FILE

BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

The City of Huron, **Complainant,** **v.** **Ohio Edison Company,** **Respondent.**	**Case No. 03-1238-EL-CSS**
In the Matter of the Application of The Toledo Edison Company's Retail Transition Cost Recovery of Nonbypassable Generation Transition Charges and Regulatory Transition Charges	**Case No. 03-1445-EL-ATA**
In the Matter of the Application of Ohio Edison Company's Retail Transition Cost Recovery of Nonbypassable Generation Transition Charges and Regulatory Transition Charges	**Case No. 03-1446-EL-ATA**
In the Matter of the Application of The Cleveland Electric Illuminating Company's Retail Transition Cost Recovery of Nonbypassable Generation Transition Charges and Regulatory Transition Charges	**Case No. 03-1447-EL-ATA**

INITIAL BRIEF OF OHIO EDISON COMPANY, THE CLEVELAND ELECTRIC ILLUMINATING COMPANY, AND THE TOLEDO EDISON COMPANY

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I. INTRODUCTION

The City of Huron ("Huron") filed its complaint against Ohio Edison Company ("Ohio Edison") to try, for its own competitive benefit, to thwart Ohio Edison's legitimate recovery of its

Commission-approved transition revenues. Huron's position is inconsistent with the policy behind, and the words of, Amended Substitute Senate Bill No. 3 ("S.B. 3"), and it should be rejected.

The regulatory compact embodied in S.B. 3 was that Ohio's electric distribution utilities ("EDUs") would open their markets to competition in the supply of generation service, but would, in return, be permitted to recover their resulting stranded costs, approved by the Commission under R.C. 4928.39, through their unbundled rates and through nonbypassable transition charges. The Commission approved transition revenues for Ohio Edison in Case No. 99-1212-EL-ETP, and Ohio Edison has a right to receive those revenues in the manner set forth in R.C. 4928.37, which sets up a comprehensive framework for the recovery of transition revenues with a few explicit exceptions.

R.C. 4928.37(A)(1) permits EDUs to recover their transition revenues in two ways: (a) through unbundled charges to those customers who continue to take their generation service from the EDU; and (b) through *nonbypassable* transition charges to all other retail electric generation customers in the EDU's certified territory. Thus, division (A)(1) encompasses all electric customers in the EDU's certified territory, regardless of the entity from which they receive electric generation *or* distribution service. There are only two narrow exceptions to division (A)(1)'s broad coverage, and they are set out in division (A)(2). Transition charges do not have to be paid by: (a) customers of municipal utilities in existence and providing service before January 1, 1999; or (b) self-generators and customer-generators. Huron concedes that retail electric distribution customers of EDUs that switch to a municipal electric utility formed after January 1, 1999 must pay transition charges under R.C. 4928.37(A)(1)(b). (Huron Exh. 4, p. 20.) Thus, the only question presented by the Complaint is whether new customers of "new"

municipal electric utilities must pay transition charges under that statute. The answer is that they must.

The Erie Community Federal Credit Union's Rye Beach branch (the "Rye Beach Facility") comes within the scope of R.C. 4928.37(A)(1)(b). It is a retail electric distribution customer that is supplied retail electric generation service from an entity other than Ohio Edison, and it is located within Ohio Edison's certified territory. (OE Exh. 31, p. 2.) The Rye Beach Facility does *not* fall within the exception set out in R.C. 4928.37(A)(2)(a) because Huron Public Power was not in existence and providing service before January 1, 1999. (Huron Exh. 1, p. 7.) Nor does the Rye Beach Facility have generation capability, thus excluding it from the R.C. 4928.37(A)(2)(b) exception, which deals with customers who generate their own electricity. Because the Rye Beach Facility falls within R.C. 4928.37(A)(1)(b), which requires that transition charges be paid by all customers in an EDU's certified territory who are supplied generation service by someone other than the EDU, and does not come within either of the two exceptions to that requirement, the Rye Beach Facility must pay Ohio Edison transition charges on each kWh of electricity it consumes.

In its attempt to persuade the Commission that it should reach a different conclusion, Huron has suggested, through its testimony, a number of reasons why R.C. 4928.37 doesn't actually mean what it says. Ohio Edison's responses to Huron's arguments may begin to sound somewhat repetitive, but that is because, in the end, all of the arguments fail for the same reason -- they cannot overcome the structure and the language of the statute.

II. PENDING CASES

A. Case No. 03-1238-EL-CSS

Huron established its municipal electric utility, Huron Public Power ("HPP"), by ordinance adopted on September 24, 2001. (Huron Exh. 1, p. 7.) The Erie County Community

Federal Credit Union ("Erie Community") constructed the Rye Beach Facility in the Huron Corporate Park, which is within Ohio Edison's certified territory. (OE Exh. 31, p. 2.) The Rye Beach Facility chose to purchase its retail electric service from Huron Public Power.

Because the Rye Beach Facility falls within the category of customers responsible for transition charges, counsel for FirstEnergy sent a letter to Huron's mayor, on March 25, 2003, explaining why Erie Community is responsible for transition charges on the power and energy used at the Rye Beach Facility. (Huron Exh. 1, Attach. P.) On April 1, 2003, another letter explaining the matter was sent by Ohio Edison's Sandusky Area Manager to Erie Community's President. (*Id.*, Attach. Q.)

The City of Huron filed its Complaint, on May 1, 2003, in response to those letters. The Complaint alleges that because the Rye Beach Facility has never been an Ohio Edison customer, as "customer" is defined in Ohio Edison's tariffs and in the Commission's ESSS rules, it need not pay transition charges. (Complaint, ¶ 29.) Huron claims that Ohio Edison's attempt to collect transition charges from the Rye Beach Facility is unreasonable and unlawful.

B. Case Nos. 03-1445-EL-ATA, 03-1446-EL-ATA, 03-1447-EL-ATA

Huron's Complaint also alleges that Ohio Edison's current Commission-approved tariffs don't permit the collection of transition charges from the Rye Beach Facility. But Ohio Edison has now filed a tariff that covers customers such as the Rye Beach Facility. On June 30, 2003, after the filing of the Complaint, Ohio Edison, The Cleveland Electric Illuminating Company, and The Toledo Edison Company (collectively, the "Operating Companies") each filed an application for approval of a transition charge tariff that reflects the provisions of R.C. 4928.37. Thus, the issue of Ohio Edison's right to collect transition charges from the Rye Beach Facility under its currently-approved tariffs is moot. The prospective collection of transition charges will

be governed by the Commission's decision in these cases.[1] Because the Operating Companies have a right, under R.C. 4928.37, to collect transition charges as provided in the pending tariffs, the tariffs are just and reasonable and should be approved.

III. ARGUMENT

The question before the Commission in the pending cases is whether all retail electric distribution customers in an EDU's certified territory that are supplied electric generation service by an entity other than the EDU and that are not served by a municipal electric utility in existence on January 1, 1999 or are not customer- or self-generators must pay the EDU's transition charges. The language of R.C. 4928.37 and the statutory framework for the collection of transition charges dictate that they must.

A. The General Assembly Intended that Electric Distribution Utilities Would Recover Their Approved Transition Revenues and That They Would Do So From a Broad Range of Electric Customers in the EDU's Certified Territory

The Commission has acknowledged that its primary goal in interpreting a statute is to determine the intent of the General Assembly in enacting that statute. *In the Matter of the Complaint of The Toledo Edison Company and American Transmission Systems, Inc. v. City of Toledo*, Case No. 02-3210-EL-PWC (May 14, 2003 Opinion and Order, p. 11.) The Commission must look to various provisions of S.B. 3 to determine the General Assembly's intent with respect to the recovery of transition revenues and who is responsible for paying transition charges.

If Huron were correct that Erie Community does not have to pay transition charges for the Rye Beach Facility, it would be very easy for municipalities to set up municipal utilities, install some minimal level of facilities, as Huron has done, and thereby unilaterally exempt their

[1] Ohio Edison will not bill the Rye Beach Facility for transition charges retroactively, but only from the effective date of the new tariffs. (Tr. II, pp. 124, 134.)

customers from having to pay the transition charges of the EDU in whose certified territory those customers are located. That cannot have been the intent of the General Assembly, given the acknowledgment in S.B. 3 that EDUs have a right to recover their approved transition revenues, the "nonbypassable" label given to transition charges, and the structure of R.C. 4928.37.

Moreover, being able to exempt their customers from paying transition charges would give municipal utilities an unfair competitive advantage over other generation providers and over the EDUs themselves. And if municipalities were able to exempt new customers taking service from the municipal electric system, those customers would have an undue advantage over similarly-situated new customers taking service from the EDU, who must pay those charges. Thus, Huron's view of who is and is not responsible for transition charges violates notions of fundamental fairness.

1. S.B. 3 requires that EDUs receive their approved transition revenues.

The mandate from the General Assembly is that electric utilities for which transition revenues are approved by the Commission "shall receive" those transition revenues. R.C. 4928.37(A)(1). The Commission was charged with determining the total allowable amount of transition costs "to be received" by the EDU as transition revenues. R.C. 4928.39. Those statutes do not say that utilities "may" receive their transition revenues if the circumstances are right or that they "may" receive their transition revenues unless new municipal utilities are formed. They provide that the EDUs "shall" recover their transition revenues through transition charges calculated on the basis of the broad coverage of R.C. 4928.37(A)(1), subject only to the narrow exceptions in R.C. 4928.37(A)(2).

S.B. 3 sets out in detail how the Commission was to establish transition charges once it determined an EDU's allowable transition costs to be collected as transition revenues. In accordance with the applicable statutes, Ohio Edison's transition charges, which were to be in

effect for a specified period of time, were calculated based on the load it was serving at the time of the transition case *and* on its projections of load growth; thus, those transition charges, along with Ohio Edison's unbundled rates, would enable Ohio Edison to receive its transition revenues only if the charges were applicable to all of those customers -- those in the service territory at the time the transition charges were established and new customers coming into the service territory after that -- whether they take service from Ohio Edison or from another supplier. The assurance that Ohio Edison would receive its transition revenues was possible precisely *because*, under the design of R.C. 4928.37, there was no chance that the subsequent creation of new municipalities would reduce the pool of customers paying transition costs.

The only municipal electric customers that are exempt under R.C. 4928.37 are those that are customers of municipal electric utilities in existence and providing service when the transition charges were established.[2] While those municipal electric utilities may gain or lose customers after January 1, 1999, it is likely that there would not be a significant difference between the number of customers before that date and the number after. Thus, exempting only customers of then-existing municipal electric utilities, as the statute does, would not jeopardize the EDUs' transition revenue recovery.

As a remedial statute,[3] R.C. 4928.37 must be "liberally construed in order to promote [its] object . . . ." R.C. 1.11. R.C. 4928.37(A)(1)(a) and (b) were designed to ensure that EDUs with approved transition revenues would actually receive those revenues, as provided by division (A)(1) of the statute. Huron's interpretation of R.C. 4928.37, which would exempt what could be

[2] The municipal exemption is not for those who were *customers* before January 1, 1999, but those who are, at any time, customers of *utilities that were formed* before January 1, 1999.

[3] EDUs have always had a right to recover their reasonable costs of providing service. R.C. 4928.37, which gives them another way of recovering such costs that could not otherwise be recovered in a competitive market, is thus a remedial statute. *See, e.g., Van Fossen v. Babcock & Wilcox Co.*, 36 Ohio St.3d 100, 107 (1988) ("Remedial laws are those affecting only the remedy provided. These include laws which merely substitute a new or more appropriate remedy for the enforcement of an existing right." (Footnotes omitted.))

an ever-growing number of customers as more and more municipalities set up electric utilities, not only violates that rule of statutory construction but also ignores the legislative intent behind, and destroys, that carefully-crafted design.

2. Transition charges are expressly designated as "nonbypassable."

The General Assembly further manifested its intent that transition charges be paid by all customers in the EDU's certified territory other than those described in R.C. 4928.37(A)(2) by labeling transition charges to be paid by customers that do not take generation service from the EDU as "nonbypassable." The statute does not say that transition charges shall be nonbypassable for all customers except new customers taking all of their service from a municipality formed after January 1, 1999. Transition charges are nonbypassable for all customers except those described in R.C. 4928.37(A)(2).

If the matter had not been important to the General Assembly, the statute could simply have set out the categories of customers who must pay the transition charges and stopped there. But by designating transition charges as nonbypassable, the General Assembly emphasized that customers could not avoid paying transition charges by taking generation *and* distribution service from an entity other than the EDU in whose certified territory they are located.

Given that the General Assembly *expressly* stated that transition charges are nonbypassable, it could not at the same time have intended, implicitly, to allow a loophole that would later permit the creation of a municipal electric utility that would convert these charges to bypassable ones. Intrinsic in the choice of the word "nonbypassable" is the recognition by the legislature that absent a legal restraint to the contrary, an entity would be motivated to bypass, if it could, paying a charge that it would otherwise be required to pay.

Taking it one step farther, a municipality, as it considered whether it could economically advantage new electric consumers by shielding them from the payment of transition charges

through the creation of a nominal municipal utility, would certainly be tempted to do so, especially if that could be effected with only a modest expenditure of its own resources. This is exactly what Huron has done.

In the words of Huron's City Manager, Michael E. Tann, HPP has a "fairly limited operation." (Tr. I, p. 36.) HPP's facilities are minimal. It owns one pole and certain equipment attached to the pole, some underground line, two meters, and some street lights in the Huron Corporate Park. (*Id.* at 39-40; OE Exh. 28.) It does not even own the transformer on the Rye Beach Facility's property; that was paid for by Erie Community, not by Huron or HPP. (Tr. I, pp. 98-99.) HPP does not have any employees of its own; an employee of the Huron water department spends about 10% of his time on HPP activities. (*Id.* at 45.) HPP has no office or telephone number; it does not have its own bill; and at the time the Rye Beach Facility began taking service from HPP, the application form for city services did not reference electricity. (*Id.* at 46; *see also* OE Exh. 21.) Even if HPP is a legitimate entity, it is not a very substantial one.

The comparative ease and availability of this ploy, not to mention the likelihood of its use by a municipality, would not have been lost on the General Assembly. The recognition of this loophole and the General Assembly's intent to close it is demonstrated by denominating transition charges as "nonbypassable" and by specifying only narrow exceptions to the broad scope of R.C. 4928.37(A)(1)(b).

3. For their customers to be exempt from paying transition charges, municipal electric utilities had to be in existence and providing service even before the effective date of S.B. 3.

Additional evidence of the General Assembly's intent regarding transition charges is the way in which it crafted the transition charge exception for customers of municipal utilities. R.C. 4928.37(A)(2)(a) states that "[n]otwithstanding division (A)(1)(b)," which requires the payment of transition charges by *all* retail electric distribution customers in the EDU's certified territory

who are supplied electric generation service from an entity other than the EDU, transition charges are not payable on electricity supplied by a municipal electric utility to customers in the EDU's certified territory if the municipal utility provides transmission or distribution service, or both, through facilities it owns or operates, "and if the municipal electric utility was in existence, operating, and providing service as of *January 1, 1999*." (Emphasis added.) S.B. 3 was signed by the governor on July 6, 1999. Exempting customers of only those municipal utilities that had been formed six months before that date ensured that municipalities did not, while S.B. 3 was being debated, rush to establish municipal utilities so that their customers could avoid paying transition charges. If the General Assembly had not been concerned about preventing customers from avoiding the payment of transition charges, it would not have limited the exemption to customers of municipal electric utilities in existence at least *six months* before S.B. 3 was signed and *nine months* before S.B. 3's October 5, 1999 effective date.

All of these pieces of R.C. 4928.37 clearly indicate the legislative intent that an EDU receive its approved transition revenues through the payment of transition charges by all electric customers in the EDU's certified territory not taking generation service from the EDU, other than those *explicitly addressed* in division (A)(2). Together they ensure that once the Commission determined that a utility was entitled to recover a specified amount of transition revenues, the utility would actually recover those revenues, through charges that could not be bypassed by customers taking their electric service from hastily-formed municipal utilities.

B. The Structure of R.C. 4928.37 Is Consistent With the Legislative Intent

R.C. 4928.37 sets out a comprehensive plan for the recovery of approved transition revenues that carries out the legislative intent that EDUs receive their Commission-approved transition revenues through unbundled rates and nonbypassable transition charges. Division (A)(1)(b) includes in the pool of customers that must contribute to the recovery of transition

revenues all retail electric distribution customers in the EDU's certified territory and then provides, in division (A)(2), specific, narrow exceptions that are logical and reasonable.

1. R.C. 4928.37 creates a comprehensive plan for the recovery of transition charges.

The structure of R.C. 4928.37 is straightforward and logical. R.C. 4928.37 addresses how all customers in an EDU's certified territory will contribute to the EDU's recovery of transition revenues and then provides specific exceptions for certain of those customers. Its structure clearly shows that the General Assembly intended that transition charges would be paid by all electric customers in an EDU's certified territory -- customers who shop and those who don't, customers who receive electric distribution service from the EDU and those who don't, those who were customers on the effective date of S.B. 3 and new customers -- except those described in division (A)(2).

R.C. 4928.37(A)(1) says that an EDU "shall receive" its approved transition revenues in two ways: through unbundled rates payable by customers supplied retail generation service by the EDU, and through the payment of nonbypassable transition charges by customers who are supplied retail electric generation service by some other entity and who do not pay the EDU's unbundled generation rates. Thus, R.C. 4928.37(A)(1) covers all of the electric customers in the EDU's certified territory and specifies how they must contribute to the recovery of the EDU's transition charges. The statute does not say that whether or not a customer will pay transition charges depends on who is providing *distribution* service to that customer.

The reference to "the customer's electric distribution utility" in the first sentence of R.C. 4928.37(A)(1)(b) is simply a way of designating the universe of customers -- those within the EDU's certified territory -- that are responsible for paying transition charges. If only those customers who take distribution service from the EDU were required in the first instance to pay

transition charges, the exception for municipal utilities providing service before January 1, 1999 would have been written differently. There would have been no need to except customers of municipalities that provide distribution service or both transmission and distribution service because, under this erroneous view, those customers would not have been covered by division (A)(1)(b) in the first place. But the exception in R.C. 4928.37(A)(2)(a) encompasses those customers not receiving distribution service from EDUs, thus indicating that even these customers must pay transition charges unless they are explicitly covered by the exception. All customers in the EDU's certified territory taking retail generation service are covered by R.C. 4928.37(A)(1)(a) and (b).

2. The exceptions set out in division (A)(2) for municipal utilities existing on January 1, 1999 and for customer-generators and self-generators are reasonable and logical.

Having specified that all retail generation customers in the EDU's certified territory are responsible, through either unbundled rates or transition charges, for transition revenues, R.C. 4928.37 then explicitly excepts certain customers. R.C. 4928.37(A)(2)(a) excepts customers of municipal utilities that existed before January 1, 1999, and division (A)(2)(b) excepts customer-generators and self-generators. Those exceptions make sense, because they cover the only categories of customers in the EDU's certified territory that, before January 1, 2000, could take electric generation service from an entity other than the EDU.

R.C. 4928.37(A)(2)(a) is not ambiguous. It says that customers in the certified territory of an EDU for which transition revenues have been approved do not have to pay transition charges if: (1) they are supplied electricity by a municipal electric utility that existed and provided service before January 1, 1999; (2) the municipal electric utility provides transmission or distribution service, or both; and (3) the transmission or distribution service is provided through facilities the municipal electric utility owns or operates, in whole or in part. The

January 1, 1999 date ensured that municipalities would not be able, before the effective date of the statute, to set up municipal utilities to allow their customers to avoid paying transition costs. And the requirement that the municipal electric utility actually own or operate transmission or distribution facilities ensures that even pre-January 1, 1999 municipal utilities could not exempt their customers from paying transition charges by setting up sham transactions. The General Assembly wanted to exempt customers of legitimate, already existing municipal utilities from paying transition charges. It did not exempt customers, like the Rye Beach Facility, of municipal electric utilities, like HPP, formed after January 1, 1999.

Division (A)(2)(b) sets out the other exception to the requirement that all customers not taking generation service from the EDU pay transition charges. If a customer generates electricity for its own use, feeds electricity back to its electric service provider, and purchases electricity from an electric service provider, the customer will pay transition charges only on the electricity that is delivered to the customer by the EDU. This exception makes sense, because it is consistent with the policy to encourage the development of small generation facilities. R.C. 4928.02(C). The Rye Beach Facility is not a customer-generator or a self-generator, so it is not exempt from paying transition charges under division (A)(2)(b).

The overall structure of R.C. 4928.37, which sets out how all retail generation customers in the EDU's certified territory will contribute to the EDU's recovery of transition revenues and then the narrow exceptions, is consistent with the intent of the General Assembly that EDUs receive their transition revenues and that all customers in the EDU's certified territory who benefit from competition contribute.

C. Huron's Interpretation of R.C. 4928.37 Is Inconsistent with the Rules of Statutory Interpretation

R.C. 4928.37 is a comprehensive statute. R.C. 4928.37(A) and (B) address all electric customers in an EDU's certified territory. They cover all customers that take generation service from the EDU and all customers that take generation service from someone else, with the exception of customers of municipal electric utilities formed before January 1, 1999, customer-generators, and self-generators. There are no gaps, no customers left in limbo. No customers are simply "read out" of the statute. No sections of the statute are superfluous; all words in the statute have meaning. The General Assembly wanted to make clear who would and would not be responsible for transition charges, and R.C. 4928.37 does that.

But for its purposes, based on the allegations of the Complaint, Huron has come up with an interpretation of the statute that would simply read customers like the Rye Beach Facility out of the statute. What is more, Huron's interpretation renders parts of the statute, including the whole of R.C. 4928.37(A)(2)(a), meaningless. That cannot be the proper interpretation of that statute.

Huron does not want Huron Public Power's customers to have to pay transition charges,[4] for if they did, Huron Public Power could not offer potential customers a competitive advantage over other electric providers, including Ohio Edison. As explained by Huron's Mayor at an April 14, 2003, City Council meeting, HPP was formed to serve customers in the corporate park because Huron believed it could offer businesses a 30-50% savings on electricity over Ohio Edison. (OE Exh. 25, p. 2.) But, as Mr. Tann explained, if HPP customers are responsible for

[4] As suggested by the testimony of its witness David R. Straus, Huron apparently will limit its arguments about who should be exempt from transition charges under R.C. 4928.37 to new customers of HPP, excluding those who may be former customers of the EDU who switched to HPP. This issue is addressed in section III. C. 5, *infra*.

transition charges, HPP's rates will be higher than Ohio Edison's. (Huron Exh. 1, p. 10.) Thus, unless HPP's customers can avoid transition charges, HPP cannot be competitive.

Being well past the deadline for establishing its own utility to enable its customers to avoid those charges, Huron has to resort to arguing that R.C. 4928.37(A)(1)(b) doesn't mean what it says. Its interpretation ignores not just some words of R.C. 4928.37, but a *whole section* of the statute, and thus is not only illogical, but also contrary to the well-recognized rule of construction, set forth in R.C. 1.47(B), that presumes that in enacting a statute, the General Assembly intended the entire statute to be effective. The rules of statutory construction require that all words in a statute be given meaning and that no words be superfluous. *East Ohio Gas Co. v. Pub. Util. Comm.*, 39 Ohio St.3d 295 (1988). Huron's interpretation violates those rules. It also ignores the legislative intent behind the design of the transition charge recovery mechanism -- it would eviscerate S.B. 3 by giving *municipalities* the power to exempt customers from paying transition charges and thus to prevent the EDUs from receiving their approved transition revenues. That cannot have been the General Assembly's intent.

Huron's interpretation of R.C. 4928.37, not coincidentally, is that customers that take both generation and distribution service from any municipal electric utility, even one formed after January 1, 1999, and that have never taken service from the EDU are not included in R.C. 4928.37(A)(1)(b) in the first place, and thus do not have to be covered by any particular exemption in division (A)(2). Under that reading of the statute, customers of municipal electric utilities formed after January 1, 1999 who were never customers of the EDU are the *only* electric customers in the EDU's certified territory that are not addressed by the statute. That is completely illogical. If the General Assembly had intended that customers taking both generation *and* distribution service from municipal electric utilities formed after January 1, 1999

not pay transition charges, it would have said so explicitly, as it did with the other exceptions. After all, the exception for municipal utilities providing service *before* January 1, 1999 applies to customers taking both transmission and distribution service, or just distribution service, from the municipal utility. Why would there not be an explicit exception for customers taking both transmission and distribution service, or just distribution service, from municipal utilities formed *after* January 1, 1999?

Huron's interpretation of R.C. 4928.37 requires a strained reading of the statute, a reading that does not comport with the rules of statutory interpretation or with the intent of the statute and the carefully crafted plan for the recovery of transition charges. Because it is so at odds with the intent of the General Assembly and the rules of statutory construction, Huron's interpretation must be rejected.

1. The responsibility for transition charges does not depend on whether the customer takes, or took, distribution service from the EDU.

R.C. 4928.37(A)(1)(b) provides for recovery of transition charges from "each customer that is supplied retail electric generation service . . . by an entity other than the customer's electric distribution utility." Huron takes the position that although the Rye Beach Facility is supplied retail generation service by an entity other than Ohio Edison, the Rye Beach Facility is not responsible for transition charges because it is not an Ohio Edison retail electric distribution service customer.

If Huron were correct, unknown numbers of customers could avoid paying transition charges, which would thwart the overall plan for the recovery of transition charges set forth in R.C. 4928.37. It would necessarily mean that even those customers of municipal electric utilities created *after* January 1, 1999 would be exempt from paying transition charges if those customers take both generation *and* distribution service from the municipal utility. Since that is the typical

circumstance for municipal utility customers, and given the commitment to transition revenue recovery manifest in R.C. Chapter 4928, Huron's interpretation of the statute cannot be correct. A closer analysis of the statutory language bears this out.

(a) Huron's interpretation would make the references to "certified territories" meaningless.

Huron is not only wrong from a public policy standpoint, its argument is also incorrect under principles of statutory interpretation that require that no words in a statute be ignored. *East Ohio*, 39 Ohio St. 3d at 299. Huron alleges that "OE has the authority to collect transition charges only from a customer's service facility that is actually receiving distribution service from OE or has made an accepted application to receive distribution service from OE." (Compl., ¶ 45.) It relies on the references in R.C. 4928.37(A)(1)(b) to "the customer's electric distribution utility" and "such retail electric distribution service customer." But it ignores entirely the reference in the same statutory provision to the "certified territory" of an EDU.

All of the language the General Assembly included in the statute must be considered. The statute does not say that the only customers responsible for an EDU's transition charges are those customers taking distribution service from that EDU. Rather, it says that all electric customers in the EDU's certified territory, regardless of their distribution service provider, are responsible for the EDU's transition charges, unless they are exempt pursuant to the express exceptions in the statute. The Rye Beach Facility is located in Ohio Edison's certified territory and is certainly *somebody's* retail electric distribution service customer. (Tr. I, p. 154.)

R.C. 4928.37(A)(1)(a) covers end-users taking generation service from the EDU. The first sentence of R.C. 4928.37(A)(1)(b) is the "everybody else" provision -- it says that EDUs may collect their transition revenues through nonbypassable transition charges paid by all electric customers supplied electric generation service by an entity other than the EDU. Huron

attempts to use the second sentence to undo the broad sweep of the first, by saying that only distribution service customers of the EDU must pay transition charges. But the only exceptions to division (A)(1) are set out in division (A)(2) and they are set out explicitly; Huron's interpretation would create a new, implicit exception in division (A)(1). Surely the General Assembly, having itself explicitly written two exceptions into the statute, did not intend that a third should be inferred.

"[T]he customer's electric distribution utility" in the first sentence of R.C. 4928.37(A)(1)(b) means the electric distribution utility in whose certified territory the customer is located, regardless of which entity actually sells electric distribution *service* to the customer. It is a reference to the electric distribution utility from which the customer, because it is located in that utility's certified territory, would take service but for its bypass of the EDU.

If the only customers responsible for a utility's transition charges are those taking distribution service from that utility, there would have been no need for the General Assembly to refer to "retail electric distribution service customer[s] *in the certified territory of the electric utility for which the transition revenues are approved* . . . ." (Emphasis added.) It could simply have relied on the references to the customer's "electric distribution utility" to define the universe of those who must pay transition charges. Given the continued existence of certified territories even after the effective date of S.B. 3, customers taking retail electric distribution service from the EDU are necessarily in the EDU's certified territory. Thus, Huron's view that the only customers responsible for transition charges are EDU distribution service customers makes the reference to the EDU's certified territory meaningless.

The references to the utility's "certified territory" were necessary to define the group responsible for transition charges precisely because that group is *not* comprised of only the

utility's distribution service customers. If the General Assembly had intended the result Huron wants, it would have said that "the transition charge shall be payable by each customer taking electric distribution service but not generation service from the electric distribution utility for which the transition revenues are approved." But it did not. Huron's interpretation of the statute violates the statutory construction rule that all words in a statute must be given meaning -- it makes the references to the utility's certified territory superfluous.

(b) Huron's interpretation would render R.C. 4928.37(A)(2)(a) meaningless.

Huron's position that an EDU may bill transition charges only to its own distribution customers also conflicts with the interpretive rule that entire statutes are intended to be effective (R.C. 1.47), because it renders much of the municipal exception in R.C. 4928.37(A)(2)(a) meaningless. There would have been no need for R.C. 4928.37(A)(2)(a), which exempts *some* customers that are supplied retail electric generation and distribution service by a municipal utility, if *all* customers supplied retail electric generation and distribution service by municipal utilities, regardless of when they began providing service, were exempt from paying transition charges in the first place.

Moreover, the way in which the R.C. 4928.37(A)(2)(a) exception is worded shows that customers taking both generation and distribution service from municipal utilities are covered by subdivision (A)(1)(b). The exception in R.C. 4928. 37(A)(2)(a) for customers of municipalities providing service as of January 1, 1999 refers to municipal electric utilities providing "electric transmission or distribution service, or both services . . . ." If the municipal electric utility were providing both services, or just distribution service, in addition to generation service, then, under Huron's interpretation, a customer of that municipal utility would not fall within the scope of division (A)(1)(b), no matter when the municipal electric utility had been formed, because the

customer would not be a distribution service customer of the EDU. But if Huron's interpretation were correct, the R.C. 4928.37(A)(2)(a) exception would have been narrower -- there would have been no need for an exception for customers of pre-January 1, 1999 municipal utilities taking distribution service or both transmission and distribution service. The only municipal utility generation customers that would have had to have been addressed in such an exception would be those few customers taking only transmission service from the municipal utility.[5] But division (A)(2)(a) is much broader, indicating that the universe of those responsible for transition charges is not just customers taking distribution service from the EDU, but all customers in the EDU's certified territory, no matter who provides them electric distribution service, so long as the customers are taking generation service from an entity other than the EDU.

Huron's reading of the statute would also make the first phrase of division (A)(2)(a) superfluous. If customers taking generation *and* distribution service from municipal utilities were not covered by division (A)(1)(b) in the first place, then there would have been no need for the words "notwithstanding division (A)(1)(b) of this section" at the beginning of division (A)(2)(a). The only reasonable explanation for the words "notwithstanding division (A)(1)(b)" is that *all* generation customers of municipal utilities, regardless of their distribution service provider, are covered by the general rule set out in division (A)(1)(b) in the first place. Only then would the narrow exception set out in division (A)(2)(a) have meaning.

2. The definitions of "customer" on which Huron relies are inapplicable.

Pointing to the references to a "customer" in R.C. 4928.37, Huron makes much of the fact that the Rye Beach Facility is not an Ohio Edison "customer" because Erie Community never applied for distribution service from Ohio Edison for the Rye Beach Facility, nor is it taking distribution service under Ohio Edison's tariff. There is no definition of "customer" in R.C.

[5] It is rare indeed for a municipal utility to provide transmission and *not* distribution service.

Chapter 4928. So Huron looks to definitions of "customer" in other places to support its interpretation. But the definitions on which Huron relies were written for other purposes, unrelated to S.B. 3 and the collection of transition charges.

The first of those definitions referred to by Huron's witness David R. Straus is the definition of "customer" in Rule 4901:1-10-01(H), O.A.C., which deals with the minimum electric safety and service standards ("ESSS"). (Huron Exh. 4, p. 8.) That rule defines a "customer" as "any person who has an agreement, by contract and/or tariff, with an electric distribution company or by contract with an electric service company, to receive service." Of course, in a rule dealing with *service* standards, it is logical to define a customer as one who takes service directly from the utility. No other definition would make sense. But those to whom a utility has a duty to provide a particular level of service do not have to be -- and are not -- the same as those who have a responsibility to pay transition charges. That responsibility is determined by R.C. 4928.37, not by the Commission's rules. The definition from the ESSS rules is not relevant to this case.

Also not relevant is the meaning of "customer" from Ohio Edison's currently-approved tariffs, to which Mr. Straus also refers. (*Id.*) The currently-approved tariff provides that "[f]or each class of service requested by a customer, before such service is supplied by the Company, an accepted application from the customer or other form of contract between the Company and the customer will be required." For this usage, too, it is significant that there is a direct retail relationship between Ohio Edison and the customer; the currently-approved tariffs set out the rights and responsibilities attendant to *that relationship*. Under R.C. 4928.37, however, the purchase of a service from the EDU is not a necessary condition for the customer to be responsible for transition charges.

Mr. Straus relied on the definitions of customer in the Ohio Administrative Code[6] and in Ohio Edison's tariffs simply to "support[] the common-usage definition" of the term "customer." (Huron Exh. 4, p. 9.) But those definitions are not examples of a common use of the word "customer"; it is the context in which they appear, and the purpose of the rules and the tariff, that prescribe those particular definitions. Mr. Straus acknowledged that he "can offer no opinion on the specific applicability of the definition in the Ohio Administrative Code or on Ohio Edison's tariff to the text of RC § 4928.37 . . . ." (*Id.*) Given that fact, his testimony with respect to those definitions is irrelevant.

More relevant to the meaning of the word "customer" in R.C. 4928.37 is the use of that word elsewhere in S.B. 3. Although Mr. Straus suggested in his pre-filed testimony that "the term 'customer' is not the same as the term 'consumer' " (*id.*), he conceded on cross-examination that "customer" and "consumer" are sometimes used interchangeably. (Tr. I, p. 148). That is the case throughout S.B. 3, and even *within* certain sections of S.B. 3. For example, R.C. 4928.14(A) requires EDUs to provide "consumers" a market-based standard service offer for all competitive services "necessary to maintain essential electric service to consumers." Division (B) requires each EDU also to offer "customers within its certified territory" competitive retail electric service at a price determined through a competitive bidding process. There is no logical reason to require a standard service offer to one set of end-users but to require a competitively-bid offer to a different set. Moreover, there is no reason that the statute should require price offerings only to end-users that already have a relationship with the EDU, whether defined as "customers" or "consumers." The offers are *available* to all end-users in the EDU's certified territory, whether or not they ultimately choose to take the service from the EDU.

[6] Though he relied on the definition in the Ohio Administrative Code, Mr. Straus had not himself reviewed the Ohio Administrative Code and in fact did not know the difference between the Ohio Administrative Code and the Ohio Revised Code. (Tr. I, p. 154.) The definition was given to him by Huron's counsel. (*Id.*)

Likewise, R.C. 4827.07 uses the terms "customer" and "consumer" interchangeably. That statute requires the prices of competitive retail electric services to be "itemized on the bill of a customer or otherwise disclosed to the customer," but then goes on to refer to a competitive retail electric service "supplied to any consumer on such a basis." Here again there is no logical basis for interpreting the words "customer" and "consumer" differently.

R.C. 4928.08, too, also uses the words interchangeably. Division (A) states that the section applies to an electric cooperative or a municipal electric utility aggregator "to the extent of a competitive retail electric service it provides to a customer . . . ." Division (B) then goes on to say that certain entities shall not "provide a competitive retail electric service to a consumer in this state" without first being certified.

It is not surprising that Mr. Straus might not have known of those other uses of the term "customer" in S.B. 3, because he is not an expert on Ohio law and was not involved in the development of S.B. 3. (Huron Exh. 4, p. 3; Tr. I, pp. 140-141.) Nothing supports Mr. Straus's conclusion that "customer" as used in R.C. 4928.37 "with respect to Ohio Edison or any other entity is a reference to a consumer that purchases a jurisdictional service from Ohio Edison or that other entity." (Huron Exh. 4, p. 9.) The use of the word "customer" elsewhere in S.B. 3 confirms that the Rye Beach Facility is a customer within the meaning of the statute.

3. The EDU need not deliver electricity to the customer to bill the customer for transition charges.

Huron will no doubt argue that R.C. 4928.37(A)(1)(b) permits an EDU to bill transition charges only on electricity it delivers to the end-user and that consequently Ohio Edison cannot bill the Rye Beach Facility transition charges because Ohio Edison does not deliver electricity to the Rye Beach Facility. But that is just another version of Huron's argument that Ohio Edison may bill transition charges only to its own distribution customers. For the reasons discussed

above, that cannot be what R.C. 4928.37 means. If it were, it would be too easy to defeat the purpose of the statutory scheme for transition cost recovery.

To give meaning to the second sentence of R.C. 4928.37(A)(1)(b), it must be read to mean that the transition charges shall be billed by the electric distribution utility "on each kilowatt hour of electricity delivered to the customer," regardless of who is delivering that electricity. The statutes do not define "deliver," but it must mean something other than providing electric distribution service. If the General Assembly had intended to make the payment of transition charges dependent on the customer taking distribution service from the EDU, the statute would have said that. It didn't.

4. Even if delivery of electricity to the customer by the EDU is a prerequisite to the recovery of transition charges from the customer, Ohio Edison delivers power to the Rye Beach Facility within the meaning of R.C. 4928.37(A)(2)(a).

Even were the Commission to find that the EDU must deliver electricity to the ultimate consumer to be able to bill that consumer transition charges, Ohio Edison meets that test. Because electricity consumed by the Rye Beach Facility flows over Ohio Edison distribution lines and through Ohio Edison facilities, and because Ohio Edison provides a component of the transmission service that effectuates the delivery of power to the Rye Beach Facility, then Ohio Edison "delivers" power to the Rye Beach Facility.

Huron suggests that Ohio Edison cannot be said to deliver power to the Rye Beach Facility because "deliver" means "distribute" and because the distribution of electricity to the Rye Beach Facility is only by HPP. Mr. Straus opined that "delivery begins after Huron Public Power receives the power at its delivery point" and that anyone attempting to be precise in his

usage of words would equate "delivery" to local distribution service. (Tr. I, pp. 165, 170.)[7] But, taking Mr. Straus's position to its logical conclusion, anyone being "precise" would not use the words "deliver" or "delivery" at all, especially if he or she were only referring to, in our example, the distribution of electricity directly to the consumer. Mr. Straus's argument actually leads to the conclusion that by using the word "delivery," the General Assembly meant something other than just distribution.

The use of "deliver" and "delivery" in S.B. 3 supports that view. There is no definition of "deliver" in S.B. 3 or anywhere else in Title 49. But the use of the words "deliver" and "delivery" in S.B. 3 indicate that "deliver" and "delivery" do not mean only "distribute" or "distribution." R.C. 4928.14(C)(3), for example, states that a supplier is deemed to have failed to provide retail generation service if, among other things, "the supplier is unable to provide delivery to transmission or distribution facilities . . . ." Because "suppliers" includes entities other than just electric distribution utilities,[8] "delivery" must mean something other than just distribution. R.C. 4928.35(D) uses "deliver" in the same way. It states that "the failure of a supplier to deliver retail electric generation service shall result in the supplier's customers . . . defaulting to the utility's standard service offer . . . ." Although there are instances in S.B. 3 of "deliver" and "delivery" being used in a way that suggests distribution, that is not always the case.

Mr. Straus admits that even in the utility industry, transmission is sometimes called "delivery" but again suggests that such a use of words would not be "precise." (Tr. I, p. 171.) Thus, although Mr. Straus looks to the "common-usage definition" of the term "customer"

[7] Indeed, even the term "distribution" was not quite right for Mr. Straus, who opined that delivery means something narrower, involving only the part of distribution that results in a physical connection to the end-user. (Tr. I, p. 170.)

[8] "Supplier" in division (C)(3) refers back to "generation supplier" in division (B).

(Huron Exh. 4, p. 9), he apparently would not apply the same test for interpreting the word "delivery." But in fact, the broader use of "deliver" -- to mean transmission alone or to encompass both transmission and distribution -- is, contrary to Mr. Straus's contention, common in the utility industry. For example, there is an Office of Electricity Delivery and Energy Reliability in the Department of Energy whose mission, as stated on its web site, is "to modernize and expand America's delivery system . . . ." *See* www.energy.gov/engine/content.do?BT_CODE=EDG1000. Certainly, that federal office is concerned not only with that part of the electric grid that involves a physical connection to the end-user, but the country's entire electric system from the point of generation to the point of consumption. Mr. Straus dismisses the significance of that by suggesting, of all things, that the Department of Energy is "irrelevant." (Tr. I, p. 178.) (That would no doubt surprise a lot of people employed by that agency.) Mr. Straus also suggests that the denomination of a contract between Buckeye Power, Inc. and several electric distribution utilities as a Power Delivery Agreement is meaningless, because it didn't involve a regulatory proceeding and because the contract was entered into in 1968. (*Id.* at 174-175.) But those observations are irrelevant. The point is that in the industry, "delivery" has always meant more than just local distribution.

The proof that it is common in the industry to use "deliver" in a broader sense than Mr. Straus would use it can be found in agreements directly related to this case. In the City of Huron/AMP-Ohio Master Services Agreement, entered into in 2002, the parties agreed to "cooperate to make arrangements with others to provide *delivery* service and facilities which will permit the establishment of the initial or additional Points of Delivery" and they refer to "the amount of electric power and energy to be *delivered* by Seller [AMP-Ohio] to Buyer [Huron]." (Huron Exh. 1, Attach. E, p. 2 of the Agreement, ¶¶ 3.2, 3.3 (emphasis added).) Appendix 2 to

the Network Integration Transmission Service ("NITS") Agreement between ATSI and AMP-Ohio, which sets out Network Resource Information and which Huron went to great pains to show is a wholesale transmission agreement, repeatedly refers to "power *delivered* to FirstEnergy" at various interconnects. (Huron Exh. 3, Attach. B, pp. 28-29 (emphasis added).)

Taking another tack, Mr. Straus suggests that there is no "delivery" of energy by Ohio Edison to the Rye Beach Facility because Ohio Edison does not provide a retail electric service, under Commission-approved tariffs, to the Rye Beach Facility. (Huron Exh. 4, p. 16.) But whether or not the service that Ohio Edison is providing is retail or wholesale is irrelevant to whether Ohio Edison delivers power within the meaning of R.C. 4928.37(A)(1)(b).

Power flows to Huron Public Power the NITS Agreement originally between American Transmission System, Inc. ("ATSI") and AMP-Ohio, on behalf of several municipalities including Huron Public Power. (OE Exh. 37, p. 2 and Attach. A.) That agreement has been assigned by ATSI to the Midwest Independent Transmission System Operator ("Midwest ISO"). (*Id.* at 2-3.) But the Rye Beach Facility is served at voltages below 69 kV. (OE Exh. 31, p. 5.) When Ohio Edison's facilities were transferred to ATSI, Ohio Edison retained ownership and control over facilities used to serve voltages below 69 kV. (*Id.*; Tr. I, pp. 209-210.) Consequently, Ohio Edison's facilities have to be used to deliver the power and energy to the Rye Beach Facility.

The path of the energy delivered to the Rye Beach Facility is through a 69 kV transmission line owned by ATSI to and through Ohio Edison's Bogart distribution substation. (OE Exh. 31, p. 5.) From there, energy flows through approximately 1.7 miles of Ohio Edison's 12.47 kV Bogart East distribution line to an Ohio Edison distribution utility pole located on Rye Beach Road, and then through a 50-foot single-span distribution radial tap to 12.47 kV cluster-

mounted primary distribution metering equipment and an interval meter, which constitute the delivery point as described in the NITS Agreement. (*Id.*) From there, the energy goes the rest of the way through the minimal Huron Public Power equipment. Whether or not Ohio Edison has any agreement directly with Huron or the Rye Beach Facility, the energy destined for the Rye Beach Facility flows through Ohio Edison's substation, over its lines, and through its metering equipment.

The purpose of the delivery point is to have energy "delivered across Ohio Edison's line to Huron and to . . . Huron Public Power's customer." (Tr. I, pp. 75-76.) Pursuant to the NITS Agreement, ATSI was responsible for having the delivery point constructed for Huron. But pursuant to a Service Level Agreement between ATSI and the FirstEnergy Operating Companies, Ohio Edison constructed and owns the delivery point. (OE Exh. 31, p. 3.) It was up to Huron to determine at what level it took energy at the delivery point. (Tr. II, p. 100.) Huron's application to ATSI for the delivery point specified that it wanted "service from the Ohio Edison 12,470/7,200-volt distribution on Rye Beach Road in Huron, Ohio to service the City's Corporate Park." (OE Exh. 31, Attach. A, p. 1.) From that point, the dealings were directly between Huron and Ohio Edison. Ohio Edison sent to Huron a "Customer Work Approval and Payment Information -- Western Region" form for the construction of the delivery point, at a cost of $20,561.14. (OE Exh. 18.) Ohio Edison received from Huron a purchase order for a "primary meter location," in the amount of $20,561.14, naming Ohio Edison as the vendor. (OE Exh. 31, p. 4, Attach. C.) Ohio Edison constructed the delivery point and invoiced Huron for the work (OE Exh. 31, p. 4, Attach. D). And Huron paid Ohio Edison directly for the delivery point. (Tr. I, pp. 58, 240.)

But Ohio Edison's participation in the delivery process is not limited to the construction of the delivery point or the use of its facilities. Ohio Edison is an active participant in the delivery process. Ohio Edison provides wholesale distribution service, as defined under the MISO tariff, to HPP. (Tr. II, pp. 53, 55, 60-61.) It is true that under an agency agreement between the FirstEnergy operating companies and ATSI, ATSI may commit the use of the operating companies' facilities when arranging for transmission service, but the operating companies do not simply hand over control of their distribution facilities to ATSI or to MISO. Ohio Edison owns, maintains, and controls those facilities as part of its distribution system. (OE Exh. 31, p. 5; Tr. II, p. 74.) Under the agency agreement, the operating companies "agree to provide all services necessary or appropriate for performance under the Transmission Tariff, and service agreements thereunder, for wholesale transmission service using Distribution and Transmission Facilities." (OE Exh. 39, p. 39.) While ATSI may have had the authority to commit the use of Ohio Edison's distribution facilities when arranging for transmission service for AMP-Ohio on behalf of its members, it is Ohio Edison that provides the service using those distribution facilities. (Tr. II, pp. 75, 76.)

In return for providing wholesale distribution service, Ohio Edison gets paid a distribution level transmission charge of $0.92 per kw per month. (OE Exh. 31, p. 5; OE Exh. 37, Attach. A, Appx. 3.) This charge is also referred to in the agency agreement as the Distribution Adder; the agency agreement requires that ATSI distribute revenues collected from the Distribution Adder to the appropriate FirstEnergy operating company, in this case Ohio Edison. (OE Exh. 39, Operating Agreement, p. 39 and Revised Operating Agreement, Appx. C, p. 2.)

It is true that the wholesale distribution service is part of a wholesale transaction. But delivery encompasses both transmission and distribution, regardless of whether it is wholesale or retail. Because Ohio Edison delivers electricity to the Rye Beach Facility through its facilities and by providing wholesale distribution service to HPP, Ohio Edison has a right under R.C. 4928.37(A)(1)(b) to collect transition charges from the Rye Beach Facility.

5. The distinction urged by Huron between new customers and switching customers has no basis in the statute.

The fact that he is not an expert on Ohio law and was not involved in the development of S.B. 3 does not stop Mr. Straus from opining that the "transition charge was designed to be generally nonbypassable to prevent customers from switching to another utility, other than existing municipal utilities, thus increasing the burden on the remaining customers." (Huron Exh. 4, p. 20.) He suggests that the Rye Beach Facility's decision to purchase electric service from HPP "did not burden Ohio Edison's retail customers any more than a decision by an equivalent new customer to select a location in Chicago, or Columbus or Paris, instead of Akron, would." (*Id.*) Even putting aside the fact that he has no basis whatever to support it, there are at least two problems with Mr. Straus's conclusion.

First, there is nothing in R.C. 4928.37 that suggests that the responsibility for transition charges lies with only those end-users who were customers of the EDU on the effective date of S.B. 3 and who then switch to another generation provider or another utility. The words of the statute cannot reasonably be interpreted to mean that "bypass" only refers to switching by those already served by the EDU. "[E]ach customer that is supplied retail electric generation service during the market development period" must contribute to the payment of transition revenues, not just those who were customers at the start of the market development period. R.C. 4928.37(a) and (b).

Second, there is no logic to excepting new customers of municipal utilities from the payment of transition charges when new customers of the EDU must contribute to transition revenues through their tariffed rates, as required by R.C. 4928.37(A)(1)(a). While Mr. Straus speculates that the Rye Beach Facility "did not burden Ohio Edison's retail customers" in the sense of creating the costs now recovered through transition charges, the fact is that GDM Company, an Ohio Edison customer and another entity located in the Huron Corporate Park, which also did not begin to take service until after the start of the market development period, *does* contribute to the recovery of transition costs. (Tr. II, p. 136.) There is no rational basis for distinguishing between the two situations on these grounds and the Commission should not impute to the General Assembly an intent to do so.

D. The Operating Companies' Transition Charge Tariffs Should be Approved

Huron argues in its Complaint that Ohio Edison did not have the ability to bill the Rye Beach Facility for transition charges because Ohio Edison's tariffs did not permit it. Ohio Edison, along with The Cleveland Electric Illuminating Company and The Toledo Edison Company, then filed tariffs that make clear their authority to collect transition charges from customers of municipal electric utilities that were formed after January 1, 1999. Huron's arguments regarding the lack of an appropriate tariff are now moot.

The decision for the Commission in the ATA cases is whether the tariffs are just and reasonable. Because, as demonstrated above, the Operating Companies have a right to collect transition charges from customers taking generation service from municipal electric utilities formed after January 1, 1999, the tariffs *are* just and reasonable and should be approved, with one modification.

The Attorney Examiner pointed out that the applicability section of the tariffs could be read to require customers taking generation service from a supplier or aggregator to pay

transition charges under the tariffs. But that was not the Operating Companies' intent, as explained by Mr. Ridmann. (Tr. II, p. 135.) Those end-users paying transition charges under other Commission-approved tariffs would not have to pay again under the proposed tariffs. The Operating Companies propose to modify the applicability section as follows:

> This tariff applies to any Customer located in the Company's certified territory that is (a) supplied retail electric generation service by an entity other than the Company, and (b) not paying Generation Transition Charges or Regulatory Transition Charges to the Company under other tariffs approved by The Public Utilities Commission of Ohio, except those Customers whose electricity is supplied . . .

If the tariffs are approved, the Operating Companies will file final tariffs with that modification.

IV. CONCLUSION

The issues as presented will require the Commission to look at words and phrases in R.C. 4928.37. But in doing so the Commission must not ignore the purpose of the statute, which was to establish the method by which EDUs "shall receive" their approved transition revenues. Huron's interpretation of R.C. 4928.37 would make it very simple for municipalities to set up electric utilities and to enable their customers to bypass what the General Assembly pointedly denominated a "nonbypassable" charge.

The structure of R.C. 4928.37, the requirement in subdivision (A)(1) that all electric customers in an EDU's certified territory contribute to the payment of transition costs, and the narrow exceptions to that requirement in subdivision (A)(2) all belie Huron's claim that the Rye Beach Facility is not responsible for transition charges. The Rye Beach Facility is supplied retail electric generation service by an entity other than Ohio Edison, it is located in Ohio Edison's certified territory, it is a retail electric distribution service customer, and it is served by a municipal electric utility formed after January 1, 1999. The Rye Beach Facility is thus responsible for transition charges.

The Commission should dismiss Huron's Complaint with prejudice and approve the Operating Companies' proposed tariffs.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Initial Brief Of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company was delivered via electronic mail and regular U.S. Mail to the following this 22nd day of September, 2005:

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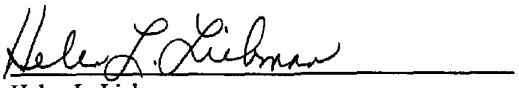

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