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

March 24, 2014

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Pursuant to the January 29, 2014 Entry by the Public Utilities Commission of Ohio ("Commission") in the above-captioned dockets and the March 7, 2014 Entry granting an extension to file replies, 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 Reply Comments on the Commission Staff's proposed energy efficiency and alternative energy rule changes ("Draft Rules").

On March 3, 2014, the Environmental and Consumer Advocates submitted Initial Comments on the Draft Rules. In these Reply Comments the Environmental and Consumer Advocates continue to support many of Staff's proposed changes originally discussed in our Initial Comments, including formalization of the utility collaborative process, the incorporation and required updating of the Technical Reference Manual ("TRM"), the expansion of the role of the Independent Program Evaluator ("Independent Evaluator"), and increased public availability of data in the annual alternative and renewable energy compliance reports. In these Reply Comments, we also identify other stakeholders that filed comments in support of these elements.

In addition to the provisions of the Draft Rules that we support, Environmental and Consumer Advocates also identify common concern regarding the impacts of certain provisions. In particular, we echo the comments of several stakeholders that the Draft Rules would reduce opportunities for important stakeholder participation in energy efficiency program portfolio review and approval. As is articulated by other comments on the docket, Environmental and Consumer Advocates support the goal of drafting the rules with an eye toward administrative economy, but not at the expense of a robust public process. We also identify shared concerns with other stakeholders regarding a particularly harmful provision in the Draft Rules that would

allow utilities to count energy reductions from updated energy performance standards set by law or regulation - and that the utilities would have no part in creating. In addition, we respond to stakeholder recommendations for modifying the Draft Rule language that incorporates combined heat and power ("CHP") and waste energy recovery ("WER").

Finally, Environmental and Consumer Advocates describe in these Reply Comments our objections to other stakeholder recommendations that would be detrimental to ratepayers and would be inconsistent with the law and Commission precedent. These include requests to opt-out industrial customers that are already receiving reasonable arrangements and requests to expand the definition of shared savings to electricity savings achieved both over *and* under the compliance benchmark. For the reasons described below, these recommendations would upend sound Commission decisions and be contrary to public policy and the goal of providing more ratepayer value in utility-run energy efficiency portfolios in the coming years.

The Environmental and Consumer Advocates appreciate the opportunity to submit Reply Comments on the Draft Rules and urge the Commission to consider the following 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)

A. The Environmental and Consumer Advocates Concur with Other Stakeholder Objections to Staff's Proposed Changes to the Portfolio Approval Process

In the initial round of comments, several parties opposed the Commission's proposed changes to the planning and reporting requirements for electric utility energy efficiency portfolios, specifically the proposal in Draft Rules 4901:1-39-04 and 4901:1-39-05 to replace the pre-approved litigated case process with an after-the-fact comment period that denies parties and

the general public the opportunity to be heard by the Commission. Specifically, the Ohio Consumers' Counsel ("OCC") articulated that this proposal would diminish the role of interested stakeholders in the portfolio planning stages and render the collaborative process less effective for all parties but the utilities.[1] Ohio Advanced Energy Economy ("OAEE")[2] and Ohio Manufacturers' Association Energy Group ("OMAEG") [3] also objected to this removal of the adjudicated case process, and the Ohio Hospital Association ("OHA") noted that pre-approval evidentiary hearings are necessary for due process and should be reinstated.[4] OHA and OMAEG further commented that the proposed post-approval comment period is inadequate and that the Commission should retain the hearing procedure prior to implementation of the portfolio and prior to collecting EE/PDR charges from customers.[5]

For the reasons explained in the Initial Comments,[6] the Environmental and Consumer Advocates echo the concerns of OCC, OAEE, OMA and OHA. We further emphasize that the current process affords stakeholders and the general public with a more substantial opportunity to participate in the pre-approval stage, including intervention in the case docket and full party status to conduct discovery, present evidence and testimony, submit briefing, and have our positions heard by the Commission. This inclusive, up-front process has been a vital part of developing and refining energy efficiency portfolios for the last five years and has resulted in greater accountability and wider-ranging, more desirable, and more effective programs. Environmental and Consumer Advocates urge the Commission to reject the proposed changes and retain the current procedure.

[1] OCC Initial Comments at 2, 4-9.
[2] OAEE Initial Comments at 7-8.
[3] OMAEG Initial Comments at 3-4, 5.
[4] OHA Initial Comments at 4-5.
[5] OHA Initial Comments at 4-5; OMAEG Initial Comments at 5.
[6] Environmental and Consumer Advocates Initial Comments at 3-13.

In addition, as OHA[7] points out and as is explained more thoroughly in our Initial Comments,[8] supplanting the litigated case procedure with a thirty-day comment period that removes the opportunity for interested parties to present their cases, opinions and experts to the Commission is inadequate and is a step in the wrong direction. Further, under Draft Rule 4901:1-39-04(E), the Commission would have no express role in portfolio pre-approval; instead, utilities would have sole discretion to accept or reject stakeholder comments, diminishing the emphasis on collaborative input. As is also explained in the Initial Comments,[9] we are concerned that the shift to post-approval portfolios would render participation in the utility energy efficiency collaboratives less effective. Further, the Commission has made clear that the utilities should prioritize in future filings energy efficiency resource bids into the PJM capacity market. [10] Yet, the shift to an after-the-fact process would seriously undermine oversight of these bids and could result in fewer energy efficiency resources bid into the market each delivery year - depriving ratepayers of considerable benefits in the process.[11]

[7] OHA Initial Comments at 4-5.
[8] Environmental and Consumer Advocates Initial Comments at 10-13.
[9] Environmental and Consumer Advocates Initial Comments at 11-13.
[10] *In the Matter of the Application of the Cleveland Electric Illuminating Company*, et al, Pub. Util. Comm. Case Nos. 12-2190-EL-POR, et al, 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; *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) (Commission noting 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.")
[11] Environmental and Consumer Advocates Initial Comments at 11-13.

B. The Environmental and Consumer Advocates Concur with Utility Opposition to After-The-Fact Portfolio Plan Approval

Ohio Power Company (AEP),[12] Duke Energy Ohio (Duke),[13] Ohio Edison (FirstEnergy),[14] and Dayton Power and Light (DP&L)[15] also weighed in on the Draft Rule changes to portfolio approval, nearly unanimously objecting (though for varying reasons) to the shift from a pre-approval process every three years to an annual after-the-fact comment process. With respect to pre-approval of program spending, Environmental and Consumer Advocates share AEP's concern that the proposed ex-post shift would lessen utility certainty of cost recovery.[16] Environmental and Consumer Advocates, though, are more concerned with the impact on customers; that moving Commission review of program spending to the end of each program year puts ratepayers at risk of uncertain or shifting costs associated with the EE/PDR rider.

While Environmental and Consumer Advocates concur that reasonable, prudent program costs should ideally be pre-approved, we do not agree with AEP's concession to replacing formal portfolio plan review with a comment process in exchange for up-front approval of program costs, lost distribution revenues and shared savings.[17] We also object to FirstEnergy's suggestion that if the Commission moves to an after-the-fact process (which we would strongly discourage), that the utilities not be required to make *any* filings with the Commission prior to implementing programs, let alone have a comment process as described in subparagraphs (D)

[12] AEP Initial Comments at 5.
[13] Duke Initial Comments at 6.
[14] FirstEnergy Initial Comments at 7-8, 13-15.
[15] DP&L Initial Comments at 2-3.
[16] AEP Initial Comments at 5.
[17] *Id*.

and (E) of Draft Rule 4901:1-39-04.[18] As discussed above, and previously,[19] any removal of the pre-approval formal docketed process would deny interested stakeholders and the general public meaningful participation in portfolio planning and review. Further, Environmental and Consumer Advocates cannot support AEP's proposed concession to the ex-post comment process, as it would place discretion entirely with the utilities whether to accept or deny stakeholder comments. And FirstEnergy's additional recommendation to impose automatic approval on portfolio plans, subject to a Commission stay, would also reduce stakeholder participation and the opportunity to be heard. Both AEP and FirstEnergy's suggestions would be wholly inadequate to meet the basic procedural interests of stakeholders (and the consumers that stakeholders represent), including the parties who have filed comments on the Draft Rules.

Aside from these concerns, the utilities make valid points on the difficulty associated with shifting from a three-year portfolio plan to an annual process. Like the Environmental and Consumer Advocates, AEP,[20] Duke,[21] DP&L,[22] and FirstEnergy[23] all oppose a one-year plan. Specifically, the Environmental and Consumer Advocates share AEP's[24] and DP&L's[25] concern that annual plan filings will be more resource-intensive than the current process - which would undermine the Commission's goal of achieving administrative economy with these Draft Rules. DP&L validly points out that requiring utilities to file new portfolios annually will prove to be "costly, time-consuming and unduly burdensome [for] all parties involved."[26] Environmental

[18] FirstEnergy Initial Comments at 7-8.
[19] Environmental and Consumer Advocates Initial Comments at 3-13.
[20] AEP Initial Comments at 5.
[21] Duke Initial Comments at 6.
[22] DP&L Initial Comments at 2-3.
[23] FirstEnergy Initial Comments at 9-10.
[24] AEP Initial Comments at 5.
[25] DP&L Initial Comments at 2-3.
[26] *Id*.

and Consumer Advocates share this concern, particularly with respect to the potentially negative impacts to customers of an ever-changing program portfolio. As DP&L explains: "[a]nnual program portfolio updates prevent the opportunity for a thorough review of the proposed plan by evaluators, EDUs and interested parties, including the Commission . . . the current three-year portfolio gives certainty to customers, program vendors and EDUs and allows for increased implementation efficiency rather than using resources for continued contract negotiations and program portfolio filing preparation and litigation."[27] Environmental and Consumer Advocates echo these comments and urge the Commission to reject the proposed changes.

C. The Environmental and Consumer Advocates Disagree with Utility Recommendations to Extend Portfolio Plans to 5 Year Intervals

At the same time, Environmental and Consumer Advocates disagree with AEP's[28] and Duke's[29] recommendations to expand the current three-year portfolio process to five year intervals. While AEP and Duke maintain that this would "allow for a more efficient planning of resources including contractual commitments and competitive bids for services needed,"[30] as DP&L points out the current three-year interval already addresses these concerns. It strikes a balance between providing certainty in program planning and implementation, while triggering Commission review at sufficiently regular intervals. It ensures that every three years programs are reviewed for cost-effectiveness, new programs and new technologies are considered, and stakeholders are heard both in the utility collaborative process and before the Commission. By expanding this process to every five years, consumers would miss out on the current level of participation. There would also be a two-year delay in responding to changing market conditions

[27] *Id.*
[28] AEP Initial Comments at 5.
[29] Duke Initial Comments at 6.
[30] AEP Initial Comments at 5.

and incorporating new technological developments and innovative program design into the portfolios, thereby depriving customers of potentially significant cost savings in the interim. For example, the federal lighting and appliance standards are constantly changing, with new EISA standards becoming effective in 2014; a potential two-year delay in addressing these changes in program portfolios will hurt consumers, who would not get the full benefit of energy efficiency savings.

In sum, Environmental and Consumer Advocates concur with the parties who oppose the changes to the current portfolio approval procedure, but do not support utility recommendations to expand the portfolio to every five years. We recommend that the Commission retain the current procedure for pre-approval of energy efficiency portfolios and maintain stakeholder opportunities to intervene in fully litigated cases.

D. The Environmental and Consumer Advocates Support Formalization of the Collaborative Procedure

In the Initial Comments, Environmental and Consumer Advocates indicated our support for Draft Rule 4901:1-39-04(C)(2) which articulates a clear procedure for the utility energy efficiency collaboratives. However, FirstEnergy and Duke object, maintaining that formalizing this process would be unnecessary and rigid.[31] In contrast, AEP does not explicitly oppose to Staff's proposal, but requests that the Draft Rules include sufficient flexibility with respect to the quarterly meetings requirement to account for scheduling or operational delays.[32]

While Duke and AEP are correct that Draft Rule 4901:1-39-04(C)(2) reflects the current process already employed in the collaboratives, Environmental and Consumer Advocates maintain that there is significant value to formalizing this process. The Commission has

[31] Duke Initial Comments at 3-4; FirstEnergy Initial Comments at 11-13.
[32] AEP Initial Comments at 6.

acknowledged the important role of the collaboratives to allow stakeholders significant interaction with utilities and an opportunity to provide valuable feedback on existing and planned programs.[33] Given this important role, Environmental and Consumer Advocates submit that the language in the Draft Rules represents a minimal outline - rather than a rigid, all-encompassing process requirement - for how collaboratives should be structured and carried out. Ideally, the Commission should go even further to fortify the process and strive for greater transparency and inclusion. The current proposal in Draft Rule 4901:1-39-04(C)(2) is a good start, though, and provides a base to build upon in the coming years. We also note that FirstEnergy's suggestion that the Draft Rules only require meetings on two instances - before a portfolio plan is filed and another just after - is insufficient and would not guarantee even annual meetings under the current three-year filing interval.[34] At the same time, Environmental and Consumer Advocates would not object to building flexibility into the rules to accommodate unforeseen events and delays, though the resulting rules should still maintain the requirement that utilities hold collaboratives on at least a quarterly basis.

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

Environmental and Consumer Advocates provide the following response to stakeholder comments on the Draft Rules for CHP and WER.

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[33] *See, e.g. 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 Portfolio Plans for 2010 through 2012 and Associated Cost Recovery Mechanism, et al*., Case No. 09-1947-EL-POR, et al., Opinion and Order at 20 (March 23, 2011) (Commission stating that is has "encouraged the formation of utility-stakeholder collaboratives because we believe that collaborative investigations may provide valuable insights into new and emerging issues. The collaborative provides an opportunity for technical staff and experts from different stakeholders to establish common vocabulary, identify key issues needing further exploration, gather lessons learned and new ideas from programs in Ohio and other states, discuss the implications of independent research, exchange data and seek to resolve factual questions.").

[34] FirstEnergy Initial Comments at 12-13.

A. Measuring Savings of CHP Systems

In our initial comments, the Environmental and Consumer Advocates urged the Commission to create a tiered production incentive for CHP to incentivize CHP developers and owners to design and operate their systems to achieve the highest possible efficiencies.[35] Many stakeholders weighed in on the matter of calculating energy savings for the purpose of setting the total cash incentive and committing savings to the EDU. The Environmental and Consumer Advocates agree with some these comments, but others offered approaches that are not ideal for program administration/implementation, or assessing true energy savings.

The Environmental and Consumer Advocates support AEP's general comments that urge the Commission to implement a host of CHP/WER provisions that would: encourage high efficiency systems that have the greatest chance of long-term viability; establish a tiered payment system based on CHP/WER efficiency to encourage the highest efficiency systems; set incentives based on performance of the system to reduce risk to all customers; retain flexibility for customers and utilities to set incentives, contracts and commitments of energy savings to account for wide variation and complexity in these projects; and ensure that funding for CHP projects is balanced against budgets for energy efficiency program portfolios for all customer classes.[36] Similar to the Environmental and Consumer Advocates' recommendation, both AEP and the Energy Resources Center at the University of Illinois at Chicago ("ERC") recommend tiered approaches in their initial comments. Of the two recommendations, the Environmental and Consumer Advocates believe that ERC's recommendation[37] provides the most benefits to

[35] Environmental and Consumer Advocates Initial Comments at 14-16.
[36] AEP Initial Comments at 11.
[37] ERC Initial Comments at 2.

both utilities and customers, creates market movement toward greater CHP deployment, and ensures that incentive dollars will flow to higher performing CHP systems.

However, the Environmental and Consumer Advocates do not agree with the Btu conversion proposal that Industrial Energy Users of Ohio ("IEU-Ohio") proposes in its initial comments.[38] First, IEU-Ohio recommends a Btu conversion for technologies that aren't even permitted as energy efficiency measures under the Ohio Revised Code - including geothermal and solar thermal. Second, the proposed Btu conversion will likely result in an overestimate of the electrical savings yielded by CHP systems.

Rather than IEU-Ohio's proposal, the Environmental and Consumer Advocates continue to recommend a tiered incentive approach structure as follows: a customer may 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 65% and 70% (LHV); 70% of the annually produced kWhs if the annual measured efficiency is between 60% (minimum requirement) and 65% (LHV).[39]

[38] IEU-Ohio Initial Comments at 12.

[39] We note a typo in our Initial Comments with respect to the recommended tiers. In those Initial Comments, we mistakenly recommended the following language for Tiers 3 and 4: "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)." Environmental and Consumer Advocates Initial Comments at 15-16. These tiers should have read: "80% of the annually produced kWhs if the annual measured efficiency is between **65% and 70%** (LHV); 70% of the annually produced kWhs if the annual measured efficiency is between **60% (minimum requirement) and 65%** (LHV)." This has been corrected in the text above.

B. Maximum Incentive Available

As mentioned in our Initial Comments, the Draft Rules set an unnecessarily low maximum incentive for the CHP and WER in applications for the mercantile self-direct cash option. Multiple stakeholders, including the Midwest Cogeneration Association,[40] the Ohio Coalition for Combined Heat and Power,[41] the Alliance for Industrial Efficiency,[42] ERC,[43] the Heat is Power Association,[44] and OMAEG,[45] also raised this concern, commenting that the maximum incentive was not sufficient for commercial, industrial or institutional users of electricity to finance CHP and WER projects. Similarly, AEP recommended raising the maximum incentive by another 1/2 cent. Further, the maximum incentive proposed in the rule is not consistent with the much higher incentives that utilities offer for other energy efficiency measures to these same customers. This unnecessarily puts CHP/WER in its own category for total available incentives, which was not the intent of Ohio Senate Bill 315.[46]

The Environmental and Consumer Advocates reiterate our Initial Comments on this matter, and further agree with some of OMAEG's recommendations. We recommend that the Commission increase the maximum incentive in the Draft Rules, at a minimum consistent with utility-run mercantile custom programs. For example, OMAEG points out that these programs currently pay up to $0.08/kWh in exchange for the customer's commitment of the annual savings

[40] Midwest Cogeneration Association Initial Comments at 4.
[41] The Ohio Coalition for Combined Heat and Power Initial Comments at 5-6.
[42] The Alliance for Industrial Efficiency Initial Comments at 3.
[43] ERC Initial Comments at 3.
[44] The Heat is Power Association Initial Comments at 2.
[45] OMAEG Initial Comments at 11.
[46] Testimony of Commission Chair Todd Snitchler before the Ohio House Public Utilities Committee on S.B. 315 at 4-5 (May 16, 2012) (available at *http://www.puco.ohio.gov/emplibrary/files/media/testimony/051612_SB%20315%20House%20Testimony.pdf*).

achieved in the first year. We further recommend that the rules contain flexibility to allow EDUs to provide higher incentives in the event they offer CHP/WER-specific programs as part of their portfolio plans. In addition, we recommend that the total maximum incentive not exceed 50% of the total project cost. Of that 50%, we suggest that the up-front incentive should be paid as a sufficiently large commitment payment to get facilities past the hurdle of high up-front costs.[47] These program criteria have helped many mercantile customers implement energy efficiency measures that would not have been possible otherwise, demonstrating their effectiveness in the context of CHP and WER projects

C. Schedule of Incentive Payments

Several stakeholders who submitted comments also echoed Environmental and Consumer Advocates' recommendation that some of the total cash incentive paid to a customer be paid during the design and engineering phase, or at a minimum at the time of a customer's agreement to commit the energy savings to their EDU. OMAEG,[48] the Alliance for Industrial Efficiency,[49] Midwest Cogeneration Association,[50] Ohio Coalition for Combined Heat and Power,[51] and ERC[52] concurred with these comments. Because of the longer payback periods and the capital intensity associated with CHP and WER systems, Environmental and Consumer Advocates believe that it is crucial that facilities receive some of the incentive up front to move forward projects that might not otherwise be completed.

[47] For example, OMAEG recommends 75% of the total cash incentive up-front as a commitment payment. *See* OMAEG Initial Comments at 11.
[48] OMAEG Initial Comments at 11.
[49] Alliance for Industrial Efficiency Initial Comments at 3.
[50] Midwest Cogeneration Association Initial Comments at 6.
[51] Ohio Coalition for Combined Heat and Power Initial Comments at 1.
[52] ERC Initial Comments at 4.

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

In the initial round of comments, several stakeholders expressed concern over Draft Rule 4901:1-39-05(A)(1)(b) which would allow utilities to count energy reductions from "the adoption of measures that are required to comply with energy performance standards set by law or regulation." OPAE,[53] OAEE,[54] and OMAEG[55] explained in their respective comments that this provision would allow "an EDU to take credit for savings from something it did not have any involvement in,"[56] and "would be a harmful step backwards for the state's energy efficiency policy."[57] For the reasons explained in our Initial Comments, the Environmental and Consumer Advocates agree with these stakeholders and urge the Commission to reject this provision.

B. Counting of Non-Energy Efficiency Measures and Double-Counting

IEU-Ohio and FirstEnergy propose several additions to the Draft Rules that would allow utilities to count various measures that do not qualify as energy efficiency or have nothing to do with utility programs, including: (i) savings as a result of funding from the universal service fund; (ii) as-found reductions for all customer classes; (iii) all reductions that are bid into PJM's capacity auctions, regardless of whether they were utility-created; (iv) "heat rate" and other efficiency improvements at power plants; and (v) water usage reductions.[58] The Commission should reject these recommendations as they are not consistent with R.C. § 4928.66, which requires utilities to implement programs that help customers reduce their electricity usage.

[53] OPAE Initial Comments at 10.
[54] OAEE Initial Comments at 9
[55] OMAEG Initial Comments at 5-7.
[56] OPAE Initial Comments at 10.
[57] OAEE Initial Comments at 9.
[58] FirstEnergy Initial Comments at 28-29; IEU-Ohio Initial Comments at 12-13.

Counting power plant upgrades and water usage reductions toward energy efficiency benchmarks is contrary to the intent of the legislation and any concept of energy efficiency.[59]

IEU-Ohio[60] and FirstEnergy[61] also argue that the Commission should adopt a rule allowing for the double-counting of resources toward both the energy efficiency and alternative energy standards. Double-counting should be explicitly prohibited in the rule. Certain resources can qualify as *either* an alternative energy resource under R.C. 4928.64 or an energy efficiency resource under R.C. 4928.66. Allowing double-counting would be inconsistent with the legislative intent behind the two separate statutes that sets requirements for distinct resources. The legislative intent is clear if one considers the implication of counting a resource toward both standards. If, as FirstEnergy and IEU-Ohio maintain, energy efficiency achieved to comply with the energy efficiency benchmarks of R.C. § 4928.66 could simultaneously count as advanced resources toward the requirements of R.C. § 4928.64, *all utilities would automatically meet the advanced energy standard by meeting the energy efficiency standard*. The energy efficiency requirements of R.C. 4928.66 (22% by 2025) are greater than that portion of the alternative energy requirements in R.C. 4928.64 that can be met with advanced resources (12.5% by 2025). Allowing double-counting of resources would render the advanced resources carve-out in R.C. § 4928.64 meaningless.[62] Therefore, the Commission should maintain the prohibition against double-counting.

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[59] *See* R.C. § 4928.66(A)(1)(a) (requiring that utility "energy efficiency programs . . . achieve energy savings").
[60] IEU-Ohio Initial Comments at 20-21.
[61] FirstEnergy Initial Comments at 28-31.
[62] "'[A] statute should not be interpreted to yield an absurd result.'" *State v. Robb*, 88 Ohio St. 3d 59, 66 (2000) (quoting *Mishr v. Poland Bd. of Zoning Appeals*, 76 Ohio St. 3d 238, 240 (1996)).

C. Transition to Net Savings

AEP and FirstEnergy argue in their initial comments that the Commission should codify a gross savings measurement standard rather than transition to a net savings requirement.[63] A gross savings standard allows utilities to count all reductions in energy usage, even if those reductions had nothing to do with utility programs. Net savings, on the other hand, "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 if utility rebates had not been available"[64] and typically include a quantification of "spillover," or the indirect program savings resulting from the actions of non-participants. The argument for codifying gross savings would be contrary to Commission precedent and the most recent report of the Independent Evaluator.

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."[65] 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. The recent report by the Independent Evaluator also demonstrates the need for net savings in Ohio. In addition to finding significant free ridership in Ohio utility energy efficiency programs, the Independent Evaluator explained: "In order to assess the benefits of [energy efficiency]

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[63] AEP Initial Comments at 3; FirstEnergy Initial Comments at 28-29.
[64] *In the Matter of the Annual Verification of the Energy Efficiency and Peak Demand Reductions Achieved by the Electric Distribution Utilities Pursuant to R.C. 4928.66,* Case No. 13-1027, 2011 Independent Evaluator Report at 6 (May 2, 2013).
[65] *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.

activities, the PUCO must be in a position to be able to determine, with reasonable certainty, the energy savings and demand reductions attributable to the energy efficiency programs undertaken by the electric utilities and mercantile customers."[66] The only way to determine whether savings should be attributed to the programs – and the only way to ensure that ratepayer money is prudently spent on real, beneficial savings – is to conduct a net-to-gross analysis.

Rather than wait until some point in the future, the Commission should use this five-year review of the efficiency rules as the opportunity to transition to a net savings reporting standard. A major factor in 2014 is the transformation of the lighting market. First, utilities have been incentivizing lighting on a mass scale in a way that has already moved the market. For 2011, FirstEnergy achieved 87% of its residential savings and 71% of its commercial savings from lighting.[67] FirstEnergy's current 2013-2015 plan continues this trend, and the problem will only worsen over time as the market transforms. Second, and perhaps most importantly, new federal lighting standards under EISA are now fully phased in as of January 1, 2014. The law requires lighting manufacturers to meet standards that reduce the energy used by bulbs and phase out standard T-8 fixtures. While some manufacturers will still manufacture conventional bulbs that barely meet the standards, CFLs are likely to become the norm. Given the utilities' continued heavy reliance on lighting in their current plans, it becomes even more critical for evaluators to analyze free ridership once CFLs become the default light bulb in most people's homes.

Finally, the Commission should reject AEP's and FirstEnergy's arguments that a net savings methodology would be costly or difficult to administer. Several Midwestern states with energy efficiency standards similar to Ohio's have successfully implemented net-to-gross standards for at least some of their energy efficiency programs. For example, Illinois has

[66] 2011 Independent Evaluator Report at 3.
[67] *Id.* at 47.

successfully adopted and applied a net-to-gross framework for the measurement and verification of utility energy efficiency savings on all of its programs. For its residential lighting programs, ComEd applies an NTG of .53 for 2014 – 2015, with lower values for CFLs. Michigan similarly recently required the reporting of net savings for lighting programs for 2014, applying a deemed .9 net-to-gross ratio for non-lighting programs. Iowa recently agreed to engage in the process of evaluating and implementing net-to-gross ratios for its utility energy efficiency programs, and has agreed to shift significant lighting resources from CFLs to LEDs. The successful transition to net savings in these states demonstrates that a net savings methodology is workable and preferable to Ohio's current gross savings allowance. The Commission should adopt the net savings recommendations explained in the Environmental and Consumer Advocates' Initial Comments.[68]

D. Environmental and Consumer Advocates Support the Proposed Expansion of the Role of the Independent Evaluator and Adoption and Regular Updates to the TRM

The disputes identified in the previous sections underscore the importance of expanding the role of the Independent Evaluator as proposed in Draft Rule 4901:1-39-05(B). Rather than be spelled out in the rules, the complicated and technical questions of crediting certain measures toward the benchmarks and the appropriate evaluation, measurement and verification ("EM&V") approach should be left to the expertise of the Independent Evaluator and the TRM process. Under the Draft Rules, the Independent Evaluator would review utility energy efficiency activities and prepare a report that summarizes its findings and recommendations. The Independent Evaluator would also be tasked with updating the TRM, with the assistance of Staff and input from stakeholders. As indicated in our Initial Comments, the Environmental and Consumer Advocates generally agree with these proposed revisions and believe that the

[68] Environmental and Consumer Advocates Initial Comments at 25-27.

Independent Evaluator is in the best position to make thorough and objective recommendations regarding compliance and EM&V practices. [69]

Several other stakeholders submitted comments on this provision of the Draft Rules. OAEE indicates support for an expanded role of the Independent Evaluator, as long as the process still allows for robust stakeholder input.[70] In contrast, though, AEP, Duke, FirstEnergy, and DP&L oppose aspects of the Independent Evaluator proposal, though for different reasons and to varying degrees. The utilities comment that the Independent Evaluator's role is duplicative of many of the activities already undertaken by each utility's own evaluator.[71] However, this is precisely the value of the Independent Evaluator. The "independent" nature ensures objective compliance determinations and verification of the utilities' energy efficiency program performance data. The Independent Evaluator is also in a more flexible position to evaluate this data in the context of a changing energy efficiency marketplace and to make recommendations for adapting EM&V practices to account for these changes. While Duke recommends that the Independent Evaluator be limited in its review to the data that the utilities have already collected, again this would subvert the essential objective nature of the Independent Evaluator.[72]

At the same time, Environmental and Consumer Advocates do share Duke's concern[73] that the Draft Rules contain a definition for the "Independent Program Evaluator" at 4901:1-39-01(O), but no corresponding definition or clear delineation of each utility's responsibility for retaining their own evaluator. While we do not share Duke's concern about allegedly

[69] *Id*.
[70] OAEE Initial Comments at 10.
[71] AEP Initial Comments at 2-3, 9-10; Duke Initial Comments at 3, 6; DP&L Initial Comments at 1-2, 4-5; FirstEnergy Initial Comments at 18-20.
[72] Duke Initial Comments at 3.
[73] Duke Initial Comments at 2-3.

overlapping roles, we recommend that the Draft Rules explicitly state that each utility is still tasked with retaining its own portfolio plan evaluator, separate and distinct from the Commission's Independent Evaluator.

With respect to the TRM, OAEE, OMAEG, and OCC support the proposal in Draft Rule 4901:1-39-05(D) to adopt and regularly update the TRM, again recommending a robust stakeholder process to review revisions and additions prior to each round of adoption.[74] AEP appears to acknowledge the validity of the TRM and the Independent Evaluator's role in making recommendations for updates.[75] While Duke does not oppose the adoption of the TRM, it does object to the annual review cycle, instead recommending that it match the multi-year portfolio planning cycle that is currently used. Environmental and Consumer Advocates disagree with Duke's characterization of the burden of updating the TRM every year.[76] This update would correspond and be logically connected to the Independent Evaluator's annual review and would provide a frequent, iterative opportunity for the Independent Evaluator and stakeholders to weigh in on appropriate EM&V techniques as they arise in the changing energy efficiency marketplace. This annual approach supports a more rigorous and thorough review, and the associated administrative costs are far outweighed by the increased benefits to portfolio plans and customer access to more cost-effective programs.

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

As explained in the Environmental and Consumer Advocates' Initial Comments, the Commission should adopt a rule setting minimum requirements for utilities to bid energy

[74] OAEE Initial Comments at 10; OMAEG Initial Comments at 10; OCC Initial Comments at 16-17.
[75] AEP Initial Comments at 2-3.
[76] Duke Initial Comments at 7-8.

efficiency and demand response resources into the PJM capacity auctions.[77] Other stakeholders, including OPAE[78] and OCC,[79] also recognize the value of this activity and recommend similar requirements. As OCC explains, a Commission rule requiring PJM participation is the only way to "assure that Ohioans realize the substantial benefits that can be gained from bidding energy efficiency resources into the PJM BRA."[80] The Environmental and Consumer Advocates agree and recommend that the Commission adopt a rule requiring the bidding of at least 85% of eligible resources, as explained in our Initial Comments.

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

A. Market Potential Studies

In our Initial Comments, the Environmental and Consumer Advocates made specific recommendations for improving the content of Draft Rule 4901:1-39-03, which would extend the current 3-year market potential study to 5-year intervals.[81] Ideally, we 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 program portfolios. However, as discussed in the Initial Comments, the Environmental and Consumer Advocates are more concerned that the rules contain *sufficient requirements* to identify new technologies and innovative program design that may be built into portfolios in future years. In the event the Commission moves forward with the five-year interval, Environmental and Consumer Advocates concur with OCC's[82] and OMAEG's[83]

[77] Environmental and Consumer Advocates Initial Comments at 29-31.
[78] OPAE Initial Comments at 8-9.
[79] OCC Initial Comments at 20-23.
[80] *Id*. at 23.
[81] Environmental and Consumer Advocates Initial Comments at 31-33.
[82] OCC Initial Comments at 19-20. We note that OCC commented that the five year period is too long between market potential assessments, and recommended that the interval remain at no

recommendations to build flexibility into Draft Rule 4901:1-39-03 to allow utilities to update market potential assessments more frequently within that window. In addition, we recommend that the Draft Rules incorporate language allowing for recommendations from interested parties on market potential within this 5-year interval to be adjudicated as necessary, or at the Commission's discretion.

B. Proposed Changes to Program Portfolio Plan Design Criteria

In the Initial Comments the Environmental and Consumer Advocates recommended that Staff build several additional program design criteria into Draft Rule 4901:1-39-03(B). One such proposal was to modify subparagraph (B)(8) to explicitly require electric utilities to consider their gas counterparts as potential partners for energy efficiency programs. Duke opposes the Draft Rule language on this provision, commenting that the required coordination would be counterproductive because each utility has optimized programs based on the characteristics of its own customers and market conditions.[84] But the Environmental and Consumer Advocates submit that there is great value in exploring cross-utility programs. Programs that are implemented statewide or by two or more collaborating utilities have the potential to reach more customers and be more cost-effective. Programs co-run by gas and electric utilities would be particularly effective, given overlapping service populations and thus the potential to reduce design and implementation costs and streamline customer outreach and participation.[85]

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more than three years. However, in the event the Commission decides to lengthen the current interval, OCC recommends in the alternative flexibility to allow utilities to conduct market potential assessments within the five year window.

[83] OMAEG Initial Comments at 3-4.

[84] Duke Initial Comments at 5.

[85] The Environmental and Consumer Advocates also note that, though Duke is concerned with coordination being "required," in fact the language in Draft Rule 4901:1-39-03(B)(8) appears discretionary. It requires utilities to include in their market potential studies the "potential" to partner with other utilities on similar programs.

Evaluating partnership opportunities is a valuable exercise in the context of these studies and would have the benefit of rendering portfolio plans more robust and cost-effective.

VI. The Commission Should Reject IEU-Ohio's Request for a Rule Exempting Reasonable Arrangement Customers from EE/PDR Riders (Draft Rule 4901:1-39-07)

In its initial comments, IEU-Ohio argues that the Commission "should adopt a rule exempting reasonable arrangement customers from EE/PDR riders."[86] Reasonable arrangements and special contracts are essentially subsidized rates for large customers, with most of the stranded costs covered by other customers. These subsidies can reach hundreds of millions of dollars for the largest users. And IEU-Ohio states that the Commission should now reduce these already-discounted rates further by exempting large customers from the EE/PDR rider to give them "a better opportunity to be successful."[87]

The Environmental and Consumer Advocates recommend that the Commission reject this request, which is neither based on the law nor sound public policy. R.C. § 4928.66 already allows for large customers to opt out of the EE/PDR rider upon a showing that they have "self-directed" energy efficiency measures and committed the savings to their utility. Allowing an automatic opt-out for all reasonable arrangement customers would be inconsistent with the current process under R.C. § 4928.66. Through participation in the current process, IEU's customers (and other industrial customers) have the opportunity to implement cost-effective energy efficiency measures and thereby modernize their facilities, reduce their energy intensity, and contribute to overall system reliability. Under IEU's proposal, however, large customers would be exempted from the program with no showing of having otherwise contributed to these system benefits. And IEU-Ohio does not explain why this provision is necessary.

[86] IEU-Ohio Initial Comments at 3.
[87] *Id.*

The hundreds of millions of dollars in avoided rates currently provided by reasonable arrangements, coupled with the potential to realize substantial and ongoing energy efficiency and peak demand reduction in the self-directed option, provide sufficient opportunity for large users to be successful. Therefore, an automatic exemption from the EE/PDR rider is unnecessary.

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

A. The Shared Savings Mechanism Should be Allowed But Only Where a Utility Exceeds Annual Benchmarks

The Environmental and Consumer Advocates disagree with IEU-Ohio's recommendation to remove shared savings from the EE/PDR rider in Draft Rule 4901:1-39-06.[88] Shared savings incentives encourage utilities to over-comply with energy efficiency benchmarks, motivating them to deliver - year after year - more cost-effective energy efficiency into the system and thus save consumers money.

This mechanism was described in recent expert testimony as follows:

> Shared savings mechanisms are intended to provide investor-owned utilities an earnings opportunity by offering shareholders a portion of the net benefits customers receive (that is, the benefits from avoiding costlier energy sources less the cost of the efficiency programs) as a reward for excellent performance at saving energy and lowering customer bills, provided minimum performance thresholds are met.[89]

This over-compliance requirement ensures that all customers – including industrial energy users – benefit from saving energy in excess of the benchmarks. The shared savings mechanism is an

[88] IEU-Ohio recommends removing Shared Savings from the proposed Rule 4901:1-39-06, because, in part, "it is unreasonable to pay incentives to an EDU to comply with Ohio law where the incentives reduce the savings that customers would achieve." *See* IEU Initial Comments at 8-9.

[89] *In the Matter of Duke Energy Ohio, Inc., to Establish and Energy Efficiency Cost Recovery Mechanism, et al*, Case No. 11-4393-EL-RDR, Direct Testimony of NRDC Staff Scientist Dylan Sullivan at 3:15-19 (May 30, 2012).

important tool to align utility business interests with investment in the lowest cost, least risky, and cleanest of energy sources (i.e., energy efficiency).[90]

Moreover, shared savings are specifically allowed by Ohio law.[91] The Commission has considered these mechanisms as part of recent utility energy efficiency portfolio plans for AEP, Duke, and FirstEnergy.[92] After substantial debate amongst the intervening parties in these dockets, the Commission acknowledged the dual benefits to both utilities *and* customers and approved reasonable shared savings recovery. [93] IEU-Ohio's comments on this mechanism in the Draft Rules mirror those that have already been made in those portfolio cases, roundly debated, and ultimately rejected.

While Environmental and Consumer Advocates believe that shared savings incentives should be encouraged, at the same time they must be carefully balanced to ensure that benefits run equally to both utilities and consumers. Commission precedent dictates that these

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[90] Id at 3:1-3.

[91] 4928.143(B)(2)(h) states: "The [EDU's Electric Security] plan may provide for or include, without limitation, any of the following: Provisions regarding the utility's distribution service, including, without limitation and notwithstanding any provision of Title XLIX of the Revised Code to the contrary, provisions regarding single issue ratemaking, a revenue decoupling mechanism or any other incentive ratemaking, and provisions regarding distribution infrastructure and modernization incentives for the electric distribution utility. The latter may include a long-term energy delivery infrastructure modernization plan for that utility or any plan providing for the utility's recovery of costs, including lost revenue, **shared savings**, and avoided costs …." (emphasis added).

[92] *See In the Matter of the Application of Columbus Southern Power Company for Approval of its Program Portfolio Plan and Request for Expedited Consideration*, Case No. 11-5568-EL-POR, Opinion and Order at 7-8, 17, and Section B (March 21, 2012); *see also*, *In the Matter of the Application of Duke Energy Ohio, Inc. for an Energy Efficiency Cost Recovery Mechanism and for Approval of Additional Programs for Inclusion in its Existing Portfolio* Case No. 11-4393-EL-RDR, Stipulation and Recommendation at 4-5 (November 18, 2011), Opinion and Order at 15, (August 15, 2012); *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company For Approval of Their Energy Efficiency and Peak Demand Reduction Program Portfolio Plans for 2013 through 2015*, Case No. 12-2190-EL-POR, Opinion and Order at 12-16 (March 20, 2013).

[93] *Id*.

mechanisms incent *over-compliance*, rather than mere compliance up to the annual benchmarks. Draft Rule 4901:1-39-01(X) recognizes this precedent by only allowing shared savings once the utility "exceeds a statutory energy efficiency and/or peak demand reduction benchmark." AEP's request in their comments to expand this definition to apply to savings achieved by meeting *or* exceeding the benchmarks is inconsistent with prior Commission orders.[94] AEP's definition would discourage utilities from striving for more energy efficiency than is required and deprive customers of substantial benefits.

To ensure that the integrity of the shared savings incentive is maintained, Environmental and Consumer Advocates recommend that the Commission reject IEU-Ohio and AEP's recommendations and maintain the language in Draft Rule 4901:1-39-01(X). We also echo the concerns of OCC[95] and OMAEG[96] that shared savings recovery has historically been decided on a case-by-case basis, based on a complete record involving the participation of many interested stakeholders. Environmental and Consumer Advocates recommend that the Commission include in the cost-recovery provision under Draft Rule 4901:1-39-06 that shared savings and lost revenue recovery will be subject to sufficient due process concerns, and that the current pre-approval adjudicated procedure be maintained to ensure that all interested stakeholders are heard by the Commission on these incentive issues.

[94] AEP Initial Comments at 3.
[95] OCC Initial Comments at 15-16.
[96] OMAEG Initial Comments at 8-9.

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

I. The Commission Should Maintain the Staff's Proposal to Require Public Disclosure of Renewable Energy Credit Information Under 4901:1-40-05(A).

In Draft Rule 4901:40-05(A) Staff proposes to impart more transparency and administrative efficiency in the annual status report filings for the alternative and renewable energy benchmarks.[97] As discussed in our Initial Comments, the Environmental and Consumer Advocates support Staff's intent and commends them for updating the rules to provide for a more transparent process, particularly as it relates to public availability of Renewable Energy Credit ("REC") data in subparagraph (A)(4).[98] These specific reporting requirements will allow renewable generation and the associated benchmarks to be more accurately assessed by Ohioans - who all have a vested interest in the deployment of renewable energy in the state. The Draft Rule language will also protect ratepayers from potential abuses, such as improper affiliate transactions or imprudent decisions pertaining to the costs of RECs. While other commenting parties object to this proposed change and call on the Commission to maintain a portion of this information as confidential, Environmental and Consumer Advocates urge the Commission to move forward with this section of the Draft Rules.

The utilities do not appear to object to public disclosure of the information identified in subparagraphs (a) & (c)-(f).[99] For example, subparagraph (A)(4)(b) requires the companies to file "[a] quantification in dollars per megawatt-hour of all applicable alternative energy portfolio standard compliance requirements, including the in-state minimums."[100] FirstEnergy characterizes this information as the type that the Commission protected in previous cases,

[97] Commission Entry at 4-5.
[98] Environmental and Consumer Advocates Initial Comments at 44-46.
[99] FirstEnergy Initial Comments at 34; Duke Initial Comments at 10.
[100] Commission Entry, Attachment B at 18 of 26.

including 11-5201-EL-RDR.[101] With regard to the REC cost data required in subparagraph (A)(4)(b), neither AEP[102] nor DP&L[103] explicitly object to including this as part of the annual compliance status reports. However, both FirstEnergy and Duke object, arguing that this data should be kept confidential as a trade secret in the competitive REC market.[104] The Environmental and Consumer Advocates disagree that this information should be automatically or always deemed confidential. Rather, we concur with Staff that as much information as possible should be made public to allow adequate review and evaluation of the health of the Ohio and regional renewables markets. As FirstEnergy points out in its comments, an entity seeking confidentiality may apply for a protective order from the Commission as a part of its filing if it seeks to protect certain information.[105] Ohio Administrative Code Rule 4901-1-24 provides a procedure for any EDU or Competitive Retail Electric Supplier ("CRES") that wishes to seek confidentiality of REC cost information. Given this process, this data should not be automatically codified as confidential, as FirstEnergy also suggests.[106]

To the extent the Commission approves a motion for protective order and deems such information as confidential, the Environmental and Consumer Advocates recommend that confidentiality be maintained only for a finite period of time. As noted in the Draft Rule, such information is confidential for an 18-month period.[107] The annual status reports are not due until nearly five months after the year end, and thus any protective order issued by the Commission

[101] FirstEnergy Initial Comments at 34-35; Duke Initial Comments at 10.
[102] AEP Initial Comments at 14.
[103] DP&L Initial Comments at 5-9.
[104] First Energy Initial Comments at 34-35; Duke Initial Comments at 10.
[105] FirstEnergy Initial comments at 34.
[106] FirstEnergy Initial comments at 35.
[107] 4901-1-24(F) states that: "Unless otherwise ordered, any order prohibiting public disclosure pursuant to paragraph (D) of this rule shall automatically expire eighteen months after the date of its issuance, and such information may then be included in the public record of the proceeding."

would render such information confidential for approximately two years after the year of purchase. At that point, it should no longer be considered confidential for any reason. This type of information is an important tool to determine the health of Ohio's market and should be made available to the public as soon as possible.

Environmental and Consumer Advocates also submit that averaged and aggregated REC cost data need not be protected. The Commission may appropriately average the information it receives and publish it in applicable dockets.[108] This still allows interested parties to accurately evaluate the market by reviewing the average price for each type of REC. Additionally, by releasing this information as an average the Commission will avoid revealing any trade secret information, and no individual bidders need be identified.[109] In contrast, FirstEnergy recommends that average REC cost data should be protected as a trade secret,[110] and Duke observes that "confidential information provided by all the reporting entities aggregated would not need to be protected … as it is anticipated that the Commission will provide trade secret protection of this information and that the status reports filed may be filed under seal."[111] However, FirstEnergy's recommendation and Duke's assumption are inconsistent with Ohio law. R.C. 1331.61(D) defines a trade secret as:

> information, including the whole or any portion or phase of any scientific or technical information, design, process, procedure, formula, pattern, compilation, program, device, method, technique, or improvement, or any business information or plans, financial information, or listing of names, addresses, or telephone numbers, that satisfies both of the following:

[108] Similar to its Presentation in the Proposed Report in Case No. 13-1901-EL-ACP but with the most current information received from the latest status reports.
[109] Unless those bidders are an affiliate. *See* Environmental and Consumer Advocates Initial Comments at 46-47.
[110] First Energy Initial Comments at 34-35.
[111] Duke Initial Comments at 10.

> (1) It derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use.
>
> (2) It is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

Under R.C. 1331.61(D) information must satisfy both subparagraphs (1) and (2) to be considered a trade secret. While the Commission may determine that *individual* information is confidential and therefore subject to efforts to maintain secrecy, a Commission-created average based on protected information would appropriately mask individual transactions and would not likely trigger the above trade secret definition. Further, this newly created information would not be of any independent economic value because it would not be tied to any actual entity in the market. Thus, while Environmental and Consumer Advocates support full transparency of individual REC data, in the event the Commission determines that certain individual information is protected by trade secret, average or aggregated cost data for each type of REC should still be fully disclosed to the public and not be subject to further protections.

In addition, Environmental and Consumer Advocates disagree with comments submitted by Interstate Gas Supply and First Energy Solutions, both CRES suppliers, that they should not be subject to the same public disclosure requirements as EDUs. [112] While it is true that there are differences between these entities (e.g. that CRES suppliers do not receive full cost recovery nor do they have a monopoly on customers), the law as it pertains to annual reporting makes no differentiation between EDUs and CRES suppliers. The rules explicitly subject these entities to the same annual reporting requirements to ensure that all data and information concerning the

[112] Interstate Gas Supply Initial Comments at 4-6; First Energy Solutions Initial Comments at 1-5.

REC market is collected as necessary to assess compliance with the renewables benchmarks. Thus, contrary to some comments, CRES suppliers should not be exempted from the public disclosure requirements of Draft Rule 4901:40-05(A).

Finally, while the Environmental and Consumer Advocates believe that public disclosure of cost information is essential to ensuring accountability of the regulated community, at the same time we share DP&L's concern that transparency only works if all those required actually disclose the requisite information.[113] DP&L identifies eleven electric services companies that did not file this information for the 2012 annual report, stating that "the information presented [in that compliance filing] was incomplete and inaccurate because a substantial portion of the market did not provide data."[114] To remedy this, DP&L suggests that the rules include some penalty which can be imposed upon any entities that are unwilling to comply. Environmental and Consumer Advocates agree with this recommendation and see such a penalty as consistent with public policy encouraging transparency and accountability.

The Environmental and Consumer Advocates therefore agree with Staff's Draft Rule that would require public availability of information included in annual compliance reports. In the event the Commission rejects Staff's proposal requiring public record treatment for the filed REC cost information, the Environmental and Consumer Advocates propose that the information only be held confidential for a maximum of 18 months, and that in the meantime the Commission aggregate the information and publicly release an average figure for each type of REC. This will help bring Ohio's market closer to transparency and afford all stakeholders the opportunity to thoroughly review Ohio's market.

[113] DP&L Initial Comments at 5-9.
[114] DP&L Initial Comments at 6-7.

CONCLUSION

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

Dated: March 24, 2014

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing *Joint Reply 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 24th day of March, 2014.

/s/ Nicholas McDaniel

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Case No(s). 13-0651-EL-ORD, 13-0652-EL-ORD, 12-2156-EL-ORD

Summary: Reply 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