BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

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

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

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Pursuant to R.C. 4903.10 and Rule 4901:1-35, Ohio Administrative Code, Ohio Edison Company ("Ohio Edison"), The Cleveland Electric Illuminating Company ("CEI"), and The Toledo Edison Company ("Toledo Edison") (collectively, the "Companies"), hereby file their Application for Rehearing of the Finding and Order entered in the journal on January 15, 2014, in the above-captioned case. As explained in more detail in the attached Memorandum in Support, the Commission's Finding and Order in this case is unreasonable and unlawful on the following grounds:

- Rule 4901:1-10-11(F) is unjust and unreasonable in that it provides for a rebuttable presumption that an electric distribution utility ("EDU") violated the rule, regardless of fault, if a circuit is listed on three consecutive reports submitted under Rule 4901:1-10-11(C).

- Rule 4901:1-10-14(C)(2)(c) is unjust, unreasonable and unlawful by allowing a customer to demonstrate creditworthiness if the applicant had a prior account with an electric utility (anywhere in the world) for the same class of service and placing the burden of that determination with the electric utility because it: i) has an adverse impact on business by requiring a specific expenditure to implement; and ii) is needlessly burdensome.

- Rule 4901:1-10-14(M) needs to be clarified and/or is unreasonable to the extent it requires an EDU to send a copy of a guarantor agreement to the guarantor and to maintain the original guarantor agreement in hard copy because it: i) creates unnecessary paperwork; ii) is needlessly burdensome; and iii) has a negative unintended consequence.

- Rule 4901:1-10-22(B)(8) needs to be clarified and/or is unjust, unreasonable and unlawful in requiring EDUs to provide the consumption for each "pricing period" on the customer's bill because it: i) creates unnecessary paperwork; ii) adversely impacts EDUs by requiring a specific expenditure to implement; and iii) is needlessly burdensome.

- Rule 4901:1-10-23(A) needs to be clarified in that it should indicate that a customer's right to a refund for inaccurate billing is also limited to 36 months.

- Rule 4901:1-10-23(F)(2) is unjust, unreasonable and unlawful by requiring EDUs to provide three years of historical data because it i) adversely impacts EDUs by requiring significant expenditure; ii) is needlessly burdensome; and iii) is unnecessary.

- Rule 4901:1-10-27(C) is unjust, unreasonable and unlawful by requiring an EDU and a transmission owner to file a report with the Commission setting forth its methodology used to assess the reliability of its transmission circuits, which is subject to review and acceptance by the director of the utility department because it: i) creates confidentiality concerns; ii) creates unnecessary paperwork; iii) is needlessly burdensome; iv) delves into an area that is federally pre-empted.

- Rule 4901:1-10-27(E) is unjust, unreasonable and unlawful by requiring EDUs to correct all deficiencies, regardless of reason or whether it has any effect on customers, within a certain timeframe because it: i) adversely impacts EDUs by requiring significant expenditure; ii) is unnecessary; and iii) needlessly burdensome.

- The Commission's rejection of the definition of "microturbine" and the reasoning therefore is unjust, unreasonable and unlawful because the definition of a "microturbine" needs a size limit to give effect to statute.

- Rule 4901:1-10-28(B)(6) is unjust, unreasonable and unlawful in that it does not specify that it is not applicable to the initial sizing decision and permits intentional excess generation.

- The Commission's Order to open a virtual net metering and aggregate net metering docket is unjust, unreasonable and unlawful in that it violates the Companies' exclusive service territories granted by Sections 4933.81 and 4933.83, O.R.C. and an evaluation docket should not be opened.

- Rule 4901:1-10-34 should be clarified to identify whether day ahead or real-time locational marginal price is to be used for payment of energy.

- Rule 4901:10-34 is unjust, unreasonable and unlawful in that it does not require a QF generator to pay incremental settlement charges or administrative costs directly attributable to the generator.

- Rule 4901:1-10-34 is unjust, unreasonable and unlawful in that it fails to provide for EDU recovery of the costs to purchase the energy output of QFs.

For these reasons, as discussed in greater detail below, the Companies respectfully request that the Commission grant the Companies' Application for Rehearing and appropriately modify the rules.

Respectfully submitted,

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

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INTRODUCTION

On November 7, 2012, the Commission issued an Entry ("November 7 Entry") requesting comments on proposed amendments to the rules contained in Chapter 4901:1-10, Ohio Administrative Code ("O.A.C."). Comments were filed by several parties on January 7, 2013 and reply comments on February 6, 2013. On January 15, 2014, the Commission issued its Finding and Order adopting several amendments to Chapter 4901:1-10 ("Order"). Ohio Edison Company ("Ohio Edison"), The Cleveland Electric Illuminating Company ("CEI"), and The Toledo Edison Company ("Toledo Edison") (collectively, the "Companies") hereby apply for rehearing on that Order.

As a creature of statute, the Commission has only the jurisdiction conferred upon it by the General Assembly.[1] 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 promulgation of rules which are in excess of legislative policy, or which conflict with the enabling statute.[2]

Pursuant to Section 119.032(C), Ohio Revised Code ('O.R.C."), the Commission must consider the following factors when it reviews the rules and determines whether the rules should be amended, rescinded or continued without change:

> (1) Whether the rules should be continued, without amendment, be amended or be rescinded, taking into consideration the purpose, scope and intent of the statute under which the rule was adopted;
>
> (2) Whether the rule needs amendment or rescission to give more flexibility at the local level;
>
> (3) Whether the rule needs amendment to eliminate unnecessary paperwork;
>
> (4) Whether the rule duplicates, overlaps with, or conflicts with other rules; and

[1] *Canton Storage and Transfer Co. v. Pub. Util. Comm.*, (1995) 72 Ohio St. 3d 1, 5.
[2] *English v. Koster*, (1980) 61 Ohio St. 2d 17, 19.

(5) Whether the rule has an adverse impact on businesses, reviewing the rule as if it were a draft rule being reviewed under sections 107.52 and 107.53 of the Revised Code, and whether any such adverse impact has been eliminated or reduced.

Subpart (D) of Section 119.032, O.R.C. also provides:

> In making the review required under division (C) of this section, the agency shall consider the continued need for the rule, the nature of any complaints or comments received concerning the rule, and any relevant factors that have changed in the subject matter area affected by the rule.

Additionally, pursuant to the Governor's Executive Order 2011-01K, the

Commission must:

(a) Determine the impact that a rule has on small businesses;

(b) Attempt to balance the critical objections of regulation and the cost of compliance by the regulated parties; and

(c) Amend or rescind rules that are unnecessary, ineffective, contradictory, redundant, inefficient, or needlessly burdensome, or that have had negative unintended consequences, or unnecessarily impede business growth.

Prior to filing the rules with JCARR, Section 121.82,[3] O.R.C. provides:

an agency *shall*:

> (A) Evaluate the draft rule against the business impact analysis instrument. If, based on that evaluation, the draft rule will not have an adverse impact on businesses, the agency may proceed with the rule-filing process. If the evaluation determines that the draft rule will have an adverse impact on businesses, the

[3] The Companies recognize that the Commission has filed its Business Impact Analysis ("BIA") in this proceeding on November 7, 2012 and July 10, 2013. The Companies also note the Commission's position that: "[t]he Commission notes that nothing in Section 121.82, Revised Code, requires the Commission to take stakeholder feedback on the BIA itself or to consider any stakeholder analysis of adverse impacts on business. The Commission issues the BIA with the proposed rules so that stakeholders may comment on whether they believe an adverse impact on business may exist. Stakeholder comments on the BIA are not prima facie evidence that an adverse impact on business exists; they are for the Commission's reference as it conducts its own analysis of the rules and their impact on business. Furthermore, an adverse impact on business identified by stakeholders does not necessarily make the rules unjust or unreasonable." December 18, 2013 Entry on Rehearing at Para. 21.

> agency shall incorporate features into the draft rule that will eliminate or adequately reduce any adverse impact the draft rule might have on businesses;
>
> (B) Prepare a business impact analysis that describes its evaluation of the draft rule against the business impact analysis instrument, that identifies any features that were incorporated into the draft rule as a result of the evaluation, and that explains how those features, if there were any, eliminate or adequately reduce any adverse impact the draft rule might have on businesses….(emphasis added)

Last, Section 107.52, O.R.C. 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 licenses, 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.

The Order adopted a number of the rules that have several unintended negative consequences, have an adverse business impact by requiring significant expenditures, are unnecessary, needlessly burdensome, and conflict with the language and intent of Sections 4928.01 and 4928.67, O.R.C. rendering such rules unjust, unreasonable and unlawful. For those reasons the Commission should grant rehearing.

ARGUMENT

I. Rule 4901:1-10-11(F) is unjust and unreasonable in that it provides for a rebuttable presumption that an electric distribution utility violated the rule, regardless of fault, if a circuit is listed on three consecutive reports submitted under Rule 4901:1-10-11(C).

The Commission has amended Rule 4901:1-10-11(F) to read "electric utilities shall take sufficient remedial action to make sure that no circuit is listed on three consecutive reports." Previously the rule only required electric distribution utilities

("EDUs") to take sufficient remedial action to cause each listed circuit to be removed from the list of worst performing circuits within two years. Subpart (F) contains a rebuttable presumption that the rule is violated if the circuit appears on the report for three consecutive reporting periods.

In their reply comments, the Companies agreed with other stakeholders that the Commission should add the language "due to the same preventable outage causes" so that Staff considers the causes of the circuit's appearance on the list as well as the utility's mitigation plan. Recognizing that the cause of an EDU missing a performance standard is important, the Commission adopted a change similar to this in to Rule 4901:1-10-10(E), which provides that the same performance standard for two consecutive years shall constitute a violation of that rule. The Commission declined to amend Rule 4901:1-10-11(F) to include provisions that would consider fault and other mitigation factors in determining whether an EDU violated the rule stating that the EDUs were proposing a more lenient standard and suggesting that the EDUs' comments related to the sufficiency of time to repair listed circuits.[4]

The Companies, however, were not proposing a more lenient standard; rather, they were simply proposing that the rule take into account that circuits may appear on the report due to causes beyond the EDUs' control and for different reasons from year to year. For example, a circuit may be on the list one year for Equipment Failure, the next year for Trees Non-Preventable and the following year due to a car-pole accident. In this example, the cause was different each year and was not within the control of the EDU for at least two of the three years, yet the adopted rule would dictate that the EDU was in violation of the rule. In this type of circumstance, the EDU should not have to expend

[4] Order at Para. 34.

time and resources to overcome a rebuttable presumption to show that it is not in violation of the rule. Rule 4901:1-10-11(F) is unjust and unreasonable because it presumes an EDU is in violation of the rule without taking into consideration fault or mitigation. The Commission should grant rehearing to amend the rule to either include the original proposed language "due to the same preventable outage causes" or, at a minimum, to indicate that it is a violation of the rule to appear on three consecutive reports for "the same reason."

II. Rule 4901:1-10-14(C)(2)(c) is unjust, unreasonable and unlawful by allowing a customer to demonstrate creditworthiness if the applicant had a prior account with an electric utility (anywhere in the world) for the same class of service and placing the burden of that determination with the electric utility because it: i) has an adverse impact on business by requiring a specific expenditure to implement; and ii) is needlessly burdensome.

The Commission adopted the following change in Subpart (C)(2):

> The applicant had a prior account with ~~the~~ an electric utility for the same class of service within two years before the date of application…..

The Companies and Duke Energy Ohio ("Duke") opposed the proposal and Dayton Power and Light ("DP&L") proposed that the rule should indicate that the burden should be placed on the customer to verify that they had an open, non-delinquent account with an electric utility. Rejecting both of these proposals, the Commission found "that a customer should be permitted to demonstrate creditworthiness based on payment history with a similar utility" and that the burden "appropriately rests with the electric utility to conduct its due diligence on the creditworthiness of the customer by determining if the customer was disconnected for fraudulent practice, tampering, or unauthorized reconnection." Presumably, the Order also intended to make it the EDU's burden to determine whether the customer was disconnected for nonpayment as well as whether the customer failed to pay the bill by the due date at least two times, which are the other circumstances under Subpart (C)(2).

Rule 4901:1-10-14(C)(2)(c) is unlawful and unreasonable in that it fails to consider the adverse impact on business and is needlessly burdensome. Specifically, in order to implement the new requirements of this rule, EDUs will need to develop systems to somehow assess an applicant's creditworthiness with any other electric utility across the United States or beyond for that matter, all of which will increase expenditures to the EDU and/or its customers. Because it would be nearly impossible for an EDU to completely shield itself from fraud by customers who assert they had an account with another electric utility somewhere at some point in the last two years, this rule will needlessly increase uncollectible amounts.

The rule also increases the burden on the EDU to track down credit histories from other electric utilities, not to mention the administrative burden of determining whether an entity constitutes an electric utility, whether the customer's service with those other electric utilities fell into one of the Subpart (C)(2) categories, and whether their credit and disconnection standards are equivalent to those imposed in Ohio.

The rule also fails to consider privacy/confidentiality issues as EDUs will not be able to obtain private confidential customer information from other electric utilities. DP&L's comments attempted to mitigate this unworkable situation by proposing that the burden to establish any creditworthiness with any electric utility be on the customer, particularly where the information needed to make the determination is only available to the customer, and not the EDU. In rejecting this proposal, the Commission perhaps misunderstood DP&L's suggestion, stating that its suggestion applied to only the exception for fraud in 4901:1-10-14(C)(2)(c), which it did not.

Moreover, there is no evidence that customers need such a significant expansion of ways to meet credit requirements or that the benefits of this new rule would exceed the costs. In any event, if needed, the burden should be on the customer to show they are credit worthy, particularly when they are relying on information available only to them to do so. For all of those reasons, the rule is unlawful, unreasonable and unjust and the Commission should grant rehearing and make the modifications proposed above.

III. Rule 4901:1-10-14(M) needs to be clarified and/or is unreasonable to the extent it requires an EDU to send a copy of a guarantor agreement to the guarantor and maintain the original guarantor agreement in hard copy because it: i) creates unnecessary paperwork; ii) is needlessly burdensome; and iii) has a negative unintended consequence.

The Commission adopted a change to Rule 4901:1-10-14(M)(2) adding a requirement that an EDU provide a copy of the signed agreement and maintain the original agreement. The rule needs to be clarified or changed in that it is unreasonable for an EDU to have to send a copy of the signed agreement to the guarantor when the guarantor is the one who sends the agreement to the EDU with the guarantor's signature – it is not countersigned by the EDU. Therefore, the guarantor would already have the signed copy of the guarantor agreement. Such a requirement creates unnecessary paperwork and cost and should be deleted on rehearing.

The rule is also unreasonable in that requiring EDUs to maintain the original agreement in hard copy creates unnecessary paperwork given that modern business practices often allow documents to be scanned and electronically stored. Requiring a utility to maintain the original hard copy agreement is also needlessly burdensome especially given that Subpart (M)(2) requires the document to be kept until the end of the guarantor agreement. Further, often guarantor agreements are faxed and a written original agreement is not received by the EDU. Requiring customers or guarantors to send a hard copy has the unintended consequence of delaying service to that customer until an EDU receives a hard copy. For those reasons, the Commission should clarify and/or grant rehearing on the rule and remove the requirement that EDUs must: i) send the guarantor a copy of the guarantor agreement; and ii) maintain hard copies of guarantor agreements.

IV. Rule 4901:1-10-22(B)(8) needs to be clarified and/or is unjust, unreasonable and unlawful in requiring EDUs to provide the consumption for each "pricing period" on the customer's bill because it: i) creates unnecessary paperwork; ii) adversely impacts EDUs by requiring a specific expenditure to implement; and iii) is needlessly burdensome.

The Commission adopted an amendment to Rule 4901:1-10-22 (B)(8)(e) requiring that EDUs list on the bill the consumption for each pricing period. The Commission based its decision on DP&L's comment for those customers billed using an interval meter, parts (a) and (b) of Subpart (B)(8) are not able to be provided because the interval meter provides consumption.[5] Because this information is not available from DP&L, DP&L suggested that in the case of a real time pricing rate, the consumption for each respective pricing period should be available to customers via the web or displayed on the bill.

The Companies seek clarification as to the intent of the Commission's change. The Companies have an interruptible rider that provides for emergency interruptions and economic buy through opportunities to customers, although less than 35 customers qualify for the program. Such economic buy through hours are very limited in number.

[5] Order at Para. 54; DP&L Comments at 7.

If a customer "buys through" during one of these periods, then they pay the LMP rate for that hour, and their bill would reflect that pricing. The Companies do not believe that type of billing outcome was intended to fall within the new requirement added to Rule 4901:1-10-22(B)(8)(e), as the number of hours are few and are sporadically spread through out the year. The customer is not primarily billed on a variable or hourly rate. If the described situation does not fall within the rule change, then the Companies do not seek rehearing on the rule change.

If, however, the rule change is intended to apply to the above-described situation, the Companies do seek rehearing on the change and request that it be deleted. If the aforementioned rule is retained, the Companies would be required to manually enter a customer's bill to accommodate the hourly pricing mechanism. Moreover, for some customers, this change would result in an increase in billing paperwork, making a bill several pages long. Also given that each EDU may have different pricing period, each EDU will be required to have different billing formats to accommodate these changes, moving away from the unified bill format as is the Commission's preference. The hourly pricing and consumption information is provided to customers, but actually including it as part of the standardized bill format would be unduly burdensome for such a few number of customers and few number of hours.

The Commission's decision to adopt this new rule appears to have failed to consider these significant adverse impacts in submitting its BIA and did not evaluate whether the benefits outweighed the costs. Because this rule is unjust, unreasonable and unlawful, the Commission should grant rehearing and remove the newly added language from 4901:1-10-22(B)(8)(e). In the alternative, the Companies request that the Commission clarify the rule to exclude customers who are billed on an hourly basis.

V. Rule 4901:1-10-23(A) needs to be clarified in that it should indicate that a customer's right to a refund for inaccurate billing is also limited to 36 months.

The Commission adopted an amendment to Rule 4901:1-10-23(A) that only permits an EDU to bill an undercharge for 36 months. The Companies request clarification and an amendment to the rule requiring EDUs to likewise credit the customer for 36 months when they discover in an inaccurate billing. The Companies believe that providing a limit on refunds will provide certainty to customers as well as the EDUs as to their responsibilities. For those reasons, the Commission should amend Rule 4901:1-10-23(A) as follows:

> When an electric utility has undercharged any nonresidential customer as the result of a meter or metering inaccuracy, billing problem, or other continuing problem under the electric utility's control, unless the customer and the electric utility agree otherwise, the maximum portion of the undercharge that may be billed to the customer in any billing month, based upon the appropriate rates, shall be determined by dividing the amount of the undercharge by the number of months of undercharged service. <u>The electric utility shall only bill the customer for the amount of the total undercharge amount rendered in the thirty-six month period immediately prior to the date the company remedies the metering inaccuracy.</u> <u>*Likewise, the electric utility shall only credit the customer for the amount of the total overcharge amount rendered in the thirty-six month period immediately prior to the date the company remedies the metering inaccuracy.*</u>

VI. Rule 4901:1-10-24(F)(2) is unjust, unreasonable and unlawful by requiring EDUs to provide three years of historical data because it: i) adversely impacts EDUs by requiring significant expenditure; ii) is needlessly burdensome; and iii) is unnecessary.

The Commission adopted an amendment, requested by Duke Energy Retail ("DER"), to Rule 4901:1-10-24(F)(2) requiring three years or more years of historical data be used for the generic customer load pattern. In its Comments, DER stated that the

"FirstEnergy EDUs and Duke Energy Ohio have the best methodologies in the state" and "could serve as a template for the rest of the state."[6] Currently, the Companies' "best methodology" provides two years of historical data. Duke Energy Retail commented that for DP&L, the provided customer load profiles were not statistically significant. For that reason alone, DER suggested that "three years of historical data would yield a more realistic result for DP&L load profiles." DER did not propose a wholesale amendment to the rule for the other EDUs. Nevertheless, the Commission adopted a three year standard for all EDUs stating that it "will yield a more realistic result."[7]

The Commission should grant rehearing on this issue because the amendment adversely impacts the EDUs by requiring a significant expenditure, has an unintended negative consequence, is needlessly burdensome and is unnecessary. For the Companies, it is not possible to rework current formulas for generic customer load patterns to go from being based upon two years of data to three years of data, thereby adding an additional entire year of data. The existing load profiles are based on two years or more of load research data. These are statistical samples where special load survey interval meters were installed on residential and small commercial customers to develop hourly load patterns and profiles for each customer class. These meters were in place for at least two years and all load research data available (two years or more) was used to create our weather adjustment formulas.

The research meters have long since been removed. Any efforts to create new formulas based on three years of historical data would require entirely new load research studies to be performed. This would be a very costly undertaking and it would take: i) a

[6] DER Comments at 6,
[7] Order at Para. 59.

year to design the studies and install the meters: ii) an additional three years to collect data; and iii) another year to analyze and create the new generic load patterns now based on three years of historical data. Moreover, the installation of smart meters would potentially render this rule unnecessary. The change in the rule did not consider the negative consequences of this amendment, the adverse business impact and the burden it will place on EDUs. Indeed, as this rule is new and was adopted after the Commission filed its BIA, the Commission did not evaluate its impact as required by Section 121.82, O.R.C. For all of those reasons, the Commission should grant rehearing on this issue and change the requirement in Rule 24(F)(2) to a two year requirement or maintain the original language. Should DER require further information from EDUs, it can request it on an individual basis or through another process.

VII. Rule 4901:1-10-27(C) is unjust, unreasonable and unlawful by requiring an EDU and a transmission owner to file a report with the Commission setting forth its methodology used to assess the reliability of its transmission circuits, which is subject to review and acceptance by the director of the utility department because it: i) creates confidentiality concerns; ii) creates unnecessary paperwork; iii) is needlessly burdensome; and iv) delves into an area that is federally pre-empted.

The Commission adopted amendments to Subpart (C) to require an electric utility and a transmission owner to file a report every five years with the Commission setting forth its methodology used to assess the reliability of its transmission circuits. Furthermore, the rule continues to state that the methodology "shall be subject to review and acceptance by the director of the utilities department." The Commission should grant rehearing on this issue because requiring the report to be filed with the Commission, and accepted by the director of the utility department, is unjust, unreasonable and unlawful because i) creates confidentiality concerns; ii) creates unnecessary paperwork; and iii) is needlessly burdensome. Moreover, it delves into an area that is federally pre-empted.

The information requested in Subpart C has historically been submitted to Staff, rather than filed with the Commission. Given that this information may contain confidential information about the Companies' transmission facilities, some of which that may not be disclosed pursuant to federal law, requiring it to be publicly filed is inappropriate. Moreover, opening a docket to file this information, presumably under seal along with a motion for protective order, creates unnecessary paperwork and is needlessly burdensome. There is no evidence that the current process is not working or that a public docket is necessary. Moreover, the Companies question the necessity of filing this document given that federal law gives FERC exclusive jurisdiction over unbundled transmission service, and under the Supremacy Clause, preempts state attempts to regulate in this area. The Commission should avoid any action that raises the prospect of a state/federal conflict that could be resolved in favor of federal law. Indeed, the Commission recognized this in removing a transmission owner's requirement to file its inspection, maintenance, repair and replacement programs with the Commission in subparts (E)(2) and (E)(3). While the Companies will continue to provide information to the Commission on the reliability of transmission circuits, the Commission should grant rehearing and maintain the original language of the rule.

VIII. Rule 4901:1-10-27(E) is unjust, unreasonable and unlawful by requiring EDUs to correct all deficiencies, regardless of reason or whether it has any effect on customers, within a certain timeframe because it: i) adversely impacts EDUs by requiring significant expenditure; ii) is unnecessary; and iii) needlessly burdensome.

The Commission adopted amendments to subpart (E)(4) requiring an EDU to correct all deficiencies to transmission and distributions facilities, regardless if they cause an outage and to document all deficiencies if they are not corrected. There are some minor deficiencies recorded during an inspection where there is no reliability-related need to repair them as quickly as the following calendar year, thereby permitting the EDU to devote resources more quickly to reliability-related deficiencies. An example of non-reliability related deficiencies is priority poles. While a minor deficiency may have been identified on a pole, the deficiency typically poses no reliability concern to the Companies or their customers. The new rule requirement may in fact move those minor deficiencies ahead of other deficiencies that may potentially have a reliability need in order to comply with this rule change. Focusing on all deficiencies, regardless of reliability concerns, will require the Companies to make a significant expenditure to comply with the rule and may cause prioritization that is not the most efficient or beneficial for customers. The Commission should grant rehearing on this issue and amend the rule as follows:

> (4) Each electric utility and transmission owner shall maintain records sufficient to demonstrate compliance with its transmission and distribution facilities inspection, maintenance, repair, and replacement programs as required by this rule. Each electric utility and transmission owner shall record all deficiencies revealed by inspections or tests and all actions taken to correct those deficiencies. Lines and equipment with recorded defects that could reasonably be expected to endanger life or property shall be promptly repaired, disconnected, or isolated. All remaining deficiencies <u>likely to cause an outage</u> shall be corrected ~~within one~~ by the end of the year ~~of~~ following the completion of the inspection or testing that originally revealed such deficiencies. The electric utility shall document all

> deficiencies that are not corrected within the designated time, including the reason for not taking corrective action for the deficiencies likely to cause an outage.

IX. The Commission's rejection of the definition of "microturbine" and the reasoning therefore is unjust, unreasonable and unlawful because the definition of a "microturbine" needs a size limit to give effect to statute.

In the November 7 Entry, the Staff proposed a definition of "microturbine" as follows: "'Microturbine' means a combustion-turbine used by a customer-generator on the customer-generator's premises." A number of parties filed comments on the proposed definition, including the Companies' recommendation to add a size limit in the definition. The Commission rejected recommendations for a proposed definition of "microturbine" in Rule 4901:1-10-28, reasoning that:

> The Commission does not believe that it would be beneficial to include a definition for microturbine in the rules at this time. Additionally, the Commission notes that there already exists an implied limitation on the size and number of microturbines that may be installed, which is the size and number of microturbines that may be installed, which is the size or number necessary for the customer-generator to intend primarily to offset part or all of its requirements for electricity.[8]

While the Companies do not necessarily disagree with the Commission's rejection of the definition from Rule 4901:1-10-28, the reasoning therefore is flawed as there must be a stated standard kW limit on the size of net metering systems. As the Companies pointed out in their initial comments and reply comments in this proceeding, the Legislature clearly intended a size limit by declaring that a net metering system must be a facility that "[u]ses as its fuel either solar, wind, biomass, landfill gas, or hydropower, or uses a **micro**turbine or a fuel cell."[9]

[8] Order at Para. 62.
[9] Section 4928.01(A)(31), O.R.C. (Emphasis added).

As the Commission recognized in the case of *WorldCom, et al. v. Toledo*[10], in a case of statutory interpretation, "determining the intention of the legislative branch [is] of primary importance."[11] The Commission in *WorldCom*, relying on a litany of Ohio Supreme Court cases, concluded that if this intent "is discernable from the face of the statute, using the words either based on their ordinary meaning or based on their technical or statutory meaning, [the Commission] need go no farther."[12] In this instance, the meaning is clear. The law requires a net metering system to use specific technologies, including "a microturbine." "Micro" is defined in Merriam-Webster's On-line Dictionary as an adjective meaning: "(i) very small; especially: microscopic; and (ii) very small; involving minute quantities." The Commission's failure to identify a standard maximum size for a turbine to be considered a "microturbine" removes the clearly qualifying characteristic from the statute. Given that the Companies have customers with loads in excess of 100 MW, simply saying that a microturbine is whatever the customer's electricity requirements happen to be at any point in time is insufficient to meet the standard required by the General Assembly's use of the term "microturbine". Without some stated kW threshold limit, the legislative intent of the use of microturbine is lost or ignored and the size limit remains virtually undefined in the rule, varying from customer to customer, and therefore open to potentially conflicting interpretation by both customers and electric distribution utilities.

The Commission's rejection of a definition of "microturbine" with a stated kW size limit is exacerbated by the discussion in the Order suggesting, in dramatic contrast

[10] Case No. 02-3210-EL-PWC (Opinion & Order, May 14, 2003).
[11] *Id*. at 12.
[12] *Id*. at 11. See also, *Akron Management Corporation v. Zaino* (2002) 94 Ohio St.3d 101,103.

with the statutory language, that the threshold to qualify as a "microturbine" is the "size or number necessary for the customer-generator to intend primarily to offset part or all of its requirements for electricity."[13] While a sizing limitation is an important element and must be retained, relying solely on a customer's requirements for electricity as the only limitation on the size of a net metering system frustrates the clear legislative intent to limit net metering eligibility to specific fuels and technologies and to give meaning to the use of the term "microturbine".

First, the plain reading of the statute makes clear that the designation of "micro" refers to the size of the turbine as a technology resource, and does not refer to the size of the customer's requirements for electricity. Similar to the distinction of a "*micro*scope" from other kinds of scopes, a "*micro*turbine" connotes a distinct kind of turbine that the legislature qualified under the statute. The Order arbitrarily and improperly eliminates the adjective "micro" from describing the turbine technology, and instead replaces that standard with the Commission's own standard, i.e. the size of the customer's electricity requirements. The result is a failure to properly define "microturbine" in a manner that can be applied uniformly to the equipment technology, and instead yield a different determination of "microturbine" for customers based on the customer's requirements for electricity.

Second, the Commission found that Staff's initial proposal for Paragraph (A)(4), and the proposals made by the stakeholders should be denied. However, the Order effectively grants GEM's proposal to allow multiple microturbines to be installed, again limited only by the amount of the customer's requirements for electricity. This interpretation ignores the clear language of Section 4928.01(A)(31)(a), O.R.C. which

[13] Order at Para. 62.

states that a net metering system "uses a microturbine or a fuel cell." (emphasis added). If the legislature had intended to allow multiple microturbines to qualify in its definition of "a net metering system," it would have used the plural form instead of the singular. The Order unlawfully suggests that any number of microturbines can be installed as a net metering system so long as the total generation does not exceed the customer's requirements for electricity. Since the statute is written in the singular, it is contrary to the statute to allow multiple microturbines in a facility to qualify for net metering.

The Companies submit that a threshold definition for "microturbine" better serves utilities, their customers, and complies with the controlling statute. If a threshold is not included in the rule and the various EDUs are left to determine a size threshold for their respective companies, such determinations can be applied and administered uniformly within each company's tariff. However, the Order explaining that a turbine of any size (or number) using any fuel can be substituted for "a microturbine" to qualify for net metering strips all meaning from the plain language used in the statute.

The Companies urge the Commission to adopt within 4901:1-10-28(A) the definition of "microturbine" as a maximum of 500 kW, as recommended by the Companies:

> (4) "Microturbine" means a combustion-turbine used by a customer-generator on the customer-generator's premises that has a nameplate capacity of 500 kW or less.

Alternatively, the Companies urge the Commission to clarify its Order to make clear that a customer's requirements for electricity is not a determinant as to whether a turbine is a microturbine that may be eligible for net metering under the statute, but that each electric utility should implement a size limitation to define microturbine. Further, the Companies urge the Commission to follow the statutory language and clarify that a net metering system is limited to a single microturbine, as is done in Section 4928.01(A)(31)(a), O.R.C.

X. Rule 4901:1-10-28(B)(6) is unreasonable and unlawful in that it does not specify that it is not applicable to the initial sizing decision and permits intentional excess generation.

The Commission approved Staff's proposal that a customer-generator who annually generates less than 120 percent of its requirements for electricity be *presumed* to intend primarily to offset part or all of a customer-generator's requirements for electricity. The Companies' Initial Comments recommended no such presumption be established, and in their Reply Comments conceded that a rebuttable presumption at 110% would not be an unreasonable level for subsequent annual review purposes. However, despite the Companies' Reply Comments, the concept of a rebuttable presumption is in fact flawed for several reasons even at the 110% presumption level, and the flaws are only exacerbated at the 120% presumption level. The rule must be made clear that a net metering system should be designed to meet no more than 100% of the customer's electricity requirements at the time it is installed.

First, except for temporary, unusually windy or sunny periods, or unusually low consumption, customers' net metering generation that exceeds 100% of their requirements for electricity are likely to have intended to have designed or operated the system to do so. Unusually excessive generation of a variable renewable resource is relatively easy to identify based on observable regional data, and the Companies can account for variable generation in their review of customers' continued eligibility for net metering. However, as discussed more fully below, a customer-generator who implements energy efficiency knowing that it will result in significant excess generation necessarily intends to <u>more</u> than offset its own requirements.

Initially, the Companies note that a customer deploying energy efficiency causing excess generation of 20% is virtually indistinguishable from a similarly situated customer whose energy efficiency-driven decreased consumption leads to slightly more excess generation of 21%. Both conditions involve deploying energy efficiency with the intended result being to generate in excess of their annual requirements for electricity by a significant margin, yet one customer enjoys a "rebuttable presumption" to remain eligible for a net metering tariff while the other customer does not. Such disparate treatment of similarly situated customers is arbitrary and capricious. Therefore, no such presumption should be employed.

Second, the Commission's proposed remedies and reflected in 4901:1-10-28(B)(3)(b) ("the procedures an electric utility has in place to address excess-generator situations") are applicable for any permanent excess generation situation, not just those over the new arbitrary threshold of 120% of annual requirements for electricity. Unless there is a corresponding decrease in generation, a net metering customer that initially sizes generation expecting to exactly, or nearly exactly, offset its annual requirements for electricity but whose subsequent energy efficiency measures lead to a permanent decrease in consumption, does so at that point intending to become an excess generator. The rule, not just the EDU's tariff or application packet, needs to be made clear that a net metering customer whose generation exceeds its electricity requirements, including as a result of employing energy efficiency, must reduce its generation or increase its electrical usage in order to remain on the net metering tariff.

Further, if at the annual review[14] a customer deploying energy efficiency is found to be generating above the customer's requirements for electricity, and if increased consumption is impossible or impractical, the rule should be made clear that the utility should notify, counsel, and then require the customer to limit generation to offset no more than 100% of the new level of expected annual requirements for electricity to remain on the net metering tariff. The rule must specify that a customer may only generate up to 100% of its electricity requirement, i.e., the arbitrary 120% presumption cannot be considered the new limit going forward.

Even if the customer's initial intent primarily was to offset its electricity requirements, the obvious intent of a decision to knowingly generate above its electricity requirements going forward is to become a net seller of electricity, which is prohibited as a net metering customer. Once a customer is already offsetting all of its requirements for electricity, any deliberate or continued increase in generation or decrease in consumption going forward simply fails to meet the statutory requirement. While incidental excess generation occasioned by temporary events may occur, the Companies' review of net metering accounts already accommodates such incidence as explained in their Initial Comments. But the statute does not allow a customer deliberately intending to <u>more</u> than offset electricity requirements to remain eligible for net metering.[15] A customer-generator who intends to over-generate through energy efficiency is indistinguishable in the eyes of this statute from a customer-generator intending to over-generate through over-sizing at initial installation.

[14] The Companies note that Rule 4901:1-10-28(B)(3) appears to erroneously refer to "(B)(10)", and it is unclear to which section the provision refers.
[15] Section 4928.01(A)(31), O.R.C.

Another problem arising from the Commission's rule, which would allow energy efficiency efforts to inappropriately permit a net metering customer to become a permanent habitual excess generator, is that it may increase the subsidy from non-net metering customers to net metering customers. Non-net metering customers already subsidize net metering customers because net metering customers are relieved of paying their fair share of the costs of the distribution and transmission system that they use to import and export power for their facilities or residences. Further, historically, net metering customers are also potentially relieved of paying charges for social programs and economic development, such as the percentage of income payment program, which all customers are required by law to pay. More recently, with the enactment of SB 221 in 2008, net metering customers are avoiding paying their fair share for energy efficiency programs required under Section 4928.66, O.R.C. some of which they may very well be taking of advantage of, and renewable energy required under Section 4928.64, O.R.C. Allowing net metering customers to avoid paying these charges is inconsistent with the requirements in these statutes. Further, it seems inappropriate for net metering customers to be able to benefit from energy efficiency programs when they are not helping to pay for the costs of those programs.

A customer-generator's new status as an intentional seller of electricity as discussed above raises transactional and jurisdictional questions, particularly for net metering customers who obtain their electric generation services from a competitive retail electric services provider ("CRES provider"). Importantly, issues remain as to who are the sellers and buyers of the shopping customer-generator's excess electricity and how do the dollars and power flow? The rules must be sufficient to make clear that electric utilities are not being inadvertently forced to absorb costs of customer generation as a result of the Commission's net metering rules.

The Companies recommend that the Commission remove the 120% presumption from the rules for the reasons set forth above, by deleting adopted Rule 4901:1-10-28(B)(6) and the reference to this sub-part appearing in Rule 4901:1-10-28(A)(3). If the Commission does not remove the 120% presumption, in the alternative, the Commission must revise the language of Rule 4901:1-10-28(B)(6) because the language of the adopted rule revision does not match the Commission's conclusion set forth in the Order at page 36, which states: "The Commission intends for customer-generators to be able to size their net metering systems at 100 percent of their requirements for electricity and still be able to engage in energy efficiency measures." Adopted Rule 4901:1-10-28(B)(6) also neither reflects the rebuttable nature of the presumption, nor makes clear that the new rule is applicable only during subsequent annual reviews and is not applicable during the initial application and approval of a customer's net metering application. If the new presumption is not removed or reduced upon Rehearing as recommended by the Companies, the Companies propose that 4901:1-10-28(B)(6) be amended as follows:

> (6) A customer-generator must intend primarily to offset part or all of the customer-generator's requirements for electricity. Subsequent to the initial installation, a ~~A~~ customer-generator that annually generates less than one hundred and twenty percent of its requirements for electricity is rebuttably presumed to ~~be~~ have primarily intended~~ing~~ to offset part or all of its requirements for electricity.

XI. The Commission's Order to open a virtual net metering and aggregate net metering docket is unjust, unreasonable and unlawful in that it violates the Companies' exclusive service territories granted by Sections 4933.81 and 4933.83, O.R.C. and an evaluation docket should not be opened.

The Order states "[t]he Commission does not believe that rules providing for virtual and aggregate net metering should be adopted at this time."[16] The Companies agree with this decision. However, the Companies do not agree that a new docket should be opened for the "purpose of continuing to consider and evaluate virtual and aggregate net metering." As the Companies previously explained, virtual net metering and aggregate net metering violate the Revised Code in several ways. Section 4928.01, O.R.C. refers to the definition of "electric load center" in Section 4933.81(E), O.R.C. which describes an "electric load center" as "all the electric-consuming facilities of any type or character owned, occupied, controlled, or used by a person at *a single location* which facilities have been, are, or will be connected to and served at a metered point of delivery and to which electric service has been, is, or will be rendered." (emphasis added). Electric utilities have the exclusive right and obligation to furnish electric service to all electric load centers within their certified territories.[17] Permitting a customer-generator to combine any excess generation at one electric load center with any other electric load center within the certified territory violates the exclusive right granted by the statute.

Virtual net metering and aggregate net metering further violate the important regulatory principles of cost causation. As stated by the Supreme Court of Ohio, a customer-generator "relies on the utility's facilities to feed back the electricity

[16] Order at Para. 72.
[17] Section 4933.83, O.R.C.

produced."[18] Allowing a customer-generator to avoid charges for the distribution system investment at both its generation load center as well as any other load center on the Companies' systems increases the amount of cost-shifting to other customers under the fiction that customer-generators have not utilized the distribution and transmission system for their own purpose and benefit. Virtual net metering and aggregate net metering would also result in greater cost-shifting from net metering customers to non-net metering customers related to other charges that all customers are required to pay under law such as energy efficiency, alternative energy, and universal service fund that net metering customers are at least partially relieved of paying as discussed above.

The Companies urge the Commission on Rehearing to reverse its decision to open a new docket to consider and evaluate virtual and aggregate net metering or, in the alternative, to include within such docket consideration and evaluation of whether Rule 4901:1-10-28(B)(10) should be modified and other provisions included to require virtual and aggregate net metering accounts to pay for actual use of the distribution and transmission system and to pay other statutorily mandated charges.

XII. Rule 4901:1-10-34 must be clarified to identify whether day ahead or real-time locational marginal price is to be used for payment of energy.

The Order remarks that the Day Ahead Energy Market is defined in the new rule, but does not clearly explain what role it plays in determining the purchase price of energy from a Qualifying Facility ("QF"). Similarly, paragraph (L) does not identify whether the hourly market clearing locational marginal price ("LMP") refers to the Day-Ahead LMP or the Real-Time LMP. The Order refers to Staff's proposal to allow a QF to select an avoided cost based on the day ahead energy market LMP or a monthly swap price.

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[18] *FirstEnergy Corp. v. Pub. Util. Comm'n,* 95 Ohio St. 401, 406 (2002).

The Companies request the Commission clarify whether payments to QFs are to be based on the day ahead energy market LMP and to modify Paragraph (L) accordingly.

XIII. Rule 4901:10-34 is unjust, unreasonable and unlawful in that it does not require a QF generator to pay incremental settlement charges or administrative costs directly attributable to the generator.

The Order makes no provision for netting the payments to a QF to reflect directly attributable costs arising from market settlement or administrative costs incurred by the electric utility. Neither the Companies nor their customers should be required to pay costs arising solely from a QFs desire to sell energy to the Companies, particularly since the Companies are legally mandated to purchase the energy. For example, there are likely to be differences between the day ahead energy market clearing prices and those in the real time market, creating discrepancies between the price required to be paid to the QF and settlement of real time performance. Similarly, the settlement and accounting for QF activity is a manually intensive process not presently within the EDU's scope of business services to its distribution customers. Finally, there are certain non-LMP charges attributable to generators as well as possible penalties for non-performance that, if directly caused by the QF, should be directly charged to the QF to protect customers from subsidizing the QF.

The Companies propose the following changes to Paragraph (L) to resolve the deficiency:

> (L) Energy payments to qualifying facilities shall be based on the day ahead energy market locational marginal price at the RTO/ISO's pricing node that is closest to the qualifying facility's point of injection, or at a relevant trading hub or zone~~,~~, net of any market settlement charges, penalties, or administrative costs directly attributable to the QF.

XIV. Rule 4901:1-10-34 is unjust, unreasonable and unlawful in that it fails to provide for EDU recovery of the costs to purchase the energy output of QFs.

The new adopted rule imposes a significant potential financial and resource burden on EDUs. The EDUs must be permitted to recover all of their costs incurred in fulfilling the requirements of this new rule. This is particularly true since the EDUs are mandated to make energy payments and incur costs in order to comply with the proposed rule. The Commission must provide in the rule a provision that clearly provides the EDU authorization for full and timely cost recovery of all energy payments made under this rule to qualifying facilities together with all other costs reasonably incurred to comply with this rule. EDUs are permitted to recover their prudently incurred costs and must be provided a reasonable opportunity to earn a fair and reasonable return on property used and useful.[19] Any order requiring the Companies to simply absorb costs would be contrary to law. Any costs incurred on behalf of a QF but not netted against the energy payments to the QF must be explicitly recoverable in an existing or new recovery mechanism. To authorize this recovery the Companies propose the following new Paragraph (M) (existing Paragraph (M) to be remunerated as Paragraph (N)):

> (M) <u>The EDU is entitled to full and timely recovery of all energy payments made under this rule to qualifying facilities together with all other costs reasonably incurred to comply with this rule. Cost recovery may occur through an existing recovery mechanism of the EDU or through a newly proposed recovery mechanism.</u>

[19] *Dayton Power & Light Co. v. Pub. Util. Comm.*, 4 Ohio St.3d 91, 103 (1983).

CONCLUSION

For all of the foregoing reasons, the Commission should grant rehearing on the issues discussed above.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that the foregoing Application for Rehearing of Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company has been filed with the Commission's Docket Information System and is available for all interested parties.

/s/ *Carrie M. Dunn*
One of the Attorneys for Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company