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

BUCKEYE POWER, INC.'S MOTION FOR LEAVE TO FILE COMMENTS OUT OF TIME REGARDING PROPOSED NET METERING RULES

Buckeye Power, Inc. ("Buckeye") respectfully requests leave to provide comments (attached to this Motion) in the above-captioned proceeding. Buckeye has not previously submitted comments in this proceeding because the Commission's net metering rules at issue are not applicable to it or any of its twenty-five electric distribution cooperative members operating in the State of Ohio. However, two recent developments, not applicable at the time the Commission last promulgated the proposed rules, have prompted Buckeye to seek to file comments in the above-captioned proceeding at this time.

First, a renewable developer that is attempting to develop renewable generating projects in the service territories of the Buckeye members has recently asserted that, contrary to Buckeye's understanding, the proposed net metering rules and related statutory provisions may allow the renewable developer to sell electric power and energy to retail consumers in the service territories of the Buckeye members pursuant to "behind-the-meter" power purchase agreements, but without regard to the requirements of the Certified Territories for Electric Suppliers Act (the "Territorial Law") and without regard to the Commission's jurisdiction over retail sales of electricity. Buckeye, therefore, believes that it is important that the Commission clarify in this

rulemaking that even if the net metering statutes and rules were applicable to Buckeye and its members, which they are not, such rules must be harmonized with the Territorial Law and with the Commission's jurisdiction over retail sales of electricity, even behind-the-meter. Furthermore, the Commission should clarify that the Commission's net metering rules can be harmonized with the Territorial Law and with the Commission's jurisdiction over retail sales of electricity by clarifying that the "hosting" relationship referred to in the net metering statutes and regulations refers to a leasing arrangement between the customer and the third party developer but not a retail sale of electricity pursuant to a power purchase agreement.

The Commission previously, in 2008, in its review of the net metering regulations at that time, declined to authorize third-party behind-the-meter power purchase arrangements, and only authorized leasing arrangements as within the meaning of the "hosting" relationship. The Commission should, in this proceeding, reaffirm its initial position from 2008 and decline to extend the hosting relationship to third-party retail sales behind-the-meter.

Second, the Commission should also consider the implications of its recent Order issued in the Commission-initiated investigation of behind-the-meter submetering and subdistribution arrangements (Case No. 15-1594-AU-COI) on the outcome of this proceeding with respect to retail sales of electric power and energy from renewable and distributed generation facilities also located behind-the-meter. Buckeye believes that the Commission's recent order in the submetering/subdistribution investigation requires that the Commission also assert jurisdiction over retail sales of electricity by renewable developers behind-the-meter.

Buckeye's comments are limited to the rules impacting net metering and, specifically, to the proposed definition of "customer-generator" in Ohio Administrative Code ("OAC") Section

4901:1-10-28(A)(2). Buckeye believes that its comments have not previously been addressed by any of the other parties in this proceeding and that, specifically, the implications of a power purchase agreement constituting a retail sale of electricity subject to the Commission's jurisdiction have not been adequately addressed so far by any other party. Certainly, the implications of the Commission's recent Order in its submetering/subdistribution investigation have not been addressed by any other party, as the Commission's Order in that docket was issued just a few days ago. Buckeye believes, therefore, that its comments will assist the Commission in its deliberations regarding proposed changes to the net metering rules.

Further, there is no prejudice by allowing Buckeye to file its comments at this time. As described in the attached Comments, the net metering rules were subject to appeals at the Ohio Supreme Court, which appeals are currently stayed. They have also been withdrawn from the Joint Committee on Agency Rule Review ("JCARR") and subsequently reproposed by the Commission, but the Commission has not yet re-issued final net metering rules, thus, they have not yet gone into effect.

Accordingly, Buckeye respectfully requests that the Commission consider its comments prior to issuing an entry regarding its proposed net metering rules. *See In the Matter of the Commission Investigation Relative to the Establishment of Local Exchange Competition and Other Competitive Issues et al.*, 1997 Ohio PUC LEXIS 175 (allowing late comments in opposition to application for rehearing).

Respectfully submitted,

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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

BUCKEYE POWER, INC.'S COMMENTS REGARDING PROPOSED NET METERING RULES

BACKGROUND ABOUT BUCKEYE AND ITS MEMBERS

Buckeye is a nonprofit electric cooperative providing wholesale electric service to its twenty-five electric distribution cooperative members, who, in turn, provide retail electric service to nearly 400,000 homes and businesses in the State of Ohio. Buckeye's twenty-five members have obligations under the federal Public Utility Regulatory Policies Act of 1978 as amended ("PURPA") to interconnect with, provide back-up and supplementary power to, and interconnect with, PURPA qualifying facilities that are located in the service territories of the Buckeye members. Pursuant to a filing made by Buckeye and its members with the Federal Energy Regulatory Commission ("FERC"), Buckeye substitutes for the members of Buckeye with respect to the PURPA purchase obligation.

Buckeye and its members do not constitute an "electric utility" or an "electric distribution utility" for purposes of Chapter 4928, Competitive Retail Electric Service, of the Ohio Revised Code ("ORC"), because Buckeye and its members operate on a nonprofit basis and because they have not made the irrevocable election and filing with the Commission under Section 4933.81(F) of the ORC to voluntarily opt into retail competition. As a result, neither the net metering statute,

Section 4928.67 ORC, nor the net metering rules, OAC rule 4901:1-10-28, apply to electric cooperatives.

Buckeye and its members have, therefore, taken the position that the Territorial Law does not permit retail sales of electricity in their service territories by electric suppliers other than the incumbent electric cooperative, even if such sales take place behind-the-meter from a renewable generation facility located on the premises of one of the cooperative's retail consumers, and even if intended primarily to serve the load of the retail consumer. Buckeye and its members have, however, taken the position that retail consumers may own their own renewable facilities behind-the-meter or lease such facilities from third parties located on the premises of the customer. Thus, Buckeye and its members have made an important distinction between retail sales of electricity pursuant to a power purchase agreement, and leases or ownership of renewable facilities behind-the-meter. Buckeye and its members believe that retail sales of electricity have important legal implications that a lease or ownership of a renewable facility by a customer may not, most notably that retail sales of electricity implicate the Commission's jurisdiction both with respect to the Commission's regulation of public utilities and with respect to the Commission's jurisdiction of electric suppliers under the Territorial Law.

Although the net metering statutes and rules do not apply to Buckeye and its members, Buckeye believes that such statutes and rules should and must be interpreted in light of, and harmonized with, the requirements of the Territorial Law and the Commission's jurisdiction over retail sales of electricity, particularly after the Commission's recent order in the submetering/subdistribution investigation. Buckeye believes that the Commission should clarify in this proceeding that the proposed net metering rules do not permit retail sales of electricity,

even behind-the-meter, pursuant to power purchase agreements, and that the "hosting" relationship set forth in the net metering statutes and rules refers to a leasing arrangement not a retail sale of electricity.

BACKGROUND ABOUT THIS PROCEEDING

The Commission issued initial proposed rule changes on November 7, 2012. After receiving comments and reply comments from interested parties, the Commission issued a Finding and Order on January 15, 2014, amending certain rules and ordering that the rules be filed with the JCARR. Following an appeal by certain parties to the Ohio Supreme Court, the Commission withdrew its net metering rules from JCARR. The appeals pending at the Ohio Supreme Court were, and are currently, stayed.

On November 18, 2015, the Commission published the most recent iteration of proposed revisions to OAC Section 4901:1-10-28, regarding net metering. The Commission requested that interested parties file comments on the proposal by December 18, 2015 and file reply comments by January 8, 2016.

As mentioned in its Motion for Leave, Buckeye has not previously filed comments in this proceeding because Buckeye is not an "electric utility" as used in OAC rule 4901:1-10-28, and, thus, the net metering rules do not and will not apply to Buckeye and its members. Recently, however, a renewable energy developer sought to implement a project within the service territory of one of Buckeye's members, and this renewable energy developer asserted that the net metering statutes and rules would, in fact, apply to Buckeye and its members and would require that Buckeye and its members permit retail sales of electricity behind-the-meter pursuant to

renewable power purchase agreements between the developer and the retail member/consumer of the Buckeye member.

Buckeye remains steadfast that the net metering rules under review in this proceeding are not applicable to it. Buckeye, however, views the Commission's review of its net metering rules as an opportunity for the Commission to clarify that its rules are not intended to, nor do they in fact, authorize retail sales of electricity, including behind-the-meter retail sales, so that even if such rules were applicable to Buckeye and its members, which they are not, such rules would not lead to the outcome that the renewable developer suggests.

Buckeye also believes that the Commission's recent order following its investigation into submetering practices in Ohio, in PUCO Case No. 15-1594-AU-COI, is instructive as to how the Commission should analyze its jurisdiction over retail sales of electricity from distributed generation facilities located behind-the-meter.

Finally, Buckeye brings to the Commission's attention that other states have reviewed this same issue, and that a number of states have come to the same conclusion that Buckeye suggests, i.e. that retail sales of electricity behind-the-meter should be subject to public utility regulation and jurisdiction. Accordingly, a Commission determination along the lines that Buckeye suggests would not be outside the mainstream of what other state courts and public utility commissions have determined when considering the same or similar issues.

Buckeye respectfully requests that the Commission consider the comments below. Buckeye believes that its comments provide a perspective not previously offered in this proceeding and will, therefore, assist the Commission in its promulgation of revised net metering rules.

INTRODUCTION

The Commission has proposed regulations that would make net metering available to "customer-generators." The Commission has proposed the following definition of "customer-generator" in OAC rule 4901:1-10-28(A)(2):

> "Customer-generator" shall have the meaning set forth in section 4928.01(A)(29) of the Revised Code. A customer that hosts or leases third party owned generation equipment on its premises is considered a customer-generator.

Ohio Revised Code Section 4928.01(A)(29) defines "customer-generator" as "a user of a net metering system." ORC Section 4928.01(A)(32) defines "self-generator" as "an entity in this state that owns or hosts on its premises an electric generation facility that produces electricity primarily for the owner's consumption and that may provide any such excess electricity to another entity, whether the facility is installed or operated by the owner or by an agent under a contract." And ORC Section 4928.01(A)(7) provides that an "electric light company" for purposes of ORC Chapter 4928 "has the same meaning as in ORC Section 4905.03 and includes an electric services company, but excludes any self-generator to the extent that it consumes electricity it so produces, sells that electricity for resale, or obtains electricity from a generating facility it hosts on its premises."

The upshot of these definitions is that an entity meeting the definition of a "customer-generator" will be eligible for net metering, and an entity meeting the definition of a "self-generator" will not be considered an "electric light company" or "electric utility" or "electric services company" for purposes of regulation under ORC Chapter 4928. However, none of these statutory definitions requires that the Commission relinquish jurisdiction over retail sales of

electricity behind the meter, and all of these definitions can be reconciled with the Commission's traditional jurisdiction over retail sales of electricity, even behind-the-meter, by defining the "host" transaction/relationship to mean a lease of a renewable facility from a third party developer to a customer rather than as a retail sale of electricity.

The statutory definition of "self-generator" in particular refers to an entity that "owns or hosts" a renewable generation facility on its premises. This is in contrast to the Commission's proposed formulation of "hosts or leases" for purposes of the regulatory definition of "customer-generator." Buckeye submits that "owns or hosts" is a better formulation, and that the "hosts" transaction/relationship should be defined as a leasing arrangement not as a retail sale of electricity pursuant to a power purchase agreement. Although the statutory definition of "self-generator" indicates that a self-generator may either own, install and operate the generation facility itself, or may have a third party own, install and operate the generation facility for the self-generator on the self-generator's premises, i.e. pursuant to a "hosting" arrangement, none of this requires that the Commission agree that retail sales of electricity may take place outside the Commission's jurisdiction, and the Commission has discretion to use its regulatory definition of "customer-generator" to harmonize that definition with the Commission's traditional regulation of public utilities and electric suppliers. Buckeye believes that the Commission should also ensure that its definition of "customer-generator" is harmonized with the Commission's recent assertion of jurisdiction over third parties in the submetering/subdistribution context.

In these comments, Buckeye will show that the power purchase agreement financing structure for distributed generation projects results in a retail sale of electricity whereas a customer lease or ownership of a renewable generating facility does not. In this proceeding, the

Commission has for the first time indicated that it may allow the power purchase agreement structure behind the meter, but Buckeye believes this to be in error. Buckeye will also show that the reasoning applied by the Commission in its recent order on submetering should lead the Commission to the conclusion that it should also assert jurisdiction over behind-the-meter retail sales in this case. Finally, Buckeye will suggest that the experiences of other states indicate that a Commission determination that net metering should be limited to customer ownership or leasing of distributed generation behind-the-meter is not outside the mainstream.

Accordingly, Buckeye requests that the Commission redefine the definition of "customer-generator" as follows:

> "Customer-generator" shall have the meaning set forth in section 4928.01(A)(29) of the Revised Code. A customer that owns or hosts third party owned generation equipment on its premises is considered a customer-generator. A customer may install and operate generation equipment on its premises, or a third party may install and operate generation equipment on the customer's premises for the customer as agent under contract. A third party owner of generation equipment on the customer's premises may lease the generation equipment to the customer, but a third party owner making a retail sale of electricity to a customer pursuant to a power purchase agreement shall be subject to regulation by the Commission as a public utility and as an electric supplier.

ANALYSIS

I. Power Purchase Agreements, even "Behind-the-Meter," Result in Retail Sales of Electricity, which are Subject to the Commission's Jurisdiction and the Territorial Law.

The Commission should review its proposed definition of "customer-generator" in light of the proliferation of distributed generation in the State of Ohio. Behind-the-meter distributed generation can be structured in several ways. First, a retail consumer in Ohio can own its own distributed generation facility on its own property and finance the development of such a facility.

In such a scenario, the electric consumer can engage a developer to construct and operate the renewable facility for the consumer, but with the consumer owning its own facility, and the consumer would not need to purchase the electric output of that system from the developer to realize its benefits. Second, an electric consumer could lease a distributed generation system to be located on its premises from a third-party developer and pay the third-party developer a rental payment for that system. The developer could own, construct, operate and maintain the renewable facility for the retail customer under such a structure. Again, such a scenario does not require the electric consumer to purchase the electric output of that system from the developer, and does not necessarily implicate the Commission's jurisdiction over retail sales of electricity.

A third funding mechanism is prevalent and problematic. Under this mechanism, an electric consumer enters into a power purchase agreement with a third-party developer. The third-party agrees to construct, operate, and maintain a distributed generation system on the electric consumer's premises. In exchange, the electric consumer agrees to purchase the electric output of the system. By their terms, these power purchase agreements result in a retail sale of electricity, transactions which are subject to the Commission's regulation of public utilities and in violation of the Territorial Law.

In this proceeding, in comments on previous iterations of the proposed rules, certain parties argued that the Commission should specifically state that customers using a power purchase agreement should be considered customer-generators. In its January 15, 2014 entry, the Commission agreed with these parties stating:

> The Commission notes that it believes customers should be permitted to host or lease net metering systems despite not having ownership of the equipment. The Commission notes that it makes no findings on the enforceability or reliability of

> purchase power agreements or contracts between a customer-generator and owners of generation equipment. The Commission only notes that such contractual agreements are permissible.

The Commission was responding to certain parties, most notably the Interstate Renewable Energy Council, Inc. ("IREC"), requesting specific language that would authorize power purchase agreements. As noted by IREC in its comments, pursuant to a power purchase agreement, "a host customer pays the owner of the system only for the actual electric output generated." Thus, IREC recognizes that the power purchase agreement effectuates a retail sale of electricity, which sales are subject to the Commission's jurisdiction. In support of its request, IREC notes that power purchase agreements have "become the dominant model in the nation's largest solar and net metering markets." Popularity, however, should not be a reason for the Commission to allow jurisdictional transactions to proceed without the Commission's supervision and regulation. And, as Buckeye notes below, a number of other states do not permit the third-party behind-the-meter power purchase agreement structure for distributed generation without public utility commission regulation or outside public utility commission jurisdiction.

Buckeye further posits that focusing only on the customer side of a power purchase agreement results in an incomplete analysis. To be sure, as marketed to customers, power purchase agreements are potentially an attractive bargain. Customers can receive a distributed generation system while paying no upfront costs, and, in return, customers pay only for electricity that is produced, which would have been necessary regardless of the presence of a generating system. However, despite the attractiveness to customers, power purchase agreements fundamentally result in a retail sale of electricity by the seller. The Commission should recognize that the seller under the power purchase agreement is " engaged in the business of supplying

electricity for light, heat, or power purposes to consumers within this state," and thus meets the statutory definition of both an "electric light company" under ORC Section 4905.03(A) and an electric supplier for purposes of the Territorial Law. In contrast, in a lease structure, the owner of the generating system is providing only the equipment that enables the customer to become a customer-generator but is not selling electricity.

No statutory language compels the Commission to specifically allow power purchase agreements to facilitate distributed generation development, and, in fact, a correct reading of the applicable statutes requires the Commission to regulate them and to exclude them from the definition of "customer-generator" for net metering purposes. IREC and other parties tout the convenience of power purchase agreements, but convenience should not and cannot trump the Commission's jurisdiction over retail sales of electricity.

II. In 2008, the Commission Declined to Include Power Purchase Agreements in the Definition of "Customer-Generator." The Commission's Position in 2008 was Correct, and the Commission Should Reaffirm its 2008 Determination.

Buckeye also notes that the Commission's statements in its January 15, 2014 entry run counter to its previous position on the same issue. Specifically, at the request of certain parties to PUCO Case No. 06-653-EL-ORD, the Commission's previous review of its net metering rules, the Commission commented on third-party ownership of net metering systems including through power purchase agreements. In its November 5, 2008 entry in that proceeding, paragraph (58), the Commission stated:

> IREC recommends allowing third-party ownership of generating facilities and OCEA recommends adding a clarification to Rule 28(A)(1) as a new paragraph (c), which states that the customer-generator is not required to be the owner or lessee of the generating facility located on the customer-generator's premises and that power purchase agreements with third-party owners of a generating facility

> are permitted. Although SB 221 does not explicitly prohibit third-party ownership of the generating facilities that are used by the customer-generator in a net metering arrangement, the law does require that the qualifying generating facility be located on the customer-generator's premises. SB 221 also defines a customer-generator as a user of the net metering system. Accordingly, we read SB 221 to mean that its permissible for a customer to rent or lease the generating equipment, but that equipment must be installed behind the customer's electric meter and any reduced usage or excess-generation credit from the electric utility shall be reflected on the customer-generator's electric bill.

Importantly, the Commission specifically declined to authorize power purchase agreements but did authorize lease arrangements. Buckeye believes that the Commission's previous position on this issue is the correct one and is the only position that can be reconciled with the Commission's statutory jurisdiction over retail sales. The Commission should reaffirm that its original position from 2008 remains correct and that a "customer-generator" means an owner or host of a distributed generation facility located on the customer's premises, and that the "hosting" relationship means a leasing relationship but not a retail sale of electricity under a power purchase agreement. The Commission should consider Buckeye's suggested definition of "customer-generator" set forth above, or at least provide clarifying comments that power purchase agreements and retail sales of electricity are not permitted behind-the-meter.

III. The Commission's Recent Order on Submetering/Subdistribution Requires the Commission to Similarly Assert Jurisdiction over Retail Sales of Electricity Occuring Behind-the-Meter Pursuant to Distributed Generation Power Purchase Agreements.

On December 7, 2016, the Commission issued an order after completing an investigation of submetering/subdistribution practices in Ohio. *See* PUCO Case No. 15-1594-AU-COI. In clarifying when it will assert jurisdiction over submetering/subdistribution arrangements, the

Commission demonstrated a willingness to focus on the fundamental nature of the transactions at issue and the business of the parties engaging in those transactions.

In the context of submetering/subdistribution, the Commission indicated that it would apply its long-standing *Shroyer* test for determining when it would assert jurisdiction over submetering/subdistribution arrangements, which take place behind the utility meter, the same as the net metering arrangements at issue in this proceeding. The *Shroyer* test has historically been applied to determine whether a landlord has been operating as a public utility and would therefore be subject to the Commission's jurisdiction. As the Commission noted, however, "It can be applied to the provision of any public utility service."

While Buckeye does not suggest that the Commission apply the *Shroyer* test to determine if customer-generators or third-party owners of generation are operating as public utilities, Buckeye does believe that the principles underlying the *Shroyer* test could apply to companies developing distributed generation projects.

Specifically, the third prong of the *Shroyer* test requires a determination as to whether the provision of a utility service is ancillary to an entity's primary business. As noted above, the retail sale of electricity is clearly a "utility service." Certain companies operating in Ohio are using power purchase agreements and retail sales of electricity to develop distributed generation as a primary facet of their business. These companies are therefore providing a utility service that is not ancillary to their primary business and that should be regulated by the Commission.

The Commission has considered a number of policy reasons counseling for regulating such companies in the submetering context, and Buckeye posits that similar policy reasons exist in the context of distributed generation development as well. Power purchase agreements are

often in place for many decades. Ohio electric consumers, particularly residential consumers, may be negotiating these contracts with more sophisticated counterparties with much more experience and knowledge. These power purchase agreements can be quite complicated and contain many provisions that are not beneficial to the customer. The fact that power purchase agreements result in a retail sale of electricity provides the Commission with jurisdiction over power purchase agreements, and the Commission should exercise this jurisdiction so as to protect retail consumers, for all of the same reasons that the Commission decided to assert jurisdiction over third-party submetering/subdistribution arrangements.

IV. Other States Regulate Third-Party Ownership of Generation Behind-the-Meter that Results in Retail Sales of Electricity.

In analyzing third-party ownership of distributed generation systems, the Commission should recognize that other states have analyzed these same issues, and some have come to the same outcome that Buckeye is suggesting. According to the Database of State Incentives for Renewables & Efficiency ("DSIRE"), nine states have disallowed or restricted third-party ownership of distributed generation through a power purchase agreement, while numerous other states have yet to definitively speak to this issue. *See* http://www.dsireusa.org/resources/detailed-summary-maps/.

Florida, as one notable example, has long found that third-party ownership of generation, even behind-the-meter, should be regulated by the Florida Public Service Commission. *See PW Ventures, Inc. v. Nichols*, 533 So.2d 281 (Fla. 1988). Florida, however, allows leases as a means for facilitating third-party ownership of generation because leases do not result in sales of electricity and are, therefore, outside the jurisdiction of the Florida Public Service Commission.

Buckeye understands that these issues all depend on the precise state laws at issue, however, Buckeye's point is not that the Commission should slavishly follow what other states have determined, rather Buckeye's point is that a Commission determination that behind-the-meter retail sales should be a regulated/prohibited transaction is within the mainstream of decisions of other states and state public utility commissions that have considered the same issue before.

CONCLUSION

Buckeye believes that the Commission's consideration of its proposed definition of "customer-generator" raises important statutory and policy issues regarding third-party ownership of distributed generation located on customers' premises particularly when the third-party developer makes a retail sale of electricity to a customer from a distributed generation facility located behind-the-meter pursuant to a power purchase agreement. Buckeye is concerned that the Commission has not so far addressed these issues and that the limited set of comments received by the Commission so far have not addressed the fact that a power purchase agreement, as opposed to a lease of facilities, constitutes a retail sale of electricity subject to the Commission's jurisdiction. Further, the comments, so far, have not addressed the implications of the Commission's recent order in its submetering/subdistribution investigation. Buckeye believes that its comments provide the Commission with an opportunity to provide clarity regarding these issues. Buckeye asserts that the Commission's initial determination, in 2008, regarding the issue of third-party sales behind-the-meter was correct and that the Commission should reaffirm in this proceeding the Commission's previous determination that it should decline to authorize behind-the-meter power purchase agreements as within the definition of a customer-generator. Thus,

Buckeye requests that the Commission make clear that third-party ownership of distributed generation resources behind-the-meter that results in retail sales of electricity is within the Commission's jurisdiction and should be excluded from the proposed regulatory definition of "customer-generator."

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion for Leave to File Comments Out of Time Regarding Proposed Net Metering Rules was filed with the PUCO electronically and has been served by electronic mail delivery upon the persons listed on the attached Service List on this 21st day of December 2016.

/s/ Stephanie M. Chmiel
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Summary: Motion Motion for Leave to File Comments Out of Time Regarding Proposed Net Metering Rules electronically filed by Ms. Stephanie M Chmiel on behalf of Buckeye Power, Inc.