IGS ENERGY
THE POWER OF TOMORROW®

September 11, 2019

Mr. Larry L. Wolpert
Executive Director
Joint Committee on Agency Rule Review

Re: Comments in Support of Proposed Ohio Adm.Code 4901:1-10-28

Dear Executive Director Wolpert:

Please find enclosed the comments of Interstate Gas Supply, Inc. and IGS Solar, LLC (collectively "IGS") in response to the comments provided by Ohio Power Company ("AEP Ohio") on the Public Utilities Commission of Ohio's ("PUCO" or "Commission") proposed changes to Ohio Adm.Code 4901:1-10-28, otherwise known as the net metering rule.

- Net metering is the manner in which owners of distributed generation resources are compensated for the excess energy they provide to the electric grid.

- Due to incomplete smart meter deployment and limitations in utility information technology systems, there is currently no avenue for shopping customers to receive compensation for this energy from a CRES provider.

- The proposed rule will require the electric distribution utilities to offer net metering service to all customers, including those that shop, so that all Ohioans have the opportunity to fairly participate.

- The proposed changes are consistent with state law and policy, which requires the Commission to promote electric competition and to "[e]ncourage implementation of distributed generation across customer classes through regular review and updating of administrative rules governing critical issues such as. . . net metering."

As noted by the Commission, implementation of AEP Ohio's proposal would exclude over half of the customers in Ohio from the opportunity to receive compensation for any excess energy they produce through localized generation projects.

IGS respectfully requests that the proposed net metering rule be approved by JCARR.

Respectfully,

/s/ Joseph Oliker
Joseph Oliker
Associate General Counsel
IGS Energy

INTERSTATE GAS SUPPLY, INC.'S AND IGS SOLAR, LLC'S COMMENTS ON THE PUBLIC UTILITY COMMISSION OF OHIO'S PROPOSED NET METERING RULES (OHIO ADM. CODE 4901:1-10-28)

I. INTRODUCTION

Interstate Gas Supply, Inc. and IGS Solar, LLC (collectively "IGS") hereby provide these comments to the Joint Committee on Agency Rule Review ("JCARR") in support of the amended net metering rule, Ohio Adm. Code 4901:1-10-28, as authorized by the Public Utilities Commission of Ohio ("Commission"). IGS understands that Ohio Power Company ("AEP Ohio") has raised concerns regarded the amended net metering rule, and IGS appreciates the opportunity to respond to these comments. As discussed below, AEP Ohio's arguments lack merit, given that its interpretation of the law goes against codified state policy and would lead to the absurd result of completely depriving customer generators that shop for electricity from receiving any value for their net metered electricity. Given Ohio's procompetitive landscape, the General Assembly clearly did not intend to discriminate against shopping customers in the manner that AEP Ohio suggests. Therefore, AEP Ohio's concerns are misguided and should be rejected.

II. BACKGROUND

A. State Policy and Net Metering

A critical component of state policy is "*encouraging the development of distributed and small generation facilities*."[1] The General Assembly has concluded that the Commission shall encourage the development of such generation facilities through "flexible regulatory policies" and "regular review and updating of *administrative rules* governing critical issues such as, but not limited to, interconnection standards, standby charges, and *net metering*."[2]

Net metering refers to the manner in which owners of distributed generation resources are compensated for energy they provide to the electric grid. For example, some customers have invested in on-site generation resources, such as solar panels. These resources permit a customer to offset a portion of their energy needs. From time to time, however, these resources produce more electricity than customers need for their own consumption. The excess electricity is placed onto the electric grid for the benefit of all customers. Net metering determines the manner in which these customers receive compensation for the excess energy they provide to the grid.

[1] R.C. 4928.02(C) (emphasis added). *See also* R.C. 4928.02(A)-(B), (D), and (K).

[2] R.C. 4928.02(K); R.C. 4928.06(A) (emphasis added).

B. Net Metered Electricity Supplied to the Electric Distribution Utility

When a customer produces energy in excess of their usage requirements, it is placed onto the distribution and transmission grid. The manner in which the energy is treated at the wholesale and retail level is dependent on the sophistication of utility meter data management and billing systems. For example, when a utility has functional bi-directional smart meters capable of recording the hour of the day the energy is placed onto the grid, the utility may record and report the amount of excess electricity a customer places onto the grid in each hour of the day.

To the extent that the electric distribution utility ("EDU") utilizes this granular energy usage information to calculate the settlement statements of load serving entities ("LSEs"), which includes competitive retail electric service ("CRES") providers and the utility itself, this excess energy will show up on the PJM[3] settlement statements as a reduction to the LSEs load, i.e. as a negative load. In this instance, the value to the CRES provider or LSE is the value of avoided cost of the electricity being displaced by the net metered electricity. That value is generally the locational marginal price ("LMP") for each hour excess energy is placed onto the grid. For the EDU, the value is equal to the reduction in standard service offer ("SSO") wholesale delivery requirements, because SSO net metered customers are serving a portion of SSO load by reducing the total PJM load requirements of the utility (their LSE). In the event that a CRES provider has a negative load recorded on their settlement statement, it is an uncertain level of compensation that is difficult to quantify over the 20-year life of a distributed resource. As such, this compensation methodology is not easily quantified or explained to a customer.

Regardless, EDUs generally do not calculate CRES provider PJM settlement statements based upon actual hourly energy usage for all customer classes because the rollout of advanced metering technology is far from complete.[4] According to the Energy Information Administration ("EIA"), less than 20% of residential customers in Ohio have a smart meter.[5] And this amount includes the smart meters deployed by Duke Energy Ohio, which must be replaced in order to provide the functionality contemplated above.[6] While AEP Ohio is the furthest along in its smart meter roll out, even that utility has failed to provide a timeline for when—if ever—it will be able to calculate wholesale market settlements in such a way to permit CRES providers to give net metering compensation

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[3] PJM Interconnection LLC, or PJM, is the regional transmission organization that coordinates the movement of wholesale electricity in all or parts of 13 states, including Ohio.

[4] *See* https://www.eia.gov/todayinenergy/detail.php?id=34012 (last viewed September 10, 2019).

[5] *Id.*

[6] *See In the Matter of the Application of Duke Energy Ohio, Inc., for an Increase in Electric Distribution Rates*, Case Nos. 17-32-EL-AIR, et al., Direct Testimony of Donald Schneider at 2-15 (Mar. 16, 2017).

to all customers in the AEP Ohio service territory. *Given this limitation, CRES providers currently receive no compensation or cost reduction when their customers net meter electricity and therefore have no ability to provide any net metering compensation to their customers.*

If CRES providers receive no cost reduction when their customers place excess electricity onto the grid, where does it go and what happens to the electricity? It is really up to the EDUs to determine what to do with the energy because they own the meters and have the responsibility to calculate the amount of energy used on the distribution and transmission grid in their service territories. Indeed, the EDUs are even responsible for reporting to PJM Interconnection, the wholesale grid operator, the amount of electricity that each CRES provider is required to procure to meet their customer load obligations for each hour of the day. One thing, however, is clear, net metered electricity is generally not applied as a credit to a CRES provider's wholesale obligations.

While there is a greater push for smart meters and interval data access for CRES providers, these efforts will take multiple years. Therefore, for the foreseeable future, it is impossible for CRES providers to provide net metered compensation to non-interval metered customers. Given this reality, it is unjust and unreasonable to authorize rules that mandate customers entertain a futile exercise. Recognizing this potential injustice, the Commission required the EDUs to make available a standard net metering tariff option for all customers.

> Although, in the long-term, net metering service should be a competitive retail electric service delivered to shopping customers by their CRES providers, we agree that further deployment of advanced meters and improvements to the EDU's billing systems are necessary before the EDU net metering tariffs can be limited to SSO customers. We will continue to explore and develop the question of when and how to transition net metering service to a competitive service through our PowerForward initiative. Further, we will consider a waiver of this rule, on a case-by-case basis, for any EDU that can demonstrate full deployment of appropriate advanced meters in its service.

In re Comm.'s Review of Chapter 4901:1-10 of the Ohio Adm. Code, Case No. 12-2050-EL-ORD, Fifth Entry on Rehearing (Dec. 19, 2018) at ¶ 16.

It is evident from the history of this proceeding that the proposed rule is the result of the Commission's thoughtful consideration of the practicalities and policies surrounding net metering, guided by multiple opportunities for stakeholder comments. The Commission, recognizing a potential limitation to shopping customers, developed a solution that complements state policy and the realities of technology. Thus, the Commission's proposed amended rule is reasonable and lawful. Therefore, as discussed below, all of AEP Ohio's concerns to the contrary lack merit.

III. THE RULE IS CONSISTENT WITH THE JCARR REVIEW FACTORS

A. The Commission's proposed rule does not exceed the scope of its statutory authority

In its comments AEP Ohio argues that it should not be required to provide compensation to shopping customers. *AEP Ohio does not dispute that its proposed rule paradigm would result in shopping customers receiving no value for their net metered energy*. Rather, AEP Ohio argues that requiring compensation for shopping customers is outside the scope of the Commission's jurisdiction under R.C. 4928.67. Thus, AEP Ohio argues that the proposed rule is inconsistent with R.C. 106.021(A).[7]

R.C. 4928.67 states that "an electric utility shall develop a standard contract or tariff providing for net metering." It shall "be identical in rate structure, all retail rate components, and any monthly charges to the contract or tariff to which the same customer would be assigned if that customer were not a customer-generator." AEP Ohio reasons that the tariff should only be available to SSO customers, relying upon the following subsequent portion of the statute related to measurement of electricity:

> If the electricity supplied by the electric utility exceeds the electricity generated by the customer-generator and fed back to the utility during the billing period, the customer-generator shall be billed for the net electricity supplied by the utility, in accordance with normal metering practices. If electricity is provided to the utility, the credits for that electricity shall appear in the next billing cycle.

R.C. 4928.67(B)(3)(b). AEP Ohio claims that EDUs do not "supply" electricity to shopping customers; thus, it argues that R.C. 4928.67 cannot require them to provide such customers with compensation for net metered electricity. There are several flaws in AEP Ohio's argument.

First, nowhere does the law state that the standard tariff must be limited to SSO customers. Second, the law does not contain the words that AEP Ohio reads into the statute. AEP Ohio supplies or provides retail electric service to all customers in its role as an electric distribution utility. Indeed, R.C. 4928.01(A)(27) defines retail electric service broadly to include "any service involved in supplying or arranging for the supply of electricity to ultimate consumers in this state." Had the General Assembly intended a more narrow interpretation, it would have explicitly limited the availability of the standard net metering tariff to electricity supplied under the SSO.

Finally, AEP Ohio overlooks the fact that *all customer-generators*—whether they

[7] AEP Comments at 2-3.

take service on the SSO or shop—feed excess electricity back to the EDU. This excess electricity is provided to the EDUs for their own benefit to do with as they see fit. Given their existing billing and metering limitations, the EDUs do not provide any of this electricity for the use of CRES providers. Thus, both the law and physics suggests that EDUs are required to make a net metering tariff available to all customers.

B. The Commission's proposed rule does not conflict with the legislative intent of the statute under which the rule is proposed

1. The context of the statute shows that all customers are entitled to net metering compensation

AEP Ohio further argues that the language in R.C. 4928.67(A)(1) demonstrates that the rules are inconsistent with the legislative intent.[8] That section of the law, however, merely establishes guidelines for the substance of what must be included in a standard net metering tariff. That section makes no mention of whether a customer would qualify for the tariff itself. AEP Ohio's argument contains an overly literal reading of the law, which merely provides structure for the price components that must be included in the standard tariff.

As the Supreme Court concluded time and again, the purpose of statutory interpretation is to carry out the General Assembly's intent. *State ex rel. United States Steel Corp. v. Zaleski*, 98 Ohio St. 3d 395 at ¶ 12 (2003). Moreover, it is axiomatic that "[w]e must construe the applicable statute and rule to avoid such unreasonable or absurd results." *State ex rel. Asti v. Ohio Dept. of Youth Servs.*, 107 Ohio St. 3d 262 at ¶ 28 (2005). If AEP Ohio's reading of the law is correct, that would suggest that the intent of the General Assembly was to exclude shopping customers from receiving any net metering compensation. That conclusion cannot be substantiated by the balance of Ohio law and the procompetitive nature of Chapter 4928. *See* R.C. 4928.02(A)-(D) and (K). Given Ohio's procompetitive environment and support for distributed generation resources, the General Assembly clearly intended for *all* customers to receive compensation for net metered electricity.

2. PURPA requires EDUs to provide net metered compensation to all customers

AEP Ohio alleges that the Public Utility Regulatory Policies Act of 1978 ("PURPA") supports its position and "provides additional context for interpreting the Ohio net metering statute and understanding the General Assembly's intent."[9] AEP Ohio's

[8] AEP Comments at 3-4.

[9] AEP Ohio Comments at 4.

argument misses the mark.

Initially, it is not clear how, if at all, a federal statute provides context to a statute enacted by the General Assembly. That issue aside, PURPA supports the conclusion that AEP Ohio is required to provide compensation to all net metering facilities.

PURPA was adopted in 1978 by the Congress "to encourage the development of cogeneration and small power production facilities." *FERC v. Mississippi*, 456 US 742, 751 (1982). "Congress believed that increased use of these sources of energy would reduce the demand for traditional fossil fuels." *Id.* But Congress also recognized "that traditional electricity utilities were reluctant to purchase power from, and to sell power to, the nontraditional facilities." *Id.* To solve this problem, PURPA required the traditional "utilities to offer to sell electricity to, *and purchase electricity from*, qualifying cogeneration and small power production facilities." *Id.* (emphasis added); *see also* Section 210(f), 16 U.S.C. § 824a-3(f).

Under PURPA, distributed energy resources are deemed "qualifying facilities." PURPA "requires electric utilities to buy *all* the power produced by alternative energy generators known as Qualifying Cogeneration Facilities ("QFs"). 18 C.F.R. § 292.303(a)." *Winding Creek Solar LLC v. Peterman*, Case Nos. 17-1531, *et al.* at p. 3 (9th Cir. Ct. Appeals) (2019) (emphasis in orginal). Electric utilities are required "to pay the same rate they would have if they had obtained that energy from a source other than the QFs. 18 C.F.R. § 292.304." *Id.* AEP Ohio's avoided cost is the energy portion of the SSO rate. This is exactly what the amended rules ordered AEP Ohio to pay customer-generators under the standard net metering tariff.

Under PURPA, an electric utility may seek relief from this mandatory purchase requirement if FERC determines that the QF has nondiscriminatory access to markets; however, there is a rebuttable presumption that QFs with capacity of 20 MW or less lack nondiscriminatory access to markets. 16 U.S. Code § 824a–3; 18 CFR 292.309. "Order No. 688 placed the burden of proof on the electric utility to demonstrate that a small QF has nondiscriminatory access to the markets of which the electric utility is a member."[10] Here, AEP Ohio has made no such filing before FERC. Moreover, given that EDUs are not currently capable of placing a negative load on CRES provider's PJM settlement statement, a shopping customer generator has absolutely no access to market-based compensation for its excess generation. Consequently, AEP Ohio holds an obligation under federal law to purchase the output of any such facility at its avoided cost—or the energy portion of the SSO rate. Because the amended rules ordered the EDUs to provide compensation at the energy portion of the SSO rate, the rules are consistent with PURPA.

[10] *PPL Electric Utilities Corporation*, Docket No. QM13-2-00, *et al*, Order Denying Application to Terminate Mandatory Purchase Obligation (Oct. 17, 2013).

Further, the statute cited by AEP Ohio actually supports the Commission's proposed rule. The first sentence of the federal standard states: "Each electric utility shall make available upon request net metering service to ***any*** **electric consumer that the electric utility serves."** (Emphasis added). 16 U.S.C. § 2621(d)(11). An EDU serves all customers in their certified territory, regardless of the entity which provides the customer with electricity.

3. The rule does not create a subsidy for shopping customers

AEP Ohio also argues that the rule conflicts with R.C. 4928.02(H), claiming that rather than avoiding subsidies, the rule creates a new one. AEP Ohio's argument appears to be, at least in part, based upon the claims that the rule requires it to "recover the associated costs in SSO rates."[11] This assertion, however, directly conflicts with the Commission's order, which provides that any costs associated with net metering would be recovered through a nonbypassable rider.[12] Thus, AEP Ohio's argument is based upon an inaccurate factual premise.

Moreover, the rule does not create a subsidy, but instead requires AEP Ohio to make a net metering tariff available on a non-discriminatory basis to all customers. That is not a subsidy—it reflects equal treatment.

C. The Commission's proposed rule does not conflict with any other proposed or existing rules

In its comments, AEP Ohio alleges that the rule conflicts with another rule. AEP Ohio argues that it cannot provide a "credit based on the energy component of its SSO when shopping customers do not purchase energy under the SSO." (AEP Ohio Comments at 5.)

First, it is not clear which rule results in a conflict (AEP Ohio does not identify an inconsistent rule); therefore, this concern is not substantiated.

Second, it is reasonable to require the EDUs to provide compensation to shopping customers based upon the energy-only portion of the SSO rate. As discussed previously, when shopping customers provide electricity onto the grid, it is available to the EDUs for their own use. The EDUs can use this electricity to reduce their SSO delivery requirements. Given that this electricity may permit the EDUs to avoid their SSO-related

[11] AEP Comments at 5.

[12] *In re Comm.'s Review of Chapter 4901:1-10 of the Ohio Adm. Code,* Case No. 12-2050-EL-ORD, Fifth Entry on Rehearing ¶ 16 (Dec. 19, 2018).

supply costs, it is reasonable to require the EDUs to provide compensation to shopping customers.

Further, AEP Ohio also seems to be suggesting that the proposed rule violates the R.C. 106.021(C) because it conflicts with a ***previous draft version*** of the rule.[13] In its comments, AEP Ohio makes repeated references to the Commissions' alleged "180-degree" course change. Notably, AEP Ohio is referencing the Commission's lawful decision to reconsider one of its determinations within the rulemaking, under its authority in R.C. 4903.10. As provided for in R.C. 4903.10(B), an order of the Commission which modifies a previous order through this process shall have the same effect of the original order. Thus, the repeated references to a previous draft version of the rule, which never proceeded through JCARR, should be ignored and cannot be considered a violation of any proposed or existing rules.

D. The Commission prepared a complete and accurate rule summary and fiscal analysis for the proposed rule as required by R.C. 106.024

Finally, AEP Ohio argues that the rule violates R.C. 106.021(E), alleging that the rule summary and fiscal analysis are incomplete and inaccurate. Regarding the rule summary, AEP Ohio claims it is insufficient because the Commission failed to explain one specific "change in course" that occurred during the rulemaking process, as referenced above.[14] AEP Ohio's argument lacks merit as there is no requirement to explain the basis for rejecting alternative views of the rule.

Under R.C. 106.024, JCARR is responsible for designing the form that agencies include with each rule filing. Presently, the JCARR form requires the Commission to "[s]ummarize the rule's content, and if this is an amended rule, also summarize the rule's changes."[15] Because a summary of "the rule's changes" is only required when filing an amended rule, it is clear that the form is referring to changes from the current version of the rule to the proposed, amended version of the rule. Summarizing the history of every deliberation made by the Commission within the rulemaking process on this form, as suggested by AEP Ohio, would be overly burdensome and provide little benefit. In any event, the Commission's Entry on Rehearing authorizing the rules, these comments, and common sense provide ample reasoning for the proposed rules. Thus, in this instance, the Commission properly provided information regarding the proposed rule in accordance with the form provided by JCARR.

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[13] AEP Comments at 6.

[14] AEP Comments at 6.

[15] http://www.jcarr.state.oh.us/assets/files/rule-summary-and-fiscal-analysis-rsfa-part-a-151.pdf.

Regarding the fiscal analysis, AEP Ohio alleges that the filing is insufficient because the Commission stated that "there is no estimated cost of compliance with this rule filing."[16] AEP Ohio's claim is without merit. The question specifically asks for "the estimated costs of compliance for all persons and/or organizations directly affected by the rule."[17] As noted by AEP Ohio, the Commission expressly stated that the EDUs will recover all of the costs associated with providing net metering through a nonbypassable rider. Thus, the organizations directly affected by the rule—the EDUs required to implement this tariff—will ultimately incur no costs to comply. Therefore, the Commission correctly reported there are no costs of compliance for directly affected organizations.

Moreover, AEP Ohio has not demonstrated that there is a cost associated with complying with the rule. To date, the level of distributed generation deployment in Ohio is de minimis. Measuring the cost impact—if any exists—resulting from the rule would be difficult if not impossible.

Further, the level of generation-related compensation that EDUs like AEP Ohio are required to provide to net metering facilities for excess electricity is less than the value of that electricity. Most distributed generation resources that participate in net metering are solar resources. Such resources operate during the peak hours where wholesale market prices are highest. Yet the energy-only portion of the SSO rate is a blend of on-peak and off-peak pricing. Therefore, the energy-only portion of the SSO rate is likely lower than the market value of the excess electricity at issue. The absence of the rule will result in shopping customers providing this electricity to AEP Ohio and its customers without receiving any compensation in return.

IV. CONCLUSION

Encouraging the implementation of customer-owned generation through the review of net metering rules is a state policy created and codified by the General Assembly. In the most recent review of these rules, the Commission recognized an impediment to effectuating this state policy impacting the majority of Ohio's customers. Thus, the Commission developed a lawful solution to remove this limitation. Thus, the Commission's proposed amended rule is reasonable, lawful, and should be approved.

Respectfully submitted,

/s/ Joseph Oliker
Joseph Oliker
Associate General Counsel
IGS Energy

[16] AEP Comments at 6-7.

[17] *Id.*

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August 23, 2019

Mr. Larry Wolpert
Executive Director
Joint Committee on Agency Rule Review

Re: *Comments Regarding the Public Utilities Commission's Proposed Adoption of Ohio Administrative Code 4901:1-10-28*

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Dear Mr. Wolpert:

Please find the enclosed comments of Ohio Power Company (AEP Ohio) regarding the proposed adoption of Ohio Administrative Code 4901:1-10-28 by the Public Utilities Commission of Ohio (Commission). The proposed rule is the subject of a JCARR hearing scheduled for September 16, 2019.

The net metering statute, R.C. 4928.67, provides compensation for the energy that certain customers generate on their own premises from fuel sources such as solar panels or wind turbines. This is a significant benefit for electric utility customers as they receive a subsidy from other customers, as explained in more detail in the comments attached here. But in adopting the generous net metering policy, the General Assembly placed explicit limitations on the availability of net metering from electric utilities. Near the end of the previous Chairman's tenure, the Commission reversed a rule it adopted only three years ago (that rejected the same position) and adopted a new proposed version of Ohio Adm.Code 4901:1-10-28(B)(1)(a) that would require electric utilities to offer net metering not only to its own generation customers, but also to shopping customers. That outcome violates the plain language of R.C. 4928.67 and is inconsistent with federal law. For that reason and other reasons described below, the proposed rule also implicates multiple JCARR review factors set forth in R.C. 106.021, and JCARR should recommend to the Senate and House of Representatives the adoption of a concurrent resolution to revise the proposed rule, such that EDUs need not offer net metering to shopping customers.

Thank you for your attention to this matter.

Respectfully Submitted,

OHIO POWER COMPANY'S COMMENTS ON THE PUBLIC UTILITY COMMISSION OF OHIO'S PROPOSED NET METERING RULES (PROPOSED OAC 4901:1-10-28)

Introduction

Ohio Power Company ("AEP Ohio") provides these comments to bring attention to an unlawful administrative overreach that the Public Utilities Commission of Ohio ("Commission") is undertaking through its effort to amend the rules applicable to net metering in Ohio. The net metering rules address compensation for the energy that certain customers (known as "customer-generators") generate on their own premises from fuel sources such as solar panels or wind turbines, when that energy is intended to offset part or all of the customer-generator's electricity requirements.

In 2015, the Commission appropriately ordered electric utilities ("EDUs") such as AEP Ohio to make their net metering tariffs available to "customer-generators taking service under the electric utility's standard service offer [SSO]," while customer-generators who shopped for electricity from competitive retail electric service ("CRES") providers "shall be informed that they will not remain on the electric utility's net metering tariff and will not be credited by the electric utility for excess generation." This aspect of the 2015 rule was consistent with the General Assembly's net metering statute, R.C. 4928.67(B)(3)(b), which provides:

> If the electricity *supplied by the electric utility* exceeds the electricity generated by the customer-generator and fed back to the utility during the billing period, the customer-generator shall be billed for the net electricity *supplied by the utility*, in accordance with normal metering practices.

(Emphasis added.) R.C. 4928.67(B)(3)(b).

Because customers who shop are not obtaining electricity "supplied by the electric utility" – they have chosen, instead, a CRES provider as their supplier – it was appropriate and reasonable for the Commission in 2015 to exclude shopping customers from the EDU net metering tariff. The 2015 version of the rule was also consistent with the Public Utility Regulatory Policies Act of 1978 ("PURPA"), as amended by the Energy Policy Act of 2005, which only requires an electric utility "to offset electric energy *provided by the electric utility* to the electric consumer during the applicable billing period." (Emphasis added.) 16 U.S.C. § 2621(d)(11).

Near the end of the previous Chairman's tenure, the Commission reversed itself on this issue and adopted a new proposed version of Ohio Adm.Code 4901:1-10-28(B)(1)(a) that would require EDUs to offer net metering *not only to SSO customers, but also to shopping customers*. As discussed below, the Commission's decision to require EDUs to offer net metering to shopping customers violates the plain language of R.C. 4928.67 and is inconsistent with federal law. For that reason and other reasons described below, the proposed rule also implicates multiple JCARR review factors set forth in R.C. 106.021, and JCARR should recommend to the Senate and House of Representatives the adoption of a concurrent resolution to revise the proposed rule, such that EDUs need not offer net metering to shopping customers. This is

precisely the type of agency overreach that is subject to invalidation by JCARR and that JCARR review is designed to prevent.

THE COMMISSION'S RULES VIOLATE MULTIPLE JCARR REVIEW FACTORS

A. The Commission's proposed rules violate the first JCARR prong because the proposed rules exceed the scope of the Commission's statutory authority. *See* R.C. 106.021(A).

The first JCARR review factor, which asks whether a proposed rule exceeds the scope of the agency's statutory authority, is consistent with black-letter law across the United States that agencies "cannot by interpretation enlarge the scope of or change a properly enacted statute." 2 Am. Jur. 2d Administrative Law, § 70 (2004) (internal citations omitted). Nor can an agency "modify, abridge, or otherwise change the statutory provision under which it acquires authority unless the statutes expressly grant it that power." *Id.* The Ohio Supreme Court has repeatedly confirmed this bedrock principle of administrative law. In *D.A.B.E., Inc. v. Toledo-Lucas Cty. Bd. of Health*, 96 Ohio St.3d 250, 2002-Ohio-4172, 773 N.E.2d 536, for example, the Court concluded that there was no grant of power in R.C. 3709.21 allowing local boards of health to promulgate a clean indoor air regulation. *See, also, Hoover Universal v. Limbach*, 61 Ohio St.3d 563, 569, 575 N.E.2d 811 (1991) ("[a] rule that is contrary to statute is invalid.") Although these principles of administrative law are well settled here in Ohio and elsewhere, they got lost or forgotten in the lengthy net metering rulemaking during which the Commission proposed, withdrew, re-proposed, and amended multiple iterations of the net metering rules – the most recent iteration of which contradicts the General Assembly's net metering statute, R.C. 4928.67.

The problem with the Commission's 180-degree reversal is that the plain language of R.C. 4928.67 prohibits the Commission from requiring a utility to offer net metering to shopping customers. As noted above, Division (B)(3)(b) of that statute sets forth the core requirement with respect to a customer-generator and provides as follows:

> If the electricity *supplied by the electric utility* exceeds the electricity generated by the customer-generator and fed back to the utility during the billing period, the customer-generator shall be billed for the net electricity *supplied by the utility*, in accordance with normal metering practices.

(Emphasis added.) R.C. 4928.67(B)(3)(b). The plain language of this provision shows that the General Assembly intended net metering to apply to "electricity" that is "supplied by the electric utility." Yet the EDU only supplies electricity to its non-shopping customers. It is undisputed that, fFor shopping customers, the CRES provider supplies the electricity, not the EDU. Thus, requiring EDUs to provide net metering service to shopping customers violates the plain language of the statute.

The term "electricity" and the phrase "supplied by the electric utility" in R.C. 4928.67(B)(3)(b) have plain and ordinary meanings that should be applied as written. No particular agency expertise is required to understand these statutory terms, thus no special deference to the Commission's interpretation of those terms is appropriate. *See In re Application*

of Ohio Edison Co., Slip Opinion No. 2019-Ohio-2401, ¶ 62 (DeWine, J., concurring); see also *In re Application of Black Fork Wind Energy, L.L.C.*, Slip Opinion No. 2018-Ohio-5206, ¶ 21 ("Administrative deference is not necessary in this case. Because the statutory language is clear we need go no further than applying the common and ordinary meaning of "amendment" to resolve this appeal.").

Through the plain language of R.C. 4928.67, the General Assembly limited the application of an EDU's net metering tariff to situations where the EDU supplies electricity, and that necessarily limits the scope of an EDU's net metering tariff to non-shopping customers. The reasons provided by the Commission for amending the rule to provide otherwise do not hold water. In a Fifth Entry on Rehearing, for example, after AEP Ohio challenged the Commission's course change, the Commission determined that:

> [a]lthough, in the long-term, net metering service should be a competitive retail electric service delivered to shopping customers by their CRES providers, we agree that further deployment of advanced meters and improvements to the EDU's billing systems are necessary before the EDU net metering tariffs can be limited to SSO customers.

Net Metering Proceedings, Fifth Entry on Rehearing (Dec. 19, 2018) at 6. On rehearing, AEP Ohio asked the Commission to rule that a formal waiver was not required since advanced metering has already been broadly deployed (*e.g.*, throughout most of AEP Ohio's service territory). But the Commission categorically rejected that approach and simply reinforced its view that net metering should be provided to shopping customers in order to fully develop the competitive market – trumping the General Assembly's explicit statutory limitations adopted in statute for net metering.

Thus, the Commission impermissibly stepped into the General Assembly's policymaking role, taking its own assessment of what additional market developments and improvements are "necessary" before EDU net metering tariffs can be "limited to SSO customers." By expressly providing in R.C. 4928.67, however, that net metering only applies to "electricity supplied by the electric utility," the General Assembly has already made that policy determination, and the Commission lacks the power to second-guess it, or to delay implementing it until some undetermined time in the future when the Commission deems that the market is ready for it.

B. The Commission's proposed rules violate the second JCARR prong because the proposed rules conflict with the legislative intent of the statute under which they were proposed. *See* R.C. 106.021(B).

It is a well-settled principle of law that, to determine legislative intent, you must first look to the language of the statute. *See State v. Gonzalez*, 150 Ohio St.3d 276, 81 N.E.3d 419, 2017-Ohio-777, ¶4. As outlined at length above, the Commission's proposed net metering rules conflict with the General Assembly's intent because they directly conflict with the net metering statute itself, R.C. 4928.67(B).

R.C. 1.42 instructs that words in statutes shall be read in context in order to ascertain the General Assembly's intent. And other provisions within R.C. 4928.67 confirm that the General Assembly intended to limit an EDU's net metering tariff to non-shopping customers. In particular, division (A)(1) of the statute provides that the mandatory net metering tariff offered by an EDU "shall be identical in rate structure, all retail rate components, and any monthly charges to the contract or tariff to which the same customer would be assigned if that customer were not a customer-generator." R.C. 4928.67(A)(1). This is a key feature of the net metering statute. But Ohio Adm.Code 4901:1-10-28(B)(1)(a), as now modified by the Commission, plainly violates it. A shopping customer does not purchase electricity from the electric utility, and there are no rate components, rate structures, or monthly charges that cover generation service for shopping customers.

Notably, the federal Public Utility Regulatory Policies Act of 1978 (PURPA), as amended by the Energy Policy Act of 2005, provides additional context for interpreting the Ohio net metering statute and understanding the General Assembly's intent. PURPA requires state regulatory authorities and each nonregulated electric utility to consider numerous standards established in subsection (d) of Section 2621. *See* 16 U.S.C. § 2621(a). PURPA also sets forth procedural requirements for consideration of the listed standards, and provisions regarding implementation of the standards. *See* 16 U.S.C. § 2621(b) & (c). The federal standards established in PURPA range from rate-related topics such as cost of service, seasonal rates, and time-of-day rates to other topics, such as integrated resource planning and energy investments in power generation and supply. *See* 16 U.S.C. § 2621(d)(1)-(19). PURPA also establishes federal standards for net metering. *See* 16 U.S.C. § 2621(d)(11). Specifically, with respect to net metering, PURPA provides:

> Net metering. Each electric utility shall make available upon request net metering service to any electric consumer that the electric utility serves. For purposes of this paragraph, the term "net metering service" means service to an electric consumer under which electric energy generated by that electric consumer from an eligible on-site generating facility and delivered to the local distribution facilities may be used to *offset electric energy provided by the electric utility* to the electric consumer during the applicable billing period.

(Emphasis added.) 16 U.S.C. § 2621(d)(11). PURPA thus only requires an electric utility to offset electric energy *provided by the electric utility to the electric consumer* during the applicable billing period. As with the Ohio net metering statute, the factual predicate for triggering the "net use" billing obligation – the utility supplying electricity to the customer – is simply not present with respect to shopping customers, who are supplied by CRES providers. Thus, from a public-policy standpoint, the net metering provisions found in PURPA/EPAct provide grounding and context to help bolster the conclusion that the General Assembly intended for EDUs to only provide an offset to energy sold to the customer by that utility (*i.e.*, a non-shopping customer in Ohio parlance). The Commission's proposed rule to the contrary conflicts with that legislative intent.

Another way in which the Commission's net metering proposal conflicts with the General Assembly's intent pertains to the electric services policies set forth in R.C. 4928.02. In that statute, the General Assembly confirmed that:

> It is the policy of this state to do the following throughout this state:
> ***
> (H) Ensure effective competition in the provision of retail electric service by avoiding anticompetitive subsidies flowing from a noncompetitive retail electric service to a competitive retail electric service or to a product or service other than retail electric service, and vice versa, including by prohibiting the recovery of any generation-related costs through distribution or transmission rates.

The Commission's proposal to require EDUs to provide net metering to shopping customers conflicts with this state policy because instead of "avoiding" an anticompetitive subsidy, the proposal creates a new one. Specifically, if EDUs are required to provide net metering to shopping customers and then recover the associated costs in SSO rates, as the Commission proposes, the EDUs' SSO customers will effectively be subsidizing the provision of net metering to customers who are shopping with CRES providers. In particular, for each kilowatt hour (kWh) that a net metering customer offsets through its behind-the-meter generation resource, the customer not only offsets generation-related kWh charges (which is rational) but also gets to offset wires charges (which is an outright subsidy) – and that subsidy is paid for by all of the other customers, including residential and business customers. While one can argue that the subsidy reflects state policy for an EDU's provision of service to non-shopping customers, that subsidy is limited by the terms of R.C. 4928.67 and should not be extended to shopping customers. This conflict with the General Assembly's intentional anti-subsidy policy is another reason why JCARR should recommend to the Senate and House of Representatives the adoption of a concurrent resolution to invalidate the proposed rule, to the extent that the proposal requires EDUs to provide net metering to shopping customers.

C. <u>The Commission's proposed rules violate the third JCARR prong because the proposed rules conflict with another proposed or existing rule. *See* R.C. 106.021(C).</u>

Pursuant to R.C. 106.021(C), a proposed rule's conflict with another proposed or existing rule provides yet another basis for JCARR to propose a concurrent resolution to invalidate the rule.

The Commission's proposed rule that EDUs are responsible for providing net metering to shopping customers engenders conflict with other net metering rules. The rules require an EDU to provide a rate credit to shopping customers for excess generation in a month, and this rate credit is to be calculated "at the energy component of the electric utility's standard service offer." Ohio Adm.Code 4901:1-10-28(B)(9)(c). But the EDU cannot provide a rate credit based on the energy component of its SSO when shopping customers do not purchase energy under the SSO. This incongruity resulting from the Commission's revised net metering rule further confirms that applying net metering tariffs to shopping customers does not make sense and runs counter to the General Assembly's intent.

A mere three years after adopting the current rule, the Commission flip-flopped on this issue and modified Ohio Adm.Code 4901:1-10-28(B)(1)(a) to require EDUs to offer net metering to shopping customers. The Commission's decision to require EDUs to offer net metering to shopping customers – a decision reflecting a 180-degree U-turn from the Commission's own prior position on the matter – represents a conflict with its own recently-adopted rule.

D. The Commission's proposed rules violate the fifth JCARR prong because the Commission failed to prepare a complete and accurate rule summary and fiscal analysis of the proposed rule as required by section 106.024 of the Revised Code. *See* R.C. 106.021(E).

The Rule Summary and Fiscal Analysis submitted by the Commission on July 23, 2019 is both incomplete and inaccurate, providing yet another basis for JCARR to recommend adoption of a concurrent resolution to invalidate the proposed rule.

The Rule Summary is incomplete because the Commission fails to include in its Summary any mention of the Commission's own change-in-course regarding whether EDUs should (or should not) be required to provide net metering to shopping customers. As noted above, the Commission's 2015 version of the proposed rule was consistent with the net metering statute because it did not require EDUs to provide net metering to shopping customers. The latest proposal, on the contrary, does. The Rule Summary and Fiscal Analysis provide no mention of, much less any explanation for, this significant and 180-degree course change.

The Fiscal Analysis is inaccurate because the Commission declares, without any basis, that "[t]here is no estimated cost of compliance with this rule filing." The Commission fails to explain how or why EDUs will incur no costs by being required to provide net metering service to shopping customers. The Commission's assertion here is belied by the Commission's own Fifth Entry on Rehearing during the rulemaking proceeding, in which the Commission stated that "EDUs should recover *all of the costs of providing net metering* through an appropriate nonbypassable rider." *See* Fifth Entry on Rehearing (Dec. 19, 2018) at 7. This assertion is a tacit admission that there will indeed be costs associated with the provision of net metering.

The assertion that there is no estimated cost of compliance associated with the rule change is also belied by the proposed rules' annual reporting requirement. Specifically, the unfair additional subsidy outlined above creates an undue burden and cost on AEP Ohio's other customers. Further, Ohio Adm.Code 4901:1-10-28(B)(13) requires EDUs to "annually report to the commission the total number and installed capacity of customer-generators on the electric utility's net metering tariffs for each technology and customer class. The electric utility shall provide any other net metering data to the commission upon request and in a timely manner." Imposing these reporting requirements with respect to an entire category of customers – shopping customers – for whom EDUs should not be required to provide net metering service in the first place will surely increase the EDUs' costs associated with data collection and annual reporting to the Commission. Indeed, the Business Impact Analysis associated with the proposed rule acknowledges "some adverse impacts" resulting from the proposed rule that are

not acknowledged in the Fiscal Analysis. *See* Business Impact Analysis (July 23, 2019) at 8 (noting that the proposed rules, in addition to imposing these reporting requirements, impact the EDUs' website disclosures; impose a requirement to provide cost estimates for the installation of meters capable of net metering; impose meter-installation requirements; and impose requirements regarding the provision of interval meter data and individual network peak load data to CRES providers). How the Business Impact Analysis quantified an estimate of merely "three to five hours" of time that will be associated with all of these requirements is anyone's guess.

The manner in which the Commission's net metering proposal evolved to its current form, to now require EDUs to offer net metering to shopping customers, presents the type of regulatory rope-a-dope that meaningful JCARR review is designed to prevent.

September 12, 2019

Hon. Jamie Callender
Chair, JCARR

Mr. Larry Wolpert
Executive Director, JCARR

Subject: OSRC written statement for JCARR hearing 9/16/19 Board of Pharmacy HME rules OAC 4729:11

Dear Rep. Callender & Executive Director Wolpert:

The Ohio Society for Respiratory Care (OSRC) is a chartered affiliate of the American Association for Respiratory Care (AARC) with over 1900 professional members in Ohio.

The OSRC submitted comments to the Ohio Board of Pharmacy (BOP) on proposed Home Medical Equipment (HME) rules (OAC 4729:11) on October 15, 2018, to the Ohio Common Sense Initiative (CSI) on November 1, 2018 and during the BOP public hearing June 13, 2019. The BOP has included several OSRC recommendations in these HME proposed rules before you today.

Under 4729-11-3-03, on-site HME inspections or investigations by an authorized board agent are described. However, the qualifications, training and competency of these authorized board agents are not addressed within this rule. The BOP plans to use pharmacy technicians with a condensed HME training session as their authorized board agents (inspectors) for these onsite HME inspections and investigations per agency policy.

From 2005-2017, HME licensing was under The Ohio Respiratory Care Board (ORCB). The ORCB chose to hire per diem HME Inspectors who have HME experience, national accreditation surveying experience and who were Ohio Licensed Respiratory Care Professionals (RCPs) who have routinely used life sustaining and technologically sophisticated equipment.

The OSRC met with the BOP leadership on September 17, 2018 to request the use of RCPs with accreditation experience for at least for the inspection of licensees providing of life sustaining equipment (to include, but not limited to, invasive and non-invasive ventilators) to make sure the most vulnerable patients on life support and advanced technology were provided safe care.

HME Law was originally passed by the Ohio Legislature in 2005 to protect the public. The OSRC believes that the safety of home care in Ohio could be compromised if HME inspections of licensees providing life support and certain technologically sophisticated equipment is inspected by authorized agent without qualifications, scope of practice and troubleshooting skills that a licensed respiratory professional would provide.

Thank-you,

Mark Kemerer, OSRC Legislative Committee
Sue Ciarlariello, OSRC Legislative Chair
Shereen Bailey, OSRC President
David Corey, OSRC Executive Office

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