

**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.)	

**REPLY COMMENTS OF
INDUSTRIAL ENERGY USERS-OHIO**

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I. INTRODUCTION

On December 12, 2012, the Public Utilities Commission of Ohio ("PUCO" or "Commission") issued an Entry initiating an investigation regarding the health, strength and vitality of the competitive retail electric service market and actions that the Commission may take to enhance the health, safety and vitality of that market. As part of the investigation, interested parties were given an opportunity to respond to numerous questions regarding default service as well as Ohio's corporate separation requirements. Based on the content of the questions, it appears that this investigation may impact the ultimate price paid as well as the size and scope of the "customer choice" opportunity available to Ohio consumers. Accordingly and on March 1, 2013, the Industrial Energy Users-Ohio ("IEU-Ohio") submitted answers to and comments on such questions for the Commission's consideration.

The procedural schedule established by the Commission also provides for the submission of reply comments on or before April 5, 2013. IEU-Ohio's reply comments are below and, in no particular order, the reply comments address proposals or positions contained in the initial comments of other interested parties. IEU-Ohio's failure to address proposals or positions expressed in the initial comments of other

interested parties implies no agreement with or support of such proposals or positions. Quite frankly, some of the initial comments are based on a fundamentally incorrect understanding of current Ohio law,¹ the Commission's application of current law,² the scope of the Commission's jurisdiction³ and authority or all of the above.

As in its initial comments, IEU-Ohio's reply comments focus on the many opportunities available to the Commission to remove barriers that are presently blocking consumers from fully realizing the benefits of Ohio's "customer choice" and pro-competitive laws and policy. As confirmed by most of the initial comments, the most significant barriers to this realization are barriers which the Commission itself has erected over the repeated objections of consumers and competitive suppliers.

The comments of Competitor Duke highlight the Commission's case-to-case inconsistency and the barriers to a fully functioning competitive retail electric market that have arisen as a consequence.⁴ It asserts that generation supply prices that are part of the SSO should be based on market prices.⁵

¹ For example, the comments of the Utility Workers Union of America ("UWUA") suggest that it may be unaware that structural separation of generation and wires functions is already required by Ohio law. The comments of Duke Energy Retail and Duke Energy Commercial Asset Management ("Competitor Duke") propose the elimination of the statutory form of governmental aggregation without regard to the "home rule" authority of cities, villages and counties which is delegated to these units of local government by the Ohio Constitution. Competitor Duke Comments at 3. Also, the comments of The Sierra Club and Ohio Environmental Council (which focus exclusively on corporate separation issues) appear to have been prepared based on an assumption that the generation, distribution and transmission functions of electric utilities remain fully subject to the Commission's supervisory and regulatory authority. However, Section 4928.05, Revised Code, generally removes the Commission's supervisory and regulatory authority with regard to any competitive retail electric service.

² For example, the comments of AARP indicate that it or the consultant on which it has relied for purposes of preparing the comments has wrongly assumed that the generation supply price in all current standard service offers ("SSO") is based on the results of a competitive bid process ("CBP"). AARP Comments at 4, 7.

³ As discussed herein, the views expressed in the comments filed by Ohio Power Company ("OP") conflict with the positions that OP has advanced in other Commission proceedings and proceedings before the Federal Energy Regulatory Commission ("FERC").

⁴ Competitor Duke Comments at 2.

⁵ Competitor Duke Comments at 3.

The comments of Hess Corporation (“Hess”), at page 4, observe that current Commission-approved electric security plans (“ESP”) are barriers to competition.

The comments of Interstate Gas Supply, Inc. (“IGS”) are similar to those of Hess, but at pages 5 and 6, IGS concludes that “[t]he result is a market structure that is dictated by the top down preferences of regulators, instead of competitive market forces driven by customer preferences, innovation, exploration, engagement, and better products with more informed customers.”

The graphs and data provided in the comments of FirstEnergy Solutions Corp. (“FES”) summarize the shopping and price-to-compare disadvantages that are punishing Ohio’s electric consumers because of the barriers established or extended by the Commission.

At page 6, the comments of the Office of the Ohio Consumers’ Counsel (“OCC”) state:

Existing barriers that prevent customers from obtaining the benefits of a fully functional competitive retail electric service market include imposing certain non-bypassable charges under an Electric Security Plan (“ESP”). Such charges can create a subsidy in the form of a non-bypassable charge flowing revenues from customers to the Utility’s affiliated Marketer. Ohioans have seen several utilities request such non-bypassable charges under the rubric of a “stability charge” or “financial integrity charge.”⁶ And the Commission has approved such charges at times over the strenuous objections of a number of parties, including OCC. However, these charges have no statutory basis and are clearly not for costs incurred to provide generation service.

⁶ See e.g., *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Authority to Establish a Standard Service Offer Pursuant to 4928.143 Ohio Rev. Code in the Form of an Electric Security Plan*, Case No. 11-346-EL-SSO, Application at 10 (March 30, 2012) (requesting a retail stability rider); *In the Matter of the Application of the Dayton Power and Light Company for Approval of its Electric Security Plan*, Case No. 12-426-EL-SSO, Second Revised Electric Security Plan at ¶12 (December 12, 2012) (requesting a Service Stability Rider) (citation original).

At page 7, OCC's comments state:

The Ohio General Assembly pointed Ohio in the direction of competition with Senate Bill 3 in 1999. But more than a decade later in the midst of historic lows in energy prices, many Ohioans are still awaiting the promise of market benefits. What will be most unfair and objectionable for consumers is if certain utilities (DP&L and AEP Ohio) are allowed to "time" their entrance into market so that their long-delayed transition to a market-based standard offer occurs only when market prices rise so that the Utilities benefit more and consumers benefit less.

Additionally, affording the Utility and/or its affiliate financial stability or integrity revenues confers a benefit on the Utility and its affiliate – an anti-competitive benefit as it is not shared by other electric Marketers. And, most importantly, it is certainly not shared by customers.

At page 8, OCC's comments state:

Standard offers do not provide the local Utilities or their affiliates with an unfair advantage over other electric Marketers. But the inflated standard offers of AEP Ohio and DP&L do provide those Utilities with an advantage through high utility bills that take more of consumers' money than would a market-based standard offer.

Among other things and as explained in the comments of Competitor Duke, Hess, IGS, OCC, FES and IEU-Ohio, the barriers selectively and inconsistently erected by the Commission provide an unreasonable and unlawful advantage to the competitive generation business of some incumbent electric distribution utilities ("EDU") or affiliates, conflict with the policy set forth in Section 4928.02, Revised Code, and work to transfer massive amounts of consumers' wealth to the benefit of incumbent utilities or their affiliates through a combination of above-market compensation and non-bypassable charges.⁷ And, the Commission's willingness to embrace these unlawful and unreasonable outcomes has inspired other EDUs to make worse the plight of consumers (all consumers).

⁷ OCC Comments at 7-8, for example.

Hopefully, this investigation will help to shine more light on the barriers that are working against the public interest. But this investigation appears to be framed as though the Commission's questions on which comments have been submitted are new and novel questions that arise solely as part of the investigation. The questions are, however, neither new nor novel. They have been addressed repeatedly. Thus, the real questions raised by this investigation are about whether the Commission will put things right and not make conditions worse for consumers by authorizing new and higher barriers in the days ahead.

II. SPECIFIC REPLY COMMENTS

A. Proposals to Expand and Increase the Burden of Ohio's Anticompetitive and Expensive Portfolio Mandates and the Commission's *Ad Hoc* Approach to Discharging its Statutory Duties

Advanced Energy Economy Ohio's ("AEEO") comments urge the Commission to act to accelerate the development of distributed generation, "price-suppressing energy efficiency" beyond what is contemplated in Ohio's portfolio mandates,⁸ "smart meters" and "dynamic pricing,"⁹ and energy storage investment.¹⁰ AEEO's comments suggest that the Commission use the PJM Interconnection, L.L.C. ("PJM") requirements for capacity-related energy efficiency resources as the Ohio standard for compliance with the energy efficiency mandate in Section 4928.66, Revised Code.¹¹

The Dayton Power and Light Company's ("DP&L") comments support changing the law to make non-bypassable the EDU's cost of compliance with the alternative energy resource mandate. More specifically, DP&L's comments state:

⁸ AEEO Comments at 2.

⁹ AEEO Comments at 4-5.

¹⁰ AEEO Comments at 6.

¹¹ AEEO Comments at 11.

Senate Bill 221 and specifically the requirement that a certain portion of the utility's load be served from a renewable energy resource ***are currently bypassable*** through the Alternative Energy Rider (AER). A change to the default service model that would make the renewable and alternative energy requirements a non-bypassable charge recovered through distribution rates would incentivize utility investment in renewable energy generation assets and/or long term renewable energy credit contracts.¹²

At page 7 of its comments, DP&L states that beyond the portfolio mandates, "... ***the market should be permitted to balance demand, energy prices and capacity costs.***"¹³ At page 8 of its comments, DP&L discusses the Commission's shared service question which asks if incumbent utilities obtain an advantage through shared services structures. DP&L's comments point to the Commission's rules and assert that:

Utilities and their affiliates are required to comply with the rules as outlined in O.A.C. §4901:1-10-37. The purpose of these rules is to ensure a competitive advantage is not gained solely because of corporate affiliation.

Thus, DP&L's comments advance positions that conflict directly with the proposals DP&L is now advancing, over the objections of consumer and other representatives, in its pending ESP proceeding where it is: (1) seeking substantial and non-bypassable above-market compensation for the benefit of its cohabitating competitive generation business; (2) asserting that it is free to ignore the "required" corporate separation requirements for the purpose of benefiting its affiliated competitive retail electric service ("CRES") provider; and, (3) seeking a non-bypassable charge for its Yankee Solar facility which DP&L claims was built to facilitate compliance with the "currently bypassable" renewable resource portfolio mandate.¹⁴

¹² DP&L Comments at 5 (emphasis added).

¹³ Emphasis added.

¹⁴ *In the Matter of the Application of The Dayton Power and Light Company to Establish a Standard Service Offer in the Form of an Electric Security Plan*, Case Nos. 12-426-EL-SSO, *et al.*, Rebuttal Testimony of Dona R. Seger-Lawson at 12-13 (March 26, 2013).

As discussed extensively in IEU-Ohio's comments and herein, proposals to expand and increase the burden of government mandates and non-bypassable charges are barriers to the "customer choice" centerpiece of Ohio's energy policy in Sections 4928.02 and 4929.02, Revised Code. The General Assembly has commenced a review of the portfolio mandates¹⁵ and proposals to change the law should be taken up with the General Assembly.

DP&L's comments in this proceeding highlight some of the problems created by the *ad hoc*, case by case, approach that the Commission has taken with regard to implementing Chapter 4928, Revised Code. IEU-Ohio discussed these problems in its initial comments. The substantial conflicts in the positions taken by DP&L in its SSO proceedings, investigatory proceedings and portfolio cases are clear evidence that EDUs are free to advance legal positions from case to case that leave consumers with the worst outcome in every case. The Commission's *ad hoc* approach to discharging its statutory duties invites the anti-consumer, anticompetitive assault that is presently underway in various Commission proceedings.

B. Proposals to Mandate EDU Bidding of Energy Efficiency and Peak Demand Capabilities into the Organized Wholesale Market

Through what amounts to twisted and defective reasoning, some comments urge the Commission to force EDUs to bid consumers' energy efficiency and peak demand attributes (associated with compliance with the government mandates in Section 4928.66, Revised Code) into PJM's organized capacity market.¹⁶ The theory behind this proposal appears to be that EDU confiscation of these consumer-owned attributes

¹⁵ 130th General Assembly, Senate Bill 58, available via the internet at: http://www.legislature.state.oh.us/bills.cfm?ID=130_SB_58 (last visited April 3, 2013).

¹⁶ For example, see the comments of the Environmental Law & Policy Center at page 1 and the comments of AEEO at page 11.

and forced injection into PJM's market through an EDU works to reduce the cost of the compliance with Ohio's anticompetitive and increasingly expensive portfolio mandates. The unwarranted assumption embedded in this theory is that these consumer-owned attributes will not be bid into the PJM organized market or otherwise relied upon to avoid the creation of an excessive capacity obligation that will appear in the consumers' peak load contribution factor. Unfortunately and based on a recent compliance plan decision¹⁷ by the Commission, it appears that the Commission has also embraced this theory and the implied unwarranted assumption. In essence, the logic of the theory suggests that it is possible to reduce Paul's electric bill by robbing Peter to pay Paul's electric bill.

If the goal is to reduce the impact of the portfolio mandates on consumers' electric bills as is implied by the comments (and the Commission's decision referenced above), it would be far more efficient and root-cause oriented to eliminate the anticompetitive and increasingly expensive mandates!

Beyond the fundamental defects in the theory and cost-savings assumption embedded in this proposal (and the Commission's decision referenced above), the proposal is without merit for many other reasons.

A comparison of the Commission's rules that define energy efficiency and the peak that is to be reduced by the mandate in Section 4928.66, Revised Code, will show that the Commission's portfolio compliance definitions are not aligned with PJM's capacity resource definitions or the math that is used by PJM to determine capacity

¹⁷ *In the Matter of the Application of The Cleveland Electric Illuminating Company, Ohio Edison Company, and The Toledo Edison Company for Approval of Their Energy Efficiency and Peak Demand Reduction Program Plans for 2013 through 2015*, Case Nos. 12-2190-EL-POR, *et al.*, Opinion and Order (March 20, 2013).

obligations.¹⁸ The mismatch expands if comparisons are made between the Commission's rules and the resources that PJM will qualify as "planned resources"¹⁹

¹⁸ For PJM's capacity resource purposes, an energy efficiency resource ("EE Resource") is a project that involves the installation of more efficient devices/equipment, or the implementation of more efficient processes/systems, exceeding then-current building codes, appliance standards, or other relevant standards, at the time of installation, as known at the time of commitment, and meets the requirements of Schedule 6 (section M) of PJM's Reliability Assurance Agreement ("RAA"). To be eligible for PJM's purposes, the EE Resource must achieve a permanent, continuous reduction in electric energy consumption (during the defined EE Performance Hours) that is **not** reflected in the peak load forecast used for the Base Residual Auction ("BRA") for the Delivery Year for which the EE Resource is proposed. The EE Resource must be fully implemented at all times during the Delivery Year, without any requirement of notice, dispatch, or operator intervention. Dispatchable demand may be offered as a Demand Resource in the PJM Capacity Market, rather than an Energy Efficiency Resource.

Planned energy efficiency projects will be allowed to offer into Reliability Pricing Model (RPM) Auctions or to be committed in a Fixed Resource Requirement (FRR) Alternative Capacity Plan for up to four consecutive Delivery Years. An EE Resource that clears in an RPM Auction will receive an RPM Auction Credit during the Delivery Year equal to the Resource Clearing Price of the Locational Deliverability Area in which the EE Resource resides times the MW amount cleared.

All of the requirements to offer or commit an EE Resource in the PJM Capacity Market are detailed in PJM Manual for PJM Capacity Market (M-18). One of the major requirements includes the measurement and verification of the EE Resource's Nominated EE Value for the Delivery Year. The Nominated EE Value is the expected average demand (MW) reduction during the defined EE Performance Hours in the Delivery Year. The EE Performance Hours are between the hour ending 15:00 Eastern Prevailing Time (EPT) and the hour ending 18:00 EPT during all days from June 1 through August 31, inclusive, of such Delivery Year, that is not a weekend or federal holiday.

A Measurement & Verification (M&V) Plan describes the methods and procedures for determining the Nominated EE Value of an EE Resource and confirming that the Nominated EE Value is achieved. An EE Resource Provider must submit an Initial Measurement & Verification Plan for the EE Resource no later than 30 days prior to the RPM Auction in which the EE Resource is to be initially offered, or no later than 30 days prior to the submittal of an FRR Capacity Plan in which the EE Resource is to be initially committed.¹ An EE Resource Provider must submit an Updated Measurement & Verification Plan for the EE Resource no later than 30 days prior to the next RPM Auction in which the EE Resource is to be subsequently offered, or no later than 30 days prior to the submittal of the next FRR Capacity Plan in which the EE Resource is to be subsequently committed. Post-installation of the EE Resource, an EE Resource Provider must submit an Initial Post-Installation M&V Report for the EE Resource prior to the first Delivery Year that the EE Resource is committed to RPM or FRR Alternative. An EE Resource Provider must submit Updated Post-Installation M&V Reports prior to each subsequent Delivery Year that the resource is committed. Failure to submit an Updated Post-Installation M&V Report prior to a subsequent Delivery Year or failure to demonstrate that post-installation M&V activities were performed in accordance with the timeline in the approved M&V Plan will result in a Final Nominated EE Value equal to zero MWs for the Delivery Year.

The last Post-Installation M&V Report submitted and approved by PJM prior to the Delivery Year that the EE Resource is committed establishes the final Nominated EE Value that is used to measure RPM Commitment Compliance during the Delivery Year. Details regarding RPM Commitment Compliance and the associated penalty for failure to

eligible to bid into PJM's capacity auctions. Accordingly, there is no necessary relationship between confiscating and then bidding consumers' portfolio compliance attributes into PJM's organized capacity market and any reductions in portfolio compliance costs or the capacity prices that fall out of PJM's organized capacity market.

IEU-Ohio would also note that on December 9, 2009, the Commission granted rehearing in response to numerous applications for rehearing that challenged the rules adopted by the Commission in Ohio Administrative Code ("O.A.C.") Chapter 4901:1-39, Energy Efficiency and Demand Reduction Benchmarks, Chapter 4901:1-40, Alternative Energy Portfolio Standard, and Chapter 4901:1-41, Greenhouse Reporting and Carbon Dioxide Control Planning. Since December 9, 2009, the Commission has not addressed the "... several assignments of error which merit further consideration."²⁰ Many of the assignments of error which prompted the Commission to grant rehearing involve the Commission's determinations on how compliance with the mandates in Sections 4928.64 and 4928.66, Revised Code, shall be measured.

On June 16, 2009, the Commission opened Case No. 09-512-GE-UNC for the purpose of developing protocols for the measurement and verification of energy and

deliver the unforced value of an RPM capacity commitment (i.e., Capacity Resource Deficiency Charge) are provided in PJM Manual for PJM Capacity Market (M-18).

PJM's Manual 18B: Energy Efficiency Measurement & Verification, Overview Section at 5 and 6, available via the Internet at <http://pjm.com/~media/documents/manuals/m18b.ashx> (last checked April 5, 2013).

¹⁹ Under PJM's requirements, providers of planned demand resources that wish to offer such resources in the PJM capacity auctions must provide documentation to support eligibility of the resource no later than 15 business days prior to the auction. Among other things, the documentation must demonstrate to PJM's satisfaction that the planned resource will be available for the start of the delivery year associated with the auction. Generally speaking, providers of energy efficiency resources must submit a measurement and verification plan ("M&V Plan") 30 days prior to the BRA. The requirements for the M&V Plan are available in PJM's Manual 18B: Energy Efficiency Measurement and Verification. PJM will only provisionally approve an EE Modification transaction for an EE Resource after PJM has approved the provider's Initial/Updated M&V Plan and the RPM Credit Requirements have been satisfied.

²⁰ *In the Matter of the Adoption of Rules for Alternative and Renewable Energy Technology, Resources, and Climate Regulations, and Review of Chapters 4901:5-1, 4901:5-3, 4901:5-5, and 4901:5-7 of the Ohio Administrative Code, Pursuant to Amended Substitute Senate Bill No. 221, Case No. 08-888-EL-ORD, Entry on Rehearing at 2 (December 9, 2009).*

peak demand reduction measures that would "...provide predictability and consistency for the benefit of the electric and gas utilities, customers, and the Commission itself."²¹

As part of this process, the Commission issued an Entry in which it said:

- (5) The Commission must be in a position to be able to determine, with reasonable certainty, the energy savings and demand reductions attributable to the energy efficiency programs undertaken by gas and electric utilities, including mercantile customers, in order (a) to verify each electric utility's achievement of energy and peak-demand reduction requirements, pursuant to Section 4928.66(B), Revised Code; (b) to consider exempting mercantile customers from cost recovery mechanisms pursuant to Section 4928.66(A)(2)(c), Revised Code; and (c) to review cost recovery mechanisms for energy efficiency and/or peak-demand reduction programs implemented by the electric or gas utilities. In order to provide guidance regarding how the Commission will determine energy savings and/or peak-demand reductions, the Commission intends to establish protocols for the measurement and verification of energy efficiency and peak-demand reduction measures, which will be incorporated into a Technical Reference Manual (TRM). The Commission's intent is that the TRM would provide predictability and consistency for the benefit of the electric and gas utilities, customers, and the Commission itself.²²

As in Case No. 08-888-EL-ORD, the actions of the Commission in Case No. 09-512-GE-UNC have been challenged by numerous objections,²³ comments and rehearing applications which were granted by the Commission on July 29, 2010 because "...sufficient reason has been set forth by the parties seeking rehearing to warrant further consideration of the matters specified in the applications for rehearing."²⁴

²¹ *In the Matter of Protocols for the Measurement and Verification of Energy Efficiency and Peak Demand Reduction Measures*, Case No. 09-512-GE-UNC, Entry at 3 (June 24, 2009).

²² *Id.* at 2-3.

²³ See, for example, *In the Matter of Protocols for the Measurement and Verification of Energy Efficiency and Peak Demand Reduction Measures*, Case No. 09-512-GE-UNC, Joint Objections and Comments to the August 6, 2010 Draft Technical Reference Manual from Ohio Edison Company, The Cleveland Electric Illuminating Company, The Toledo Edison Company, Columbus Southern Power Company, Ohio Power Company, Duke Energy Ohio, Inc., The Dayton Power and Light Company and Industrial Energy Users-Ohio (November 3, 2010).

²⁴ *In the Matter of Protocols for the Measurement and Verification of Energy Efficiency and Peak Demand Reduction Measures*, Case No. 09-512-GE-UNC, Entry on Rehearing at 3 (July 29, 2010).

Given the comprehensive state of incompleteness of the Commission's efforts to identify and resolve issues that have been repeatedly contested before the Commission, proposals that urge the Commission to require EDUs to bid planned energy efficiency into the PJM organized market put the cart without wheels before the hobbled horse. Layering a mandate that planned energy efficiency be bid into the PJM capacity market on top of the Commission's incomplete effort to identify the energy efficiency that counts for purposes of compliance with the Ohio energy efficiency mandate is an accident waiting to happen.

More fundamentally, the Commission's misapplication of Ohio's portfolio mandate law on one hand and its failure to clearly articulate what an EDU must do to comply with the portfolio mandates on the other leave EDUs and customers affected by the portfolio requirements unable to ascertain how they might comply with such requirements at the time they are obliged to comply. The law calls this type of government regulation a "standardless trap," a form of regulation that violates the United States and Ohio Constitutions.²⁵ Since the portfolio mandates became part of Ohio law, the Commission's implementation of the portfolio mandates has layered one standardless compliance trap upon another.

Bidding expected portfolio compliance energy efficiency into the PJM organized market as the Commission has recently ordered in Case Nos. 12-2190-EL-POR, *et al.* in this context of incomplete and long-delayed work on the part of the Commission begs the question of what planned energy efficiency will count towards compliance with the mandates and how it will be counted. At first blush, this may appear to be an EDU problem. But consumers know well that the EDUs will find a way to dump the financial

²⁵ See e.g. *Norwood v. Horney*, 110 Ohio St.3d 353, 2006-Ohio-3799 at ¶¶97-98.

consequences of all this profound and prolonged confusion into the electric bills paid by consumers and that consumers, not EDUs, will ultimately suffer from the confusion arising from the Commission's action and prolonged inaction.

To the extent that consumers' energy efficiency or peak demand attributes that are to be confiscated under this proposal (and the Commission's decision referenced above) arise from Ohio-sponsored "incentives" or other credits or payments, the direction of PJM's current initiatives (such as the Minimum Offer Price Rule or "MOPR") suggest a rocky road ahead. These initiatives indicate that the offer price for these attributes will be dictated by PJM in ways that will limit the opportunity to "clear" in the PJM capacity market.

The Commission has no authority to authorize utilities to confiscate the attributes (planned or otherwise) of consumers' energy efficiency efforts or to regulate consumers by directing EDUs to confiscate the attributes and transfer the benefits of such attributes to other consumers or EDUs.²⁶

On a practical level, the three-year forward obligation that is created in PJM's organized capacity market when capacity resources clear in PJM's auction process creates significant administrative challenges relative to Ohio's portfolio mandates. The challenges highlight the speculation that is embedded in proposals that assume that value will be produced from a scheme that requires EDUs to confiscate consumers' expected energy efficiency attributes and then bid them into PJM's organized capacity market as a planned energy efficiency resource.

Clearly, any energy efficiency that can be counted for Section 4928.66, Revised Code, compliance purposes is tied to a particular compliance year and not three years

²⁶ *Ohio Manufacturers' Association v. Public Utilities Commission of Ohio*, 46 Ohio St.2d 214 (1976).

into the future or PJM's planning year convention. Clearly, the capacity resource potential of any planned energy efficiency that is bid into the PJM capacity market is a generation-related function over which the Commission no longer possesses (with very limited exceptions) regulatory or supervisory powers. Clearly, it is unlawful for Ohio to mingle competitive and non-competitive goods and services.

So, what happens when the capacity resource potential of any expected energy efficiency that clears the PJM capacity market is not available during the delivery year? What happens when the Commission completes all the work that is currently on the Commission's compliance measurement to-do list and expands or contracts what counts for compliance purposes? If the General Assembly were to eliminate or reform the mandates, how do the EDUs that have cleared planned energy efficiency bids through the PJM organized capacity market cover the three-year forward obligation? If the General Assembly were to impose a percentage limitation on the aggregate compliance and electric bill effects of the portfolio mandates, what is the incremental consumer advantage (if there is any advantage) of confiscating expected energy efficiency attributes and bidding them into the PJM organized capacity market?²⁷ Will the Commission ignore the law and give EDUs a new generation-related non-bypassable charge to subsidize the EDUs' "transition" out of the obligation created by the Commission-mandated bid of planned energy efficiency attributes into the PJM market?

Confiscation of consumers' energy efficiency attributes accompanied by a Commission requirement that EDUs bid PJM-eligible planned energy efficiency into the

²⁷ The recent testimony of PJM's Andrew Ott before the Ohio Senate Public Utilities Committee indicates that capacity prices in the organized PJM market have been little affected by energy efficiency. Testimony of Andrew Ott on Behalf of PJM Interconnection LLC before the Ohio Senate Public Utilities Committee (March 19, 2013).

PJM organized capacity market do not yield a market-based approach to anything. A government mandate is a government mandate and a barrier to a fully functioning retail electric market.

C. OP Agrees that the Commission Authorized OP to Erect Artificial, Unlawful and Unreasonable Barriers

OP's comments take up what it calls threshold legal and policy matters relating to SSO structures.²⁸ The comments then state that not all barriers to consumers' ability to obtain the benefits of a fully functional retail market are barriers and that the Commission should only be concerned with an artificial, unlawful or unreasonable barrier.²⁹

At pages 3 and 4, OP's comments state that a competitive market approach is not required in Ohio, thereby implicitly suggesting that the Commission's effort to explore, in this investigation, barriers to a fully functional retail market is a waste of time as a matter of law.

At page 5, OP's comments state that market-based pricing was repealed in 2008 and indicate that only an EDU can decide where and when a market-based pricing outcome can exist.

At page 14, OP's comments state that: "If there is any advantage given to the EDU, it is by virtue of the statutory structure imposed by current law...." At page 22, OP's comments state that: "Matters relating to the provision of retail generation service outside the context of SSO pricing should remain deregulated and subject to the competitive market." In other words, OP's comments irreconcilably press the Commission to obey the commands of Ohio's "customer choice" legal structure and, at

²⁸ OP Comments at 1.

²⁹ OP Comments at 2.

the same time, preserve the anti-consumer and anticompetitive barriers that are presently unreasonably and unlawfully inflating the electric bills of OP's shopping and non-shopping retail customers.

Like some of the questions which the Commission asked interested parties to address, OP's comments are based on a fundamentally defective premise that views SSO-related determinations made by the Commission as the exclusive means by which the benefits of a fully functional retail electric market may be realized by consumers. This premise ignores the "customer choice" centerpiece of Ohio law and the right of each customer to make an affirmative choice as an individual customer or through participation in governmental aggregation programs. More specifically, OP's comments and the questions assume that the means by which consumers are provided access to the market is confined to the SSO. But, as IEU-Ohio explained in its comments, that is not what Ohio law commands.

OP's comments do concede that the Commission should concern itself with unreasonable and unlawful barriers and that "[m]atters relating to the provision of retail generation service outside the context of SSO pricing should remain deregulated and subject to the competitive market."³⁰ These concessions are important.

As a matter of fact and law, the Commission's determinations regarding the level of OP's compensation for wholesale generation capacity service were made outside the context of SSO pricing in a proceeding separate and apart from OP's ESP proceeding. Based on OP's threshold propositions, matters relating to compensation for generation capacity service that are addressed outside an SSO "...should remain deregulated and subject to the competitive market." Also, OP has repeatedly asserted that the

³⁰ OP Comments at 22.

Commission's regulation of sales of wholesale generation capacity for resale is unauthorized, unlawful and explicitly preempted by the Federal Power Act. It advanced this position most recently on March 25, 2013 in a FERC filing in Docket No. ER13-1164-000. In this recent FERC filing, OP states that the Commission established compensation for wholesale generation capacity service and that, at page 15 of 18, only FERC has jurisdiction over such wholesale rate matters.

If, as OP's comments state, the Commission's investigation is confined to unreasonable or unlawful barriers, OP's Ohio and FERC pleadings confirm that the Commission acted unreasonably and unlawfully when it authorized OP to collect above-market compensation for wholesale capacity service. By force of OP's threshold legal and policy positions, OP's comments support IEU-Ohio's request that the Commission expunge the unreasonable and unlawful barriers that are presently blocking OP's retail customers from enjoying the full benefit of the electric bill reduction benefits that are available in the retail electric market but for such barriers.

D. Non-Recourse Purchase of Receivables Proposals

Several of the CRES providers urge the Commission to require EDUs to implement a non-recourse purchase of receivables ("NRPOR") program to put CRES providers on more "equal footing" with the SSO available from EDUs.³¹ In other words, the CRES providers want their collection risk associated with competitive retail electric service such as generation supply directly assigned to captive distribution service customers.

As presented, the NRPOR proposal is not a market-based approach for managing collection risk. Two wrongs don't make a right even if they provide equal

³¹ For example, see Constellation NewEnergy, Inc. and Exelon Generation Company Comments at 5-6 and Hess Comments at 3.

footing. And, the equal footing claim is, at best, a stretch. Unlike CRES providers, EDUs don't have the legal ability to refuse providing generation supply service to a retail consumer based on credit and collection risk considerations.

Rather than mandating an NRPOR program for inclusion in EDUs' tariffs and expanding the non-bypassable revenue that is dumped into retail electric bills, all suppliers should be responsible for managing the collection risk associated with sales of any service that is a competitive retail electric service. Mandating consumer responsibility for collection risk is not a consumer-friendly or market-based approach to managing collection risks.

Collection risk is a financial and business risk of firms that operate in a competitive market. Businesses that do a better job of managing this risk obtain an advantage in competitive markets, an advantage that is earned based on merit. Relative to better options, transferring this risk to consumers through non-bypassable charges allocates collection risks to those parties with the least ability to manage the risks, stifles innovation, raises electric bills unnecessarily and results in a barrier to competition.

As IEU-Ohio discussed in its initial comments, the Commission has the authority (Section 4928.04, Revised Code) to declare billing and collection service a competitive service and permit consumers to obtain such service from any supplier or suppliers. There is no good reason to use incumbent EDU tariffs to impose CRES provider collection risks on retail customers through the non-bypassable charges that are the main part of the NRPOR proposal.

III. MISCELLANEOUS

A. Helping All Customers Access the Benefits of the Retail Electric Market

In its initial comments, IEU-Ohio made recommendations designed to overcome barriers that prevent Percentage of Income Payment Plan (“PIPP”) customers from reducing their electric bills through access to generation supply other than that available through the SSO. Competitor Duke’s comments (at page 3) move to a similar conclusion and the comments of the Low Income Advocates (“LIA”)³² take this subject up in considerable detail. The comments of the LIA also observe, at page 11, that the CBP used to establish default generation supply prices has been very successful in lowering electric bills.

As IEU-Ohio explained in its initial comments, reducing the electric bills of PIPP customers through competitive procurement of generation supply also works to reduce the Universal Service Fund (“USF”) charges that are paid by all customers.

Allowing EDUs to continue to serve PIPP customers at SSO generation supply prices where such prices have not been determined through a CBP provides the EDU or its generation business affiliate(s) with an unlawful, unreasonable and anticompetitive advantage at the expense of all customers and the public interest. Ohio’s prolonged failure to act on this opportunity must be remedied.

³² The LIA includes: Ohio Poverty Law Center, Edgemont Neighborhood Coalition, Pro Seniors, Inc., Southeastern Ohio Legal Aid Services, Legal Aid Society of Columbus, Legal Aid Society of Cleveland, Communities United for Action and The Citizens Coalition (which also separately filed comments). Ohio Partners for Affordable Energy (“OPAE”) filed separate comments expressing agreement with the LIA comments. Beginning at page 9, the LIA comments offer opinions regarding the ability of competition to benefit customers and cite a Texas-oriented report. Here, the LIA suggest that Texas electric prices which are above the National average are proof that competition may not work as hoped. However and since much of the electricity in Texas is generated by natural gas units, the conclusions in the Texas report are difficult to export to any other state or region. Also, the relevance of the Texas report is called into question by the comments of the Northeast Ohio Public Expenditure Council (“NOPEC”). At page 2 of NOPEC’s comments, it explains that Texas “customer choice” reforms do not provide for governmental aggregation.

B. Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company's Suggestion

At page 14 of their comments, Ohio Edison Company ("OE"), The Cleveland Electric Illuminating Company ("CEI") and The Toledo Edison Company ("TE") (collectively, the "FE-EDUs") suggest that the EDUs that are not receiving financial support from non-bypassable riders should be given an opportunity to add a profit component to their SSO price. Of course, there is already a profit component in the SSO price when the generation supply price is determined through a CBP as is the case for the FE-EDUs' SSO. This profit amount is embedded in the competitively determined price for the default generation supply.

The FE-EDUs may envy the anticompetitive financial advantage that the Commission has unlawfully and unreasonably provided to some EDUs or their affiliates through the authorization of non-bypassable generation-related charges. IEU-Ohio understands that the FE-EDUs may want to get in line for some of the same. But, the FE-EDUs' profit component suggestion is a chip off the two-wrongs-don't-make-a-right block.

C. Shopping and Reasonable Arrangements

In IEU-Ohio's initial comments, it discussed the opportunity to reduce the "delta revenue" associated with reasonable arrangements by using a market-based price for generation supply rather than the default generation supply price to measure delta revenue. The comments of the Ohio Energy Group ("OEG"), at page 4, move in a similar direction.

D. The Questions' Definitional Disabilities

IEU-Ohio's initial comments identified that several of the Commission's questions presented definitional challenges. The comments of other interested parties contained similar observations.³³

IV. CONCLUSION

For the reasons discussed herein and previously, IEU-Ohio urges the Commission to promptly act to remove the barriers that the Commission has allowed to be inserted between retail consumers and CRES providers ready and willing to help consumers realize the full electric bill reduction and stabilization benefits that are presently available in the market but for such barriers. Among other things, the barriers provide an unreasonable and unlawful advantage to the competitive generation business of some incumbent EDUs or their affiliates, conflict with the policy set forth in Section 4928.02, Revised Code, and work to transfer massive amounts of consumers' wealth to some incumbent utility beneficiaries or their affiliates through a combination of above-market compensation and non-bypassable charges.

Respectfully submitted,

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³³ For example, see The Citizens Coalition's Comments at 5 and the FE-EDUs' Comments at 6.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *Reply Comments of Industrial Energy Users-Ohio* was served upon the following parties of record this 5th day of April 2013, via electronic transmission, hand-delivery or first class U.S. mail, postage prepaid.

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