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

REPLY OF BUCKEYE POWER, INC. IN SUPPORT OF MOTION FOR LEAVE TO FILE COMMENTS OUT OF TIME REGARDING PROPOSED NET METERING RULES

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BACKGROUND

On December 21, 2016, Buckeye filed a Motion to submit comments out-of-time in this docket regarding the Commission's five-year review of the net-metering rules contained in Ohio Administrative Code Chapter 4901:1-10-28 and, specifically, regarding the proposed definition of "customer-generator" to be contained in OAC Section 4901:1-10-28(A)(2). Buckeye indicated in its Motion that it was filing comments at this time for two reasons: First, a renewable developer had recently indicated that the Commission's net metering rules would require Buckeye and its members to allow behind-the-meter retail sales in their service territories notwithstanding the requirements of the Certified Territories for Electric Suppliers Act and notwithstanding the Commission's jurisdiction over public utilities; and, second, the Commission's recent order in the submetering/subdistribution investigation (PUCO Case No. 15-1594-AU-COI) indicates that the Commission may assert jurisdiction over behind-the-meter retail sales transactions in circumstances outside of the landlord-tenant context, and the Commission should, therefore, consider the implications of its decision in the submetering/subdistribution investigation before granting the request of certain parties in this proceeding for a blanket rule allowing power purchase/retail sales transactions to take place from behind-the-meter distributed generation facilities outside of the Commission's jurisdiction.

The only party to oppose Buckeye's motion to late-file comment in this docket was One Energy Enterprises LLC ("One Energy"). On January 5, 2017, One Energy filed a Memorandum Contra Buckeye's Motion in this docket ("One Energy's Memo Contra"), and, on January 6, 2017, One Energy filed an Application for Rehearing of the Commission's December 6, 2016 Order in the submetering/subdistribution investigation referencing Buckeye's comments filed in this docket ("One Energy's Application for Rehearing").

INTRODUCTION

One Energy argues that it is Buckeye who has attempted to introduce into this net metering docket the complicated subject of the Commission's jurisdiction over third-party behind-the-meter power purchase/retail sales transactions from distributed generation facilities. However, it is renewable developers, not Buckeye, who have asked the Commission in this docket to issue a blanket rule stating that behind-the-meter power purchase/retail sales transactions from distributed generation facilities should be exempt from the Commission's jurisdiction over public utilities and certified service territories. Buckeye agrees with One Energy that this is a very complicated subject that requires a full and careful analysis by the Commission and input by industry participants before the Commission should issue any blanket ruling on this subject. As Buckeye mentioned in its comments, Buckeye also agrees with One Energy that this subject did not receive sufficient attention or discussion in this proceeding so far and that the Commission should, therefore, not issue any blanket ruling without further proceedings and without full input and discussion from all interested parties.

Buckeye urges the Commission not to issue in the final net metering rules any blanket statement that power purchase/retail sales transactions are permitted under Ohio law outside of Commission jurisdiction and oversight. Instead, as mentioned in Buckeye's comments, Buckeye urges the Commission to reaffirm and leave in place the existing Commission guidance contained in the Commission's November 5, 2008 order in Docket No. 06-653-EL-ORD (the "2008 Order"), which order, despite requests from renewable developers to the contrary, declined to authorize behind-the-meter power purchase/retail sales transactions as within the definition of "customer-generator" but did conclude that customer-generators may own or lease

distributed generation facilities, with the lease arrangement constituting the "hosting" arrangement referred to the applicable distributed generation statutory definitions.

Alternatively, if the Commission is going to issue a blanket statement about its jurisdiction over behind-the-meter power purchase/retail sales transactions in this docket, Buckeye urges the Commission to assert jurisdiction over such transactions because (1) the applicable distributed generation statutory definitions do not support the proposition that self-generators include power purchase/retail sales transactions, (2) the Commission's jurisdiction over public utilities and the Certified Territories for Electric Suppliers Act does include such transactions, even when such transactions take place behind-the-meter, (3) the Commission's recent order in the submetering/subdistribution investigation affirms that the Commission does have jurisdiction over public utilities making jurisdictional retail sales even behind-the-meter and that the Commission's jurisdiction over behind-the-meter transactions extends outside of the landlord-tenant context, and (4) other states have similarly asserted jurisdiction over behind-the-meter power purchase/retail sales transactions from distributed generation facilities, so such a ruling would be within the mainstream of other state decisions on this same issue.

One Energy also argues that Buckeye is attempting to change current law and policy. One Energy calls Buckeye's comments "a radical departure from Ohio law and policy."[1] However, it is the renewable energy parties to this proceeding, not Buckeye, who are asking the Commission to change existing law. As Buckeye mentioned in its comments, the existing law regarding this subject is reflected in the Commission's 2008 Order, where in response to a request by the Interstate Renewable Energy Council, Inc. ("IREC") for the Commission to authorize behind-

[1] One Energy's Memo Contra, p. 2.

the-meter power purchase/retail sales transactions as outside the Commission's jurisdiction, 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.[2]

The Commission got things right in 2008 when it declined to authorize behind-the-meter power purchase/retail sales transactions as within the definition of customer-generator, and the Commission should reaffirm its 2008 determination in this docket.

Furthermore, the statutory definition of customer-generator requires the customer to be a user of a net metering system.[3] Buckeye submits that a "user"of a net metering system requires more than a mere power purchaser and that an owner or lessee of a net metering system fits more squarely within that definition. More importantly, the statutory definition of "self-generator" requires that the electric generating facility "produces electricity primarily for the owner's consumption."[4] Certainly, in a power purchase/retail sales transaction, the electric generating facility does not produce electricity primarily for the benefit of the owner of the electric generating facility. Buckeye urges the Commission to reaffirm in this docket the prior guidance that the Commission gave on this subject in Docket No. 06-653-EL-ORD.

[2] 2008 Order, pp. 22-23.

[3] Ohio Revised Code § 4928.01(A)(29).

[4] Ohio Revised Code § 4928.01(A)(32).

Existing law is also reflected in the Commission's recent order in the submetering/subdistribution investigation, where the Commission extended its jurisdiction to third-party behind-the-meter transactions in circumstances where the third-party meets any aspect of the so-called *Shroyer* test. One Energy argues that the Commission's decision in the submetering/subdistribution investigation does not directly apply to third-party behind-the-meter power purchase/retail sales transactions from distributed generation facilities. Buckeye does not dispute this assertion. However, Buckeye does assert that if the Commission has jurisdiction over a third-party reselling or redistributing electricity behind-the-meter, in circumstances where the third party meets any aspect of the *Shroyer* test, then the Commission should certainly also have jurisdiction over a third party making a direct retail sale of electricity behind-the-meter from an electric generating facility. All of the policy reasons that support the Commission's decision in the submetering/subdistribution investigation also support the Commission asserting jurisdiction over third-party behind-the-meter power purchase/retail sales transactions from distributed generation facilities, at least on a case by case basis, if not by blanket rule.

It is certainly true that the Commission did, in its January 15, 2014 order (the "2014 Order") in this docket, and in response to requests from IREC and the so-called "Solar Advocates," propose a regulatory definition of "customer-generator" and supporting comment that would appear to authorize behind-the-meter power purchase/retail sales transactions as outside the Commission's jurisdiction.[5] However, this determination is not yet final, as the Commission pulled the net metering rules from JCARR, and then resubmitted them in this docket for further comments, where they now remain pending.

[5] 2014 Order, p. 32.

For all of the reasons set forth in Buckeye's comments and this Reply to One Energy's Memo Contra, Buckeye urges the Commission to rethink its 2014 Order and, instead, to assert jurisdiction over third-party behind-the-meter power purchase/retail sales transactions, either on a case by case basis, or by blanket rule after further exploration of the issues in a new rulemaking or Commission investigation. If the Commission is inclined to issue a blanket ruling in this docket, Buckeye urges the Commission to assert jurisdiction over third-party behind-the-meter power purchase/retail sales transactions by adopting the definition of "customer-generator" suggested by Buckeye in its comments.

DETAILED REPLY TO ONE ENERGY FILINGS

I. One Energy is the renewable developer who caused Buckeye to late-file comments in this docket by claiming that the net metering rules have applicability to Buckeye and its members. One Energy should not now be permitted to argue that Buckeye should not have an opportunity to comment on the Commission's net metering rules.

In its Motion, Buckeye mentioned that a renewable developer had prompted Buckeye to file comments in this rulemaking docket because the developer had argued that Buckeye and its members are required to allow retail sales by third party developers behind-the-meter notwithstanding the Commission's jurisdiction over public utilities engaged in the business of supplying electricity to consumers within this State, notwithstanding the applicability of the territorial law to electric suppliers providing retail electric service to electric load centers in this State, notwithstanding the Commission's previous guidance in the net metering docket (Case No. 06-653-EL-ORD), which is current law, where the Commission declined to authorize power purchase agreements as within the definition of customer-generator, notwithstanding the distributed generation statutory definitions, which refer to the electric generating facility being used primarily for the owner's benefit, and which do not authorize retail sales outside Commission jurisdiction, and notwithstanding that the Commission's net metering rules do not

directly apply to Buckeye or its members. This renewable developer threatened litigation against Buckeye and its members. This renewable developer is One Energy, the only party to object to Buckeye's Motion to late-file comments in this docket. One Energy should not be permitted to claim, on the one hand, that the Commission's net metering rules have applicability to Buckeye and its members, and then, on the other hand, argue that Buckeye should not be permitted to comment on the net metering rules. Again, no other party objected to Buckeye's late-filed comments. Buckeye's Motion to late-file comments should be approved.

II. Buckeye's Comments will assist the Commission in its decision-making because no other party has asked the Commission to consider the implications of the Commission's recent order in the submetering/subdistribution investigation before issuing any blanket rule regarding the Commission's jurisdiction over third-party behind-the-meter power purchase/retail sales transactions.

Buckeye's comments should be accepted by the Commission because Buckeye's comments are the only comments that bring to the Commission's attention the potential applicability of the Commission's recent decision in the submetering/subdistribution investigation to the Commission's determination in this docket regarding whether or not to grant the request of certain renewable developers for a blanket rule permitting third-party behind-the-meter power purchase/retail sales transactions as outside the Commission's jurisdiction. Buckeye's comments have been filed before the Commission issues a final net metering rule, and Buckeye's comments will assist the Commission in its decision-making. No party will be prejudiced by Buckeye's late-filed comments. Having said that, Buckeye is not trying to foreclose further debate, and Buckeye is not opposed to further exploration of the issues in a separate rulemaking docket or Commission investigation, as One Energy suggests, or in case by case determinations of the Commission's jurisdiction over behind-the-meter transactions using the *Shroyer* test that the Commission announced in the submetering/subdistribution investigation. Buckeye is, however, for all of the reasons set forth in Buckeye's comments and in

this Reply, opposed to the Commission granting the request of the renewable parties for a blanket rule authorizing third-party behind-the-meter power purchase/retail sales transactions as outside the Commission's jurisdiction. Buckeye's Motion to late-file comments should be approved.

III. Buckeye agrees with One Energy that the Commission should not issue any blanket rule in this docket regarding the Commission's jurisdiction over third-party behind-the-meter power purchase/retail sales transactions.

In its Memo Contra, One Energy states that, "[B]uckeye 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."[6] Buckeye agrees with One Energy that the Commission should not issue any blanket rule in this net metering docket regarding the Commission's jurisdiction over third-party behind-the-meter power purchase/retail sales transactions from distributed generation facilities. However, it is the renewable developers, i.e. IREC and the Solar Advocates, not Buckeye, who have sought to hijack this proceeding by requesting the Commission to issue a blanket rule in this docket permitting third-party behind-the-meter power purchase/retail sales transactions from distributed generation facilities without a sufficient exploration of the issues.

In its January 7, 2013 Initial Comments in this docket ("IREC Comments"), IREC stated that:

> IREC appreciates the staff's inclusion of third-party-owned systems where the customer 'hosts or leases' the system, but encourages the Commission to go further and explicitly clarify that a host customer may enter into a PPA with a third-party owner and still engage in net metering. Arguably, the word 'hosts'

[6] One Energy's Memo Contra, p. 5.

> would encompass the PPA model, because the customer does provide the site for the TPO's system under the PPA model. However, some may argue that if 'hosts' was intended to be an all-encompassing term, there would not be a need to specify that leases are included. IREC suggests that the ambiguity be resolved. IREC views the statutory definition of customer-generator, as the 'user' of the net metering system, to be sufficiently broad to support third-party ownership of net-metered systems, but cautions that the solar services industry will likely find the term 'hosts or leases' in the proposed revisions too vague to signal that the use of PPAs is permissible in Ohio.[7]

In addition, in the January 7, 2013 Joint Comments of the Solar Advocates ("Solar Advocates Comments"), they stated that:

> Although the Solar Advocates support this revision, we recommend that the Commission additionally clarify that a PPA is not a regulated activity and that a third-party owner of a generating system should not be considered a provider of retail electric service. As the Commission explained in the previous rulemaking, Senate Bill ("SB") 221 allows for net metering so long as the "generating facility [is] located on the customer-generator's premises" and the "equipment [is] installed behind the customer's electric meter." *In the Matter of the Commission's Review of Chapters 4901:1-9, 4901:1-10, 4901:1-21, 4901:1-22, 4901:1-23, 4901:1-24, 4901:1-25 of the Ohio Administrative Code*, Case No. 06-653-EL-ORD, Finding and Order at 22-23 (Nov. 5, 2008). Therefore, under a PPA, the third-party owner of the system would be a participant in the net metering arrangement but not a regulated entity. The Commission should memorialize this understanding in its order to provide clarity in the area of PPAs, which are a common and effective arrangement for customer-generators to install generating systems and implement net metering.[8]

It is these parties, therefore, not Buckeye, who have raised this issue in the context of the net metering rules docket.

One Energy states that, "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."[9] This statement is patently false. As shown by the above

[7] IREC Comments, p. 4.

[8] Solar Advocates Comments, p. 3.

[9] One Energy's Memo Contra, p. 3.

comments of IREC and the Solar Advocates, it was the renewable parties, not Buckeye, who first raised the issue in this proceeding of whether third-party owners of distributed generation should be considered a public utility or cause a retail sale. Furthermore, as noted above, IREC had initially raised the same issue in the Commission's prior five year review of the net metering rules in 2008 in Docket No. 06-653-EL-ORD. Having said that, Buckeye agrees with One Energy that the Commission should not issue any blanket rule in this proceeding regarding Commission jurisdiction over third-party behind-the-meter power purchase/retail sales transactions.

IV. Buckeye agrees with One Energy that the Commission should address its jurisdiction over behind-the-meter power purchase/retail sales transaction in a separate rulemaking proceeding or on a case-by-case basis.

Buckeye asserts, and One Energy appears to agree, that the Commission should not grant the request of IREC and the Solar Advocates without a more thorough discussion of the relevant issues. One Energy acknowledges that, "[T]his is a sophisticated and nuanced conversation that deserves rigorous debate and due process for all of the parties involved."[10] One Energy states that this issue involves a "myriad of legal and policy implications."[11] Buckeye agrees with One Energy.

One Energy also argues that stakeholders impacted by Buckeye's proposal should have the opportunity to thoroughly discuss Buckeye's proposal before the Commission considers Buckeye's proposal.[12] Buckeye does not disagree. However, Buckeye believes that the same reasoning applies to the request of IREC and the Solar Advocates.

[10] One Energy's Memo Contra, p. 7.

[11] One Energy's Memo Contra, p 2.

[12] One Energy Memo Contra, p. 6.

V. If the Commission is going to issue any blanket rule in this docket regarding the Commission's jurisdiction over behind-the-meter power purchase/retail sales transactions, the Commission should assert jurisdiction over such transactions.

One Energy characterizes Buckeye's position that a customer-generator and a self-generator may own or lease distributed generation equipment outside of Commission jurisdiction but that a third-party behind-the-meter power purchase/retail sales transaction should be subject to Commission regulation as a public utility and as an electric supplier under the territorial law, as "absurd."[13] However, One Energy does not dispute that a number of other states have made the same determination as Buckeye suggests. Are these state public utility commissions, courts and legislators also "absurd?" Is the Commission also "absurd" because in its prior Order in Docket No. 06-653-EL-ORD, the Commission declined IREC's request to authorize power purchase agreements as outside the Commission's jurisdiction? Is the Commission also "absurd" because the Commission, in its recent order in the submetering/subdistribution investigation, extended its jurisdiction on a case by case basis to third party resale and redistribution arrangements that take place behind-the-meter in circumstances where the third-party satisfies any prong of the *Shroyer* test?

Buckeye asserts that if anything is absurd it is that apparently One Energy and numerous other parties have ignored the Commission's prior determination of this issue in Case No. 06-653-EL-ORD, which is current law, and where, despite specific requests from IREC to the contrary, the Commission declined to authorize power purchase agreements and only authorized leases as within the meaning of customer-generator and the hosting relationship referred to in the definition of "self-generator." Apparently, One Energy and other renewable developers have proceeded to enter into numerous behind-the-meter power purchase/retail sales transactions

[13] One Energy Memo Contra, p. 6.

without consideration of the Commission's jurisdiction over such transactions, including potential regulation of the third-party sellers as public utilities and the retail sales transaction as a violation of the certified territories law.

Furthermore, IREC and the Solar Advocates clearly do not think that Buckeye's position is absurd. Instead, IREC stated that it needed the Commission to explicitly clarify that power purchase agreements are outside Commission jurisdiction and if the Commission does not do so, "the solar services industry will likely find the term 'hosts or leases' in the proposed revisions too vague to signal that the use of PPA's is permissible in Ohio."[14] Additionally, the Solar Advocates requested in this docket that the Commission "clarify that a PPA is not a regulated activity and that a third-party owner of a generating system should not be considered a provider of retail electric service."[15] The Solar Advocates went on to state that, "The Commission should memorialize this understanding in its order to provide clarity in the area of PPAs . . . ."[16] IREC and the Solar Advocates have, therefore, explicitly acknowledged that the current state of law does not indicate that the use of third-party behind-the-meter PPAs is permissible in Ohio without Commission regulation.

Even One Energy itself, on the one hand, argues that the issue is nuanced and complex and requires further input from stakeholders but, on the other hand, argues that Buckeye's position is absurd. These are inconsistent positions. This unresolved nuance and complexity has also apparently not stopped One Energy and certain other renewable developers from proceeding full steam ahead with numerous behind-the-meter power purchase/retail sales transactions

[14] IREC Comments, p. 4.

[15] Solar Advocates Comments, p. 3.

[16] *Id.*

without the clarity and guidance from the Commission that IREC and the Solar Advocates think is necessary.

Because One Energy and other renewable developers have ignored the prior Commission guidance on this issue contained in the Commission's November 5, 2008 order in Docket No. 06-653-EL-ORD, and because One Energy and other renewable developers have admittedly proceeded to make behind-the-meter power purchase/retail sales without Commission authorization and without consideration of the Commission's jurisdiction over public utilities and retail sales, then if the Commission is determined to make any blanket ruling in this docket, the Commission should find that it will assert jurisdiction over such transactions so as not to reward the willful disregard by One Energy and other renewable developers of the Commission's prior orders.

A. The applicable statutory definitions regarding distributed generation support the Commission's assertion of jurisdiction over power purchase/retail sales transactions.

As mentioned in Buckeye's comments, the best way for the Commission to harmonize its jurisdiction over public utilities and retail sales under the territorial law with the applicable statutory distributed generation definitions is for the Commission to define the "hosting" relationship referred to in those definitions as a leasing relationship not a retail sale of electricity.

The statutory definition of "customer-generator" defines a customer-generator as a user of a net metering system. As the Commission determined in its 2008 Order, a user of a net metering system requires more than a mere purchaser of power and better fits with an owner or lessee of such a system. Furthermore, the statutory definition of "self-generator" refers to an entity that owns or hosts an electric generation facility on its premises, but that produces electricity primarily for the owner's consumption. By requiring that the electric generation facility produce electricity primarily for the "owner's" consumption, this would seem to preclude

a power purchase agreement relationship where the party consuming the output of the electric generation facility is not the owner of the facility. The definition of self-generator also allows the electric generation facility to be installed or operated by the owner or by an agent under contract. This can be accommodated under an ownership or lease arrangement and does not require a power purchase/retail sales relationship.

Nowhere do the applicable statutory distributed generation definitions indicate that they are intended to override the Commission's jurisdiction over public utilities or retail sales under the territorial law. In fact, all of the applicable statutory distributed generation definitions can be best reconciled with the Commission's existing jurisdiction by defining the hosting relationship referred to in those definitions as a leasing relationship rather than as a power purchase/retail sales relationship. If the legislature intended to usurp the Commission's jurisdiction over public utilities and retail sales, it would have been more clear.

B. Despite One Energy's protestations, the Commission's recent Order in the submetering/subdistribution investigation supports the Commission's assertion of jurisdiction over behind-the-meter PPAs.

One Energy states in its Application for Rehearing of the Commission's submetering/subdistribution order that the Commission should apply the *Shroyer* test to determine whether an entity is a public utility, but that the Commission should not apply the *Shroyer* test to determine whether an entity is engaging in "retail sales" of electricity. Buckeye does not understand One Energy's purported distinction between an entity making a "retail sale" of electricity and an entity operating as a public utility subject to the Commission's jurisdiction. The Solar Advocates seem to understand the relevance of retail sales to the Commission's jurisdiction over PPAs when the Solar Advocates, in their January 7, 2013 Joint Comments in this docket asked the Commission to "clarify that a PPA is not a regulated activity and that a third-party owner of a generating system should not be considered a provider of retail electric

service."[17] Regardless, Buckeye would certainly agree that the Commission could/should apply the *Shroyer* test to One Energy and other renewable developers that sell electric power and energy behind the meter pursuant to power purchase agreements in order to determine whether such entities are operating as "public utilities" under Ohio law, i.e. whether they are engaged in the business of supplying electricity for light, heat or power purposes to consumers in the State of Ohio.[18] The retail sales determination is, however, relevant to whether an electric supplier is also operating in violation of the Certified Territories for Electric Suppliers Act[19], which relates to retail electric service furnished to an electric load center for ultimate consumption.[20]

One Energy also states in its Application for Rehearing of the Commission's submetering/subdistribution order that the Commission should only apply the *Shroyer* test to those who resell or redistribute utility services but that the Commission should determine whether other entities are public utilities on a case by case basis using relevant Commission and Supreme Court case law. Buckeye disagrees with One Energy that the *Shroyer* test is irrelevant to the Commission's determination of whether to exercise jurisdiction over behind-the-meter power purchase/retail sales transactions from distributed generation facilities or that there is a distinction to be made between a direct retail sale of electricity by a third-party from a distributed generation facility located behind-the-meter and a resale or redistribution of electricity by a third-party behind-the-meter.

One Energy also attempts to make a distinction between submetering/subdistribution arrangements and behind-the-meter PPAs on the grounds that submetering/subdistribution

[17] Solar Advocates Comments, p. 3.

[18] *See* Ohio Revised Code § 4905.03(C).

[19] Ohio Revised Code §§ 4933.81 to 4933.90.

[20] *See* Ohio Revised Code § 4933.81(F).

arrangements often involve more than one customer.[21] However, Buckeye sees no reason that the Commission's submetering/subdistribution order would not apply in circumstances where only a single tenant is involved. Similarly, Buckeye can see circumstances where a distributed generation developer might use a power purchase/retail sales transaction to deliver electricity to more than one consumer behind-the-meter. Buckeye fails to see why the number of consumers served in a given transaction should have any relevance to the Commission's jurisdictional determination. What is relevant to the Commission's jurisdictional determination is that One Energy and other renewable energy developers are clearly in the business of providing electricity to consumers in the State of Ohio and that these developers avail themselves of all of the tax, grants and other incentives available to public utilities and other renewable generation developers. As such, One Energy and other renewable developers meet at least one if not more than one of the *Shroyer* tests.

VI. Federal PURPA law does not supersede the Commission's jurisdiction over retail sales of electricity.

One Energy implies that the federal Public Utilities Regulatory Policy Act of 1978, as amended ("PURPA") places some limitation on the jurisdiction of the Commission over retail sales of electricity. One Energy states, "Buckeye's proposal also ignores the limitation of state regulation over certain distributed generation projects under [PURPA]."[22] Buckeye acknowledges that PURPA requires Buckeye and its members to interconnect with, provide back-up power to, and purchase the output of qualifying cogeneration and small power production facilities. Buckeye also acknowledges that certain cases in the cogeneration context seem to imply that the PURPA obligations imposed on an interconnecting utility apply to a

[21] *See* One Energy's Memo Contra, p. 8.

[22] One Energy's Memo Contra, p. 9.

customer that leases a qualifying facility as well as to a customer who owns a qualifying facility. But these cogeneration cases are clear that the FERC has no jurisdiction over a transaction that a state public utilities commission determines to be a state jurisdictional retail sales transaction. Accordingly, to the extent that the Commission determines that a behind-the-meter power purchase/retail sales transaction is under the Commission's jurisdiction, there will be no PURPA obligation with respect to the transaction other than between the third party owner of the qualifying facility and the interconnecting utility but not between the interconnecting utility and the power purchase/retail sales customer.

VII. Commission jurisdiction over third-party behind-the-meter power purchase/retail sales transactions would not undermine state policy encouraging distributed generation.

One Energy asserts that Commission jurisdiction over third-party behind-the-meter power purchase/retail sales transactions would be contrary to state policy encouraging distributed generation contained in Ohio Revised Code Section 4928.02.[23] One Energy also asserts that Buckeye has a goal of undermining the right of customers to self-generate.[24] Both of these statements are incorrect.

As Buckeye mentioned in its comments, customers and developers have at least three ways of developing distributed generation projects. A customer can own and finance its own distributed generation project, including by contracting with others for the installation and operation of the project. A customer can also host a distributed generation project on its site, with a third party owning and operating the project, so long as the developer leases the project to the customer rather than makes a jurisdictional retail sale of electricity to the customer. Buckeye has no objection to any distributed generation structure that does not involve a retail sale of

[23] *See* One Energy's Memo Contra, p. 9.

[24] *See* One Energy's Memo Contra, p. 5.

electricity by a public utility in its service territory.[25] Buckeye has also voluntarily offered in certain circumstances to accommodate a power purchase agreement structure by agreeing to purchase the output of the hosted generation facility from the third-party renewable developer and then reselling the output to the hosting customer. Buckeye and its members also voluntarily offer to net meter the output of renewable distributed generation facilities subject to certain limitations, even though they are not subject to the Ohio net metering statutes and rules. Buckeye is not, therefore, opposed to distributed generation arrangements. Buckeye is, however, concerned that its territorial rights not be undermined and that the Commission not relinquish its jurisdiction in circumstances where Commission oversight is needed.

In its Application for Rehearing of the Commission submetering/subdistribution order, One Energy states that, "These distributed generation projects involved sophisticated, often commercial or industrial customers that choose to self-generate. These arrangements have nothing to do with residential customers being unwillingly subjected to unfair submetering charges or captured residential customers that are precluded from shopping for generation supply."[26] One Energy implies that behind-the-meter PPAs from distributed generation facilities are not marketed to unsophisticated residential customers on a regular basis. Buckeye is aware of no such limitations in Ohio, and it is Buckeye's understanding that PPAs are regularly marketed to both residential and commercial/industrial customers. Such customers are no more captive than tenants who may choose to move to another location to avoid excessive submetering charges. The point is that the Commission should not decide to relinquish jurisdiction on a blanket basis over transactions involving customers who may require the Commission's

[25] Having said that, Buckeye and its members only have an interconnection, back-up and purchase obligation with respect to qualifying facilities under PURPA, and Buckeye and its members have no obligation to offer net metering, although they have voluntarily agreed to do so in certain circumstances.

[26] One Energy's Application for Rehearing, p. 5.

protection. Power purchase agreements are complicated documents containing many terms that a customer may not understand or that may have negative implications for the customer. Even CRES suppliers are subject to minimum marketing, credit support, and other consumer-protection requirements, and all of the implications of long-term PPAs are not yet known. The Commission should not, therefore, issue any blanket rule relinquishing jurisdiction over third-party behind-the-meter power purchase/retail sales transactions, as IREC and the Solar Advocates have requested.

CONCLUSION

In the Commission's recent order in the submetering/subdistribution investigation, the Commission extended the *Shroyer* test to third parties reselling and redistributing electricity behind-the-meter, and the Commission stated that it would assert jurisdiction over any entity meeting any one of the three parts of the *Shroyer* test. The Commission extended the *Shroyer* test outside of the landlord-tenant context to potentially all behind-the-meter arrangements meeting any aspect of the *Shroyer* test. Buckeye supports the Commission's decision in the submetering/subdistribution investigation and asserts that the logic of the Commission's decision in that case as well as the policy reasons supporting the Commission's decision in that case also extend to third-party behind-the-meter power purchase/retail sales transactions from distributed generation facilities. Certainly, if the Commission's jurisdiction extends to third-party resale and redistribution transactions behind-the-meter, it should also extend to direct sales from electric generation facilities. As mentioned in Buckeye's comments in this docket, third-party power purchase/retail sales transactions take place in the residential context as well as the commercial/industrial context. One Energy claims that these transactions take place primarily/exclusively in the commercial/industrial context and between sophisticated

counterparties, but Buckeye is aware of no such limitation, and Buckeye understands that such transactions take place between sophisticated renewable developers like One Energy, who are in the business of supplying electricity to consumers in the State of Ohio, and unsophisticated residential consumers where there is a need for Commission jurisdiction and oversight.

Renewable developers like One Energy certainly take advantage of all tax breaks, grants and other incentives available to public utilities and generation owners/developers. Renewable developers like One Energy therefore likely meet at least one if not more than one of the *Shroyer* tests.

In any event, Buckeye agrees with One Energy that the Commission should undertake further analysis of this complex issue and, at a minimum, should determine on a case by case basis, using the *Shroyer* test or another similar test, whether renewable developers like One Energy who make retail sales of electricity behind-the-meter constitute public utilities for purposes of Commission regulation and the certified territorial law. The Commission should not, however, issue any blanket rule in the net metering docket, as IREC and the Solar Advocates have suggested, that would exempt behind the meter power purchase/retail sales transactions from the Commission's jurisdiction. If the Commission is inclined to issue a blanket rule, the Commission should do so only after a full and complete investigation of all issues and with input by all interested parties in a separate rulemaking or Commission investigation, as One Energy suggests. But if the Commission is inclined to issue a blanket rule in this docket, the Commission should assert jurisdiction over third-party behind-the-meter power purchase/retail sales transactions from distributed generation facilities by adopting the definition of "customer-generator" suggested by Buckeye in its comments.[27]

[27] *See* Buckeye Comments, p. 11.

The Commission should accept Buckeye's late-filed comments in this docket for all of the reasons set forth in Buckeye's December 21, 2016 Motion and in this Reply.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Reply of Buckeye Power, Inc. in Support of 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 12th day of January, 2017.

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Summary: Reply Reply of Buckeye Power, Inc. in Support of 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.