BEFORE THE
PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Commission's Review of its Rules for Energy Efficiency Programs Contained in Chapter 4901:1-39 of the Ohio Administrative Code.	)	**Case No. 13-0651-EL-ORD**
In the Matter of the Commission's Review of its Rules for the Alternative Energy Portfolio Standard Contained in Chapter 4901:1-40 of the Ohio Administrative Code	)	**Case No. 13-0652-EL-ORD**
In the Matter of the Amendment of Ohio Administrative Code Chapter 4901:1-40, regarding the Alternative Energy Portfolio Standard, to Implement Am. Sub. S.B. 315.	)	**Case No. 12-2156-EL-ORD**

JOINT COMMENTS OF THE ENVIRONMENTAL LAW & POLICY CENTER, OHIO ENVIRONMENTAL COUNCIL, SIERRA CLUB, NATURAL RESOURCES DEFENSE COUNCIL, ENVIRONMENTAL DEFENSE FUND, AND CITIZENS COALITION

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Pursuant to the January 29, 2014 Entry by the Public Utilities Commission of Ohio ("PUCO" or "Commission") in the above-captioned dockets, Ohio Environmental Council, Environmental Law & Policy Center, Sierra Club, Natural Resources Defense Council, Environmental Defense Fund, and Citizens Coalition (collectively "Environmental and Consumer Advocates") hereby submit comments on the Commission Staff's proposed rule changes ("Draft Rules"). The Draft Rules cover a number of issues regarding energy efficiency and alternative energy measurement, reporting, and compliance activities. As stated in the Commission's Entry, the proposed changes in the Draft Rules seek to, among other things, "minimize the expense for all stakeholders in the administrative review process," "allow [for] flexibility," and "accommodate legislative changes . . . under SB 315." The Environmental and

Consumer Advocates agree with many of these changes, including the addition of requirements for the utility collaborative process; the incorporation and required updating of the Technical Reference Manual ("TRM"); the availability of public data regarding compliance reports; and the expansion of the role of the Independent Program Evaluator ("Independent Evaluator"). However, the Environmental and Consumer Advocates also have additional recommendations, which are explained below. Of particular concern are the provisions in the Draft Rules that remove or reduce opportunities for important stakeholder and general public participation in energy efficiency program portfolio planning and verification. The Environmental and Consumer Advocates support the goal of minimizing expenses and streamlining processes as they relate to the implementation of the energy efficiency benchmarks. Administrative economy should not take the place of a robust public process, however, and we recommend that the Commission consider the Draft Rules with an eye toward preserving stakeholder participation at all stages of the program portfolio planning and review process.

The Environmental and Consumer Advocates appreciate the opportunity to comment on the Draft Rules and urge the Commission to consider these comments and requests for clarification and incorporate the recommendations when formulating the final version of the rules.

COMMENTS ON DRAFT ENERGY EFFICIENCY RULES UNDER O.A.C. CHAPTER 4901:1-39

I. Proposed Procedural Changes to Filing and Review of Program Portfolios (Draft Rule 4901:1-39-04) and Annual Status Reports (Draft Rule 4901:1-39-05)

The Commission's proposed changes to the planning and reporting requirements for electric utility energy efficiency portfolios are significant departures from the current process.[1] Environmental and Consumer Advocates are concerned that these revisions would reduce Commission oversight of utility energy efficiency programs and would deprive ratepayers and other interested parties–and the general public–the ability to have a meaningful impact on the program planning process.

As explained below, the current procedure affords stakeholders considerable participation in the portfolio pre-approval process, including the opportunity to contribute technical analyses and market experience to inform program design, participate in negotiations with utilities to refine program offerings, and intervene in a litigated case docket in which a diversity of positions are heard by the Commission. These opportunities are critical for Ohio's ratepayers to ensure accountability in the planning process and to drive utilities toward greater investment in cost-effective energy efficiency programs. Environmental and Consumer Advocates submit that the proposed rule changes would remove these procedural protections by: (1) replacing the litigated case procedure in the pre-approval process with a comment period that denies parties and the general public the opportunity to present their cases to the Commission, and (2) shifting Commission review to an after-the-fact process that provides insufficient oversight and reduces procedural protections for ratepayers.

[1] Ohio Adm. Code ("O.A.C.") Chapters 4901:1-39-04 to 39-05, and proposed changes to these Chapters in the Draft Rules.

Environmental and Consumer Advocates urge the Commission to reject these changes and retain the current procedure for Commission pre-approval of energy efficiency portfolios, as this has been a critical tool to ensure accountability in the complicated realm of energy efficiency portfolio planning and has driven more effective programs in the process. At the same time, and as discussed later in these comments, we support the Draft Rules that articulate a clear procedure for the utility energy efficiency collaboratives, as well as the expansion of the role of the Independent Program Evaluator. These measures would add additional layers of accountability that are desired by both the Commission and the Environmental and Consumer Advocates.

A. The Program Portfolio Approval Process

i. Requirements Under the Current Rules

Currently, each electric utility is required to design an energy efficiency and peak demand reduction program portfolio every three years[2] and vet programs with members of its energy efficiency collaborative.[3] Each utility then files its portfolio for approval by the Commission in a fully docketed and adjudicated process in which the utility has the burden to prove that its plan is consistent with Ohio's energy efficiency policy.[4] Stakeholders can intervene in the case docket, and they are afforded full party status to conduct discovery, present evidence and testimony, submit briefing, and have their positions ruled upon by the Commission.[5] In addition, the current process affords members of the general public time to learn about the plan and provide communications that are commonly placed in the "Public

[2] O.A.C. Chapters 4901:1-39-04(B).
[3] O.A.C. Chapters 4901:1-39-04(C)(2).
[4] O.A.C. Chapters 4901:1-39-04(B); *see also* Ohio Revised Code ("R.C.") § 4928.02; R.C. § 4928.66(A)(1)(a).
[5] O.A.C. Chapters 4901:1-39-04(E).

Comments" section of the case docket.[6] This input is important because it may have a significant impact on program participation and market transformation. The Environmental and Consumer Advocates have intervened in nearly every program portfolio docket since the energy efficiency benchmarks went into effect in 2009,[7] along with numerous other interested parties including manufacturers, industrial associations, clean energy trade groups, hospital associations, energy services contractors, and consumer advocates.[8] In addition, hundreds of letters from the general public–weighing in on the proposed programs–have been filed in various POR dockets.[9]

This inclusive pre-approval process has been a vital aspect of Ohio's energy efficiency portfolio planning for the last five years and has resulted in greater accountability and wider-ranging, more desirable, and more effective utility programs. In 2012 alone, AEP, DP&L, Duke and FirstEnergy collectively reported more than 1.6 million MWh in energy savings from their

[6] *See, e.g.*, Case Nos. 12-2190-EL-POR, et al (FirstEnergy EE/PDR portfolio cases). Hundreds of letters were filed over a period of two months in that process. The Draft Rules would severely curtail opportunity for the general public to comment on a portfolio plan.
[7] *See, e.g.*, the Environmental Intervenors' participation in the most recent energy efficiency and peak demand reduction (EE/PDR) program portfolios for AEP 2012-2014 EE/PDR (Dkt. 11-5569-EL-POR), FirstEnergy 2013-2015 EE/PDR (Dkt. 12-2190-EL-POR), DP&L 2013-2015 EE/PDR (Dkt. 13-0833- EL-POR), Duke 2014-2016 EE/PDR (Dkt. 13-0431-EL-POR).
[8] *See, e.g.*, intervenors on the AEP 2012-2014 EE/PDR (Dkt. 11-5569-EL-POR), including the groups known as the Environmental Advocates, Ohio Consumers' Counsel, Industrial Energy Users-Ohio, Ohio Hospital Association, Ohio Manufacturers' Association, Ohio Partners for Affordable Energy; *see also* intervenors on the FirstEnergy 2013-2015 EE/PDR (Dkt. 12-2190-EL-POR), including all the aforementioned entities, Ohio Energy Group, EnerNOC, Inc., Citizen Power, Inc., Advanced Energy Economy Ohio, Nucor Steel Marion, Inc., and Northeast Ohio Public Energy Council; intervenors on the Duke 2014-2016 EE/PDR, including the groups collectively known as the Environmental Advocates, Ohio Advanced Energy Economy, The Kroger Co., Ohio Energy Group, Ohio Partners for Affordable Energy, EMC Development Co., and Greater Cincinnati Energy Alliance, Inc.
[9] *See* footnote 6.

energy efficiency programs–savings that were driven in large part by the current process and that have increased in subsequent years.[10]

ii. Analysis of Staff's Proposal to Remove the Pre-Approval Process

Staff now proposes Draft Rules that would supplant the litigated case procedure with a 30-day comment period that removes the opportunity for interested parties to present their cases to the Commission. Under this revision, the Commission would have no express role in portfolio pre-approval. The utilities would be afforded sole discretion to accept or reject stakeholder comments, which would diminish the emphasis on collaborative input.[11] As described below, this approach is a significant departure from the current procedure that, if implemented, would seriously undermine the ability of ratepayers, the general public, and other interested parties to have a meaningful impact on the utility portfolio planning process, both before the Commission as well as within the collaboratives.

First, Environmental and Consumer Advocates are concerned that removing the litigated case procedure would deprive interested parties of the ability to have their cases heard by the Commission. As described above, Environmental and Consumer Advocates and numerous other stakeholders have intervened in nearly every utility portfolio docket for the last five years and

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[10] *In the Matter of the Annual Energy Efficiency Portfolio Status Report of Ohio Power Company*, Pub. Util. Comm. No. 13-1182-EL-EEC, 2012 Portfolio Status Report at 7-8 (reporting 571.0 GWh of electric savings); *In the Matter of the Annual Energy Efficiency Portfolio Status Report of Duke Energy Ohio, Inc*., Pub. Util. Comm. No. 13-1129-EL-EEC, Annual Energy Efficiency Status Report of Duke Energy Ohio Inc. at 4-6 (reporting 294,000 MWh of electric savings); *In the Matter of The Dayton Power and Light Company's Portfolio Status Report*, Pub. Util. Comm. No. 13-1140-EL-POR, The Dayton Power and Light Company's Combined Notice of Filing Portfolio Status Report and Application to Adjust Baselines at 1-2. (reporting 181,011 MWh from utility programs and 5,515 MWh from mercantile programs); *In the Matter of the Annual Energy Efficiency Portfolio Status Report of FirstEnergy*, Pub. Util. Comm. No. 13-1185-EL-EEC, Energy Efficiency and Peak Demand Reduction Program Portfolio Status Report to the Public Utilities Commission of Ohio at 6 (reporting 586,000 MWh of electric savings).

[11] Draft Rule 4901:1-39-04(E).

have taken full advantage of the robust evidentiary process. Environmental and Consumer Advocates request that the Commission retain this current approach; the proposal to shift to a mere notice and comment period is insufficient to satisfy basic procedural opportunities and to address the depth and complexity of these portfolios.

Second, Environmental and Consumer Advocates are concerned that the proposed rules would render participation in the utility energy efficiency collaboratives less effective. We participate in the collaboratives run by AEP, DP&L, Duke and FirstEnergy, alongside other regular case intervenors. The collaboratives allow stakeholders significant interaction with utilities and an opportunity to provide valuable feedback on existing and planned programs. An important motivator in the continuing constructive relationship between collaborative members and the utilities is the knowledge that the three-year portfolio will eventually be filed in a robust, fully litigated case process. This provides important procedural protections for all parties. But, importantly, it also strikes a balance between the interests of utilities and the interests of collaborative participants such that each is motivated to work together in good faith to refine the elements of the portfolio and resolve disputed issues even before the portfolio is presented to the Commission.

This dynamic give and take is evident in Duke and DP&L's recent filings. In the litigated case docket for its 2014-2016 portfolio, Duke entered into a stipulation with several members of its collaborative (including Environmental and Consumer Advocates) to resolve issues raised by the parties that ". . . represent[ed] a serious compromise of complex issues and involve[d] substantial benefits that would not otherwise have been achievable."[12] This

[12] *See In the Matter of the Application of Duke Energy Ohio, Inc. for Approval of its Energy Efficiency and Peak-Demand Reduction Portfolio Programs*, Pub. Util. Comm. No. 13-431-EL-POR, Amended Stipulation and Recommendation at 4 (parties to the stipulation included the

stipulation resulted in a significant expansion of Duke's program portfolio[13] and secured the utility's agreement to bid energy efficiency resources into the PJM Base Residual Action ("BRA") for its portfolio plan and the beyond-plan year.[14] The pre-approval negotiation process also yielded a similar stipulation between DP&L and its collaborative members (including Environmental and Consumer Advocates) for the 2013-2015 portfolio plan.[15] These negotiations are made possible largely by the existence of Commission review in the fully litigated case docket.

As explained more fully below, the Environmental and Consumer Advocates also note that they support Staff's proposed rule changes articulating a clear procedure for utility energy efficiency collaboratives.[16] However, the corresponding proposal to remove portfolio pre-approval threatens the integrity of the collaborative model. The collaboratives are important vehicles for change that should be maintained and strengthened. Thus, Environmental and Consumer Advocates recommend that the Commission retain the pre-approval structure, while continuing to fortify the collaboratives to strive for greater transparency and inclusion in the stakeholder process.

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groups collectively known as the Environmental Advocates, Ohio Advanced Energy Economy, The Kroger Co., Ohio Partners for Affordable Energy, EMC Development Co., and Greater Cincinnati Energy Alliance, Inc.).

[13] *Id*. at 11-13. This comprehensive agreement resulted in an expansion of Duke's portfolio of programs, including agreement to work with the parties on Combined Heat and Power projects, pilots targeting Information Technology system efficiency and retro-commissioning for large builds, a cool roofs measure, an outdoor lighting LED program, and development of financing opportunities to drive deeper participation in programs.

[14] *Id*. at 6-11. Duke agreed to bid at least 80% of eligible existing and planned energy efficiency resources into the PJM Base Residual Action (BRA) for the three-year portfolio period and at least 50% for the beyond-plan year of 2017.

[15] *See In the Matter of the Application of The Dayton Power and Light Company for Approval of its Energy Efficiency and Peak Demand Reduction Program Portfolio Plan for 2013 through 2015*, Pub. Util. Comm. No. 13-0833- EL-POR, Stipulation and Recommendation at 5-10, 14-16.

[16] Draft Rule 4901:1-39-04(C)(2).

Third, the Draft Rules would render all four utility portfolio plans due on the same day of each year–with all comments due 30 days later. This would constitute a burden for interested parties. Currently, utilities file their three-year portfolio plans in a staggered manner such that no more than two case dockets have been active at one time. Under this revision, Environmental and Consumer Advocates and other interested parties would be tasked with reviewing four separate program portfolio plans, consulting with their experts, coordinating with other interested parties, and drafting and filing four sets of comments–all within a single 30 day window. This would pose serious constraints on the commenting parties.

B. Annual Status Reports and the Proposal to Shift Review to an After-the-Fact Process

i. Requirements Under the Current Rules

In addition to the fully litigated pre-approval process, currently utilities are required to file portfolio status reports by March 15 of each year. These reports include (among other things) a performance review of all approved energy efficiency programs over the previous year and a recommendation for whether each program should be continued, modified or eliminated.[17] This status report stage does not include a litigated case docket. The status reports allow for flexibility in program planning within the three-year portfolio window; utilities have the option to propose alternatives to replace programs it decides to eliminate, seek Commission approval to reallocate funds between programs within the same customer class, and make changes to its program mix and budget allocations with proper notice.[18] In addition, subsequent to the filing of these reports, the Independent Program Evaluator prepares its own analysis of the utility's activities. This third-party process is an essential tool for ensuring the accuracy of utility

[17] O.A.C. Chapter 4901:1-39-05(A)-(C).
[18] O.A.C. Chapter 4901:1-39-05(C)(2)(c).

evaluation, measurement, and verification procedures, as well as ensuring that ratepayers are getting the most out of their investments in energy efficiency.

ii. Analysis of Staff's Proposal to Shift Commission Review to the After-The-Fact Status Report Stage

The Draft Rules also propose to shift Commission review of utility portfolios from the three-year pre-approved stage to an after-the-fact process, corresponding to the utilities' annual status reports. While Environmental and Consumer Advocates assume that Staff is seeking greater accountability from utilities in the program verification stage, as discussed above, Commission review is far more essential in the pre-approval stage. The current process already provides accountability in the pre-approval litigated case procedure, as well as with the annual Independent Program Evaluator review. If the Commission changes anything about this process, Environmental and Consumer Advocates recommend that the Commission implement *both* the current pre-approval *and* ex-post verification of utility activities. This would create a dynamic check-and-balance system that would strengthen the current process. And as discussed below, Environmental and Consumer Advocates also support the Commission's proposal to expand the role of the Independent Program Evaluator, which will provide even more assurance that the utilities are prudently investing ratepayer dollars.

Environmental and Consumer Advocates are also concerned that the proposal to shift Commission review to the after-the-fact status report stage lacks a guaranteed opportunity for a fully litigated case process. Under the proposed language, "the [C]ommission shall schedule a hearing on the [electric] utility's performance in meeting its annual statutory requirements for energy efficiency and peak demand reduction, ***or*** issue its opinion and order,"[19] based upon the Independent Program Evaluator's recommendations and stakeholder comments received on the

[19] Draft Rule 4901:1-39-05(D) (emphasis added).

status reports. Thus, rather than guaranteeing interested party intervention, the proposed rules would allow the Commission to simply issue a ruling without holding an evidentiary hearing at all–and without having heard the positions of interested stakeholders on the record. This is a clear departure from the current pre-approval and fully litigated case process.

Further, if Staff is seeking greater flexibility in how programs are administered, Environmental and Consumer Advocates submit that the current process already addresses this concern. As discussed above, the existing rules for annual status reports allow for flexibility in program planning within the three-year portfolio window.[20] Utilities may address program elements in a piecemeal manner, refine programs that are not performing as planned, remove programs that are not effective, and build in new technologies as necessary to improve the performance of existing programs. Thus, flexibility is already allowed in each annual status report.

Finally, Environmental and Consumer Advocates are concerned that shifting Commission review to an after-the-fact process would seriously undermine oversight of utility plans to bid energy efficiency into the PJM capacity market. The current pre-approval and litigated case procedure has driven the utilities to bid more and more energy efficiency resources into PJM. As discussed above, in their most recent portfolio filings Duke[21] and DP&L[22] agreed to bid at least 80% and 75% respectively of eligible existing and planned energy efficiency resources into the PJM BRA for their three-year portfolio plans, in addition to at least 50% for the beyond-plan year. The Commission also ordered FirstEnergy to bid 75% of its planned energy efficiency

[20] O.A.C. Chapter 4901:1-39-05(C)(2)(c).
[21] *See* Duke 2014-2016 EE/PDR Portfolio Plan, Amended Stipulation and Recommendation at 6-11.
[22] *See* DP&L 2013-2015 EE/PDR Portfolio Plan, Stipulation and Recommendation at 14-16.

resources under their current program portfolio for the 2016/2017 delivery year.[23] Further, the Commission has made clear that these bids should be priorities in future utility filings. In its FirstEnergy ruling, the Commission noted that energy efficiency resources generated by the utility's portfolio plan are "valuable asset[s] managed by [FirstEnergy] on behalf of ratepayers" and that the utility is ". . . required to manage such assets prudently in order to minimize the costs of the energy efficiency programs."[24] The Commission also noted the considerable consumer benefits of bidding energy efficiency resources into capacity markets, including ". . . lowering capacity auction prices and reducing associated [demand side management and energy efficiency rider] costs." [25]

Environmental and Consumer Advocates would like to see these substantial ratepayer benefits realized. To accomplish this, however, the bid framework must be reviewed for prudency *well in advance* of the auction. For example, the deadline for submission of planned energy efficiency resources into the 2017/2018 PJM BRA is May of 2014, a full three years prior to the delivery year.[26] Under the current pre-approval process, the Commission and interested parties have a meaningful opportunity to review these bid frameworks prospectively. If this review was shifted to after-the-fact, however, it would be too late for parties to impact the sufficiency of the bids. The only recourse remaining for an insufficient bid would be to reduce the utility's cost recovery for its energy efficiency programs, which amounts to little more than a

[23] *In the Matter of the Application of the Cleveland Electric Illuminating Company*, Pub. Util. Comm. No. 12-2190-EL-POR, Opinion and Order at 10-11 (March 2, 2013). Environmental and Consumer Advocates note that they recommended a more substantial PJM auction bid for FirstEnergy.
[24] *In the Matter of the Application of the Cleveland Electric Illuminating Company*, Pub. Util. Comm. No. 12-2190-EL-POR, Entry on Rehearing at 6 (July 17, 2013).
[25] *Id.* at 20.
[26] *See* 2017/2018 RPM Base Residual Auction Planning Period Parameters, available at http://www.pjm.com/~/media/markets-ops/rpm/rpm-auction-info/2017-2018-rpm-bra-planning-parameters-report.ashx.

penalty. In the meantime, ratepayers would have missed out on the opportunity to have their energy efficiency resources bid into the market for that delivery year, thereby losing considerable benefits in the process. Thus, Environmental and Consumer Advocates request that the Commission retain the current pre-approval process to ensure that utilities prudently bid energy efficiency into future PJM capacity markets and continue to serve the interests of ratepayers in the coming years.

C. Recommendation of Environmental and Consumer Advocates Regarding the Filing and Review of Program Portfolios and Annual Status Reports

Environmental and Consumer Advocates recommend that the Commission retain the current procedure for pre-approval of energy efficiency portfolios and maintain the option of intervening in fully litigated cases. If the Commission changes anything about this process, Environmental and Consumer Advocates recommend that the Commission implement *both* the current pre-approval *and* ex-post verification of utility activities. In the event the Commission opts to move to an annual post-approval process, we recommend that the Commission include language that provides for a regular (e.g. once every 3 years) fully litigated docket to provide Commission review of the utility portfolio, address stakeholder concerns, allow members of the general public sufficient time to review and provide comment, and have these concerns heard on the record.

II. Accommodating Combined Heat and Power and Waste Energy Recovery Systems

Environmental and Consumer Advocates also provide the following comments on the sections in the Draft Rules relating to combined heat and power ("CHP") and waste energy recovery ("WER"). The Draft Rules seek to address and incorporate CHP and WER into the clean energy rules, but there are several areas that need further explanation or clarification.

A. Measuring Savings and Incentivizing CHP and WER Systems

i. More Efficient CHP and WER Systems Should Receive a Higher Incentive

The Draft Rules seem to establish a production incentive in which kilowatt hours generated equals kilowatt hours saved, in terms of the savings the customer can commit to the utility and which the utility then applies to its annual savings benchmark. SB 315, and thus the Draft Rules, requires a minimum efficiency level of 60% and that 20% of the useful energy be thermal energy. However, this 100% conversion rate of kilowatt hours generated to kilowatt hours saved creates a scenario in which customers and CHP developers have very little incentive to properly design and operate their CHP systems to achieve the highest possible efficiencies. Such efficiencies can approach or even exceed 80%, which is much higher than the minimum level of 60%, and the rules should be drafted to encourage this enhanced efficiency. The goal of Ohio's energy efficiency benchmarks is to save electricity; thus the incentives provided to customers should be designed to actually achieve *new* savings through enhanced efficiency–not simply displace purchased power from the grid.

The Draft Rules also set a maximum per kilowatt hour incentive at $0.005/kwh for customers choosing to seek a cash payment incentive via the mercantile self-direct program for either a CHP or WER system. This maximum for CHP systems appears to be set without taking into account the total efficiency of the system, and as a result could be granted for projects that meet just the minimum efficiency levels established under Ohio Senate Bill 315. We address this specific $0.005/kwh incentive in more detail below. As a general matter, however, we recommend that Commission Staff establish a framework whereby CHP systems that demonstrate higher efficiencies receive a higher incentive from the utility. Environmental and

Consumer Advocates believe that this approach would be more consistent than the Draft Rules with the savings goals of Ohio's energy efficiency benchmarks.

Environmental and Consumer Advocates presented these concepts to Commission Staff early last year. On April 23rd, 2013, the Ohio Environmental Council and the Natural Resources Defense Council, with the endorsement of Environmental Law and Policy Center, presented a White Paper to Commission Staff during the informal workshop on the impending CHP rules. In the White Paper, we recommended "Threshold/Tiered Approach." SB 315 law requires that CHP installations exceed the 60% efficiency threshold to be qualify as energy efficiency measures under the savings benchmarks.[27] In this Threshold/Tiered Approach, we recommended that a portion of the electricity produced by a CHP system (MWh) be allowed as qualified savings, beginning with a minimum annual efficiency tier of 60-65%. CHP projects falling in this first tier would be eligible to claim 60% of their total electrical output savings to the utility and establish total cash incentives on this basis. As described below, as system efficiency is improved, so is the portion of the total electrical output that qualifies for the purposes of utility savings and the total cash incentive. Environmental and Consumer Advocates recommend that the Draft Rules incorporate this model, as it would effectively encourage CHP customers and developers to strive for increased efficiency in the CHP system (measured in Lower Heating Value or LHV) and thus receive higher incentives. This model would also ensure that utility incentives – either through the mercantile self-direct program or via a utility-run custom or prescriptive program –flow to CHP systems that are utilizing as much of the waste heat as possible in order to achieve the highest possible efficiencies. At the same time, though, the model does not penalize customers that meet just the minimum eligibility threshold; CHP

[27] R.C. 4928.01(A)(40) and R.C. 4928.66(A)(1)(a)

customers that have installed systems at the 60% efficiency level would still be eligible to receive an incentive. Further, the model is neutral in terms of picking technology winners, and it is based on the actual performance of the system (rather than just the system's design specifications).

Specifically, the Tiered Approach would allow customers to receive the production incentive ($/kWh produced annually) on 100% of the annually produced kWhs if the annual measured efficiency is 75% (LHV) or greater; 90% of the annually produced kWhs if the annual measured efficiency is between 70% and 75% (LHV); 80% of the annually produced kWhs if the annual measured efficiency is between 70% and 80% (LHV); 70% of the annually produced kWhs if the annual measured efficiency is between 60% (minimum requirement) and 70% (LHV).

ii. Self-Direct Maximum per kWh Incentive

As mentioned above, the Draft Rules set an unnecessarily low maximum incentive for the CHP and WER in applications for the mercantile self-direct cash option. Rather than Staff's proposal, the Environmental and Consumer Advocates endorse the comments made by the Ohio Coalition for Combined Heat and Power, the Energy Resources Center at the University of Illinois at Chicago, and the Alliance for Industrial Efficiency on setting this incentive. In sum, we recommend that Commission Staff reconsider the maximum incentive per kilowatt hour of $0.005, as it is quite low in comparison to what utilities pay for other energy efficiency measures and significantly lower than other states' programs. Further, the proposed maximum does not provide an adequate incentive in terms of fulfilling the intent of SB 315, which was ultimately to spur CHP and WER projects forward that wouldn't have otherwise been developed.

Environmental and Consumer Advocates are also concerned that the $0.005 maximum incentive in the Draft Rules will end up getting locked in for utility-run programs in the event CHP/WER-specific programs are added to utility portfolios. In this regard, we recommend the Commission clarify if the Draft Rule precludes utilities from establishing a higher per kilowatt hour incentive in any existing or future pilot program, custom program or prescriptive program for CHP and WER.

As a means of illustrating the recommendations outlined above, the Environmental and Consumer Advocates would like to use a CHP application pending before the Commission. Late last year, Jay Plastics applied for CHP to be considered under FirstEnergy's mercantile self-direct program.[28] In its filing, the applicant identified four key elements to be considered in determining a cash incentive through the mercantile self-direct program: (1) the amount of kilowatt hours that will be counted as savings; (2) the per kilowatt hour incentive that the utility will pay; (3) the amount of time the savings will be committed to the utility by the customer; and (4) the schedule for incentive payments. This approach would ensure a fair exchange between the customer and the utility, and thus Environmental and Consumer Advocates recommend that these elements be folded into the Draft Rules. The Draft Rules propose to set a hard number for just *one* of these elements (the kilowatt per hour incentive) without establishing clear guidance for the other elements. This approach is confusing and is unreasonable for mercantile customers–a rate class that typically seeks regulatory certainty–and would be particularly problematic in future years as customers seek to develop CHP and WER projects and find no clear guidance on the abovementioned elements.

[28] *See* Dkt. No. 13-2440-EL-EEC, Several of the organizations that are part of the Environmental and Consumer Advocates sent letters of support for the Jay Plastics application to the Commission.

Given these concerns, Environmental and Consumer Advocates recommend that the Commission increase the total incentive allowed for the mercantile self-direct cash payment option for both CHP and WER to an amount that aligns with what utilities pay for other, equally valuable energy efficiency measures, as well as what other states' programs offer for CHP and WER systems. In addition, we recommend that the Draft Rules allow for CHP and WER systems to be eligible for incentive payments for at least eleven years, through 2025 and the end of the current energy efficiency standard. We also recommend that the Commission clearly establish in the Draft Rules that customers in both the self-direct and utility-run programs may seek some portion of their incentive to be paid up front, or structured in a way that allows the customer to receive a majority of their total incentive in the first few years of the project's operation. CHP projects tend to require a great deal of capital intensity and often include a lengthy design and engineering phase. Providing customers with a portion of this incentive up front will help move forward CHP and WER projects that would not otherwise have been developed, thereby demonstrating the effectiveness of this important incentive.

B. Standard Mercantile Self-Direct Applications and Annual Report for CHP and WER Systems

The Draft Rules also include application templates that standardize the process for seeking an incentive for their CHP or WER system through the existing mercantile self-direct program. The standard application requires an annual report, indicating that Staff intends to establish a performance-based incentive for customers whereby a system's actual performance will be reported annually as a way to ensure the system is performing at the level intended in the original application. We commend the Commission on establishing a performance-based system, but recommend that this incentive system be clarified in the following ways.

First, we recommend a procedural revision. While the annual report, along with the required information in the original application, indicates a performance-based incentive, the Draft Rules do not explain this in detail. We recommend adding language in Draft Rule 4901:1-39-07 that clearly establishes the requirement to file an annual report to the PUCO.

Second, while the performance-based incentive is detailed for the mercantile self-direct option, the Draft Rules do not specify that the same incentive will be required of any existing or future CHP/WER-specific program within the utility's efficiency portfolio. We recommend the Draft Rules clarify in 4901:1-39-07 that the same performance-based incentive be required of these utility-run programs as well.

C. Setting the Maximum that Utilities Can Claim from CHP/WER Projects Towards the Overall Annual Benchmarks

Ohio Senate Bill 315 included an important provision in Ohio Revised Code Section 4928.66(A)(1)(a), which reads:

> For purposes of a waste energy recovery or combined heat and power system, an electric distribution utility shall not apply more than the total annual percentage of the electric distribution utility's industrial-customer load, relative to the electric distribution utility's total load, to the annual energy savings requirement.

This provision was intended to ensure that utility-run efficiency program dollars and savings were adequately distributed among all customer classes–residential, commercial and industrial. The provision protects energy efficiency budgets and savings goals in the residential and commercial rate classes, as well as for the other utility-run industrial programs, from encroachment by potentially large, costly CHP projects. However, the Draft Rules do not explicitly address this provision of SB 315. We recommend revising the Draft Rules to clarify that, in annual status reports, utilities must assess their total industrial customer load and demonstrate to the Commission that the savings they claim from CHP/WER systems do not disproportionately outpace their total industrial customer load.

D. Defining "Useful Thermal Energy"

In addition, the Draft Rules do not add a definition for "useful thermal energy" in O.A.C. 4901:1-39-01 as it pertains to the definition of a "Combined Heat and Power System." Clearly defining this term is critical to calculating the overall efficiency of a CHP system. If left undefined, a CHP customer or developer could interpret it to mean the amount of thermal energy that *could* be used, rather than the amount of thermal energy that is *actually* used by the system. This would significantly skew the calculated efficiency of the system.

Environmental and Consumer Advocates recommend adding a new definition for this phrase in Draft Rule 4901:1-39-01 to read: "Useful thermal energy is the thermal energy output of the system that is recovered and utilized by the facility or process."

III. Proposed Changes to Annual Performance Verification and the Role of the Independent Evaluator (Draft Rule 4901:1-39-05)

A. Draft Rule 4901:1-39-05(A)(1)(b) Regarding Measures Required to Comply with Energy Performance Standards Set by Law or Regulation

The Draft Rules also address the measurement of energy efficiency savings in several places. The Environmental and Consumer Advocates agree with the general framework of Staff's proposal to defer energy efficiency measurement issues to the Independent Evaluator and the TRM. The Independent Evaluator is in the best position to adapt to the changing energy efficiency marketplace and make recommendations regarding evaluation, measurement, and verification practices. As explained by the Commission in Case No. 09-512- EL-UNC, utilities that follow the measurement requirements in the Ohio TRM enjoy a presumption of prudence.

In Draft Rule 4901:1-39-05(A)(1)(b), the Draft Rules deviate from this framework in one significant respect. Draft Rule 4901:1-39-05(A)(1)(b) states:

> An electric utility shall not provide a financial or rider exemption incentive for, but may 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.

The Environmental and Consumer Advocates strongly disagree with this drastic reversal from the previous rules. Draft Rule 4901:1-39-05(A)(1)(b) would allow utilities to count the adoption of measures that have nothing to do with utility programs. With regard to lighting and the Energy Independence and Security Act ("EISA"), utilities will be able to use an inflated and unrealistic baseline for measuring savings, even though EISA's requirements ensure that certain inefficient light bulbs are unavailable to consumers. The Commission should remove this provision for several reasons: (1) it allows for the counting of quintessential free riders; (2) it is inconsistent with the requirements of PJM, all other states, and any concept of utility energy efficiency; (3) it significantly dilutes the energy efficiency benchmarks; and (4) it allows for utilities to earn shared savings on energy usage reductions the utilities had nothing to do with.

In the context of energy efficiency programs, "free riders" are program participants who would have adopted efficiency measures even in the absence of the energy efficiency program. In the hearing on FirstEnergy's most recent portfolio filing, FirstEnergy witness Ed Miller defined the term "free rider," explaining: "[I]n the most general sense, a free rider would be a customer who, theoretically, would have -- would have purchased the . . . more efficient equipment without the influence of the program."[29] The Commission has consistently agreed with virtually all parties that it is important for utility energy efficiency programs to limit free rider concerns.[30] Allowing utility "savings" to come from federally-mandated reductions (like

[29] *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 2013-2015*, Case Nos. 12-2190-EL-POR, 12-2191-EL-POR, 12-2192-EL-POR, Hearing Tr. Vol. III, pp. 406-408.
[30] *See* Case No. 12-2190, Mar. 20, 2013 Opinion and Order at 23, 25, 30.

the requirements of EISA) would be allowing classic free riders to count toward the energy efficiency benchmarks.

The Draft Rule's prohibition against incentives to these customers does not alleviate the free rider problem. The definition of "free rider" in the context of energy efficiency is not the same as free ridership in general economics, which is concerned with parties receiving a benefit without paying their fair share. As explained above, energy efficiency free ridership means the counting of energy reductions that would have occurred absent utility programs. Prohibiting incentive payments misses the point. The free ridership problem created by the rule is not solved by prohibiting incentive payments in those instances when a customer adopts a measure to comply with federal or state law.

Allowing these legally-mandated energy reductions to count as utility energy efficiency savings is inconsistent with PJM's rules,[31] the requirements in other states,[32] and even the Commission's own statements on this issue. In explaining that these reductions should not count toward the benchmarks in the TRM docket, the Commission stated that when newly "installed equipment must meet federal or state minimum efficiency standards, [] simply installing such equipment could not be the result of or attributable to an electric utility's or mercantile

[31] *See* PJM Manual 18B at 26, available at http://www.pjm.com/~/media/documents/manuals/m18b.ashx

[32] The Environmental and Consumer Advocates do not know of any other states that allow for the counting of measures required to comply with federal or state code. Like the Ohio TRM, the TRMs from other states reject this approach to counting energy efficiency savings. *See, e.g.*, Pennsylvania TRM at, available at http://www.puc.pa.gov/filing_resources/issues_laws_regulations/act_129_information/technical_reference_manual.aspx; Illinois TRM at 20, available at http://ilsagfiles.org/SAG_files/Technical_Reference_Manual/Version_2/Illinois_Statewide_TRM_Version_2.0.pdf

customer's program."[33] In the previous rulemaking, the Commission even addressed the specific change included in the Draft Rules and came to the opposite conclusion of Staff's current recommendation:

> We have changed the provision of [Rule 4901:1-39-05(H)] to prohibit only the counting of those measures that are subject to energy performance standards required by law, including those embodied in the Energy Independence and Security Act of 2007. We see no reason to credit electric utilities for benefits of measures that would have happened regardless of their efforts. Under the new rule, the replacement of incandescent lighting with compact florescent lighting program would count now, *but not after such measures become required under the Energy Independence and Security act of 2007*.[34]

The Commission's logic in the previous rulemaking is consistent with the concept of free ridership and still applies today–utility energy efficiency savings cannot include "measures that would have happened regardless of [the utility's] efforts."

In practical terms, Draft Rule 4901:1-39-05(A)(1)(b) would allow utilities to use inflated and unrealistic baselines when measuring energy savings. For example, EISA requires screw-in light bulbs to use fewer watts for a similar lumen output, progressively reducing the amount of allowable watts over the course of three years, from 2012-2014.[35] Effective January1, 2014, EISA reduced the baseline for 60 watt incandescent lumen-equivalents to 43 watts. This means EISA requires manufacturers to replace 60 watt bulbs with bulbs that produce the equivalent amount of light with 43 watts or less (EISA-compliant CFLs use only 13-15 watts and are approximately four times as efficient at the 43 watt EISA standard). Despite the fact that

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[33] *In the Matter of the Protocols for the Measurement and Verification of Energy Efficiency and Peak Demand Reduction Measures*, Case No. 09-512-GE-UNC, October 15, 2009 Finding and Order at 14-15.

[34] *In the Matter of the Adoption of Rules for Alternative and Renewable Energy Technology, Resources, and Climate Regulations, and Review of Chapters 4901:5-1, 4901:5-3, 4901:5-5, and 4901:5-7 of the Ohio Administrative Code, Pursuant to Amended Substitute Senate Bill No. 221,* Case No. 08-888-EL-ORD, April 15, 2009 Order at 20 (emphasis added).

35 H.R. 6 (110th), Section 321(a)(3), Energy Independence and Security Act of 2007 (enacted).

consumers now only have access to these 43 watt or less bulbs, Draft Rule 4901:1-39-05(A)(1)(b) would allow savings to be measured using a 60 watt baseline. This inflated baseline allowance will have a huge effect on utility reported savings and will significantly dilute the energy efficiency benchmarks.

Shared savings mechanisms provide yet another reason to reject Draft Rule 4901:1-39-05(A)(1)(b). Pursuant to the Draft Rule, if a customer is required by federal law to replace a piece of equipment with new equipment meeting performance standards set by law, the utility would not only get to count those energy reductions toward benchmarks, it would also be permitted to receive an incentive payment from customers based on those reductions, which it did not create. In other words, utilities could charge customers for "savings" created when consumers are forced by federal law to switch to a more efficient light bulb. The absurdity of this scenario underscores the need for Draft Rule 4901:1-39-05(A)(1)(b) to be removed from the Draft Rules. Instead, the Commission should leave issues of energy efficiency measurement to the Independent Evaluator and the TRM.

B. Recommendations Regarding The Role of the Independent Evaluator

The Draft Rules expand and clarify the role of the Independent Evaluator. Pursuant to Draft Rule 4901:1-39-05(B), the Independent Evaluator must review utility energy efficiency activities and prepare a report that summarizes the Independent Evaluator's findings and recommendations. The Independent Evaluator is also tasked with updating the TRM, with the assistance of Staff and input from stakeholders. As explained above, the Environmental and Consumer Advocates generally agree with these proposed revisions and believe that the Independent Evaluator is in the best position to thoroughly and objectively verify energy efficiency program results. However, the Environmental and Consumer Advocates believe

certain changes and additions to the Draft Rules, detailed below, would maximize the value of the Independent Evaluator's activities.

i. The Independent Evaluator should report on certain metrics to allow benchmarking and sharing of best practices among Ohio utilities.

Environmental and Consumer Advocates recommend that the Commission add a new sub-section 4901:1-39-05(B)(5) as follows:

> (5) An evaluation of the electric utility's energy efficiency portfolio plan's programs using the following metrics: (a) energy efficiency spending as a percentage of revenues; (b) energy savings as a percentage of total sales; (c) peak demand savings as a percentage of peak demand retail cost of energy; (d) cost of first year savings; (e) revenue claimed by the electric utility via shared shavings or lost distribution revenue; and (f) any other recovery associated with an electric utility's energy efficiency and peak demand reduction programs.

The independent program evaluator should be able to report on these metrics with little difficulty. If the independent program evaluator were to report on these metrics for the Ohio electric utilities, this would allow the Commission and stakeholders to more easily compare the performance of the utilities' programs. If any utilities are lagging in these metrics, they could review the energy efficiency programs used by the utilities with higher scores. Utilities could benchmark their performance and could adopt successful programs from the utilities with higher scores. This should result in continuous improvement of the utilities' performance.

ii. The Draft Rules should require a net savings approach and should include net-to-gross analyses in the Independent Evaluator's activities.

The Environmental and Consumer Advocates have urged the Commission to transition to a net savings methodology in other dockets[36] and repeat those recommendations in these comments. Draft Rule 4901:1-39-05 should require utilities to report energy efficiency savings

[36] *See* Comments of Environmental Advocates, Case No. 13-1027; Comments of ELPC on DP&L 2013-2015 EE/PDR Portfolio, Case No. 13-0833.

for compliance purposes on a net savings basis, and Draft Rule 4901:1-39-05(B)(5) should include this net-to-gross analyses as part of the Independent Evaluator's activities.

Net energy savings "can be defined as the incremental energy savings attributable to the utility efficiency program that exclude 'free riders' who would have installed the energy efficient measures" even in the absence of utility programs.[37] Net savings also typically include a quantification of "spillover," or the indirect program savings resulting from the actions of non-participants. Net savings measurement and quantification are typically referred to as net-to-gross ("NTG") adjustments.

The Commission currently allows utilities to utilize gross savings toward benchmarks, but the PUCO has explained that it "plans to revisit this issue of net and gross savings in the future."[38] The Commission explained in 2009 that "as utilities gain greater experience with the delivery of efficiency programs, the Commission would transition to the use of net savings measurement to more completely track the impacts of efficiency programs."[39] Now, utilities and stakeholders in Ohio have five years of energy efficiency programs under our belts, and utilities have developed sophisticated programs and accepted measurement and verification practices. This experience demonstrates that Ohio is now ready for a net savings methodology.

There are several benefits to the adoption of a net savings requirement. By factoring in free ridership and spillover, application of a net-to-gross ratio more accurately measures actual energy efficiency savings attributable to utility programs and measures. It also encourages the design of better programs with fewer free rider concerns. If Program A and Program B produce

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[37] Independent Evaluator Report at 6, available at http://dis.puc.state.oh.us/TiffToPDf/A1001001A13E02B63849G13794.pdf

[38] *In the matter of the Protocols for the Measurement and Verification of Energy Efficiency and Peak Demand Reduction Measures*, Case No. 09-512-GE-UNC, June 24, 2008 Entry, App'x A at 2.

[39] *Id.*

similar gross savings, but Program B has serious free rider problems, a utility should choose to implement Program A. Under the current gross savings standard, however, both programs are evaluated the same for reporting purposes. Adopting a net-to-gross approach will encourage utilities to design and implement programs that deliver actual savings with fewer free riders. Since ratepayer money is being spent on achieving energy savings through utility programs, as the Commission has noted, "it is important to ensure that program expenditures are focused on energy efficiency measures that are less likely to occur absent the program."[40]

As explained above, the general framework created by the Draft Rules is to leave measurement and verification issues with the Independent Evaluator and the TRM. The Environmental and Consumer Advocates agree with this framework. Therefore, consistent with this approach, the Draft Rules should assign the Independent Evaluator the task of calculating and applying NTG ratios to utility programs. The Environmental and Consumer Advocates recommend that the Commission add a new sub-section 4901:1-39-05(B)(6) as follows:

> (6) An analysis of appropriate net-to-gross values for use by electric utilities in reporting energy efficiency savings. The net-to-gross analysis shall include free ridership and spillover.

C. Recommendations Regarding Consistent Reporting Criteria in the Draft Rules

Draft Rule 4901:1-39-05(A) describes the requirements for utilities' annual portfolio performance or status reports. Utility status reports have value, but inconsistent reporting criteria pose fundamental challenges to comparing data across utility reports. Inconsistent reports make it difficult to evaluate the overall performance of Ohio's energy efficiency benchmarks, as well as to determine with accuracy the total savings and benefits to customers. Further, inconsistent reporting standards and requirements render comparison of utility performance unnecessarily

[40] *See id.*

difficult. This is a critical factor for program design and oversight; stakeholders and Commission Staff need access to comparable performance data if they hope to effectively impact program design and ensure that the most cost-effective, successful programs continue to be ramped up year after year.t,.

Currently, annual status reports do not require a basic level of consistency in reporting criteria, rendering both stakeholders and the Commission unable to fully impact the evolution of successful programs as described above. To remedy this concern, Environmental and Consumer Advocates recommend that uniform reporting metrics be adopted for all regulated utilities responsible for energy efficiency reporting. We recommend that the Commission establish a process by which the relevant merits of criteria in portfolio/status reports are identified each year, so that each year utilities move closer to consistent reporting. One particular example is FirstEnergy's use of cumulative program savings. All other utilities report incremental annual savings in each status report. In contrast, to determine what FirstEnergy's incremental savings in a given year it is necessary to review *all* prior status filings, and work backwards, subtracting each prior year d from the current filing. This can also lead to incorrect citations to FirstEnergy's annual program performance. Environmental and Consumer Advocates believe it would be more administratively efficient to include in the Draft Rules a template or some other standardized reporting framework to ensure that each utility reports their incremental savings in each annual report.

In addition, Draft Rule 4905:1-39-05(C) provides thirty days for comments to the utilities' annual status reports. This time period has proven inadequate in the past. In the experience of Environmental and Consumer Advocates, a thirty day window is insufficient to review and create comments on the volume and density included in four separate reports. The

inconsistencies noted above also contribute to this time constraint. A longer time period not only affords interested parties the ability to adequately review the documentation and evaluate an electric utility's performance, it also allows time for any public comment regarding the filing. Opinion and input from the general public should be encouraged. A shortened comment period reduces the chance for such input. Therefore, the longer time period for comment should be adopted by the Commission.[41]

IV. The Draft Rules Should Include Minimum Requirements for Utilities to Bid Energy Efficiency and Demand Response into PJM Capacity Auctions.

The Commission has consistently recognized that energy efficiency and demand response resources can provide significant value to customers if they are bid into PJM's capacity auctions. To provide consistency and to maximize the benefits for customers, the Draft Rules should codify a universal minimum requirement for utilities to bid these resources into PJM.

The PJM BRA is a competitive auction that secures capacity commitments three years before the resources will be needed. Energy efficiency resources (i.e. energy savings from utility energy efficiency programs) are eligible resources for participation in the auction. Participants in the BRA bid eligible resources into the auction, which commits them to install those resources by the delivery year. There is no requirement that the resources utilities bid into the BRA are actually installed at the time of the bid, only that they will be available when needed in three years, which means that resources do not need to be installed and producing savings at the time

[41] The Environmental and Consumer Advocates wish to note the distinction between this recommendation for an extended comment period on utility annual status reports, and our opposition (discussed on pages 2-11 of these comments) to Staff's proposal to shift the current procedure for pre-approval of energy efficiency portfolios to post-approval corresponding with the annual status report filing. By submitting the request in this section for a longer comment period, we are not supporting any replacement of the Commission pre-approval process with a mere comment period. Notwithstanding these comments on the annual status report, Environmental Advocates reiterate our recommendation that the Commission retain the current pre-approval litigated case procedure for utility portfolio plans.

of the bid. Utilities, therefore, are free to bid into the BRA the savings they reasonably expect to generate by the delivery year to meet Ohio's energy efficiency standard.

The Commission has recognized that "requiring [utilities] to bid all planned savings into future PJM BRAs could substantially benefit ratepayers by lowering capacity auction prices and reducing [rider] costs."[42] In fact, bidding into the BRA has the potential to significantly reduce costs for consumers in three ways. First, cleared bids produce a direct payment that would serve as a revenue source that could be used to offset the costs of energy efficiency portfolio plans since the resources that clear the auction receive the clearing price for those resources. Customers are already paying for the energy efficiency and demand response resources produced by portfolio plans, and they should reap all the rewards from those investments, including revenues from the BRA. Second, bidding anticipated eligible resources at a low price could shift the supply curve to the right and cause the auction to clear at a lower price than it otherwise would have. Energy efficiency resources, which can be bid into the auction at a very low price, can displace higher cost resources, which results in a lower auction clearing price and savings for all ratepayers in the form of lower capacity prices. Third, the participation of energy efficiency resources could delay or obviate the need for expensive new transmission and distribution projects.

Codifying a bidding requirement would ensure that customers receive the full benefit from energy efficiency investments. "The energy efficiency resources generated by [utility] energy efficiency resources are a valuable asset managed by the [utility] on behalf of ratepayers. [Utilities] are required to manage such assets prudently in order to minimize the costs of the

[42] Case No. 12-2190-EL-POR, March 20, 2013 Opinion and Order.

energy efficiency programs."[43] A universal requirement would also provide certainty and consistency among the utilities regarding PJM bidding, and a Commission rule would certainly be more efficient than addressing the issue in a piecemeal fashion through portfolio plan filings. Finally, as explained elsewhere in these comments, an after-the-fact remedy with regard to PJM bidding is simply not feasible. Even if stakeholders were successful in proving a utility did not act prudently by failing to provide an adequate bid to PJM, it would be difficult to account for potential capacity reductions that were lost because of the inadequate bid. A clear Commission rule addressing minimum requirements for PJM bidding could alleviate these concerns.

The Environmental and Consumer Advocates recommend, for purposes of planning and making bids into the PJM auction, the addition of the following sub-section under Draft Rule 4901:1:39-04:

> PJM Bidding. Electric utilities shall bid into the PJM base residual auction at least 85% of existing and projected energy efficiency and demand response resources that are eligible under PJM rules. For the purposes of bidding projected energy efficiency and demand response resources into the PJM base residual auction, electric utilities shall assume any approved program portfolio plan under 4901:1-39-04 will continue for four calendar years beyond the current year, in the absence of an order by the commission amending the program portfolio plan.

This recommendation would ensure benefits for customers and eliminate the tension between the current plan period of three years and PJM's forward-looking base residual auction, which requires bids for a delivery year three years into the future.

V. Proposed Changes to Program Planning Requirements (Draft Rule 4901:1-39-03)

A. Market Potential Studies

Draft Rule 4901:1-39-03 discusses potential studies and the assessment of viable energy efficiency opportunities in a service territory over a given period. Currently, these plans are

[43] Case No. 12-2190-EL-POR, July 17, 2013 Entry on Rehearing at 6.

developed on a 3-year rolling basis consistent with the initially developed filing schedule of 3-year portfolio plans. The current frequency of these studies provides opportunities for utilities to take into account changed circumstances and new information about trends in technologies, qualifying measures and opportunities to evaluate new program designs that may provide greater savings to customers.

The Draft Rules extend this period to 5 years.[44] Ideally, Environmental and Consumer Advocates prefer that Staff retain the current timeline to allow the utilities, stakeholders and the Commission more frequent opportunities to review changing circumstances and evaluate new technologies that may improve energy efficiency portfolios. However, the Environmental and Consumer Advocates are more concerned that the rules contain *sufficient requirements* such that market potential studies provide an in-depth picture of the ways in which portfolios can be expanded in future years. To accomplish this, we recommend revising the Draft Rules to require utilities to incorporate in the studies more rigorous and innovative measures, as well as emerging technologies such as retro-commissioning and continuous commissioning, which are valuable approaches to identifying deep energy savings in commercial buildings. Despite the recent advances in software and automation to make these procedures more cost-effective for large, medium and small buildings alike, these measures are not currently being addressed in all of the utilities' market potential studies. To ensure that this additional level of rigor occurs, Environmental and Consumer Advocates recommend adding the following language:

Under "program planning requirements," in 4901:1-39-03(A)(1), where Commission Staff adds "commercially available measures" to this provision, we also recommend modifying this to read: "commercially available measures including operational practices and design

[44] Commission's Entry at Attachment A at 9 of 30 (4901:1-39-03(A)).

improvements." The former would address retro-commissioning and the latter would suggest a more thorough treatment of whole-system design improvement in new construction of commercial buildings. We recommend similar language revisions in the corresponding definitions for "achievable potential (4901:1-39-01(A)), "economic potential" (4901:1-39-01(J)), and "technical" potential (4901:1-39-01(Z)). Environmental and Consumer Advocates also recommend modifying 4901:1-39-03(A)(3) to ensure that each market potential study explains in detail the utility's methodology for determining achievable potential from economic potential, including a description of key parameters and input data, with formal citations of all references to supporting data and methodology validation.

B. Proposed Changes to Program Portfolio Plan Design Criteria

The Draft Rules include several changes to the program portfolio design criteria in Draft Rule 4901:1-39-03(B). Environmental and Consumer Advocates believe that the addition of additional design criteria in Draft Rule 4901:1-39-03(B) could greatly improve energy efficiency planning and program design.

First, the Environmental and Consumer Advocates recommend that Staff make a few minor revisions clarifying the Draft Rules. Under Draft Rule 4901:1-39-03(B)(7), we request clarity on the definition of "anticipated impacts on new construction." We also suggest that Staff add an explanation for how it plans to minimize lost opportunities by capturing the maximum potential for efficiency measures and design improvements in new construction. Under Draft Rule 4901:1-39-03(B)(8), we suggest that gas utilities be included as explicit potential partners for energy efficiency programs. As with the (B)(7), (B)(8) would also be improved by including a requirement that portfolios identify new opportunities in emerging technologies and fast-growing electric uses (e.g., server rooms, data centers, and other high-tech facilities) and that the

utilities must quantify any that have become significantly large or promising since the previous market potential study. Environmental and Consumer Advocates also recommend that Commission Staff re-instate market transformation as a design criterion in Draft Rule 4901:1-39-03(B)(13).

Second, the Environmental and Consumer Advocates recommend that the Commission add the following sub-section (B)(13) under the program portfolio plan design criteria:

> (13) Costs and benefits of making additional financing options available to customers by allowing customers to pay for energy efficiency improvements through a monthly charge on the customers' monthly utility bills.

High upfront financing costs are a significant barrier for energy efficiency projects.[45] Upfront financing costs can be reduced or eliminated by on-bill financing programs. There are two basic types of on-bill financing programs: On-Bill Financing ("OBF") and On-Bill Repayment ("OBR"). While both types of programs provide benefits, OBR programs provide greater benefits than OBF programs.

OBF has been offered in approximately 20 states. OBF utilizes ratepayer funds to finance projects, while OBR utilizes third-party private capital. OBF usually places the utility in the role of the underwriter. OBF programs are operating in many states and can produce low financing rates but OBF puts utility ratepayers at risk for paying defaulted loans, while OBR does not. OBR programs are also expected to have lower interest rates than conventional financing because several characteristics of OBR provide natural credit enhancements: utility bill default rates are extremely low; the repayment obligation would arise from the utility tariff and would not be dischargeable in bankruptcy; the loan pool would be statewide; the programs would

[45] Bell, Catherine J., *et al.* "On-bill Financing for Energy Efficiency Improvements: A Review of Current Program Challenges, Opportunities and Best Practices." American Council for an Energy-Efficient Economy (December 2011) p. 1, available at http://www.puc.state.pa.us/Electric/pdf/Act129/OBF-ACEEE_OBF_EE_Improvements.pdf

be financed by third-party lenders with low capital costs; and a secondary market may develop as the market matures and the loans are securitized. If private capital is used, the program should be able to reach greater scale and provide greater flexibility in the types of financing offered.

The OBR obligation is structured as a rate under the utility tariff for a specific utility meter. The repayment obligation for a project that is funded through OBR would flow through the utility bill as a rate under the tariff, thus any future utility customers at that property will receive the benefits of the project and incur the repayment charge for the term of the obligation. A subsequent customer would not be responsible for any payments due prior to the customer's occupancy. This is similar to the obligation incurred by successive owners when a property owner finances special improvements through the utility bill. Stranded asset obligations, payment for line extensions and undergrounding are all examples of finance based rates that automatically bind successor-customers without requiring consent.

California, Connecticut, and Hawaii have approved the OBR concept and are in the process of implementing their programs. Maryland, New York, New Jersey, and Pennsylvania are considering OBR programs.

When developing programs for their energy efficiency and peak-demand reduction portfolio plans, utilities should evaluate the costs and benefits of implementing an OBR program. If these programs can be offered in a cost-effective manner, this would provide new opportunities for customers to implement energy efficiency projects. Utilities should receive credit toward their energy efficiency targets for projects financed with OBR, using an accounting methodology to be approved by the Commission.

Third, the Environmental and Consumer Advocates recommend that the Commission add the following sub-section (B)(14):

(14) Potential for energy efficiency and demand response resources created by utility programs to be bid into PJM capacity auctions.

As explained above, the Commission has recognized the significant benefits regarding the bidding of energy efficiency and demand response resources into PJM capacity auctions. In planning its program portfolio, a utility should consider the extent to which potential programs create savings that are eligible to be bid into PJM. If Program A and Program B will create similar energy efficiency savings at similar costs, but only Program A savings will be eligible for participation in PJM, the utility should incorporate this factor into its planning and prioritize Program A over Program B.

Fourth, the Environmental and Consumer Advocates also recommend the additional consideration of "programs offered by other utilities" as an addition (and clarification) to the eighth criterion in the list.[46]

Finally, the Environmental and Consumer Advocates disagree with the removal of the design criteria in (B)(13): "The degree to which the program promotes market transformation."[47] This is an important criterion that, while implied by other criteria in the list, should be a specific and express consideration of any portfolio plan design.

VI. Proposed Changes to Portfolio Plan Content (Draft Rule 4901:1-39-04(C))

The necessary content that must be part of a Portfolio Plan is discussed within Draft Rule 4901:1-39-04(C). The required items do not differ in any dramatic way from the rules that have been in place since 2009. The only difference is that the Draft Rules include more reporting requirements for utilities to describe interaction with stakeholders. This represents an

[46] *Id.* at 10 of 30. This criterion as proposed states that "Potential to partner the proposed program with similar programs offered by other utilities, in a cost effective manner." Even if the potential to partner does not exist, a successful program offered by another utility should be a consideration.

[47] Commission's Entry at Attachment A at 11 of 30 (4901:1-39-03(B)(13).

improvement over current rules, and the Environmental and Consumer Advocates strongly support these additional requirements. However, this progress should go farther in explaining the collaborative process and requirements for utilities. Specifically, these comments recommend that rather than simply require that input on new programs be solicited, program proposals for an upcoming plan should be provided to stakeholders for review and comment well before actual filing, regardless of whether the Commission decides to retain the current schedule or implement a modified procedural schedule. In recent years, litigation has been the only avenue to proposing changes to plans when working with utilities that do not share them before filing.

Accordingly, the Environmental and Consumer Advocates recommend that utilities be required to provide some summary of proposed programs to stakeholders before filing and allow those stakeholders and the utilities to mutually collaborate to improve program offerings and reduce differences. While this already occurs voluntarily in some collaboratives, this is an important point that needs to be considered in the light of the wide range of utility performance in collaboratives to date. Some utilities lead effective collaboratives where stakeholders work hand in hand with administrators to review programs, improve them, and address challenges in a responsive and effective way that leads to strong results and satisfied customers. Ideally, this is how all collaboratives should function. Unfortunately, they do not. Accordingly, throughout this rule package it is important for the Commission to take opportunities, like the recommendation provided above, that have the prospect of producing universally productive and effective collaboratives.

Providing a description of programs to be put into the filing ahead of time, in the collaborative setting, will allow stakeholders and utilities alike to more positively resolve

differences and challenges through collaboration, and this change could reduce litigation costs and needs.

VII. Proposed Changes to Mercantile Self-Direct Programs (Draft Rule 4901:1-39-07)

A. The Commission should reject the inclusion of the "as-found" method in Proposed Rule 4901:1-39-07

This section proposes to incorporate the Mercantile Pilot Program suggested by the Commission for inclusion in these rules by its Finding and Order in 10-834-EL-POR. Proposed subsection (B)(3) includes the ability of mercantile customers who replace non-functioning equipment or installation of new equipment to commit any energy reductions to its EDU utilizing the "as-found method." Environmental and Consumer Advocates view the as-found method as in direct conflict with R.C. § 4928.66 and its requirement that utilities "implement energy efficiency [and peak demand reduction] programs that achieve" certain benchmarks.[48] While the proposed rule uses the term "mercantile customers' program," the activities envisioned by this section's use of the as-found method are not necessarily programs under the statute, nor under the Commission's definition of the term.

Section 4928.66 creates an active, rather than a passive, requirement, and requires that utilities only count savings from the implementation of actual programs, rather than passively count savings from equipment upgrades that do not require customer action beyond what would occur absent the program.[49] This is further emphasized, in the context of mercantile customers, under R.C. §4928.66(b)(2)(C), where utilities are permitted to count savings from "mercantile customer-sited energy efficiency . . . and peak demand reduction *programs*" that are committed

[48] R.C. § 4928.66(A0(1)(a).
[49] *See In re Columbus S. Power Co.*, 129 Ohio St. 3d 46, 46 (Ohio 2011). Here the Ohio Supreme Court summarized Section 4928.66 as requiring "electric-distribution utilities [to] implement programs to increase energy efficiency and to reduce peak demand."

to the utility. The Commission rules go on to define "Program" as "a single offering that includes one or more measures provided to electric consumers."[50] The replacement of broken equipment integral to a customer's business is not such a "single offering" of the EDU, but a business-as-usual practice conducted by said customer for reasons separate from energy reduction.

Business-as-usual equipment replacements with the least efficient equipment on the market cannot be considered an "energy efficiency . . . [or] peak demand reduction program," under the statue and therefore cannot count toward benchmarks. Adopting such a rule that conflicts with the enabling statutes is unlawful and would not pass muster under the requisite review of the Joint Committee of Agency Rule Review ("JCARR").[51] Furthermore, counting "savings" and paying incentives to customers for reductions in energy use that would occur even in the absence of energy efficiency incentive, is the quintessential form of free-ridership – a practice that the Commission and the utilities should work to curtail, not perpetuate. We request that the Commission pursue an alternative that incents replacement of failed equipment with the most efficient equipment available.

B. Commission Clarification Concerning Incenting Behavioral Programs in Draft Rule 4901:1-39-07(C)(2)

Draft Rule 4901:1-39-07(C)(2) states:

> Commitment of a mercantile customer's behavioral energy efficiency program that is made pursuant to a commitment payment shall be counted by the electric utility for one year. Subsequent annual applications may be made if the behavioral program continues. **After five consecutive years of approved**

[50] Proposed O.A.C.§4901:1-39-01(W). This definition is identical to that in current O.A.C. §4901:1-39-01(V).

[51] *See* R.C. §119.03(I)(1) (a) "The joint committee on agency rule review may recommend the adoption of a concurrent resolution invalidating a proposed rule, amendment, rescission, or part thereof if it finds any of the following: . . .That the rule-making agency has exceeded the scope of its statutory authority in proposing the rule, amendment, or rescission"

> **commitment payment applications, the energy efficiency savings shall be counted as permanent by the electric utility.** If the energy savings levels vary from year to year during the five year period, the lowest of the energy savings levels shall be counted as permanent by the electric utility, and no additional payments will be made to the customer.

The Environmental and Consumer Advocates recognize the importance of behavioral programs in the overall movement to realize the environmental and fiscal benefits of electric energy savings. Further, we understand and appreciate the sheer difficulty in properly accounting the savings realized. While we may be in agreement with the need to better recognize and count efficiency from behavior modification programs, however, questions emerge concerning the methodology presented in this draft for calculating savings for behavioral programs. Specifically: What does it mean that the savings are "permanent"? Does the determining of behavioral programs as permanent after five consecutive years render the program incentive moot, as to discontinue the incentive payment? Or, does the permanence of the behavioral change allow for perpetual incentive? Furthermore, Environmental and Consumer Advocates question why the rules would only include mercantile customer behavioral programs, and not a methodology for capturing savings from residential and small commercial class customers.

Thus the Environmental and Consumer Advocates request clarification on Staff's proposed methodology and appropriate amendments to the final rule.

VIII. Proposed Changes to Energy Efficiency Definitions (Draft Rule 4901:1-39-01)

A. Draft Rule 4901:1-39-01(N): Revised Definition of Energy Efficiency and What Counts as "Electrical Savings" from Combined Heat and Power Systems.

Draft Rule 4901:1-39-01(N) adds several new phrases to the definition of energy efficiency:

> Energy efficiency means reducing the consumption of electrical energy, without substitution from other energy sources, while maintaining or improving the end-use customer's existing level of functionality, or while maintaining or improving

the utility system functionality, or producing electricity from waste energy recovery systems or producing electricity from combined heat and power systems.

The addition of the final two phrases addresses the inclusion of CHP and WER as energy efficiency. The added definition of "producing electricity from waste energy recovery systems" is appropriate, given the other qualifying conditions associated with WER systems, per Section 4928.01(A)(38)(a)(i) and (ii) of the Revised Code. These conditions (1) prohibit electrical output if it was generated by the additional use of fossil fuels, and not exclusively exhaust heat and (2) disqualifies waste heat recovery systems installed at facilities whose primary purpose is to generate electricity, thus ruling out any "energy savings" or "renewable energy" achieved by a natural gas combined cycle facility, for example.

The Draft Rule, per the definition listed above and the lack of the proposed rule's inclusion of a universal electric savings calculation method, seems to indicate that 100% of a CHP system's electrical output will count as electrical savings for the purpose of determining the energy savings commitment to the utility on account of the customer, as well as determining the overall incentive available for those electrical savings. We do not agree that 100% of the electrical output should count as energy saved for several reasons.

Moreover, the added definition of "producing electricity from combined heat and power systems," is not appropriate on account that combined heat and power (CHP) systems rely on the combustion of a fuel (primarily) in order to achieve its primary function of generating electricity. In this regard, combined heat and power systems can often add capacity, in terms of electrical load, to a facility's total load factor. A CHP system's secondary function–capturing and utilizing exhaust heat–makes a CHP system much more efficient than the traditional method of meeting both thermal and electrical needs, which is purchasing power from the grid and burning a fuel in order to meet a thermal demand (e.g. natural gas).

Since a CHP system burns fuel to achieve its efficiency, and both electrical and thermal efficiencies are achieved, we recommend modifying the definition of CHP as an efficiency resource from its current proposed language to read:

> Energy efficiency means reducing the consumption of electrical energy, without substitution from other energy sources, while maintaining or improving the end-use customer's existing level of functionality, or while maintaining or improving the utility system functionality, or producing electricity from waste energy recovery systems or displacing electricity consumption through the use of ~~producing electricity from~~ combined heat and power systems.

B. Draft Rule 4901:1-39-01(O): Independent Program Evaluator

The proposed changes in the definition of "Independent Program Evaluator" should be modified. First, the PUCO should clarify that utilities still retain their own independent evaluators. The proposed language is unclear as to whether it eliminates the responsibility of the utility to retain a qualified entity capable of conducting program evaluation. Existing rules require the utilities to retain their own evaluators subject to Commission approval. This requirement should be retained, and any Draft Rules that are adopted should clarify that this requirement has not been eliminated.

Second, it weakens the language in existing rules which require the evaluators to "Determine program and portfolio cost-effectiveness." 4901:1-39-01(M)(2). This language needs to be strengthened to ensure that both the utilities and the PUCO perform annual assessments of overall program costs and benefits, including the savings produced from program activity going back to the inception of Ohio's efficiency standard. And this assessment must be made in a public docket in plain language so that the public can be assured that these programs are indeed cost-effective.

IX. Waiver of Commission Rules (Draft Rule 4901:1-39-02(B))

Draft Rule 4901:1-39-02(B) states that "[t]he Commission may, sua sponte, or upon an application or a motion filed by a party, waive any requirement of this chapter, other than a requirement mandated by statute, for good cause shown." The current rule allows for the Commission to waive a requirement of this chapter if requested by a party, but not on the Commission's own motion. The Draft Rules should not include any waiver provision, as it is both unlawful and against notions of good public policy.

The Commission does not have authority to waive its own duly-enacted regulations and requirements. "Administrative regulations issued pursuant to statutory authority have the force and effect of law; consequently, administrative agencies are bound by their own rules until those rules are duly changed."[52] A rule allowing the Commission to waive any other rule is unlawful and invalid.

The waiver provision is not only unlawful, it is also problematic for the normal functioning of the Commission. A rule allowing the Commission to *sua sponte* waive other rules completely undermines the certainty and clarity supposedly provided by codifying the requirements in the first place. If administrative agencies could simply grant themselves authority to waive their own rules without following proper procedure to change those rules, "it takes little imagination to conjure up the chaos that may result from pressures applied to

[52] *State ex rel. Cuyahoga Cnty. Hosp. v. Ohio Bureau of Workers' Comp.*, 27 Ohio St. 3d 25, 28 (1986). *See Mulhausen v. State*, 2007 Ohio App. LEXIS 3571, *6 (Ohio Ct. App. 2007) ("Where the agency has enacted rules and regulations pursuant to statute . . . , such agency has no power to waive the qualifications established by those rules or regulations." (internal quotation marks omitted)); *Hannan v. Ohio Bureau of Empl. Servs.*, 1999 Ohio App. LEXIS 4934, *4 (Ohio Ct. App. 1999) ("The Board of Review does not have the discretion to grant an exception to the regulations of its agency.").

administrative agencies, particularly as the personnel of those agencies changes."[53] The Draft Rules should exclude any waiver provision that allows for the injection of this uncertainty into the Commission's requirements.

X. Proposed Changes to the Recovery Mechanism Requirements (Draft Rule 4901:1-39-06)

The Draft Rules remove the following requirement:

> The extent to which the cost of transmission and distribution infrastructure investments that are found to reduce line losses may be classified as or allocated to energy efficiency or peak demand reduction programs . . . shall be limited to the portion of those investments that are attributable to and undertaken primarily for energy efficiency or demand reduction purposes.

This requirement is an important aspect of a utility's cost recovery mechanism. Utilities frequently undertake transmission and distribution investments, which can be tens or hundreds of millions of dollars, as part of their normal course of business. These costs should not be included in utility energy efficiency budgets and should not be recovered through the energy efficiency riders. Therefore, the Environmental and Consumer Advocates recommend that the above requirement remain in Draft Rule 4901:1-39-06.

COMMENTS ON DRAFT ALTERNATIVE ENERGY RULES UNDER O.A.C. CHAPTER 4901:1-40

I. Proposed Changes to Annual Status Reports (Draft Rule 4901:1-40-05)

A. Certain Data Made Publically Available Under Draft Rule 4901:1-40-05(A)

The Environmental and Consumer Advocates support the addition of the reporting requirements proposed in Draft Rule 4901:1-40-05(A)(4). This proposed rule addition outlines specific information that must be included in the report, including the "actual annual sales

[53] *See Diltz v. Crouch*, 173 Ohio St. 367, 369 (1962) (holding that the Board of Liquor Control did not have authority to continue to modify its orders after the institution of an appeal or the expiration of the time for an appeal).

volume" used to calculate the baseline, the quantification in dollars per megawatt hour for all renewables, compliance status, cost cap information, and a discussion of impediments in achieving the renewable benchmarks.[54] More importantly, the proposal requires that each utility and service provider make this information "publicly available."[55] These specific reporting requirements will allow renewable generation and the associated benchmarks to be more accurately assessed by interested Ohioans.

Recent precedent has held that such information is not confidential. In an annual status report case, the Attorney-Examiner ("AE") reviewed the 2012 filing of an electric services company. The report detailed all activities the company undertook in the previous year in order to demonstrate compliance with alternative energy benchmarks and planning requirements.[56] At the same time, the company filed a motion for protective treatment of certain information in Attachment A and B of its report.[57] Attachment A contained information regarding its 2012 compliance baseline and payment calculations.[58] The company claimed that the information consisted of "specific volumes and prices regarding the company's electricity purchases" and release that information would put the company at a competitive disadvantage with respect to ongoing purchasing activities.[59]

The AE properly noted that all facts and information in the possession of the Commission shall be public, except as provided in R.C.149.43.[60] R.C. 149.43 states that "public records"

[54] Commission's Entry at Attachment B at 18-19 of 26 (4901:1-40-05(A)(4)(a-f)).
[55] *Id.*
[56] Entry, filed February 14, 2014, Pub. Util. Comm. No. 13-1912-EL-ACP, ¶2-3.
[57] *Id*. at ¶3.
[58] *Id*.
[59] *Id*.
[60] *Id*. at ¶4.

excludes information that cannot be released under federal or state law.[61] The Ohio Supreme Court held that the "state or federal law" exemption is intended to cover trade secrets.[62] The AE then cited to R.C. 1333.61(D) which defines the elements of a trade secret and to an Ohio Supreme Court cases which delineates the six factors for analyzing a trade secret claim.[63]

The AE stated that previous application of the statutory requirements and the Court's six factor test resulted in the granting of motions for protection orders for future projected data, but that such a motion should be denied for any current or historical data that that has been publicly disclosed, such as a company's historical intrastate sales or renewable energy credit requirements that are a mathematical function of public-reported sales.[64] Thus the AE denied protection of 2012 actual data, including the Company's actual intrastate sales and the resulting REC requirement calculations and compliance payments.[65] The proposed rule addition codifies this characterization of information that may be used to review compliance with the renewables benchmarks. It encourages transparency that is needed to understand the renewables market in Ohio and in the region, and it allows for a substantive and informed assessment of the impacts that these requirements have on Ohio and Ohio's electric utility customers. Therefore, this proposed addition is fully supported by the Environmental and Consumer Advocates.

B. Reporting of Affiliate Transactions

In addition, the Environmental and Consumer Advocates recommend that the Commission add a new sub-section (A)(4)(g) as follows:

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[61] *Id*.
[62] *Id*. (citing *State ex. Rel. Besser v. Ohio State*, 89 Ohio St. 396, 399, 732 N.E.2d 373 (2000).).
[63] *Id*. (citing *State ex. Rel. the Plain Dealer v. Ohio Dept. of Ins.*, 80 Ohio St.3d 513, 524-525, 687 N.E.2d 661 (1997).).
[64] *Id.*
[65] *Id.* at ¶6.

(g) A full description of any affiliate transactions used to meet the alternative energy portfolio standard compliance requirements.

If a utility enters into affiliate transactions to meet its alternative energy portfolio standard compliance requirements, the utility should fully report the details of these transactions in its annual status report. This will enable the Commission and stakeholders to determine whether the terms of the transactions were reasonable or whether the utility acted imprudently. This would be a simple matter for the utilities to report and it would provide additional protection for customers. In addition, it would provide information for any corporate separation audits conducted by or on behalf of the Commission.

II. Codification of the 3% Cost Cap Calculation (Draft Rule 4901:1-40-07)

Ohio R.C. § 4928.64(C)(3) sets out what has been termed the 3% cost cap for renewable energy acquisition:

> An electric distribution utility or an electric services company need not comply with a benchmark under division (B)(1) or (2) of this section to the extent that its reasonably expected cost of that compliance exceeds its reasonably expected cost of otherwise producing or acquiring the requisite electricity by three per cent or more. The cost of compliance shall be calculated as though any exemption from taxes and assessments had not been granted under section 5727.75 of the Revised Code. [66]

The Commission's rules in current O.A.C. 4901:1-40-07 provide some clarity for the methodology of calculating the cost cap. However, the proceedings in PUCO Case No. 11-5201, the commissioned Goldberg Report recommendations, and the Commission's order in the case, concluded that that further interpretation and clarification for the 3% cost cap calculation rules was necessary. The proposed amendments to Rule 4901:1-40-07 attempt to provide this clarification.

[66] R.C. § 4928.64(C)(3)

A. The proposed calculation of the 3% cost cap should include price suppression.

Since the cost cap is meant to act as a ratepayer protection, it should consider all relevant costs and cost savings produced by renewable energy in the market. As such, a calculation of the cap should include a cost of generation forecast consisting of the generation auction price, adjusted for the price suppression benefits from renewable energy. During the pendency of 11-5201, Commission Staff, Environmental and Consumer Advocates, and others recommended that a simple dollar per MWH calculation of price suppression be added to the "reasonably expected" dollar per MWH price for the compliance year.

The Commission, in its August 7, 2013 Opinion and Order in 11-5201, suggested that the addition of the Staff's recommended addition of price suppression benefits into the 3% cost cap calculation "would add a subjective element to an objective calculation and the record in the case does not provide a clear explanation of how price suppression benefits would be determined." However, later that very month, Staff submitted a report from its study to "quantify the changes in *wholesale electricity prices* and *generator emissions* that are likely to occur as a result of the state's Alternative Energy Portfolio Standard (AEPS) requirements."[67]

The report's conclusion, based on two scenarios considering currently operational renewable facilities and one considering all Ohio Power Siting Board approved facilities, showed a wholesale price reduction of between 0.15% and 0.51%, respectively.[68] In stark contrast to the Commission's earlier holding, the Staff's report concluded that "the analysis of renewable

[67] The Public Utilities Commission of Ohio, "Renewable Resources and Wholesale Price Suppression" ("Report") (August 2013), available at http://www.midwestenergynews.com/wp-content/uploads/2013/09/PUCO-renewable-energy-standard-study.pdf

[68] *Id.* at 5.

energy price impacts can be conducted by Commission Staff through PROMOD IV simulation, a powerful, well respected and unbiased tool that is currently at our disposal."[69]

Based on this conclusion from the Staff report, Environmental and Consumer Advocates suggest that a true calculation of the cost cap must include the benefits from renewable energy price suppression on the wholesale market, and that such a calculation is possible and less subjective than the Commission initially perceived. Further, in its initial recommendation in Case No. 11-5201, Staff not only included the addition of price suppression in the cost calculation, but suggested to take it upon itself to "annually calculate a $/MWH suppression benefit (if any) and distribute this suppression calculation to all affected Companies."[70] With the Staff responsible for determining an annual price suppression benefit, EDUs, customers, and stakeholders can be confident that the suppression benefits are properly and independently verified and calculated. Environmental and Consumer Advocates, thus, urge the Commission to adopt Staff's original recommendation from 11-5201, and account for price suppression benefits in the cost cap calculation.

B. The Environmental and Consumer Advocates support Staff's recommendation that all alternative compliance methods must be exhausted before applying for cost cap protection.

Under proposed subsection (A)(4), an EDU or electric services company "shall pursue all reasonable compliance options prior to requesting relief" based on the cost cap. We support the Draft Rule as consistent with both the statute's intent for the state to realize economic and environmental benefits of renewable energy as well as consistent with the Commission's Finding and Order in Case No. 11-5201.

[69] *Id.* at 7.
[70] 10-0834-EL-POR Staff Br. at 10.

To further strengthen this point, we recommend the addition of clarifying language requiring demonstration of the EDU or electric services company's activities to exhaust all other compliance alternatives. Also, as pointed out in Staff's cost cap recommendation in Case No. 11-5201, when the cap is triggered for purchases in one year, it does not and should not preclude a company from "pursuing reasonable transactions for compliance resources applicable to future years."[71] Addition of such language into the proposed rule would assure that companies would continue to obtain the best price on RECs in future years, even though the company will not acquire further RECs in a current year.

Finally, the Environmental and Consumer Advocates believe that a clarification is needed to the cost cap calculation for those situations where an EDU employs R.C. §4928.143(B)(2)(c) and decides to develop its own renewable project rather than just buy RECs. In those scenarios, scenarios which may become more prevalent as EDUs look to comply with remaining 12.5% of the standard beyond the statutory benchmarks, the Environmental and Consumer Advocates recommend that the total cost for the construction of the renewable energy facility must be characterized as a generation cost not a compliance cost. The RECs themselves that are generated from the project should be the only compliance cost to count toward the 3% provision.

RESPONSES TO QUESTIONS RAISED IN THE ENTRY

Staff raises several topics for consideration on pp. 4-5 of the Commission's Entry. The Environmental and Consumer Advocates provide the following responses:

(a) R.C. 4928.64(D)(1)(b) requires the Commission to include in its annual reports to the general assembly the average annual cost of renewable energy credits purchased by utilities and companies for the year covered in the report. To satisfy this requirement on a going-forward basis, Staff is considering different options for compiling the cost data. Options currently under consideration include modifying Ohio Adm.Code 4901:1-40-05 to include the cost information as part of the annual

[71] *Id.*

compliance status reports or coordinating with the recognized attribute tracking systems to initiate a cost disclosure requirement. Staff is soliciting comments on these two options, as well as any other options for collecting this cost information in the future.

The Environmental and Consumer Advocates believe that O.A.C. 4901:1-40-05 should require utilities and companies to include this cost information as part of their annual status reports. The aggregate cost data, including the average price paid for RECs and the renewable energy source for the purchased RECs, should be publicly available.

(c) Staff has proposed language in Ohio Adm.Code 4901:l-40-05(A) that would address confidentiality as pertains to the contents of the annual compliance status reports. Staff believes this language will increase program transparency and improve administrative efficiency, particularly in light of Staff's proposal to remove the filing of projected data.

This topic is addressed in Section I of the Environmental and Consumer Advocates' comments on the draft alternative energy rules at pages 44-47.

(e) Staff has proposed a revision to Ohio Adm.Code 4901:l-40-04(B) in order to include certain "new, retrofitted, refueled or repowered generating facilities" per S.B. 315. Staff welcomes comments on what placed in-service date should be applied specifically to these facilities.

When Ohio Senate Bill 221 was enacted (127th GA), the intent of the Alternative Energy Resource Standard was to encourage development of both advanced and renewable resources. Advanced resources included clean coal, advanced nuclear, fuel cells, cogeneration, certain solid waste resources and energy efficiency. While the renewable energy standard (12.5% by 2025) was the only portion of the alternative standard to receive benchmarks, the legislative intent for the standard overall was to diversify Ohio's electric portfolio gradually by adding new generating assets that were cleaner, and more efficient than traditional fossil-fuel resources.

The addition of "new, retrofitted, refueled or repowered generating facilities" seems to have expanded the original legislative intent of the "advanced tier." With such broad new

definitions for any "new, retrofitted, refueled, or repowered" facility there are many more qualifying resources - including existing resources. On account of this significant shift in the purpose of the advanced tier, per Senate Bill 315, we strongly recommend that the "placed-in-service" date be September 10, 2012, the effective date of Ohio Senate Bill 315. This placed in service date is fair, as compliance with the advanced tier has been a somewhat undetermined component of the AERS, with the exception of the ability of utilities to count energy efficiency towards their compliance with the advanced resource requirements. Energy efficiency already has secured a cost recovery mechanism, therefore it would be relatively easy for utilities to deploy energy efficiency as its compliance strategy for the advanced tier of the AERS.

(g) Staff is soliciting feedback on the attached Combined Heat and Power and Waste Energy Recovery application templates.

This topic is addressed in Section II(A) and (B) of the Environmental and Consumer Advocates' comments on the draft energy efficiency rules at pages 13-19.

CONCLUSION

The Environmental and Consumer Advocates appreciate the opportunity to comment on the Draft Rules and urge the Commission to consider the above recommendations in finalizing the energy efficiency and alternative energy rules.

Dated: March 3, 2014

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing *Joint Comments* submitted on behalf of the Environmental Law & Policy Center, Ohio Environmental Council, Sierra Club, Environmental Defense Fund, Natural Resources Defense Council, and Citizens Coalition, was served by electronic mail, upon the following Parties of Record, this 3rd day of March, 2014.

/s/ Nicholas McDaniel

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Summary: Comments of the Environmental and Consumer Advocates electronically filed by Mr. Nicholas A. McDaniel on behalf of Environmental Law and Policy Center and Ohio Environmental Council and Sierra Club and Natural Resources Defense Council and Environmental Defense Fund and Citizens Coalition