

**BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Commission's Review	)	
of its Rules for Energy Efficiency Programs	)	Case No. 13-651-EL-ORD
Contained in Chapter 4901:1-39 of the Ohio	)	
Administrative Code.	)	

In the Matter of the Commission's Review	)	
of its Rules for the Alternative Energy	)	Case No. 13-652-EL-ORD
Portfolio Standard Contained in Chapter	)	
4901:1-40 of the Ohio Administrative Code.	)	

In the Matter of the Amendment of Ohio	)	
Administrative Code Chapter 4901:1-40,	)	Case No. 12-2156-EL-ORD
Regarding the Alternative Energy Portfolio	)	
Standard, to Implement Am. Sub. S.B. 315.	)	

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**INDUSTRIAL ENERGY USERS-OHIO'S COMMENTS**

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**INDUSTRIAL ENERGY USERS-OHIO'S COMMENTS**

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In response to the Public Utilities Commission of Ohio's ("Commission") January 29, 2014 Entry in the above-captioned proceedings, Industrial Energy Users-Ohio ("IEU-Ohio") hereby submits its Comments regarding Staff's proposed energy efficiency and peak demand reduction ("EE/PDR") rules and alternative energy resource rules.

IEU-Ohio's comments urge the Commission to adopt sensible reforms through its rules that will make compliance with the energy usage reduction mandate (*i.e.* the EE/PDR mandate) and the alternative energy resource mandates easier to achieve at lower overall costs to customers. Accordingly, IEU-Ohio urges the Commission to:

- Adopt rules that exempt a customer with a reasonable arrangement from its electricity distribution utility's ("EDU") EE/PDR rider and remove the energy usage characteristics of the reasonable arrangement customer from its EDU's compliance baseline;

- Adopt modifications to the Commission's Staff's ("Staff") proposed rules regarding the mercantile customer commitment process (automatic approval process, establishing rules that provide that EE/PDR rider exemptions and one-time cash refund payments will be based on actual savings, and ongoing reporting requirements);
- Reject Staff's proposed rule that would allow the collection of shared savings through EE/PDR riders;
- Modify Staff's proposed rule to limit the recovery of lost distribution revenue from those customer classes that caused the lost distribution revenue;
- Adopt IEU-Ohio's proposed rules regarding how to measure and quantify the output of any combined heat and power ("CHP"), waste heat recovery, geothermal energy, solar thermal energy, or water usage reduction system that a customer commits towards an EDU's energy usage reduction mandate, and allow these systems to qualify as advanced energy resources;
- Adopt a rule specifying that reliance on the Technical Reference Manual ("TRM") is voluntary, and modify Staff's proposed rules regarding the process for updating the TRM;
- Adopt a rule that provides that a mercantile customer is not required to turn over to its EDU any attributes of the mercantile customer's EE/PDR projects eligible to be bid into PJM Interconnection, L.L.C.'s ("PJM") wholesale energy or capacity markets as part of a commitment under Section 4928.66(A)(2)(c), Revised Code;
- Reject Staff's proposed rule that prohibits all measures from being relied upon for compliance with both the energy usage reduction mandate and the alternative energy resource mandate;
- Modify Staff's proposed rules to allow advanced energy resources to be relied upon to meet the alternative energy resource mandate in each year of the compliance period through 2025.

## **I. REASONABLE ARRANGEMENTS**

### **A. The Commission should adopt a rule that exempts customers with a reasonable arrangement from EE/PDR riders**

Section 4905.31, Revised Code, provides the Commission with authority to grant a reasonable arrangement between any customer or group of customers and a public utility. The statute further provides that the reasonable arrangement may include any

“financial device that may be practicable or advantageous to the parties interested.”<sup>1</sup>

The Commission should add a rule to Chapter 4901:1-39, Ohio Administrative Code (“O.A.C.”), which exempts customers with a reasonable arrangement approved pursuant to Section 4905.31, Revised Code, from its EDU’s EE/PDR rider. Exempting customers with reasonable arrangements from EE/PDR riders will give them a better opportunity to be successful while reducing the overall delta revenue that would otherwise be collected from all customers. Accordingly, the Commission should adopt a rule exempting reasonable arrangement customers from EE/PDR riders and adjust the compliance baseline to remove such customers’ load and usage characteristics.

**B. The Commission should adjust each EDU’s compliance baseline to remove the effects of the energy usage characteristics of reasonable arrangement customers from the energy usage reduction mandate**

Section 4929.66(A)(2)(a), Revised Code, provides that the Commission may modify the energy usage reduction required under Section 4928.66(A)(1)(a), Revised Code, and the peak demand reduction required by Section 4928.66(A)(1)(b), Revised Code, “to adjust for new economic growth in the utility’s certified territory.” Adjusting EDUs’ EE/PDR compliance baselines to account for economic growth associated with customers operating under reasonable arrangements will reduce the overall costs of the energy usage reduction mandate. Accordingly, the Commission should modify Staff’s proposed Rule 4901:1-39-05(A)(1)(c), O.A.C., as follows.

An electric utility may file an application to adjust its sales and / or demand baseline. In making such an adjustment, the baseline shall be normalized for weather and for changes in number of customers, sales, and peak demand to the extent such changes are outside the control of the electric utility. The electric utility shall include in its application all assumptions, rationales, and calculations, and shall propose methodologies and practices to be used in any proposed adjustments or normalizations. To

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<sup>1</sup> Section 4905.31(E), Revised Code.

the extent approved by the commission, normalizations for weather, changes in number of customers, sales, and peak demand shall be consistently applied from year to year. An electric distribution utility shall modify its baseline to exclude load and usage characteristics of the customers in its certified distribution territory with a reasonable arrangement authorized pursuant to section 4905.31 of the Revised Code.

## **II. MERCANTILE CUSTOMER COMMITMENT PROCESS**

### **A. The Commission should clarify that all mercantile applications are eligible to seek Commission approval through the automatic approval process**

IEU-Ohio requests that the Commission modify Staff's proposed Rule 4901:1-39-07(C)(1), O.A.C., to clearly provide that the automatic approval process applies to mercantile customers seeking rider exemptions as well as a one-time cash refund payment. Although the Staff states that it intended to incorporate the approved Mercantile Pilot Program in its amendments,<sup>2</sup> its proposed rule does not clearly specify the type of applications that qualify under the automatic approval process. The currently approved automatic approval process<sup>3</sup> provides that customers may use the standardized application form regardless of whether the mercantile customer is seeking a rider exemption or a one-time cash refund payment (including a payment for behavioral changes) in exchange for committing its self-directed project towards an EDU's energy usage reduction mandate. Accordingly, IEU-Ohio recommends that Staff's proposed Rule 4901:1-39-07(C)(1), O.A.C., be modified as follows:

Any such application filed in accordance with the automatic approval template published by the commission shall be deemed automatically

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<sup>2</sup> Entry at 3 (Jan. 29, 2014).

<sup>3</sup> See *In the Matter of a Mercantile Application Pilot Program Regarding Special Arrangements with Electric Utilities and Exemptions from Energy Efficiency and Peak Demand Reduction Riders*, Case No. 10-834-EL-POR, Review and Recommendation of the PUCO Staff at 5 (Jan. 15, 2013) (hereinafter "*Mercantile Pilot Program Case*"); *Mercantile Pilot Program Case*, Second Entry on Rehearing at 6 (May 25, 2011) (extending the applicability of the automatic approval template to applications seeking rider exemptions).

approved unless suspended by order of the commission or an attorney examiner within 60 days of the filing of the application. The automatic approval process shall apply to a mercantile customer committing its energy efficiency or peak demand reduction program savings, or combined heat and power or waste heat recovery capabilities, towards its electric distribution utility's energy efficiency and peak demand reduction portfolio requirements specified in section 4928.66 of the Revised Code, regardless of whether the customer is seeking a one-time cash refund, an exemption (of any duration) from its electric distribution utility's energy efficiency and peak demand reduction cost recovery mechanism, or a commitment payment.

- B. The Commission should specify that a mercantile customer who commits its EE/PDR savings to its EDU pursuant to Section 4928.66(A)(2)(c), Revised Code, will be provided a rider exemption or a one-time cash refund payment based upon its actual savings. For rider exemptions, the duration of the EE/PDR rider exemption should be measured in accordance with the benchmark comparison methodology as defined by Staff's proposed Rule 4901:1-39-01(D), O.A.C.**

In its July 17, 2013 Finding and Order in the *Mercantile Pilot Program Case*, the Commission recognized that approving mercantile customer rider exemptions and one-time cash refund payments based upon actual savings was the most reasonable method.<sup>4</sup> Accordingly, it “adopt[ed] the ‘as-found’ method for measuring savings, even in the case of replacement of failed equipment.”<sup>5</sup> The “as-found” methodology measures a mercantile customer’s actual EE/PDR savings. In the same Finding and Order, the Commission also adopted the benchmark comparison methodology to measure the duration of EE/PDR rider exemptions available to mercantile customers that committed their EE/PDR savings to their EDUs pursuant to Section 4928.66(A)(2)(c), Revised Code.<sup>6</sup>

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<sup>4</sup> *Mercantile Pilot Program Case*, Finding and Order at 5 (July 17, 2013).

<sup>5</sup> *Id.*

<sup>6</sup> *Id.* at 4.



Staff, however, has proposed two rules which, if accepted, would conflict with the Commission's Finding and Order. Staff's proposed Rule 4901:1-39-05(A)(1)(b), O.A.C., provides that a mercantile customer's rider exemption or one-time cash refund payment will not be based upon actual measurable savings if the mercantile customer's EE/PDR project's measures "are required to comply with energy performance standards set by law or regulation ... or an applicable building code." Staff's proposed Rule 4901:1-39-07(B)(3), O.A.C., provides that a mercantile customer's rider exemption or one-time cash refund payment will be based on savings above a hypothetical baseline if the EE/PDR project involves the replacement of failed equipment, and would establish the hypothetical baseline based upon the energy usage characteristics of "standard new equipment or practices where practicable."<sup>7</sup> These proposed rules would have the effect of shortening the duration of an EE/PDR rider exemption and decreasing the one-time cash refund payment available to a mercantile customer who commits its EE/PDR savings to its EDU pursuant to Section 4928.66(A)(2)(c), Revised Code.

Section 4928.66(A)(2)(c), Revised Code, provides the Commission with discretion in determining whether an exemption from an EDU's EE/PDR rider "reasonably encourages" a mercantile customer to commit its actual EE/PDR savings to its EDU. IEU-Ohio recommends that the Commission exercise its discretion and provide mercantile customers EE/PDR rider exemptions and one-time cash refund payments based upon a mercantile customer's actual EE/PDR savings. The use of the actual EE/PDR savings under the as-found methodology to calculate an EE/PDR rider exemption (in conjunction with the benchmark comparison methodology) and a one-

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<sup>7</sup> This proposed rule would also establish a baseline for the initial installation of new equipment.

time cash refund payment has been previously adopted by the Commission.<sup>8</sup> Furthermore, reliance on hypothetical energy usage baselines for purposes of calculating the duration of a mercantile customer's EE/PDR rider exemption or the magnitude of the one-time cash refund payment does not "reasonably encourage" a mercantile customer to commit its EE/PDR savings to its EDU.<sup>9</sup>

Accordingly, IEU-Ohio recommends that the Commission adopt the following rule:

For committing its energy efficiency or peak demand reduction savings to its electric distribution utility, a mercantile customer may elect to receive a one-time cash refund payment or an exemption from its electric distribution utility's energy efficiency and peak demand reduction cost recovery mechanism.

- (a) The duration of a mercantile customer's rider exemption or the amount of a one-time cash refund payment received by a mercantile customer shall be based upon the actual energy efficiency and peak demand reduction savings achieved by the mercantile customer. Actual savings are measured in reference to the mercantile customer's existing conditions. Actual savings shall not be adjusted to account for savings resulting from measures that were required to comply with applicable law, regulation, building code, or industry practice unless that law, regulation, building code, or industry practice was required to be implemented by the mercantile customer regardless of whether the mercantile customer completed the applicable energy efficiency and peak demand reduction project.
- (b) In instances where the mercantile customer constructs a new facility that is not replacing an existing facility, a mercantile customer's rider exemption or one-time cash refund payment shall be based upon the incremental energy efficiency and peak demand reduction savings that exceed any applicable building code, or energy efficiency and peak demand reduction measure required by law or regulation.

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<sup>8</sup> *Mercantile Pilot Program Case*, Finding and Order at 4-5 (July 17, 2013).

<sup>9</sup> See Section 4928.66(A)(2)(c), Revised Code.

**C. The Commission should modify Staff’s proposed rule for ongoing reporting associated with a mercantile customer seeking a rider exemption longer than one year to allow the ongoing reporting to continue through the mercantile customer’s EDU**

As drafted by Staff, proposed Rule 4901:1-39-07(C)(3), O.A.C., provides: “[n]o exemption from an energy efficiency cost recovery rider granted pursuant to an automatic approval shall extend more than one year unless the applicant provides an annual update to staff on such form as published by the Commission.”<sup>10</sup> (emphasis added). The Commission should modify Staff’s proposed Rule 4901:1-39-07(C)(3), O.A.C., to provide that mercantile customers may verify their continued actual EE/PDR savings to their EDUs, which will report those ongoing savings to the Commission in their annual reports filed in accordance with Staff’s proposed Rule 4901:1-39-05, O.A.C. This modification would also recognize that Staff’s proposal applies to the “applicant” filing the mercantile customer automatic approval application, and in practice the vast majority of these applications are jointly filed between the mercantile customer and its EDU. Additionally, this modification recognizes that a mercantile customer is already under an obligation as part of its commitment agreement with its EDU to annually verify that its EE/PDR savings still exist.

Accordingly, IEU-Ohio proposes that the Commission modify Staff’s proposed Rule 4901:1-39-07(C)(3), O.A.C., as follows:

No exemption from an energy efficiency cost recovery rider granted pursuant to an automatic approval shall extend more than one year unless the applicant provides an annual update to staff on such form as published by the Commission. Each mercantile customer that has received an exemption under the automatic approval process of longer than one year shall verify annually its actual energy efficiency and peak demand reduction savings and report the verified savings to its electric distribution

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<sup>10</sup> Entry at Attachment A, page 28 of 30 (Jan. 29, 2014).

utility each year. The length of rider exemption shall be determined by the use of the benchmark comparison methodology.

**D. The Commission should direct Staff to update the standardized mercantile customer application**

The Commission should direct Staff to update the current version of the standardized mercantile customer application form on the Commission's website consistent with the final rules approved by the Commission in this docket.<sup>11</sup>

**III. STAFF'S PROPOSED ALLOWANCE FOR RECOVERY OF SHARED SAVINGS IS UNREASONABLE**

The Commission should revise Staff's proposed Rule 4901:1-39-06, O.A.C., to eliminate the second sentence of that rule that would allow shared savings to be collected through an EDU's EE/PDR rider because it is unreasonable to pay incentives to an EDU to comply with Ohio law where the incentives reduce the savings that customers would achieve. Section 4928.66, Revised Code, requires each EDU to achieve annual energy savings and reductions in peak demand. That Section also provides that if an EDU fails to achieve the required annual EE/PDR savings, the Commission shall assess a forfeiture on the EDU. Thus, it is unreasonable to provide an EDU with incentives to complete its obligation under the law and for which it faces a forfeiture if it fails to comply.

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<sup>11</sup> The current form published by the Commission is outdated and does not fully reflect the changes in the automatic approval process/template ordered by the Commission on May 25, 2011 and July 17, 2013. *Mercantile Pilot Program Case*, Second Entry on Rehearing (May 25, 2011) (containing a redlined mercantile application form; *Mercantile Pilot Program Case*, Finding and Order (July 17, 2013) (approving Staff's proposed redlined mercantile application form with one modification). For instance, the current form published on the Commission's website states that the automatic approval template and process does not apply to mercantile customers seeking EE/PDR rider exemptions.

**IV. THE COMMISSION SHOULD LIMIT THE RECOVERY OF LOST DISTRIBUTION REVENUE THROUGH EE/PDR RIDERS TO THOSE CUSTOMER CLASSES THAT CAUSED THE LOST DISTRIBUTION REVENUE**

To the extent the Commission allows recovery of lost distribution revenue through an EE/PDR rider, the Commission should modify Staff's proposed Rule 4901:1-39-06, O.A.C., to provide that the recovery will be allocated to the customer classes that generated the lost distribution revenue.

**V. INCONSISTENCIES AND OMISSIONS IN THE PROPOSED RULES REGARDING GEOTHERMAL ENERGY, SOLAR THERMAL ENERGY, CHP, WASTE HEAT RECOVERY SYSTEMS, AND WATER USAGE REDUCTIONS**

The Commission should adopt IEU-Ohio's proposal below which address inconsistencies and omissions in the Staff's proposed rules for geothermal energy, solar thermal energy, CHP, waste heat recovery systems, and reductions in water usage.

**A. Geothermal Energy**

The Staff's proposed definition of "geothermal energy" contained in Rule 4901:1-40-01(T), O.A.C., limits geothermal energy to only geothermal energy that results in the production of electricity. Ohio law does not limit geothermal energy that qualifies as a renewable energy resource under Ohio law to only geothermal energy that results in the production of electricity.<sup>12</sup> In Ohio, the use of geothermal energy may include devices such as a ground source heat pump for heating and cooling purposes. The Commission should revise the definition of geothermal energy to allow any type of geothermal energy to qualify as a renewable resource.

**B. Solar Thermal Energy**

Similarly, proposed Rule 4901:1-40-01(FF), O.A.C., limits solar thermal energy to only the use of this technology to produce electricity. Ohio law does not limit solar

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<sup>12</sup> Section 4928.01(A)(37)(a)(iv), Revised Code.

thermal energy that qualifies as a renewable energy resource under Ohio law to only solar thermal energy that results in the production of electricity.<sup>13</sup> In Ohio, the use of solar thermal energy may include uses such as heating water. The Commission should revise the definition of solar thermal energy to allow any type of solar thermal energy to qualify as a renewable resource.

### **C. CHP and Waste Energy Recovery Systems**

The proposed rules also seek to implement changes in the law associated with the passage of Amended Substitute Senate Bill 315 (“SB 315”). Proposed Rule 4901:-39-01(F), O.A.C., repeats the statutory definition of a CHP system.. Similarly, proposed Rule 4901:1-39-01(CC), O.A.C., defines a waste energy recovery system by reference to the statutory definition in Section 4928.01(A)(38), Revised Code. Proposed Rule 4901:1-39-07(A), O.A.C., also recognizes the Commission has been directed to consider providing an exemption from recovery of compliance costs from mercantile customers that commit either the output of their CHP systems or their waste energy recovery system towards an EDU’s EE/PDR compliance obligation pursuant to Section 4928.66(A)(2)(c), Revised Code.

Although the proposed rules recognize that commitment of the output of either a waste energy recovery system or CHP system may be used towards compliance with Ohio’s EE/PDR mandate, the proposed rules fail to provide any specific guidance on how to count the output of either a waste energy recovery system or CHP system. Therefore, IEU-Ohio recommends the Commission modify proposed Rule 4901:1-39-07(C), O.A.C., as shown below:

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<sup>13</sup> Section 4928.01(A)(37)(a)(i), Revised Code.

A mercantile customer may file, either individually or jointly or with an electric utility, an application to commit the customer's demand reduction, demand response, or energy efficiency programs or the output of the customer's combined heat and power system or waste energy recovery system that have been implemented in the previous three years for integration with the electric utility's demand reduction, demand response, and energy efficiency programs, pursuant to division (A)(2) of section 4928.66 of the Revised Code. Such application, if filed individually, shall be filed no later than one calendar year after the end of the three-year period. However, such applications that are filed jointly shall be filed no later than March 31 of the year following the individual application deadline, but only if the mercantile customer commitment agreement with the electric utility was executed by the individual filing deadline.

Additionally, IEU-Ohio recommends the Commission adopt the following rule regarding the conversion of BTUs into kWh and kW:

An electric distribution utility shall count the output of a combined heat and power system or waste energy recovery system and any energy savings resulting from a geothermal system or solar thermal system towards its compliance obligation under section 4928.66(A)(1)(a) of the Revised Code by dividing the annual British thermal units (BTUs) of energy captured by the combined heat and power system, waste energy recovery system, geothermal system or solar thermal system by 3,412 BTUs per kilowatt-hour to calculate the kilowatt-hours that count towards the electric distribution utility's compliance obligation. An electric distribution utility shall count the output of a combined heat and power system or waste energy recovery system and any reduction in demand resulting from a geothermal system or solar thermal system towards its compliance obligation under section 4928.66(A)(1)(b) of the Revised Code by dividing the annual British thermal units (BTUs) of energy captured by the combined heat and power system, waste energy recovery system, geothermal system or solar thermal system by 3,412 BTUs per kilowatt-hour and dividing the resulting value by 8,760 hours to calculate the equivalent demand reduction in kilowatts that counts towards the electric utility's compliance obligation.<sup>14</sup>

#### **D. Water Usage Reductions**

The Commission should adopt new rules that allow the total energy savings from water usage reductions to count towards the energy usage reduction benchmarks. The Commission should also adopt rules that specify that a measure which results in water

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<sup>14</sup> The value of 3,412 Btu/kilowatt-hour ("kWh") is a constant and "is used as the thermal conversion factor for electricity retail sales." U.S. Energy Information Administration, Annual Energy Review 2011, at 326 (Table A.6, n.11), available at: <http://www.eia.gov/totalenergy/data/annual/pdf/sec12.pdf>. (last accessed Mar. 3, 2014).

usage reduction qualifies as an advanced energy resource pursuant to Section 4928.01(A)(34)(g), Revised Code. This Section provides that the definition of advanced energy resource includes “[d]emand-side management and any energy efficiency improvement.”

Accordingly, the Commission should adopt the following rules for inclusion in Chapter 4901:1-39, O.A.C:

The commission will recognize and count energy savings and peak demand reductions that occur as a consequence of consumer reductions in water usage or reductions and improvements in wastewater treatment.

The Commission should also adopt the following rules for inclusion in Chapter 4901:1-40, O.A.C:

Advanced energy resources shall include any mercantile customer or supplier method or any modification or replacement of any property, process, device, structure, or equipment that reduces the energy intensity of any water supply function or water treatment function.

- (a) "Water supply function" means the functions associated with the following:
  - (i) Raw water collection, purification, treatment, and storage;
  - (ii) Establishing or maintaining pressure to balance water supply and demand;
  - (iii) Water delivery and transfer.
- (b) "Water treatment function" means any of the preliminary, secondary, tertiary, and advanced activities, whether physical, biological, or chemical, associated with the removal of contaminants from, or conditioning of, wastewater prior to its return to the environment or recycled use;



## VI. STAFF'S PROPOSED PROCESS FOR UPDATING THE TECHNICAL REFERENCE MANUAL

The Commission should modify Staff's proposed rules regarding the TRM to make's Staff's proposal lawful and to bring Staff's proposed rules into accord with prior Commission orders.

On August 20, 2008, the Commission issued an Entry in Case No. 08-888-EL-ORD (the "*Green Rule Case*") containing Staff's proposed EE/PDR rules and alternative energy resource rules.<sup>15</sup> In the rules proposed by Staff in the *Green Rules Case*, Staff had recommended that the Commission adopt the following rule (which is similar to Staff's proposed rule in this case):

An electric utility shall include in its benchmark report a description of all methodologies, protocols, and practices used or proposed to be used in measuring and verifying program results. Staff may publish guidelines for program measurement and verification of compliance with division (A)(1) of section 4928.66 of the Revised Code, and the utility should identify and explain any deviations from such guidelines.<sup>16</sup>

Ohio Power Company ("AEP-Ohio") filed comments and argued that this rule would amount to an unlawful delegation of authority to Staff and would deprive parties of due process.<sup>17</sup> The Dayton Power and Light Company ("DP&L") also filed comments opposing this rule.<sup>18</sup> Both AEP-Ohio and DP&L proposed that the Commission provide

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<sup>15</sup> *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*, PUCO Case No. 08-888-EL-ORD, Entry (Aug. 20, 2008) (hereinafter "*Green Rules Case*").

<sup>16</sup> *Id.*

<sup>17</sup> *Green Rules Case*, Opinion and Order at 19 (Apr. 15, 2009).

<sup>18</sup> *Id.*

that any Staff issued guidelines would not be binding until approved by the Commission.<sup>19</sup>

The Commission removed the reference to Staff's proposed guidelines from the final rules it adopted.<sup>20</sup>

As previously discussed, the intent of these rules was not to delegate this Commission's policy decisions to our staff. Revised rule 39-04 establishes a separate review process for the three-year portfolio planning cycle, while new Rules 39-05 and 39-06 contain the annual compliance reporting requirements and review processes. With respect to measurement and verification guidelines, we anticipate the selection of an appropriate forum and process in the near future, but in any event, we intend that such guidelines would be established with some form of Commission approval.<sup>21</sup>

The appropriate forum referenced in this Commission order was the *TRM Case*.<sup>22</sup> In its Entry opening the *TRM Case*, the Commission held:

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.<sup>23</sup>

The Commission ultimately held that the TRM should be established as a set of guidelines rather than a mandate.<sup>24</sup>

Under this approach, the Commission will consider prescriptive compliance with the TRM to be a safe harbor. Any utility that elects to

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<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *In the Matter of Protocols for the Measurement and Verification of Energy Efficiency and Peak Demand Reduction Measures*, PUCO Case No. 09-512-GE-UNC, Entry (June 24, 2009) (hereinafter "*TRM Case*") (the acronym TRM throughout refers to Technical Reference Manual)..

<sup>23</sup> *TRM Case*, Entry at 3 (June 24, 2009).

<sup>24</sup> *TRM Case*, Entry on Rehearing at 11 (July 31, 2013).

adhere to the guidance in the TRM will benefit from a presumption of reasonableness, which any other party not in agreement would have the burden to rebut in any applicable proceeding. To the extent that a utility seeks to utilize the "as-found" method recently adopted by the Commission with respect to mercantile customer applications, or any other method of determining energy savings and demand reductions, the Commission will review the utility's request on a case-by-case basis, and the utility will bear the burden of demonstrating that its alternative method is just and reasonable.

...

Although we strongly encourage the electric utilities and gas utilities to utilize the TRM, we emphasize again that no provision within the TRM shall be considered binding on any party, including Staff, in any Commission proceeding.<sup>25</sup>

After concluding that the TRM would not be binding on any party, the Commission directed its Staff "to update the TRM, in coordination with the Independent Program Evaluator, [and] to incorporate the above changes and to develop a process by which to update the TRM on a regular basis."<sup>26</sup>

Accordingly, the Commission should modify Staff's proposed rules to provide that reliance on the TRM is not mandatory, and should modify Staff's proposed process for updating the TRM to allow parties the opportunity to comment on Staff's proposed changes which must be approved by the Commission.

**A. The Commission should modify Staff's proposed rule to specify that reliance on the TRM is not mandatory but instead provides a presumption of reasonableness**

As discussed above, the Commission held that reliance on the TRM was not mandatory, and instead would provide a presumption of reasonableness. Staff's proposed rules contain a process for updating the TRM each year, but the proposed rules fail to specify what role the TRM will have. Staff's proposed rules do not require

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<sup>25</sup> *Id.* at 11-12 (internal citation omitted).

<sup>26</sup> *Id.* at 12.

EDUs or mercantile customers to rely on the TRM, and there is no reference to the TRM in Staff's proposed rules outside of the annual process Staff has proposed to update the TRM.<sup>27</sup>

Accordingly, the Commission should adopt the following language as part of Rule 4901:1-39-05(A), O.A.C., to provide that reliance on the TRM is optional, but provides a presumption of reasonableness:

As part of the electric distribution utility's compliance demonstration under division (A)(1) of this rule, the electric distribution utility shall specify the methodology it has used to measure and verify its energy efficiency and peak demand reduction savings. An electric distribution utility's methodologies for measuring and verifying its energy efficiency and peak demand reduction savings will be presumed reasonable if they follow the measurement and verification methodologies specified in the technical reference manual published by the commission's staff. If an electric distribution utility utilizes different methodologies to measure and verify the energy efficiency and peak demand reduction savings it has achieved, the electric distribution utility shall demonstrate that the measurement and verification methodologies it relies upon are reasonable.

**B. The Commission should modify Staff's proposed process for annually updating the TRM because the process as proposed would create an unlawful delegation of authority to Staff and would violate parties' due process rights**

As currently proposed by Staff in Rule 4901:1-39-05(E), O.A.C., Staff will ultimately decide how the TRM will be updated each year, and will instruct the independent evaluator accordingly. Staff's proposal, however, is unlawful and unreasonable because it amounts to an unlawful delegation of authority to its Staff and violates parties' due process rights.

Staff's proposed rules would transfer the Commission's decision-making responsibility related to the energy usage reduction mandate to Staff and would provide Staff with the ultimate decision on how to count and "reasonably encourage" mercantile

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<sup>27</sup> Rules 4901:1-39-05(B)-(E), O.A.C.

customers to commit their EE/PDR savings to their EDUs. This amounts to an unlawful delegation of authority. Additionally, Staff's proposed process to update the TRM deprives parties of the ability to challenge the TRM through the rehearing or appeals process as the statutes regarding applications for rehearing and appeals only apply to orders of the Commission. Finally, Staff's proposed rules do not provide parties an opportunity to address Staff's proposed changes to the TRM before they go into effect (Staff requires parties to file comments before Staff makes any proposals).

As implicitly recognized by the Commission in the *Green Rules Case*, Staff's proposed process to establish measurement and verification standards without prior Commission approval and without allowing parties the opportunity to comment on Staff's proposed guidelines is unlawful and unreasonable. Accordingly, the Commission should modify Staff's proposed rules to provide parties with an opportunity to comment on Staff's proposed guidelines and to provide that the Commission must approve Staff's proposed guidelines before they can go into effect.

**VII. THE COMMISSION SHOULD ADOPT A RULE THAT PROVIDES THAT MERCANTILE CUSTOMERS ARE NOT REQUIRED TO TURN OVER ANY ATTRIBUTES ELIGIBLE TO BE BID INTO PJM'S WHOLESALE MARKETS AS PART OF MAKING A COMMITMENT PURSUANT TO SECTION 4928.66(A)(2)(C), REVISED CODE**

In the Commission's July 17, 2013 Entry on Rehearing in Case Nos. 12-2190-EL-POR, *et al.*,<sup>28</sup> the Commission stated that mercantile customers were not required to transfer ownership rights to energy attributes eligible to be bid into PJM's wholesale markets as a condition of receiving an exemption for providing a commitment under Section 4928.66(A)(2)(c), Revised Code. Staff's proposed rules do not

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<sup>28</sup> *In the Matter of the Application of The Cleveland Electric Illuminating Company, Ohio Edison Company, and The Toledo Edison Company for Approval of Their Energy Efficiency and Peak Demand Reduction Program Plans for 2013 through 2015*, PUCO Case Nos. 12-2190-EL-POR, *et al.*

incorporate this decision. Accordingly, IEU-Ohio recommends that the Commission adopt a rule that provides that a mercantile customer retains its attributes of an EE/PDR project which is eligible to be bid into PJM's wholesale markets and is not required to transfer these attributes to its EDU as part of the commitment process set forth in Section 4928.66(A)(2)(c), Revised Code.

**VIII. THE COMMISSION SHOULD ALLOW ALTERNATIVE ENERGY RESOURCES THAT REDUCE ENERGY USAGE TO APPLY TO BOTH THE ALTERNATIVE ENERGY RESOURCE AND ENERGY USAGE REDUCTION MANDATES**

The Commission should delete Staff's proposed Rule 4901:1-40-01(M), O.A.C., to allow alternative energy resources that result in a reduction in energy usage to apply to both the alternative energy resource mandates and the energy usage reduction mandate. Ohio law only limits one specific type of resource from counting toward both mandates: "a waste energy recovery system that is, or has been, included in an energy efficiency program of an electric distribution utility pursuant to requirements under section 4928.66 of the Revised Code."<sup>29</sup> The General Assembly was obviously aware that measures could potentially count towards compliance with both mandates, but only excluded this one resource from counting towards both. Additionally, Staff's proposed rule would work against customers implementing CHP facilities that may qualify as both a renewable energy resource and also result in a reduction in energy usage for the mercantile customer. Thus, Staff's proposed rule would discourage the development of CHP systems.

Accordingly, the Commission should delete Staff's proposed Rule 4901:1-40-01(M), O.A.C..

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<sup>29</sup> Sections 4928.01(A)(34)(h)(i), and 4928.01(A)(37)(a)(ix), Revised Code.

## **IX. COUNTING ADVANCED ENERGY RESOURCES BEFORE 2025**

The Commission should modify Staff's proposed rules to allow advanced energy resources to be relied upon to meet the alternative energy resource mandate in each year of the compliance period through 2025. Section 4928.64(B), Revised Code, provides:

By 2025 and thereafter, an electric distribution utility shall provide from alternative energy resources, including, at its discretion, alternative energy resources obtained pursuant to an electricity supply contract, a portion of the electricity supply required for its standard service offer under section 4928.141 of the Revised Code, and an electric services company shall provide a portion of its electricity supply for retail consumers in this state from alternative energy resources, including, at its discretion, alternative energy resources obtained pursuant to an electricity supply contract.

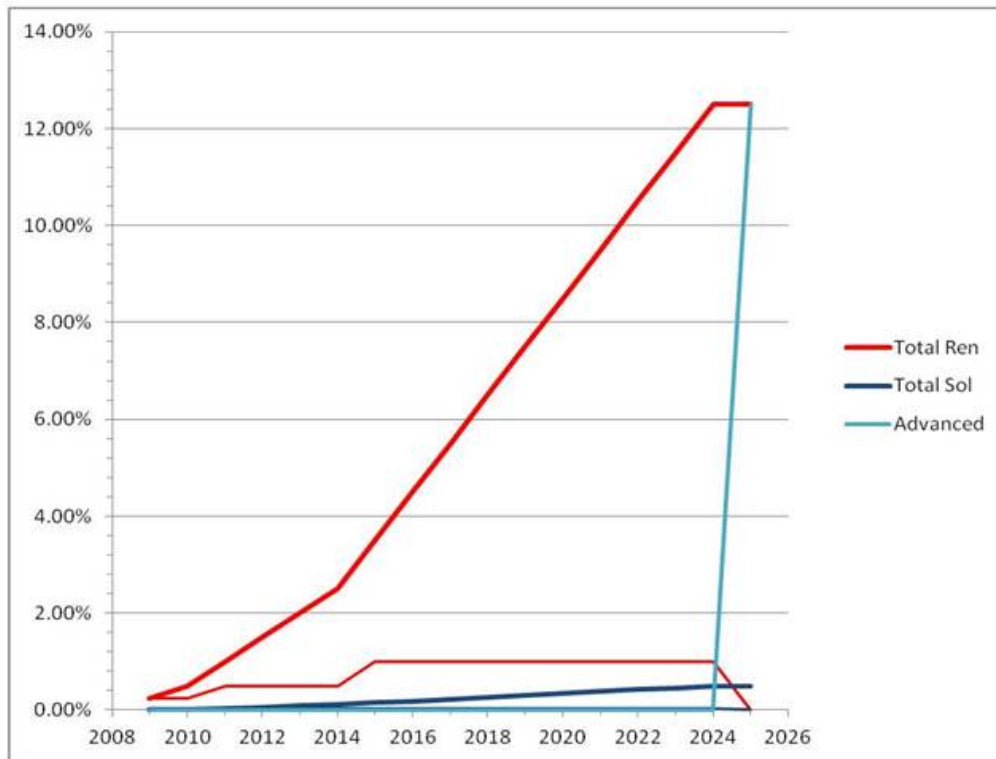
This Section further provides that “[o]f the alternative energy resources implemented by the subject utility or company by 2025 and thereafter,” half may be generated from advanced energy resources and at least half shall be generated from renewable energy resources.<sup>30</sup>

As demonstrated in the following graph published by the Commission, the current rules in Chapter 4901:1-40, O.A.C. (which also reflect Staff's proposed rules), do not allow for advanced energy resources to count at all towards the alternative energy resource mandate until 2024.<sup>31</sup>

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<sup>30</sup> Section 4928.64(B)(1)-(2), Revised Code.

<sup>31</sup> PUCO electric industry briefing to the House Public Utilities Committee, slide 42, (Sept. 29, 2011), available at: [http://www.puco.ohio.gov/puco/assets/File/92911\(1\).pptx](http://www.puco.ohio.gov/puco/assets/File/92911(1).pptx).



The practical effect of the current and proposed alternative energy resource mandate rules is to make the at-least-12.5% “renewable” mandate by 2025 a 25% mandate by favoring renewable energy resources to the exclusion of advanced energy resources before 2024. If utilities and competitive retail electric service (“CRES”) providers are required to procure 25% of their energy from alternative sources by 2025 and advanced energy resources are not counted until 2024, the obvious market response will be for parties to fill up their compliance bucket with resources that count now and beyond 2025. The Commission’s rules have in effect stifled market entry opportunities for advanced energy resources.

Accordingly, IEU-Ohio recommends that the Commission modify Staff’s proposed rules to allow advanced energy resources to be relied upon to meet the alternative energy resource mandate in each year of the compliance period through 2025.



**X. CONCLUSION**

IEU-Ohio requests that the Commission adopt IEU-Ohio's recommendations described herein.

Respectfully submitted,

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## **CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing *Industrial Energy Users-Ohio's Comments* was served upon the following parties of record this 3<sup>rd</sup> day of March 2014 via electronic transmission, hand-delivery or first class mail, U.S. postage prepaid.

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### **ATTORNEY EXAMINERS**

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