Office of the Ohio Consumers' Counsel

Residential Utility Consumer Advocate

JOINT COMMITTEE ON AGENCY RULE REVIEW

Green Rules

Submitted by:
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TESTIMONY OF AMY GOMBERG,
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Good afternoon, Chairman Skindell, Vice-Chairman Niehaus, and members of the committee. I am Amy Gomberg, the Director of Legislative and Government Affairs for the Office of the Ohio Consumers' Counsel. The Office of the Ohio Consumers' Counsel (OCC) is the statutory representative of Ohio's 4.5 million residential utility consumers. I am here today to testify in opposition to the recent changes made to 4 crucial components of the "green rules," the rules following the passage of S.B. 221 which govern the development of renewable energy and energy efficiency in Ohio.

While most of the rules in this package comply with the legislative intent of S.B. 221 and will provide benefits to the public, there are four rules that the Public Utilities Commission of Ohio ("PUCO" or "Commission") must revise to comply with Ohio law. In particular the energy efficiency and renewable energy requirements established by S.B. 221 are the jewels of Ohio's electric energy law because they can help avoid building expensive power plants and can provide consumers with tools to reduce their utility bills. The changes in the rules made by the PUCO take away these benefits, turning a balanced law into a bad deal for consumers. While the rest of the country is taking steps forward on efficiency and renewable energy, the PUCO's latest changes to the rules have moved Ohio several steps backwards.

In my testimony I will discuss four rules and the JCARR prong that they violate:

1. The modifications to the rules regulating the determination of energy savings for mercantile customer-sited programs is inconsistent with another rule and violates the intent of R.C. 4928.66(A)(2)(c) (compliance through "programs.");

2. The streamlined and limited the amount and type of information that will be included in the utility Resource Plans, Ohio Adm. Code Chapter. 4901:5-5, violates the policy of the state related to electricity pricing in R.C. 4928.02(A) (ensures adequate, ... reasonably priced electric service);

3. The modifications to the requirements that a "storage facility" must satisfy to qualify as a resource for meeting the renewable energy resource benchmarks violates the

legislative intent of R.C. 4928.01(A)(35) ("... promote the better utilization of a renewable energy resource that primarily generates off-peak");

4. The modification to the definition of "double counting" expands the intent of R.C. 4928.64(B) (benchmarks requiring increasing renewable energy generation) and the policy directives of R.C. 4928.02 (providing "...[A]ppropriate incentives to technologies that can adapt successfully to potential environmental mandates,").

1. **In Proposed Rule 4901:1-39-05(F), the PUCO modified the determination of energy savings for mercantile customer-sited programs to be inconsistent with another rule proposed by the PUCO and to violate the intent of R.C. 4928.66(A)(2)(c) (compliance shall come from "energy efficiency programs.");**

The statute states that compliance with the energy efficiency targets shall be measured by including the effects of all mercantile customer <u>energy efficiency programs</u> (R.C. 4928.66 (A)(2)(c)). The legislature intended for mercantile customers and utilities alike to develop new **programs** to reduce their energy use, not rely on "business as usual" actions that would not have happened regardless of S.B. 221. **The proposed rule (O.A.C. 4901:1-39-05(F)) would allow mercantile customers to gain energy efficiency credit for "business as usual" actions, such as purchasing up-to-code equipment, which violates the intent of the law.**

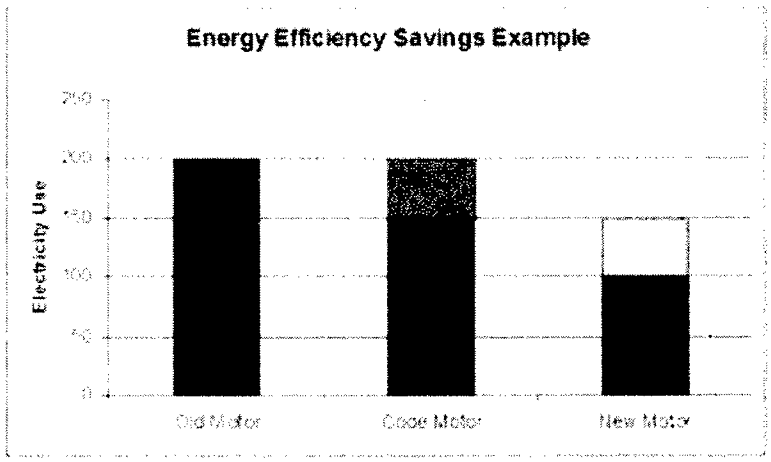
Additionally, the PUCO further clarifies in proposed rule 4901:1-39-05(H): "An electric utility shall not count in meeting any statutory benchmark <u>the adoption of measures that are required to comply with energy performance standards set by law or regulation</u>, including but not limited to, those embodied in the Energy Independence and Security Act of 2007, or an applicable building code." Therefore, in order for a utility to count energy efficiency savings to meet one of their mandated benchmarks, the savings regardless of whether they are from the residential, commercial, or industrial sector, must be **above code savings** incurred from the implementation of an **energy efficiency program. This rule clearly conflicts with the proposed rule regarding energy efficiency compliance for the mercantile sector.**

Proposed rule 4901:1-39-05(F) is unclear and introduces a conflicting standard for mercantile customers, which allows savings to be counted towards the utility energy efficiency benchmarks that should not qualify for that treatment. The proposed rule suggests that **all energy** savings may be counted, due to the inclusion of several confusing and open ended terms and phrases in the rule including "be presumed to be the effect of a ... energy efficiency ... program...where practicable. Electric utilities may make an alternative demonstration that mercantile customer energy savings or peak demand reductions are effects of such a program."

For utility-sponsored programs only the incremental savings above code would count whereas for mercantile customers <u>all</u> savings, including the upgrade from current operation to code may be able to count. To provide context, I do not know of <u>any</u> other state in the country that allows "up-to-code" energy savings to count towards meeting their energy efficiency standards.

Additionally, the PUCO issued a Finding and Order on October 15, 2009 adopting positions with regard to a number of provisional recommendations concerning an Energy Efficiency Technical Reference Manual. In this order, they explain what may or may not qualify as energy efficiency savings. We believe this Manual is clearer and more consistent, whereas the proposed rule is unclear and inconsistent.

To demonstrate more clearly the impact of the changes, the following chart shows hypothetical scenarios of a mercantile customer who is replacing an in-efficient motor. The electricity use numbers for each of the motors described are completely hypothetical. In this chart, the old motor used 200 kWh of energy, a current up-to-code motor uses 150 kWh and an "above-code" motor uses only 100 kWh of electricity to produce the same amount of work.



This colored box represents the "up-to-code" energy savings under debate. The PUCO's rules are conflicting regarding counting these savings.

This colored box represents the "above-code" energy savings of the new motor.

Proposed rule 4901:1-39-05(F) allows **all** savings (both colors) to be counted when a mercantile customer's equipment fails and is replaced with an above-code item, or an item is replaced early. Proposed rule 4901:1-39-05(H) only allows only the "above-code" savings to count for utility energy efficiency programs. The Energy Efficiency Technical Reference Manual allows the "up-to-code" energy savings to count ONLY for the remaining life-time of the old motor. This conflict should be rectified by enacting the same standard for both mercantile and utility programs: only savings facilitated by a **program** count toward the energy savings benchmarks, and only if the energy savings exceed code. As a compromise, we would generally support the definition as described in the Technical Reference Manual Finding and Order.

Together, the changes to 4901:1-39-05(F) in the Commission's October 15 and 28 entries violate the intent of the legislature, conflict with another rule, and create a presumption of energy savings where energy savings might not exist. This internal conflict in the Entry should be rectified by holding both mercantile and utility programs to the same, lawful standard.

We urge the members of JCARR to oppose this provision of the rules, and encourage the PUCO to modify this rule to remain consistent with other rules, and the guidelines provided in the Energy Efficiency Technical Reference Manual.

2. **The PUCO's decision to limit the amount and type of information required in Resource Plan filings (4901:5-5-06) results in the PUCO and others being unable to adequately assess resource allocation issues, and therefore conflicts with the intent of the legislation:**

> **Relevant Statutory Provision:**
> **R.C. 4928.02(A):** "It is the policy of this state to …. ensure the availability of adequate, reliable, safe, efficient, nondiscriminatory, and reasonably priced electric service."
> **4928.143(B)(2)(b):** "No such allowance for generating facility construction shall be authorized, however, unless the commission first determines in the proceeding that there is need for the facility based on resource planning projections submitted by the electric distribution utility."

The modifications in rule 4901:5-5-06 conflict with the PUCO's ability to "ensure the availability of adequate, reliable, safe, efficient, nondiscriminatory, and reasonably priced electric service," as stated in 4928.02(A). The rule, revised in the October 15th Entry on Rehearing, allows utilities to submit resource plans once every five years. Without annual filings of Integrated Resource Plans (IRPs), the PUCO (and interested parties) will have inadequate information from which to determine important resource allocation questions, such as approving cost recovery from customers for expensive new power plant construction, or deployment of new services such as smart grid, renewable energy or energy efficiency. Without consistent information, provided in an integrated manner, and the complete historical perspective that annual IRPs provide, utilities will more easily be able to manipulate any single year's information to justify their action. Additionally, the PUCO will be forced to make decisions on other important utility issues in a vacuum. In order to ensure adequately priced electric service, the PUCO and other interested parties need to have, on an annual basis, up-to-date and complete information as provided in IRPs.

In earlier versions of the rule, the PUCO proposed an annual IRP reporting requirement. The PUCO explained in its April 15th Opinion and Order that it will "require annual IPR filing as a necessary tool for this Commission."[1] The Commission's position on these annual reporting requirements was rigid, and emphasized how important and vital these annual plans are.

Additionally, AEP filed comments acknowledging the importance of resource plans because they are the only way to evaluate electric utility compliance with statutorily mandated renewable energy and efficiency requirements.[2]

Resource plans are the critical and the only context in which the PUCO can determine whether the actions of the utilities under Revised Code sections 4928.64 and 4928.66 will ensure the "availability to consumers of adequate, reliable, safe, efficient, nondiscriminatory and reasonably priced electric service." These plans ensure that energy savings from utility energy efficiency programs are used to avoid construction of unnecessary and expensive power plants. The multi-year gap between resource plan filings means that the PUCO could make expensive and irreversible decisions with outdated and incomplete information.

We urge JCARR to oppose the changes to Ohio Adm. Code 4901:5-5-06, presented in the October 15th Entry on Rehearing, that reduce the frequency and amount of information required in the utilities' resource plans, and the PUCO should restore its original requirement for more frequent resource plan filings. Without more frequent filings, the OCC, other consumer and environmental groups, and the PUCO will have limited information from which to determine the public interest in important resource allocation questions.

3. The modifications (Ohio Adm. Code 4901:1-40-04(A)(8)) to the requirements that a "storage facility" must satisfy to qualify as a resource for meeting the renewable energy resource benchmarks violates the legislative intent;

The statute states in R.C. 4928.01(A)(35):

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[1] Opinion and Order (April 15, 2009) at 43.

[2] Entry on Rehearing (June 17, 2009) at 42.

> "Renewable energy resource" includes ... storage facility that will promote better utilization of a renewable energy resource that primarily generates off peak…."

The proposed rules expands this definition: O.A.C. 4901:1-40-04(A)(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, **<u>or the equivalent renewable energy credits are obtained.</u>**
> (b) The amount of energy that may qualify from a storage facility is the amount of electricity dispatched from the storage facility."

As written, the proposed change to the rule would allow a utility to pump fossil fuel energy into a storage device, and buy renewable energy credits (RECs), regardless of if they were generated on or off peak, for the amount of energy that it has stored. Then, it could claim that the resulting energy, when released from the storage facility deserves renewable energy credit. This conflicts with the statute ("promot[ing] better utilization of a renewable energy resource that primarily generates off peak") and the intent of the legislature (fostering generation of renewable energy resources and industries). In addition it causes more confusion to how this renewable energy resource will be calculated to comply with annual benchmarks.

The modification to the definition of a storage facility conflicts with the intent of the legislation to provide in-state renewable energy resources, industries and facilities:

R.C. 4928.64(B)(3):

> "At least one-half of the renewable energy resources implemented by the utility or company shall be met through facilities located in this state; the remainder shall be met with resources that can be shown to be deliverable into this state."

Additionally, the intent of S.B. 221 is spelled out in a letter from Senator Jon Husted, written on October 1, 2008, when he was still serving as Speaker of the House. The letter states "I would encourage the PUCO to resolve any potential ambiguities regarding Senate Bill 221 in favor of the legislative intent to encourage the advanced and renewable energy industry to flourish in Ohio and maximize the economic and environmental benefits to the state."

The proposed change to the definition of storage facility flies in the face of this intent. Instead, of developing Ohio's renewable energy industry, this revised definition may allow utilities to purchase readily available and inexpensive "out-of-state" RECs from out-of-state renewable energy facilities that may or may not be generating "off-peak" (as required by law). For instance, a utility may attempt to purchase RECs from a hydroelectric facility in Oregon, and use those RECs to store their own fossil fuel power in a storage facility as a "renewable resource." Then, when that energy is later released from the storage facility, they may attempt to convert it to a much more valuable in-state REC.

This is the renewable energy equivalent of turning straw into gold, and was certainly not the result contemplated by the legislature. This could completely wipe out the requirement to build any in-state renewable energy. Therefore, the storage facility definition should be rejected by the JCARR committee, as this transfer of RECs does nothing to spur in-state renewable energy development.

Additionally, a lack of clarity in the calculation of the storage RECs conflicts with the intent of the legislation.

All storage facilities require more energy to store the energy than is generated when the energy is later released. Rule 4901:1-40-04(A)(8), contains a vague description of an incomplete process about how the RECs purchased will compare with the RECs "created" through the storage process. No formula is presented that clarifies how RECs used to store energy versus RECs created will be calculated or "counted" by the PUCO. Why would any storage facility buy, for example, three RECs on the front end in order to create two RECs later on? One possibility, as stated, is to purchase inexpensive out-of state RECs to create more valuable in-state RECs by masking a traditional fossil-fuel generation process. Another motivation may have something to do with the way the PUCO is planning on calculating the value of the stored RECs, which may significantly affect how these will by used to satisfy compliance with S.B. 221. There is no explanation in the rule on how the PUCO will calculate these stored RECs and **this could significantly dilute the renewable energy requirements, which goes against the legislative intent.**

Details of this calculation should be developed, presented and discussed in an open, transparent process. It should then be a part of this rule and subject to JCARR's approval. Simply put, without sufficient detail to describe exactly how a facility's processes will be counted when submitted to meet specific statutory benchmarks, the PUCO is reserving for itself substantive future rulemaking. **By doing so, the PUCO is exceeding the scope of its authority** by cloaking in a private process the affection of future policy, which could have a significant impact on the development of renewable energy generation in Ohio. Until the entire process is presented for review, the JCARR Committee should reject this murky and incomplete expansion of the storage rule.

Lastly, it is unclear how the storage facility process, as presented by the PUCO will affect the calendar limitation place on a REC. The statute states:

R.C. 4928.65:

> "An electric distribution utility or electric services company may use renewable energy credits any time in the five calendar years following the date of their purchase or acquisition from any entity…."

The new rule allows the storage facility to purchase "equivalent renewable energy credits" for storage. The proposed rules may allow for a REC to outlive its statutory life. The RECs may be purchased, and the storage facility may not use the stored energy for up to five years. Once the stored energy is released, would the facility be able to claim an additional five years before claiming the REC credit? This would double the allowable statutory time limit. This in combination with the out of state REC **clearly conflicts with the intent of the legislature,** as this would potentially allow unlimited amounts of non-Ohio renewable energy to qualify for Ohio's renewable energy standard.

The PUCO needs to provide a clear, coherent, and concise rule or group of rules that respect statutory guidelines and follow legislative intent regarding storage facilities. If allowed to stand, this rule will decrease investment in Ohio's renewable energy facilities that S.B. 221 was enacted to support, inhibiting green energy job creation and Ohio's transition to a clean energy economy. **Because the proposed rule conflicts with legislative intent, the JCARR committee should reject this rule.**

4. The PUCO's modification to the definition of "double counting" (proposed rule 4901:1-40-01(M)) expands the intent of the legislation.

In its October 15 Entry, the Commission substantially changed the rule on double counting and related definitions. Double counting was formerly defined as prohibiting the use of a REC or energy efficiency savings to satisfy "multiple regulatory requirements." This phrase was eliminated. Along with this change, the term "fully aggregated" was deleted from the definition section (formerly rule 4901:1-40-01(T), and the phrase "fully aggregated" was removed from the definition of "renewable energy credit" (proposed rule 4901:1-40-01(BB).

- **Each megawatt of renewable energy should be counted only once:**

The proposed rule now allows a renewable energy credit ("REC") to satisfy "multiple regulatory requirements." The Commission's original definition of a REC required that each REC must be "fully aggregated," which meant that a REC retained "all of its environmental attributes, including those pertaining to air emissions...." By removing the language requiring fully aggregated RECS, and allowing a REC to satisfy "multiple regulatory requirements," the PUCO may lead parties into thinking they can use a REC as both an offset and a renewable energy credit. Renewable energy generation that meets screening criteria (that resulting emissions reductions are permanent, additional, verified, and enforceable) and may also be considered an offset – but should then be used to satisfy only one regulatory requirement. It is either an offset or a REC. Otherwise, the same megawatt of generation is being double-counted to satisfy multiple regulatory requirements.

- **The PUCO's changes are based on a misunderstanding of REC attributes:**

  The Commission's motivation for these modifications appears to be based on a misunderstanding regarding REC attributes. Ohio EPA-issued allowances (part of the NOx Budget Trading Program) are available upon the approval of an application for them by a generator. Unlike the environmental attributes above, these allowances may be considered separately from the REC. Concerns about this separate EPA program did not justify the definitional changes.

- **A primary goal of S.B. 221 is the diversification of Ohio energy resources:**

  The Commission should re-adopt its original position on RECS in order to promote the development of renewable energy and diversification of an electric distribution utility's energy portfolio, which is a primary and overarching policy goal of the S.B.221 legislation. These definitions were originally in line with legislative intent. Double-counting a REC for multiple regulatory requirements will allow more than S.B. 221 intended and significantly slow the development of renewable energy in Ohio, which would violate the legislative intent of S.B. 221.

CONCLUSION

The Commission's October 15th and October 28th modifications to the proposed rules clearly conflict with the original intent of S.B. 221 as described above. The changes made to the Commission's original JCARR filing – a filing that was developed after a 10-month process and thousands of pages of comments from numerous stakeholder groups - no longer adhere with the legislative intent of S.B. 221 or the widely acclaimed transparent process. In specific instances, the modifications create inconsistency within the PUCO rules regarding energy efficiency and peak demand reduction.

We urge you to oppose these specific, identified provisions, and support the rest of the "green rules" package.

<u>Additional Code References:</u>

Energy Efficiency
Ohio Adm. Code 4901:1-39-05(F):

> "A mercantile customer's energy savings and peak-demand reductions shall be measured by including the effects of all demand-response programs for mercantile customers 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 <u>to the extent they involve the early retirement of 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."</u>

Integrated Resource Planning
Relevant Statute: R.C.4935.04(C): Each person owning or operating a major utility facility within this state, or furnishing gas, natural gas, or electricity directly to more than fifteen thousand customers within this state annually shall furnish a report to the commission for its review. The report shall be termed the long-term forecast report…"

(D): The commission shall:
"…(3) Hold a public hearing:…(b) At least once in every five years, on the latest report furnished…"

Relevant Rules:
4901:5-1-02: Form of long-term forecast report (LTFR) filing required.
Except for electric services companies exempted pursuant to division (A)(1) of section 4928.05 of the Revised Code, each person owning or operating a major utility facility within this state, or furnishing gas, natural gas, or electricity directly to more than fifteen thousand customers within this state shall annually furnish a long-term forecast report to the commission for its review, in compliance with the rules set forth in this chapter.

*Note: **Rule 4901:5-5-06** Describes in detail the resource plans for electric utilities. Each part of this plan was, up until the October 15th Entry, required to be furnished on an annual basis with the rest of the LTFR. Below is the portion of the Entry where the PUCO acknowledges that it is reducing the information required on an annual basis, and that the information removed from the annual filing will only be required when there is a "substantial change" or in a hearing year. Hearings are only required once every 5 years, this is where the "only-once-every-five-years" concern comes from.*

Finding (27): With respect to Rule 4901:5-5-06, we are reorganizing and substantially revising this rule to clarify that the resource plan filing contemplated under this new rule is to be included as part of the electric utility's long-term forecast report (LTFR) annual

April 15 filing, pursuant to Section 4935.04(D)(3), Revised Code. Under Rule 4901:5-3-01 (A), the resource plan would only require a forms filing for the years in which no hearing is required under Section 4935.04(D)(3), Revised Code, so long as the forecast does not show a substantial change, or no good cause is shown…the pre-2000 rule was rewritten to reflect the statutory mandates of S.B. 221, and streamlined to limit the amount and type of information required from the electric utilities to that which is necessary for the Commission to fulfill its obligations under S.B. 221. We believe that the new, abbreviated resource plan, as amended by this entry, satisfies those goals.

4901:5-5-06(B): "In the long-term forecast report filed pursuant to rule 4901:5-3-01 of the Administrative Code, the following must be filed in the forecast year prior to any filing for an allowance under sections 4928.143(B)(2)(b) and (c) of the Revised Code…"

Double Counting
Relevant Rule: O.A.C.4901:1-40-01(M):

"Double-counting" means utilizing renewable energy, 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.
(3) Support multiple voluntary product offerings.
(4) Substantiate multiple marketing claims.
(5) Some combination of these.