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BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

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

COMMENTS OF THE  
NATIONAL ENERGY MARKETERS ASSOCIATION

The National Energy Marketers Association (NEM)<sup>1</sup> hereby submits its comments on the questions set forth in the Commission's Entry of December 12, 2012, in the above-referenced proceeding [hereinafter "Order"] for the purpose of initiating an investigation into the retail electric service market in Ohio. The Commission referenced 1999 and 2008 electric deregulation laws passed in the State in initiating the investigation and explained, "As Ohio electric utilities are making the transition from functional to structural separation, the Commission finds it appropriate to evaluate the vitality of the competitive retail electric service markets supported by these legislative mandates now that the mandates have been in place sufficient time to assess the results." The Commission also cited as a source of concern the generation retirements that may cause insufficient generation capacity to meet reliability requirements. The Commission noted its, "responsibility to encourage market access for retail electric service, including both supply- and demand-side products, and to protect consumers against market deficiencies and market power," prompting its request for comments on, "the extent to which barriers may exist to a consumer's means to choose a retail electric service that meets their needs."

In general and as explained more fully in response to the Commission's questions herein, NEM recommends that default service in its current form should be considered as a transitional step to the utilities exit from the commodity merchant function. The next step in market evolution should incorporate the use of competitive procurement methods for obtaining and pricing default service supplies. Default service rates should be adjusted on a monthly basis for mass market consumers and on an hourly basis for large commercial and industrial consumers who can be billed hourly. The provision of increased market-based pricing signals for no-notice default commodity service should be accompanied by the unbundling of commodity-related costs from utility delivery rates. Default service rates should include the full retail cost of providing 24/7

<sup>1</sup> The National Energy Marketers Association (NEM) is a non-profit trade association representing both leading suppliers and major consumers of natural gas and electricity as well as energy-related products, services, information and advanced technologies throughout the United States, Canada and the European Union. NEM's membership includes independent power producers, suppliers of distributed generation, energy brokers, power traders, global commodity exchanges and clearing solutions, demand side and load management firms, direct marketing organizations, billing, back office, customer service and related information technology providers. NEM members also include inventors, patent holders, systems integrators, and developers of advanced metering, solar, fuel cell, lighting and power line technologies.

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no-notice last resort service. In the final step in market evolution, commodity service should be provided exclusively by competitive providers, and consumers should be fully engaged in the marketplace. By virtue of these measures, consumers throughout Ohio will realize the full benefits of energy choice. NEM also recommends that the utilities be required to fulfill their statutory obligation to complete a corporate separation with adherence to strict codes of conduct.

NEM strongly supports the leadership this Commission has exhibited in leading Ohio's gas utilities through a transitional process to exit the gas merchant function. This began at Dominion East Ohio with the recognition that the historically utilized Gas Cost Recovery mechanism was not sending accurate pricing signals to consumers to facilitate the development of the retail gas market. Through a phased process first incorporating a Standard Service Offer auction and then a Standard Choice Offer auction, the competitive marketplace was increasingly relied upon to reliably provide consumers with retail natural gas service while maintaining consumer protections. The path followed by the Ohio natural gas utilities is regarded as a successful national model of a competitive retail marketplace. This experience stands as a valuable starting place to the instant Investigation and what can be achieved for Ohio's electric consumers.

The questions posed by the Commission relate to market design and corporate separation. NEM's answers to the questions are set forth below.

### **Market Design**

**(a) Does the existing retail electric service market design present barriers that prevent customers from obtaining, and suppliers from offering, benefits of a fully functional competitive retail electric service market? To the extent barriers exist, do they vary by customer class?**

There are retail market design barriers that are preventing consumers from realizing the full benefits of retail competition and from competitive suppliers being able to compete effectively in the marketplace. As an initial observation, there is a significant difference across electric utilities in Ohio as to what the default service construct looks like, which increases the costs of competitive entry for suppliers. In comparison, in other jurisdictions such as Pennsylvania there is a fairly uniform Price to Compare (PTC) default service construct across the utilities. So long as the utility is retained in the default service role, the PTC is a benchmark for consumer shopping. However, in order for the PTC to provide consumers with a more meaningful basis upon which to compare utility commodity offerings and competitive supply offerings, it should bear a greater resemblance to market conditions and more fully reflect the utilities' full costs of providing commodity service. In addition, some of the Ohio electric utilities are not utilizing a competitive process to procure power for default service supply. As a first transitional step, the electric utilities should be relying upon a competitive procurement process to produce pricing signals that bear a resemblance to current market conditions to permit consumers to make informed shopping decisions.

NEM recommends that in the market end state, there should be no need for default service, all consumers should be engaged in the market and buying from a competitive supplier. During a transition to the market end state wherein the utility has exited the merchant role, utility default

service should use a competitive procurement method for obtaining and pricing commodity. Market design should ensure market based pricing and full rate unbundling such that the utility commodity rates reflect the full costs of providing 24/7 no notice generation default service. Utility delivery rates should be scrutinized and commodity-related costs should be unbundled and added to default rates to remove existing inequities and subsidies.<sup>2</sup> All suppliers providing electric commodity service to customers at retail, including default service providers and competitive suppliers, incur costs to do so in addition to the wholesale cost of the energy commodity. These costs include:

transmission charges, scheduling and control area services, risk management premiums, load shape costs, commodity acquisition and portfolio management, working capital, and taxes, as well as costs for administrative and general expenses, metering, billing, collections, bad debt, information exchange, compliance with consumer protection regulations, and customer care.

These costs are incurred by competitive energy suppliers and are included in competitive energy supplier pricing. When these same costs are also included in utility delivery pricing it results in a double payment of these costs by consumers. The failure to transfer these costs from the utility delivery rate to the utility default rate, in addition to resulting in a consumer double payment, provides a competitive advantage to the utility. Costs that remain in utility delivery service pricing, for a service that the utility is no longer rendering is anti-competitive and contrary to proper utility cost of service regulation. The default service rate should be a fully loaded retail price for the product. This is as opposed to the current artificially created default service rate and the attendant regulatory intervention required to oversee that rate, which in the end is a poor proxy for current market conditions.

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<sup>2</sup> See, e.g., 52 Pa. Code § 69.1808. Default service cost elements.

(a) The PTC should be designed to recover all generation, transmission and other related costs of default service. These cost elements include:

(1) Wholesale energy, capacity, ancillary, applicable RTO or ISO administrative and transmission costs.

(2) Congestion costs will ultimately be recovered from ratepayers. Congestion costs should be reflected in the fixed price bids submitted by wholesale energy suppliers.

(3) Supply management costs, including supply bidding, contracting, hedging, risk management costs, any scheduling and forecasting services provided exclusively for default service by the EDC, and applicable administrative and general expenses related to these activities.

(4) Administrative costs, including billing, collection, education, regulatory, litigation, tariff filings, working capital, information system and associated administrative and general expenses related to default service.

(5) Applicable taxes, excluding Sales Tax.

(6) Costs for alternative energy portfolio standard compliance.

(b) EDC rates should be scrutinized for any generation related costs that remain embedded in distribution rates. This review should occur no later than the next distribution rate case for each EDC filed after September 15, 2007. The Commission may initiate a cost allocation case for an EDC on its own motion if such a case is not initiated by December 31, 2007. Changes to rates resulting from the examination would take effect after the expiration of Commission-approved rate caps.

The very notion of “default service” is anathema to a competitive market paradigm, and is a distortion to the market. NEM notes that the concept of “default service” simply doesn’t exist in other markets, outside of retail energy. Default service requires an excessive level of regulatory intervention to try to approximate a level competitive playing field. In the interim during a transitional use of a default service construct, it is imperative that the Commission look at every aspect of utility rate recovery and determine the appropriate allocation of costs between delivery and commodity functions. Default service must also be properly priced to reflect all of the costs of a retail product, not just a wholesale pass-through of commodity costs. The inequities and cost subsidies of utility default service rates must be examined and eliminated. Rate unbundling permits consumers to see and understand the full extent of the costs associated with utility commodity default service and permit consumers to make accurate, informed comparisons with competitive offerings. Also, consumers that migrate will not be penalized by a double payment of commodity-related costs, once to their competitive supplier that is currently providing the service, and once to the utility that is no longer providing the service but is collecting the cost through bundled delivery rates.

In a truly competitive market, the consumer is entrusted with the responsibility of engaging with prospective suppliers. The competitive suppliers bear the cost of acquiring the customer. By comparison, there is a presumption in retail energy markets that a consumer must initiate service with the utility before it can shop. The utility bears no acquisition costs, and the consumer is not engaged in making an affirmative decision to take utility default service. NEM urges that the presumption that a consumer must initiate service with the utility before it can shop is a significant barrier to retail market development and should be eliminated.

**(b) Does default service provide an unfair advantage to the incumbent provider and/or its generation affiliate(s)?**

Yes, default service does provide an unfair competitive advantage to the utility. First, the utility has no customer acquisition costs in comparison with competitive suppliers that incur costs to market to, acquire, enroll and retain a customer. The utility benefits from instant economies of scope and scale in serving its large default service customer base.

In addition, because the utility has a dual function in the marketplace as a competitive provider of energy but also as the entity with whom the supplier must interact and interface in order to effectuate changes in customer service, sharing of billing and other customer information, the utility wields a significant amount of control over the market vis a vis its competitors.

As noted in our response to question (a), in a market that has opened to competition, the presumption that consumers who have not selected a competitive supplier have made an affirmative decision to receive service from the utility is unwarranted and an unfair advantage to the utility. This is compounded by the problem that so long as the utility is in the default service role there will be a group of consumers that will fail to shop, even when it is in their best economic interest to do so. Consumer apathy to shopping, apathy to educating themselves about energy choice, and apathy to choosing a competitive supplier are all by-products of this default market structure and presumption that consumers should initiate service with the utility before

being able to select a competitive supplier. Consumers should have the freedom and responsibility of selecting a competitive provider when they initiate electric service.

**(c) Should default service continue in its current form?**

No. Default service should be a part of a transitional process to a full utility exit from the merchant function. The utilities current default service price for mass market customers is a blended rate of short- to long-term products/cost allocations (depending upon whether the utility used a competitive process to procure supplies). The very nature of blended, long-term products is not to bear a resemblance to current market conditions and is subject to pricing peaks and valleys that do not create sustained opportunities for market entry or consumer shopping.

In addition, the costs that are associated with no-notice retail last resort service are not reflected in default service rates, which are largely wholesale commodity passthroughs, and thus the default service rate is inherently a misrepresentation of retail market pricing. This distorts consumers' perceived value of market-based competitive offerings in the marketplace and will cause consumers to make faulty decisions based on inaccurate utility price to compare information. When competitive suppliers can truly compete on the basis of price, this will yield the lowest price for consumers.

**(d) Does Ohio's current default service model impede competition, raise barriers, or otherwise prevent customers from choosing electricity products and services tailored to their individual needs?**

Yes. Retaining the utility as the default provider of energy supply services long term in a restructured environment will have a negative impact on the development of competitive markets. The structure and pricing of default service are critically important issues in determining whether consumers will receive the benefits of meaningful price competition. Retaining incumbent utilities in the default service role for all consumers and setting a price for default service that does not bear a close correlation to market-based pricing and that fails to fully capture the cost of providing no-notice retail last resort service, creates a significant barrier to competitive suppliers and perpetuates the same non-competitive energy services that restructuring is designed to replace.

Commodity supply and related services, information and technologies are inherently competitive functions. Allowing the utility to remain in the default service role can discourage competitive entities from entering the market. Competitive entities lack the instant scope and scale that captive customers offer the utilities and therefore different cost considerations underly said entities offerings versus those of the utility. Additionally, retaining a regulated monopoly in a competitive marketplace inherently distorts the competitive playing field and requires a significant amount of regulatory intervention and oversight to try to ensure a level competitive playing field.

**(e) Should Ohio continue a hybrid model that includes an ESP and MRO option?**

Both the ESP and MRO options suffer from problems. The ESP option is an artificially constructed rate, and is not cost-based. The ESP requires a large degree of regulatory intervention to oversee its calculation, and it injects a large distortion in the market. There are a number of riders attached to the ESP rate that complicate its calculation and are subject to ongoing modification. This is problematic for consumers and suppliers in that the rate does not bear a resemblance to market conditions and is potentially subject to change in a manner that could undermine the value of competitive offerings. For example, under DPL's ESP none of the commodity is currently procured through a competitive procurement process.

The Commission has not approved an MRO plan to date. However, the MRO construct is at base a wholesale commodity pricing structure, not a full retail product price. As discussed in further detail in response to question (a), the default service structure should incorporate not only a market-based commodity pricing component, but to that should also be added the full retail costs of providing no-notice retail last resort service.

**(f) How can Ohio's electric default service model be improved to remove barriers to achieve a properly functioning and robust competitive retail electric service electricity market?**

Consistent with our previous recommendations and responses to the Commission's questions, NEM recommends that in the market end state competitive suppliers should be relied upon to provide electric service to all consumers. However, in the interim until this is achieved, improvements could be made to the current default service model. Utility default service should include more timely, market based pricing signals to consumers to provide an environment for sustained competitive activity and more accurate basis upon which consumers can evaluate competitive energy offerings. This should be accompanied by utility default service pricing that fully captures the cost of providing no-notice last resort service at retail.

NEM also suggests that default service could be improved if there was no longer a presumption that new service customers begin on utility service and then have the opportunity to switch to a competitive provider. Consumers should have a choice of supplier from the start of service.

**(g) Are there additional market design changes that should be implemented to eliminate any status quo bias benefit for default service?**

Even with significant amounts of regulatory intervention, the default service bias cannot be sufficiently neutralized to ensure a fair and level competitive playing field. However, if a utility default service model is utilized, it should be premised on the fundamentals of a market-based commodity price (monthly-adjusted rate for mass market consumers/hourly pricing for large commercial and industrial customers) to which is added all of the costs of providing retail commodity service. There also need be no presumption in a default service model that non-migrated consumers have decided not to shop. Consumers that take default service should have the right and responsibility to be engaged in the market and make an affirmative decision as to their energy supplier.

Default service should be viewed as a transitional measure for an interim period after which only competitive suppliers are relied upon to meet consumers' energy commodity needs. This transitional approach has been used successfully by Ohio's natural gas utilities in eliminating the historic Gas Cost Recovery mechanism that did not provide accurate pricing signals to consumers and moving to Standard Service Offer and then Standard Choice Offer rates set through a descending clock auction process. Other jurisdictions have also undertaken a transitional path to move from a utility default service structure. Below are illustrative examples of these approaches.

#### A. Declaration of Competitive Service<sup>3</sup>

A transitional mechanism in place in the electric market in Illinois involves the declaration of a utility's tariffed service to become a competitive service.<sup>4</sup> A service can be declared competitive by the Illinois Commerce Commission upon a showing that 33% of eligible customers have migrated from the tariffed service to a competitive supplier and that at least three competitive suppliers provide a comparable service in the utility's service territory.<sup>5</sup> The Illinois statute explicitly declared that the provision of electric power and energy to retail customers in the service territories of ComEd and Ameren for customers with peak demands of 400 kilowatts and above is a competitive service.<sup>6</sup> Upon the declaration of service as competitive, service to those customers by the utility will only be rendered on an hourly-pricing basis. The Illinois Commerce Commission also granted ComEd's petition to declare the provision of power and energy to customers with peak demands of 100 kilowatts and above but less than 400 kilowatts as a competitive service.<sup>7</sup>

#### B. Establish Date Certain for Utility Exit of Merchant Function

Atlanta Gas Light exited the merchant function in 1999. Georgia's Natural Gas Competition and Deregulation Act of 1997<sup>8</sup> permitted gas utilities to elect to exit the merchant function upon a showing that sufficient competition existed in their service territory. Once the determination was made that market conditions were sufficiently competitive, customers that had not chosen a marketer were randomly assigned to one based on the marketer's market share at the time. The Georgia PSC instituted an interim pooler to serve customers in the event their marketer can no longer provide service.<sup>9</sup> Legislation in 2002 provided for the creation of a "regulated provider" to serve low income and high-risk customers unable to

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<sup>3</sup> Ohio law also provides a process for the declaration of competitive service. See O.R.C. 4928.06(D).

<sup>4</sup> Illinois Public Utilities Act, Section 16-113.

<sup>5</sup> Illinois Public Utilities Act, Section 16-113(a).

<sup>6</sup> Illinois Public Utilities Act, Section 16-113(f).

<sup>7</sup> Illinois Commerce Commission Docket Nos. 08-0619, 08-0620, and 08-0621.

<sup>8</sup> O.C.G.A. § 46-4-150 et. seq.

<sup>9</sup> Georgia Public Service Commission Docket No. 8390-U, Order Designating Interim Pooler, November 4, 1999.

receive service from a marketer.<sup>10</sup> Marketers serving customers in this service territory perform their own billing and customer care.

### C. Separation of Generation and Transmission

Texas law required that all electric customers have the option of choosing a competitive supplier by January 1, 2002.<sup>11</sup> The electric utilities were required to unbundle their business activities into three entities: a wholesale power generation company, a retail electric provider (REP), and a transmission and distribution company.<sup>12</sup> When competition began on January 1, 2002, standard offer service was transferred to the affiliated REP of the utility company, to provide service at the Price to Beat, which could be adjusted twice per year for fuel cost changes. Affiliated REPs were prohibited from offering competitive rates to residential and small commercial customers in the utility service territory, other than as the standard offer provider, until 40% of residential and small commercial customer load had chosen a competitive supplier. Provider of last resort service is rendered by competitive providers on a customer class-specific basis. Marketers serving customers in Texas perform their own billing and customer care.

If the underlying default service structure is implemented consistent with our recommendations for a market-based commodity price signal to which is added all of the costs of providing retail commodity service, there are additional retail market enhancements the Commission should consider that have been implemented in other retail choice jurisdictions that have facilitated supplier participation in the market and therefore provided increased opportunities for consumer shopping. Some of these retail enhancements are as follows:

#### A. Purchase of Receivables Programs

Perhaps the most important retail enhancement approved and implemented by Commissions and utilities in other choice jurisdictions is non-recourse utility purchase of receivables (POR) programs to facilitate the development of competitive retail energy markets, particularly for mass market consumers. As long as a utility remains in the competitive commodity market, the efficient use of its legacy billing infrastructure through the implementation of a non-recourse purchase of receivables program is to the benefit of all consumers, particularly so long as uncollectibles remain in utility delivery rates. A key feature of such programs is allowing the utility to treat the purchased receivables as their own for collections and disconnection purposes.

When utilities offer to purchase receivables, this one rule change has a significant impact on the cost to serve consumers that may otherwise be uneconomic to serve

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<sup>10</sup> Natural Gas Consumers Relief Act of 2002. See O.C.G.A. § 46-4-166.

<sup>11</sup> Texas Utility Code Ann. Section 39.102.

<sup>12</sup> Texas Utility Code Ann. Section 39.051.

in a competitive marketplace. POR provides consumers with greater access to competitive offerings because it significantly minimizes consumer credit ratings as an impediment in customer enrollment. The implementation of a POR program should have virtually no additional cost to the utility or the consumer. Importantly, allowing a utility to maximize the use of its legacy billing system avoids significant duplication of infrastructure costs, costs that have already been paid by ratepayers. In not requiring marketers to develop duplicative systems and processes it promotes efficiencies, reduce costs to consumers, and reduces barriers to entry which will increase customer choice.

## **B. Access to Data**

Seamless, low-cost, efficient data and information exchange is the key to lowering the cost of energy and related services as well as enhancing reliability in a competitive retail marketplace. Critical to the long-run success of a competitive energy industry is the ease of entry into the marketplace of competitive suppliers of all sizes. The greater the number of competitive suppliers, the more price competition and variety of value-added services will be offered to consumers. In order to facilitate competitive entry, standardized business practices and a consistent set of information standards should be utilized. In particular, NEM recommends that the utilities provide historical load profile information in a web-based application and that utilities provide customer lists to competitive suppliers.

In the absence of standardized business practices, market participants are forced to divert scarce resources to customize billing, back office, and customer care facilities, and to develop and maintain non-standardized information protocols or develop specialized knowledge of different rules in each jurisdiction, driving energy prices higher nationwide. Consistent and uniform implementation of business rules will allow marketers to compete in Connecticut in a more cost-effective manner.

### **(h) What modifications are needed to the existing default service model to remove any inherent procurement (or other cost) advantages for the utility?**

The utility is the dominant actor in the marketplace. The utility has the majority of the market share in the retail electric market. Attendant with that dominant position, the utility benefits from economies of scale in power procurement for a larger consumer base, which it serves at a lower risk than competitive providers (both because of the relative certainty of the size of the customer base it will serve and the regulatory cost recovery mechanisms that permit the utility to serve consumers at low or no risk). Because of its market share, the utility has a buying advantage and volume advantage when it is procuring power. These procurement advantages may be diminished to a degree as consumers continue to migrate to competitive suppliers but they cannot be fully compensated for so long as the utility remains in the default service provider role. Proper market-based pricing and cost allocation of all commodity-related activities to default service rates is also necessary to avoid a significant procurement and cost advantage to the utility.

**(i) What changes can the Commission implement on its own under the existing default service model to improve the current state of retail electric service competition in Ohio?**

As described in our previous responses, the existing default service model should be modified to: 1) ensure market-based commodity pricing; and 2) full utility delivery rate unbundling such that the utility default service rates reflect the full retail costs of providing 24/7 no notice generation default service. The Commission has the statutory authority to implement these modifications. Ohio Revised Code Section 4928.141 provides that, “an electric distribution utility shall provide consumers, on a comparable and nondiscriminatory basis within its certified territory, a standard service offer of **all competitive retail electric services** necessary to maintain essential electric service to consumers, including a firm supply of electric generation service.” (emphasis added). NEM interprets this language to require that the Standard Service Offer, in fact, reflect the full retail costs of providing this service, not merely a passthrough of wholesale commodity costs. This is reinforced by the general policy of the State set forth in O.R.C. Section 4928.02(B) to, “Ensure 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.” (emphasis added).

**(j) What legislative changes, if any, including changes to the current default service model, are necessary to better support a fully workable and competitive retail electric service market?**

NEM’s recommended changes to the current default service model can be achieved under the Commission’s current statutory authority.

**(k) What potential barriers, if any, are being created by the implementation of a provider's smart meter plans? Should CRES suppliers be permitted to deploy smart meters to customers? Should the Commission consider standardizing installations to promote data availability and access?**

As the utilities implement smart meter plans, it is critical that access to the smart grid infrastructure be provided in a manner that avoids the creation of new information and/or demand or demand response-related monopolies. We urge the Commission to ensure that all authorized market participants have secure, reliable, non-discriminatory (non-proprietary), open access to the information that will be created to facilitate the “smart grid.” This will entail the use of “open standards” to implement new generations of smart meters and smart IT infrastructures needed to “interoperably” handle a virtual tsunami of near real-time usage and pricing data. Open standards and non-discriminatory (non-proprietary) access to smart grid infrastructure will serve to incent a new critically-needed generation of services, application developers and information technologies, to securely, reliably and interoperably collect (meters), process (analyze), store and provide secure access to the substantial increase of data needed to develop new demand response-related products, services, information technologies and price offerings. Commission approval of smart meter plans and cost recovery should be premised upon the utility’s provision of open, non-discriminatory access to the smart grid infrastructure to competitive energy marketers and other third parties authorized by consumers to receive and

manage their energy usage information. Real-time data should be provided by the utility to market participants on a real-time basis.

**(l) Should the Commission consider standardized billing for electric utilities?**

A critical goal of utility rate unbundling is to provide consumers with information that will allow them to evaluate competitive offers against utility default service rates. Bills which separate out regulated delivery and unregulated competitive services, so that consumers may choose, on a line-item basis, both the amount and price of each competitive service that they wish to purchase are essential to fostering competition in the energy market. Unbundled rates expose consumers to price signals that permit them to compare competitive options.

**(m) Do third party providers of energy efficiency products, renewables, demand response or other alternative energy products have adequate market access? If not, how could this be enhanced?**

No, these third party providers do not have adequate market access. This is due to many of the same market distortions caused by retaining the utility in the default service role as have been discussed elsewhere in these comments. The removal of utilities from default service will hasten the opportunities for innovation and product development in these additional product segments. In addition, providing for market-based default service rates will allow these market participants to develop such products and bring additional value to consumers.

**(n) Does an electric utility have an obligation to control the size and shape of its native load so as to improve energy prices and reduce capacity costs?**

The utilities have a statutory obligation to achieve energy savings goals and peak demand reduction. Beginning in 2009, the utilities are required to, “implement energy efficiency programs that achieve energy savings equivalent to at least three-tenths of one per cent of the total, annual average, and normalized kilowatt-hour sales of the electric distribution utility during the preceding three calendar years to customers in this state,” as well as to, “implement peak demand reduction programs designed to achieve a one per cent reduction in peak demand in 2009 and an additional seventy-five hundredths of one per cent reduction each year through 2018.”<sup>13</sup> Aside from these statutory requirements, the utilities do not have an obligation to control the size and shape of its native load. Indeed, the level of planning and regulatory intervention associated with this type of control is contrary to the functioning of a robust competitive marketplace and consumer shopping.

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<sup>13</sup> O.R.C. 4928.66(A)(1)(a) and (b).

## **Corporate Separation**

**(a) Whether an electric utility should be required to disclose to the Commission any information regarding the utility's analysis or the internal decision matrix involving plant retirements, capacity auction, and transmission projects, including correspondence and meetings among affiliates and their representatives?**

Current law and regulation require the electric utility over which the Commission has jurisdiction to allow the Commission to, "examine such books, accounts, or other records kept by an electric utility or its affiliate as may relate to the businesses for which corporate separation is required."<sup>14</sup> On a related note, utilities should not derive an unfair competitive advantage from information received from a generation affiliate.

**(b) Should a utility's transmission affiliate be precluded from participating in the projects intended to alleviate the constraint or should competitive bidding be required?**

NEM notes that transmission siting is a matter of FERC jurisdiction. That being said, corporate separation AND competitive bidding are both necessary and appropriate measures to ensure the functioning of the competitive marketplace.

**(c) How long should a utility be permitted to retain their injection rights?**

We are unclear what the Commission is referring to in this question. We reserve the right to comment on this question upon Commission clarification.

**(d) As fully separate entities, does a utility's distribution affiliate have a duty to oppose the incentive rate of return at FERC?**

As separate entities, the affiliate should advocate consistent with its own best interests.

**(e) Is there a potential for consumers to be misled by a utility's corporate separation structure?**

NEM believes as a long-standing principle that a utility should not speak on behalf of its unregulated affiliate or give the appearance that it is speaking on behalf of its unregulated affiliate. In addition, a utility and its unregulated affiliate should not trade upon, promote or suggest to any customer, supplier or third party that they may receive preferential treatment as a result of the affiliation. Relatedly, all suppliers, affiliated and non-affiliated, must not misrepresent the nature of their relationship with the utility in their dealings with consumers. As a general proposition, if a utility name is used by an entity, affiliated or non-affiliated, that entity must make proper disclosures with respect to its relationship with the utility. In other words, the focus of the regulations should be on proper disclosure regardless of the entity's affiliation.

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<sup>14</sup> O.R.C. 4928.18(B).

In this regard the Commission's current regulations require that, "Shared representatives or shared employees of the electric utility and affiliated electric services company shall clearly disclose upon whose behalf their public representations are being made when such representations concern the entity's provision of electric services."<sup>15</sup> The Commission regulations place a corresponding requirement on CRESs and prohibits CRES advertising or marketing that would, "Lead the customer to believe that the CRES provider is soliciting on behalf of or is an agent of an Ohio electric utility when no such relationship exists," and generally prohibits CRESs from, "Engaging in any solicitation that leads the customer to believe that the CRES provider is soliciting on behalf of or is an agent of an Ohio electric utility when no such relationship exists."<sup>16</sup>

**(f) Are shared services within a 'structural separation' configuration causing market manipulation and undue preference?**

There is a potential for advantage if shared services are not properly priced and costs allocated in accordance with existing guidelines.<sup>17</sup>

**(g) Should generation and competitive suppliers be required to completely divest from transmission and distribution entities, maintain their own shareholders and, therefore, operate completely separate from an affiliate structure?**

The critical point is the corporate separation of the wires company from the generation and retail provider that is reinforced with strong codes of conduct. Effective corporate separation has not yet occurred for all of the Ohio utilities. The utilities should be required to fulfill their statutory obligation to complete a corporate separation with adherence to strict codes of conduct. Firewalls and the separation of functions, information, operations and personnel must be effective and enforceable. Enforceable standards of conduct must ensure that proprietary and confidential competitor information is scrupulously safeguarded. Under no circumstances should the electricity commodity supplies of an unregulated affiliate be subsidized by regulated rates.

**(h) Are there PJM tariffs or FERC rules that would mitigate market power and/or facilitate retail electric service competition?"**

PJM has had a Market Monitoring Unit since 1999 that was spun off into a separate entity in 2008 called Monitoring Analytics. Its purpose is to implement the PJM Market Monitoring Plan, which among its purposes includes monitoring and reporting on, "the potential of any Market Participant(s) to exercise market power within the PJM Region."<sup>18</sup>

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<sup>15</sup> O.A.C. 4901:1-37-04(D)(11).

<sup>16</sup> O.A.C. 4901:1-21-05(C)(8)(h) and (C)(10).

<sup>17</sup> See O.A.C. 4901:1-37-08.

<sup>18</sup> PJM Market Monitoring Plan, available at: [http://www.monitoringanalytics.com/reports/FERC\\_Orders/Orders/mmplan.pdf](http://www.monitoringanalytics.com/reports/FERC_Orders/Orders/mmplan.pdf)

**Conclusion**

NEM appreciates the opportunity to offer these comments on the current state of default service in Ohio and a proposed transitional path that will permits consumers to realize the benefits of a competitive retail market.

Sincerely,

A handwritten signature in black ink that reads "Craig Goodman". The signature is written in a cursive style with a large, looped "C" and "G".

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