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**

REPLY COMMENTS OF OHIO EDISON COMPANY, THE CLEVELAND ELECTRIC ILLUMINATING COMPANY, AND THE TOLEDO EDISON COMPANY

James W. Burk (0043808)
Counsel of Record
Carrie M. Dunn (0076952)
76 South Main Street
Akron, OH 44308
Tel: (330) 384-5861
Fax: (330) 384-3875
burkj@firstenergycorp.com
cdunn@firstenergycorp.com

ATTORNEYS FOR OHIO EDISON
COMPANY, THE CLEVELAND
ELECTRIC ILLUMINATING COMPANY
AND THE TOLEDO EDISON COMPANY

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I. INTRODUCTION

On December 12, 2012, the Public Utilities Commission of Ohio ("Commission") issued an Entry initiating an investigation into Ohio's retail electric service markets in the above-referenced matter ("Entry") ultimately directing that comments be filed on March 1, 2013 and reply comments be filed on April 5, 2013. Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company ("FE EDUs") hereby timely file their reply comments as directed by the Commission.

The Commission's Entry divided its inquiry into two broad categories: Market Design and Corporate Separation. Numerous parties submitted comments under both categories.[1] Generally speaking, the majority of questions related to Market Design focused on: 1) whether the current default service model was working; 2) what, if any, changes should be made at the present time; and 3) what can be done to improve the model. In response to these questions, the EDUs and customer groups such as OCC, OEG, AARP, Nucor, OMAEG, low income representatives and some CRES providers commented that the current model is working and that no major changes are needed at this time. Rather, the view was that it is important that all EDUs implement corporate separation, if they have not already done so, and promptly begin bidding out their SSO load through a competitive auction structure – that until those steps have been taken there is really no single default service model in place upon which the retail electric generation market in Ohio may be appropriately assessed.

Certain CRES providers offered comments that would necessitate radical statutory changes and a significant change in direction for public policy relative to the

[1] The fact that the FE EDUs do not respond to all parties' comments may not be interpreted as the FE EDUs agreement or acquiescence with any such comments.

provision of electric service to retail customers in Ohio. Most of these suggestions are beyond the jurisdiction and authority of the Commission to implement. Further, while part of the CRES providers' rationale is that their proposed changes would be for the benefit of customers, the customer groups that submitted comments made no such similar recommendations, and were, in fact, opposed to many of the CRES providers' suggestions.

Given the current high levels of shopping in service territories that have implemented a competitive bidding process to establish the pricing for SSO load and the lack of support from the EDUs and customer groups, such radical changes with their attendant risks should not be pursued.

Regarding the Corporate Separation section of the Entry, those parties that supplied substantive comments recognized that most of the questions the Commission posed were related to topics that are either beyond the authority of the Commission to address or subject to the exclusive jurisdiction of the Federal Energy Regulatory Commission ("FERC"). Moreover, several parties raised concerns that are not appropriate for consideration in this proceeding as they are already addressed through the corporate separation statute and rules at the state level and the FERC Standards of Conduct and Affiliate Restrictions. Therefore, no changes should be pursued based upon responses to the Corporate Separation questions contained in the Entry.

II. MARKET DESIGN QUESTIONS

Because similar responses were given by parties to multiple questions, due to the similarity of the questions, the FE EDUs reply comments will be organized more by issue rather than by specific Entry question in an effort to avoid discussing a similar issue or topic multiple times. At a high level, most of the market design questions are aimed at eliciting comments as to whether : (i)the retail electric generation market in Ohio is functioning properly; (ii) there are problems that need to be fixed or (iii) there are improvements to the retail electric generation market that can be made by the Commission.

The FE EDUs agree with IEU's observation that phrases such as "fully functional competitive retail electric service market" within certain questions have no standardized meaning and that the Commission needs to define such terms before a meaningful analysis may take place. The FE EDUs also agree with the other EDUs in the state and most other parties that, to date, there is no evidence or indications that customers are prevented from taking advantage of the benefits of the competitive market. For example, OEG indicates that existing market design appears to be working fine[2] and AARP and Low Income Advocates agree that customers have few, if any, barriers to selecting a CRES provider.[3] OCC and NOPEC recognize that having a SSO is necessary to ensure reasonable priced retail electric service in Ohio, and that a SSO provides protection for customers who elect not to shop.[4] However, until all EDUs are competitively bidding their SSO load and corporation separation is complete, it is really too early to make a

[2] OEG comments, p. 1.

[3] AARP comments, p. 5; Low Income Advocates, p. 2.

[4] OCC comments, pp. 4-5; NOPEC, p. 5.

meaningful assessment of the retail market in Ohio. Certainly with over 70% of customers shopping with CRES providers, the FE EDUs' customers are certainly benefiting from the current design and structure of the competitive retail generation market.

A. Purchase of Supplier Receivables ("POR")

Some CRES providers comment that having EDUs purchase CRES provider receivables on a non-recourse basis would help them compete in Ohio.[5] To be sure, having an assured 100% collection rate for all amounts billed would certainly and significantly help any competitor. As discussed in the extensive briefing in the FE EDUs ESP 3 case, Case No. 12-1230-EL-SSO ("Case No. 12-1230"), and their reply comments in the rulemaking proceeding in Case No. 12-2050-EL-ORD, which the FE EDUs will not repeat in entirety here, the CRES providers likewise have failed to demonstrate here that a POR program is appropriate or consistent with a fully functional competitive retail electric service market.

In Case No. 12-1230, the Commission found that neither the Suppliers (as defined in that case and including at least RESA and Direct Energy) nor IGS "have demonstrated that the absence of a POR program is a barrier to competition which precludes 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.'"[6] In addition, the Commission found "no evidence in the record of any

[5] Dominion Retail comments, p. 11. Exelon comments, pp. 6, 15 ; RESA comments, p. 23 ; IGS comments, p. 2. Hess comments, p. 10.

[6] Case No. 12-1230-EL-SSO, Second Entry on Rehearing at ¶ 52 (January 30, 2013).

study which systematically compares any measure of competition between electric utilities which offer POR programs and those that do not, in Ohio or otherwise."[7]

Since 2003, the FE EDUs have applied partial payments received from shopping customers pursuant to a priority that first arose from a stipulation in Case No. 02-1944-EL-CSS.[8] This Partial Payment Posting Priority applies partial payments generally in the following order: (1) CRES arrears; (2) utility service arrears; (3) utility service current bill; and (4) CRES current bill.[9] The Commission adopted this approach by amending O.A.C 4901:1-10-33(H).

Contrary to the CRES providers' contention that a lack of POR program is a barrier to competition[10], the FE EDUs have demonstrated in Case No. 12-1230 that over the past few years, shopping levels have significantly increased in the FE EDUs' territories to higher than 70% of customers shopping with a CRES provider and nearly 80% of generation sales being purchased from a CRES provider.[11] Today, the FE EDUs have the highest level of shopping in the state.[12] Even RESA's witness, Teresa Ringenbach in Case No. 12-1230 admitted that CRES providers are not suffering a

[7] *Id.*

[8] *In the Matter of the Complaint of WPS Energy Services, Inc. and Green Mountain Energy Company v. FirstEnergy, Cleveland Electric Illuminating Company, and Ohio Edison Company,* Case No. 02-1944-EL-CSS, Opinion and Order, p. 3 (Entry date: Aug. 6, 2003).

[9] *Id.*

[10] RESA comments, p. 23; IGS comments, p. 2.

[11] Shopping sales levels are also high and have increased in the other Ohio EDU service territories. For example, Duke's shopping rate as of December 31, 2012 was 73% and DPL's shopping sales rate for the same period was 62%. While AEP's shopping sales rate was 46%, which is a 23% increase from September 30, 2012 levels. *See* Commission website http://www.puco.ohio.gov/puco/index.cfm/industry-information/statistical-reports/electric-customer-choice-switch-rates/.

[12] Case No. 12-1230-EL-SSO, Tr. Vol. II, p. 19; Tr. Vol. III, pp. 29-30. As of December 31,2012, the shopping sales level for CEI was 85%, OE was 77% and TE 77%. *See* Commission website http://www.puco.ohio.gov/puco/index.cfm/industry-information/statistical-reports/electric-customer-choice-switch-rates/.

competitive disadvantage from the lack of a POR program.[13] IGS witness Vincent Parisi similarly admitted that "we're on equal footing with respect to other CRES providers, with or without [a POR program]."[14]

In comparison, a POR program essentially provides a subsidy to CRES providers that undermines the market, is inconsistent with the policy of the State, and sends the wrong price signals to customers.[15] Coincidentally, these are some of the very same alleged barriers to competition that the same CRES providers rail against in other areas of their comments.

IGS and RESA witnesses each testified in Case No. 12-1230 that a POR program would shift uncollectible expenses from a CRES provider to the FE EDUs.[16] As a result, non-shopping customers of the FE EDUs would bear the uncollectible expenses generated from customers of the CRES providers.[17] These are expenses that the customers of the FE EDUs would not otherwise bear.[18] In fact, as part of state policy articulated in R.C. § 4928.02(H), anticompetitive subsidies flowing from noncompetitive retail electric service to competitive retail electric service and vice versa should be avoided. Therefore, the CRES providers' proposal that nonshopping EDU customers should subsidize them for their uncollectible expense is directly at odds with this state policy.

[13] Case No. 12-1230-EL-SSO, Tr. Vol. III, p. 64.

[14] Case No. 12-1230-EL-SSO, Tr. Vol. II, p. 210.

[15] Case No. 12-1230-EL-SSO, Tr. Vol. I, p. 267.

[16] Case No. 12-1230-EL-SSO, Tr. Vol. II, pp. 187-188; Tr. Vol. III, p. 66.

[17] Case No. 12-1230-EL-SSO, Tr. Vol. III, p. 68.

[18] *Id.*, pp. 69-70, 90.

A POR program also may lead to higher amounts of uncollectible expenses for customers.[19] CRES providers currently have higher uncollectible expenses compared to utilities.[20] Under a POR program, CRES providers would be relieved of any risk of non-collection.[21] Instead, CRES providers would receive payment for their billing regardless of how much their customers ultimately pay.[22] Indeed, in Case No. 12-1230, Mr. Parisi and Ms. Ringenbach acknowledged that this program would allow a CRES provider to become indifferent as to whether its customers pay their electric bills.[23] The parties advocating a POR program seek to compel the EDUs to cover the cost of uncollectible expenses for CRES providers but have provided no information regarding the extent of these costs. Nor have the parties advocating for a POR program demonstrated there is a need for such a program. In fact, Ms. Ringenbach testified that only five states out of the fifteen states offering competitive retail electric service currently offer a POR program to CRES providers.[24]

IGS argues that shopping customers are subsidizing SSO default service because the generation uncollectible expense incurred by non-shopping customers is paid, in part, by shopping customers.[25] For the FE EDUs, this is incorrect. The rider through which the FE EDUs recover generation uncollectible amounts is bypassable for shopping customers. Stated another way, the amount of this rider is added to the price to compare,

[19] Case No. 12-1230-EL-SSO, Tr. Vol. I, pp. 247-248; Tr. Vol. II, pp. 189-190.

[20] Case No. 12-1230-EL-SSO, Tr. Vol. II, p. 189.

[21] *Id.*, p. 194.

[22] Case No. 12-1230-EL-SSO, Tr. Vol. II, pp. 193, 194.

[23] *Id.*, p. 194; Case No. 12-1230-EL-SSO, Tr. Vol. III, pp. 68-69.

[24] Case No. 12-1230-EL-SSO, Tr. Vol. III, p. 64.

[25] IGS Energy comments, p. 2.

which makes it easier for CRES providers to obtain customers. The FE EDUs' shopping customers are not subsidizing non-shopping customers as alleged by IGS.

Most importantly, adoption of a POR program would require the Commission to change its current rules regarding disconnection. Utilities are presently prohibited from disconnecting for nonpayment of charges for services provided by CRES providers.[26] In Case No. 12-1230, IGS witness Vincent Parisi admitted that a "key component" of IGS's recommendation for a POR program is for the utility to have the ability to disconnect for CRES charges.[27] Direct Energy and RESA witness Teresa Ringenbach similarly admitted that part of her proposal for a POR program requires an electric utility to have the ability to disconnect customers for nonpayment of charges provided by CRES providers.[28] Mr. Parisi and Ms. Ringenbach also acknowledged that the total amount that would cause a customer to be disconnected would increase under a POR program.[29] Thus, none of these recommendations is feasible unless the Commission changes the disconnection rules for EDUs.

Given the high level of shopping in the FE EDUs' certified territories and the number of CRES providers available to serve those customers,[30] a POR program is not needed to "jump start" competition as was needed in other states. Further, adopting a

[26] Case No. 12-1230-EL-SSO, Tr. Vol. III, p. 70.

[27] Case No. 12-1230-EL-SSO, Tr. Vol. II, p. 212.

[28] Case No. 12-1230-EL-SSO, Tr. Vol. III, p. 70.

[29] Case No. 12-1230-EL-SSO, Tr. Vol. II, p. 211; Tr. Vol. III, p. 70.

[30] There are presently nearly 40 registered CRES providers in the FE EDUs' service territories with approximately two dozen providing competitive retail electric service to customers.

POR program would cause unnecessary expenditures by the EDUs, which is unneeded in Ohio's highly-developed competitive market for retail generation.[31]

For all of the foregoing reasons, including the creation of anticompetitive subsidies that contradict state policy, the creation of unneeded costs that would be imposed upon the FE EDUs and their non-shopping customers, and given the highly competitive market already existing in the FE EDUs' service territories in Ohio and the already high and increasing levels of shopping in the other EDUs, the Commission should reject the proposal to mandate a purchase of receivables program.

B. Supplier Consolidated Billing

Similar to their position in Case No. 12-1230,[32], the CRES providers here also contend that the Commission should require the FE EDUs to implement supplier consolidated billing.[33] The details provided by RESA's witness Ms. Ringenbach in Case No. 12-1230 demonstrate the motive for their request. Under supplier consolidated billing, a supplier would take responsibility for billing, including billing the regulated utility charges on the utility portion of the bill.[34] The supplier then could use the bill to market its products and gain business advantages and brand loyalty.[35] Ms. Ringenbach explained that this is one of the "primary benefits" for implementing supplier

[31] Case No. 12-1230-EL-SSO, IGS witness Parisi Testimony, Exhibit 3.

[32] Case No. 12-1230-EL-SSO, RESA witness Ringenbach Testimony, pp. 14-15; Tr. Vol. III, p. 75; Exelon witness Bennett Testimony, pp. 7-9.

[33] RESA comments, p. 32.

[34] Case No. 12-1230-EL-SSO, Tr. Vol. III, pp. 75-76.

[35] *Id.*, p. 76.

consolidated billing.[36] Yet RESA can accomplish this goal without an order from the Commission. Ms. Ringenbach admitted that, even without supplier consolidated billing, a CRES provider could bill directly its customers.[37] The CRES provider also could design the bill format.[38]

Indeed, only one state, Texas, has adopted supplier consolidated billing.[39] The differences between Texas's utility model and Ohio's model, however, are striking.[40] Unlike Ohio, Texas does not designate a utility as the default service provider.[41] In Texas, the RTO serves as a "middleman that you don't have in Ohio today."[42] In addition, there are "smart meters all across Texas . . . so some of these things wouldn't apply in Ohio because we don't have the meter structure for it."[43] Further, based on the information provided by NOPEC, pursuing the Texas model in Ohio would not be desirable.[44]

Moreover, supplier consolidated billing is inefficient and costly. It would require a Commission rule change to allow CRES providers to shut off a customer's electric service.[45] Because a CRES provider could choose whether to provide supplier consolidated billing, the FE EDUs also would need to maintain their current billing system for those CRES providers who do not opt to engage in supplier consolidated

[36] *Id.*, p. 77.

[37] Case No. 12-1230-EL-SSO, Tr. Vol. III, p. 78.

[38] *Id*.

[39] *Id.*, p. 77.

[40] *Id.*, pp. 77-78.

[41] *Id.*, p. 85.

[42] *Id.*, p. 86.

[43] *Id.*

[44] NOPEC comments, pp. 3-4

[45] Case No. 12-1230-EL-SSO, Tr. Vol. III, p. 78.

billing.[46] And the FE EDUs would need to maintain their current billing system for those CRES providers who change their minds and decide not to continue to undertake the responsibility of providing billing services. Indeed, Ms. Ringenbach acknowledged that Direct Energy, a member of RESA, could opt to shift billing responsibilities back to the FE EDUs once a customer's contract expired, which may be as often as every other year.[47] The FE EDUs thus would need to maintain a billing system even for CRES providers that did undertake supplier consolidated billing, effectively requiring the FE EDUs to stand by as the biller of last resort, with all the attendant costs and risks.

Another outcome of implementing supplier consolidated billing is that uncollectible expense may increase, as it has been argued that customers are more likely to pay the EDU bill than a bill from a CRES provider. Under supplier consolidated billing, the bill would no longer be sent by the EDU, but would be sent by a CRES provider. So if this theory is true, then uncollectible expense may increase as a result of implementing supplier consolidated billing.

The Commission should not require supplier consolidated billing. The FE EDUs already have in place a highly developed and well-functioning billing system that serves millions of customers, including over a million shopping customers and numerous CRES providers. Supplier consolidated billing would cause significant costs for the purpose of creating duplicative billing systems and would require changes in law to give CRES providers the right to disconnect retail customers, all for the purpose of giving certain CRES providers a business advantage. The Commission should maintain its position and continue to reject supplier consolidated billing.

[46] *Id.*, pp. 79-80.

[47] Case No. 12-1230-EL-SSO, Tr. Vol. III, p. 80.

C. Elimination of Default Service/CRES provider as Default Provider

The structure of SSO service in Ohio is established through statutory provisions, so this is not an aspect of the competitive retail generation market that the Commission could change under its jurisdiction. In response to the question regarding the EDU continuing to serve as the SSO supplier of retail generation service for customers who choose not to shop or are dropped back to SSO service due to supplier default, several CRES providers recommended that either the default provider role be entirely eliminated or that a CRES provider provide SSO service to customers.[48] These recommendations both ignore the important public policy fulfilled by the provision of default SSO generation service being provided by the EDU and, if adopted, would be directly violative of Ohio law. As such, the Commission should reject them.

The CRES providers recommending the elimination of SSO default service, or demanding parity between SSO service and service provided by CRES providers, fail to recognize or acknowledge that the FE EDUs as the SSO service provider cannot pick and choose its customers, or their generation price, and they cannot leave the service territory at their discretion. All of these options, though, are available to CRES providers. CRES providers can offer their service to the customers or classes of customers they choose and can price and design their product as they decide. They can also leave the service territory or the entire Ohio market if they desire, which actually has happened with multiple suppliers since competition was introduced in Ohio in 2001. These fundamental

[48] RESA comments, p. 17; Dominion Retail comments, p. 3; IGS comments, pp. 3-4.

differences must be kept in mind by the Commission as part of any assessment of the retail generation market.

The FE EDUs do not own generation. To establish the SSO price, the FE EDUs conduct a wholesale competitive bid process to acquire the needed energy and capacity to serve customers that choose to remain with the EDU for retail generation service. This competitive bidding process is approved by the Commission, conducted by an independent bid manager, and overseen by the Commission Staff and its consultant. From this process, a tariff rate is established that is available to all customers as contemplated by R.C. 4928.14 and 4928.141. This rate is the price for customers who either choose not to shop or that are returned to the EDU for generation service due to supplier default or any other reason. This option should be maintained for customers.

Maintaining the EDU in the role of default SSO generation service provider was supported by most parties that submitted initial comments.[49] These parties recognized that the SSO service provided by an EDU fulfills an important role, a "safety net" as described by some, for customers that choose not to shop or whose supplier defaults in the provision of generation service to the customer. Greater assurance supporting that safety net exists if the EDU provides the SSO service, as the EDU remains subject to regulation by the Commission. A competitive supplier is not regulated by the Commission, regardless of whether they are a default service provider or individual CRES provider.

D. Default Service Bid Period Too Long/Price Stability for Customers

[49] OCC comments, pp. 4-5; NOPEC comments, p.5; Low Income Advocates comments, p. 4; Duke Energy comments, p. 4; AARP comments, p. 9; OEG comments, p. 2; Hess comments, p. 9.

Several suppliers provided comments criticizing the length of the bid period and bid structure used by EDUs to establish their default SSO pricing, centering around their assertion that the SSO pricing is not reflective of market on a monthly or even hourly basis for some customers.[50] Thus, they recommend that the SSO price should be more precisely reflective of market to make it easier for CRES providers to switch customers to their service. These comments were against the weight of comments submitted by other parties, which supported continuation of the competitive bidding as part of the default service model and expressed the appropriateness and desirability of maintaining the stability of rates established based on longer term competitive bids for customers that choose to remain with their EDU as their retail generation supplier. For example, OEG believes the current default service model provides a safe harbor to customers that choose to avoid the risks associated with a completely unregulated market.[51] OMAEG believes the current model should be continued to the extent it provides stable and predictable energy prices.[52] Price stability for retail customers should remain as an option for customers through the provision of the SSO by the EDU.

Customers who prefer more stable pricing and want to avoid volatile prices over a longer term should not be denied that choice. This is a concept and a conclusion with which the Commission itself has recently agreed. In the FE EDUs' ESP 3 case, Case No. 12-1230, the Commission was confronted with this very issue in deciding whether to adopt the FE EDUs proposal for a three year bid period for part of their SSO Load rather than the planned one year bid period. The issue was well vetted through the testimony

[50] RESA Comments, pp. 8-9; NEMA Comments, p. 1; Hess Comments, p. 4.

[51] OEG comments, p. 2.

[52] OMAEG comments, p. 4.

and briefing from multiple parties. In its Order, the Commission determined that the proposed three year bid time period was most appropriate and should be adopted. Specifically, the Commission stated:

> "The Commission agrees with the FE EDUs and Staff that the laddering of products in order to smooth out generation prices, *mitigating the risk of price volatility*, will benefit ratepayers and the public interest. The Commission finds that OCC/CP and AEP Retail's arguments have merely established that future prices are uncertain; however, unlike OCC/CP and AEP Retail, the Commission believes that future price uncertainty makes laddering of products in order to *mitigate volatility* an even greater benefit for ratepayers (Co. Ex. 3 at 8; Tr. I at 155; Tr., II at 154). ESP 2 Case, Opinion and Order (Aug. 25, 2010) at 8, 36. Further, although OCC/CP contend that customers could achieve price stability by purchasing power in the market from a CRES provider, *the Commission believes that non-shopping customers are also entitled to receive the benefit of price stability.*"[53]

While there are parties seeking to do away with the customer's ability to choose a more stable pricing product through the SSO price offered by the EDU, the Commission has already ruled on this issue and determined that such pricing is appropriate and beneficial to non-shopping customers.

E. Lack of Information/Improved Electronic Data Interchange ("EDI")

RESA includes in its comments a long wish list of information and enhanced EDI that it says it would like for EDUs to produce. Unfortunately, it provides no indication of the cost imposed on the EDUs to actually develop and produce such information on an ongoing basis. It also provides little in the way of an explanation as to how all of the additional information will aid the competitive retail market in Ohio, other than to say that Duke Energy-Ohio agreed to it in a Stipulation. In order for an EDU to be permitted

[53] *Opinion and Order*, p. 32, Case No. 12-1230-EL-SSO (July 18, 2012). (Emphasis added).

to disclose a customer’s account number and noncompetitive billing information to a CRES provider without customer consent, the Commission would need to modify its rules.

The FE EDUs already offer information and enhanced EDI transactions in the major areas off of RESA’s wish list namely a secure website for customer information including Eligible Customer List, online interval data, and sync lists.[54] Further, the FE EDUs maintain EDI protocols in accordance with the Ohio EDI working group. Finally, the FE EDUs already: i) do not validate enrollments on customer name; ii) autocancel bill ready 810's; iii) support historical summary and historical interval data via EDI, all of which represent items off of RESA’s list of wants for additional information and Enhanced EDI.

In addition, the FE EDUs also provide to CRES providers loss factor, service voltage and special matter configuration, support supplier drop rescission requests via supplier initiated EDI 814 Reinstatement, adopt EDI standards for special meter configuration (“REFKY”) and provide supplier bill messaging on utility consolidated bills.

For the FE EDUs, much of the requested RESA information and Enhanced EDI is already provided and in place. The FE EDUs follow and are in compliance with the requirements of the Ohio EDI Implementation Guide, which is developed as part of a process overseen by the Commission, and are not permitted to simply implement changes that are not provided for through the Ohio EDI Implementation Guide.

[54] RESA comments at p. 28.

F. Proper Allocation of Costs/Subsidies

In responses to different questions, supplier commentors stated that costs should be properly allocated to bypassable generation pricing so that EDU generation charges are not subsidized by regulated transmission and distribution services.[55] While cost allocation and subsidies are a legitimate concern, the FE EDUs' costs making up their bundled rates were unbundled as part of their transition case in 1999-2000. The allocation of costs has been revisited through multiple stabilization plans, a distribution rate case, and multiple SSO proceedings before the Commission. Because the FE EDUs bid out their load through a Commission-authorized wholesale competitive auction, it is transparent that the costs incurred by the FE EDUs as a result of the auction process flow through to retail customers on a bypassable basis.

As discussed above, IGS argues that default service is being subsidized by shopping customers because generation uncollectible amounts are not included in bid prices.[56] For the FE EDUs, this is an incorrect statement because nonshopping generation uncollectible amounts are collected through a bypassable rider, thereby adding the amount of that rider to the price to compare, which makes it easier for CRES providers to acquire customers. Shopping customers do not subsidize the FE EDUs non-shopping customers as alleged by IGS.

III. Corporate Separation

[55] RESA comments, p. 9; IGS comments, p. 2;

[56] IGS comments, p. 2.

Question (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?

As noted in the opening comments of several stakeholders, this question raises significant jurisdictional issues because FERC has exclusive jurisdiction over market rules and rates once structural separation has occurred.[57] Not a single stakeholder cites any authority that establishes that a state commission has jurisdiction to require an affiliate to disclose any information,[58] although some do advance conclusory assertions requesting that such disclosures should be required.[59] For example, the comments of IGS - that "EDUs should not provide any competitive advantages to subsidiary companies, which includes access to . . . any [] information that is not also provided to CRES providers equally"[60] - fail to recognize that such disclosures are already required by the Transparency aspect of FERC's *Edgar/Alleghany* rules.[61] These and similar comments

[57] *See, e.g.* FE EDU comments, p. 21 ("once an EDU corporately separates its generating units, or once and EDU unbundles transmission lines, FERC has exclusive jurisdiction over the market rules and rates that apply to such a generation entity or the terms and conditions of the unbundled transmission service"); FES comments, pp. 20-21 ("Once structural separation has occurred, [FERC] has exclusive and preemptive jurisdiction over the market rules and rates that apply the resulting stand-alone generation"); IEU comments, p 30 ("[u]nbundled transmission service is subject to the exclusive jurisdiction of FERC").

[58] Several commentors cite extensively to Ohio state laws that they claim provide the Commission with authority to require such disclosures, even these entities fail to cite to any federal authority and their reliance on state law to support their position is simply insufficient to overcome the federal preemption issues raised by this question. *See* Sierra Club/OEC comments, pp. 2-7 (extensively discussing purported authority for such disclosures under Ohio law but failing to address any single authority contradicting the federal authority cited by the FE EDUs and FirstEnergy Solutions Corp. regarding federal preemption); UWUA comments, pp. 1-2 (same).

[59] *See, e.g.,* IGS comments, p 8; OEG comments, p 5; Citizens Coalition comments, p. 16.

[60] IGS comments, p 8.

[61] *See Allegheny Energy Supply Co., LLC,* 108 FERC ¶ 61,082, P 22 (2004) ("*Alleghany*") (setting forth the four *Alleghany* criteria, which includes the transparency guideline whereby all suppliers have equal access to all data that is relevant to supplier participation), *see also, e.g., Connectiv Energy Supply,* 115 FERC ¶ 61,222 (analysis of the facts that satisfy the four *Allegheny* criteria) (2006).

demonstrate that any action on this question should take place in FERC dockets, where there is jurisdiction to address each such allegation and issue.

UWUA also expresses concern about actions taken by affiliates of the FE EDUs regarding aging generation plants in response to environmental regulations.[62] The generation plants in question are not owned, controlled, operated by the FE EDUs. SB 3, as enacted in 1999, had as one of its provisions that the rates and operations of electric utilities were to be unbundled and corporate separation requirements were put in place to assure that separation. The FE EDUs followed the law. The generation plants that UWUA refers to are on the competitive side of the business and as such are subject to market pressures. The FE EDUs announced no plant retirements. The FE EDUs' personnel are not involved in discussions leading to decisions to retire generation plants, or discussions relating to capacity auctions or transmission projects.

While UWUA cites to a statute regarding violations of the corporate separation provisions urging the Commission to commence an investigation. UWUA, however, seems more upset with the fact that SB 3 required corporate separation, and that the FE EDUs followed those very corporate separation provisions, rather than any corporate separation violations. They cite to no instances that may be construed as a violation of the corporate separation rules or any grounds upon which any investigation could be based. While the UWUA's perspective on plant closures is understandable, there is no basis upon which further action may be pursued.

[62] UWUA comments, pp. 1-2.

Question (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?

The majority of comments in response to this question assert that a transmission affiliate should not be precluded from participating in projects intended to alleviate constraint.[63] Indeed, as a number of these stakeholders note, transmission affiliates are often in the best position to efficiently participate in such projects and allowing such affiliates to participate promotes competition by increasing the number of participants.[64] Certain parties, however, advance comments suggesting that competitive bidding should be required.[65] Regardless of the merits of competitive bidding, the jurisdictional authority to mandate such a process is located at the federal level, and not at the state level. Next, the Sierra Club and OEC assert that "projects intended to alleviate constraint should include an opportunity for non-transmission alternatives to participate."[66] However, they cite no authority whatsoever indicating that the Commission should implement any proposal.[67] This is not surprising, because again as described in certain of

[63] *See, e.g.* DPL comments, pp. 7-8; Duke Energy comments, p 10; AEP comments, p. 23; OCC comments, p 23; UWUA comments, p 3.

[64] *See, e.g.* DPL comments, pp. 7-8 ("Often the transmission affiliate is familiar with the system, power flows, knows the terrain, any right of way concerns, typical weather conditions, and is in the best position to build a transmission project."); Duke Energy comments, p. 10 (noting that "[i]t is axiomatic that the more participants in a market, the more competitive the market and the more favorable the prices").

[65] *See, e.g.*, OEG comments, p. 5 (asserting that "[c]ompetitive bidding should be required" but acknowledging that "this issue is more appropriately addressed by FERC"); Sierra Club comments, p. 8 (claiming that a "competitive bidding process should be required");.

[66] Sierra Club/OEC comments, p. 8.

[67] Indeed, the only support they do cite in support of this assertion is a very general and broad policy statements in the Ohio code. *Id.* In any case, the Supremacy Clause of the United States Constitution establishes that state regulations cannot displace federal law and confer jurisdiction over matters that are already exclusively within the federal purview. *See* U.S. Const. art. vi, § 2. Thus, because, as described in the opening Comments of the FE EDUs, these matters are already within FERC's exclusive jurisdiction any citation to state law is simply irrelevant. *See* FE EDUs, pp. 22-24.

the initial comments,[68] jurisdiction over transmission planning issues is located at the federal level, and not at the state level.

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

Several stakeholders suggest that a utility's distribution affiliate has a duty to oppose an "unjustified"[69] rate of return or a rate of return that "adversely affect[s] its customers."[70] Such assertions provide little guidance, however, with respect to the question of whether a transmission rate increase is reasonable or justified.[71] More importantly, any attempt to impose some kind of obligation under state law would run into preemption issues because the rule is that a state agency cannot compel a public utility to make a regulatory filing with FERC.[72] Second, and most importantly, any attempt to impose such a duty would indirectly interfere with FERC's exclusive jurisdiction over transmission rates and would invade the expansive regulatory regime FERC has established to regulate holding company structural issues.[73]

[68] *See, e.g.,* FE EDUs comments, pp. 22-24, IEU comments, p. 30 ("The subject area identified in the question is within the exclusive jurisdiction of FERC."); AEP comments, p. 23 ("These matters are for FERC and PJM jurisdiction and oversight."). *See also* Duke Energy Retail and Duke Energy Commercial Asset Management comments, pp. 8-9 (stating that "transmission projects are under the jurisdiction of the Federal Energy Regulatory Commission" but "acknowledge[ing] the Commission's appreciation of the impact on retail customers").

[69] NOPEC comments, p. 9 (citing no authority but suggesting that utilities have "a duty from an Ohio utility law prudence standpoint to attempt to minimize its transmission costs that are passed onto its consumers, including intervening at FERC to oppose unjustified transmission rate increases")

[70] Sierra Club/OEC comments, p. 9 (advocating for greater oversight to ensure "fully separate entities," because in the commentors' opinion no entity will fully comply with such a "'duty'" until it is fully separate).

[71] *Cf. Morgan Stanley Cap. Grp. Inc. v. Pub. Util. Dist. No. 1*, 554 U.S. 527, 532 (2008) ("The statutory requirement that rates be "just and reasonable" is obviously incapable of precise judicial definition . . . .")

[72] *See* FE EDUs comments, p. 26 (citing *Massachusetts v .United States*, 729 F.2d 886 (1st Cir. 1984) (Breyer, J.)).

[73] FE EDUs comments, p. 25-27.

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

Compliance with the corporate separation rules applicable to FE EDUs should assuage any concern with a customer being misled due to corporate structure. That being said, the FE EDUs are unaware of any circumstances where a customer has alleged that they were misled due to corporate structure.

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

While the majority of stakeholders recognize that shared services are not causing market manipulation or undue preference,[74] a number of commentors do suggest that shared services can provide EDUs with an advantage in terms of lower costs.[75] We submit that such reduced costs are not problematic but, in fact, desirable. IGS, however, does assert that shared services potentially can be "damaging to competitive markets, if the costs attributable to the services are only incremental, and if the services shared also provide access to information (either by the affiliated company or the EDU) that would not otherwise be available to other CRES providers."[76] This position, however, is not consistent with FERC's pertinent Standards of Conduct, which explicitly prohibit such non-public information sharing regardless of whether it is done directly or through a conduit.[77]

[74] *See, e.g.*, DPL comments, p. 8; Duke Energy comments, p. 12; Duke Energy Retail and Duke Energy Commercial Asset Management comments, p. 9; OEG comments, p. 6; AEP comments, p. 25.

[75] *See, e.g.,* IGS comments, pp. 8-9.

[76] *Id*.

[77] *See* FE EDUs comments, p. 28; FES comments, pp. 23-24.

In addition, the NOPEC suggests – without any citations to supporting authority – that "[it] believes that this should be the subject of a separate PUCO case."[78] We respectfully disagree with this conclusory and unwarranted assertion. As discussed elsewhere,[79] this subject is outside of the Commission's jurisdiction and thus should not be addressed in this current Commission proceeding – or in a separate Commission proceeding.

Question (g): Should generation and CRES providers be required to completely divest from transmission and distribution entities, maintain their own shareholders and, therefore, operate completely separate from an affiliate structure?

IGS simply writes "Absolutely" as its response to this question.[80] IGS's suggestion, however, is neither meaningful nor helpful because it fails to provide any factual basis, and because it fails to address the important jurisdictional issues. As demonstrated elsewhere, FERC's regulatory regime largely occupies the field with respect to the appropriate degree of corporate separation and independence of affiliated electric distribution, generation and transmission entities.[81]

Similarly, while the Sierra Club and OEC argue for divestiture, they also fail to address the jurisdictional issues presented.[82] Instead, their comments rely on unsubstantiated and baseless implications regarding certain actions by the FE EDUs.[83] They go on, moreover, to suggest that the Commission should open up an investigation

[78] NOPEC comments, p. 9.

[79] *See* FE EDUs comments, p. 28; FES comments, pp. 23-24.

[80] IGS comments, p. 9.

[81] *See* FE EDUs comments, pp. 29-30; FES comments, pp. 24-25.

[82] *See* Sierra Club/OEC comments, pp. 13-15.

[83] *See id.*

into the conduct of the FE EDUs. While the Commission may open an investigation to ensure its rules and regulations have been followed, it does not have authority to address issues that are governed by PJM's Tariff. Instead, as the Sierra Club and OEC acknowledge, if any improper conduct did occur "an individual or outside entity may file such a complaint."[84] And any such complaint must under federal law be presented at FERC.

Finally, although the UWUA oppose any proposal to require complete divestiture as this could lead to "a potentially toxic combination of higher consumer prices, reduced employment levels, reduced reliability, and considerable increase in financial risk" they do suggest that the Commission should consider "additional protections."[85] Specifically, they suggest that the Commission review proposals submitted in connection with a proceeding before the Pennsylvania Public Utility Commission and determine whether any warrant adoption in Ohio. This assertion, however, ignores the fact that these untested proposals are also likely preempted by federal law given FERC's extensive regulation in this area.[86]

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

The vast majority of stakeholders that responded to this question noted the substantial FERC regulations and FERC-approved PJM Tariff provisions that establish an extensive framework to monitor for and, if necessary, mitigate market power. As such, there are good grounds for the Commission to conclude that FERC's rules – and the

[84] *Id.* at 15.

[85] UWUA comments, p. 4.

[86] *See* FE EDUs comments, pp. 29-30; FES comments, pp. 24-25.

relevant PJM tariffs – mitigate any potential for exercise of market power in the wholesale markets, and that PJM's tariffs facilitate retail competition.

IV. Conclusion

With shopping sales levels at nearly 80% and more than 70% of customers shopping across all customer classes, the FE EDUs believe that the current default service model has provided and continues to provide significant benefits to their over a million and a half customers shopping customers. Once all EDUs in the state are establishing their SSO prices through a competitive wholesale bid process, the already high levels of shopping statewide would be expected to increase over the entire state. Until that time, no major changes to the model should be undertaken.

Respectfully submitted,

/s/ James W. Burk
James W. Burk, (0043808)
Counsel of Record
Carrie M. Dunn

FIRSTENERGY SERVICE COMPANY
76 South Main Street
Akron, OH 44308
(330) 384-5861
(330) 384-3875 (fax)
burkj@firstenergycorp.com
cdunn@firstenergycorp.com

Attorneys for Applicants, Ohio Edison
Company, The Cleveland Electric
Illuminating Company, and The Toledo
Edison Company

CERTIFICATE OF SERVICE

The undersigned herby certifies that a true and correct copy of the foregoing Reply Comments has been served upon the below-named counsel via electronic mail this 5th day of April, 2013.

/s/ James W. Burk__________________
James W. Burk

EMAIL SEVICE LIST

mhpetricoff@vorys.com
smhoward@vorys.com
grady@occ.state.oh.us
serio@occ.state.oh.us
fdarr@mwncmh.com
sam@mwncmh.com
dboehm@BKLlawfirm.com
mkurtz@BKLlawfirm.com
cmooney2@columbus.rr.com
drinebolt@ohiopartners.org
msmalz@ohiopovertylaw.org
jmaskovyak@ohiopovertylaw.org
gkrassen@bricker.com
William.wright@puc.state.oh.us
stnourse@aep.com
judi.sobecki@dplinc.com
amy.spiller@duke-energy.com
Stephen.Bennett@Exeloncorp.com
Cynthia.Brady@Constellation.com
David.Fein@Constellation.com
callwein@wamenergylaw.com
cgoodman@energymarketers.com
wsundermeyer@aarp.org
mjsatterwhite@aep.com
yalami@aep.com
srantala@energymarketers.com
gpoulos@enernoc.com
storguson@columbuslegalaid.com

anne.reese@lasclev.org
meissnerjoseph@yahoo.com
julie.robie@lasclev.org
mwarnock@bricker.com
tsiwo@bricker.com
ejacobs@ablelaw.com
nmorgan2lascinti.org
callwein@wamenergylaw.com
trent@theoec.org
cathy@theoec.org
jkooler@hess.com
toddm@wamenergylaw.com
NMcDaniel@elpc.org
barthroyer@aol.com
Gary.A.Jeffries@dom.com
mkl@bbrslaw.com
mwalters@proseniors.org
gbenjamin@communitylegalaid.org
plee@oslsa.org
rjohns@oslsa.org
jlang@calfee.com
talexander@calfee.com
coneil@calfee.com
lsacher@calfee.com
haydenm@firstenergycorp.com
carlwwood@verizon.net
markbrooks@uwua.net

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