BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

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

APPLICATION FOR REHEARING OF OHIO EDISON COMPANY, THE CLEVELAND ELECTRIC ILLUMINATING COMPANY, AND THE TOLEDO EDISON COMPANY

Pursuant to R.C. 4903.10 and Rule 4901:1-35, Ohio Administrative Code, Ohio Edison Company ("Ohio Edison"), The Cleveland Electric Illuminating Company ("CEI"), and The Toledo Edison Company ("Toledo Edison") (collectively, the "Companies"), hereby file their Application for Rehearing of the Finding and Order ("Order") entered in the journal on November 8, 2017, in the above-captioned case. As explained in more detail in the attached Memorandum in Support, the Commission's Order in this case is unreasonable and unlawful on the following grounds:

1. The Commission's proposed Rule 4901:1-10-28(B)(7)(b) that allows a customer-generator to size a net metering system to deliberately exceed consumption by 20% (i.e., 120%) is unjust and unlawful because it allows excess generation as a primary intent in conflict with the provisions of the Ohio Revised Code.

2. The Commission's proposed Rule 4901:1-10-28(A)(7) definition of a "microturbine" as having a nameplate capacity up to two (2) megawatts is unjust and unlawful in that it exceeds a reasonable interpretation of the underlying statue.

3. The Commission's proposed Rule 4901:1-10-28(B)(6) that includes contiguous lots within a customer-generator's premises for the purpose of locating a net metering system is unreasonable and unlawful because it would allow customer-generators to cross boundaries of non-owned property, such as streets and public rights-of-way, and allow third party-owned equipment to supply electricity across property lines.

4. The Commission's Finding and Order is unreasonable and unlawful because it provides only for recovery of the cost of providing credits and does not include recovery for all of the costs of implementation and compliance with the new rules.

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

Respectfully submitted,

/s/ *Robert M. Endris*

Robert M. Endris (0089886)
Counsel of Record
FIRSTENERGY SERVICE COMPANY
76 South Main Street
Akron, OH 44308
(330) 384-5728
(330) 384-3875 (fax)
rendris@firstenergycorp.com

ATTORNEY FOR OHIO EDISON COMPANY, THE CLEVELAND ELECTRIC ILLUMINATING COMPANY AND THE TOLEDO EDISON COMPANY

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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**

MEMORANDUM IN SUPPORT

INTRODUCTION

On January 15, 2014, the Commission issued a Finding and Order in this case that adopted both amended and no-change rules in Ohio Adm.Code Chapter 4901:1- 10 and ordered that they be filed with the Joint Committee on Agency Rule Review (JCARR), the Secretary of State, and the Legislative Service Commission. However, subsequent to issuing the Order and filing the rules with JCARR, Rule 4901:1-10-28 regarding net metering was withdrawn from JCARR for further consideration.

On May 5, 2015, the Commission's Staff conducted a workshop to receive additional stakeholder input on net metering. Numerous stakeholders attended the workshop and provided Commission Staff with insight on how the net metering rule should be developed. The May 5, 2015 workshop was the Commission's second regarding Ohio Adm.Code Chapter 4901:1-10. However, the purpose of the May 5, 2015 workshop was solely related to the issue of net metering in Ohio Adm.Code 4901:1-10- 28.

Following the second workshop, by Entry issued on November 18, 2015, the Commission requested comments and reply comments on proposed Ohio Adm.Code 4901:1-10-28 (Net Metering Rule) from interested stakeholders. Comments were received by the Natural Resources Defense Council (NRDC); The Alliance for Solar Choice (TASC);

Ohio Power Company (AEP Ohio); the Ohio Consumers' Counsel (OCC); DirectEnergy Business, LLC, and Direct Energy Services, LLC (jointly, Direct Energy); Duke Energy Ohio, Inc. (Duke); The Toledo Edison Company, The Cleveland Electric Illuminating Company, and Ohio Edison Company (collectively, FirstEnergy); One Energy, LLC (One Energy); the Environmental Law and Policy Center (ELPC), the Ohio Environmental Council (OEC), the Environmental Defense Fund (EDF), and Vote Solar (collectively, Environmental Advocates); The Dayton Power and Light Company (DP&L); and IGSSolar, IGSGeneration, and Interstate Gas Supply, Inc. (collectively, IGS) on December 18, 2015. Thereafter, reply comments were received by DP&L, One Energy, OCC, AEP Ohio, Duke, IGS, the Ohio Manufacturers' Association Energy Group (OMAEG), FirstEnergy, Direct Energy, and the Environmental Advocates on January 8, 2016.

As a creature of statute, the Commission has only the jurisdiction conferred upon it by the General Assembly.[1] And, while the Commission has general authority to promulgate regulations and rules of procedure, this authority is limited by precluding the Commission from legislating through the promulgation of rules which are in excess of legislative policy, or which conflict with the enabling statute.[2]

Pursuant to Section 119.032(C), Ohio Revised Code (‘O.R.C.”), the Commission must consider the following factors when it reviews the rules and determines whether the rules should be amended, rescinded or continued without change:

> (1) Whether the rules should be continued, without amendment, be amended or be rescinded, taking into consideration the purpose, scope and intent of the statute under which the rule was adopted;
>
> (2) Whether the rule needs amendment or rescission to give more flexibility at the local level;

[1] *Canton Storage and Transfer Co. v. Pub. Util. Comm.*, (1995) 72 Ohio St. 3d 1, 5.
[2] *English v. Koster*, (1980) 61 Ohio St. 2d 17, 19.

(3) Whether the rule needs amendment to eliminate unnecessary paperwork;

(4) Whether the rule duplicates, overlaps with, or conflicts with other rules;

(5) Whether the rule has an adverse impact on businesses, reviewing the rule as if it were a draft rule being reviewed under sections 107.52 and 107.53 of the Revised Code, and whether any such adverse impact has been eliminated or reduced.

Subpart (D) of Section 119.032, O.R.C. also provides:

> In making the review required under division (C) of this section, the agency shall consider the continued need for the rule, the nature of any complaints or comments received concerning the rule, and any relevant factors that have changed in the subject matter area affected by the rule.

Additionally, pursuant to the Governor's Executive Order 2011-01K, the Commission must:

(a) Determine the impact that a rule has on small businesses;

(b) Attempt to balance the critical objections of regulation and the cost of compliance by the regulated parties; and

(c) Amend or rescind rules that are unnecessary, ineffective, contradictory, redundant, inefficient, or needlessly burdensome, or that have had negative unintended consequences, or unnecessarily impede business growth.

Prior to filing the rules with JCARR, Section 121.82,[3] O.R.C. provides: an agency *shall*:

(A) Evaluate the draft rule against the business impact analysis instrument. If, based on that evaluation, the draft rule will not have an adverse impact on businesses, the agency

[3] The Companies recognize that the Commission has filed its Business Impact Analysis ("BIA") in this case on November 7, 2012 July 10, 2013, and November 18, 2015. The Companies also note the Commission's position that "[t]he Commission notes that nothing in Section 121.82, Revised Code, requires the Commission to take stakeholder feedback on the BIA itself or to consider any stakeholder analysis of adverse impacts on business. The Commission issues the BIA with the proposed rules so that stakeholders may comment on whether they believe an adverse impact on business may exist. Stakeholder comments on the BIA are not prima facie evidence that an adverse impact on business exists; they are for the Commission's reference as it conducts its own analysis of the rules and their impact on business. Furthermore, an adverse impact on business identified by stakeholders does not necessarily make the rules unjust or unreasonable." December 18, 2013 Entry on Rehearing at Para. 21.

> may proceed with the rule-filing process. If the evaluation determines that the draft rule will have an adverse impact on businesses, the agency shall incorporate features into the draft rule that will eliminate or adequately reduce any adverse impact the draft rule might have on businesses;
>
> (B) Prepare a business impact analysis that describes its evaluation of the draft rule against the business impact analysis instrument, that identifies any features that were incorporated into the draft rule as a result of the evaluation, and that explains how those features, if there were any, eliminate or adequately reduce any adverse impact the draft rule might have on businesses;

Last, Section 107.52, O.R.C. provides that:

> A draft rule that affects businesses has an adverse impact on businesses if a provision of the draft rule that applies to businesses has any of the following effects:
>
> (A) It requires a license, permit, or any other prior authorization to engage in or operate a line of business;
>
> (B) It imposes a criminal penalty, a civil penalty or another sanction or creates a cause of action, for failure to comply with its terms; or
>
> (C) It requires specific expenditures or the report of information as a condition of compliance.

The Order adopted an interpretation of the rules that conflicts with the Revised Code.

For these reasons the Commission should grant rehearing.

ARGUMENT

I. Rule 4901:1-10-28(B)(7)(b) is unreasonable and unlawful because it allows a customer-generator to intentionally generate in excess of its annual requirements for electricity.

The Commission approved Staff's proposal that a customer-generator may size its net metering system to generate up to 120 percent of its annual requirements for electricity. The rule should not allow for a net metering system to be designed to meet more than 100% of the customer's electricity requirements at the time it is installed.

Sizing a net metering system that exceeds 100% of the customer's requirements for electricity unmistakably reflects an intent that is not permitted by the statute. O.R.C. 4928.01(31)(d) requires that a net metering system "[i]s intended primarily to offset part or all of the customer-generator's requirements for electricity." There is no reasonable interpretation of customer intent for a generating system that is deliberately sized to generate in excess of the customer's consumption other than to conclude that it is intended primarily to *exceed* the customer-generator's requirements for electricity. There is no percentage of deliberately-sized excess that can convert this intent to exceed into a secondary or tertiary motive. In other words, only sizing up to 100% of annual requirements is consistent with the statutory restriction to "offset part or all" while any amount deliberately sized in excess is intended to be "more than." Allowing installation of deliberately over-sized generation replaces the statutory restriction with a new arbitrary and contradictory standard.

Further, in the Commission's discussion of monetary credits for excess generation, the Commission explains that the 120% sizing threshold "should prevent significant excess generation." (Order at p. 18). However, with no limit to the size of solar-, wind-, biogas- or fuel cell-based systems, the amount of excess generation could become quite large for a commercial or industrial customer as well as cumulatively for an electric distribution utility. When load reductions occur, such as from energy efficiency, the economy, or business operations, the excess generation could very well exceed the 120% originally sized. Thus, not only is deliberately sizing in excess of electricity requirements in conflict with the statute, it is not an effective barrier to the accumulation of significantly excessive monetary credit balances. Moreover, the Commission's directive for utilities to work with Staff to prevent excessive monetary credit balances likely will be completely ineffective so long as customer-generators continue to have the right to deliberately size up to 120% in excess of their needs under this adopted Rule.

As the Companies noted in their Comments, this is not just the Companies' perspective. Shortly after enactment of this law the Commission itself noted in its Merit Brief to the Supreme Court of Ohio the statutory safeguards against excess generation that:

> It would appear that FirstEnergy is concerned with a proliferation of customer self-generators that will regularly produce excess power into FirstEnergy's system. *That is neither the intent nor the expectation of the General Assembly or the Commission*, each of which has established safeguards to ensure that this does not happen.[4]

The Commission went on to argue therein that "the proper focus is upon whether the customer-generator, over entire billing periods, *consistently produces more power than it uses*"[5] and "the intention of the General Assembly was to encourage development and introduction of alternative, competitive energy supplies for customers and not as a revenue source for customer self-generators."[6] The Commission further argued "The statute is equally clear that, under the *infrequent* circumstances where, over a complete billing cycle, a customer generator produces more power than it uses…."[7] Taken together, these statements reveal a clear picture of that earlier Commission's perspective on the statutory restriction against excess generation.

The adopted rule diametrically opposes the Commission's own contemporaneous interpretation of statutory intent that excess generation be infrequent, not deliberate, and not a revenue (monetary credit) source. It clearly does <u>not</u> fall within the General Assembly's intended purpose related to net metering. The proposed rule simply cannot and does not fit within the statutory language and intent expressed in the Code.

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[4] Merit Brief Submitted on Behalf of Appellee, the Public Utilities Commission of Ohio, FirstEnergy Corp. v. Public Utilities Commission of Ohio, Case No. 01-573, p.8, (filed July 18, 2001) (emphasis added), (*FirstEnergy Corp. v. Pub. Util. Comm'n*, 95 Ohio St. 3d 401 (2002)).
[5] Id. p.9. (emphasis added)
[6] Id. (emphasis added)
[7] Id., p.14. (emphasis added)

The Companies respectfully request the adopted proposed rule be revised so as not to be contrary to the statute by condoning initial sizing to deliberately produce excess generation by removing the phrase "one hundred and twenty percent of" from 4901:1-10-28(B)(7)(b).

II. **The Commission's adopted Rule 4901:1-10-28(A)(7) definition of a "microturbine" as having a capacity up to two (2) megawatts is unjust and unlawful because it exceeds a reasonable interpretation of the underlying statue.**

As noted by the Companies in their Comments, this definition does not give adequate effect to the statutory requirement set forth in Revised Code 4928.01(A)(31)(a) that distinguishes "microturbine" from other types of combustion turbines. The only limit previously applied by the Commission was 100 kW. Moreover, reliable current industry sources peg the upper range of "microturbines" at 250 kW to 500 kW. Ignoring these industry sources and the Commission's original interpretation of the statute, and instead to select a threshold four, eight, or twenty times in size is arbitrary, capricious and unreasonable.

The Commission justifies its selected threshold on flawed grounds. First, it declares the term "microturbine" to be a "secondary size limit" because of the additional requirement in 4928.01(A)(31)(d) that requirements for electricity not be exceeded. This logic is misplaced for several reasons. The microturbine qualification in the statute is listed among four criteria, none of which are indicated as subordinate to any other. Rather, all four criteria equally must be met. Further, this logic would change the meaning of the word based on the size of a customer-generator's requirements for electricity, for which there is no such qualifier in the statute. Indeed, the Commission made no such leap in logic in its first promulgation of the statute when it set the limit at 100 kW based on the exact same statutory language.

Second, the Commission notes that two (2) MW is the threshold at which interconnected generation generally qualifies for Level 2 Expedited Review in the Commission's

Interconnection Rules, Ohio Adm. Code 4901:1-22-07. This logic is also misplaced. The interconnection rules have nothing to do with fuel source or equipment type, and are applicable to machines that are not even eligible for net metering, such as reciprocating engines. Further, the 2 MW threshold for Level 2 Expedited Review is based on the generator size relative to the nearby electric distribution system and the need to conduct a more in-depth Feasibility Study and System Impact Study for larger generators pursuant to design standards and PJM rules. Following the Commission's logic, if the Level 2 Expedited Review 2 MW threshold had any bearing on the requirements of 4928.01(A)(31)(a), then solar-, wind-, and biogas-based systems along with fuel cells should also be limited to a capacity of 2 MW or less. Finally, the passage of Senate Bill 3 enacting the net metering statute predated the Commission's promulgation of the 2 MW threshold for Level 2 Expedited Review; the General Assembly therefore could not have considered Ohio Adm. Code 4901: 1-22-07 when it chose the term "microturbine."

The Companies' proposed definition with a 500-kW capacity threshold is closer to the Commission's original interpretation of the statute, at the top end of the current industry definition, and substantially increases the size limit of a microturbine for purposes of promoting distributed generation and therefore should be adopted.

III. **The Commission's proposed Rule 4901:1-10-28(B)(6) that includes contiguous lots within a customer-generator's premises for the purpose of locating a net metering system is unreasonable and unlawful because it would allow customer-generators to cross boundaries of non-owned property, such as streets and public rights-of-way, and allow third party-owned equipment to supply electricity across property lines.**

The Order adopted a definition of "premises" that is contrary to the statutory exclusive certified territory established by the General Assembly, and would promote unsafe conditions.

An "electric load center" under the statute means "all the electric-consuming facilities of any type or character owned, occupied, controlled, or used by a person at a single location which facilities have been, are, or will be *connected to and served at* ***a metered point*** *of delivery* and to which electric service has been, is, or will be rendered." Revised Code 4933.81(E). (emphasis added) The exclusivity of service in a certified territory is established in R.C. 4933.83(A): "each electric supplier shall have the exclusive right to furnish electric service to all electric load centers located presently or in the future within its certified territory…"

The adopted definition conflicts with the statute by also including nearby properties that are separated by easements, public thoroughfares, transportation rights-of-way, or utility rights-of-way." Such properties simply are not "a single location" when crossing property not even owned by the customer. Moreover, under the Companies' tariffs and pursuant to the Commission's rules, customers cannot string their own electric wires across easements, public thoroughfares, transportation rights-of-way, or utility rights-of-way to serve other properties they own. Adopting a definition that would allow the customer or a third-party equipment owner to distribute electricity across easements, public thoroughfares, transportation rights-of-way, or utility rights-of-way should not be allowed simply because distributed generation is involved.

The Companies therefore request the Commission amend the adopted rule to exclude contiguous lots from the requirement that a net metering system be located on a customer-generator's premises.

IV. The Commission's Finding and Order is unreasonable and unlawful because it provides only for recovery of the cost of providing credits and does not include recovery for all of the costs of implementation and compliance with the new rules.

On page 19 of the Order, the Commission acknowledges the electric utilities' Comments regarding incurrence of various implementation and compliance costs regarding the proposed amendments. The Commission then approves cost deferral and discusses how cost recovery may be sought. However, the only specific cost mentioned is the cost of providing credits for excess generation which failed to expressly include, or perhaps simply overlooked,, the considerable costs to modify billing systems, provide up to 36 months of consumption history to assist in the sizing of customer-generator facilities, create new reports, create and administer a new net metering application, and make interval data available on a timely basis. It would be unjust and unreasonable to force the Companies to incur these significant costs at their own expense without the ability to seek recovery. Since there was no discussion of excluding these kinds of costs identified by the utilities, the Companies respectfully the Commission modify its Order by clarifying that any and all compliance costs shall be included within any recovery mechanism as described in the Order.

CONCLUSION

For all of the foregoing reasons, the Commission should grant rehearing on the issues discussed above.

Respectfully submitted,

/s/ *Robert M. Endris*

Robert M. Endris (0089886)
Counsel of Record
Carrie M. Dunn
FIRSTENERGY SERVICE COMPANY
76 South Main Street
Akron, OH 44308
(330) 384-5728
(330) 384-3875 (fax)
rendris@firstenergycorp.com

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

CERTIFICATE OF SERVICE

I certify that the foregoing Application for Rehearing of Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company has been filed with the Commission's Docket Information System on December 8, 2017 and is available for all interested parties.

/s/ *Robert M. Endris*_____________
One of the Attorneys for Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company