

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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

**ONE ENERGY ENTERPRISES LLC'S MEMORANDUM CONTRA
BUCKEYE POWER INC.'S MOTION FOR LEAVE
TO FILE COMMENTS OUT OF TIME**

I. INTRODUCTION

One Energy Enterprises LLC ("One Energy") respectfully requests that the Public Utilities Commission of Ohio ("Commission") deny Buckeye Power, Inc.'s ("Buckeye") Motion for Leave to File Comments Out of Time and attached Comments ("Motion for Leave and Comments").

Buckeye's comments must be rejected for procedural reasons alone. First, Buckeye's motion was filed without a memorandum in support as is required by O.A.C. Rule 4901-1-12(A). Because the motion and late-filed comments were filed improperly, they should not be considered by the Commission and should be struck from the record. Second, if Buckeye's improperly filed motion and comments are to be considered by the Commission, then the Commission must fully reopen the rulemaking process or open a separate proceeding to allow stakeholders to thoroughly respond to Buckeye's late-filed and prejudicial comments. As discussed below, the failure to do so by the Commission would violate the due process of parties to whom the Commission's net-metering rules actually apply.

Buckeye's comments should also be denied because they propose a radical departure from Ohio law and policy, far too late and far beyond the scope of this proceeding. Namely, Buckeye proposes that the Commission regulate all behind the meter self-generation arrangements through power purchase agreements as public utilities. As discussed more fully in Section II(B) of this memorandum contra, Buckeye barely considers the myriad of legal and policy implications of this dramatic proposal. These issues should be addressed in a proceeding where the scope of the issues is well defined and all interested parties have an opportunity to comment. These issues should not be haphazardly inserted into this proceeding at the last minute by a party that admittedly has no interest in the net metering rules.

II. ARGUMENT

A. **There is no justification for Buckeye's late-filed comments and to permit Buckeye's comments would violate the due process rights of parties actually impacted by Ohio's net metering rules.**

Buckeye fails to provide a legitimate excuse for filing comments **369 days after initial comments** were due and **348 days after reply comments** were due. As an initial matter, Buckeye admits it has no interest in the net metering rules.¹ The Commission should deny Buckeye's late intervention based on this fact alone.

Although it has no interest in this proceeding, Buckeye claims "two recent developments" justify its late filing: (1) Buckeye's belief that the expansion of distributed generation projects in its members' service territories may potentially violate the Certified Territories Act, and (2) the Commission's order (the "Submetering Order") in the submetering

¹ Motion for Leave and Comments at 1. ("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.").

investigation.² Neither excuse justifies Buckeye's late filing. First, Buckeye's "recent" difference of opinion with a renewable generation developer regarding customers' right to self-generate is not an excuse for filing comments in this net metering docket a year late. As Buckeye admitted, Ohio's net metering laws do not apply to behind the meter generation in cooperatives' territories. Therefore, a "recent" proposed third-party renewable energy project in electric cooperative territory would not have even triggered a need for Buckeye's members to apply the Commission's net metering rules. Moreover, the Commission provides a separate forum for Certified Territories Acts disputes; this is not the proper forum.

Second, Buckeye's arguments regarding the Submetering Order are completely outside the scope of this proceeding. Buckeye states that the Submetering Order "requires that the Commission also assert jurisdiction over retail sales of electricity by renewable developers behind-the-meter."³ This is more than a simple request to revise the proposed net metering rules. Buckeye is asking the Commission to determine that **all** distributed generation projects that involve power purchase agreements are public utilities or are otherwise subject to commission jurisdiction. Whether or not distributed generation should be considered a public utility or cause a "retail sale" were never issues addressed in the net metering proceeding and are not relevant to the issue of net metering, which addresses the type of billing that a customer generator can qualify for. The Commission's recent order in the Submetering Order, which solely sets forth a test to determine whether certain submetering entities are public utilities, should not give Buckeye a free pass to file comments in this case that are over a year late. To the extent the Commission wishes to consider such arguments, this is not the appropriate forum. Finally,

² *In the Matter of the Commission's Investigation of Submetering in the State of Ohio*, Case No 15-1594-AU-COI, Finding and Order (December 7, 2016).

³ Motion for Leave and Comments at 2.

assuming it is true, Buckeye only recently learned of the Commission's proposed definition of "customer-generator." This does not necessarily constitute a "recent development." It simply means Buckeye was negligent in monitoring Commission rulemaking cases.

The Commission cannot permit this gross departure from due process or it will set a precedent that its deliberate procedures are always open to radical reconsideration more than a year after comments are due. However, if the Commission wishes to expand the scope of this proceeding as Buckeye requests, due process requires that all interested parties be able to file comments and reply comments regarding the issues that Buckeye raises. For entities that will actually be substantially impacted by Buckeye's proposed definition of customer-generator, unlike any of Buckeye's members, it is even more important that due process be provided before the Commission considers Buckeye's comments.⁴

B. Buckeye's late-filed comments haphazardly introduce significant legal and policy issues that extend beyond the scope of this proceeding.

Buckeye's comments propose that the Commission radically depart from Ohio law and policy. The Commission should exercise caution before considering Buckeye's proposals at this juncture without additional input and analysis from stakeholders. For purposes of administrative efficiency and economy, One Energy briefly highlights, below, some of the significant legal and policy consequences arising from Buckeye's ill-conceived comments. In the event the Commission wishes to further consider the issues in Buckeye's late-filed comments, One Energy reserves the right to fully address them in reply comments.

⁴ *In re Thompkins*, 115 Ohio St. 3d 409, 2007-Ohio-5238, ¶¶ 13-14 ("Our courts have long recognized that due process requires both notice and an opportunity to be heard***In accordance with this requirement, the government must attempt to provide actual notice to interested parties if it seeks to deprive them of a protected liberty or property interest.")(citations removed).

1. Buckeye seeks to enable parties not subject to Ohio's net-metering rules to dictate how the rules should be applied to others through late-filed, prejudicial comments.

The Commission's Order initiating this rulemaking stated that "all *interested parties* shall have until December 18, 2015, to file comments on the proposed rule and until January 8, 2016, to file reply comments."⁵ The net-metering rules at issue in this rulemaking simply do not apply to Buckeye's member cooperatives. Buckeye acknowledges as much in its comments.⁶ Yet Buckeye requests that the Commission significantly alter the application of Ohio's net-metering law by proposing a change in fundamental definitions and proposing that distributed generators be regulated as public utilities. This should give the Commission pause. The Commission should be wary of parties seeking to modify rules that only apply to other parties with no impact on themselves.

Although Buckeye's members are not affected by the net-metering rules at issue, Buckeye clearly seeks to hijack this limited rulemaking to pursue its broader goals of undermining the right of customers to self-generate. **This is an entirely separate issue from net-metering.** And while it is a discussion that One Energy, and likely many others, is eager to have, it does not belong in this rulemaking. The Commission should be protective of the scope of its rulemakings.

2. Buckeye's proposal to treat behind the meter self-generation power purchase agreement arrangements as a retail sale ignores serious practical and legal realities.

At the heart of Buckeye's comments is a proposal that a "customer generator" may only own or lease generation equipment on its premises, whereas a behind the meter power purchase agreement should be treated as an electric retail sale subject to public utility regulation by the

⁵ Order, 12-2050-EL-ORD (Nov. 18, 2016) at 4.

⁶ Motion for Leave and Comments at 1, 5.

Commission.⁷ On its face, this proposal is absurd and highly problematic for a number of reasons:

- It ignores the language of the Ohio Revised Code, which states that “customer generator” means a *user* of a net metering system”,⁸
- It requests that the Commission reverse its own position that a customer using a power purchase agreement to host behind the meter generating equipment for its sole use is a “customer generator”;⁹
- It fails to define what a retail sale is under Ohio law and how a power purchase agreement causes a retail sale to take place;
- It requests that the Commission foreclose a primary financing model for behind the meter distributed generation to Ohio’s electric customers;
- It jeopardizes all net metering systems in Ohio that use a power purchase agreement structure;
- It requests that the Commission ignore the policy of the majority of U.S. states and territories that allow third party power purchase agreements in favor of a minority of states that prohibit such arrangements;¹⁰
- It ignores that, when the legislature and Commission has had to define retail electric generation service by non-utility entities, it has deliberately excluded behind the meter self-generation arrangements.¹¹

Stakeholders actually impacted by Ohio’s net metering rules, including the hundreds of Ohio companies that use behind the meter generation arrangements, should have the opportunity to thoroughly discuss why these reasons, and others, are fatal to Buckeye’s proposal before the Commission even considers Buckeye’s proposal.

⁷ *Id.* at 11-15.

⁸ R.C. 4928.01(A)(29) (emphasis added).

⁹ Order, Case No. 12-2050-EL-ORD (Jan. 15, 2014) at 32.

¹⁰ See, Database of State Incentives for Renewables & Efficiency, http://www.dsireusa.org/resources/detailed-summary-maps/3rd-party-ppa_0302015-2/; see also Buckeye Motion to Intervene at 17.

¹¹ For instance, under O.A.C. Rule 4901:1-21-01(II), “retail electric generation service means the provision of electric power to a retail customer in this state *through facilities provided by an electric distribution utility and/or transmission entity in this state.*” Emphasis added.

3. Buckeye proposes that the Commission evaluate private contracts to determine whether they are permissible under Buckeye's modified definition of "customer generator."

As discussed above, Buckeye's proposed modification to the definition of "customer generator" turns on whether or not the behind the meter generation arrangement is through a lease or power purchase agreement. To Buckeye, this distinction is decisive but Buckeye offers no definitions or guidelines to ascertain whether a contract is a lease or a power purchase agreement. In fact, Buckeye fails to mention there are legal tests under Ohio law to determine when a contract is a lease, fails to mention that the analysis of whether a contract is a lease is nuanced and complex, and fails to mention how the Commission would go about determining whether a contract is a so-called lease or is a power purchase agreement that would subject a renewable energy developer to Commission jurisdiction. Instead, Buckeye ignores this nuance and leaves the question of whether the Commission is to be the arbiter of private contracts unanswered. One Energy respectfully submits that, under Ohio law, this analysis is unnecessary and is not the proper role of the Commission. At the very least, this is a sophisticated and nuanced conversation that deserves rigorous debate and due process for all of the parties involved.

In fact, when the Commission originally decided that customer-generator arrangements could include those through power purchase agreements, it went out of its way to expressly decline to evaluate the details of such contracts:

The Commission notes that it believes customers should be permitted to host or lease net metering systems despite not having ownership in the equipment. The Commission notes that it makes no findings on the enforceability or reliability of power purchase agreements or contracts between a customer-generator and owners

of generation equipment. The Commission only notes that such contractual arrangements are permissible.¹²

Buckeye offers no compelling justification for the Commission to now involve itself in evaluating such agreements between private parties.

4. Buckeye's proposal that the Commission treat behind the meter self-generation arrangements through power purchase agreements as a public utility ignores traditional public utility legal principles, mischaracterizes the Submetering Order, ignores federal law, and would place a significant burden on the Commission and customers.

Again, apparently without fully considering the implications of what it proposes, Buckeye urges the Commission to regulate behind the meter self-generation power purchase agreements as public utilities. This proposal ignores the legal principles of the traditional public utility model. Ohio law has long held the determination of entities as public utilities is a mixed question of law and fact and indicates that an entity may be characterized as a public utility if the nature of its operation is a matter of public concern, and membership is indiscriminately and reasonably made available to the general public.¹³ Quite simply, behind the meter distributed generation serving a single customer does not have any of these characteristics.

Buckeye argues that the recent Submetering Order justifies the Commission's regulation of behind the meter distributed generation as public utilities.¹⁴ However, Buckeye grossly mischaracterizes that decision by ignoring fundamental differences between the submetering utility service for many customers in a residential community and a behind the meter arrangement designed for the sole use of a single customer. Moreover, the Commission spent over a year evaluating whether to assert jurisdiction over submetering arrangements. If the

¹² Order, Case No. 12-2050-EL-ORD (Jan. 15, 2014) at 32.

¹³ See, *Marano v. Gibbs*, 45 Ohio St. 3d 310, 311 (Ohio 1989).

¹⁴ Motion for Leave and Comments at 15-17.

Commission desires to entertain Buckeye's proposal, then it must do so in the context of a similar rigorous process, not at the last minute through late-filed comments.

Buckeye's proposal also ignores the limitation of state regulation over certain distributed generation projects under the Public Utilities Regulatory Policy Act of 1978. Finally, given the prevalence of power purchase agreement arrangements in Ohio, Buckeye's proposal would place significant administrative burden on the Commission and individual customers. If even to be considered, these issues stemming from Buckeye's proposal require thorough discussion and analysis, especially by those parties who will actually be impacted by the proposal.

5. Buckeye's proposal is void of any consideration of Ohio's state policy.

Ohio's net-metering rules do not apply to Buckeye, but Buckeye wishes to modify how Ohio's net-metering rules apply to others. Despite this, Buckeye does not bother to consider the detriment its proposal would have on key state policies that must be taken into account by the Commission in this rulemaking.

R.C. 4928.02 establishes that, "[i]t is the policy of this state to do the following throughout this state:

- Ensure diversity of electricity supplies and suppliers, by giving consumers effective choices over the selection of those supplies and suppliers and by encouraging the development of distributed and small generation facilities;¹⁵
- Encourage innovation and market access for cost-effective supply- and demand-side retail electric service including, but not limited to, demand-side management, time-differentiated pricing, waste energy recovery systems, smart grid programs, and implementation of advanced metering infrastructure;¹⁶

¹⁵ R.C. 4928.02(C).

¹⁶ R.C. 4928.02(D).

- Encourage implementation of distributed generation across customer classes through regular review and updating of administrative rules governing critical issues such as, but not limited to, interconnection standards, standby charges, and net metering;¹⁷
- Facilitate the state's effectiveness in the global economy.¹⁸

By proposing to curtail distributed generation, thereby limiting customer choice and innovation, Buckeye's proposal would undermine these important state policies.

III. CONCLUSION

For these reasons, One Energy respectfully requests that the Commission deny Buckeye's late-filed motion to intervene and accompanying comments. If the Commission chooses to investigate or to address these issues, it should do so in a broader grid modernization case that provides all parties with an opportunity to explain the complicated issues involved.

Respectfully submitted on behalf of
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¹⁷ R.C. 4928.02(K).

¹⁸ R.C. 4928.02(N).

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Memorandum Contra was served upon the parties of record listed below this 5th day of January 2017 *via* electronic mail.



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Summary: Text One Energy Enterprises LLC'S Memorandum Contra Buckeye Power Inc.'s Motion For Leave To File Comments Out of Time electronically filed by Teresa Orahod on behalf of Dylan F. Borchers