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 Second Entry on Rehearing entered in the journal on May 28, 2014, in the above-captioned case. As explained in more detail in the attached Memorandum in Support, the Commission's Second Entry on Rehearing in this case is unreasonable and unlawful on the following grounds:

- The Commission's interpretation of Rule 4901:1-10-28(B)(9)(c) regarding Net Energy Metering is unjust, unreasonable and unlawful in that it requires the Companies to issue a monetary credit for excess generation by a customer-generator calculated in a manner that is inconsistent with the Revised Code and the Supreme Court of Ohio's holding in *FirstEnergy Corp v. Pub. Util. Comm.*, 95 Ohio St.3d 401 (2002).

For the reasons discussed in greater detail in the attached Memorandum in Support, the Companies respectfully request that the Commission grant the Companies' Application for Rehearing and appropriately modify the rules.

Respectfully submitted,

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INTRODUCTION

On November 7, 2012, the Commission issued an Entry requesting comments on proposed amendments to the rules contained in Chapter 4901:1-10. 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 ("Order") adopting several amendments to Chapter 4901:1-10. On March 12, 2014, the Commission granted several Applications for Rehearing for purposes of further consideration. On May 28, 2014, the Commission issued its Second Entry on Rehearing ("Second Entry"), which interprets adopted rule 4901:1-10-28(B)(9)(c) regarding the monetary credit calculation for excess generation by net metering customer-generators.

In its Order, the Commission addressed numerous comments regarding credits for excess generation and found that the credit for excess generation should be a monetary credit based on the SSO generation price. Order p. 38-40. Ohio Power, in its Memorandum in Support of Application for Rehearing, requested the Commission clarify that the monetary credit is based on the energy component of the SSO generation price. The Interstate Renewables Energy Council ("IREC") countered that Ohio Power's request would increase the cost to customer-generators by lowering the credit paid for excess generation. IREC Memorandum Contra at p. 5. The Commission denied Ohio Power's requested clarification. Second Entry at p. 20.

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

[1] *Canton Storage and Transfer Co. v. Pub. Util. Comm.*, (1995) 72 Ohio St. 3d 1, 5.

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;
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> (2) Whether the rule needs amendment or rescission to give more flexibility at the local level;
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> (3) Whether the rule needs amendment to eliminate unnecessary paperwork;
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> (4) Whether the rule duplicates, overlaps with, or conflicts with other rules;
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> (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;
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> (b) Attempt to balance the critical objections of regulation and the cost of compliance by the regulated parties; and
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> (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.

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[2] *English v. Koster*, (1980) 61 Ohio St. 2d 17, 19.

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 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;

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:
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> (A) It requires a licenses, permit, or any other prior authorization to engage in or operate a line of business;
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> (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.

[3] The Companies recognize that the Commission has filed its Business Impact Analysis ("BIA") in this case 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.

The Second Entry on Rehearing adopted an interpretation of the rules that conflicts with the Revised Code and the Supreme Court's holding in *FirstEnergy Corp*. For these reasons the Commission should grant rehearing.

ARGUMENT

The Commission's interpretation of adopted Rule 4901:1-10-28(B)(9)(c) is unjust and unreasonable in that it requires an electric distribution utility ("EDU") to issue a monetary credit for excess generation calculated in a manner that conflicts with the Revised Code and the Supreme Court's holding in *FirstEnergy Corp*.

A. The Commission's interpretation of "electricity" ignores the plain language in the statutory definitions.

The Commission's interpretation of adopted Rule 4901:1-10-28(B)(9)(c) ignores the plain language of the statutory definition of a net metering system as "a facility for the production of electrical *energy*." ORC 4928.01(A)(31) (emphasis added). A "customer-generator" is defined as a "user of a net metering system." ORC 4928.01(A)(29). Therefore, by definition, a customer-generator is permitted by law to only provide electrical *energy* to an EDU because a net metering system may only produce "electrical energy" under law. The legislature's subsequent use of the term "electricity" in ORC 4928.67 must be interpreted in a manner consistent with the clear and unambiguous statutory definitions set forth in ORC 4928.01, and not based on the Commission's interpretation of language appearing elsewhere. To do otherwise would render the definitions of "net metering system" and "customer-generator" meaningless. Statutes may not be interpreted to render statutory provisions meaningless. R.C. 1.52. In other words, the legislature's explicit definition takes precedence over any other nomenclature.

Moreover, the Commission's interpretation of "electricity" as including capacity and demand components as well as energy for the purpose of calculating the monetary credit creates a conflict between sections 4928.01 and 4928.67 of the Revised Code. Specifically, the Commission's interpretation requires the insertion of the words "demand" and "capacity" into the definition of a net metering system, or, in the alternative, to ignore that the legislature used the term "electrical energy" instead of "electricity" in its definition. The longstanding canons of statutory interpretation dictate that if there are two possible interpretations of a word, the interpretation which contradicts other statutory provisions must yield to the one that gives effect to other sections of the code, thereby harmonizing the two sections. Allen v. Parish, 3 OHIO 187, 193; 1827 Ohio LEXIS 109, p.12. The precise definition of a "net metering system" as a facility that produces electrical *energy* clearly signals the legislature did not contemplate net metering customer-generators providing anything but electrical energy to an EDU from their net metering systems.

B. The Commission's Second Entry interpretation is inconsistent with its other findings in this proceeding.

The PUCO's new interpretation that the use of the word "electricity" in 4901:1-10-28(B)(9)(c) means energy, capacity, and demand is inconsistent with its denial of DPL's recommendation in this proceeding that the statutory determination of "requirements for electricity" should include a demand component.[4] Order at p. 37. The Commission rejected DPL's position, stating "The Commission finds that Staff's

[4] DPL Comments at p. 18. ("DPL believes strongly that "requirements for electricity" has the meaning of both energy (kWh) and demand (kW).")

proposal that a customer-generator's requirements for electricity should be the average amount of electricity consumed annually by the customer-generator over the previous three years should be adopted." Order at p. 38. If "electricity" does not refer also to demand and capacity when determining the customer's annual requirements for electricity under ORC 4928.01(A)(31)(d) (and OAC 4901:1-10-28(B)(6) and (7)), then it equally cannot refer to demand and capacity in addition to energy in ORC 4928.67. Interpretations giving different meanings to the same word appearing in different provisions of the same statute is logically inconsistent, and fails to give effect to the statutes. Allen, p193.

Similarly, the Revised Code requires that net metering be accomplished using a single meter capable of "registering the flow of electricity in each direction." ORC 4928.67(B)(1). The Commission has never suggested in any forum that such single meters <u>must</u> measure capacity and demand along with energy. Nor has the Commission ever suggested that ORC 4928.67(B)(3)(a)[5] requires that EDUs measure the net capacity and net demand of customer-generators—only their net energy.

Most importantly, the Commission explicitly interpreted "electricity" as energy-only elsewhere in the Second Entry. The Revised Code requires that hospital customer-generators be paid "the market value of the customer-generated electricity at the time it is generated." ORC 4928.67(A)(2)(b). The Commission's adopted rule 4901:1-10-28(C)(3) states in part, "For purposes of this rule, market value means the locational marginal price of energy determined by a regional transmission organization's operational market at the

[5] "The electric utility shall measure the net electricity produced or consumed during the billing period in accordance with normal metering practice."

time the customer-generated electricity is generated." Further, PJM[6] defines locational marginal price as "The hourly integrated market clearing marginal price for energy at the location the energy is delivered or received."[7] The Commission's interpretation of "electricity" in this instance again only refers to energy, consistent with the statutory definition.

Moreover, the Commission's interpretation of "electricity" to mean energy-only with respect to hospital customer-generators also appears in its earlier Order. Indeed, the Commission therein uses the terms "electricity" and "energy" interchangeably, for example, stating "However, the Commission believes that the hospital generator should be credited with the *electricity* generated by the hospital and delivered to the utility grid, but not for the total *energy* generated, which would include the *energy* consumed by the hospital. Therefore, *energy* generated by the hospital under net metering and delivered to the grid should be measured by a separate meter or meter register to allow for the proper crediting of the *energy* delivered by the hospital at the market rate." Order at p. 41. The Commission's Order and Second Entry applied to hospital generators clearly interprets the term *electricity* to mean *energy* in these statutes, which, again, is consistent with the statutory definition.

Simply put, Ohio's EDUs and the Commission, consistent with the Supreme Court's Opinion and statutory definitions, have uniformly and routinely implemented every other appearance of the term "electricity" with respect to the net metering statutes to mean energy only, while the Commission's recent changed interpretation of the excess

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[6] The relevant regional transmission operator for Ohio's EDUs.
[7] http://www.pjm.com/~/media/documents/manuals/M35.ashx

generation credit provision in 4928.67(B)(3)(b) represents a significant departure from that otherwise consistent and routine interpretation and established precedent.

C. The Commission's new interpretation nullifies the Supreme Court's decision.

The Second Entry on Rehearing effectively nullifies the 2002 Supreme Court of Ohio decision in *FirstEnergy Corp.* In that case, the Supreme Court ordered the Commission to approve, without change or modification, the Net Energy Metering Rider as filed by FirstEnergy, which conspicuously provided credit for excess generation explicitly based on the energy component only.[8] The Companies' Net Energy Metering Rider includes a defined calculation of the credit based solely on the energy component. This Net Energy Metering tariff provision has remained in place and unchanged continuously since the 2002 decision by the Supreme Court. Indeed, the Commission approved the Companies' tariff credit calculation based on the energy-only component on multiple occasions: both as initially filed, following the directive issued by the Supreme Court in their opinion issued in 2002, and subsequently as part of the Commission's approval of the Companies' last distribution base rate case in 2009. Case No. 07-551-EL-AIR. The Commission's Second Entry on Rehearing in this proceeding would render the Companies' Net Energy Metering Rider tariff void as non-compliant with its newly-announced interpretation—i.e., the Commission's Second Entry on Rehearing would have the impact of reversing the Supreme Court's reversal in the *FirstEnergy Corp*. decision, which is impermissible.

[8] The Commission's modifications of the proposed tariff compliance filing included striking the Companies' energy-only credit language.

Although the Supreme Court decision does not explicitly state that the statutory references in ORC 4928.67 to electricity means electrical energy, such determination is the only outcome that gives meaning to the definitions set forth in ORC 4928.01 and is wholly consistent with the Supreme Court order to the Commission to reinstate FirstEnergy's Net Energy Metering Rider tariff as-filed unmodified by the Commission, including the energy-only component calculation of credit for excess generation. Conversely, the Commission's new interpretation in its Second Entry on Rehearing is not consistent with the tariff reinstated by the Supreme Court, or the Revised Code.

D. EDUs have demonstrated their ability to attribute an energy price to customer-generators.

In its Second Entry the Commission states that Ohio Power has not demonstrated that it would be "practical, or even possible, to attribute an energy price to the electricity generated by a customer-generator." Second Entry p. 21. Whether it was demonstrated to the Commission in <u>this</u> proceeding that it is both possible and practical to isolate an energy price is irrelevant given that the Commission has approved numerous tariff compliance filings by various EDUs which do exactly that--identify the energy and capacity components of the SSO price. (*See*, the Companies' Rider GEN tariffs that conspicuously identify energy and capacity components. *See also* Duke Energy's tariffs RE and RC representing the retail price for SSO service that separately identifies energy and capacity components). Moreover, the Commission has approved the net energy metering tariffs of Duke Energy, AEP Ohio, and the Companies, [CITES] each of which clearly indicates that credits for excess generation will be calculated using the respective energy-only component of the SSO price. In this regard, nothing in the definitions related to net metering or the language of the net metering statute, ORC 4928.67, has changed since the Supreme Court's Opinion or the Commission's approvals of the EDU tariffs. Thus, IREC's Memorandum Contra noted by the Commission in the Second Entry is simply incorrect—Ohio Power's requested language would have codified the existing practice by at least three of the four EDUs and maintained the credits at existing approved amounts consistent with the Supreme Court opinion and statutory definitions, while the Commission's new interpretation represents an increase in the amount to be credited.

E. The Commission's rejection of cost recovery confiscates utility property

DPL raised the issue of authorization for cost recovery of the credit payments for excess generation in its initial comments. The Commission denied DPL's request without explaining why cost recovery was denied. In their Applications for Rehearing, both DPL and Ohio Power asserted that the rule should clarify how the utility recovers that cost, specifically through a nonbypassable charge, while Ohio Power further asserted that if the electric utility is recovering this cost through negative load, then that load should be included as a reduction to the SSO load (accounts) for purposes of PJM settlement.

IGS opposed the rehearing on this ground, asserting that CRES suppliers should not be required to credit the customer for net metered generation because CRES suppliers will not be getting access to, or utilization of, the electricity that is delivered back to the distribution system. IGS further asserts that since the electricity generated by a net metering customer-generator is placed directly onto the distribution system, the distribution utility receives the electricity, which reduces the SSO obligation of the electric distribution utility. Despite IGS' erroneous assertions, the Commission again denied DPL's and Ohio Power's request without discussion of cost recovery.

As the Commission notes, EDUs are mandated by law to provide monetary credits to customer-generators for the excess energy they deliver onto the grid. However, the Commission does not address what happens to that energy or how EDUs will be compensated for the amounts paid to net metering customer-generators. Notably, the Companies do not take ownership of that energy, nor do they collect revenues or experience less cost due to customer-generators' excess energy. Instead, from the Companies' perspective any reductions to SSO obligation results in less revenues collected from customers to reconcile that obligation. Thus, absent an appropriate authorized mechanism for cost recovery from customers as requested by DPL and Ohio Power, these credit payments are simply an unfunded mandate. The Commission erred when it denied the request for authorized recovery of the mandated costs incurred, and should grant the Companies' request for Rehearing to establish the appropriate cost recovery mechanism.

CONCLUSION

For all of the foregoing reasons, the Commission should grant rehearing on the issue 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 on June 27, 2014 and is available for all interested parties.

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