THE PUBLIC UTILITIES COMMISSION OF OH3IO

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| 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 |
| 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. 13-651-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. 13-652-EL-ORD |

## SECOND ENTRY ON REHEARING

Entered in the Journal on April 10, 2019

## I. SUMMARY

{¶ 1} The Commission grants, in part, the applications for rehearing filed by Ohio Power Company and the Dayton Power & Light Company; Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company; Duke Energy Ohio, Inc.; and Environmental Law & Policy Center, Environmental Defense Fund, Natural Resources Defense Council, and the Ohio Environmental Council, and denies the applications for rehearing filed by Interstate Gas Supply, Inc. and the Ohio Consumers' Counsel.

## II. DISCUSSION

### A. *Procedural History*

{¶ 2} R.C. 111.15(B) requires all state agencies to conduct a review, every five years, of their rules and to determine whether to continue their rules without change, amend their rules, or rescind their rules.

{¶ 3} On December 19, 2018, the Commission issued a Finding and Order (Finding and Order), addressing written comments filed by parties and revising certain rules within Ohio Adm.Code Chapters 4901:1-39 and 4901:1-40 based on the comments.

{¶ 4} On January 18, 2019, the following parties timely filed applications for rehearing: Ohio Power Company and the Dayton Power & Light Company (collectively, AEP Ohio/DP&L); the Ohio Consumers' Counsel (OCC); Duke Energy Ohio, Inc. (Duke); Environmental Law & Policy Center, Environmental Defense Fund, Natural Resources Defense Council, and the Ohio Environmental Council (collectively, the Conservation Groups); Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company (collectively, FirstEnergy); and Interstate Gas Supply, Inc. (IGS).

{¶ 5} On January 28, 2019, the following parties filed memoranda contra: Industrial Energy Users-Ohio (IEU), OCC, the Conservation Groups, FirstEnergy, and IGS.

{¶ 6} On February 6, 2019, the Commission granted the applications for rehearing filed by various parties for the purpose of further consideration of the matters specified in the applications for rehearing.

{¶ 7} For ease of discussion, we address the assignments of error raised by the parties in their applications for rehearing as they relate to the specific rules in Ohio Adm.Code Chapters 4901:1-39 and 4901:1-40. To the extent that any assignment of error is not specifically addressed in the foregoing discussion, it is deemed denied.

*B. Overall Comments on the Rules*

{¶ 8} Both Duke and the Conservation Groups urge the Commission to provide the parties another opportunity to provide comments on the rules because the rules were originally proposed in January 2014. The Conservation Groups state that the Commission should have provided an opportunity for public comment prior to incorporating changes in response to Sub.S.B. No. 310 of the 130th General Assembly (SB 310), pursuant to R.C. Chapter 119. The Conservation Groups add that, even if the Commission technically

complied with the notice and hearing requirement back in 2013 and 2014, it was unreasonable to continue to rely on that compliance in issuing a final rule five years later, in December 2018. (Duke App. for Rehearing at 1-2; Conservation Groups App. for Rehearing at 1-2, 6-7.)

**{¶ 9}** The Commission is not a Revised Code Chapter 119 agency. In fact, R.C. 119.01(A)(1) explicitly states that "Sections 119.01 to 119.13 of the Revised Code do not apply to the public utilities commission." As noted above and in the Finding and Order, the Commission promulgated its rules under R.C. 111.15(B). Furthermore, because the Commission merely aligned the rules originally proposed in 2014 with statutory changes under SB 310, the Commission denies rehearing on the assignments of error posed by the parties.

**{¶ 10}** As its first assignment of error, IGS contends the Finding and Order is unreasonable because it creates a portfolio plan process that is inconsistent with its stated goals, resulting in a more burdensome process for the Commission and stakeholders which lacks explicit language to bolster the Commission's broad authority over the process and ensure the process is consistent with Commission precedent and policy. In support of its argument, IGS notes that the proposed rules contain no stated reasonableness standard and language stating that the burden on the EDU to demonstrate that its program portfolio plan is consistent with state policy has been removed. IGS further states that the proposed rules should include some sort of express standard to reflect the Commission's broad authority to make any appropriate modifications to ensure the plan was reasonable, consistent with law prior to implementation, and consistent with state policy. (IGS App. for Rehearing at 6.)

**{¶ 11}** Initially, as noted in the definition of "verified savings" in proposed rule Ohio Adm.Code 4901:1-39-01(EE), the Ohio technical reference manual (TRM) is based on a reasonableness standard. Furthermore, the Commission's broad authority to administer and enforce the provisions of R.C. Title 49, including regulating a utility's portfolio plan

under R.C. 4928.66, is well-established. *See, e.g., Kazmaier Supermarket, Inc. v. Toledo Edison Co.*, 61 Ohio St.3d 147, 150-151, 573 N.E. 2d 655, 658 (1991). As such, we find that a separate statement of the Commission's authority to ensure that a portfolio plan is reasonable, lawful, and consistent with state policy is not necessary in the proposed rules. Thus, we deny IGS's assignment of error to the extent it is requesting for such a statement.

### *C. Ohio Adm.Code 4901:1-39-01 - Definitions*

**{¶ 12}** As their fifth assignment of error, AEP Ohio/DP&L state that proposed Ohio Adm.Code 4901:1-39-01(P)(3) is unreasonable because it would give an independent program evaluator (IPE) the power to recommend updates to the TRM with little or no notice prior to the deadline for an electric utility's portfolio plan filing. The parties request that TRM updates referred to in this rule should be made at least one full year in advance of their next portfolio plan implementation for appropriate program planning. (AEP Ohio/DP&L App. for Rehearing at 12-13.)

**{¶ 13}** In our Finding and Order, we indicated that the TRM will be applied on a prospective basis and that companies should make use of the TRM in effect at the time the EDU files to update its program portfolio plan. Finding and Order at ¶ 123. For example, if the TRM is filed on October 15, 2019, then the portfolio plan filed on September 1, 2020 would need to comply with the October 15, 2019 TRM. Additionally, it is the Commission's expectation that the TRM will be updated periodically, as needed. Consequently, AEP Ohio/DP&L's application for rehearing regarding this assignment of error is denied.

**{¶ 14}** As their fourth assignment of error, AEP Ohio/DP&L contend that the Commission's new definition of "non-energy benefits" in Adm.Code 4901:1-39-01(S) should be modified to expressly recognize and take into account additional non-energy benefits, including operations and maintenance cost reductions, productivity increases, reduced product loss, positive health effects, increased operational safety, and additional sales increases excluding market effects. (AEP Ohio/DP&L App. for Rehearing at 11-12.)

**{¶ 15}** The Commission denies rehearing on this assignment of error because the items listed as examples of non-energy benefits in this rule do not necessarily exclude the additional items identified by the parties in their application for rehearing. In fact, the proposed rule specifically states that non-energy benefits "mean positive non-monetized impacts that do not affect the calculation of program cost-effectiveness pursuant to the total resource cost test including *but not limited to*" the listed items (emphasis added). Therefore, the parties will have an opportunity to propose the non-energy benefits they have identified during the post-approval performance verification process.

**{¶ 16}** As its third assignment of error, the Conservation Groups allege that the Commission unreasonably approved a definition of "shared savings" in Ohio Adm.Code 4901:1-39-01(Y) that may not be workable in future program years. Noting that the definition memorializes a previous Commission decision that a utility may not trigger shared savings in a year that it relies on banked savings for compliance, the Conservation Groups contend that definition may not encourage strong utility efficiency programs in a post-approval regime where the utility cannot be certain whether a program evaluator or other stakeholder will argue after-the-fact that the utility should have relied on banked savings in a given year. The Conservation Groups suggest that the Commission should allow an opportunity to revisit the issue where a utility portfolio plan proposal conclusively demonstrates that some limited reliance on banked savings would provide real value to customers. (Conservation Groups' App. for Rehearing at 16-17.)

**{¶ 17}** The Commission denies rehearing on this assignment of error because the definition of "shared savings" does not specifically exclude the option of triggering shared savings through previously banked savings. Furthermore, as explained in Paragraphs 43-44, the Commission clarifies its position on whether banked savings can trigger shared savings.

**{¶ 18}** As its fifth assignment of error, the Conservation Groups contend that the Commission's definition of total resource cost (TRC) test in proposed Ohio Adm.Code

4901:1-39-01(BB) unreasonably fails to make clear that it should include all relevant benefits of energy efficiency in weighing benefits versus costs. The Conservation Groups request that the Commission clarify the definition of the TRC test to ensure utilities include avoided natural gas costs among the benefits of energy efficiency measures that reduce natural gas usage. In lieu of a reasonable definition of the TRC test, the Conservation Groups suggest that the Commission apply the utility cost test (UCT), which simply compares the electric utility system costs of efficiency programs to the electric utility system benefits that they produce – to reasonably and accurately gauge the cost-effectiveness of utility efficiency programs, in either pre-approval or post-approval. (Conservation Groups' App. for Rehearing at 18-19.)

**{¶ 19}** The Commission finds that the TRC test definition should not incorporate avoided natural gas costs, as these rules are related to energy efficiency programs for electric, rather than gas, utilities. See Finding and Order at ¶ 60. Furthermore, the Commission has previously stated that, under proposed Ohio. Adm.Code 4901:1-39-04(B), utilities can utilize the UCT when they can demonstrate that a program within its portfolio is better measured by that test instead of the TRC test. Finding and Order at ¶¶ 55, 76. Consequently, as these issues were thoroughly addressed in the Finding and Order, we deny rehearing on this assignment of error posed by the Conservation Groups.

**{¶ 20}** The Conservation Groups also state as its seventh assignment of error that the Commission failed to clarify the definition of "verified savings" in proposed Ohio Adm.Code 4901:1-39-01(EE) and address whether such savings should be measured at the customer meter and exclude line losses (Conservation Groups' App. for Rehearing at 21). In response to the Conservation Groups, FirstEnergy notes that R.C. 4928.662(E) recognizes there are savings resulting from energy efficiency beyond those measured at the customer meter, including line losses resulting from projects undertaken on the transmission and distribution system. If energy is not consumed and, therefore, not delivered because of the utility's energy efficiency efforts, then the corresponding line losses are not incurred and

those costs are thus avoided by customers. Moreover, FirstEnergy states that if line losses are incurred, R.C. 4928.66(A)(2)(c) specifically directs that line losses are to be included. (FirstEnergy Memorandum Contra at 6-7.)

{¶ 21} Upon review, the Commission agrees with FirstEnergy that the definition of "verified savings" is clear in that it recognizes that there are savings resulting from energy efficiency beyond those measured at the customer meter. The current definition is consistent with R.C. 4928.662(E) and, therefore, the Commission declines to further amend proposed Ohio Adm.Code 4901:1-39-01(EE). Accordingly, the Conservation Groups' assignment of error is denied.

*D. Ohio Adm.Code 4901:1-39-04 – Program portfolio plan and filing requirements*

{¶ 22} As its only assignment of error, OCC alleges that the Commission's Finding and Order is unlawful and unreasonable because it eliminates the pre-approval process, does not allow for meaningful stakeholder participation in energy efficiency proceedings, and allows utilities to charge customers any amount they choose without prior Commission approval, in violation of R.C. 4905.22. In support of its argument regarding meaningful stakeholder participation, OCC claims that the September 1 deadline for filing a program portfolio plan leaves little time for the Commission to take action regarding the filing. It further states that it is unlikely that there will be enough time for discovery, settlement negotiations, and if necessary, a hearing and post-hearing briefing, followed by an order. According to OCC, the issue is compounded by the fact that all four of Ohio's EDUs will likely file their applications on the same day (September 1), thereby causing parties to attempt to resolve each of them simultaneously over a very short period of time. (OCC App. for Rehearing at 4.)

{¶ 23} The Commission denies rehearing on this assignment of error. As we noted in our Finding and Order, we are moving from a pre-approval to a post-approval process. The September 1 filing is intended to provide notice to interested parties about the EDUs' proposed plans. The Commission also indicated that interested parties will have an

opportunity to provide input about the filed program portfolio plans during the collaborative process outlined in Ohio Adm.Code 4901:1-39-03(D), and if continuing issues arise, such issues can be addressed during the performance verification process described in Ohio Adm.Code 4901:1-39-05. Under Ohio Adm.Code 4901:1-39-05, the annual performance verification process may also allow for a hearing, if required. Finding and Order at ¶¶ 65, 88.

**{¶ 24}** Additionally, as its third and final assignment of error, IGS maintains that the Finding and Order is unjust and unreasonable because it allows EDUs to omit the amount of rebates or incentives included in their annual program portfolio plans. IGS states that it currently uses its own funds to advertise and promote the rebates and incentives offered through portfolio plans and needs to know an EDU's rebate amount in its annual program portfolio plan. It further states the purpose of the annual filing is to inform stakeholders and the ratepayers of the energy efficiency/peak demand reduction (EE/PDR) opportunities offered by their EDU and omitting them conflicts with the purpose of the program portfolio plan filing. (IGS App. for Rehearing at 10-12.)

**{¶ 25}** The Commission notes that existing Ohio Adm.Code 4901:1-39-04 does not require EDUs to disclose costs. Furthermore, disclosure of rebate and incentive amounts prior to program implementation would not allow EDUs to be flexible and respond to changes in market conditions throughout the year. We agreed with AEP Ohio when it first suggested in its comments that EDUs should not be required to disclose the amount of rebates or incentives offered through each of its programs and continue to find that the annual filing will only need to list whether the EDU is utilizing such rebates and incentives. Finding and Order at ¶ 81. Consequently, the Commission denies rehearing on this assignment of error.

### *E. Ohio Adm.Code 4901:1-39-05 – Annual performance verification*

**{¶ 26}** Initially, the Commission notes that several assignments of error submitted by the parties are regarding the fact that the Commission is moving from a pre-approval to

a post-approval annual performance verification process. AEP Ohio/DP&L state that the portfolio process has historically been a very litigious and time-consuming process that often spans months, or years, between filing and approval. However, the parties maintain that a pre-approval process is necessary to eliminate legal issues prior to portfolio implementation. They further state that extended planning periods help utilities provide the lowest cost, due to the certainty of implementation and would still permit the Commission to have oversight with regular audits and independent evaluations. (AEP Ohio/DP&L App. for Rehearing at 5-8.)[1]

{¶ 27} Similarly, the Conservation Groups claim that pre-approval review of plans is the only reasonable way to accomplish supervision of utility efficiency programs while carrying out state policy of encouraging innovation under R.C. 4928.02(D). With post-approval of plans, the Conservation Groups believe that the Commission will never be able to identify and remedy sub-par efficiency programs and lost customer savings that span over a year. They point out that certainty regarding cost recovery is a top priority for utilities in implementing energy efficiency programs and the new rules fail to provide needed assurance. Finally, they note that utility stakeholder collaboratives and complaint cases are poor substitutes for the due process currently afforded to stakeholders, which allows significant substantive input to hold the utility accountable to provide well-designed and well-implemented programs. (Conservation Groups App. for Rehearing at 8-9.)

{¶ 28} The Conservation Groups state that pre-approval is vital to provide utilities a basis for effective participation in the wholesale markets. The Ohio utilities have consistently decided it would not be prudent to bid all planned energy efficiency resources in the PJM Base Residual Auctions (BRA) where they did not have explicit Commission pre-approval for that year's programs, often resulting in significantly lower revenues from subsequent incremental auctions. Without the current process, the Conservation Groups

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1 Although AEP Ohio/DP&L's first assignment of error references Ohio Adm.Code 4901:1-39-04, the issues put forth by the parties are discussed here as they related to the post-approval annual performance verification process.

surmise that customers will receive less market revenue even if the utilities run the same programs producing the same efficiency resources, and the wholesale price for capacity will rise artificially as those resources are not timely bid into PJM. (Conservation Groups App. for Rehearing at 10.)

**{¶ 29}** The Conservation Groups believe that important issues will fall through the cracks because Commission and stakeholders will have less time to review four sets of utility programs every year on the accelerated schedule. They state that the Commission can also expect a litany of complaints filed by intervenors, because they will have no other avenues to address program shortcomings. (Conservation Groups App. for Rehearing at 10-11.)

**{¶ 30}** The Conservation Groups further indicate that utilities are less likely to innovate in a post-approval process as they will be likely to rely principally on programs that the Commission has approved in the past to ensure cost recovery. According to the Conservation Groups, these programs may pass the minimum cost-effectiveness threshold but will fail to provide long-term value to customers. (Conservation Groups App. for Rehearing at 12-14.)

**{¶ 31}** Even if the transition to post-program review would have been reasonable five years ago, the Conservation Groups argue that with the current climate of uncertainty around utility program design and shared savings constructs, it is vital to retain the pre-approval process, which allows utilities and stakeholders to work through disagreements based on a full exchange of information and a robust litigation process with the aim of getting certainty from the Commission up-front rather than trying to hash out complex and controversial issues well after the fact. (Conservation Groups' App. for Rehearing at 11). As an example, the Conservation Groups mention Case No. 17-32-EL-AIR, in which the Commission approved a stipulation resolving various issues, including Duke's Distribution Capital Investment Rider (Rider DCI). [2] The Conservation Groups claim that in this case,

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2 *In re the Application of Duke Energy Ohio, Inc. for an Increase in Electric Distribution Rates*, Case No. 17-32-EL-AIR, et al. (*Duke Global Settlement*), Opinion and Order (Dec. 19, 2018) at ¶ 208.

the Commission has endorsed a pre-approval review approach when it required a pre-filing and approval for a proposed battery storage project contemplated in the stipulation. (Conservation Groups App. for Rehearing at 15-16.)

**{¶ 32}** Continuing its arguments in support of its first assignment of error, IGS states that the new portfolio plan process will fail to promote efficiency, reduce regulatory delay, or minimize administrative costs. First, under the new rules, an EDU would have to file an increased number of filings each year, consisting of a portfolio plan, performance report, and cost recovery mechanism every year. IGS also notes that under the current rules, stakeholders would be able to challenge an EDU's EE/PDR programs every year, instead of once every three years under the current rules. Moreover, it states that should the Commission continue to apply a reasonable cost cap, FirstEnergy would have to raise its challenge every year until its Supreme Court of Ohio appeal is resolved.[3] Lastly, IGS states that regulatory delay also increases with the new process because potential disallowances and reconciliation of costs do not occur until the issuance of a Commission order during the performance verification process. However, IGS states that performance verification cannot be completed until the filing of the IPE's report, which currently has no filing deadline. (IGS App. for Rehearing at 5-6.) Further, IGS recognizes the risk on the EDU that the projects are subject to potential disallowance at some point in the future, but the investments and resulting impacts to Ohio's marketplace will still have been made. Consequently, IGS states that pre-approval of the projects is the best way to ensure EE/PDR ratepayer dollars are spent consistent with law, state policy, and Commission precedent. (IGS App. for Rehearing at 5-6.)

**{¶ 33}** As the parties have readily noted in their filings, and which we already addressed in the Finding and Order, the current pre-approval process for program portfolio plans is time-consuming, costly, and litigious. We envision the proposed process to provide

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3 *In re the Application of the 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 2017 through 2019*, Case No. 2018-0379, Notice of Appeal (March 12, 2018).

more stakeholder input at the initial stages of a utility's design process for its portfolio programs, as outlined in Ohio Adm.Code 4901:1-39-03(D), which the Commission anticipates will minimize the need for extensive litigation during the performance verification process. Finding and Order at ¶ 88. Furthermore, as indicated above, the filing of the program portfolio plan is intended to simply provide notice to interested parties about a utility's plan. While the parties' arguments focus on having to resolve complex and controversial issues after-the-fact during the performance verification process, it is the Commission's expectation that the utilities and interested parties will work toward resolving these issues prior to program implementation during the collaborative process. Furthermore, an annual filing with a post-approval of programs will allow utilities to create more flexible and efficient programs as they will be able to design programs based on year-to-year market conditions and forecasts. Moreover, an annual approach to program design ensures that important issues are identified and do not fall through the cracks, contrary to the Conservation Groups' claim.

**{¶ 34}** In regard to the PJM BRA issue raised by the Conservation Groups, as we stated in our Finding and Order, we expect utilities to evaluate their risk margins, consider market conditions, make reasonable assumptions, and bid into the PJM BRA accordingly. Finding and Order at ¶¶62, 68. During the performance verification process, the Commission will evaluate whether the decisions the utilities made were prudent and will authorize them to recover costs accordingly.

**{¶ 35}** In response to the Conservation Groups' comment regarding the battery storage project in the *Duke Global Settlement*, the Commission clarifies that battery storage project was part of a stipulation in a matter involving ten cases and four major proceedings. In those proceedings, Duke filed an application for an electric security plan (ESP), pursuant to R.C. 4928.143, in which Duke proposed to continue or modify a number of established riders, including Rider DCI. Also as part of its application, Duke proposed that it be allowed to invest $20 million in a battery storage project, which would be recoverable under Rider

DCI. Finding the project consistent with R.C. 4928.02, which encourages innovation, the Commission allowed the battery storage project to move forward. Because this was a pilot project, the purpose of which was to explore innovative concepts and gather financial and operational data, the Commission determined that it would be subject to pre-approval and ongoing monitoring. *Duke Global Settlement*, Opinion and Order (Dec. 19, 2018) at ¶¶ 78, 208. We find that the Commission's directive for Duke to obtain pre-approval for the pilot project was not a blanket endorsement for pre-approval for all EE/PDR programs. Instead, the necessity of gathering critical data from the pilot battery storage project was a unique situation and is inapplicable to the Commission's transition to post-approval performance verification process for portfolio programs under these rules.

**{¶ 36}** Finally, in response to IGS's assignment of error, the Commission clarifies that the IPE report filing deadline will be included in the procedural entry issued by the attorney examiner during the performance verification process. Therefore, we deny rehearing on all assignments of error posed by parties with regard to the transition to a post-approval process and grant rehearing only to clarify that the deadline for the IPE to file his or her report will be set by a procedural entry.

**{¶ 37}** In their respective applications for rehearing, AEP Ohio/DP&L and Duke state that they should be allowed to use banked savings to trigger shared savings and accordingly propose changes to Ohio Adm.Code 4901:1-39-05(A)(1)(c) (AEP Ohio/DP&L App. for Rehearing at 9-11; Duke App. for Rehearing at 6). Similarly, FirstEnergy claims that it is unreasonable to arbitrarily exclude banked savings from being used to trigger shared savings (FirstEnergy App. for Rehearing at 2).

**{¶ 38}** The Conservation Groups argue that the Finding and Order is unreasonable and should have gone further to the extent that it does not clearly state that any shared savings mechanism must rely only on verified, real-world savings resulting from a utility's energy efficiency programs. The Conservation Groups explain that Ohio utilities have utilized shared savings mechanisms in the following way: First, the utility calculates its

threshold annual energy savings to determine whether it has triggered a shared savings payment by over-complying with the annual benchmark and the applicable percentage tier based on the percentage of over-compliance. Second, the utility calculates net avoided costs for customers from those energy savings, as a basis for receiving its shared savings incentive payment based on the applicable percentage tier. The Conservation Groups state that the proposed rules do not address the full universe of what savings eligible for compliance under R.C. 4928.662 may also count at the trigger/first stage for shared savings. If those savings do qualify to trigger shared savings, the Conservation Groups allege customers will then end up providing incentive payments even though the utility may not have made actual efforts to help customers save energy. (Conservation Groups App. for Rehearing at 14-15, 17-18.)

**{¶ 39}** Contrary to AEP Ohio/DP&L and FirstEnergy, IEU and OCC contend that there is no statutory right to collect shared savings triggered by banked savings, and there is no reasoned basis for the Commission to deviate from its long-standing precedent preventing EDUs from imposing additional non-bypassable charges on customers for shared savings based on banked savings. Further, IEU states that the law already provides an adequate "incentive" for compliance, which directs the EDUs to comply with the EE/PDR requirements and mandates penalties for an EDU's failure to comply. (IEU Memorandum Contra at 2-5; OCC Memorandum Contra at 2-3.)

**{¶ 40}** IGS, in its memorandum contra, states that FirstEnergy and AEP Ohio/DP&L mistakenly argue the modification regarding banked savings was not based on the record. In fact, IGS notes that OCC proposed to exclude banked savings from the definition of shared savings and the Commission accepted OCC's recommendation. Further, according to IGS, allowing the use of banked savings to trigger shared savings is not a longstanding approach. Finally, IGS concludes that the Commission's finding on this issue is reasonable and lawful. (IGS Memorandum Contra at 3-4.)

**{¶ 41}** Alternatively, the Conservation Groups, while recognizing that a definition of shared savings that categorically excludes banked savings from calculation of a shared savings trigger may not always be reasonable, state that it would also be unreasonable to categorically allow the use of banked savings to trigger shared savings in all circumstances. Therefore, rather than codifying any particular approach to this issue, the Conservation Groups urge the Commission to leave the question open for resolution in the full context of a given portfolio plan proceeding. (Conservation Groups Memorandum Contra at 1-3.)

**{¶ 42}** FirstEnergy responds stating the Conservation Groups are mistaken in that shared savings should only be triggered by after-the-fact evaluated and verified energy savings. According to FirstEnergy, the Commission has already determined ex-ante is the appropriate metric for determining compliance with the statutory targets and the purpose of shared savings is to incent utilities to exceed their compliance targets. Ex-post, or evaluated and verified savings, takes into consideration factors outside the utilities' control and are not known until several months after the end of a program year. Thus, changing the process from ex-ante to ex-post would be fundamentally unfair as it could penalize utilities for factors occurring beyond their control after program implementation. Further, according to FirstEnergy, utilities would not be able to track progress throughout the year and would not be able to accurately predict the trigger or amount of shared savings. FirstEnergy also provides that R.C. 4928.662(A) counts energy savings from compliance with federal standards. Alleging that the Conservation Groups misunderstand and mischaracterize the newly adopted amendments as they apply to the multi-step process for determining shared savings, FirstEnergy notes the definition of shared savings precludes banked savings from the net savings (or net benefits) process step, not the initial trigger step in the process. In order to provide clarity and avoid future misunderstanding, FirstEnergy recommends that in the definition of "shared savings," the term "net benefits" should replace "net savings." (FirstEnergy Memorandum Contra at 1-4.)

**{¶ 43}** Based on AEP Ohio/DP&L and Duke's assignments of error, and in part, the Conservation Groups' assignment of error, we have amended proposed Ohio Adm.Code 4901:1-39-05(A)(1)(C) to allow banked savings to trigger shared savings. We have also clarified in the definition of shared savings in Ohio Adm.Code 4901:1-39-01(Y) that banked savings may not be used to calculate shared savings. We recognize that the EDUs have made an effort to bank savings when compliance costs were low. We also recognize that it is a benefit to customers for utilities to rely on banked savings as customers have already paid for those savings. Furthermore, as noted by the Conservation Groups, relying on banked savings allows EDUs to control costs when statutory benchmarks will increase in the future, pursuant to R.C. 4928.66(A)(1)(a). Consequently, the Commission grants rehearing on the assignments of error posed by AEP Ohio/DP&L and Duke, and in part, the Conservation Groups.

**{¶ 44}** To the extent that the Conservation Groups request us to clarify that any shared savings mechanism must rely only on verified, real-world savings resulting from a utility's energy efficiency programs, the Commission declines to grant rehearing on this assignment of error. Utilities may utilize any statutorily approved energy savings in reaching their EE/PDR benchmark, thereby triggering shared savings. As mentioned elsewhere in this Second Entry on Rehearing, during the prudency review, the IPE will evaluate the utilities calculation of their shared savings and put forth a recommendation to the Commission.

**{¶ 45}** Next, as its second assignment of error, Duke argues that the proposal rule is unlawful and unreasonable in that it does not adequately explain the IPE process, specifically noting that proposed Ohio Adm.Code 4901:1-39-05(B) suggests that the IPE will be performing a financial audit, but there is no language in any rule detailing how the IPE is to be paid. Duke states that in the past, the EDUs were ordered to pay for these services, but the Commission has imposed a cap on spending for all the EDUs. If the cost of the IPE

is to be included in program costs, then Duke requests that the cap be adjusted accordingly. (Duke App. for Rehearing at 4-5.)

**{¶ 46}** Upon review, we clarify that it is not the Commission's intent that the cost of the IPE be included in any reasonable cost cap that may be proposed in the future. In other words, the cost of the IPE will be excluded from the performance verification process. Therefore, rehearing on this assignment of error is denied.

**{¶ 47}** In its second assignment of error, IGS alleges that the Finding and Order is unjust and unreasonable because it knowingly creates an ineffective review mechanism. Specifically, IGS believes there should be a prescribed due date for the IPE Report. IGS is also concerned that any issues determined by the Commission in the annual performance review will take multiple years to be implemented. Because the Commission describes the IPE's role as "essential to the performance verification process," and the new portfolio process relies on this post-implementation review, IGS states that it is unreasonable not to provide a due date to ensure meaningful, timely review of an EDU's portfolio plan. (IGS App. for Rehearing at 9-10.)

**{¶ 48}** The Commission denies IGS's assignment of error. As noted above, the deadline for the IPE's report will be included in the procedural entry issued by the attorney examiner during the performance verification process.

**{¶ 49}** With regard to proposed Ohio Adm.Code 4901:1-39-05(C), FirstEnergy believes it would be more appropriate to address TRM revisions in a separate docket from the IPE report to allow each process to run its own course without hampering the other. While the timing of filing such reports may nearly coincide, subsequent docket activity as contemplated in the adopted rules may result in different timing of the effective date for updates or revisions to the TRM. (FirstEnergy App. for Rehearing at 3.)

{¶ 50} The Commission agrees and grants rehearing on FirstEnergy's second assignment of error to clarify that TRM revisions will be addressed in a separate docket from the IPE report.

{¶ 51} As its third assignment of error FirstEnergy alleges that Ohio Adm.Code 4901:1-39-05(D) is unlawful and unreasonable because the proposed process does not allow time for reply comments prior to scheduling a hearing or issuing and order. As such, FirstEnergy recommends that the rule include a modest 15-day time period for reply comments. (FirstEnergy App. for Rehearing at 4.)

{¶ 52} The Commission agrees with FirstEnergy and grants rehearing on this assignment of error. Accordingly, proposed Ohio Adm.Code 4901:1-39-05(D) has been updated to include a 15-day reply comment period.

{¶ 53} The Conservation Groups indicate that the current Ohio TRM is outdated and contains potentially unreasonable savings assumptions, which receive special status under R.C. 4928.662, to the extent the Commission designates the TRM as a safe harbor for providing verified savings for utilities. Consequently, the Conservation Groups state it is vital for the Commission to keep the TRM as up-to-date as possible. The Conservation Groups suggest adding language in proposed Ohio Adm.Code 4901:1-39-05 to provide a specific timeframe for considering or adopting suggestions made by the IPE or other parties to update the TRM. Furthermore, in order to ensure that proposed TRM updates are resolved in a timely manner and that utilities do not continue to rely on outdated savings assumptions in the interim, the Conservation Groups also suggest adding additional clarifying language to the rule. (Conservation Groups' App. for Rehearing at 19-21.)

{¶ 54} Similar to the Conservation Groups, FirstEnergy notes as its fourth assignment of error that proposed Ohio Adm.Code 4901:1-39-05 is unjust and unreasonable as it does not indicate an effective date for the updated TRM to be used in evaluating portfolio performance, thereby creating potential conflicts. Specifically, it states that while

the TRM may be automatically approved 30 days after filing, such approval could arrive too late to incorporate into the new September 1 annual plan filing or approval could come after plan filing and before plan performance is implemented or evaluated. FirstEnergy suggests that the rule provide that updates to the TRM become effective for use on January 1 following the approval of the updated TRM and only applicable for subsequently filed EE/PDR program portfolio plan filings. FirstEnergy clarifies that the same TRM that was used in support of FirstEnergy portfolio plan should also be used to evaluate plan performance. (FirstEnergy App. for Rehearing at 4-5.)

{¶ 55} Additionally, in response to the Conservation Groups' suggested clarifying language for proposed Ohio Adm.Code 4901:1-39-05, FirstEnergy contends that such language is unnecessarily duplicative, unreasonable, and would likely delay a utility's compliance efforts. Moreover, according to FirstEnergy, the Conservation Groups advocate delaying the outcome of such compliance efforts while any proposed TRM updates are being considered, which is inconsistent with the Commission's stated purpose for the TRM to provide utilities with predictability. (FirstEnergy Memorandum Contra at 4-5.)

{¶ 56} The Commission denies rehearing on these assignments of error. Proposed Ohio Adm.Code 4901:1-39-05(D) provides parties an opportunity to identify issues with the existing TRM when providing comments regarding the IPE's report due to the fact the IPE's report includes suggested revisions to the TRM. Furthermore, specific timeframes for filing comments and reply comments are provided in the proposed rule. Additionally, unless otherwise indicated by the Commission, changes to the TRM are automatically approved within 30 days pursuant to proposed Ohio Adm.Code 4901:1-39-05(F). Again, as we indicated above, we expect Commission Staff to periodically update the TRM, as needed. Consequently, the Commission finds that additional clarifying language is unnecessary in this rule.

*F. Ohio Adm.Code 4901:1-39-06*

**{¶ 57}** As their second assignment of error, AEP Ohio/DP&L claim the Commission's deletion of certain critical language in proposed Ohio Adm.Code 4901:1-39-06(A) is unreasonable. In support of their argument, they claim that shared savings is an incentive to operate highly cost-effective programs and to meet or exceed mandated requirements with the lowest cost and highest energy and demand savings possible, adding that the Commission's deletion of this critical language in the proposed rule risks undermining these principles. Specifically, the parties suggest the Commission include the following language which was previously deleted in the proposed rule: "Inclusion of any lost distribution revenue and shared savings in the proposed rate adjustment mechanism shall be consistent with prior Commission directives." (AEP Ohio/DP&L App. for Rehearing at 5-8.)

**{¶ 58}** Similarly, as its fifth assignment of error, FirstEnergy maintains that proposed Ohio Adm.Code 4901:1-39-06(A) unreasonably requires an EDU to demonstrate "how it proposes recovery and why" in each rate recovery mechanism filed contemporaneously with the annual portfolio plan filing. However, it states that the Commission has already determined how energy efficiency recovery should occur and approved energy efficiency recovery mechanisms that are in effect today. Consequently, FirstEnergy requests that the Commission grant rehearing to clarify that Commission-approved energy efficiency recovery mechanisms in effect will remain in place and that cost recovery mechanisms approved in other Commission proceedings need not be re-justified in an annual rate adjustment filing under this rule. (FirstEnergy App. for Rehearing at 5-6.)

**{¶ 59}** In response to FirstEnergy, OCC states that FirstEnergy appears to ask the Commission to include rules providing that if a cost-collection mechanism is approved once, it is automatically approved for all future periods. OCC requests the Commission reject this proposal because there should be no presumption that a past collection mechanism is just and reasonable for future plan periods. (OCC Memorandum Contra at 5.)

{¶ 60} IGS, in response to AEP Ohio/DP&L's concerns, states that the Commission inserted the new language regarding cost recovery associated with anything other than direct program implementation costs to alleviate concerns raised by stakeholders about shared savings and lost distribution revenues. Additionally, it claims that FirstEnergy mischaracterizes the scope of the new rule regarding cost recovery. According to IGS, the rule only requires "how it proposes recovery and why" regarding proposals to recover costs associated with anything that is not an EE/PDR program through an EE/PDR recovery mechanism, and an EDU can avoid this requirement by simply only collecting costs for the actual programs. Therefore, IGS recommends the Commission maintain the current language in the rule. (IGS Memorandum Contra at 2-3.)

{¶ 61} The Commission denies rehearing on these assignments of error and agrees with IGS's comments on this issue. The language in proposed Ohio Adm.Code 4901:1-39-06(A) allows utilities to recover for both direct program implementation costs and other costs, such as lost distribution revenues and shared savings, as long as the utility is able to demonstrate the reasonableness of such recovery. Consequently, the Commission declines to adopt additional language in this rule.

{¶ 62} As its first assignment of error, Duke reiterates that post-approval leaves the EDU in limbo and at risk for recovery of costs already incurred in ensuing year. Duke notes that one of the complications created by the proposed process is that the Commission has imposed caps on spending for each of the EDUs, which have a major impact on the size and cost of an EDU's portfolio as well as the EDU's ability to meet the legislated mandates. Duke states that the proposed rules do not address this change in portfolio planning and structure and urges the Commission to address parameters for dealing with caps under the circumstances. (Duke App. for Rehearing at 3-4.)

{¶ 63} The Commission declines to grant rehearing on this assignment of error posed by Duke. Cost caps, if imposed in the future, should be addressed on a case-by-case basis, depending upon the specific facts and circumstances of each case. Consequently, the

Commission declines to add any language regarding cost caps to Ohio Adm.Code 4901:1-39-06(A).

**{¶ 64}** In support of its application for rehearing, OCC argues that the 30-day response period in proposed Ohio Adm.Code 4901:1-39-06(B) is half of the current 60-day period, leaving virtually no opportunity for parties to review the utility's application, serve discovery, review discovery responses, and prepare comments. OCC further states that under the current rules, the Commission holds a hearing in each energy efficiency portfolio case. The new rules, according to OCC, require no hearing and the utility's proposed charges to consumers are automatically deemed reasonable and approved if the Commission takes no action within 30 days of parties' comments on the proposal. OCC points out that under Ohio law, whenever a public utility wishes to increase its rates, it must file an application with the Commission to accomplish the change, but those procedural requirements are not being adhered to in this case and the automatic approval of charges to consumers is unlawful. Further, R.C. 4905.22 requires all charges to customers to be just and reasonable, but under the new rules, according to OCC, a utility could propose unjust and unreasonable rates which would automatically go into effect without the Commission making a determination that such charges are just and reasonable. (OCC App. for Rehearing at 4-8.)

**{¶ 65}** FirstEnergy also takes issue with the proposed process in its sixth assignment of error, arguing that proposed Ohio Adm.Code 4901:1-39-06(B) is unfair, unjust, and unreasonable in that it does not provide an opportunity for it to file a reply to comments filed by other parties. FirstEnergy proposes that the rule provide a modest period of 15 days for reply comments on the proposed rate adjustment mechanism. If no comments are filed, the 15-day period is not triggered, and the mechanism is automatically deemed reasonable as the adopted rule provides. (FirstEnergy App. for Rehearing at 6.)

**{¶ 66}** In response to OCC, FirstEnergy asserts that OCC ignores the process established by the Commission for stakeholder input and potential hearings on the rate

adjustment mechanism reflected in proposed Ohio Adm.Code 4901:1-39-06. Moreover, FirstEnergy states that it and other parties have proposed the Commission's rule should specifically include language stating that justification for cost recovery beyond direct program costs be consistent with Commission directives in other proceedings, such as a Commission approved ESP, which provides for meaningful participation as well as administrative efficiency. Further, FirstEnergy proclaims that stakeholder participation will continue under the proposed rules, noting that many of the interested parties participating in this proceeding also participated in its most recent ESP case and routinely participate in its quarterly collaborative process meetings. As for OCC's conjecture that utilities with impunity could propose actions as part of their portfolio plans that violate Ohio laws, FirstEnergy submits that the Commission has well-established remedies if an EDU were to engage in such activities. (FirstEnergy Memorandum Contra at 7-8.)

**{¶ 67}** With regard to OCC's comments, the Commission notes that the rule mentions: "[a]ny revenue received under the electric utility's rate adjustment mechanism shall be subject to potential disallowance and reconciliation based on the commission's decision issue in the annual performance verification process in 4901:1-39-05, Ohio Administrative Code." We clarify that only the proposed mechanism takes effect after 30 days if the Commission takes no action. However, charges collected from consumers are subject to review by the Commission in the post-approval performance verification process. The Commission also agrees with FirstEnergy in that ample opportunity is provided for stakeholder input in both proposed Ohio Adm.Code 4901:1-39-05 and 4901:1-39-06. Additionally, a reply comment period has been incorporated in Ohio Adm.Code 4901:1-39-05(D) based on FirstEnergy's third assignment of error above and as such, an additional comment period prior to performance verification is not necessary. Consequently, the Commission denies these assignments of error.

**{¶ 68}** FirstEnergy, in its seventh and final assignment of error, also states that the Commission should declare that utility energy efficiency expenditures made in good faith

and consistent with the proposed portfolio plan will not be subject to disallowance prior to a final Commission order on the rate adjustment mechanism hearing process. In such instances, FirstEnergy believes that the utility should also be allowed a reasonable amount of time to curtail any program activities impacted by the order, during which time the utility shall continue to receive full recovery of all costs reasonably incurred. (FirstEnergy App. for Rehearing at 6-8.)

**{¶ 69}** With regard to FirstEnergy's seventh assignment of error, additional language declaring that expenditures will not be subject to disallowance prior to a final Commission order on the rate adjustment mechanism hearing process, the Commission finds that such language is unnecessary. The rate adjustment recovery mechanism proposed under Ohio Adm.Code 4901:1-39-06 is related to identifying appropriate categories of costs to be recovered and is unrelated to whether the EDU will prudently spend dollars on its EE/PDR programs. As indicated above, during the performance verification process outlined in Ohio Adm.Code 4901:1-39-05, the Commission will evaluate whether the EDU's decisions were prudent and will authorize it to recover costs accordingly. The Commission anticipates that collaborative process outlined in Ohio Adm.Code 4901:1-39-03(D) will assist an EDU in proposing a reasonable rate adjustment recovery mechanism when filing its program portfolio plan, which should minimize the need for extensive litigation. Therefore, the Commission declines to further amend proposed Ohio Adm.Code 4901:1-39-06(B) and declines rehearing on this assignment of error.

### *G. Ohio Adm.Code 4901:1-39-07*

**{¶ 70}** In its third assignment of error, Duke notes that the Commission, in its Finding and Order, indicates that the IPE, as well as the utility's evaluator must review its programs. According to Duke, it is unclear if the state's mercantile program is included as part of the EDU's responsibility for verification. Duke argues that this is another directive

that adds an additional burden on the EDU without providing any means of recovering costs. (Duke App. for Rehearing at 5-6.)

{¶ 71} The Commission denies rehearing on this assignment of error. It appears that Duke is referring to historical mercantile programs when it refers to the "state's mercantile program." We will, however, clarify that if a mercantile customer of Duke commits its energy savings to Duke, the Commission expects Duke to conduct its own due diligence regarding the energy efficiency to be committed.

### *H. Ohio Adm.Code 4901:1-40-05*

{¶ 72} As their sixth assignment of error, AEP Ohio/DP&L state that proposed Ohio Adm.Code 4901:1-40-05(A)(3)(h) unreasonably and unlawfully permits only electric services companies, and not electric utilities, to omit certain information from compliance status reports, which is contrary to R.C. 4928.64(C)(3). Accordingly, the parties request the Commission to grant rehearing, modify Ohio Adm.Code 4901:1-40-05(A)(3)(h), and insert "electric utility" along with "electric service company" in the opening clause of the rule. (AEP Ohio/DP&L App. for Rehearing at 15.)

{¶ 73} The Commission denies rehearing on this issue. EDUs are guaranteed recovery from ratepayers of costs incurred in complying with the requirements of R.C. 4928.64. However, competitive retail electric services providers are not guaranteed such recovery and bear the risk of non-recovery. Therefore, we deny rehearing on this issue.

### *I. Ohio Adm.Code 4901:1-40-07*

{¶ 74} AEP Ohio/DP&L, as their seventh assignment of error, allege that proposed Ohio Adm.Code 4901:1-40-07(B)'s maximum recoverable compliance funds unreasonably and unlawfully imposes a limitation on compliance cost calculation that is not contained in or contemplated by R.C. 4928.64(C)(3) and (4) and effectively eliminates an EDU's ability to seek a force majeure finding under R.C. 4928.64(C)(4). According to AEP Ohio/DP&L, this

new rule effectively requires the utility not to seek recovery of compliance costs that exceed the three percent cap. (AEP Ohio/DP&L App. for Rehearing at 14-16.)

{¶ 75} In response, OCC argues that new cost cap rules are consistent with the statute, which provides that a utility "need not comply" with the renewable energy mandates if the cost would exceed this three percent limitation (OCC Memorandum Contra 4-5).

{¶ 76} The Commission grants rehearing on this assignment of error. Based on AEP Ohio/DP&L's comments, the Commission has revised the language in Ohio Adm.Code 4901:1-40-07 to ensure that there is no arbitrary limitation regarding the compliance cost calculation that is not contemplated by R.C. 4928.64(C)(3) and (4). Further, minor changes have also been made in proposed Ohio Adm.Code 4901:1-40-05 and 4901:1-40-08 to align the Commission's decision to eliminate the limitation on the cost cap calculation in Ohio Adm.Code 4901:1-40-07, consistent with R.C. 4928.64.

{¶ 77} In their eighth, and final assignment of error, AEP Ohio/DP&L state that the newly adopted rules do not acknowledge R.C. 4928.641(A), which confirms that cost recovery for renewable energy resource contracts executed before April 1, 2014 shall continue on a bypassable basis until the prudently incurred costs associated with such contracts are fully recovered (AEP Ohio/DP&L App. for Rehearing at 14-16). The Commission denies rehearing on this assignment of error as we have revised the language of Ohio Adm.Code 4901:1-40-07 to eliminate any arbitrary limitations on recovery.

## III. ORDER

{¶ 78} It is, therefore,

{¶ 79} ORDERED, That the applications for rehearing filed by Ohio Power Company and the Dayton Power & Light Company; Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company; Duke Energy Ohio, Inc.;

and Environmental Law & Policy Center, Environmental Defense Fund, Natural Resources Defense Council, and the Ohio Environmental Council are granted, in part. It is, further,

**{¶ 80}** ORDERED, That the applications for rehearing filed by Interstate Gas Supply, Inc. and the Ohio Consumers' Counsel are denied. It is, further,

**{¶ 81}** ORDERED, That a copy of this Second Entry on Rehearing be served upon all commenters and parties of record in this matter.

THE PUBLIC UTILITIES COMMISSION OF OHIO

M. Beth Trombold, Chair

Thomas W. Johnson

Lawrence K. Friedeman

Daniel R. Conway

Dennis P. Deters

AS/mef

Entered in the Journal

APR 10 2013

Tanowa M. Troupe
Secretary

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# "Rescind"

~~4901:1-39-01 Definitions.~~

~~(A) "Achievable potential" means the reduction in energy usage or peak demand that would likely result from the expected adoption by homes and businesses of the most efficient, cost-effective measures, given effective program design, taking into account remaining barriers to customer adoption of those measures. Barriers may include market, financial, political, regulatory, or attitudinal barriers, or the lack of commercially available product. "Achievable potential" is a subset of "economic potential."~~

~~(B) "Anticipated savings" means the reduction in energy usage or peak demand that will accrue from contractual commitments for program participation made in the reporting period, which measures in such programs are scheduled for installation in the subsequent reporting periods.~~

~~(C) "Capital stock" means all devices, equipment, and processes that use or convert energy.~~

~~(D) "Coincident peak-demand savings" means the demand savings for energy efficiency measures that are expected to occur during the summer on-peak period which is defined as June through August on weekdays between three p.m. and six p.m.~~

~~(E) "Commission" means the public utilities commission of Ohio.~~

~~(F) "Cost effective" means the measure, program, or portfolio being evaluated that satisfies the total resource cost test.~~

~~(G) "Demand response" means a change in customer behavior or a change in customer-owned or operated assets that affects the demand for electricity as a result of price signals or other incentives.~~

~~(H) "Economic potential" means the reduction in energy usage or peak demand that would result if all homes and businesses adopted the most efficient and cost-effective measures. Economic potential is a subset of the "technical potential."~~

~~(I) "Electric utility" has the meaning set forth in division (A)(11) of section 4928.01 of the Revised Code.~~

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~~(J) "Energy baseline" means the average total kilowatt-hours of distribution service sold to retail customers of the electric utility in the preceding three calendar years as reported in the electric utility's most recent long-term forecast report, pursuant to division (A)(2)(a) of section 4928.66 of the Revised Code. The total kilowatt-hours sold shall equal the total kilowatt-hours delivered by the electric utility.~~

~~(K) "Energy benchmark" means the annual level of energy savings that an electric utility must achieve as provided in division (A)(1)(a) of section 4928.66 of the Revised Code.~~

~~(L) "Energy efficiency" means reducing the consumption of energy while maintaining or improving the end-use customer's existing level of functionality, or while maintaining or improving the utility system functionality.~~

~~(M) "Independent program evaluator" means the person(s) hired by one or more of the electric utilities, at the direction of the commission, to complete the following activities:~~

~~(1) Monitor, verify, evaluate, and report on the electric energy savings and peak-demand reductions resulting from utility program and mercantile customer activities.~~

~~(2) Determine program and portfolio cost-effectiveness.~~

~~(3) Conduct program process evaluations.~~

~~(4) Perform due diligence reviews of evaluations or documentation provided by an electric utility or mercantile customer, as directed by the commission.~~

~~Such person shall work at the sole direction of the commission.~~

~~(N) "Market transformation" means a lasting structural or behavioral change in the marketplace that increases customer adoption of energy efficiency or peak reduction measures that will be sustained after any program promoting such behavior ceases.~~

~~(O) "Measure" means any material, device, technology, operational practice, or educational program that makes it possible to deliver a comparable level and quality of end-use energy service while using less energy or less capacity than would otherwise be required.~~

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~~(P) "Mercantile customer" has the meaning set forth in division (A)(19) of section 4928.01 of the Revised Code.~~

~~(Q) "Nonenergy benefits" mean societal benefits that do not affect the calculation of program cost-effectiveness pursuant to the total resource cost test including but not limited to benefits of low-income customer participation in utility programs; reductions in greenhouse gas emissions, regulated air emissions, water consumption, natural resource depletion to the extent the benefit of such reductions are not fully reflected in cost savings; enhanced system reliability; or advancement of any other state policy enumerated in section 4928.02 of the Revised Code.~~

~~(R) "Peak demand," when measuring reduction programs, means the average maximum hourly electricity usage during the highest one hundred hours on the electric utility's system in a calendar year.~~

~~(S) "Peak demand baseline" means the average peak demand on the electric utility's system in the preceding three calendar years as reported in the electric utility's most recent long-term forecast report, pursuant to division (A)(2)(a) of section 4928.66 of the Revised Code.~~

~~(T) "Peak demand benchmark" means the reduction in peak demand an electric utility's system must achieve as provided in division (A)(1)(b) of section 4928.66 of the Revised Code.~~

~~(U) "Person" shall have the meaning set forth in division (A)(24) of section 4928.01 of the Revised Code.~~

~~(V) "Program" means a single offering of one or more measures provided to consumers. For example, a weatherization program may include insulation replacement, weather stripping, and window replacement measures.~~

~~(W) "Staff" means the staff or authorized representative of the public utilities commission.~~

~~(X) "Technical potential" means the reduction in energy usage or peak demand that would result if all homes and businesses adopted the most efficient measures, regardless of cost.~~

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~~(Y) "Total resource cost test" means an analysis to determine if, for an investment in energy efficiency or peak-demand reduction measure or program, on a life-cycle basis, the present value of the avoided supply costs for the periods of load reduction, valued at marginal cost, are greater than the present value of the monetary costs of the demand-side measure or program borne by both the electric utility and the participants, plus the increase in supply costs for any periods of increased load resulting directly from the measure or program adoption. Supply costs are those costs of supplying energy and/or capacity that are avoided by the investment, including generation, transmission, and distribution to customers. Demand-side measure or program costs include, but are not limited to, the costs for equipment, installation, operation and maintenance, removal of replaced equipment, and program administration, net of any residual benefits and avoided expenses such as the comparable costs for devices that would otherwise have been installed, the salvage value of removed equipment, and any tax credits.~~

~~(Z) "Verified savings" means an annual reduction of energy usage or peak demand from an energy efficiency or peak-demand reduction program directly measured or calculated using reasonable statistical and/or engineering methods consistent with approved measurement and verification guidelines.~~

## "New"

**4901:1-39-01 Definitions.**

(A) "Achievable potential" means the reduction in energy usage or peak demand that would result from the expected adoption by electricity consumers of the most efficient and cost-effective commercially available energy efficiency measures, taking into account applicable societal and market-related barriers to customer adoption of those measures. Achievable potential is a subset of "economic potential."

(B) "Annualized energy savings" means the recognition, in the year of installation or implementation, of the total amount of energy savings that would be achieved in a full year of service, regardless of the actual date of installation or implementation.

(C) "Anticipated savings" means the reduction in energy usage or peak demand that is expected to accrue from program participation.

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(D) "Benchmark comparison method" means the comparison of customer's energy efficiency savings percentage to the electric utility's statutorily required energy efficiency savings percentage, for the purpose of determining the length of the rider exemption that the customer may receive for dedication of its energy efficiency savings to the electric utility.

(E) "Coincident peak-demand savings" means the demand savings resulting from energy efficiency measures that occur during the summer on-peak period which is defined as June through August on weekdays between ~~3~~2:00 p.m. and 6:00 p.m.

(F) "Combined Heat and Power System" means the coproduction of electricity and useful thermal energy from the same fuel source designed to achieve thermal-efficiency levels of at least sixty per cent, with at least twenty per cent of the system's total useful energy in the form of thermal energy.

(G) "Commission" means the public utilities commission of Ohio.

(H) "Cost-effective" means that the measure, program, or portfolio being evaluated satisfies the total resource cost test or utility cost test, as applicable.

(I) "Demand response" means a change or potential change in customer behavior or a change in customer-owned or operated equipment that reduces the demand for electricity during specified time periods as a result of price signals or other incentives.

(J) "Economic potential" means the reduction in energy usage or peak demand that would result if all electricity consumers adopted the most efficient, cost-effective commercially available energy efficiency measures. Economic potential is a subset of technical potential.

(K) "Electric utility" has the meaning set forth in division (A)(11) of section 4928.01 of the Revised Code.

(L) "Energy baseline" means the annual average total kilowatt-hours of distribution service sold to retail customers of the electric utility in the preceding three calendar years as reported in the electric utility's most recent long-term forecast report, pursuant to division (A)(2)(a) of section 4928.66 of the Revised Code.

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(M) "Energy benchmark" means the annual level of energy savings that an electric utility must achieve as provided in division (A)(1)(a) of section 4928.66 of the Revised Code.

(N) "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.

(O) "Gross savings" means the energy and demand savings that result from program activities without regard to the reasons behind the decision to participate in those programs.

(OP) "Independent program evaluator" means the person(s) chosen by the commission, to monitor, verify, evaluate and report on one or more of the following activities:

(1) Electric energy savings and peak-demand reductions resulting from electric utility energy efficiency and peak demand reduction programs, as reported in the electric utility's annual performance verification process, pursuant to rule 4901:1-39-05, of the Administrative Code.

(2) Electric utility energy efficiency portfolio plan design and implementation, including evaluation of the plan's programs, measures, and cost effectiveness, and make recommendations for improvement.

(3) Recommend updates to the technical reference manual, as necessary, pursuant to changes in regulations, equipment availability, and market conditions.

(4) Appropriateness and reasonableness of all costs included in any riders designed to recover the costs of energy efficiency portfolio plan implementation from ratepayers.

(5) Perform other due-diligence reviews of evaluations and/or documentation provided by an electric utility or mercantile customer, as directed by the commission or its staff.

Such person shall work at the sole direction of the commission. If a person other than staff is chosen by the commission as an independent program evaluator, that

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person shall contract with the electric utility for payment for the work activities, and work at the direction of the commission or its staff.

(PQ)"Measure" means any material, device, technology, operational practice, or educational program that makes it possible to deliver a comparable level and quality of end-use electrical energy service while using less electrical energy or capacity than would otherwise be required.

(QR) "Mercantile customer" means a commercial or industrial customer if the electricity consumed is for nonresidential use and the customer consumes more than seven hundred thousand kilowatt hours per year or is part of a national account involving multiple facilities in one or more states, as set forth in division (A)(19) of section 4928.01 of the Revised Code.

(RS) "Non-energy benefits" mean positive non-monetized impacts that do not affect the calculation of program cost-effectiveness pursuant to the total resource cost test including but not limited to low-income customer participation in utility programs, reductions in greenhouse gas emissions, reductions in regulated air emissions, reductions in natural resource depletion, enhanced system reliability, or advancement of state policy as itemized in section 4928.02 of the Revised Code.

(ST) "Peak demand," when measuring reduction programs, means the average maximum hourly electricity usage during the highest one hundred hours on the electric utility's system in a calendar year.

(TU)"Peak-demand baseline" means the annual average of peak demand on the electric utility's system in the preceding three calendar years as reported in the electric utility's most recent long-term forecast report, pursuant to division (A)(2)(a) of section 4928.66 of the Revised Code.

(UV)"Peak-demand benchmark" means the reduction in peak demand an electric utility's system must achieve, or have the capability to achieve, as provided in division (A)(1)(b) of section 4928.66 of the Revised Code.

(VW)"Person" shall have the meaning set forth in division (A)(24) of section 4928.01 of the Revised Code.

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(~~W~~X) "Program" means a single offering that includes one or more measures provided to electricity consumers. ~~For example, a weatherization program may include insulation replacement, weather stripping, and window replacement measures.~~

(~~X~~Y) "Shared savings" means the percentage of the net savings that a distribution electric utility may earn in any year in which it exceeds a statutory energy efficiency and/or peak demand reduction benchmark. The net savings is the difference in the present value of the EDU's portfolio of avoided generation, transmission and distribution costs minus the total costs of the energy efficiency programs inclusive of each program's measurement and verification costs. The net savings do not include banked savings or any savings related to historical mercantile programs, transmission and distribution infrastructure projects, customer action programs, and special improvement districts as defined in section 1710.01, Revised Code~~, and banked savings~~.

(~~Y~~Z) "Staff" means the public utilities commission's staff or authorized representative.

(~~Z~~AA) "Technical potential" means the reduction in energy usage or peak demand that would result if all electricity consumers adopted the most efficient commercially available energy efficiency measures.

(~~AA~~BB) "Total resource cost test" means an ex-ante analysis to determine if, for an investment in energy efficiency or peak-demand reduction measure or program, on a life-cycle basis, the present value of the avoided supply costs for the periods of load reduction, valued at marginal cost, are greater than the present value of the monetary costs of the demand-side measure or program borne by both the electric utility and the participants, plus the increase in supply costs for any periods of increased load resulting directly from the measure or program adoption. Supply costs are those costs of supplying energy and/or capacity that are avoided by the investment, including generation, transmission, and distribution to customers. Demand-side measure or program costs include, but are not limited to, the costs for equipment, installation, operation and maintenance, removal of replaced equipment, and program administration, net of any residual benefits and avoided expenses such as the comparable costs for devices that would otherwise have been installed, and the salvage value of removed equipment.

(CC) "Useful thermal energy" means the thermal energy output of a CHP system that is recovered for use by the facility.

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(DD) "Utility cost test" means a benefit-cost test where benefits are avoided utility costs resulting from the demand-side management program, and costs are those incurred by the EDU, including incentive costs and excluding any direct customer costs. The utility cost test is also known as the program administrator cost test.

(BBEE) "Verified savings" means an annual reduction of energy usage or peak demand from an energy efficiency or peak-demand reduction program directly measured or calculated using methods found in the Ohio technical reference manual or other reasonable statistical and/or engineering, as approved by the commission ~~methods consistent with approved measurement and verification guidelines.~~

(CCFF) "Waste Energy Recovery System" shall have the same meaning as set forth in division (A)(38) of section 4928.01 of the Revised Code.

# "Rescind"

~~4901:1-39-02 Purpose and scope.~~

~~(A) Pursuant to division (A)(1)(a) of section 4928.66 of the Revised Code, beginning in 2009, each electric utility is required to implement energy efficiency programs. Such programs, at a minimum, shall achieve established statutory benchmarks for energy efficiency. Additionally, pursuant to division (A)(1)(b) of section 4928.66 of the Revised Code, beginning in 2009, each electric utility is required to implement peak-demand reduction programs designed to achieve established statutory benchmarks for peak-demand reduction. The purpose of this chapter is to establish rules for the implementation of electric utility programs that will encourage innovation and market access for cost effective energy efficiency and peak-demand reduction, achieve the statutory benchmark for peak-demand reduction, meet or exceed the statutory benchmark for energy efficiency, and provide for the participation of stakeholders in developing energy efficiency and peak-demand reduction programs for the benefit of the state of Ohio.~~

~~(B) The commission may, 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.~~

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## "New"

**4901:1-39-02 Purpose and scope.**

(A) Pursuant to division (A)(1)(a) of section 4928.66 of the Revised Code, each electric utility is required to implement energy efficiency programs. Such programs, at a minimum, shall achieve established statutory energy benchmarks for energy efficiency and peak demand reduction, and may include a combined heat and power system placed into service or retrofitted on or after September 10, 2012, or a waste energy recovery system placed into service or retrofitted on or after the same date, except that a waste energy recovery system described in division (A)(38)(b) of section 4928.01 of the Revised Code may be included only if it was placed into service between January 1, 2002, and December 31, 2004. The purpose of this chapter is to establish rules for the implementation of electric utility energy efficiency and peak-demand reduction programs.

(B) The 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.

## "Amend"

**4901:1-39-03 Program planning requirements.**

(A) Assessment of potential. Unless otherwise ordered by the commission, Prior to ~~implementing an proposing its comprehensive energy efficiency and peak demand~~ reduction program portfolio plan, and at least once every five years thereafter, an electric utility shall conduct an assessment of potential energy savings and peak-demand reduction from adoption of energy efficiency and demand-response measures within its certified territory~~, which will be included in the electric utility's program portfolio filing pursuant to rule 4901:1-39-04 of the Administrative Code~~. Such assessment may be updated by the electric utility from time to time, at less than five year intervals, as market conditions warrant. An electric utility may collaborate with other electric utilities to co-fund or conduct such an assessment on a broader geographic basis than its certified territory. However, such an assessment must also

disaggregate results on the basis of each electric utility's certified territory. Such assessment shall include, but not be limited to, the following:

(1) Analysis of technical potential. ~~Each electric utility shall survey and characterize the energy using capital stock located within its certified territory and quantify its actual and projected energy use and peak demand.~~ Based upon ~~the~~ a survey and characterization of electricity-consuming facilities within its certified territory, the electric utility shall conduct an analysis of the technical potential for energy efficiency and peak-demand reduction obtainable from applying commercially available ~~alternate~~ measures.

(2) Analysis of economic potential. For each available ~~alternate~~ measure identified in its assessment of technical potential, the electric utility shall conduct an assessment of cost-effectiveness using either the total resource cost test or the utility cost test, whichever is applicable.

(3) Analysis of achievable potential. For each available ~~alternate~~ measure identified in its analysis of economic potential as cost-effective, the electric utility shall conduct an analysis of achievable potential. Such analysis shall consider the ability of the program design to overcome barriers to customer adoption, including, but not limited to, appropriate bundling of measures.

(4) For each measure considered, the electric utility shall describe all attributes relevant to assessing its value, including, but not limited to potential energy savings or peak-demand reduction, cost, and nonenergy benefits.

(B) Program portfolio plan design criteria. When developing programs for inclusion in its program portfolio plan, an electric utility shall consider the following criteria:

(1) Relative cost-effectiveness.

(2) Benefits and costs to all members of a customer class, including nonparticipants.

(3) Potential for broad participation within the targeted customer class.

(4) ~~Likely~~ Projected magnitude of aggregate energy savings or peak-demand reduction.

(5) Nonenergy benefits.

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(6) Equity among customer classes.

(7) ~~Relative advantages or disadvantages of energy efficiency and peak demand reduction programs for~~ Anticipated impacts on the construction of new facilities, or the replacement ~~of retiring capital stock, or~~ retrofitting of existing facilities~~capital stock~~.

(8) Potential to partner ~~integrate~~ the proposed program with similar programs offered by other utilities, ~~if such integration produces the most~~ in a cost-effective ~~result and is in the public interest~~manner.

(9) ~~The degree to which a program~~ Potential to bundle ~~bundles~~ measures so as to avoid lost opportunities to attain energy savings or peak reductions that would not be cost-effective or would be less cost-effective if installed individually.

(10) ~~The degree to which the program design~~ Potential to engage ~~engages~~ the energy efficiency supply chain and leverages partners in program delivery.

(11) ~~The degree to which the program~~ Potential to successfully ~~addresses~~ address market barriers or market failures.

(12) ~~The degree to which the program leverages~~ Potential to leverage knowledge gained from existing program successes and failures.

~~(13) The degree to which the program promotes market transformation.~~

(13) Opt-out customers, which are customers, as defined in R.C. 4928.6610, which have chosen not to participate in an electric utility's energy efficiency and peak demand reduction portfolio plan.

(C) Promising measures not selected. Each electric utility shall identify measures considered but ~~not~~ found not to be cost-effective or achievable but show promise for future deployment. The electric utility shall identify potential actions that it could undertake to improve the measure's technical potential, economic potential, and achievable potential to enhance the likelihood that the measure would become cost-effective and reasonably achievable.

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(D) The electric utility may seek to collaborate or consult with other utilities, regional and municipal governmental organizations, nonprofit organizations, businesses, and other stakeholders to develop programs meeting the requirements of this chapter.

## "Rescind"

~~**4901:1-39-04 Program portfolio plan and filing requirements.**~~

~~(A) Each electric utility shall design and propose a comprehensive energy efficiency and peak-demand reduction program portfolio, including a range of programs that encourage innovation and market access for cost-effective energy efficiency and peak-demand reduction for all customer classes, which will achieve the statutory benchmarks for peak-demand reduction, and meet or exceed the statutory benchmarks for energy efficiency. An electric utility's first program portfolio plan filed pursuant to this rule, shall be filed with supporting testimony prior to January 1, 2010. Each electric utility shall file an updated program portfolio plan by April 15, 2013, and by the fifteenth of April every third year thereafter, unless otherwise directed by the commission.~~

~~(B) Each electric utility shall demonstrate that its program portfolio plan is cost-effective on a portfolio basis. In general, each program proposed within a program portfolio plan must also be cost-effective, although each measure within a program need not be cost-effective. However, an electric utility may include a program within its program portfolio plan that is not cost-effective when that program provides substantial nonenergy benefits.~~

~~(C) Content of filing. An electric utility's program portfolio plan shall include, but not be limited to, the following:~~

~~(1) An executive summary and its assessment of potential pursuant to paragraph (A) of rule 4901:1-39-03 of the Administrative Code.~~

~~(2) A description of stakeholder participation in program planning efforts and program portfolio development.~~

~~(3) A description of attempts to align and coordinate programs with other public utilities' programs.~~

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~~(4) A description of existing programs. The electric utility shall provide a summary of existing programs with a recommendation for whether the program should continue and, if so, a description of its relationship to any proposed programs. If a program has previously been approved and is unchanged, the electric utility may reference the program description currently in effect. If the electric utility is proposing to modify an existing program, the electric utility shall provide a description of the proposed modification and the basis for proposed changes.~~

~~(5) A description of proposed programs. An electric utility shall describe each program proposed to be included within its program portfolio plan with at least the following information:~~

~~(a) A narrative describing why the program is recommended pursuant to the program design criteria in this chapter.~~

~~(b) Program objectives, including projections and basis for calculating energy savings and/or peak demand reduction resulting from the program.~~

~~(c) The targeted customer sector.~~

~~(d) The proposed duration of the program.~~

~~(e) An estimate of the level of program participation.~~

~~(f) Program participation requirements, if any.~~

~~(g) A description of the marketing approach to be employed, including rebates or incentives offered through each program, and how it is expected to influence consumer choice or behavior.~~

~~(h) A description of the program implementation approach to be employed.~~

~~(i) A program budget with projected expenditures, identifying program costs to be borne by the electric utility and collected from its customers, with customer class allocation, if appropriate.~~

~~(j) Participant costs, if any.~~

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~~(k) Proposed market transformation activities, if any, which have been identified and proposed to be included in the program portfolio plan.~~

~~(l) A description of the plan for preparing reports that document the electric utility's evaluation, measurement, and verification of the energy savings and/or peak-demand reduction resulting from each program and the process evaluations conducted by the electric utility. The independent program evaluator will prepare an independent evaluation, measurement, and verification plan at the direction of the commission staff to monitor, verify, evaluate and report on the energy savings and peak-demand reductions resulting from utility programs and mercantile customer activities. The independent program evaluator's plan may rely on data collected and reported by the electric utility.~~

~~(D) Unless otherwise ordered by the commission, any person may file objections within sixty days after the filing of an electric utility's program portfolio plan. Any person filing objections shall specify the basis for all objections, including any proposed additional or alternative programs, or modifications to the electric utility's proposed program portfolio plan.~~

~~(E) The commission shall set the matter for hearing and shall cause notice of the hearing to be published one time in a newspaper of general circulation in each county in the electric utility's certified territory. At such hearing, the electric utility shall have the burden to prove that the proposed program portfolio plan is consistent with the policy of the state of Ohio as set forth in section 4928.02 of the Revised Code, and meets the requirements of section 4928.66 of the Revised Code.~~

# "New"

**4901:1-39-04 Program portfolio plan and filing requirements.**

(A) Upon the expiration of any existing commission-approved program portfolio plans, each electric utility shall continue to implement a comprehensive energy efficiency and peak-demand reduction program portfolio, which was developed pursuant to the requirements of rule 4901:1-39-03, of the Administrative Code, and which will cost-effectively achieve the statutory benchmarks for energy efficiency and peak-demand

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reduction. No later than September 15 in the last year of an existing commission approved portfolio plan, and no later than September 15 each year thereafter, each electric utility shall file an updated program portfolio plan to be implemented in the following calendar year, unless otherwise directed by the commission.

(B) ~~An~~Each electric utility's shall demonstrate that its program portfolio plan ~~is~~shall be cost-effective on a portfolio basis, based on the total resource cost test. In general, each program proposed within a program portfolio plan must also be cost-effective, although each measure within a program need not be cost-effective. However, an electric utility may include a program within its program portfolio plan that is not cost-effective pursuant to the total resource cost test when that program provides substantial non-energy benefits or the electric utility can demonstrate that an alternative cost test is more appropriate.

(C) Content of filing. An electric utility's program portfolio plan shall include, but not be limited to, the following:

(1) An executive summary and its assessment of potential pursuant to paragraph (A) of rule 4901:1-39-03 of the Administrative Code.

(2) A description of stakeholder participation in program planning efforts and program portfolio development. At a minimum, each electric utility shall conduct quarterly stakeholder meetings ~~at which it~~ At these meetings, the electric utility shall provide updates on the energy efficiency and peak demand- reductions achieved by its programs, all costs incurred in implementation of its programs, and information about new programs or measures that it is considering. ~~and~~ Additionally, the electric utility shall solicit input from stakeholders on existing and potential new programs.

(3) A description of attempts to align and coordinate programs with other public utilities' programs.

(4) An analysis of existing programs. The electric utility shall provide a description of each existing program, and measures within the program, including an analysis of the success of the program and the electric utility's rationale for continuing, modifying, or eliminating the program or measures within the program.

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(5) A description of programs included in the portfolio plan. An electric utility shall describe each program included within its program portfolio plan with at least the following information:

(a) A narrative describing why the program is being included pursuant to the program design criteria in this chapter. For existing programs being retained from the prior portfolio plan, a reference to the analysis described in paragraph (C)(4) of this rule is sufficient

(b) Program objectives, including projections and basis for calculating energy savings and/or peak-demand reduction resulting from the program.

(c) The targeted customer sector.

(d) The proposed duration of the program.

(e) An estimate of the level of program participation.

(f) Program participation requirements, if any.

(g) A description of the marketing approach to be employed, including whether the electric utility intends to make use of rebates or incentives offered through each program, and how it is expected to influence consumer choice or behavior.

(h) A description of the program implementation approach to be employed.

(i) A program budget with projected expenditures, identifying program costs to be borne by the electric utility and collected from its customers, with customer class allocation, when costs will be shared among customer classesif appropriate.

(j) Participant costs, if any.

(k) A description of the plan for preparing reports that document the electric utility's evaluation, measurement, and verification of the energy savings and/or peak-demand reduction resulting from each program and the process evaluations conducted by the electric utility.

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(D) An electric utility, as part of its filing, may request to adjust its sales and/or demand baseline. In making such an adjustment, the baseline shall be normalized for weather and for changes in numbers of customers, sales, and peak demand to the extent such changes are outside the control of the electric utility. The electric utility shall include in its application all assumptions, rationales, and calculations, and shall propose methodologies and practices to be used in any proposed adjustments or normalizations. To the extent approved by the commission, normalizations for weather, changes in numbers of customers, sales, and peak demand shall be consistently applied from year to year. The electric utility shall modify its baseline, on a going forward basis, to exclude load and usage characteristics of all opt-out customers and the customers in its certified distribution territory with a reasonable arrangement authorized by the commission pursuant to section 4905.31 of the Revised Code.

~~Unless otherwise ordered by the commission, any person may file comments within thirty days after the filing of an electric utility's program portfolio plan. Any person filing comments shall specify the basis for all recommendations made, including any proposed additional or alternative programs or measures, or modifications that are suggested to be made to the electric utility's proposed program portfolio plan.~~

~~(E) Within thirty days after the deadline for filing comments pursuant to paragraph (D) of this rule, the electric utility shall file its response, in which it shall indicate which recommendations it has accepted for inclusion into its program portfolio plan.~~

# "Rescind"

~~**4901:1-39-05 Benchmark and annual status reports.**~~

~~(A) Initial benchmark report. Within sixty days of the effective date of this rule, each electric utility shall file an initial benchmark report with the commission that identifies the following information:~~

~~(1) The energy and demand baselines for kilowatt-hour sales and kilowatt demand for the reporting year; including a description of the method of calculating the baseline, with supporting data.~~

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~~(2) The applicable statutory benchmarks for energy savings and electric utility peak-demand reduction.~~

~~(B) An electric utility may file an application to adjust its sales and/or demand baseline. The baseline shall be normalized for weather and for changes in numbers of customers, sales, and peak demand to the extent such changes are outside the control of the electric utility. The electric utility shall include in its application all assumptions, rationales, and calculations, and shall propose methodologies and practices to be used in any proposed adjustments or normalizations. To the extent approved by the commission, normalizations for weather, changes in numbers of customers, sales, and peak demand shall be consistently applied from year to year.~~

~~(C) Portfolio status report. By March fifteenth of each year, each electric utility shall file a portfolio status report addressing the performance of all approved energy efficiency and peak-demand reduction programs in its program portfolio plan over the previous calendar year which includes, at a minimum, the following information:~~

~~(1) Compliance demonstration. Each electric utility shall include a section in its portfolio status report detailing its achieved energy savings, achieved demand reductions, and the expected demand reductions that its programs were reasonably designed to achieve, relative to its corresponding baselines. At a minimum, this section of the portfolio status report shall include each of the following:~~

~~(a) An update to its benchmark report.~~

~~(b) A comparison with the applicable benchmark of actual energy savings and peak-demand reductions achieved by electric utility programs.~~

~~(c) An affidavit as to whether the reported performance complies with the statutory benchmarks.~~

~~(2) Program performance assessment. Each electric utility shall include a section in its portfolio status report demonstrating whether it has successfully implemented the energy efficiency and demand reduction programs approved in its program portfolio plan. At a minimum, this section of the annual portfolio status report shall include each of the following:~~

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~~(a) A description of each approved energy efficiency or peak-demand reduction program implemented in the previous calendar year including:~~

~~(i) The key activities undertaken in each program, the number and type of participants, a comparison of the forecasted savings to the verified savings achieved by such program, the magnitude of anticipated savings, and a trend analysis of how anticipated savings will be realized over the life of the program.~~

~~(ii) All energy savings counted toward the applicable benchmark as a result of energy efficiency improvements implemented by mercantile customers and committed to the electric utility.~~

~~(iii) All peak-demand reductions counted toward the applicable benchmark as a result of energy efficiency improvements, demand response, or demand reduction improvements implemented by mercantile customers and committed to the electric utility.~~

~~(iv) A description of all transmission and distribution infrastructure improvements made by the electric utility that reduce line losses to the extent the reduction in line losses has been applied to meet the applicable benchmarks with a calculation and description of the net impact of such improvements on losses.~~

~~(b) An evaluation, measurement, and verification report that documents the energy savings and peak-demand reduction values and the cost-effectiveness of each energy efficiency and demand-side management program reported in the electric utility's portfolio status report. Such report shall include documentation of any process evaluations and expenditures, measured and verified savings, and cost-effectiveness of each program. Measurement and verification processes shall confirm that the measures were actually installed, the installation meets reasonable quality standards, and the measures are operating correctly and are expected to generate the predicted savings. Upon commission order, the staff may publish guidelines for program measurement and verification.~~

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~~(c) A recommendation for whether each program should be continued, modified, or eliminated. The electric utility may propose alternative programs to replace eliminated programs, taking into account the overall balance of programming in its program portfolio plan. The electric utility shall describe any alternate program or program modification by providing at least the information required for proposed programs in its program portfolio plan pursuant to this chapter. An electric utility may seek written staff approval to reallocate funds between programs serving the same customer class at any time, provided that the reallocation supports the goals of its approved program portfolio plan and is limited to no more than twenty five per cent of the funds available for programs serving that customer class. In addition, an electric utility may change its program mix or budget allocations at any time, as long as it provides notice to all parties in the proceeding in which the program portfolio plan was approved.~~

~~(D) Independent program evaluator report. Subsequent to the filing of the electric utility's portfolio status report, the independent program evaluator will prepare and file a report of the independent program evaluator's activities and conclusions in monitoring, verifying, and evaluating the energy savings and peak demand reductions resulting from the electric utility programs and mercantile customer activities. The report shall also include the verification and evaluation, through the use of due diligence techniques including project inspections, of the electric utility's evaluation, measurement, and verification report.~~

~~(E) An electric utility may satisfy its peak demand reduction benchmarks through a combination of energy efficiency and peak demand response programs implemented by electric utilities and/or programs implemented on mercantile customer sites where the mercantile program is committed to the electric utility.~~

~~(1) For energy efficiency programs, an electric utility may count the programs' effects resulting in coincident peak demand savings.~~

~~(2) For demand response programs, an electric utility may count demand reductions towards satisfying some or all of the peak demand reduction benchmarks by demonstrating that either the electric utility has reduced its actual peak demand, or has the capability to reduce its peak demand and such capability is created under either of the following circumstances:~~

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(a) A peak-demand reduction program meets the requirements to be counted as a capacity resource under the tariff of a regional transmission organization approved by the Federal Energy Regulatory Commission.

(b) A peak-demand reduction program equivalent to a regional transmission organization program, which has been approved by this commission.

(F) A mercantile customer's energy savings and peak-demand reductions shall be measured by including the effects of all demand-response programs of the mercantile customer and all mercantile customer-sited energy efficiency and peak-demand reduction programs. A mercantile customer's energy savings and peak-demand reductions shall be presumed to be the effect of a demand response, energy efficiency, or peak-demand reduction program to the extent they involve the early retirement of fully functioning equipment, or the installation of new equipment that achieves reductions in energy use and peak demand that exceed the reductions that would have occurred had the customer used standard new equipment or practices where practicable. Electric utilities may make an alternative demonstration that mercantile customer energy savings or peak demand reductions are effects of such a program.

(G) A mercantile customer may file, either individually or jointly with an electric utility, an application to commit the customer's demand reduction, demand response, or energy efficiency programs for integration with the electric utility's demand reduction, demand response, and energy efficiency programs, pursuant to division (A)(2)(d) of section 4928.66 of the Revised Code. Such application shall:

(1) Address coordination requirements between the electric utility and the mercantile customer with regard to voluntary reductions in load by the mercantile customer, which are not part of an electric utility program, including specific communication procedures.

(2) Grant permission to the electric utility and staff to measure and verify energy savings and/or peak demand reductions resulting from customer sited projects and resources.

(3) Identify all consequences of noncompliance by the customer with the terms of the commitment.

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~~(4) Include a copy of the formal declaration or agreement that commits the mercantile customer's programs for integration, including any requirement that the electric utility will treat the customer's information as confidential and will not disclose such information except under an appropriate protective agreement or a protective order issued by the commission pursuant to rule 4901-1-24 of the Administrative Code.~~

~~(5) Include a description of all methodologies, protocols, and practices used or proposed to be used in measuring and verifying program results, and identify and explain all deviations from any program measurement and verification guidelines that may be published by the commission.~~

~~(H) An electric utility shall not 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.~~

~~(I) Benchmarks not reasonably achievable. If an electric utility determines that it is unable to meet a benchmark due to regulatory, economic, or technological reasons beyond its reasonable control, the electric utility may file an application to amend its benchmarks. To the extent that forecasted peak demand and peak prices do not materialize for economic reasons, the electric utility may be granted a waiver of its benchmark for the difference between actual performance and expected performance of demand response programs.~~

~~(J) Benchmarks not reasonably achievable. If an electric utility determines that it is unable to meet a benchmark due to regulatory, economic, or technological reasons beyond its reasonable control, the electric utility may file an application to amend its benchmarks. To the extent that forecasted peak demand and peak prices do not materialize for economic reasons, the electric utility may be granted a waiver of its benchmark for the difference between the actual and expected performance of demand response programs. In any such application, the electric utility shall demonstrate that it has exhausted all reasonable compliance options.~~

## "New"

**4901:1-39-05 Annual performance verification.**

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(A) Portfolio performance report. By May fifteenth of each year, each electric utility shall file a portfolio performance report addressing the performance of its energy efficiency and peak-demand reduction programs in its program portfolio plan over the previous calendar year which includes, at a minimum, the following information:

(1) Compliance demonstration. Each electric utility shall include a section in its portfolio performance report detailing its achieved annualized energy savings, achieved demand reductions, and the demand reductions that its programs were reasonably designed to achieve, relative to its corresponding energy and peak demand reduction baselines. At a minimum, this section of the portfolio status report shall include each of the following:

(a) A benchmark report. The benchmark report shall provide the energy and peak demand baselines for kilowatt-hour sales and kilowatt demand for the reporting year, including a description of the method of calculating the baselines, and the applicable statutory benchmarks for energy savings and electric utility peak-demand reduction, with supporting data.

(b) A comparison of actual annualized energy savings and peak-demand reductions achieved by electric utility programs with the applicable benchmarks. 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~~ federal standards ~~Energy Independence and Security Act of 2007~~, or an applicable building code. The prohibition against a financial or rider exemption incentive does not preclude the electric utility from compensating a customer for the administrative costs and inconvenience of undertaking the commitment process, in the form of a commitment payment.

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

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~~commission, normalizations for weather, changes in numbers of customers, sales, and peak demand shall be consistently applied from year to year. The electric utility shall modify its baseline, on a going forward basis, to exclude load and usage characteristics of all opt-out customers and the customers in its certified distribution territory with a reasonable arrangement authorized by the commission pursuant to section 4905.31 of the Revised Code.~~

(c~~d~~) Banking surplus energy savings. To the extent that an electric utility's actual energy savings exceeds its energy efficiency benchmark for any year, the electric utility may apply such surplus energy savings to ~~either~~ its energy efficiency benchmarks for a subsequent year. Banked surplus may be used by the utility to trigger the shared savings incentive. However, the shared savings incentive is only eligible for energy and demand savings achieved in the current program year. ~~, but banked surplus energy savings shall not be used to trigger shared savings incentive.~~ ~~or toward meeting its advanced energy requirement, but not both. In order to exercise this option, the electric utility shall indicate in the annual portfolio status report for the year in which the surplus occurs whether the surplus will be directed to a subsequent year's energy efficiency benchmark or its advanced energy requirement.~~

(d~~e~~) Benchmarks not reasonably achievable. If an electric utility determines that it is unable to meet a benchmark due to regulatory, economic, or technological reasons beyond its reasonable control, the electric utility may file an application to amend its benchmarks. ~~To the extent that forecasted peak demand and peak prices do not materialize for economic reasons, the electric utility may be granted a waiver of its benchmark for the difference between actual performance and expected performance of demand response programs.~~

~~(f) Any exclusion from the baseline calculations for economic development customer and opt-out customer accounts shall also exclude any energy and demand savings from the economic development customer and opt-out customer account, but only in each year in which the economic development customer or opt-out customer account is excluded from the baseline.~~

(e~~g~~) The electric utility shall specify the methodology it has used to measure and verify its energy efficiency and peak-demand reduction savings. An electric utility's methodologies for measuring and verifying its energy efficiency and

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peak demand reduction savings will be presumed reasonable if they follow the measurement and verification methodologies specified in the technical reference manual published by the commission's staff. If an electric distribution utility utilizes different methodologies to measure and verify the energy efficiency and peak demand reduction savings it has achieved, the electric distribution utility shall demonstrate that the measurement and verification methodologies it relies upon are reasonable.

(f) The electric utility shall include a summary of program savings and expenditures in a template prescribed by staff.

(2) Program performance assessment. Each electric utility shall include a section in its portfolio performance report demonstrating whether it has successfully implemented the energy efficiency and demand-reduction programs in its program portfolio plan. At a minimum, this section of the annual portfolio performance report shall include each of the following:

(a) A description of each energy efficiency or peak-demand reduction program implemented in the previous calendar year including:

(i) The key activities undertaken in each program, the number and type of participants, a comparison of the forecasted savings to the verified savings achieved by such program, the magnitude of anticipated savings, and a trend analysis of how anticipated savings will be realized over the life of the program.

(ii) All energy savings and peak-demand reductions counted toward the applicable benchmark as a result of energy efficiency improvements, demand response, or demand reduction improvements implemented by mercantile customers and committed to the electric utility.

(iii) A description of all transmission and distribution infrastructure improvements made by the electric utility that reduce line losses to the extent the reduction in line losses has been applied to meet the applicable benchmarks with a calculation and description of the net impact of such improvements on losses.

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(iv) A description of all other applicable energy efficiency and peak demand reduction activities that the electric utility proposes to count toward its applicable benchmarks.

(b) An evaluation, measurement, and verification report that documents the energy savings and peak-demand reduction values and the cost-effectiveness of each energy efficiency and demand-side management program reported in the electric utility's portfolio status report. Such report shall include documentation of any process evaluations and expenditures, measured and verified savings, and cost-effectiveness of each program. Measurement and verification processes shall confirm that the measures were actually installed, the installation meets reasonable quality standards, and the measures are operating correctly and are expected to generate the predicted savings.

(B) Independent program evaluator report. The independent program evaluator may conduct its report-related review activities on an ongoing basis, including during the implementation of the electric utility's program portfolio plan, subsequent to completion of the plan year, and subsequent to the filing of the electric utility's portfolio performance report. The electric utility shall cooperate with the independent program evaluator as it conducts its review activities. Subsequent to the filing of the electric utility's portfolio performance report, the independent program evaluator will prepare and file a report which shall include, but is not limited to, the following:

(1) A description of the independent program evaluator's activities, analyses, and conclusions in monitoring, verifying, and evaluating the energy savings and peak-demand reductions resulting from the electric utility programs and mercantile customer activities.

(2) The independent program evaluator's verification and evaluation, through the use of due-diligence techniques including project inspections, of the electric utility's evaluation, measurement, and verification report.

(3) An evaluation of the electric utility's energy efficiency portfolio plan's programs, measures, cost-effectiveness, and the appropriateness of all costs included in the electric utility's energy efficiency cost recovery riders.

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~~(4) The independent evaluator's recommended revisions to be made to the technical reference manual, as an appendix to the report.~~

(C) The independent evaluator shall file recommended revisions to the technical reference manual, in addition to its report filed pursuant to section (B) of this rule.

(CD) Any person may file comments regarding an electric utility's annual portfolio performance report and the independent program evaluator's report filed pursuant to this chapter within thirty days after the filing of the independent program evaluator's report. Reply comments shall be due fifteen days later.

(DE) ~~Within thirty days of the filing of the independent program evaluator's recommendations, any stakeholder may request a hearing on any aspect of the electric utility's performance in complying with its annual statutory requirement for energy efficiency and peak demand reduction.~~ Based upon ~~its review of any such hearing requests, and~~ the recommendations of the independent program evaluator relative to the electric utility's performance, and the comments received on the reports pursuant to paragraph (CD) of this rule, the commission ~~shall~~may schedule a hearing in order to review 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.

(EF) Based upon the recommendations of the independent program evaluator relative to revisions to the technical reference manual, and the comments received on the independent program evaluator's recommendations pursuant to paragraph (CD) of this chapter, the commission's staff shall direct the independent program evaluator to file an updated technical reference manual. Unless otherwise indicated by the commission, the updated technical reference manual shall be deemed to be automatically approved on the thirtieth day after its filing.

# "Rescind"

~~**4901:1-39-06 Review of annual reports and issuance of the commission verification report.**~~

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~~(A) Any person may file comments regarding an electric utility's initial benchmark report or annual portfolio status report filed pursuant to this chapter within thirty days of the filing of such report.~~

~~(B) Upon receipt of such report, the staff shall review the report and any timely filed comments, and file its findings and recommendations regarding program implementation and compliance with the applicable benchmarks, and any proposed modifications thereto, verifying the electric utility's compliance or noncompliance with its approved program portfolio plan and the mandated energy efficiency improvements and peak demand reductions. If staff finds that an electric utility has not demonstrated compliance with the approved program portfolio plan or annual sales or peak demand reductions required by division (A) of section 4928.66 of the Revised Code, staff may recommend remedial action and/or the assessment of a forfeiture. Additionally, the staff may recommend modifications to a program within the electric utility's program portfolio plan.~~

~~(C) The commission may schedule a hearing on the electric utility's portfolio benchmark report or status report. If staff recommends a forfeiture, the commission shall schedule a hearing on the staff's recommendations.~~

~~(D) The commission shall adopt, or modify and adopt, the staff's recommendations and findings as its annual verification report of the electric utility's achieved energy efficiency and peak demand reductions pursuant to division (B) of section 4928.66 of the Revised Code. Such verification report shall be provided to the consumers' counsel of Ohio.~~

# "New"

**4901:1-39-06 Recovery mechanism.**

(A) Concurrent with the filing of its program portfolio plan, the electric utility shall ~~propose~~file a proposed rate adjustment mechanism for recovery of costs incurred in implementing its energy efficiency, peak-demand reduction, and demand response programs. ~~Inclusion of any lost distribution revenue and shared savings in the proposed rate adjustment mechanism shall be consistent with prior Commission directives.~~ If the electric utility proposes to include for recovery anything in addition to direct program implementation costs, the electric utility shall demonstrate how it proposes such

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recovery to occur and why such recovery is appropriate and necessary. ~~Any cost recovery that occurs under the electric utility's rate adjustment mechanism shall be subject to reconciliation based on the commission's opinion and order issued in the performance verification process.~~

(B) Unless otherwise ordered by the commission, any person may file comments within thirty days after the filing of an electric utility's proposed recovery mechanism. Any person filing comments shall specify the basis for all recommendations made, or modifications that are suggested to be made to the electric utility's proposed recovery mechanism. Based on comments received, the commission may schedule a hearing on the proposed recovery mechanism. If the commission takes no action within 30 days of receiving comments, the recovery mechanism shall be automatically deemed to be reasonable. Any revenue received under the electric utility's rate adjustment mechanism shall be subject to potential disallowance and reconciliation based on the commission's decision issued in the annual performance verification process in 4901:1-39-05, Ohio Administrative Code.

## "Rescind"

~~**4901:1-39-07 Recovery mechanism.**~~

~~(A) With the filing of its proposed program portfolio plan, the electric utility may submit a request for recovery of an approved rate adjustment mechanism, commencing after approval of the electric utility's program portfolio plan, of costs due to electric utility peak-demand reduction, demand response, energy efficiency program costs, appropriate lost distribution revenues, and shared savings. Any such recovery shall be subject to annual reconciliation after issuance of the commission verification report issued pursuant to this chapter.~~

~~(1) 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, pursuant to division (A)(2)(d) of section 4928.66 of the Revised Code, shall be limited to the portion of those investments that are attributable to and undertaken primarily for energy efficiency or demand reduction purposes.~~

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~~(2) Mercantile customers, who commit their peak-demand reduction, demand response, or energy efficiency projects for integration with the electric utility's programs as set forth in rule 4901:1-39-08 of the Administrative Code, may individually or jointly with the electric utility, apply for exemption from such recovery.~~

~~(B) Any person may file objections within thirty days of the filing of an electric utility's application for recovery. If the application appears unjust or unreasonable, the commission may set the matter for hearing.~~

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## "New"

**4901:1-39-07 Historical mercantile customer programs, combined heat and power, or waste energy recovery systems.**

(A) An application to commit a mercantile customer's energy efficiency program, or a customer's combined heat and power system or waste energy recovery system, to its electric utility's programs, pursuant to division (A)(2) of section 4928.66 of the Revised Code, may include a request for an incentive payment based on payment levels established in the electric utility's portfolio plan, or a commitment payment for behavioral programs, combined heat and power systems, waste energy recovery systems, or other payment for efficiency savings that do not qualify for an incentive payment, or an exemption from the cost recovery mechanism set forth in rule 4901:1-39-06 of the Administrative Code. Such application shall be filed pursuant to the requirements set forth in section (C) of this rule. Alternatively, an application for an incentive payment, commitment payment, or cost recovery mechanism exemption may be combined with any other reasonable arrangement, approved pursuant to Chapter 4901:1-38 of the Administrative Code, if such reasonable arrangement contains appropriate measurements and verification of program results.

(B) In meeting its energy efficiency and peak-demand reduction benchmarks, an electric utility shall include mercantile customer energy efficiency, ~~and~~ peak demand reduction, combined heat and power, and waste energy recovery programs implemented on mercantile customer sites where the mercantile program is committed to the electric utility.

(1) For energy efficiency programs, an electric utility may count the programs' effects resulting in energy savings and coincident peak-demand savings towards its energy efficiency requirements and peak demand reduction requirements.

(2) For demand response programs, an electric utility may count demand reductions towards ~~satisfying some or all of their~~ its peak-demand reduction benchmarks by demonstrating that either the electric utility has reduced its actual peak demand, or has the capability to reduce its peak demand and such capability is created under either of the following circumstances:

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(a) A peak-demand reduction program meets the requirements to be counted as a capacity resource under the tariff or capacity auction of athe regional transmission organization in which the electric utility is a member and which has been approved by the federal energy regulatory commission.

(b) A peak-demand reduction program equivalent to a regional transmission organization program, which has been approved by theis commission.

(3) A mercantile customer's energy savings and peak-demand reductions shall be presumed to be the effect of a demand response, energy efficiency, or peak-demand reduction program to the extent they involve the replacement of functioning equipment. If the mercantile customer's program involves the replacement of non-functioning equipment or an initial installation of new equipment, the electric utility may count the savings based on the efficiency of the replaced equipment, if any, but may provide a financial or rate exemption incentive based only on the reductions in energy use and peak demand that exceed the reductions or levels that would have occurred had the customer used standard new equipment or practices where practicable. However, nothing in this section prohibits the electric utility from compensating a mercantile customer for the administrative costs and inconvenience of undertaking the commitment process, in the form of a commitment payment. Electric utilities may make an alternative demonstration, subject to commission approval, that mercantile customer energy savings or peak demand reductions are eligible to be counted toward the electric utility's statutory requirements.

(4) Inclusion of all such mercantile customer energy efficiency and peak demand reduction programs shall be subject to commission approval and subsequent verification through the annual performance verification process, pursuant to rule 4901:1-39-05 of the Administrative Code.

(C) A mercantile customer may file, either individually or jointly with an electric utility, an application to commit the customer's demand reduction, demand response, or energy efficiency programs or the output of the customer's combined heat and power system or waste energy recovery system that have been implemented in the previous three years for integration with the electric utility's demand reduction, demand response, and energy efficiency programs, pursuant to division (A)(2) of section 4928.66 of the Revised Code. Such application, if filed individually, shall be filed no later than

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December 31 of the ~~one~~ calendar year ~~after~~following the end of the three-year period. However, such applications that are filed jointly shall be filed no later than March 31 of the year following the individual application deadline, but only if the mercantile customer commitment agreement with the electric utility was executed by the individual filing deadline.

(1) Any such application filed in accordance with the automatic approval template published by the commission shall be deemed automatically approved unless suspended by order of the commission or an attorney examiner within 60 days of the filing of the application.

(2) 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 commitment payment applications, the energy efficiency savings shall be counted as permanent by the electric utility, and no additional payments will be made to the customer. 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.

(3) No exemption from an energy efficiency cost recovery rider granted pursuant to an automatic approval shall extend more than one year unless the ~~applicant~~mercantile customer, or the electric utility on behalf of the mercantile customer, provides an annual update to staff on such form as published by the commission. The length of rider exemption shall be determined by the use of the benchmark comparison method.

(4) An application to commit a mercantile customer's demand reduction, demand response, or energy efficiency program to the electric utility that is not filed in accordance with the commission's automatic approval template, shall not be deemed automatically approved. Such an application shall address the following areas:

(a) eCoordination requirements between the electric utility and the mercantile customer with regard to voluntary reductions in load by the mercantile

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customer, which are not part of an electric utility program, including specific communication procedures.

(b) Grant permission to the electric utility and staff to measure and verify energy savings and/or peak-demand reductions resulting from customer-sited projects and resources.

(c) Identify all consequences of noncompliance by the customer with the terms of the commitment.

(d) Include a copy of the formal declaration or agreement that commits the mercantile customer's programs for integration, including any requirement that the electric utility will treat the customer's information as confidential and will not disclose such information except under an appropriate protective agreement or a protective order issued by the commission pursuant to rule 4901-1-24 of the Administrative Code.

(e) Include a description of all methodologies, protocols, and practices used or proposed to be used in measuring and verifying program results, and identify and explain all deviations from any program measurement and verification guidelines that may be published by the commission.

## "Rescind"

~~4901:1-39-08 Mercantile customer exemptions.~~

~~An application to commit a mercantile customer program for integration filed pursuant to paragraph (C) of rule 4901:1-39-05 of the Administrative Code, may include a request for an exemption from the cost recovery mechanism set forth in rule 4901:1-39-07 of the Administrative Code. To be eligible for such exemption, the mercantile customer must consent to providing an annual report on the energy savings and electric utility peak-demand reductions achieved in the customer's facilities in the most recent year. The report shall include the following:~~

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~~(A) A demonstration that energy savings and peak-demand reductions associated with the mercantile customer's program are the result of investments that meet the total resource cost test, or that the electric utility's avoided cost exceeds the cost to the electric utility for the mercantile customer's program.~~

~~(B) A statement distinguishing programs implemented before and after January 1, 2009, or in future reports filed for years subsequent to 2009, before and after the most recent year.~~

~~(C) A quantification of the energy savings or peak-demand reductions for programs initiated prior to 2009 in the baseline period, recognizing that programs may have diminishing effects over time as technology evolves or equipment degrades.~~

~~(D) A recognition that the energy saving and demand reduction effects during the electric utility's baseline period of any mercantile customer-sited energy efficiency or peak-demand reduction programs that are integrated into an electric utility's programs are excluded from the electric utility's baselines by increasing its baseline for energy savings and baseline for peak-demand reductions by the amount of mercantile customer energy savings and demand reductions.~~

~~(E) A listing and description of the customer programs implemented, including measures taken, devices or equipment installed, processes modified, or other actions taken to increase energy efficiency and reduce peak demand, including specific details such as the number, type, and efficiency levels both of the installed equipment and the old equipment that is being replaced, if applicable.~~

~~(F) An accounting of expenditures made by the mercantile customer for each program and its component energy savings and electric utility peak-demand reduction attributes.~~

~~(G) The timeline showing when each program went into effect, and when the energy savings and peak-demand reductions occurred.~~

~~(H) Any request for an exemption may be combined with any other reasonable arrangement, approved pursuant to Chapter 4901:1-38 of the Administrative Code, if such reasonable arrangement contains appropriate measurements and verification of program results.~~

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# "Amend"

**4901:1-40-01 Definitions.**

(A) "Advanced energy fund" has the meaning set forth in section 4928.61 of the Revised Code.

~~(B) "Advanced energy resource" has the meaning set forth in division (A)(34) of section 4928.01 of the Revised Code.~~

~~(C) "Alternative energy resource" has the meaning set forth in division (A)(1) of section 4928.64 of the Revised Code.~~

(~~D~~B)"Biologically derived methane gas" means landfill methane gas; or gas from the anaerobic digestion of organic materials, including animal waste, municipal wastewater, institutional and industrial organic waste, food waste, yard waste, and agricultural crops and residues.

(~~E~~C)"Biomass energy" means energy produced from organic material derived from plants or animals and available on a renewable basis, including but not limited to: agricultural crops, tree crops, crop by-products and residues; wood and paper manufacturing waste, including nontreated by-products of the wood manufacturing or pulping process, such as bark, wood chips, sawdust, and lignin in spent pulping liquors; forestry waste and residues; other vegetation waste, including landscape or right-of-way trimmings; algae; food waste; animal wastes and by-products (including fats, oils, greases and manure); biodegradable solid waste; and biologically derived methane gas.

~~(F) "Clean coal technology" means any technology that removes or has the design capability to remove criteria pollutants and carbon dioxide from an electric generating facility that uses coal as a fuel or feedstock as identified in the control plan requirements in paragraph (C) of rule 4901:1-41-03 of the Administrative Code.~~

(~~G~~D) "Co-firing" means simultaneously using multiple fuels in the generation of electricity. In the event of co-firing, the proportion of energy input comprised of a renewable energy resource shall dictate the proportion of electricity output from the facility that can be considered a renewable energy resource.

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(~~I~~E) "Commission" means the public utilities commission of Ohio.

(~~J~~F) "Deliverable into this state" means that the electricity or qualifying biologically derived methane gas originates from a facility within a state contiguous to Ohio. It may also include electricity originating from other locations, pending a demonstration that the electricity ~~could be~~is physically ~~delivered~~ deliverable to the state.

(~~K~~G) "Demand response" has the meaning set forth in rule 4901:1-39-01 of the Administrative Code.

~~(K) "Demand-side management" has the meaning set forth in paragraph (F) of rule 4901:5-5-01 of the Administrative Code.~~

(~~L~~H) "Distributed generation" means electricity production that is on-site and is connected to the electricity grid.

(~~M~~I) "Double-counting" means utilizing renewable energy or, renewable energy credits, or energy efficiency savings to do any of the following:

(1) Satisfy multiple Ohio state renewable energy requirements or such requirements for more than one state.

(2) ~~Comply with both the energy efficiency and advanced energy statutory benchmarks.~~

(~~2~~3) Support multiple voluntary product offerings.

(~~3~~4) Substantiate multiple marketing or public relations claims.

(~~4~~5) Some combination of these.

(~~N~~J) "Electric generating facility" means a power plant or other facility where electricity is produced.

(~~O~~K) "Electric services company" has the meaning set forth in division (A)(9) of section 4928.01 of the Revised Code.

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(~~P~~L) "Electric utility" has the meaning set forth in division (A)(11) of section 4928.01 of the Revised Code.

(~~Q~~) ~~"Energy efficiency" has the meaning set forth in rule 4901:1-39-01 of the Administrative Code.~~

(~~R~~M) "Energy storage" means a facility or technology that permits the storage of energy for future use as electricity.

(~~S~~N) "Fuel cell" means a device that uses an electrochemical energy conversion process to produce electricity.

(O) "Geothermal energy" means hot water or steam extracted from geothermal reservoirs in the earth's crust and used for electricity generation.

(~~U~~P) "Hydroelectric energy" means electricity generated by a hydroelectric facility as defined in division (A)(3~~7~~5) of section 4928.01 of the Revised Code.

(~~V~~Q) "Hydroelectric facility" has the meaning set forth in division (A)(3~~7~~5) of section 4928.01 of the Revised Code.

(~~W~~R) "Mercantile customer" has the meaning set forth in division (A)(19) of section 4928.01 of the Revised Code.

(~~X~~S) ~~"MISO" means "Midwest Midcontinent Independent Transmission System Operator, Inc." or any successor regional transmission organization.~~

(T) "Ohio run-of-the-river hydroelectric facility" means a run-of-the-river hydroelectric facility placed in service on or after January 1, 1980, that is located within this state, relies upon the Ohio river, and operates, or is rated to operate, at an aggregate capacity of forty or more megawatts.

(~~Y~~U) "Person" shall have the meaning set forth in division (A)(24) of section ~~4928.01~~1.59 of the Revised Code.

(~~Z~~)V "PJM" means "PJM Interconnection, LLC" or any successor regional transmission organization.

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(AAW) "Placed-in-service" means when a facility or technology becomes operational.

(BBX) "Renewable energy credit" or "REC" means the environmental attributes associated with one megawatt-hour of electricity generated by a non-solar renewable energy resource or its non-electric equivalent, ~~except for electricity generated by facilities as described in paragraph (E) of rule 4901:1-40-04 of the Administrative Code.~~

(CCY) "Renewable energy resource" has the meaning set forth in division (A)(37) of section 4928.01 of the Revised Code.

(~~EE~~Z) "Small hydroelectric facility" means a hydroelectric facility that operates, or is rated to operate, at an aggregate capacity of less than six megawatts.

(~~DD~~ZAA) "Solar energy resources" means solar photovoltaic and/or solar thermal resources.

(~~EE~~AABB) "Solar photovoltaic" means energy from devices which generate electricity directly from sunlight through the movement of electrons.

(CC~~BB~~) "Solar renewable energy credit" or "S-REC" means the environmental attributes associated with one megawatt-hour of electricity generated by a solar energy resource.

(~~FFCC~~DD) "Solar thermal" means the concentration of the sun's energy, typically through the use of lenses or mirrors, to drive a generator or engine to produce electricity.

(~~GGDD~~EE) "Solid wastes" has the meaning set forth in section 3734.01 of the Revised Code.

(~~HHFF~~FF) "Staff" means the commission staff or its authorized representative.

(HGG) "Standard service offer" means an electric utility offer to provide consumers, on a comparable and nondiscriminatory basis within its certified territory, all competitive retail electric services necessary to maintain essential electric service to consumers, including a firm supply of electric generation service.

(HH) "Waste energy recovery system" has the meaning set forth in division (A)(38) of section 4928.01 of the Revised Code.

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(~~JJJ~~) "Wind energy" means electricity generated from wind turbines, windmills, or other technology that converts wind into electricity.

## "Amend"

**4901:1-40-02 Purpose and scope.**

(A) This chapter addresses the implementation of the ~~alternative energy~~renewable portfolio standard, including the incorporation of renewable energy credits, as detailed in sections 4928.64 and ~~4928.65~~4928.645 of the Revised Code respectively. Parties affected by these ~~alternative energy~~renewable portfolio standard rules include all Ohio electric utilities and all electric services companies serving retail electric customers in Ohio. With the exception of the filing requirements set forth in 4901:1-40-05 of the Administrative Code, any ~~Any~~ entities that do not serve Ohio retail electric customers during a given calendar year shall not be required to comply with the terms of the ~~alternative energy~~renewable portfolio standard during that calendar year.

(B) The commission may, 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.

## "Rescind"

~~4901:1-40-03 Requirements.~~

~~(A) All electric utilities and affected electric services companies shall ensure that, by the end of the year 2024 and each year thereafter, electricity from alternative energy resources equals at least twenty-five per cent of their retail electric sales in the state.~~

~~(1) Up to half of the electricity supplied from alternative energy resources may be generated from advanced energy resources.~~

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~~(2) At least half of the electricity supplied from alternative energy resources shall be generated from renewable energy resources, including solar energy resources, in accordance with the following annual benchmarks:~~

~~Annual benchmarks for alternative energy resources generated from renewable and solar energy resources~~

| ~~By end of year:~~ | ~~Renewable energy resources~~ | ~~Solar energy resources~~ |
|---|---|---|
| ~~2009~~ | ~~0.25%~~ | ~~0.004%~~ |
| ~~2010~~ | ~~0.50%~~ | ~~0.01%~~ |
| ~~2011~~ | ~~1.0%~~ | ~~0.03%~~ |
| ~~2012~~ | ~~1.5%~~ | ~~0.06%~~ |
| ~~2013~~ | ~~2.0%~~ | ~~0.09%~~ |
| ~~2014~~ | ~~2.5%~~ | ~~0.12%~~ |
| ~~2015~~ | ~~3.5%~~ | ~~0.15%~~ |
| ~~2016~~ | ~~4.5%~~ | ~~0.18%~~ |
| ~~2017~~ | ~~5.5%~~ | ~~0.22%~~ |
| ~~2018~~ | ~~6.5%~~ | ~~0.26%~~ |
| ~~2019~~ | ~~7.5%~~ | ~~0.30%~~ |
| ~~2020~~ | ~~8.5%~~ | ~~0.34%~~ |
| ~~2021~~ | ~~9.5%~~ | ~~0.38%~~ |
| ~~2022~~ | ~~10.5%~~ | ~~0.42%~~ |
| ~~2023~~ | ~~11.5%~~ | ~~0.46%~~ |
| ~~2024 and each year thereafter~~ | ~~12.5%~~ | ~~0.50%~~ |

~~(a) At least half of the annual renewable energy resources, including solar energy resources, shall be met through electricity generated by facilities located in this state. Facilities located in the state shall include a hydroelectric generating~~

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~~facility that is located on a river that is within or bordering this state, and wind turbines located in the state's territorial waters of lake Erie.~~

~~(b) To qualify towards a benchmark, any electricity from renewable energy resources, including solar energy resources, that originates from outside of the state must be shown to be deliverable into this state.~~

~~(3) All costs incurred by an electric utility in complying with the requirements of section 4928.64 of the Revised Code, shall be avoidable by any consumer that has exercised choice of electricity supplier, during such time that a customer is served by an electric services company.~~

~~(B) The baseline for compliance with the alternative energy resource requirements shall be determined using the following methodologies:~~

~~(1) For electric utilities, the baseline shall be computed as an average of the three preceding calendar years of the total annual number of kilowatt-hours of electricity sold under its standard service offer to any and all retail electric customers whose electric load centers are served by that electric utility and are located within the electric utility's certified territory. The calculation of the baseline shall be based upon the average, annual, kilowatt-hour sales reported in that electric utility's three most recent forecast reports or reporting forms.~~

~~(2) For electric services companies, the baseline shall be computed as an average of the three preceding calendar years of the total annual number of kilowatt hours of electricity sold to any and all retail electric consumers served by the company in the state, based upon the kilowatt-hour sales in the electric services company's most recent quarterly market monitoring reports or reporting forms.~~

~~(a) If an electric services company has not been continuously supplying Ohio retail electric customers during the preceding three calendar years, the baseline shall be computed as an average of annual sales data for all calendar years during the preceding three years in which the electric services company was serving retail customers.~~

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~~(b) For an electric services company with no retail electric sales in the state during the preceding three calendar years, its initial baseline shall consist of a reasonable projection of its retail electric sales in the state for a full calendar year. Subsequent baselines shall consist of actual sales data, computed in a manner consistent with paragraph (B)(2)(a) of this rule.~~

~~(3) An electric utility or electric services company may file an application requesting a reduced baseline to reflect new economic growth in its service territory or service area. Any such application shall include a justification indicating why timely compliance based on the unadjusted baseline is not feasible, a schedule for achieving compliance based on its unadjusted baseline, quantification of a new change in the rate of economic growth, and a methodology for measuring economic activity, including objective measurement parameters and quantification methodologies.~~

~~(C) Beginning in the year 2010, each electric utility and electric services company annually shall file a plan for compliance with future annual advanced and renewable energy benchmarks, including solar, utilizing at least a ten-year planning horizon. This plan, to be filed by April fifteenth of each year, shall include at least the following items:~~

~~(1) Baseline for the current and future calendar years.~~

~~(2) Supply portfolio projection, including both generation fleet and power purchases.~~

~~(3) A description of the methodology used by the company to evaluate its compliance options.~~

~~(4) A discussion of any perceived impediments to achieving compliance with required benchmarks, as well as suggestions for addressing any such impediments.~~

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# "New"

**4901:1-40-03 Requirements.**

(A) All electric utilities and affected electric services companies shall ensure that, by the end of the year 2027 and each year thereafter, electricity from qualifying renewable energy resources equals the benchmarks set forth in R.C. 4928.64(B)(2). Non-electric sources as permitted by law and certified by the Commission may be used to satisfy the renewable energy resource requirements.

(1) The qualifying renewable energy resources implemented by the utility or company shall be met either through facilities located in this state or with resources that can be shown to be deliverable into this state.

(2) The qualifying electricity or non-electric source supplied from renewable energy resources, including solar energy resources, shall be provided in accordance with the annual benchmarks detailed in section 4928.64(B)(2) of the Revised Code.

(3) All costs incurred by an electric utility in complying with the requirements of section 4928.64 of the Revised Code shall be avoidable by any consumer that has exercised choice of electricity supplier during such time that a customer is served by an electric services company.

(B) The baseline for compliance with the qualified renewable energy resource requirements of section 4928.64 of the Revised Code shall be determined as follows:

(1) For electric utilities, the baseline shall be computed using one of the following methodologies:

(a) The average of total kilowatt hours sold by the utility in the preceding three calendar years to any and all retail electric customers whose electric load centers are served by that electric utility and are located within the electric utility's certified territory.

(b) The total kilowatt hours sold to any and all retail electric consumers whose electric load centers are served by that utility and are located within the utility's

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certified territory in the applicable compliance year. An electric utility that opts to use this methodology may in subsequent compliance years switch to the methodology described in (B)(1)(a), but in so doing, the electric utility shall be required to use the methodology described in (B)(1)(a) for at least three consecutive compliance years.

(c) The annual sales used to compute the baseline under methodologies (B)(1)(a) or (B)(1)(b) shall be based upon the annual sales as reported in the electric utility's forecast reports or reporting forms.

(2) For electric services companies, the baseline shall be computed using one of the following methodologies:

(a) The average of total kilowatt hours sold annually by the company in the preceding three calendar years to any and all retail electric consumers served by the company in the state. ~~(a)~~ If an electric services company has not been continuously supplying Ohio retail electric customers during the preceding three calendar years, the baseline shall be computed as an average of annual sales data for all calendar years during the preceding three years in which the electric services company was serving retail customers.

(b) The total number of kilowatt hours sold to any and all retail electric customers who are served by the company and are located within this state during the compliance year. An electric services company that opts to use this methodology may in subsequent compliance years switch to the methodology described in (B)(2)(a), but in so doing, the electric services company shall be required to use the methodology described in (B)(2)(a) for at least three consecutive compliance years.

(c) The annual sales used to compute the baseline under methodologies in (B)(2)(a) and (B)(2)(b) shall be based upon the annual sales as reported in the electric services company's Annual Reports for Fiscal Assessment or as otherwise directed by the commission.

(3) An electric utility or electric services company may request a reduced baseline to reflect new economic growth in its service territory or service area. A company

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requesting a reduced baseline shall file an application with the Commission seeking approval for such reduction.

# "RESCIND"

~~4901:1-40-04 Qualified resources.~~

~~(A) The following resources or technologies, if they have a placed-in-service date of January 1, 1998, or after, are qualified resources for meeting the renewable energy resource benchmarks:~~

~~(1) Solar photovoltaic or solar thermal energy.~~

~~(2) Wind energy.~~

~~(3) Hydroelectric energy.~~

~~(4) Geothermal energy.~~

~~(5) Solid waste energy derived from fractionalization, biological decomposition, or other process that does not principally involve combustion.~~

~~(6) Biomass energy.~~

~~(7) Energy from a fuel cell.~~

~~(8) A storage facility, if it complies with the following requirements:~~

~~(a) The electricity used to pump the resource into a storage reservoir must qualify as a renewable energy resource, or the equivalent renewable energy credits are obtained.~~

~~(b) The amount of energy that may qualify from a storage facility is the amount of electricity dispatched from the storage facility.~~

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~~(9) Distributed generation system used by a customer to generate electricity from one of the resources or technologies listed in paragraphs (A)(1) to (A)(8) of this rule.~~

~~(10) A renewable energy resource created on or after January 1, 1998, by the modification or retrofit of any facility placed in service prior to January 1, 1998.~~

~~(B) The following resources or technologies, if they have a placed-in-service date of January 1, 1998, or after, are qualified resources for meeting the advanced energy resource benchmarks:~~

~~(1) Any modification to an electric generating facility that increases its generation output without increasing the facility's carbon dioxide emissions (tons per year) in comparison to its actual annual carbon dioxide emissions preceding the modification. In such an instance, it is the incremental increase in generation output that may be quantified and applied toward an advanced energy requirement.~~

~~(2) Any distributed generation system, designed primarily to meet the energy needs of the customer's facility that utilizes co-generation of electricity and thermal output simultaneously.~~

~~(3) Clean coal technology.~~

~~(4) Advanced nuclear energy technology, from:~~

~~(a) Advanced nuclear energy technology consisting of generation III technology as defined by the nuclear regulatory commission or other later technology.~~

~~(b) Significant improvements to existing facilities. In such an instance, it is the incremental increase in generation attributable to the improvement that may be quantified and applied toward an advanced energy requirement. Extension of the life of existing nuclear generation capacity shall not qualify as advanced nuclear energy technology.~~

~~(5) Energy from a fuel cell.~~

~~(6) Advanced solid waste or construction and demolition debris conversion technology that results in measurable greenhouse gas emission reductions.~~

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~~(7) Demand-side management and energy efficiency, above and beyond that used to comply with any other regulatory standard or programs.~~

~~(C) The following new or existing mercantile customer-sited resources may be qualified resources for meeting electric utilities' annual, renewable- or advanced-energy resource benchmarks, as applicable, provided that it does not constitute double-counting for any other regulatory requirement and that the mercantile customer has committed the resource for integration into the electric utility's demand response, energy efficiency, or peak demand reduction programs pursuant to rule 4901:1-39-08 of the Administrative Code.~~

~~(1) Renewable energy resources from mercantile customers include the following:~~

~~(a) Electric generation equipment that uses a renewable energy resource and is owned or controlled by a mercantile customer.~~

~~(b) Any renewable energy resource of the mercantile customer that can be utilized effectively as part of an alternative energy resource plan of an electric utility and would otherwise qualify as a renewable energy resource if it were utilized directly by an electric utility.~~

~~(2) Advanced energy resources from mercantile customers include the following:~~

~~(a) A resource that improves the relationship between real and reactive power.~~

~~(b) A mercantile customer-owned or controlled resource that makes efficient use of waste heat or other thermal capabilities.~~

~~(c) Storage technology that allows a mercantile customer more flexibility to modify its demand or load and usage characteristics.~~

~~(d) Electric generation equipment owned or controlled by a mercantile customer that uses an advanced energy resource.~~

~~(e) Any advanced energy resource of the mercantile customer that can be utilized effectively as part of an advanced energy resource plan of an electric utility and~~

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would otherwise qualify as an advanced energy resource if it were utilized directly by an electric utility.

(D) An electric utility or electric services company may use renewable energy credits (REC) to satisfy all or part of a renewable energy resource benchmark, including a solar energy resource benchmark.

(1) To be eligible for use towards satisfying a benchmark, a REC must originate from a facility that meets the definition of a renewable energy resource, including solar energy resources, and be measured by a utility grade meter in compliance with paragraph (B) of rule 4901:1-10-05 of the Administrative Code, for facilities with generating capacity of more than six kilowatts. Such facilities could include a mercantile customer-sited resource that is not committed for integration into an electric utility's demand response, energy efficiency, or peak demand reduction program pursuant to rule 4901:1-39-08 of the Administrative Code but that otherwise qualifies under the terms of paragraph (A) of this rule.

(2) To use RECs as a means of achieving partial or complete compliance, an electric utility or electric services company must be a registered member in good standing of at least one of the following:

(a) The PJM's generation attributes tracking system.

(b) The MISO's renewable energy tracking system.

(c) Another credible tracking system approved for use by the commission.

(3) A REC may be used for compliance any time in the five calendar years following the date of its initial purchase or acquisition.

(4) Double counting is prohibited.

(5) The RECs must be associated with electricity that was generated no earlier than July 31, 2008.

(E) For a generating facility of seventy-five megawatts or greater that is situated within

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~~this state and has committed by December 31, 2009, to modify or retrofit its generating unit or units to enable the facility to generate principally from biomass energy by June 30, 2013, the number of RECs produced by each megawatt-hour of electricity generated principally from biomass energy shall equal the actual percentage of biomass feedstock heat input used to generate such megawatt-hour multiplied by the quotient obtained by dividing the then existing unit dollar amount used to determine a renewable energy compliance payment as provided under division (C)(2)(b) of section 4928.64 of the Revised Code, by the then existing market value of one REC, but such megawatt-hour shall not equal less than one credit.~~

~~(F) An entity seeking resource qualification shall file an application for certification of its resources or technologies, upon such forms as may be prescribed by the commission. The application shall include a determination of deliverability to the state in accordance with paragraph (I) of rule 4901:1-40-01 of the Administrative Code.~~

~~(1) Any interested person may file a motion to intervene and file comments and objections to any application filed under this rule within twenty days of the date of the filing of the application.~~

~~(2) The commission may approve, suspend, or deny an application within sixty days of it being filed. If the commission does not act within sixty days, the application is deemed automatically approved on the sixty-first day after the date filed.~~

~~(3) If the commission suspends the application, the applicant shall be notified of the reasons for such suspension and may be directed to furnish additional information. The commission may act to approve or deny a suspended application within ninety days of the date that the application was suspended.~~

~~(4) Upon commission approval, the applicant shall receive notification of approval and a numbered certificate where applicable. The commission shall provide this certificate number to the appropriate attribute tracking system.~~

~~(5) Representatives of certified facilities must notify the commission within thirty days of any material changes in information previously submitted to the commission during the certification process. Failure to do so may result in revocation of certification status.~~

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~~(6) Certification of a resource or technology shall not predetermine compliance with annual benchmarks, and does not constitute any commission position regarding cost recovery.~~

~~(G) At its discretion, the commission may classify any new technology or additional resource as an advanced or renewable energy resource. Any interested person may request a hearing on such classification.~~

## "New"

**4901:1-40-04 Qualified resources.**

(A) The following resources or technologies, if they have a placed-in-service date of January 1, 1998, or after, are qualified resources for meeting the qualified renewable energy resource benchmarks:

(1) Solar photovoltaic or solar thermal energy.

(2) Wind energy.

(3) Hydroelectric energy.

(4) Geothermal energy.

(5) Solid waste energy derived from fractionalization, biological decomposition, or other process that does not principally involve combustion.

(6) Biomass energy.

(7) Energy from a fuel cell.

(8) A storage facility, if it promotes the better utilization of a renewable energy resource. The amount of energy that may qualify from a storage facility is the amount of electricity discharged from the storage facility.

(9) Abandoned coal mine methane energy.

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(10) Waste energy recovery system placed into service or retrofitted on or after September 10, 2012, as defined in division (A)(38)(a) of Section 4928.01 of the Revised Code. The portion of the electricity production that is generated from recovered waste energy shall be recognized as renewable.

(11) A waste energy recovery system defined in division (A)(38)(b) of section 4928.01 of the Revised Code, provided that it was placed into service between January 1, 2002, and December 31, 2004.

(12) A renewable energy resource created on or after January 1, 1998, by the modification or retrofit of any facility placed in service prior to January 1, 1998.

(13) Ohio run-of-the-river hydroelectric facility.

(14) Small hydroelectric facility, regardless of placed in-service date.

(15) Biologically-derived methane gas resources, including biologically derived methane gas resources that are not converted to electricity, excluding biologically-derived methane gas resources used solely for the purpose of flaring. This includes heat captured from a generator of electricity, boiler, or heat exchanger fueled by biologically derived methane gas; and compressed natural gas produced from biologically derived methane gas.

(a) The producer of the biologically derived methane gas must adequately demonstrate measurement, verification, and quantity of biologically derived methane gas produced on a continuing basis. The method used for measuring and calculating the biologically derived methane gas produced must be approved in advance by the commission as part of the facility certification process.

(b) Biologically derived methane gas that has been certified and tracked is not eligible again for certification and may not be double-counted.

(c) The energy derived from biologically derived methane gas shall be measured and verified in accordance with applicable tracking system requirements. For the purposes of converting the quantity of energy derived

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from biologically derived methane gas to an electricity equivalent, one megawatt hour equals 3,412,142 British thermal units. The producer must demonstrate adequate energy content, in British thermal units, and metering accuracy. Biologically derived methane gas shall be reported in megawatt hours.

(16) Distributed generation system used by a customer to generate electricity from one of the resources or technologies listed in paragraphs (A)(1) to (A)(15) of this rule.

(B) The following new or existing mercantile customer-sited resources may be qualified resources for meeting electric utilities' annual renewable energy resource benchmarks, as applicable, provided that it uses a renewable energy resource and that the mercantile customer commits the resource for integration into the electric utility's demand-response, energy efficiency, or peak-demand reduction programs pursuant to rule 4901:1-39-07 of the Administrative Code and division (A)(2)(c) of section 4928.66 of the Revised Code:

(1) Electric generation equipment that uses a renewable energy resource and is owned or controlled by a mercantile customer.

(2) A resource that improves the relationship between real and reactive power.

(3)A mercantile customer-owned or controlled resource that makes efficient use of waste heat or other thermal capabilities.

(4)Storage technology that allows a mercantile customer more flexibility to modify its demand or load and usage characteristics.

(5) Electric generation equipment owned or controlled by a mercantile customer that uses a renewable energy resource.

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(C) An electric utility or electric services company may use RECs and S-RECs, as applicable, to satisfy all or part its qualifying renewable energy resource benchmarks, including a solar energy resource benchmark.

(1) To be eligible for use towards satisfying a benchmark, a REC or S-REC must originate from a facility that has been certified by the commission under paragraph (D) of this rule.

(2) To become certified under paragraph (D) of this rule, an electric generating facility or a qualifying non-electric source, must demonstrate that it satisfies the following:

(a) The definition of a renewable energy resource, including solar energy resources;

(b) The applicable placed in-service date;

(c) The deliverability requirement;

(d) It is registered with, or commits to become registered with, an attribute tracking system recognized by the commission;

(e) The facility's electrical output is measured by a utility-grade meter in compliance with paragraph (B) of rule 4901:1-10-05 of the Administrative Code, for facilities with generating capacity of more than six kilowatts. Gas meters for measuring qualifying gas resources shall comply with the accuracy requirements in Section 4933.09 of the Revised Code; and

(f) All other requirements as delineated in the certification application.

(3) To demonstrate compliance with a renewable energy resource benchmark, an electric utility or electric services company must retire the RECs and S-RECs with any of the following attribute tracking systems: :

(a) The PJM EIS generation attributes tracking system (GATS);

(b) The midwest renewable energy tracking system (M-RETS); or

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(c) Another credible tracking system approved for use by the commission.

(4) A REC or S-REC may be used for compliance any time in the five calendar years following the date of its initial purchase or acquisition.

(5) Double counting is prohibited.

(6) The RECs and S-RECs must be associated with electricity that was generated no earlier than July 31, 2008 for resources or technologies included in the definition of "renewable energy resources" by Amended Substitute Senate Bill 221 (127th General Assembly). For resources or technologies added to the definition of "renewable energy resources" by Amended Substitute Senate Bill 315 (129th General Assembly), the RECs must be associated with electricity that was generated no earlier than September 10, 2012. For resources or technologies added to the definition of "renewable energy resources" by Substitute Senate Bill 310 (130th General Assembly), the RECs must be associated with electricity that was generated, or a qualifying non-electric source that was produced, no earlier than September 12, 2014.

(7) The RECs and S-RECs must be associated with electricity, or a qualifying non-electric source, that was generated no later than the end of the compliance year.

(D) An entity seeking facility qualification shall file an application for certification of its electric generating facility, or qualifying non-electric source, upon such forms as may be prescribed by the commission. The application shall include a determination of deliverability to the state in accordance with paragraph (F) of rule 4901:1-40-01 of the Administrative Code.

(1) Any interested person may file a motion to intervene and file comments and objections to any application filed under this rule within twenty days of the date of the filing of the application.

(2) An application is deemed automatically approved within 30 days after the application is filed, unless suspended by order of the commission.

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(3) If the commission suspends the application, the applicant shall be notified of the reasons for such suspension and may be directed to furnish additional information.

(4) Upon commission approval, the applicant shall receive notification of approval and a numbered certificate where applicable. The commission shall provide this certificate number to the appropriate attribute tracking system.

(5) If an applicant withdraws an application prior to commission approval, then the case shall be closed without further action from the commission.

(6) Representatives of certified facilities must notify the commission within thirty days of any material changes in information previously submitted to the commission during the certification process. Failure to do so may result in revocation of certification status.

(7) The Commission may revoke a certificate due to changes that negate the facility's certification eligibility. In the event a certificate is revoked, the Commission may recognize as viable compliance resources the RECs or S-RECs generated during the time of certification unless specifically stated otherwise by the commission.

(8) Certification of a resource or technology shall not predetermine compliance with annual benchmarks, and does not constitute any commission position regarding cost recovery.

(E) At its discretion, the commission may classify any new technology as a qualifying renewable energy resource. Any interested person may request a hearing on such classification.

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## "Rescind"

~~4901:1-40-05 Annual status reports and compliance reviews.~~

~~(A) Unless otherwise ordered by the commission, each electric utility and electric services company shall file by April fifteenth of each year, on such forms as may be published by the commission, an annual alternative energy portfolio status report analyzing all activities undertaken in the previous calendar year to demonstrate how the applicable alternative energy portfolio benchmarks and planning requirements have or will be met. Staff shall conduct annual compliance reviews with regard to the benchmarks under the alternative energy portfolio standard.~~

~~(1) Beginning in the year 2010, the annual review will include compliance with the most recent applicable renewable and solar energy resource benchmark.~~

~~(2) Beginning in the year 2025, the annual review will include compliance with the most recent applicable advanced energy resource benchmark.~~

~~(3) The annual compliance reviews shall consider any under-compliance an electric utility or electric services company asserts is outside its control, including but not limited to, the following:~~

~~(a) Weather-related causes.~~

~~(b) Equipment shortages for renewable or advanced energy resources.~~

~~(c) Resource shortages for renewable or advanced energy resources.~~

~~(B) Any person may file comments regarding the electric utility's or electric services company's alternative energy portfolio status report within thirty days of the filing of such report.~~

~~(C) Staff shall review each electric utility's or electric services company's alternative energy portfolio status report and any timely filed comments, and file its findings and recommendations and any proposed modifications thereto.~~

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~~(D) The commission may schedule a hearing on the alternative energy portfolio status report.~~

## "New"

**4901:1-40-05 Annual status reports and compliance reviews.**

(A) Unless otherwise ordered by the commission, each electric utility and electric services company shall file by April fifteenth of each year, on such forms as may be published by the commission, an annual renewable energy portfolio status report analyzing all activities undertaken in the previous calendar year to demonstrate how the applicable renewable energy portfolio benchmarks ~~and planning requirements~~ have been met. Staff shall conduct annual compliance reviews with regard to the benchmarks under the renewable energy portfolio standard.

(1) The annual review will include compliance with the most recent applicable renewable and solar energy resource benchmark.

(2) The annual compliance reviews shall consider any under-compliance an electric utility or electric services company asserts is outside its control, including but not limited to, the following:

(a) Weather-related causes.

(b) Equipment shortages for renewable energy resources.

(c) Resource shortages for renewable energy resources.

(3) The renewable energy portfolio status reports filed by each electric utility and electric services company for the applicable compliance year shall include at least the following content that, with the exception of paragraphs (d) ~~and (e)~~, shall be made publicly available:

(a) The actual annual sales volumes used to compute the compliance baseline, including identification of the source of the sale volume figures.

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(b) A quantification in megawatt-hours of all applicable renewable energy portfolio standard compliance requirements.

(c) An indication of the compliance status relative to each of the applicable ~~alternative~~ renewable energy portfolio standard compliance requirements.

(d) Demonstration of status relative to the statutory three percent cost provision~~(s)~~, for the compliance year addressed in the annual status report, pursuant to the calculation methodology described in rule 4901:1-40-07 of the Administrative Code.

~~(e) A prospective calculation of its maximum recoverable compliance funds for the year following the compliance year, pursuant to the calculation methodology described in rule 4901:1-40-07 of the Administrative Code.~~

(e)~~(f)~~ Identification of the attribute tracking system(s) used to demonstrate compliance.

(f)~~(g)~~ A discussion of any perceived impediments to achieving compliance with required benchmarks, as well as suggestions for addressing any such impediments.

(g)~~(h)~~ An electric services company may omit the contents required in paragraphs (d) ~~and (e) of this section~~ if the company affirms in its compliance status report that it will not seek compliance relief under section 4928.64(C)(3) of the Revised Code for that year.~~those years.~~

(B) Any person may file comments regarding an electric utility's or electric services company's renewable energy portfolio status report within thirty days of the filing of such report.

(C) Staff shall review each electric utility's or electric services company's renewable energy portfolio status report and any timely filed comments, and file its findings and recommendations and any proposed modifications thereto.

(D) An annual compliance status report is deemed automatically approved unless suspended by the commission within sixty days of the filing date of staff's findings and

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recommendations. The commission may schedule a hearing on the renewable energy portfolio status report.

## "Amend"

**4901:1-40-06 Force majeure.**

An electric utility or electric services company may seek a force majeure determination from the commission for all or part of a minimum renewable- or solar-energy benchmark.

(A) A decision on a request for a force majeure determination will be rendered within ninety days of an electric utility or electric services company filing a request for such determination. The process and timeframes for such a determination shall be set by entry of the commission, the legal director, deputy legal director, or attorney examiner.

(1) At the time of requesting such a determination from the commission, an electric utility or electric services company shall demonstrate that it pursued all reasonable compliance options including, but not limited to, renewable energy credit (REC) solicitations, REC banking, and long-term contracts.

(2) The request shall include an assessment of the availability of ~~qualified in-state resources, as well as~~ qualified resources within the service territories of ~~PJM and the MISO~~any regional transmission organizations that manage transmission systems located in Ohio.

(B) If the commission determines that force majeure conditions exist, it may modify that compliance obligation of the electric utility or electric services company, as it considers appropriate to accommodate the finding.

(1) Such modification does not automatically reduce future-year obligations.

(2) The commission retains the right to increase a future year's compliance obligation by the amount of any under compliance in a previous year that is attributed to a force majeure determination.

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## "Rescind"

~~4901:1-40-07 Cost cap.~~

~~(A) An electric utility or electric services company may file an application requesting a determination from the commission that its reasonably expected cost of compliance with an advanced energy resource benchmark would exceed its reasonably expected cost of generation to customers by three per cent or more. The process and timeframes for such a determination shall be set by entry of the commission, the legal director, deputy legal director, or attorney examiner.~~

~~(1) The burden of proof for substantiating such a claim shall remain with the electric utility or electric services company.~~

~~(2) An electric utility or electric services company shall pursue all reasonable compliance options prior to requesting such a determination from the commission.~~

~~(3) In the case that the commission makes such a determination, the electric utility or electric services company may not be required to fully comply with that specific benchmark.~~

~~(B) An electric utility or electric services company may file an application requesting a determination from the commission that its reasonably expected cost of compliance with a renewable energy resource benchmark, including a solar energy resource benchmark, would exceed its reasonably expected cost of generation to customers by three per cent or more. The process and timeframes for such a determination shall be set by entry of the commission, the legal director, deputy legal director, or attorney examiner.~~

~~(1) The burden of proof for substantiating such a claim shall remain with the electric utility or electric services company.~~

~~(2) An electric utility or electric services company shall pursue all reasonable compliance options prior to requesting such a determination from the commission.~~

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~~(3) In the case that the commission makes such a determination, the electric utility or electric services company may not be required to fully comply with that specific benchmark.~~

~~(C) Calculations involving a three per cent cost cap shall consist of comparing the total expected cost of generation to customers of an electric utility or electric services company, while satisfying an alternative energy portfolio standard requirement, to the total expected cost of generation to customers of the electric utility or electric services company without satisfying that alternative energy portfolio standard requirement.~~

~~(D) Any costs included in a commission-approved unavoidable surcharge for construction or environmental expenditures of generation resources shall be excluded from consideration as a cost of compliance under the terms of the alternative energy portfolio standard and therefore, would not count against the applicable cost cap. Such costs should, however, be included in the calculation of the total expected cost of generation to customers described in paragraph (C) of this rule.~~

~~(E) If the commission makes a determination that a three per cent provision is triggered, the electric utility or electric services company shall comply with each benchmark up to the point that the three per cent increment would be reached for each benchmark.~~

## "New"

**4901:1-40-07 Cost cap.**

(A) By no later than April fifteenth of each compliance year, electric utilities and electric services companies shall calculate their status relative to the statutory three percent cost provision ~~maximum recoverable compliance funds to be used for compliance with (A)(1), as applicable,~~ during the most recent~~that~~ compliance year. Electric services companies may be excused from this requirement pursuant to rule 4901:1-40-05(A)(3)(g)~~(h)~~ of the Administrative Code. ~~The prospective calculations and related information shall be provided to the commission pursuant to rule 4901:1-40-05 of the Administrative Code.~~ Alternatively, an electric utility or electric services company may

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file an application with the commission for review of its cost cap calculation prior to the date required in rule 4901:1-40-05 of the Administrative Code.

(1) A discretionary three percent cost cap is applicable to the renewable energy benchmarks specified in division (B)(2) of section 4928.64 of the Revised Code.

~~(2) The burden of proof for demonstrating compliance with the three percent cost cap shall remain with the entity filing the application.~~

(2)~~(3)~~ An electric utility or electric services company shall pursue all reasonable compliance options prior to requesting relief from compliance with the renewable energy resource requirements based on the three percent cost cap.

(3)~~(4)~~ In the case that the commission makes such a determination that an electric utility's or electric services company's compliance costs exceed the applicable three percent cost cap, the electric utility or electric services company may not be required to fully comply with the renewable energy benchmarks specified in division (B)(2) of section 4928.64 of the Revised Code.

(B) The calculation of the company's status relative to the statutory three percent cost provision ~~maximum recoverable compliance funds~~ shall follow the multi-step process as detailed below. If full compliance with the applicable benchmark would prompt a company to exceed the three percent cost provision, the company may seek relief from the Commission for that incremental portion of its compliance obligation. ~~In the event that an electric utility reaches its maximum recoverable compliance funds for a year for paragraph (A)(1) of this rule, it shall not seek recovery of any additional compliance costs towards that benchmark for that compliance year.~~

(1) Determine the compliance baseline in megawatt-hours for the compliance year consistent with the applicable section of paragraph (B) of rule 4901:1-40-03 of the Administrative Code.

(2) Calculate a reasonably expected dollar per megawatt-hour figure for the compliance year.

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(a) For an electric utility, the dollar per megawatt-hour figure should be a weighted average of the reasonably expected cost of the SSO supply for delivery during the compliance year, net of distribution losses.

(b) For electric service companies, this dollar per megawatt-hour figure should be a weighted average of the reasonably expected cost of supply for delivery during the compliance year, net of distribution system losses.

(3) Calculate the total cost by multiplying the dollar per megawatt-hour figure in paragraph (2) by the compliance baseline calculated in paragraph (1).

(4) Multiply the total cost in paragraph (3) by three percent.~~, with the result representing the maximum recoverable compliance funds to be applied towards compliance resources for paragraphs (A)(1) for that compliance year.~~

# "Amend

**4901:1-40-08 Compliance payments.**

(A) Any electric utility or electric services company that does not achieve an annual renewable energy resource benchmark, including a solar benchmark, shall remit a compliance payment based on the amount of noncompliance rounded up to the next megawatt hour (MWh), unless the commission has identified the existence of force majeure conditions or the commission has granted relief under ~~determined that~~ the three per cent cost-cap provision.~~ would be exceeded in the event of full compliance~~.

(1) The required payment for noncompliance with any solar energy resource benchmark shall be calculated by quantifying the level of noncompliance, rounded to the next MWh, and multiplying this figure by the per MWh amount in the table below.

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Solar energy resources - compliance payment

| Year | Payment per MWh |
|---|---|
| ~~2009~~2014, 2015, and 2016 | ~~$450~~350 |
| 2017 and 2018 ~~2010 and 2011~~ | $~~400~~250 |
| 2019 and 2020 ~~2012 and 2013~~ | $~~350~~200 |
| 2021 and 2022~~2014 and 2015~~ | $~~300~~150 |
| ~~2016 and 2017~~ 2023 and 2024 | $~~250~~100 |
| ~~2018 and 2019~~2025 and beyond | $~~200~~50 |
| ~~2020 and 2021~~ | ~~$150~~ |
| ~~2022 and 2023~~ | ~~$100~~ |
| ~~2024 and beyond~~ | ~~$50~~ |

(2) The required payment for noncompliance with any renewable energy resource benchmark, excluding solar, shall be calculated by quantifying the level of noncompliance, rounded to the next MWh, and multiplying this figure by an amount determined by the commission.

(a) The per MWh payment for renewable energy resources for the year 2009 is forty-five dollars.

(b) Beginning in the year 2010, the per MWh payment for renewable energy resources will be adjusted annually to reflect the annual change to the consumer price index as defined in section 101.27 of the Revised Code. Such adjustment

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shall be performed by staff no later than June first of each calendar year. This annual adjustment shall be calculated using the following formula:

= ((CPIYR2/CPIYR1) * current per MWh payment)

(c) In no event shall the compliance payment for renewable energy resources be less than forty-five dollars per MWh.

(3) At least annually, the staff shall conduct a review of the renewable energy resource market, including solar, both within this state and within the regional transmission systems active in the state. The results of this review shall be used to determine if changes to the solar- or renewable-energy compliance payments are warranted, as follows:

(a) The commission may increase compliance payments if needed to ensure that electric utilities and electric services companies are not using the payments in lieu of acquiring or producing energy or RECs from qualified renewable resources, including solar.

(b) Any recommendation to reduce the compliance payments shall be presented to the general assembly.

(B) Any compliance payment shall be submitted to the commission for deposit to the credit of the advanced energy fund. All compliance payments shall be delivered to the commission within thirty days of the imposition of any compliance payment requirement by the commission.

(C) Compliance payments shall be subject to such collection and enforcement procedures as apply to the collection of a forfeiture under sections 4905.55 to 4905.60 and 4905.64 of the Revised Code.

(D) Any electric utility or electric services company found to be liable for a compliance payment is prohibited from passing compliance payments on to consumers. In the event that a compliance payment is required, an electric utility or electric services company shall ~~submit~~ file an attestation, signed by a company officer or designee, indicating that it will not seek to recover the specific compliance payment from

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consumers. Such attestation shall be ~~submitted to staff~~filed within thirty days of the imposition of any compliance payment requirement.

## "Amend"

**4901:1-40-09 Annual report.**

(A) Pursuant to division (D)(1) of section 4928.64 of the Revised Code, an annual report shall be submitted to the general assembly addressing at least the following topics:

(1) The compliance status of electric utilities and electric services companies with respect to the ~~advanced and~~ qualified renewable ~~and~~ energy resource benchmarks.

(2) Suggested strategies for electric utility and electric services company compliance.

(3) Suggested strategies for encouraging the use of ~~alternative~~ renewable energy resources in supplying this state's electricity needs in a manner that considers:

(a) Available technology.

(b) Costs.

(c) Job creation.

(d) Economic impacts.

(4) Average annual REC and S-REC costs for the compliance year(s) covered by the report.

(B) The report shall be submitted in accordance with section 101.68 of the Revised Code.

(C) Prior to its submission to the general assembly, the report will be issued for public comment by interested persons for thirty days, unless otherwise ordered by the commission. The process and timeframes for soliciting public comment shall be set by entry of the commission, the legal director, deputy director, or attorney examiner.