

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Review of Chapters)
 4901:5-17, 4901:5-19, 4901:5-21, 4901:5-23,)
 4901:5-25, 4901:5-29, 4901:5-33, 4901:5-35,) Case No. 06-1201-AU-ORD
 and 4901:5-37 of the Ohio Administrative Code)

Initial Comments of Ohio Edison Company,
The Cleveland Electric Illuminating Company and The Toledo Edison Company

Come Now Ohio Edison Company, The Cleveland Electric Illuminating Company,
 The Toledo Edison Company ("Companies"), by counsel, and in accordance with the
 Commission's Entries issued on October 11, 2006 and November 14, 2006 hereby
 submit their initial comments to the proposed rules filed in this docket. The Companies
 appreciate the opportunity to comment upon Staff's proposed changes to the
 administrative rules governing energy emergencies.

General Comments

The underlying legal authority for the Commission to promulgate rules in this
 proceeding for Chapters 4901:5-19 is R.C. 4905.03, and for Chapter 4901:5-37 is R.C.
 4928.06 and R.C. 4928.11. One of the fundamental changes in the rules is the shift,
 particularly in Chapters 4901:5-19 and 4901:5-37, in the applicability of the rules from
 applying only to electric utilities, to now including Electric Providers, which includes
 electric service companies, municipal electric systems, electric cooperatives as well as
 electric distribution utilities, and Electric Power Producers within the scope of the rules.
 The extent of the Commission's jurisdiction to promulgate rules in 4905:1-19 affecting

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electric service companies and Electric Power Producers is limited under R.C. 4935.03 to empowering the Governor, during a declared energy emergency, to require them to sell electricity to alleviate hardship or produce emergency supplies to meet emergency needs. In certain respects, the proposed rules appear to exceed this statutory scope. For example, there does not appear to be statutory authority for the Commission to direct the Attorney General to bring an action to enforce these rules as is suggested in Rule 4901:5-19-02(M). The rules authorized to be promulgated under the authority of R.C. 4935.03 are to be designed to empower the Governor to take certain actions in a declared energy emergency. Another example is Rule 4901:5-19-05(A)(4), which imposes new requirements on Electric Power Producers beyond those contemplated in R.C. 4935.03 and is discussed in more detail below.

Comments pertaining to specific rules

Rule 4901:5-19-01(K). FirstEnergy recommends that a definition for "firm sales" be established as it is unclear whether there is any limitation on this term in terms of amount of power involved in the sale, location of the purchaser of the power, length of the sale, and more precisely what is meant by firm as there are varying degrees of firmness of power in wholesale power transactions.

Rule 4901:5-19-02(G). In most of the provisions keyed directly to an amount of utility normal burn days, the number of burn days is coupled with the fact that the Governor has already declared an energy emergency. In this proposed rule provision, action may be taken solely because a particular Electric Power Producer remaining days burn is 20 days or less. Given the overly broad definition of Electric Power

Producer, i.e. anyone who owns a generator of any sort in the entire state and is in the business of selling generation, it will undoubtedly be common for many Electric Power Producers to have less than a 20 day supply of fuel. This definition would potentially apply to landfill owners, distributed generation, net metering situations, windmill farms, etc. Further, depending on the type and use of the generation, it may be standard business practice to have less than a 20 day supply of fuel for the generator. With no justification for the 20 day standard, no required showing that additional electric sales are necessary to avoid hardship, and the broad definition of Electric Power Producer, this rule is simply an unlimited right for the Governor to order any Electric Power Producer in the state to increase sales of electric energy, and to do so without having to declare an Energy Emergency. Given the detailed steps that are required to be followed at different phases in Rule 4901:5-19-05, this rule is unnecessary and should be deleted.

Rule 4901:5-19-02, 3(A), and 4 related to Electric Power Producers. The existing rule states that a party may not be penalized for not following a rule until after the Governor specifies which rules are in effect during an energy emergency. The proposed rule would allow parties to be penalized for not following a rule that the Governor has not yet determined to be in effect. This is inappropriate. The Commission's jurisdiction under R.C. 4935.03 over Electric Power Producers is limited, and the Commission's jurisdiction to impose the proposed rule provisions applying to Electric Power Producers in Rule 4901:5-19-02 and 5-19-04 is ambiguous at best, particularly outside of a declared Energy Emergency. The only requirement under R.C. 4935.03 on Electric Power Producers is to produce emergency supplies to meet

emergency needs, at the direction of the Governor. The provisions in Rule 02 and 04 imposing requirements upon Electric Power Producers appear to be beyond the Commission's rulemaking authority and should be deleted.

Rule 4901:5-19-05. In this proposed rule, within the context of an Energy Emergency having been declared by the Governor, certain actions to be taken by various parties are keyed to declining levels of statewide normal burn days. However, no basis or justification is offered regarding how those particular levels were selected or why they are appropriate. In fact, those levels may well exceed the standard operating procedures of many Electric Power Producers.

Rule 4901:5-19-05(A)(4)(A) requires the issuance of bulletins to consumers on fuel levels by every Electric Power Producer in the state. It is unclear what benefit this will provide, but clearly may lead to consumer panic if they see declining levels, even if such declining levels pose no threat or are temporary in nature. FirstEnergy recommends this rule provision be deleted.

Rule 4901:5-19-05(A)(4)(B). In this proposed rule, the Commission gives itself the authority to order all Electric Power Producers to operate generating plants to optimize fuel usage. This rule appears exceed the Commission's statutory authorization arising in R.C. 4935.03. In that statute, Electric Power Producers may only be required by the Governor to produce emergency supplies to meet emergency needs. Further, such an order may be preempted by federal authority over the matter, which the rule should be modified to recognize.

Rule 4901:5-37-01. The Commission derives its statutory authority to promulgate rules in this Chapter from R.C. 4928.06 and R.C. 4928.11, and the Commission's Entry in this proceeding provides no other statutory authority. R.C. 4928.06 applies only to authorization for the Commission to promulgate rules, address competitive retail electric service products, and address market abuses. R.C. 4928.11 pertains only to noncompetitive retail electric service, which would include electric distribution utilities. Suppliers subject to certification under 4928.08 do not provide noncompetitive retail electric service. The scope of the rule appears to exceed the underlying statutory authorization in this regard, and the rules should be modified accordingly.

Rule 4901:5-37-01(D). The definition of "Emergency" in the proposed rule is overly broad such that an emergency could exist every day under the definition, i.e., every day it would be reasonable to anticipate that a constraint will exist somewhere on the transmission or distribution system that may adversely affect the operation of a transmission or distribution facility. Constraints on the transmission system are in fact one of the primary contributors to congestion costs imposed by both the MISO and PJM, and they occur to some degree every day. And, an Emergency could exist even when the "constraint" on electric energy or on the transmission or distribution system would have no impact on the reliability of electric service. The rule should be modified to clarify the specific instance that would constitute an emergency for purposes of this chapter.

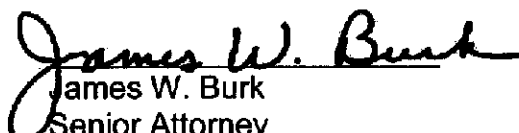
Rule 4901:5-37-02(B). This proposed rule imposes a requirement that Electric Entities must comply with Commission orders during an Emergency, but fails to indicate

how an Emergency is determined to exist, what entity or entities makes the determination that an Emergency exists, over what time frame or geographic area such Emergency exists, or how the Electric Entities will know of any such Emergency. Neither R.C. 4928.06 nor R.C. 4928.11 appear to provide statutory authority for the Commission to declare an Emergency as contemplated by this chapter, and the Governor's authority to declare an Energy Emergency is covered in R.C. 4935.03. Further any such orders issued by the Commission or otherwise at the state level may be subject to preemption by a federal authority, and the rule should be modified to reflect that situation.

Conclusion

The Companies understand the Commission's desire to expand the applicability of the rules entities beyond the scope of traditional utilities. But certain aspects of the proposed rules seek to impose requirements upon competitive entities, such as Electric Power Producers, who are not subject to the Commission's jurisdiction and who are only subject to the requirements of R.C. 4935.03 to a limited degree. The Commission's proposed rules cannot exceed the scope of that statutory authorization. The Companies request the Commission to consider the foregoing comments in their deliberations regarding the promulgation of new rules.

Respectfully submitted,


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