

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Commission's)	
Review of Chapter 4901:1-10, Ohio)	
Administrative Code, Pursuant to)	Case No. 12-2050-EL-ORD
Chapter 4928, Revised Code, Regarding)	
Electric Companies.)	

APPLICATION FOR REHEARING

Kathy J. Kolich
FIRSTENERGY SERVICE COMPANY
76 South Main Street
Akron, OH 44308
T: 330-384-4580
F: 330-384-3875
Email: kjkolich@firstenergycorp.com

TABLE OF CONTENTS

	<u>Page No.</u>
APPLICATION FOR REHEARING	1
MEMORANDUM IN SUPPORT	3
I. Introduction	3
II. Arguments	5
A. Rule 4901:1-10-05(J) is unlawful because it conflicts with the enabling statute that authorized the Commission to promulgate rules governing advanced metering.	5
B. The Order directing that the Rules be submitted to the Joint Committee on Agency Rule Review ("JCARR") is unlawful because the Commission failed to comply with R.C. § 121.82.	6
C. The Rules are unjust and unreasonable because they permit customers, without just cause, to dictate the type of equipment an EDU uses when delivering electric distribution service.	7
D. Proposed Rule 4901:1-10-05(J) is unjust and unreasonable to the extent it requires an EDU to submit a tariff for a service that it is not required, nor is being provided across its service territory.	11
III. CONCLUSION	12
CERTIFICATE OF SERVICE	14

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Commission's)	
Review of Chapter 4901:1-10, Ohio)	
Administrative Code, Pursuant to)	Case No. 12-2050-EL-ORD
Chapter 4928, Revised Code, Regarding)	
Electric Companies.)	

**APPLICATION FOR REHEARING OF OHIO EDISON COMPANY,
THE CLEVELAND ELECTRIC ILLUMINATING COMPANY AND
THE TOLEDO EDISON COMPANY**

Pursuant to R.C. § 4903.10 and Rule 4901-1-35, O.A.C., Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company (collectively, the "Companies"), all of which are electric distribution utilities ("EDUs"), as that term is defined in R.C. § 4928.01(A)(6), hereby apply for a rehearing of the Commission's October 16, 2013 Finding and Order ("Order") issued in the above-captioned case, because it is unreasonable and unlawful in the following respects:

- a. **Rule 4901:1-10-05(J) is unlawful because it conflicts with the enabling statute that authorized the Commission to promulgate rules governing advanced metering.**
- b. **The Order directing that the Rules be submitted to the Joint Committee on Agency Rule Review ("JCARR") is unlawful because the Commission failed to comply with R.C. § 121.82.**
- c. **The Rules are unjust and unreasonable because they permit customers, without just cause, to dictate the type of equipment an EDU uses when delivering electric distribution service.**
- d. **Proposed Rule 4901:1-10-05(J) is unjust and unreasonable to the extent it requires an EDU to submit a tariff for a service that it is not required, nor is being provided across its service territory.**

For these reasons, and as set forth in greater detail in the Companies' Memorandum in Support, which is attached hereto and incorporated herein by reference, the Companies respectfully request that the Commission grant rehearing and issue an Entry on Rehearing consistent with this filing.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Kathy J. Kolich", written over a horizontal line.

Kathy J. Kolich
FIRSTENERGY SERVICE COMPANY
76 South Main Street
Akron, OH 44308
T: 330-384-4580
F: 330-384-3875
Email: kjkolich@firstenergycorp.com

On behalf of Ohio Edison Company, The
Cleveland Electric Illuminating Company
and The Toledo Edison Company

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Commission's)	
Review of Chapter 4901:1-10, Ohio)	
Administrative Code, Pursuant to)	Case No. 12-2050-EL-ORD
Chapter 4928, Revised Code, Regarding)	
Electric Companies.)	

**MEMORANDUM IN SUPPORT OF THE APPLICATION FOR REHEARING
OF OHIO EDISON COMPANY, THE CLEVELAND ELECTRIC
ILLUMINATING COMPANY AND THE TOLEDO EDISON COMPANY**

I. INTRODUCTION

The Commission, in its October 16, 2013 Finding and Order ("Order") set forth rules related to Electric Service and Safety Standards to the extent such rules involve advanced metering opt out and definitions related thereto as set forth in Rule 4901:1-10-01 and Proposed Rule 4901:1-10-05(J) (collectively "the Rules"). (Order, p. 3).¹ These rules involve advanced meters that are defined as those that meet the "pertinent engineering standards using digital technology" and which are "capable of providing one-way [or two-way] communications with the electric utility to provide usage and/or other technical data. (Proposed Rule 4901:1-10-01(A); Order, p. 9). According to the Commission, this definition includes meters with Automated Meter Infrastructure ("AMI"), Automated Meter Reading ("AMR") or Encoder Receiver Transmitter Technologies ("ERT") capabilities. (Order, p. 9).²

¹ The Order applies only to these two rules. (Order, p. 3). Accordingly the Companies' comments and challenges are limited to these two rules. The Companies reserve the right to challenge other aspects of Chapter 4901:1-10 as set forth in future Commission rulings.

² AMI technology is another term for what has become known as "Smart meters, which have the capability for (i) two way communication; (ii) recording of interval data; (iii) remote disconnection; (iv) bi-directional metering and (v) Home Area Networking. AMR technology involves one way communication that can transmit aggregate usage data to a hand held meter reading device or some other device capable of collecting total usage data and transmitting it to the EDU. An ERT is simply an antenna or other similar device that allows for the AMR technology.

Proposed Rule 4901:1-10-05(J), governs an EDU's ability to install an advanced meter, requiring an electric distribution utility ("EDU") to provide notice to a customer of its intent to do so and to allow a customer the opportunity to "opt out" of such an installation and, instead, request a "traditional meter", which is defined as any meter with an analog or digital display that does not have the capability to communicate with the utility using either one-way or two-way communications." (Proposed Rule 4901:1-10-01(GG)). Such opt out opportunity would be required to be set forth in an Advanced Meter Opt Out Service tariff. (Proposed Rule 4901:1-10-05(J)(5)).³

As will be discussed in more detail below, the Rules are unjust, unreasonable and unlawful because they (i) are in conflict with the statute that authorized the Commission to propose such rules; (ii) were developed through a process that does not comply with the prerequisites set forth in R.C. § 121.82; and (iii) provide no rational explanation as to why customers should obtain a right to dictate the day-to-day operations of an EDU. Moreover, the Rules are unjust and unreasonable to the extent that they require an EDU to submit a tariff for a service that is not being offered across the EDU's service territory, or that would conflict with an already Commission approved program.

Accordingly, the Companies respectfully request that the Commission grant rehearing and either remove the Rules in their entirety for the reasons set forth below, or, at a minimum, modify Proposed Rule 4901:1-10-01(A) so that the definition of "advanced meter" excludes AMR meters with ERT capabilities, and Proposed Rule 4901:1-10-05(J) is not mandated for an EDU that does not offer advanced metering on a broad scale, or otherwise would be inconsistent with an already approved Commission program, such as the Companies' Department of Energy

³ While the Companies believe that this proposed rules should be removed in its entirety, should the Commission not do so, this proposed rule should be modified to the extent that there is an inconsistency in the rule that only allows residential customers to opt out of obtaining an advanced meter, while the definition set forth in new rule 4901:1-10-01(I) includes all classes of customers. At a minimum, the Commission should clarify its intent with regard to the scope of the opt out service.

pilot program (“DOE Program”), which was approved in Case No. 09-1820-EL-ATA, *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and the Toledo Edison Company for Approval of Ohio Site Deployment of the Smart Grid Modernization Initiative and Timely Recovery of Associated Costs*, Finding and Order (June 30, 2010 and May 15, 2013).

II. ARGUMENTS

A. Rule 4901:1-10-05(J) is unlawful because it conflicts with the enabling statute that authorized the Commission to promulgate rules governing advanced metering.

As a creature of statute, the Commission has only the jurisdiction conferred upon it by the General Assembly. *Canton Storage and Transfer Co. v. Pub. Util. Comm.*, (1995) 72 Ohio St. 3d 1, 5. And, while the Commission has general authority to promulgate regulations and rules of procedure, this authority is limited by precluding the Commission from legislating through the enactment of rules which are in excess of legislative policy, or which conflict with the enabling statute. *English v. Koster*, (1980) 61 Ohio St. 2d 17, 19. The rule which governs metering is set forth in Proposed Rule 4901:1-10-05. There are two statutes which enable the Commission to promulgate rules related to metering. The first, R.C. § 4905.28, authorizes the Commission to “establish reasonable rules, regulations specifications and standards to secure the accuracy of all meters and appliances for measurement.” Clearly, rules governing a customer’s right to opt out of the installation of advanced metering have nothing to do with the accuracy of the meter, thus rendering Proposed Rule 4901:1-10-05(J) beyond the scope of this enabling statute. The second enabling statute, R.C. § 4928.06, authorizes the Commission to adopt rules, to the extent necessary, that carry out Chapter 4928 and the policies specified in R.C. § 4928.02. Revised Code Section 4928.02(D) indicates that it is the policy of the state to “[e]ncourage innovation and market access for cost-effective supply- and demand-side retail electric service including, but not limited to, demand-side management, time-differentiated pricing, waste energy

recovery systems, smart grid programs, and implementation of advanced metering infrastructure.” By allowing a customer the opportunity to “opt out” of the installation of advanced metering, the Commission is *discouraging* innovation and market access to advanced metering -- something that is contrary to the policy of the State. Inasmuch as R.C. § 4928.06 authorizes the Commission to implement rules that carry out the intent of Chapter 4928 and the policies set forth in R.C. § 4928.02, Proposed Rule 4901:1-10-05(J) is unlawful as being in conflict with the enabling statute. *English, supra.*

B. The Order directing that the Rules be submitted to the Joint Committee on Agency Rule Review (“JCARR”) is unlawful because the Commission failed to comply with R.C. § 121.82.

The Commission ordered that the Rules be filed with JACARR. (Order, p. 20). Prior to making such a filing, R.C. § 121.82, Revised Code, requires the Commission to evaluate the rules against a business impact analysis. If there is an adverse impact on business, the Commission is to incorporate features into the draft rules to eliminate or adequately reduce any adverse impact, with such revisions being sent to the Common Sense Initiative Office, where the proposed revisions will be reviewed. Revised Code Section 107.52 provides that:

A draft rule that affects businesses has an adverse impact on businesses if a provision of the draft rule that applies to businesses has any of the following effects:

- (A) It requires a license, permit, or any other prior authorization to engage in or operate a line of business;
- (B) It imposes a criminal penalty, a civil penalty, or another sanction, or creates a cause of action, for failure to comply with its terms; or
- (C) It requires specific expenditures or the report of information as a condition of compliance.

In this instance, an EDU is required to inform a customer of its intent to install an advanced meter and, should the customer desire not to have such a meter installed, the EDU must, instead, install a traditional meter. (Proposed Rule 4901:1-10-05(J)(1)). Should an EDU

fail to comply with this requirement, the customer would have a cause of action under R.C. § 4905.26, potentially subjecting the EDU to treble damages. R.C. § 4905.61. Moreover, by allowing the customer to choose whether to allow the installation of advanced metering, or, alternatively, to have the EDU remove the advanced metering currently installed, the EDU must incur specific expenditures through both the maintenance of additional inventory that would otherwise not be necessary, and the labor, materials and operating costs incurred to remove the advanced meter and/or to install the traditional meter.⁴ And, while the Rules include a provision that would require the EDU to file a tariff to recover the costs of removing or replacing an advanced meter with a traditional meter, the Commission has failed to provide any explanation as to why an EDU should have to incur the costs in the first place, or why a customer should be able to dictate the type of equipment an EDU elects to use in the delivery of its service; especially when such a right has never existed in the past.

In light of the foregoing, Proposed Rule 4901:1-10-05(J) has an adverse impact on business by not only creating a cause of action and subjecting the EDU to a penalty for non-compliance, but by also requiring the EDU to unnecessarily incur costs to maintain additional inventory or to make an otherwise unnecessary service call. Inasmuch as the Commission failed to perform an appropriate business impact analysis prior to ordering the Rules to be filed with JCARR, the Order and related rules are unlawful.

C. The Rules are unjust and unreasonable because they permit customers, without just cause, to dictate the type of equipment an EDU uses when delivering electric distribution service.

1. The entire proposed rule is unreasonable.

Proposed Rule 4901:1-10-05(J)(2) requires an EDU to notify a customer at least one business day in advance of the EDU's intention to install an advanced meter. The EDU must

⁴ Although the proposed rule allows for the filing of a tariff to recover costs incurred for such replacement of an advanced meter with a traditional meter (4901:1-10-05(J)(5)(c)), cost recovery is not factored into the definition of an "adverse business impact."

then provide the customer with the option to decline the installation of an advanced meter and, instead, retain a traditional meter, provided that the customer pays a tariffed opt out service fee. (Proposed Rule 4901:1-10-05(J)(1)). Further, if a customer already has an advanced meter installed, the customer can instruct the EDU to remove the advanced meter and replace it with a traditional meter. (Id.).⁵ Never before have EDUs been required to notify customers of their intention to install a meter, or provide a customer with the right to dictate the type of meter to be installed. And the Commission has failed to provide any explanation that would justify granting customers this new right.

The meter is simply one component of an EDU's delivery system. A customer has never in the past had the opportunity to dictate the type of equipment that an EDU chooses for the delivery of electric distribution service. Customers are not authorized to decide the type of cable that carries the electricity to their homes, nor can they dictate the type of transformers, circuits or other similar equipment that the EDU uses to provide service. The Commission has failed to provide *any* explanation as to why metering equipment chosen by the EDU is any different from the rest of the EDU's delivery infrastructure. Nor has the Commission provided *any* explanation to justify the awarding of this new authority upon individual customers. Absent such an explanation and justification, the rule is unjust, unreasonable and unlawful.

Further, the Rules require the EDU to provide the customer with at least one business day's notice of its intent to install advance metering. While this may be possible under a full scale deployment scenario, the notice requirement for individual situations may disrupt daily operations, should a team be called out to make other repairs and decide to also make the installation because it fits in their schedule. The one day notice requirement for individual

⁵ The proposed rule is silent on the cost of removing a traditional meter and replacing it with an advanced meter, after the customer had previously decided to have a advanced meter removed and a traditional meter installed. Also, there is no limitation on how often a customer could change its mind and have the meters swapped out. At a minimum, should the Commission not remove Proposed Rule 4901:1-10-05(J) in its entirety, the proposed rule should be modified to clarify how these issues are to be dealt with.

situations could increase costs of operations. Therefore, if the Rules are retained, the Companies recommend that the one business day notice requirement be modified to only apply in full scale deployment situations.

2. At a minimum, the definition of “advanced meter” should be revised to exclude AMR meters.

According to the Order, AMR meters with ERT capabilities come within the scope of the proposed definition of advanced meters. Based on Proposed Rule 4901:1-10-01(A) the Companies would be required to notify a customer of the Companies’ intent to install an AMR meter at least one business day in advance of such installation, and then allow the customer the option to reject the installation of the AMR meter. Further, if an AMR meter is already installed, the proposed rule allows the customer to request that it be removed and replaced with a traditional meter. (Proposed Rule 4901:1-10-05(J)(1). The problem is that AMR meters have become “traditional meters” for all practical purposes, due to the length of time they have been in service.

EDUs have been installing and using AMR meters for years without complaint from customers. As Dayton Power & Light noted in its comments (at 3), the AMR meters with ERT capabilities have been installed since the mid 1990s. The Companies also have deployed approximately 20,000 AMR meters over the years in locations where it is difficult to otherwise obtain a manual meter reading, either due to the inaccessibility of the meter for reasons such as dog hazards, locked gates, or meters located within the home, or in order to streamline meter reading by avoiding the necessity of long walks to the meter in areas such as farming communities with houses with large set backs from the road. If customers opt to have these meters removed, or refuse to have them installed in the future, the expected result will be increased meter reading costs for the EDUs and, ultimately, their customers; increased estimated

meter readings (AMR is a solution to inaccessible meters); and potential stranded investment in AMR meter reading systems.

Customers have never had the right to decide whether an AMR meter is installed on their homes, and there has never been any outcry over the installation of these types of meters. Moreover, AMR meters are installed for valid operational reasons. By allowing customers to dictate if and when an AMR meter is installed, operations are disrupted and, as stated, the cost of providing meter reading services increases. And, while Proposed Rule 4901:1-10-05(J)(5)(c), (d) and (e) allow an EDU to establish a tariff charge for the removal of an existing advanced meter and subsequent installation of a traditional meter, as well as a recurring fee to recover costs of providing special meter reading services, such recovery does not change the fact that the meter reader cannot, in many instances, physically perform a manual read of the meters at most locations with AMR metering.

In sum, there is no valid reason to fix a problem that does not currently exist. AMR meters have been installed and have been in operation on the Companies' distribution systems for over twenty years without meaningful complaint. The Commission has failed to provide any explanation as to why, all of a sudden, customers should be able to choose whether an AMR meter is installed. Accordingly, the inclusion of AMR meters with ERT capabilities within the scope of the definition of "advanced meters" is unjust and unreasonable and should be modified to exclude it from the definition of "advanced meter."

While the Companies believe that the Rules should be removed in their entirety, should the Commission disagree the Companies urge the Commission to modify the definition as proposed by Dayton Power & Light in its comments:

"Advanced meter" means any meter that meets the pertinent engineering standards using digital technology to measure demand and/or usage at hourly intervals or more frequently, provides usage data to both consumers and energy

companies at least once daily. And requires a fixed network that enables two-way data transfer

In so doing, the Commission addresses what seems to be the true reason for the Rules — the opting out of the installation of AMI/Smart Meters — without disrupting day-to-day operations involving meters that have been in the field for over two decades without incident.

D. Proposed Rule 4901:1-10-05(J) is unjust and unreasonable to the extent it requires an EDU to submit a tariff for a service that it is not required, nor is being provided across its service territory.

Proposed Rule 4901:1-10-05(J)(5) provides that an “electric utility *shall file* a proposed tariff for opt-out service within thirty days of the effective date of this rule” (emphasis added). This mandate requires every EDU in the state to make such a filing, regardless of whether or to what extent the EDU offers advanced metering. As the Order acknowledges, nothing in the rules requires utilities to install advanced meters. (Order, p. 12). And, as the Companies explained in their comments to the proposed rules, the Companies have very few installed smart meters in their service territories. Indeed, the only smart meters that have been installed are those being installed under the previously mentioned DOE Program. As part of that approval, the program allows customers to opt out of obtaining a smart meter without any charge.⁶ Therefore there would be no need to file the opt out service tariff for this program. Further, the only other “advanced meters”, as currently defined in the proposed rule, being installed by the Companies are the AMR meters previously discussed. Therefore, if the Commission agrees to exclude AMR meters from the definition of “advanced meters,” the customer will not have an option to opt out, thus negating the need to file such a tariff. Further, because the Companies only have AMI/Smart Meters being installed through the DOE Program, which already allows for opt out without charge, and has already been approved by the Commission, the filing of an opt out tariff

⁶ *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and the Toledo Edison Company for Approval of Ohio Site Deployment of the Smart Grid Modernization Initiative and Timely Recovery of Associated Costs*, Case No. 09-1820-EL-ATA, Compliance Filing and Motion, Exhibit C, page 4 (Oct. 19, 2012).

that includes a cost for opting out creates unnecessary confusion on the part of the customer and unnecessary expense and resources on the part of the Companies. While the Commission noted that FirstEnergy is not the only utility within the State (Order, p. 12), the Companies circumstances do not fit with the scope of the one-size-fits-all Proposed Rule 4901:1-10-05(J). Therefore, it should not be designed to recognize these differences among the State's EDUs. Accordingly, the Companies recommend that Proposed Rule 4901:1-10-05(J)(5) be modified along the following lines:

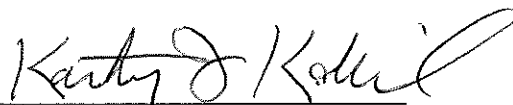
The electric utility shall file a proposed tariff for opt-out service within the later of thirty calendar days after the effective date of this rule, or within thirty days of obtaining approval from the Commission to install meters under a system wide advanced meter deployment plan. *[If AMR meters are not removed from the definition of advanced meters, the following should also be included: Notwithstanding the foregoing, no tariff for opt out service shall be required for either advanced meter reading (AMR) meters or if any advanced meters are being installed under a program approved by the Commission prior to the effective date of this rule.]*

III. CONCLUSION

In sum, the Companies submit that the Rules in their entirety are unlawful, unjust and unreasonable because (i) they are contrary to the statute authorizing the Commission to develop such rules, (ii) the order to file the rules with JACARR violates the requirements to perform, as a prerequisite, a proper business impact analysis consistent with the requirements of R.C. § 121.82; and (iii) provide a customer with the authority to dictate the day-to-day operations of an EDU without a just reason. Accordingly, the Rules should be removed in their entirety. Should the Commission disagree, then at a minimum, the Rules should be modified to address only issues that are truly issues. As currently proposed the Rules are overly broad and attempt to

correct non-existing problems and therefore, at a minimum, the Rules should be modified consistent with the comments set forth above.

Respectfully submitted,

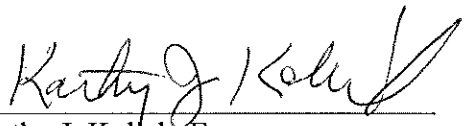
A handwritten signature in cursive script, appearing to read "Kathy J. Kolich", written over a horizontal line.

Kathy J. Kolich
FIRSTENERGY SERVICE COMPANY
76 South Main Street
Akron, OH 44308

On behalf of Ohio Edison Company, The Cleveland
Electric Illuminating Company and The Toledo
Edison Company

CERTIFICATE OF SERVICE

The foregoing *Application for Rehearing of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company* and the related *Memorandum in Support* were filed with the Public Utilities Commission of Ohio Docketing Information System on this 15th day of November, 2013, with courtesy copies being sent via electronic mail to the parties of record.


Kathy J. Kolich, Esq.

This foregoing document was electronically filed with the Public Utilities

Commission of Ohio Docketing Information System on

11/15/2013 4:38:52 PM

in

Case No(s). 12-2050-EL-ORD

Summary: Application For Rehearing electronically filed by Ms. Kathy J Kolich on behalf of Ohio Edison Company and The Cleveland Electric Illuminating Company and The Toledo Edison Company