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**

MEMORANDUM CONTRA OF OHIO EDISON COMPANY, THE CLEVELAND ELECTRIC ILLUMINATING COMPANY AND THE TOLEDO EDISON COMPANY TO APPLICATIONS FOR REHEARING FILED BY THE OHIO HOSPITAL ASSOCIATION, INTERESTATE GAS SERVICES, INC., OHIO POWER COMPANY AND THE DAYTON POWER AND LIGHT COMPANY

I. INTRODUCTION

This proceeding concerns amendments to the rules for electric service and safety standards contained in Chapter 4901:1-10, Ohio Administrative Code ("O.A.C"). On November 7, 2012, the Commission issued an Entry ("November 7 Entry") requesting comments on proposed amendments to Chapter 4901:1-10. Comments were filed by several parties on January 7, 2013 and reply comments on February 6, 2013. The Ohio Hospital Association ("OHA"), Interstate Gas Services, Inc. ("IGS"), Ohio Power Company ("AEP Ohio") and The Dayton Power and Light Company ("DP&L") are among those stakeholders who filed extensive comments.

On January 15, 2014, the Commission issued its Finding and Order adopting several amendments to Chapter 4901:1-10 ("Order"). On February 14, 2014, OHA, IGS, AEP Ohio and DP&L filed applications for rehearing ("AFRs"). AFRs are governed by Section 4903.10, Ohio Revised Code ("O.R.C") and Rule 4901-1-35, O.A.C. Under those authorities, AFRs are to be granted only where a Commission order is

"unreasonable," "unlawful," or "unjust or unwarranted." Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company (collectively, "Companies") hereby file their Memorandum Contra OHA and IGS's AFRs. As it relates to those issues, the Order is not "unreasonable," "unlawful," or "unjust or unwarranted." OHA and IGS's AFRs fail to meet those standards. Thus, the Commission should deny rehearing.

The portion of this Memorandum Contra AEP Ohio and DP&L's AFRs seeks clarification of certain issues raised therein.

II. OHA'S APPLICATION FOR REHEARING SHOULD BE DENIED.

A. The Commission's Order declining to add a new subsection to address the worst-performing critical human service facility circuits is not unreasonable or unlawful.

In its Comments, OHA recommended a new subpart be added to Rule 4901:1-10-11, O.A.C. to address worst performing circuits to critical human service facility circuits.[1] OHA also recommended adding a new definition of "critical human service facility" to Rule 4901:1-10-01, O.A.C. as: "any location incorporating a state recognized medical emergency service department, a state recognized labor and delivery department or a state recognized behavioral health department."[2] The sole reason OHA gave for these additions was "to provide greater reliability for the services delivered to hospitals with a minimum of additional work on the part of the electric utilities."[3]

The Commission rejected not only OHA's recommendation to add critical human service facility circuits to Rule 4901:1-10-11, O.A.C. but also OHA's proposed definition

[1] OHA Comments at 4-5 (January 7, 2013).
[2] *Id.* at 3.
[3] *Id.* at 6.

of "critical human service facility."[4] In refusing to add critical human service facility circuits to Rule 4901:1-10-11, O.A.C., the Commission: "agreed with Ohio Power, FirstEnergy and DP&L that OHA's recommendation for Ohio Adm. Code 4901:1-10-11(D) would be redundant with Ohio Adm. Code 4901:1-10-08."[5] In its AFR, OHA contends that the Commission's Order was unreasonable because its recommendation was not redundant with Rule 4901:1-10-08, O.A.C. The Commission should deny OHA's AFR because its decision was correct not only for the reasons stated in its Order, but also for other reasons discussed below.

First, the Commission was correct in finding that OHA's proffered rule was redundant with Rule 4901:1-10-08, O.A.C. That rule requires electric distribution utilities ("EDUs") to have an emergency plan, which prioritizes restoration in the event of an outage to the very facilities OHA believes should have priority in Rule 4901:1-10-11, O.A.C. As those facilities already receive priority status for restoration in the event of an outage, there is no need to also give those circuits connected to those facilities priority over and above all other types of facilities by placing them on the worst performing circuit list. Indeed, OHA acknowledges that the purpose of its recommended change to Rule 4901:1-10-11 was "to improve the channels of communications during disruptions in electrical distribution service" – one of the very functions of Rule 4901:1-10-08, O.A.C. In emergency plans, hospitals are already part of the Companies restoration prioritization process and they are identified. During a storm, the external affairs and customer support employees work with critical facilities, answering questions for them and getting information to the employees who are undertaking restoration efforts. Outage

[4] Order at ¶¶13, 33.
[5] *Id.* at ¶33

restoration information is already available on the Companies' website. This already occurs as a result of the emergency plan required by Rule 4901:1-10-08, O.A.C. making OHA's proposed rule redundant.

In addition, as the Companies commented, OHA's recommended rule also duplicates Rule 4901:10-11(C), O.A.C. Specifically, that rule already requires the Companies to report *all* of the worst performing eight per cent of the electric utility's distribution circuits during the previous twelve-month reporting period. If one of those facilities is on one of the Companies' worst performing circuits as defined by Rule 4901:10-11(C), O.A.C., it will be reported. There is no need for a new reporting standard specifically for "critical human service facility circuits." Therefore OHA's recommended rule is also redundant with Rule 4901:1-10-11(C).

Last, the Commission correctly rejected OHA's recommended rule because it is unclear what types of facilities would fit into the definition "critical human service facility." As the Companies commented, the definition OHA proffered for "critical human service facility"[6] is overbroad and vague as there is not a quantifiable standard for the determination of which medical facilities would be reportable and in what manner such a list of reportable facilities would be kept up to date. These new standards could include an unmanageable, large number of facilities. It would be impossible for an EDU to know what facilities are "state-recognized" and what facilities are included in the definition and how that may change over time. Numerous unanswered questions exist regarding this proposal, for example, whether the terms used are defined and publicly available and how often such terms may change, how such entities can be confirmed, and

[6] OHA proffered the following definition of "critical human service facility:" location incorporating a state recognized medical emergency service department, a state recognized labor and delivery department or a state recognized behavioral health department. OHA Comments at 3 (January 7, 2013).

how many such entities exist and where they are located, and who is responsible to assure that such entities continue to meet the definition, and who will have responsibility to track updated definitions of the terms and compare the updated definitions to the list of entities under the new proposed definition of "critical human service facility."

Moreover, the ramifications of adding rule-driven reliability standards to a potentially large number of presently undefined facilities, and then having to keep that unwieldy list accurately updated, are severe. The purpose of the "critical customer" designation is to alert utility dispatchers during an outage of certain customers that may have inadequate back-up life support facilities. Clearly, hospitals and other health care facilities do not fall into this category because they must have adequate on-site generation. Moreover, if a customer relies on electricity "for its daily survival" then it should take steps to provide for a back up as the electric utility cannot guarantee that service to such a customer will never, under any circumstances, be interrupted. This is especially true give that many outages occur outside the control of the electric utility as a result of storms and accidents. Therefore, adding these standards to this is not necessary, unduly burdensome and redundant with current rules. For all of those reasons, the Commission should deny rehearing.

B. The Commission's Order declining to add a specific provision for reporting outages to essential facilities including hospitals was not unreasonable.

In its comments, OHA recommended that the rules require that the EDUs provide outage event information to hospitals "as close to real-time as is practicable for the utility."[7] The Commission correctly rejected OHA's recommendation finding that

[7] *Id.* at 4.

provisions for reporting outages to affected essential facilities are already in the rules.[8] On rehearing, OHA contends that the Commission "unreasonably ignored OHA's additional recommendation that the amount of time that must elapse before an interruption of service is elevated to the status of an outage under the rules be reduced."[9] OHA argues that due to the advent of major investments in smart grid technologies by all of the Ohio EDUs, it is feasible to reduce the amount of time that must elapse before an interruption in service is elevated to the status of an "outage."[10]

Advanced meter infrastructure ("AMI") programs are being addressed in different proceedings, and therefore should not be addressed on an ad hoc basis in this proceeding. Further, while the Companies have an AMI pilot underway, it is by no means capable of producing the information sought by OHA. Amending the rule to require this information, when it is not able to be provided, is premature at best. Moreover, OHA has not demonstrated why the Commission's Order was unreasonable as it has not given any reason why a change is necessary to reduce the time that elapses before an outage is reported.

Even if the information could be provided, the Commission's rejection of the proposed rule was not unreasonable. Hospitals and other critical facilities already receive outage information as part of the emergency plan. The Companies also provide that information on their website. As the Commission noted in Case No. 06-0653-EL-ORD in response to some commenters' suggestions to add to the list of people contacted about outages: "the Commission's outage coordinator is the appropriate contact fulfilling the Commission's role as a 'responder' in the Ohio Emergency Management Agency's

[8] Order at ¶20.
[9] OHA AFR at 4.
[10] *Id.*

emergency response system."[11] The Commission, thus concluded, that it is "unnecessary to add additional reporting requirements when an outage occurs."[12] For those reasons, the Commission should deny rehearing.

III. IGS's APPLICATION FOR REHEARING SHOULD BE DENIED

IGS asks the Commission to grant Rehearing for the purpose of clarifying "that reciprocating engine technology is eligible for net metering because it has been IGS's experience that certain electric distribution utilities are denying requests for net metering on CHP projects simply because reciprocating engine technology is being utilized instead of traditional turbines."[13] In support of its AFR, IGS asserts "[e]xcluding reciprocating engines from net metering effectively favors one technology for CHP projects at the expense of another, for no apparent reason."[14] IGS also asserts that "reciprocating engines make up a substantial portion of new installations for CHP projects of less 5 MWs."

IGS's argument fails for one simple and inescapable reason: the net metering statute does not include reciprocating engines in the list of technologies that are eligible for net metering. The statute provides that only a system using "as its fuel either solar, wind, biomass, landfill gas, or hydropower, or uses a microturbine or a fuel cell" is eligible for net metering.[15] The reason the Commission's rule "favors" microturbine and fuel cell technology over reciprocating engine technology is because that is precisely what is required by the controlling statute. On this ground, alone, the Commission should deny IGS's AFR.

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[11] Case No. 06-0653-EL-ORD, Finding and Order at ¶21 (November 5, 2008).
[12] *Id.*
[13] IGS AFR at 3.
[14] *Id.*
[15] Section 4928.01(A)(31)(a), O.R.C.

IGS's argument fails for policy reasons as well. Net metering is an incentive retail rate mechanism that is subsidized by other customers in order to foster installation of specifically desired distributed generation technologies. IGS's own argument suggests that reciprocating engines are being installed routinely without the need for these incentives, since they already make up a "substantial portion of new installations" in Ohio. Moreover, reciprocating engines are not *per se* excluded from net metering--reciprocating engines fueled by landfill gas may qualify under the statute.

The Commission is a creature of statute and can only take such actions as are authorized by the Legislature and therefore cannot adopt administrative rules that contravene statutes.[16] IGS's AFR requests the Commission to take an action in contravention of statute, which it cannot do. For all of the above reasons, the Commission should deny IGS's request.

IV. AEP OHIO'S APPLICATION FOR REHEARING

A. Net Metering Cost Recovery

AEP Ohio requests rehearing on jurisdictional grounds by noting that both the Ohio Revised Code and the United States Code specify that net metering is authorized when the electric utility provides electric energy to the electric consumer.[17] The Companies agree that state and federal law only describe net metering when electric energy is provided by the local electric utility and this is a threshold question that must be addressed. AEP Ohio goes on to request clarification regarding recovery of costs to pay for net excess energy credit refunds as a non-bypassable charge, but also notes a lack of clarity whether the Order specifies that net excess energy is intended to reduce a utility's

[16] *English v. Koster*, 61 Ohio St. 2d 17, 19 (1980).
[17] AEP Ohio AFR at 5.

standard service offer ("SSO") load or instead be liquidated through the PJM market.[18] AEP Ohio states, "This load should be included as a reduction to the SSO load to benefit all ratepayers."[19] Similar to the treatment of Qualifying Facility ("QF") purchases discussed below, burying customer-generators' excess energy into SSO load increases the risk perceived by wholesale SSO providers which could in turn lead to higher prices for SSO customers.

The Companies respectfully submit that recognizing a reduction to the Companies' SSO load for net metering customers' excess energy would flow the value of that energy to SSO customers alone, and not to "all ratepayers" as suggested by AEP Ohio. In this respect, the flexibility urged by AEP Ohio should permit EDUs to implement recovery corresponding with the settlement of the energy itself. In other words, EDUs should be permitted to propose recovery mechanisms appropriate for their customers. Such a mechanism could be utilized to reduce a utility's SSO load, or it could involve liquidating the excess energy through the PJM market, or any other acceptable mechanism. But such mechanisms should not be limited to just reducing a utility's SSO load, as that may not be the most beneficial approach.

B. Net Metering Compliance and Enforcement

AEP Ohio also notes the Order does not provide for "enforcement capability by utilities to ensure customers are not intentionally oversizing their equipment."[20] AEP Ohio proposes two amendments: 1) require prospective customer-generators to certify its expected electricity usage; and 2) automatic ineligibility if the 120% threshold is

[18] *Id.* at 7-8.
[19] *Id.* at 8.
[20] *Id.* at 10.

exceeded.[21] Preliminarily, the Companies consider AEP Ohio's characterization of the 120% threshold as a "margin of error" to be an important distinction from intentional excess generation. AEP Ohio's proposed amendments are similar to the Companies' recommendations, but the automatic ineligibility recommendation should not be read to allow a customer-generator to maintain excess output above 100%. A customer should be given a chance to correct its excess generation condition through promptly curtailing generation or increasing consumption, but if it does not then the customer should be removed from the net metering tariff. Moreover, for both the initial sizing and on-going eligibility reviews it is the utility's role to assess and enforce compliance. The Companies' recommended amendments allow EDUs properly to deny net metering for intentional oversizing and excess generation.

C. PURPA Compliance

The Companies share AEP Ohio's concern that cost recovery be explicitly provided in the new Rule. However, to the extent that AEP-Ohio proposes that QF generation automatically be included as a reduction to the SSO load, the Companies respectfully disagree and request that utilities be provided greater flexibility. If limited to SSO customers only, the requirement to purchase energy at Locational Marginal Price ("LMP") from facilities up to 20 MW in size may impose considerable risk of market price spikes upon SSO customers as QF purchases displace competitive bid auction results. The Companies respectfully submit that a better approach is to require QFs to bear market price risk directly instead of shifting such risks to the Companies' customers by clarifying that electric utilities may liquidate QF energy in the PJM market. Moreover, to the extent that auction bidders perceive an added risk that their winning

[21] *Id.* at 11.

bids might be displaced by new QF energy generation, such risk may get priced into bids resulting in higher prices to SSO customers.

V. THE COMMISSION SHOULD ACCEPT DP&L'S PROPOSED ADDITION TO RULE 4901:1-10-28(B)(10), O.A.C.

DP&L proposes an additional provision in the Rule 4901:1-10-28(B)(10), O.A.C. to require customer-generators to pay for their use of the grid for excess generation.[22] The Companies support this request particularly if the Commission retains the 120% presumption in Rule 4901:1-10-28(B)(6). The Companies support this request because a net metering customer benefiting from the use of the distribution system should pay their fair share of the costs associated with the distribution system. The Companies reiterate that routine excess generation by customer-generators was neither contemplated in the statute nor in previous versions of the Commission's net metering rules. Therefore, the provision that prohibits an EDU from charging a customer-generator for electricity fed back to the system previously applied only to the "ebb and flow" along the way to generating no more than necessary to offset part or all of the annual requirements for electricity. As soon as a customer-generator engages in the practice of routine excess generation, it becomes a seller of electricity by intent and only the arbitrary and capricious 120% "presumption" maintains eligibility for net metering. Other customers should not be forced to subsidize net metering customers at all, and certainly not related to the net metering customer pushing excess generation onto the system, thereby causing other customers to absorb even more of the distribution system costs avoided by the excess generator.

[22] DP&L AFR at 12.

VI. CONCLUSION

For all of the foregoing reasons, the Commission should deny OHA and IGS's applications for rehearing, and should grant AEP Ohio's and DP&L's applications consistent with the Companies' recommendations discussed above.

Respectfully submitted,

/s/ *Carrie M. Dunn*
James W. Burk (0043808)
Counsel of Record
Carrie M. Dunn (0076952)
FIRSTENERGY SERVICE COMPANY
76 South Main Street
Akron, OH 44308
(330) 384-5861
(330) 384-3875 (fax)
burkj@firstenergycorp.com
cdunn@firstenergycorp.com

Attorneys for Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company

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

Jason B. Keyes	jkeyes@kfwlaw.com
Thadeus B. Culley	tculley@kfwlaw.com
Christopher J. Allwein	callwein@wamenergylaw.com
Kimberly W. Bojko	Bojko@CarpenterLipps.com
Jeanne W. Kingery	Jeanne.Kingery@duke-energy.com
Amy B. Spiller	amy.spiller@duke-energy.com
Elizabeth H. Watts	elizabeth.watts@duke-energy.com
Judi L. Sobecki	judi.sobecki@dplinc.com
Nathan G. Johnson	Nathan@buckeyeforestcouncil.org
Scotte Elliott	selliott@metrocdengineering.com
Melissa R. Yost	yost@occ.state.oh.us
M. Howard Petricoff	mhpetricoff@vorys.com
Stephen M. Howard	smhoward@vorys.com
Matthew S. White	mswhite@igsenergy.com
Vincent A. Parisi	vparisi@igsenergy.com
J. Thomas Siwo	tsiwo@bricker.com
Matthew W. Warnock	mwarnock@bricker.com
Matthew J. Satterwhite	mjsatterwhite@aep.com
Steven T. Nourse	stnourse@aep.com
Richard L. Sites	ricks@OHANET.org
Thomas J. O'Brien	tobrien@bricker.com
Steven Giles	sgiles@hullinc.com
Joseph M. Clark	joseph.clark@directenergy.com
Jennifer L. Lause	Jennifer.lause@directenergy.com
Emma Berndt	emma.berndt@opower.com
Erica McConnell	emcconnell@kfwlaw.com
Nick McDaniel	nmcdaniel@elpc.org

Summary: Memorandum Contra Applications for Rehearing filed by The Ohio Hospital Association, Interstate Gas Services, Inc., Ohio Power Company and The Dayton Power and Light Company electronically filed by Ms. Carrie M Dunn on behalf of The Cleveland Electric Illuminating Company and The Toledo Edison Company and Ohio Edison Company