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

THIRD ENTRY ON REHEARING

The Commission finds:

(1) R.C. 119.032 requires all state agencies to conduct a review, every five years, of their rules and to determine whether to continue their rules without change, amend their rules, or rescind their rules. At this time, the Commission is reviewing the electric service and safety (ESS) rules contained in Ohio Adm.Code Chapter 4901:1-10, as required by R.C. 119.032.

(2) On January 15, 2014, the Commission issued its Finding and Order (Order), adopting the rules in Ohio Adm.Code Chapter 4901:1-10. Pursuant to R.C. 4903.10, any party who has entered an appearance in a Commission proceeding may apply for rehearing with respect to any matters determined by the Commission, within 30 days of the entry of the Order upon the Commission's journal.

(3) On February 14, 2014, Direct Energy Services, LLC (Direct Energy), the Ohio Hospital Association (OHA), The Dayton Power and Light Company (DP&L), Duke Energy Ohio, Inc. (Duke), the Ohio Power Company (Ohio Power), Ohio Edison Company, Toledo Edison Company, and the Cleveland Electric Illuminating Company (collectively, FirstEnergy), and IGS Energy (IGS) filed Applications for Rehearing. Memoranda contra the Applications for Rehearing were filed by the Interstate Renewable Energy Council, Inc. (IREC), Direct Energy, IGS, FirstEnergy, and the Ohio Consumers' Counsel (OCC).

(4) On March 12, 2014, the Commission issued an entry on rehearing granting rehearing for further consideration of the matters specified in the applications for rehearing. Thereafter, on May 28, 2014, the Commission issued our Second Entry on Rehearing granting, in part, and denying, in part, the applications for rehearing filed by DP&L, FirstEnergy, Duke,

Ohio Power, Direct Energy, and IGS. Additionally, the Commission denied the application for rehearing filed by OHA.

(5) On June 27, 2014, FirstEnergy filed an application for rehearing regarding the Second Entry on Rehearing. In its sole assignment of error, FirstEnergy alleges that the Commission's Second Entry on Rehearing is unlawful or unreasonable because the Commission's interpretation of Ohio Adm.Code 4901:1-10-28(B)(9)(c) requires the electric distribution utilities (EDUs) to issue a monetary credit for excess generation in a manner that violates the Revised Code and *FirstEnergy Corp. v. Pub. Util. Comm.*, 95 Ohio St.3d 401 (2002). Subsequently, on July 7, 2014, IGS filed a memorandum contra to FirstEnergy's application for rehearing.

(6) The Commission has now reviewed and considered the assignment of error raised in FirstEnergy's application for rehearing. Any arguments in support of its assignment of error not specifically discussed herein have been thoroughly and adequately considered by the Commission and are hereby denied. The Commission will address the merits of FirstEnergy's application for rehearing below.

(7) As a preliminary matter, IGS argues in its memorandum contra to FirstEnergy's application for rehearing that FirstEnergy's application is procedurally improper. IGS asserts that R.C. 4903.10 prohibits FirstEnergy from filing an additional application for rehearing on matters that have already been denied. IGS notes that FirstEnergy's initial application for rehearing failed to provide any arguments regarding Ohio Adm.Code 4901:1-10-28(B)(9)(c), and that the Commission has already denied rehearing on other parties' arguments regarding Ohio Adm.Code 4901:1-10-28(B)(9)(c).

(8) The Commission finds that IGS's argument has merit and that rehearing on FirstEnergy's application for rehearing should be denied for being procedurally improper. We find that FirstEnergy's application for rehearing is procedurally improper because it requests rehearing on a matter that has already been denied by the Commission. R.C. 4903.10 does not permit parties to have "two bites at the apple" to file rehearing upon rehearing of the same issue. *In re Ohio Power Company*

and Ormet Primary Aluminum Corporation, Case Nos. 96-999-EL-AEC, et al., Second Entry on Rehearing (Sept. 13, 2006) at 3-4. After the Commission issued its Finding and Order in this matter on January 15, 2014, numerous parties filed applications for rehearing, including FirstEnergy. Regardless, the Commission denied all of the assignments of error raised by the parties regarding Ohio Adm.Code 4901:1-10-28(B)(9)(c). FirstEnergy now requests rehearing on the Commission's interpretation of Ohio Adm.Code 4901:1-10-28(B)(9)(c), which is a matter that has already been addressed and denied by the Commission.

(9) However, even if FirstEnergy's application for rehearing was not procedurally improper, the Commission would still deny rehearing on the Companies' assignment of error because FirstEnergy has presented an unreasonable reading of R.C. 4928.67, which would prevent the Commission from furthering the policies of the state of Ohio enumerated in R.C. 4928.02. FirstEnergy makes multiple arguments in support of its single assignment of error that the Commission's Second Entry on Rehearing is unlawful or unreasonable because the Commission's interpretation of Ohio Adm.Code 4901:1-10-28(B)(9)(c) requires the EDUs to issue a monetary credit for excess generation in a manner that violates the Revised Code and *FirstEnergy Corp. v. Pub. Util. Comm.*, 95 Ohio St.3d 401 (2002). We will address these arguments below individually.

(10) FirstEnergy first argues that the Commission's interpretation of the word "electricity" in Ohio Adm.Code 4901:1-10-28(B)(9)(c) is inconsistent with the plain language of R.C. 4928.01(A)(31). According to FirstEnergy, R.C. 4928.01(A)(31) indicates that a net metering facility is a facility for the production of electrical energy, not for the production of electricity. Therefore, according to FirstEnergy, 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. FirstEnergy then asserts that the subsequent use of the term "electricity" in R.C. 4928.67 must be interpreted to mean "electrical energy," to be consistent with R.C. 4928.01(31).

Further, FirstEnergy argues that the Commission's interpretation of "electricity" to include all of the components of electricity creates a conflict between R.C. 4928.01 and

4928.67. Specifically, FirstEnergy argues that the Commission's interpretation rewrites the statute to include the words "demand" and "capacity" into the definition of net metering system in R.C. 4928.01(31). FirstEnergy asserts that the General Assembly's use of the term "electrical energy" signals their intent for a net metering system to provide just the energy component of electricity to the EDU. Therefore, FirstEnergy asserts that the rate paid to customer-generators should include only the energy component of electricity.

IGS argues that FirstEnergy incorrectly asserts that the Commission ignored the plain definition of the term "electricity" in R.C. 4928.01(30). Additionally, IGS avers that the statutory definition of net metering system in R.C. 4928.01(31) does not limit the Commission's authority; it merely describes the function of a net metering system. IGS asserts that the controlling statute, which is R.C. 4928.67(A)(1), indicates that credits for excess generation may include compensation for the capacity and demand components of electricity. IGS claims that the components of electricity supplied include capacity, demand, and energy; therefore, the electricity generated should also be recognized to include the components of capacity, demand, and energy. IGS argues that R.C. 4928.67(A)(1) confirms this by requiring that the contract or tariff for net metering must be identical in rate structure, *all retail rate components,* and any monthly charges to the contract or tariff to which the same customer would be assigned if that customer were not a customer-generator.

The Commission agrees with IGS that electricity supplied to a customer generator includes components such as capacity, demand, and energy; therefore, the electricity generated by the customer-generator should also be recognized to include the components of capacity, demand, and energy. As the Supreme Court of Ohio has noted, "the net-generator provisions . . . speak solely in terms of electricity generated and supplied, as they should. A net-generator customer of FirstEnergy only generates and supplies electricity; it does not provide transmission, distribution, or ancillary services." *FirstEnergy Corp. v. Pub. Util. Comm.,* 95 Ohio St.3d 401 (2002). Therefore, by using the SSO rate for the credit to customer-generators, we have provided a full and complete rate, exclusive of transmission, distribution, or ancillary services, to be applied to

the electricity generated and supplied by the customer generator.

We find no merit to FirstEnergy's argument that the Commission's interpretation of "electricity" in Ohio Adm.Code 4901:1-10-28(B)(9)(c) is inconsistent with the definition of "net metering system" set forth in R.C. 4928.01(31). The Commission notes that the definition of "net metering" in R.C. 4928.01(30) states that net metering means measuring the difference in an applicable billing period between the *electricity* supplied by an electric service provider and the *electricity* generated by a customer-generator that is fed back to the electric service provider. This definition is consistent with the use of "electricity" in R.C. 4928.67, which also speaks in terms of electricity supplied and electricity generated.

We also disagree with FirstEnergy's assertion that the statutory references in R.C. 4928.67 to the term electricity actually mean electrical energy. We note that FirstEnergy's arguments are internally inconsistent, as FirstEnergy argues that the General Assembly knew exactly what it meant when it used the term electrical energy in R.C. 4928.01(31), but that it did not know what it meant when it used the term electricity throughout R.C. 4928.67, 4928.01(30), and 4928.01(31).

(11) FirstEnergy next argues that, if one adopts its argument that only the energy component of electricity is provided to the distribution system by a net metering system, then the credit for excess generation should be calculated at an energy-only rate. FirstEnergy asserts that the Commission erred when it found that the parties did not demonstrate that it would be practical, or even possible, to attribute an energy price to the electricity generated by a customer generator.

(12) We find, as we did in our Order, that the EDUs should credit customer-generators for electricity at the SSO rate, which has energy, demand, and capacity components built into it. We agree with IGS that this determination is consistent with R.C. 4928.67(A)(1), which requires that the contract or tariff for net metering must be identical in rate structure, all retail rate components, and any monthly charges to the contract or tariff to which the same customer would be assigned if that customer were not a customer-generator. The SSO rate is the generation

rate authorized by the Commission pursuant to R.C. 4928.141 for the EDUs to provide the competitive retail electric services necessary to maintain essential electric service to consumers. The electric services necessary to maintain electric service to customers includes energy, capacity, and demand. By using the SSO rate, the Commission ensures that customer-generators are credited for all of the components of electricity that they provide to the distribution system and only for the components of electricity that they provide to the distribution system. Additionally, by using the SSO rate, the Commission ensures that customer-generators are credited for providing electricity without requiring that a demand meter be installed.

(13) FirstEnergy also argues that the Commission's interpretation of "electricity" to include energy, capacity, and demand is inconsistent with the Commission's denial of DP&L's initial application for rehearing. FirstEnergy argues that the Commission determined that the term "requirements for electricity" in Ohio Adm.Code 4901:1-10-28(B)(7) does not include a demand factor. The Commission held that DP&L's proposal to use a demand factor should be denied, both for sizing a net metering system and for calculating the customer-generator's requirements for electricity.

IGS argues that the Commission's interpretation of "electricity" to include energy, capacity, and demand is unrelated to its determination that "requirements for electricity" for sizing a facility should not include a demand factor adjustment. IGS asserts that Ohio Adm.Code 4901:1-10-28(B)(7) indicates that when determining a customer's primary intentions for offsetting their requirements for electricity, the total consumption in kilowatt hours could be compared to total production in kilowatt hours. IGS avers that the Commission's rule is designed for ease of implementation and to prevent unintended negative consequences. Additionally, IGS asserts that the Commission's determination regarding Ohio Adm.Code 4901:1-10-28(B)(7) is entirely unrelated to the present issue regarding compensation for electricity supplied and generated.

(14) The Commission finds that FirstEnergy's argument lacks merit. We note that the Commission rejected DP&L's proposal that the term "requirements for electricity" include demand because

the proposal could have been interpreted to require customer-generators to install an electric meter capable of measuring demand. However, the Commission believes that this would have been inconsistent with R.C. 4928.67(B)(1), 4928.02, and the Ohio Supreme Court's holding in *FirstEnergy Corp. v. Pub. Util. Comm.*, 95 Ohio St.3d 401 (2002).

Additionally, we indicated that our intention was to provide clarity and consistency to the rules. Much like we denied DP&L's proposal to provide clarity and consistency to customers, using the SSO rate for excess generation will also provide clarity and consistency to how the rules are applied to customers. Adopting the SSO rate for the credit to customer-generators for excess generation is the most simple, efficient, and understandable way to enforce and accomplish the General Assembly's intentions in R.C. 4928.01(30), 4928.01(31), 4928.02, and 4928.67.

(15) FirstEnergy next argues that the Commission's Second Entry on Rehearing nullifies the Supreme Court of Ohio's holding in *FirstEnergy Corp. v. Pub. Util. Comm.*, 95 Ohio St.3d 401 (2002). FirstEnergy asserts that, on multiple occasions, the Commission has approved tariff calculations based solely on the energy component of electricity. While FirstEnergy concedes that the Ohio Supreme Court's decision does not explicitly state that the statutory references to electricity in R.C. 4928.67 mean electrical energy, FirstEnergy argues that such a determination is the only outcome that gives meaning to R.C. 4928.01.

(16) We find no merit to FirstEnergy's argument that the Commission's Second Entry on Rehearing nullifies the Ohio Supreme Court's holding in *FirstEnergy Corp. v. Pub. Util. Comm.*, 95 Ohio St.3d 401 (2002). The single issue in that case was whether the Commission acted unlawfully or unreasonably in ordering FirstEnergy to modify a proposed net-energy metering rider (August Rider) that FirstEnergy argued was consistent with R.C. Chapter 4928 and the Commission's rules. The Ohio Supreme Court held that the Commission acted unlawfully or unreasonably in ordering modifications to FirstEnergy's August Rider when the proposed rider was already in compliance with the R.C. Chapter 4928 and the Ohio Administrative Code. Further, the Court provided direction on how the rules could have been

drafted to violate the Revised Code; specifically, the Court indicated that the rules should not require the EDUs to pay customer-generators for distribution or transmission service.[1] The Ohio Supreme Court then remanded the case to the Commission with instructions for the Commission to approve the August Rider without modification. *FirstEnergy Corp. v. Pub. Util. Comm.*, 95 Ohio St.3d 401 (2002) at ¶19.

We find no merit to the argument proposed by FirstEnergy that the only way the rules can comply with the Ohio Supreme Court's holding is to provide an energy-only credit for excess generation. We recognize that customer-generators do not provide a distribution or transmission service to the EDUs, as the Court indicated; therefore, we did not adopt a rule requiring that customer-generators be compensated for distribution or transmission service. *FirstEnergy Corp. v. Pub. Util. Comm.*, 95 Ohio St.3d 401 (2002). Under the newly adopted Ohio Adm.Code 4901:1-10-28(B)(9)(c), customer-generators will still pay distribution and transmission charges, as well as other nonbypassable charges, in compliance with the Revised Code and the Ohio Supreme Court's holding in *FirstEnergy Corp.* Under the newly adopted Ohio Adm.Code 4901:1-10-28, customer-generators will still be billed for distribution and transmission service, and will still pay their share of non-bypassable riders, even if their credit for excess generation is applied to their total bill pursuant to R.C. 4928.67(B)(1)(b).

(17) Finally, FirstEnergy argues that the Commission failed to address cost recovery, and that requiring the EDUs to provide a credit refund without providing cost recovery would be an unlawful confiscation of utility property. FirstEnergy requests that the Commission clarify how the EDUs are to receive cost recovery for providing a credit to customer-generators for excess generation. Additionally, FirstEnergy notes that it does not take ownership of the electricity, nor does it collect revenues or experience less cost due to customer-generators'

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1 We note that the Supreme Court's holding in FirstEnergy Corp. included transition charges, the energy efficiency fund rider, and the universal service fund rider. Pursuant to R.C. 4928.32 and 4928.33, transition revenues could only be collected by the EDUs during their market development periods (MDPs). The MDPs for each of the EDUs have now ended; therefore, transition revenues are no longer being recovered. Additionally, the universal service fund and the energy efficiency rider are distribution riders that are paid through distribution rates as indicated on the distribution section of customer bills.

excess energy. FirstEnergy avers that from its perspective, any reduction to SSO obligations results in less revenues collected from customers.

IGS argues that it may be unfair to require the EDUs to provide a credit to customer-generators without cost recovery. IGS asserts that a bypassable rider should be put in place to recover the cost of the credit refunds provided to customer-generators for net excess generation.

(18) We find that FirstEnergy's argument lacks merit. We note that in the Second Entry on Rehearing, we held that net metering is a noncompetitive distribution service that must be offered by the distribution utilities. Therefore, the costs of this distribution service should be recovered through base distribution rates. To recover these costs, the EDUs should record the costs in the test year for their next distribution rate case and recovery of these costs will then be included in base distribution rates.

(19) Accordingly, the Commission finds that rehearing on FirstEnergy's assignments of error regarding Ohio Adm.Code 4901:1-10-28(B)(9)(c) are denied. Since there are no remaining issues for rehearing, we find that the rules, as adopted, should be filed with the Joint Committee on Agency Rule Review as soon as is reasonably possible. Additionally, we find that the EDUs should file their proposed tariffs consistent with the rules and Orders by no later than 30 days after the effective date of the rules.

It is, therefore,

ORDERED, That the application for rehearing filed by FirstEnergy is denied, in accordance with findings (8) and (19). It is, further,

ORDERED, That the adopted rules be filed with the Joint Committee on Agency Rule Review, the Secretary of State, and the Legislative Service Commission, in accordance with Divisions (D) and (E) of R.C. 111.15. It is, further,

ORDERED, That the final rules be effective on the earliest date permitted. Unless otherwise ordered by the Commission, the five-year review date for Ohio Adm.Code Chapter 4901:1-10 shall be in compliance with R.C. 119.032. It is, further,

ORDERED, That a copy of this Third Entry on Rehearing be served upon all electric utilities in the state of Ohio, all certified competitive retail electric service providers in the state of Ohio, the Electric-Energy industry list-serve, and all other interested persons of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO

Thomas W. Johnson, Chairman

Steven D. Lesser

Lynn Slaby

M. Beth Trombold

Asim Z. Haque

BAM/vrm

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Barcy F. McNeal
Secretary