Due Process Clauses of the Fifth and Fourteenth Amendments give rise to the void-for-vagueness doctrine. The doctrine has two primary goals. The first goal is to ensure "fair notice" to the subject of the law as to what the law requires; the second is to provide standards to guide the discretion of those charged with enforcing the law. *Columbia, Natural Resources, Inc. v. Tatum*, 58 F.3d 1101, 1104 (6th Cir. 1995). The Supreme Court has defined the first goal with greater specificity by holding that "[a] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess as to its meaning and differ as to its application, violates the first essential of due process of law." *Id*. at 1105 (quoting *Connally v. General Constr. Co*., 269 U.S. 385, 391, 46 S. Ct. 126, 70 L.Ed 322 (1926)). The second goal "relates to notice to those who must enforce the law … [t]he standards of enforcement must be precise enough to avoid 'involving so many factors of varying effect that neither the person to decide in advance nor the jury after the fact can safely and certainly judge the result.'" *Id*. (citing *Cline v. Frink Dairy Co*., 274 U.S. 445, 465, 47 S.Ct. 681, 71 L.Ed. 1146 (1927)).

Although the vagueness doctrine arises most often in the context of criminal laws that implicate First Amendment values, "vague laws *in any area* suffer a constitutional infirmity." *Ashton v. Kentucky*, 384 U.S. 195, 200, 86 S.Ct. 1407, 16 L.Ed.2d 469 (1966) (collecting cases at n. 1) (emphasis added). *See also*, *Cline*, 274 U.S. at 463 ("The principle of due process of law requiring reasonable certainty of description in fixing a

standard for exacting obedience from a person in advance has application as well in civil as in criminal legislation.")

The Ohio Supreme Court re-affirmed and clarified the void-for-vagueness doctrine in its recent decision in *Norwood v. Horney*, 110 Ohio St.3d 353, 2006-Ohio-3799. The court struck down a municipal ordinance that allowed private property in a "deteriorating area" to be taken by eminent domain, even though the municipal code set forth "a fairly comprehensive array of conditions that purport to describe a 'deteriorating area,' including … incompatible land uses, nonconforming uses, lack of adequate parking facilities, faulty street arrangement, obsolete platting, and diversity of ownership." *Id*. at ¶ 93. The Court held:

> In the cases before us, we cannot say that the appellants had fair notice of what conditions constitute a deteriorating area, even in light of the evidence adduced against them at trial. The evidence is a morass of conflicting opinions on the condition of the neighborhood. Though the Norwood Code's definition of 'deteriorating area' provides a litany of conditions, it offers so little guidance in application that it is almost barren of any practical meaning.
>
> In essence, 'deteriorating area' is a standardless standard. Rather than affording fair notice to the property owner, the Norwood Code merely recites a host of subjective factors that invite ad hoc and selective enforcement – a danger made more real by the malleable nature of the public-benefit requirement. [*Id*. at ¶¶ 97-98.]

The void-for-vagueness doctrine, as illustrated by the foregoing cases, is clearly violated by the Commission's adoption of an ***all*** available cost-effective energy efficiency opportunities compliance obligation. As more fully discussed below, the practical implications of the Commission's compliance obligation leaves EDUs and the mercantile customer members of IEU-Ohio guessing as to the meaning of this compliance obligation which fails to identify the details required to safely and certainly

judge the result. In essence, the Commission has adopted an illegal "standardless standard."

Since the General Assembly's adoption of the portfolio mandates in Section 4928.64 and 4928.66, Revised Code, the Commission's implementation choices, often dispensed through a conflicting sequence of twists and turns, have been consistently bewildering to Ohio's business community. The *Entry* follows this unfortunate, nonsensical and wasteful pattern.

On June 16, 2009, the Commission opened Case No. 09-512-GE-UNC for the purpose of developing protocols for the measurement and verification of energy and peak-demand reduction measures. As part of this process, on June 24, 2009, the Commission issued an Entry in which it said:

> The Commission must be in a position to be able to determine, with reasonable certainty, the energy savings and demand reductions attributable to the energy efficiency programs undertaken by gas and electric utilities, including mercantile customers, in order (a) to verify each electric utility's achievement of energy and peak-demand reduction requirements, pursuant to Section 4928.66(B), Revised Code. … In order to provide guidance regarding how the Commission will determine energy savings and/or peak-demand reductions, the Commission intends to establish protocols for the measurement and verification of energy efficiency and peak-demand reduction measures, which will be incorporated into a Technical Reference Manual (TRM), The Commission's intent is that the TRM would provide predictability and consistency for the benefit of the electric and gas utilities, customers, and the Commission itself.

In the Matter of Protocols for the Measurement and Verification of Energy Efficiency and Peak Demand Reduction Measures, Case No. 09-512-GE-UNC, Entry at 2-3 (June 24, 2009).

In that same Entry, the Commission called for collaboration and asked utilities to work with mercantile customers to advise the Commission on measures that are in

current use, measures which the utilities may intend to use in their compliance programs, and measures that mercantile customers may intend to use to seek an exemption from cost recovery mechanisms. Moreover, in Appendix A to the June 24, 2009 Entry, the Commission identified areas in need of policy guidance. Accordingly, many parties (including IEU-Ohio) filed Comments and Reply Comments for the Commission's consideration. On October 15, 2009, the Commission issued a Finding and Order, which introduced new policy questions (contained in Appendix C).

The October 15, 2009 Finding and Order also contained proposed provisional policy recommendations for the manner in which those questions should be resolved in the context of the development of the Technical Reference Manual ("TRM"). Moreover, the Finding and Order signaled an interpretation of the Amended Substitute Senate Bill 221 ("SB 221") requirements that was not supported by the statutory language. In particular, the Finding and Order changed the baseline specified by the General Assembly for purposes of measuring the effects of energy efficiency programs and compliance with the portfolio benchmarks established by the General Assembly. The Finding and Order rejected measurements based on actual achieved efficiency relative to the three-year average as required by Section 4928.66, Revised Code (which has become known as the "as-found" method),[6] and, in effect, rewrote the law to establish a higher baseline.

In November 2009, several EDUs filed Comments in response to the October 15, 2009 Finding and Order. Likewise, IEU-Ohio, the Office of the Ohio Consumers'

[6] "Under the 'as-found' method, savings are calculated by subtracting the energy efficiency of existing equipment from the proposed new, more efficient equipment." *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 8, fn. (October 15, 2009).

Counsel (“OCC"), and Ohio Edison Company (“OE”), Cleveland Electric Illuminating Company (“CEI”) and The Toledo Edison Company (“TE”) (collectively, "FirstEnergy") filed Applications for Rehearing on the October 15, 2009 Finding and Order. On December 11, 2009, the Commission granted these Applications for Rehearing for further consideration. Subsequently, the Commission held the first workshop on the TRM.

On June 16, 2010, the Commission issued its Entry on Rehearing denying IEU-Ohio, FirstEnergy and the OCC's November 2009 Applications for Rehearing. For reasons explained previously by IEU-Ohio and others, the June 16, 2010 Entry on Rehearing worked to modify the all-inclusive provisions of Section 4928.66, Revised Code, in ways that imposed undue, unjust and unconscionable prejudice on the EDUs and customers.

On July 2, 2010, IEU-Ohio contested the June 16, 2010 Entry on Rehearing by filing another Application for Rehearing. FirstEnergy also filed an Application for Rehearing on July 16, 2010 protesting the Commission's ongoing violations of Sections 4928.64 and 4928.66, Revised Code.

On July 29, 2010, the Commission granted the July 2, 2010 and July 16, 2010 Applications for Rehearing filed by IEU-Ohio and FirstEnergy to further consider the issues raised therein. These July 2, 2010 and July 16, 2010 Applications for Rehearing remain pending. On that same date (July 29, 2010), the Commission issued an Entry establishing a workshop in conjunction with the Staff’s release of a draft TRM.

On August 6, 2010, the draft TRM was filed in Case No. 09-512-GE-UNC. The draft TRM workshop was held on August 10, 2010 at the Commission's offices.

IEU-Ohio and others participated in the workshop and, among other things, identified technical and legal problems with the draft TRM. The legal issues were tied to: 1) conflicts with Sections 4928.64 and 4928.66, Revised Code; 2) the lack of transparent and clear guidelines in the TRM; and 3) the fact that the Commission had not yet ruled on IEU-Ohio and FirstEnergy's July 2010 Applications for Rehearing.

In the meantime, on September 15, 2010, the Commission issued an Entry in Case No. 10-834-EL-EEC announcing a Mercantile Customer Pilot Program. In that Entry (beginning at page 3), the Commission established a review process that is more consistent with Section 4928.66, Revised Code, but the Commission limited the life of the Pilot Program thereby creating further confusion.

On October 4, 2010, the Commission issued an Entry in Case No. 09-512-GE-UNC to establish a formal process to address the draft TRM that was the subject of prior Applications for Rehearing, Comments and the workshop held on August 10, 2010. IEU-Ohio and others filed extensive Comments and Reply Comments as part of this more formal review of the TRM that the Commission had previously held out as the document that would efficiently guide efforts to comply with Sections 4928.64 and 4928.66, Revised Code. Since commencing the more formal phase of its effort to issue a useful and legal TRM, the Commission's work remains incomplete.

In sum, without clear guidance on how to comply with the energy efficiency requirements of SB 221, the Commission has, in this case, manufactured more confusion about how compliance with Section 4928.66, Revised Code, can be lawfully achieved. More specifically, the Commission has now gone beyond the law and common sense by adopting an ***all*** available cost-effective energy efficiency

opportunities compliance obligation without any guidance on how EDUs or mercantile customers can pass the Commission's vague and moving-target test. Instead, the Commission continues to, in effect, ask EDUs and mercantile customers alike to venture out into a sea of confusion with no map to guide them home.

III. CONCLUSION

In light of the foregoing, IEU-Ohio respectfully asks the Commission to grant rehearing and modify the *Entry* to remedy the errors identified above.

Respectfully submitted,

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I hereby certify that a copy of the foregoing *Application for Rehearing of Industrial Energy Users-Ohio and Memorandum in Support* was served upon the following parties of record this 7th day of October 2011, via electronic transmission, hand-delivery or first class mail, U.S. postage prepaid.

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