**BEFORE**

**THE PUBLIC UTILITIES COMMISSION OF OHIO**

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| In the Matter of the Commission’sInvestigation of Ohio’s Retail Electric Service Market. | ))) | Case No. 12-3151-EL-COI |

**REPLY COMMENTS IN RESPONSE TO PUCO’S ENTRY**

**OF JUNE 5, 2013**

**BY**

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**REPLY COMMENTS**

**BY**

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# I. INTRODUCTION

 The provision, price, and terms of electric service are of great importance to all residential customers who take service from Ohio’s electric utilities/ marketers. The Office of the Ohio Consumers’ Counsel (“OCC”) appreciates this opportunity to provide reply comments with respect to the PUCO’s June 5, 2013 Order on this critical matter for residential electric service consumers and for Ohio.

# II. REPLY COMMENTS

## A. The PUCO’S MARKET DESIGN QUESTIONS

### (a) Comments were filed suggesting that the relationship between an incumbent electric distribution utility and a customer should be neither terminated nor encouraged. Does this comment pertain to distribution service or to generation service?

 The retail electricity market in Ohio has been in development for over a decade now and is alive and well. There is a significant level of customer shopping in the state. But IGS, an electricity marketer, maintains that the current default rate structure (i.e. generation standard service offer or “standard offer”) is a barrier to sustaining retail electric competition in Ohio.[[1]](#footnote-2) IGS paints consumers as “apathetic” and “not engaging in the market.” IGS states that, “In a fully competitive market, the preferences of customers drive the market forward, rather than the preferences of utilities, consumer advocates and regulators.”[[2]](#footnote-3) Similar sentiments were expressed at the first PUCO workshop. Marketers seem to think that consumers who do not choose a marketer “do not shop,” and are doing so because they are unsophisticated with respect to electric choice and unaware of options.

 We begin our response with a few words in defense of Ohioans that certain electricity marketers would label as “apathetic.” Ohioans have many things to be non-apathetic or even downright worried about, such as children, schools, parents, a job (or the need to find a job), money and so on. While a marketer’s offer to supply electricity may loom large in its world, that same offer is of much less importance to Ohioans where responsibilities of daily life may leave little time for sifting through marketer mailings, answering the door for a marketer’s agent and otherwise deciphering energy offers that could strain even an expert’s ability to analyze.

IGS also suggests that customers should be encouraged to leave the default electric utilities’ generation service. But IGS’s goal is not to merely encourage the development of the retail electric choice market but to eliminate default service.[[3]](#footnote-4) According to IGS, default service should be supplied in total by competitive suppliers.[[4]](#footnote-5)

But IGS and certain other electricity marketers fail to recognize that purchasing electricity through the utility and not by using a marketer is also a customer choice. Customers can be “shoppers” and can be informed and can consciously choose default service as their preferred energy supply option. Customers that “prefer” to stay with the generation standard service offer (for whatever reason) should not be penalized for doing so and should not be forced into making energy supply choices that they do not wish to make.

The choice not to choose is a real option that customers should continue to have. Indeed, that choice may, in many circumstances, be the best, most economic choice the customer can make. Furthermore, it is contrary to a competitive market to remove a competitive option. The PUCO, while providing customer education regarding both standard offer service and competitive suppliers, should act in a neutral manner, providing neither encouragement nor discouragement regarding one option or another.

The standard offer provides a safe harbor for customers who elect not to shop,[[5]](#footnote-6) who choose to come back to the standard offer after shopping, who prefer not to receive energy supply from a marketer, or who choose the standard offer over marketer offers. And, importantly, the standard offer also functions as a price to compare -- a way to evaluate the prices and terms of other offers by alternative generation suppliers.

Retail electric customer choice means customers can choose from any number of options that may permit them to obtain reasonably priced retail electric service. And if a customer chooses the standard service offer, that choice must be honored. Retention of the relationship between the customer and the electric utility is essential to preserve these invaluable benefits that customers realize from the current market structure.[[6]](#footnote-7)

But IGS seeks to eliminate this choice, a notion that is antithetical to the spirit and letter of S.B. 221. IGS’ extreme position should be rejected.

### (b) If predatory pricing or other market factors become a barrier to a fully functional competitive retail electric service market, can and should the Commission regulate predatory pricing or other market factors?

In its response to this question, Constellation NewEnergy and Exelon Generation restate the general principles set forth in earlier comments submitted in response to the PUCO’s December 12, 2012 questions. Among these are an emphasis on obtaining non-discriminatory access to billing and usage information and allowing marketers to sign up new customers at the time the electric utility initiates service.[[7]](#footnote-8)

Yet current PUCO rules already provide sound guidance on these issues, appropriately balancing customer privacy concerns with the amount of customer information that is necessary for marketers to offer their services.[[8]](#footnote-9) Further, customers have, and should continue to have, the right to request that their information not be provided to competitive providers.[[9]](#footnote-10) These rules apply equally to affiliates and non-affiliates of electric utilities.

When customers enroll with a marketer and marketers have obtained the appropriate consent from the customer, electric utilities may disclose additional customer specific information to the marketer.[[10]](#footnote-11) But it is completely inappropriate and unnecessary for competition to allow the disclosure of any additional customer information if the customer does not explicitly consent to the disclosure.

Constellation/Exelon also recommended that customers should be able to enroll with a marketer at the same time customers apply for electric service with the electric utility.[[11]](#footnote-12) Toward this end, Constellation/Exelon claims that greater access to metering data is needed by marketers to facilitate enrollment of customers at competitive prices.[[12]](#footnote-13) Currently, generic load information is provided to marketers, unless customers object to the release of this information.[[13]](#footnote-14) The current rules enable customers to request up to twenty-four months of usage information from the electric utility, including time-differentiated usage information at no charge from the utility.[[14]](#footnote-15) If customers consent to the release of this more-detailed usage information, the utilities can provide this data to the marketers. However, detailed usage information should not be provided to marketers unless customers explicitly consent to the release of the information.

The PUCO should reject Constellation/Exelon’s recommendation to allow enrollment of customers concurrent with customers requesting electric service from the utility. The current rules require electric utilities to provide a Customer Rights and Obligations document to customers when they apply for service.[[15]](#footnote-16) Much of the information that customers need to know to select a marketer, including their rights to protect their customer information, are contained within this document. Constellation/Exelon’s recommendation would compromise customers’ privacy and would result in customers enrolling with a marketer without having the information needed to assess a marketer’s offer or to protect their customer information. Such a result would be contrary to the public interest. Constellation/Exelon’s proposals to change these rules should be rejected.

### (c) In a fully functional retail market, with no merchant or wholesale based default service, should the Commission and/or an independent market monitor have the ability to regulate market power?

OCC reiterates that this is a hypothetical question because Ohio is currently operating under a default system, which should continue because it enhances competition in the retail electric service industry. Nevertheless, the Ohio Power Company (“AEP Ohio”) appears to argue that the PUCO should not have the ability to regulate competitive retail electric services after the standard service offer is supplied completely by competitive bid. Ohio Power asserts it should be regulated by the Ohio Consumer Sales Practices Act and the Antitrust Laws.[[16]](#footnote-17) But this position is directly contrary to the Ohio Revised Code.

The PUCO is charged with an ongoing statutory duty to monitor[[17]](#footnote-18) and the express authority to regulate market power[[18]](#footnote-19) within the competitive retail electric service market. This authority is not conditioned on the existence of default service and the responsibilities set forth in R.C. 4928.141 through R.C. 4928.144. By the wording of the statute, this authority does not ever expire, even after a full transition to a competitive market in Ohio. Therefore, OCC only supports the use of the Ohio Consumer Sales Practices Act and the Antitrust Laws as *additional* consumer protections to add to existing regulatory protections.

### (d) Would a time-differentiated standard service offer (SSO) rate cause more shopping based upon customer preference for avoiding uncertainty?

 Imposing a time-differentiated standard service offer on customers was opposed by all commenters except for IGS. Although IGS believes that time-differentiated SSO rates would “help [to] break the status-quo bias default service,” IGS argues that it would only do so if the time-differentiated rates were “the only electric utility rate available to customers.”[[19]](#footnote-20) In other words, for the purpose of forcing customers off of the standard offer, IGS suggests that electric utilities not be able to offer the current default service price that applies to all hours of the day.

 OCC discussed this topic in its comments. OCC supports a time-differentiated rate ***option*** (meaning voluntary for customers) that is offered by both utilities and marketers. But the proposal to require electric utilities to only offer time-differentiated rates would harm SSO customers by taking away the most basic and understandable service offering available to them.[[20]](#footnote-21) Further, the proposal to limit utilities to charging time-differentiated rates would undermine the Apples-to-Apples price comparison since marketers would ***not*** be required to offer time-differentiated rates. It would result in more customer confusion as customers would struggle to understand why the price of electricity is different at different times. And it may result in rate shock to customers who use more electricity than other customers during higher-priced time periods and who may be unable to shift more usage toward lower-priced time periods.

 IGS’s comments also improperly assume that reasonably priced non-time-differentiated rates, or fixed rates, would be available to customers through marketers. But this would not necessarily be the case, as OCC emphasized in its comments, since marketers cannot be required to offer service, in any form or at any price. [[21]](#footnote-22) Thus, it is customers who would be exposed to “all of the risk inherent in time-differentiated rates with no recourse or opportunity to mitigate risk through any provider.”[[22]](#footnote-23)

 Many parties expressed similar concern regarding mandatory time-differentiated standard offer rates. Consumers et al.[[23]](#footnote-24) stated that mandatory time-differentiated rates would be “an anti-consumer policy” and “would not comply with the current statutory directives and policies.”[[24]](#footnote-25) According to Consumers et al., if time-differentiated rates were mandatory, “customers that are on fixed-incomes, low-incomes, and those persons that are unable to reduce their usage because they are already at minimum usage” would be hurt. At the same time, such customers might be asked “to pay for upgrades they cannot use.”[[25]](#footnote-26) FirstEnergy and DP&L also disagreed with any proposal for mandatory time-differentiated generation rates. DP&L stated in particular that such rates would in fact be harmful to some of the most at-risk customers.[[26]](#footnote-27)

 Even some marketers saw mandatory time-differentiated SSO rates as problematic as they “would impede the ability of the competitive market to develop the most efficient and valuable products for the customer.”[[27]](#footnote-28) FES commented that marketers are better positioned to offer such rates.[[28]](#footnote-29) Based on the overwhelming comments received, it is clear that mandatory time-differentiated SSO rates are contrary to the public interest and should not be implemented. However, electric utilities should be free to offer the option of time-differentiated rates as long as the default service remains as a non-time-differentiated rate.

 Importantly, imposing time-of-day rates would be inconsistent with a number of the state policies enunciated in R.C. 4928.02. For instance, under R.C. 4928.02(B), it is the policy of the state to “[e]nsure the availability of unbundled and comparable retail electric service that provides consumers with the supplier, price, terms, conditions, and quality options they elect to meet their respective needs.” Imposing a specific type of service will take away consumers’ options contrary to this policy. And under R.C. 4928.02(L), it is the policy of the state to protect at-risk populations. Taking away options and imposing time-of-day rates would, according to Consumers et al., harm, not protect, low income customers, one group of at-risk consumers.

R.C. 4928.06 makes the policies of R.C. 4928.02 more than a statement of general policy objectives. R.C. 4928.06(A) imposes upon the PUCO a specific duty to ensure the policy specified in section 4928.02 of the Revised Code is effectuated.[[29]](#footnote-30) Indeed, the Ohio Supreme Court struck down a PUCO order where the PUCO violated one of the subsections of R.C. 4928.02.[[30]](#footnote-31)

For all of these reasons, imposing time-differentiated standard service offer rates on a mandatory basis is a bad idea. IGS’s proposal should be rejected.

## B. CORPORATE SEPARATION

### (a) Since generation has been declared competitive in Ohio, should return on investment for electric utilities be reduced in order to reflect lower risk?

Electric utilities’ business risk associated with their regulated assets has decreased as a result of the PUCO declaring that generation service in Ohio is competitive. The risk associated with the construction and operation of generating facilities is no longer subject to the return on investment assessment. But FirstEnergy disagrees and argues that the question posed by the PUCO is premised on a faulty assumption.[[31]](#footnote-32) FirstEnergy contends that electric utilities face a variety of risk factors that are continually changing and expanding. Amazingly, FirstEnergy argues that the elimination of risk factors associated with the construction and operation of generating facilities—facilities that are no longer part of the business of the FirstEnergy utilities—does not reduce its risk.

There is nothing logical or sensible about FirstEnergy’s position that the elimination of a significant risk does not reduce overall risk. While utilities face a number of risks, the elimination of a significant risk reduces overall risk by the relative magnitude of the risk eliminated. First Energy identifies and discusses other risk factors which electric utilities confront. These risk factors, such as the economic recession, and new energy and environmental initiatives, could be considered in measuring the risk faced by utilities currently. But the presence of these risk factors does not change the fact that electric utility risk has been substantially reduced by the elimination of generation risk.

In discussing the recessionary environment, FirstEnergy paints a picture in which the economy has singled out regulated utilities to face the challenges of earning an adequate return for shareholders.[[32]](#footnote-33) But the fact of economic cycles is a risk factor electric utilities have faced since they went into business. Further, the current “recessionary environment,” which is notably improving, has impacted not just regulated utilities but all segments of American society. This includes residential customers who face the impact of the recession as well as higher utility rates imposed by utilities pushing for ever higher returns on shareholders’ investments.

The risk factors discussed by FirstEnergy are not caused by, and have nothing to do with, the deregulation of generation service. Moreover, other than simply making a claim, FirstEnergy has offered no proof or factual basis to support its claims that the separation of generation service may actually increase the risk of an electric utility. After all, an electric utility is allowed to fully recover all the costs associated with providing distribution service as well as the costs of obtaining generation services on behalf of its customers. Even FirstEnergy itself admitted that “the risk of recovering generation costs for electric utilities has been diminished.”[[33]](#footnote-34) However, in acknowledging this truth, FirstEnergy laments that the risk of recovery of generation costs for electric utilities has not been completely eliminated.[[34]](#footnote-35)

An electric utility’s return on **distribution** investments should be set at an appropriate level to provide adequate, safe, and reliable service at reasonable rates for the risk associated with those services Electric utilities are to be “fully on their own” in the generation market. Thus, market prices for generation are the only means by which a seller of generation (whether electric utility or non-electric utility) can recover generation costs. Inasmuch as electric utilities in Ohio are not required to share the increased profits from a higher market price for generation, electric utilities should not be insulated from incurring losses if lower market prices do not cover the costs associated with any retained generation assets. Because electric utilities profit from market forces, they should not be insulated from market forces.

# III. CONCLUSION

 The Office of the Ohio Consumers’ Counsel appreciates the PUCO’s attention to the Ohio retail electric services market. The focus for that PUCO attention should be on providing value, including lower or more affordable rates for customers. Toward this end, the PUCO should ensure that the structure of the electricity market retains the option of utility standard offers for customers.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

 The undersigned hereby certifies that a true and correct copy of the foregoing Reply Comments have been served upon the below-named persons via electronic service this 22nd day of July, 2013.

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1. IGS Comments at 3. IGS neglected to include itself and electricity marketers on its list of those who should not control outcomes for customers. [↑](#footnote-ref-2)
2. IGS Comments at 2. [↑](#footnote-ref-3)
3. IGS Comments at 3. [↑](#footnote-ref-4)
4. Id. [↑](#footnote-ref-5)
5. R.C. 4928.141. [↑](#footnote-ref-6)
6. OCC Comments at 6. [↑](#footnote-ref-7)
7. Id. [↑](#footnote-ref-8)
8. Ohio Adm. Code 4901:1-10-24(F). [↑](#footnote-ref-9)
9. Ohio Revised Code 4928.10(G). [↑](#footnote-ref-10)
10. Ohio Adm. Code 4901:1-10-24(E). [↑](#footnote-ref-11)
11. Exelon Comments at 5. [↑](#footnote-ref-12)
12. Id. [↑](#footnote-ref-13)
13. Ohio Revised Code 4928.10(G). [↑](#footnote-ref-14)
14. Ohio Adm. Code 4901:1-10-12(F)(3). [↑](#footnote-ref-15)
15. Ohio Adm. Code 4901:1-10-12(A). [↑](#footnote-ref-16)
16. AEP Ohio Comments at 2. [↑](#footnote-ref-17)
17. R.C. 4928.06(C). [↑](#footnote-ref-18)
18. R.C. 4928.06(E)(1). [↑](#footnote-ref-19)
19. IGS Comments at 11. [↑](#footnote-ref-20)
20. OCC Comments at 10. [↑](#footnote-ref-21)
21. OCC Comments at 11 [↑](#footnote-ref-22)
22. Id. [↑](#footnote-ref-23)
23. “Consumers et al.” refers to the group of Ohio Partners for Affordable Energy; AARP; The Ohio Poverty Law Center; Edgemont Neighborhood Coalition; Pro Seniors, Inc.; Southeastern Ohio Legal Services; Legal Aid Society of Columbus; Legal Aid Society of Cleveland; Communities United for Action; and, The Citizens Coalition, who have jointly submitted their Supplemental Reply Comments. [↑](#footnote-ref-24)
24. Consumers et al Comments at 11. [↑](#footnote-ref-25)
25. Consumers et al Comments at 12. [↑](#footnote-ref-26)
26. FE Comments at 7; DP&L Comments at 3. [↑](#footnote-ref-27)
27. RESA Comments at 7. RESA is ambivalent as they appear to also support a mandatory real time price as a default service for some customers. *See also Constellation Comments at 6.* [↑](#footnote-ref-28)
28. FES Comments at 8. [↑](#footnote-ref-29)
29. *Migden-Ostrander v. Pub. Util. Comm*., 102 Ohio St.3d 451, 2004-Ohio-3924 at ¶13. [↑](#footnote-ref-30)
30. *Elyria Foundry Co. v. Pub. Util. Comm.* (2007), 114 Ohio St.3d 305. [↑](#footnote-ref-31)
31. First Energy Comments at 13. [↑](#footnote-ref-32)
32. First Energy Comments at 13. [↑](#footnote-ref-33)
33. First Energy Comments at 14. [↑](#footnote-ref-34)
34. First Energy Comments at 14. [↑](#footnote-ref-35)