BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

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

COMMENTS
BY THE
SIERRA CLUB
And OHIO ENVIRONMENTAL COUNCIL

I. Introduction

The Sierra Club and Ohio Environmental Council ("OEC") responds to the Public Utilities Commission of Ohio's ("PUCO" or "Commission") request for input in its investigation of Ohio's retail electric service market. The investigation also includes energy efficiency and renewable issues, smart metering and corporate separation issues. The Sierra Club and OEC respectfully submit these Comments in response to the Commission Entry filed in the above-captioned case on December 12, 2012.

Although Sierra Club and OEC have interests in the smart meter, energy efficiency, renewable energy and native load issues, these comments focus exclusively on corporate separation issues and how these affect distributed generation and energy efficiency potential in Ohio. Sierra Club and OEC would direct the Commission to other

recent cases to review advocacy in the other areas.[1] Sierra Club and OEC reserve the right to address these issues as appropriate in joint or separate reply briefs.

II. 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?

Sierra Club and OEC urge the Commission to exercise its broad authority and require disclosure of as much information as possible in order to serve the public interest. Sierra Club and OEC assert that the Commission possesses, via statute, the authority to require such disclosures – even to the point of examining the records of an affiliate. The Ohio Administrative Code also provides authorization for the Commission to examine the books and records of any utility affiliate.[2] The Commission should not hesitate to exercise this authority.

1. Ohio Law Provides the Commission with Broad Authority to Require Disclosure of Information Related to Cost of Electric Service.

Ohio Revised Code Section 4928.01(A)(11) defines an electric utility as "an electric light company that has a certified territory and is engaged on a for-profit basis either in the business of supplying a noncompetitive retail electric service in this state or in the businesses of supplying both a noncompetitive and a competitive retail electric service in this state." An *electric light company* is defined as being "…in the business of

[1] See, for example, Case Nos. 12-2190-EL-POR, et al, and Case No. 11-5201-EL-RDR.

[2] Ohio Adm. Code 4901:1-37-02(D).

supplying electricity for light, heat, or power purposes to consumers within this state, including supplying electric transmission service for electricity delivered to consumers in this state, but excluding a regional transmission organization approved by the federal energy regulatory commission…."[3] Therefore, this question covers Electric Utilities under the Commission's jurisdiction that have a certified territory, that may supply both distribution and generation service to Ohio utility customers and may supply transmission service. This would include the six Ohio Electric Distribution Utilities ("EDUs"). The EDUs are *public* utilities according to Ohio law.[4] The Commission should strive to ensure that as much information as possible regarding the dealings between an EDU and its affiliate are disclosed to the public, including any utility's analysis or the internal decision matrix involving plant retirements, capacity auction, and transmission projects, and including correspondence and meetings among affiliates and their representatives.

In exchange for a monopoly in its service territory, public utilities are subject to state regulation. The PUCO is authorized by statute to supervise every public utility, the persons and companies that own and operate each utility, and to examine the "records and accounts of the business thereof done in this state."[5] This is specific to records and accounts "that may in *any way* affect or relate to the costs associated with the provision

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[3] R.C. 4928.01(A)(7) refers to the definition as it appears in R.C.4905.03(C): "…An electric light company, when engaged in the business of supplying electricity for light, heat, or power purposes to consumers within this state, including supplying electric transmission service for electricity delivered to consumers in this state, but excluding a regional transmission organization approved by the federal energy regulatory commission…."

[4] R.C. 4905.02(A) states: "As used in this chapter, "public utility" includes every corporation, company, copartnership, person, or association, the lessees, trustees, or receivers of the foregoing, defined in section 4905.03 of the Revised Code…."

[5] R.C. 4905.05.

of electric utility service by any public utility operating in this state…."[6] This broad supervision over matters related to cost of service is further reiterated and authorized in Ohio Revised Code Section 4905.06.[7] It is quite likely that interactions between an EDU and its affiliate may include items "relate[d] to the costs associated with the provision of electric utility service by public utilities in this state." Therefore, the Commission may review these records to determine their effect on the prices Ohio utility customers pay for service.

2. Ohio Law Authorizes the Commission to Review Affiliate Records.

Ohio law authorizes the Commission to review the records of an affiliate to ensure corporate separation is maintained. Ohio Revised Code Section 4928.17 requires each utility to file a corporate separation plan. The law requires these plans to "satisf[y] the public interest in preventing unfair competitive advantage and preventing the abuse of market power."[8] Ohio law gives the Commission jurisdiction to investigate the violation of Ohio law or a corporate separation plan.[9] This investigative power also includes the authority to review the affiliate's records:

> For this purpose, the commission may examine such books, accounts, or other records kept by an electric utility or its affiliate as may relate to the

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[6] (Emphasis Added) R.C. 4905.05.

[7] R.C. 4905.06 states in part: "The commission has general supervision over all other companies referred to in section 4905.05 of the Revised Code to the extent of its jurisdiction as defined in that section, and may examine such companies and keep informed as to their general condition and capitalization, and as to the manner in which their properties are leased, operated, managed, and conducted with respect to the adequacy or accommodation afforded by their service, and their compliance with all laws and orders of the commission, insofar as any of such matters may relate to the costs associated with the provision of electric utility service by public utilities in this state which are affiliated or associated with such companies."

[8] R.C. 4928.17(A)(2).

[9] R.C.4918.18(B).

businesses for which corporate separation is required under section 4928.17 of the Revised Code, and may investigate such utility or affiliate operations as may relate to those businesses and investigate the interrelationship of those operations.[10]

3. The Ohio Administrative Code Contains Provisions for Ongoing Reviews of the "Interrelationship" Between an Electric Utility and Its Affiliate.

This authority of the Commission to review affiliate records is reiterated in the Ohio Administrative Code. The rules are applicable to the "activities of the electric utility and its transactions or other arrangements with its affiliates."[11] To ensure compliance, the Rules state that "the examination of the books and records of affiliates may be necessary."[12] The Commission staff, *at their discretion*, "may investigate such electric utility and/or affiliate operations and the interrelationship of those operations."[13] Staff is specifically allowed to review all information (required to be maintained) from both the utility and the affiliate related to "the businesses for which corporate separation is required."[14] This information would include meetings between affiliates and utilities regarding plant retirements, capacity auctions and transmission projects, as any or all of these have the potential to impact costs customers pay for electricity distribution and generation.

The Rules include a code of conduct which prohibits employees of an affiliate from having "access to any information about the electric utility's transmission or

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[10] (Emphasis added) R.C. 4928.18(B).

[11] Ohio Adm. Code 4901:1-37-03(A)(1).

[12] Ohio Adm. Code 4901:1-37-02(D).

[13] Ohio Adm. Code 4901:1-37-07(B).

[14] Ohio Adm. Code 4901:1-37-07(A).

distribution systems" that isn't readily available to other competitors.[15] Any meeting between an electric utility and an affiliate would certainly provide sufficient opportunity and potential for the exchange of such information. When such a violation occurs, the Rules require the utility to maintain a log, which is also subject to review by the Commission and staff.[16] If the Commission and staff are not reviewing these on a regular basis they should be, in order to ensure Ohio's retail market is not being distorted or manipulated by improper communication between an electric utility and its affiliate. But it is clear that Ohio law and the accompanying rules certainly give the Commission broad authority to investigate the interrelationships between a utility and its affiliates. Sierra Club and OEC urge the Commission to exercise this authority on a regular basis, to ensure the market develops properly, to protect Ohio utility customers, and in order to effectuate Ohio policies that promote distributed generation and greater energy efficiency.

In determining what information should be disclosed, the Commission should be guided by its obligations to Ohio customers to obtain and review as much of the information regarding interactions between an EDU and its generation or transmission affiliate as possible – especially information that may significantly affect the price customers pay for electricity. Information reviewed should be routinely requested by the Commission and its staff, provided to the Ohio Consumers' Counsel and docketed on the Commission's website.[17] The Commission is charged with ensuring that customers have

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[15] Ohio Adm. Code 4901:1-37-04(D)(3).

[16] Ohio Adm. Code 4901:1-37-04(E)(2).

[17] This request is aligned with Ohio law, which requires that "Except as provided in section 149.43 of the Revised Code and as consistent with the purposes of Title XLIX [49] of the Revised Code, all facts and

access to "adequate, reliable, safe, efficient, nondiscriminatory, and reasonably priced retail electric service."[18] The potential for improper communication and conflicts of interest between a regulated utility and its affiliate require the Commission's ongoing oversight and diligence.

There are very clear conflicts of interest between EDUs and their affiliates. Generally, an EDU is responsible for providing safe, reliable and affordable electric service to customers within its monopoly territory. An unregulated generation affiliate ("CRES Provider") is not subject to regulation and seeks to maximize profit in a competitive environment. Information traded between the two entities could provide a competitive advantage to a CRES Provider over its competitors. Certain conduct by one affiliate may serve to raise prices (and therefore profit) within the monopoly territory of an EDU. Therefore, the Commission has an obligation to its customers to be vigilant and review this information as it relates to cost of service. The Sierra Club and OEC recommend that affiliate interaction among Ohio utilities be consistently monitored and scrutinized by the Commission – and that the information reviewed be made available to the public.

(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?

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information in the possession of the public utilities commission shall be public, and all reports, records, files, books, accounts, papers, and memorandums of every nature in its possession shall be open to inspection by interested parties or their attorneys. (R.C. 4905.07).

[18] R.C. 4928.02(A) states: "It is the policy of this state to do the following throughout the state: Ensure the availability to consumers of adequate, reliable, safe, efficient, nondiscriminatory, and reasonably priced retail electric service…."

A competitive bidding process should be required and should be run by a 3rd party to eliminate any conflicts of interest. Without the minimum protection afforded by competitive bid process, any project awarded to an affiliate will have the immediate appearance of impropriety. A corporately-separated affiliate should not have preference over any other company. This would essentially be a form of self-dealing – in which a public utility would take an action that would benefit its own interests – including those of an affiliate – rather than the interests of the public for whom it is obligated to provide safe, reliable and reasonably priced service.

In addition, projects intended to alleviate constraint should include an opportunity for non-transmission alternatives to participate. Distributed generation and energy efficiency should have a fair opportunity to provide relief. It is state policy to encourage distributed generation.[19] As stated in this case Entry: "It is the Commission's 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." Therefore, the Commission must encourage distributed generation and energy efficiency as part of the constraint solution.

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

Injection rights should terminate when the utility ceases to provide power. Prior to the termination of the provision of power (e.g. the announcement of a plant retirement); the Commission could initiate a competitive process to encourage development of new power sources for that region or area. In order to ensure a true

[19] R.C. 4928.02 states: "It is the policy of this state to…(C) Ensure the diversity of electric supplies and suppliers…by encouraging the development of distributed and small generation facilities; …(K) Encourage implementation of distributed generation across customer classes…."

competition, the Commission must exercise its authority, as described above, to ensure continued corporate separation. Otherwise, plant retirement information, provided to an affiliate ahead of the announcement, would give that affiliate an unfair advantage to fill the power gap created by such a retirement. Again, distributed generation and energy efficiency should be given the opportunity to fill such gaps. If true competition is encouraged and fostered by the Commission, Sierra Club and OEC are certain that competing resources will create "a diversity of supplies and suppliers" as envisioned in Ohio's statutory energy policy.[20]

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

A fully separate distribution utility would have the duty to oppose the incentive rate of return, if such a rate would have the potential to adversely affect its customers. But "fully separate entities" is difficult to achieve. "Fully separate entities" indicates full compliance with the Ohio law governing corporate separation and Commission oversight to maintain that separation.

Revised Code Section 4928.17 requires each electric distribution utility with an affiliate to file and comply with a corporate separation plan. In the law, the plan must provide for full separation from a competitive or non-electric product affiliate, and must satisfy "the public interest in preventing unfair competitive advantage."[21] In addition the plan must ensure that the utility does not extend to the competitive or non-electric product affiliate office space or supplies, tools or equipment, customer information,

[20] R.C. 4928.02(C).

[21] R.C.4928.17(A)(1)and (2).

marketing information, mailing or personnel.[22] The Commission must approve the plan.[23] The achievement of "fully separated entities" is difficult and extends beyond the submission of a plan and its subsequent approval. This will not occur without regulatory oversight and vigilance. As presented above, the Commission must continually review the separation of public utilities and their related affiliates. Until continuous regulatory oversight becomes reality, it is unlikely that an affiliate will undertake such a "duty."

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

Sierra Club and OEC note that consumers are likely misled by any attempt at purposeful confusion fostered by utility affiliates or their agents under the same "umbrella" and with a similar logo. Sierra Club and OEC agree with the comments filed by Ohio Partners for Affordable Energy ("OPAE") in PUCO Case Nos.12-925-GA-ORD and 12-1924-EL-ORD, in which several recommendations for reforms are listed. These reforms would assist in protecting customers from being misled by affiliate relationships.

In those comments, prepared with the assistance of Barbara R. Alexander, Consumer Affairs Consultant, OPAE listed several problems with how branding could lead to confusion on the customer's part in determining whether a representative of an affiliate (or competitor) was a part of the electric distribution utility. OPAE noted that a

[22] R.C. 4928.17(A)(3).

[23] R.C.4928.17(C).

typical customer relies on what is stated during an in-person meeting disproportionately over any written terms and how this is purposefully employed by marketers.[24]

Sierra Club and OEC note that OPAE makes several recommendations. Several of these should be employed to reduce the potential that the utility's corporate structure will mislead the customer into thinking they are dealing with a representative from the traditional distribution utility. These include:

- A Supplier should be required to affirmatively identify the name of the Supplier represented and affirmatively state he or she is NOT working for the local distribution company – orally and in writing.

- A Supplier going door-to-door or appearing in-person should not wear apparel or accessories that contain branding elements or suggest a relationship that does not exist with any distribution utility.

- A Supplier should not be able to use the name, bills, marketing materials or other materials of a distribution utility in a way that suggests a relationship that does not exist.[25]

Sierra Club and OEC recommend these proposals be adopted.

The Ohio Consumers' Counsel ("OCC") filed a complaint against Columbia Retail Energy in 2010. The complaint illustrated the confusing and misleading practices as Columbia Retail Energy used a similar name, logo, and marketing materials that made it difficult to distinguish Columbia Gas, the distribution utility, from the marketer, Columbia Retail Energy.[26]

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[24] *In the Matter of the Commission's Review of its Rules for Competitive Retail Natural Gas Service Contained in Chapters 4901:1-27 through 4901:1-34 of the Ohio Administrative Code, et al*, Case Nos. 12-925-GA-ORD, et al, OPAE Comments at 13 (January 7, 2013).

[25] Case Nos. 12-925-GA-ORD, et al, OPAE Comments at 41 (January 7, 2013).

[26] *THE OHIO CONSUMERS COUNSEL VS INTERSTATE GAS SUPPLY DBA COLUMBIA RETAIL ENERGY*, Case No. 10-2395-GA-CSS, OCC Application at 6- , (October 21, 2010).

It is hard to imagine that certain corporate separation structures that use similar tactics (separate affiliates using similar logos, names and marketing materials) would NOT confuse customers. The Commission should not merely investigate the potential these structures have for misleading the public, but rather how this purposeful confusion has already affected the market due to customers believing they are dealing with their traditional distribution company, when in actuality they are communicating (and signing contracts with) an allegedly separate affiliate.

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

As stated above, "fully separate entities" – consisting of the initial separation and the maintenance (through regulatory oversight) of that separation - would alleviate the potential for market manipulation and undue preference. However, shared services, which require compensation based on embedded costs,[27] may create low overhead for affiliates. In turn this allows an affiliate that is a beneficiary of such an arrangement to charge less for generation service. This essentially provides EDUs a competitive advantage with their retail affiliates over competitors in the developing Ohio market.

Regarding costs, the Ohio Revised Code states that a corporate separation plan must ensure it will "not extend any undue preference or advantage to any affiliate."[28]

[27] R.C. 4928.17(A).

[28] R.C. 4918.17(A).

Ohio Administrative Code states that sharing of facilities, services, or employees must be done in a way that does not violate the Administrative Code of Conduct.[29]

Sierra Club and OEC recommend that compensation for the above listed items be changed to market rates in the statute, and that the Ohio Administrative Code be revised to reflect this change. Otherwise, entities sharing facilities and personnel likely have an advantage over competitors. These advantages may destroy or diminish any real market growth or transformation. In addition, regardless of whether any statutory or administrative changes occur, the Commission should consistently exercise its broad statutory authority and review the records and accounts of Ohio EDUs and their affiliates to ensure "fully separate entities" exist in Ohio.

(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?

Yes. Sierra Club and OEC share PUCO's concern over the developments in the ATSI zone of the PJM BRA as being indicative of the way in which a corporation can manipulate market conditions and regulatory oversight to gain windfall profits at the expense of Ohio electricity customers.

The Sierra Club and OEC agree with PUCO's suggestion that generation resources should divest from transmission and distribution entities, becoming truly separate entities with separate shareholders. Currently, there are opportunities for affiliates to manipulate markets through their subsidiaries to benefit shareholders at the

[29] Ohio Adm. Code 4901:1-37-04(A)(2) and (4).

expense of consumers, all while controlling market dynamics such that consumers have no choice but to pay artificially inflated prices for electricity.

A prime example is Ohio Edison Company, Cleveland Electric Illuminating Company and the Toledo Edison Company (collectively "FirstEnergy" or "Companies") approach to the PJM 2015/2016 base residual auction ("2015/2016 BRA"). Despite the potential to provide significant revenue for its customers and, more importantly, to mitigate capacity price increases for the entire ATSI zone, FirstEnergy elected to withhold the resources from the auction, which resulted in record capacity prices and thus profits for its generation company and their common shareholders. Simultaneously, FirstEnergy's transmission affiliate, ATSI, benefits from the capacity shortage to construct nearly $1 billion in projects to alleviate the constraint. The distribution utility's refusal to bid expected energy efficiency and peak demand reduction resources benefitted its generation and transmission affiliates while severely impacting its customers. When questioned about the utility's duty to its customers, FirstEnergy's Vice President asserted that the distribution utility need not do anything unless it benefits its shareholders.[30] Yet questions regarding the benefit conferred to FirstEnergy affiliates at the expense of the distribution utility's customers were dismissed as being outside the jurisdiction of the PUCO. Thus, until shareholder divestment from affiliates occurs, distribution utilities will continue to have the overriding incentive of maximizing affiliate profits at the expense of customers.

This is a good example of why the Sierra Club and OEC urge the Commission to exercise its broad authority to review the interrelationship of an EDU and its affiliates on

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a consistent, ongoing basis. FirstEnergy Services Corporation has one Chief Executive Officer and one set of shareholders. It is the job of the CEO to take action to increase value for shareholders. If withholding expected energy efficiency and peak demand reduction savings from the auction benefitted the Company, it would be expected that this action would be taken by the EDU, even though the withholding of resources from the auction was an action *detrimental* to the EDU's customers.

This is precisely the kind of activity that should trigger an investigation as described in Ohio Revised Code Section 4928.18. Although an individual or outside entity may file such a complaint, there are benefits to having the Commission initiate a complaint under this statute. Chief among these benefits, as noted above, is the broad authority to review the accounts and records of each EDU and the affiliate. The Commission and staff have the understanding to look into these potential violations and take appropriate action. The Sierra Club and OEC advocate for the Commission to employ this authority now, for this and other cases.

Thus, if Ohio wants diversity in electric supplies and suppliers, desires to see an increase in the deployment of distributed generation, and mandates utilities to maximize energy efficiency potential, Sierra Club and OEC recommend the complete divestiture of generation and competitive suppliers from transmission and distribution entities.

III. Conclusion

The Sierra Club and OEC appreciate the opportunity to submit comments regarding the Commission's specific questions in this case. The Sierra Club and OEC respectfully request that the Commission consider and adopt the above recommendations.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing *Comments by the Sierra Club and Ohio Environmental Council* has been filed with the Public Utilities Commission of Ohio and has been served upon the following parties via electronic mail or regular mail on March 1, 2013.

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