

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

**In the Matter of the Commission's
Investigation of Ohio's Retail Electric
Service Market.**

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Case No. 12-3151-EL-COI

**Initial Comments
(Second Set)
of the
Retail Energy Supply Association**

Date: July 8, 2013

Introduction

The Retail Energy Supply Association (“RESA”)¹ is a broad and diverse group of retail energy suppliers who share the common vision that competitive retail energy markets deliver a more efficient, customer-oriented outcome than a regulated utility structure. In December 2012, the Public Utilities Commission of Ohio (“Commission”) initiated this docket and asked interested stakeholders to file comments to an original set of questions related to the design of Ohio’s retail electric service market and to corporate separation of the regulated electric distribution assets from competitive generation assets. RESA filed initial and reply comments in this proceeding and encouraged the Commission to take a variety of steps designed to further develop the retail electric service market in Ohio.

On June 5, 2013, the Commission requested that interested stakeholders file comments to a second series of questions which arose as part of the original comments or are related to the design of Ohio’s retail electric service market. RESA is pleased to provide these additional initial comments in order to assist the Commission.²

Market Design Questions

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

Since distribution service is still a monopoly service in Ohio pursuant to Section 4933.83, Revised Code, and the customer must contract with the EDU for distribution service, the comment

¹RESA’s members include: AEP Energy, Inc.; Champion Energy Services, LLC; ConEdison *Solutions*; Constellation NewEnergy, Inc.; Direct Energy Services, LLC; GDF SUEZ Energy Resources NA, Inc.; Hess Corporation; Homefield Energy; IDT Energy, Inc.; Integrys Energy Services, Inc.; Just Energy; Liberty Power; MC Squared Energy Services, LLC; Mint Energy, LLC; NextEra Energy Services; Noble Americas Energy Solutions LLC; NRG, Inc.; PPL EnergyPlus, LLC; Stream Energy; TransCanada Power Marketing Ltd. and TriEagle Energy, L.P. The comments expressed in this filing represent the position of RESA as an organization but may not represent the views of any particular member of RESA.

²RESA is also looking forward to the workshops scheduled by the Commission in this proceeding, and continuing the discussions of solution-driven ideas in that forum.

paraphrased in the question should apply only to generation service. With respect to generation, the EDU should treat the default generation service as Section 4905.03, Revised Code, intended, namely as nothing more than a default service to assure that no customer loses electric service if the customer does not choose a competitive retail electric service (“CRES”) provider. To ensure that customers are well informed about all of their options regarding electric service, the EDU and the Commission may be required to educate customers to evaluate their options and to detail the benefits of retail competition. Also, education to ensure customers understand the split between wires service and generation service is critical. For instance, it is imperative for a customer to understand that choosing a CRES provider will not impact the reliability of electric service in any way, and that the utility fully supports a customer in its choice of electric provider, regardless of competitive or default service. In the upcoming workshops, RESA will ask the Commission to make changes which will immediately benefit customers by removing several existing and unfortunate barriers that promote default service over robust retail competition. These include: (1) easier enrollment with information known and readily available to the customer; (2) immediate enrollment with CRES suppliers for new customers and portability of existing CRES contracts if an existing shopping customer moves; (3) greater information supporting the supplier-customer relationship should be set forth in EDU-supplied bills; and (4) extending non-recourse Purchase of Receivables (“POR”) programs to the few Ohio utilities where it does not currently exist.

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

State policy (Section 4928.02(I), Revised Code) focuses on assuring retail customers have meaningful electricity supply choices in Ohio. As a state agency, the Commission only has

the authority expressly delegated to it.³ On the subject of predatory pricing, the Commission was not empowered to enforce federal or state antitrust statutes, criminal conspiracy laws, or wire and mail fraud. Predatory pricing schemes, such as those that consist of intentionally offering a good or service under cost for the purpose of eliminating competition,⁴ as well as other forms of market manipulation, violate state and federal law. Such schemes should trigger federal law enforcement by the Justice Department and the Federal Trade Commission (“FTC”). Similarly, the Ohio Attorney General has the jurisdiction to enforce the Valentine Act, which also makes predatory pricing illegal under state law. The Justice Department, FTC, and the Ohio Attorney General’s office have the expertise, and ability to gather the necessary information over time and to prosecute those who attempt to manipulate the market. The Commission’s authority over utilities and its ability to implement state energy policy does not equate to a policing power outside of the acts of public utilities for which the Commission was given general supervisory authority.⁵

That does not mean the Commission has no role to play in the development and maintenance of a functioning competitive market. The General Assembly has empowered the Commission “to protect electric consumers” from market deficiencies, address the effects of market power⁶ and ensure retail customers access to various electric supplies and suppliers.⁷ The General Assembly also directed the Commission to prevent subsidies flowing between the regulated services of a utility and the competitive services of an affiliate.⁸ In addition, the

³*Lucas County Commrs. v. Pub. Util. Comm.* (1997), 80 Ohio St. 3d 344; 1997 Ohio 112; 686 N.E.2d 501; 1997 Ohio LEXIS 3111, citing *Columbus S. Power Co. v. Pub. Util. Comm.* (1993), 67 Ohio St. 3d 535, 537; 620 N.E.2d 835, 838.

⁴*See, generally, Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209; 113 S. Ct. 2578; 125 L. Ed. 2d 168; 1993 U.S. Lexis 4245 (1993).

⁵ Sections 4905.05 and .06, Revised Code

⁶ Section 4928.02(I), Revised Code.

⁷ Section 4928.02(C), Revised Code.

⁸ Section 4928.02(H), Revised Code.

General Assembly gave the Commission specific authority to prescribe the rules and enforce corporate separation between regulated and competitive assets.⁹ Further, the Commission is in a position to request records and reports from the EDUs necessary to prepare and publish market monitoring reports which may be needed in civil or criminal claims of anti-trust behavior. Thus, the combination of the Commission plenary authority over EDUs and its authority to take action to assure functioning markets provide the Commission with tools to prevent the effects of market manipulations.

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

Under the current regulatory scheme, Section 4928.04, Revised Code, keeps the EDU in the position of the provider of last resort. The fact that the EDU will have to purchase the generation needed for bundled service – even if that is done by public auction – leaves the Commission with its plenary, supervisory authority over the EDU in the position described above. Should the General Assembly change this position or facts occur such that the EDU truly exits the merchant function, the issue of market monitor would have to be reconsidered by the General Assembly.

Market power in the wholesale electricity market is regulated by the Federal Energy Regulatory Commission (“FERC”). The regional transmission organization in which Ohio participates, PJM Interconnection, LLC (“PJM”), has an external independent market monitor under contract with FERC to objectively monitor, investigate, evaluate and report on the PJM Markets. An Ohio Commission market monitor looking at wholesale manipulation would be superseded by FERC’s jurisdiction and authority, be duplicative of PJM’s Market Monitor

⁹ Section 4928.17, Revised Code.

responsibilities, and be frustrated by the inability to investigate companies and operations that exist largely outside of Ohio.

Market Design Question (d): Regarding government aggregation, should the Commission require public disclosure of any information in addition to commodity pricing, such as inducements or incentives related to commodity contracts? In general, should the Commission require public disclosure of any information in addition to commodity pricing, such as inducements, incentives, or broker commission related to commodity contracts?

RESA believes that public disclosure of inducements and incentives related to opt-out government aggregation commodity contracts could be required by the Commission. First, the Commission already has existing statutory authority, in Sections 4928.10(A) and 4928.20(K), Ohio Revised Code, to implement such a requirement in its rules. Second, the inducements and incentives are relevant to the decision-making process for customers who are automatically enrolled if they do nothing as a result of a government aggregation process. In other words, customers should have the ability to know the complete context of the offers of the CRES provider serving the government aggregation to ensure they can make their decision within the allotted 21 days. Third, there is already a venue for public disclosure within the opt-out notice and also through the government aggregator's certification docket for customers to have access to pertinent information about the aggregation program and selection criterion.

Market Design Question (e): Would a time-differentiated standard service offer ("SSO") rate cause more shopping based upon customer preference for avoiding uncertainty?

The answer to this question is largely determined by the meaning of "time-differentiated standard service offer rate." If the question refers to rate-making that uses peak, off-peak, or other defined usage period rate variations, then the answer is that products of that structure are best suited to be provided by the competitive marketplace. One of the fundamental tenants of a well-structured competitive retail energy market where utility default service exists, is that the

default service should be as basic and “plain vanilla” as possible. Time-differentiation, as defined as rate variation based on peak, off-peak, day-of-the-week, or other defined periods of usage, is a market innovation that is best left to the CRES supplier. If the SSO were to be structured under this time-differentiation, it would impede the ability of the competitive market to develop the most efficient and valuable products for the customer. It would also break the tenant of “plain vanilla” default service.

If the question refers to time-differentiation as simply moving default service to market hourly pricing, then the answer changes significantly. Another tenant of well-structured competitive retail energy markets where utility default service exists is that the default service should be as close to market pricing as possible, or “market reflective.” Market reflectivity insures that default service is not artificially raised or lowered in a manner that creates a divergence to market pricing that cannot be sustained but for an EDU’s unique guarantee of cost recovery. There are few default service constructs more market reflective than market hourly pricing. As such, if this particular question asks whether the competitive retail market would be made more robust and sustainable by moving some, or all customers, to hourly default service pricing, the answer becomes resoundingly affirmative. To the extent that hourly default pricing is not appropriate, for whatever reason, RESA reminds that market reflective default service is imperative to customers experiencing the myriad of benefits that can only be afforded by a robust, sustainable competitive retail market. Regardless of technology, pricing default service to most closely follow underlying wholesale market conditions is the outcome that we must achieve.

Market Design Question (f): Are CRES providers better positioned to manage uncertainty in a retail market than EDUs that offer a flat SSO rate?

Yes, in essence, a CRES provider engages in bottom-up planning (hedging), which includes adjusting both the supply of energy and any financial instruments to secure prices each time a customer contracts for service or ends an existing contract. This customer-by-customer planning is significantly more flexible than the former regulatory compact in which the EDU builds facilities with long physical lifetimes and the customers pay for the units so long as they are used and useful.

CRES providers deal with market uncertainty every day. It is the nature of CRES business that customers and contracts are perpetually moving to and from, and contract prices change monthly. No CRES provider has one day every year when they enroll/drop/renew contracts. Additionally, the CRES providers' hedging strategies manage market uncertainty not only utility-by-utility, but also across states with differing regional transmission organizations and regulatory rules. It is the very nature of the CRES business to manage market uncertainty knowing that, unlike a utility, CRES providers have no recourse to go to a regulatory commission to ask for the money lost after a mismanaged change.

Market Design Question (g): Is integrated resource planning compatible with a retail market construct? If yes, how can such planning be done, given the current construct of functionally separated business units? If no, how can investment in transmission, generation, and demand management be co-optimized?

No, resource planning now takes place at PJM with its base residual auctions, energy (day-ahead) markets, and regional transmission enhancement planning program.

Market Design Question (h): Could integrated resource plans be done on a statewide basis? If so, how would such planning be accomplished? Could the Commission be helpful in facilitating this type of planning?

No. Resource planning is handled on a regional basis through PJM as the organization responsible for the transmission and generation assets of all its members across 13 states and the District of Columbia. The PJM competitive market rules and pricing drive the most cost

efficient investment when and where needed. For example, today merchant gas-fired units are being built by independent developers to provide generation for customers in and outside of Ohio based on current market conditions. The Commission can serve a very important role by collecting and making consumption data and market-switching data publicly available. That will be helpful for those entrepreneurs who are planning merchant generation plants.

Corporate Separation Questions

Corporate Separation Question (a): How can the Commission ensure that decisions made on behalf of the jurisdictional EDU are not providing preferential outcomes for nonregulated entities?

The Commission has plenary authority over EDUs.¹⁰ As part of its oversight, the Commission can not only insist on well-written separation plans, but also enforce them. Pursuant to Rule 4901:1-20-16(I) – (K), Ohio Administrative Code, the Commission can review the records of the EDU and its affiliates, as Commission Staff has already done. To its credit, the Commission Staff today will follow-up on anti-competitive practices, such as the transfer of customer information to a market affiliate or the attendance by an EDU employee with a marketing representative at a meeting with a prospective customer. Even so, enforcement may be improved by use of more detailed logs when customers are transferred (enrollment time), or by prevention of delays in the provision of prospective customer data to non-affiliated marketing companies.

In addition, enforcement of the restrictions related to shared employees by the EDU and its marketing affiliate can take place.¹¹ Today, logs are kept by the EDUs, which means the EDUs are largely policing themselves. There needs to be (a) greater detail in the EDU corporate

¹⁰ Sections 4905.05 -.07, Revised Code.

¹¹ See, e.g., Rules 4901:1-20-16(G)(4)(c), (d), (h), and (j) Ohio Administrative Code.

separation plans related to shared employees and (b) a better process established at the Commission so that CRES providers can inform the Staff of the happenings in the market. Today, this notification process is so informal that it is almost non-existent, and some suppliers may not even know how to approach these issues with the Commission.

Corporate Separation Question (b): Is there a corporate structure that will ensure decisions made by non-EDU affiliates minimize costs to ratepayers of the EDU?

In general, as long as the EDUs have strict policies and enforce those policies to comply with their corporate separation plans and codes of conduct standards in fact and spirit, there should be no advantage to affiliates or disadvantage for EDU customers. However, there is one area in which additional action by the Commission will strengthen the current corporate separation rules and codes of conduct. The Commission should add a restriction for EDU employees who move to any EDU affiliate, and vice versa, similar to noncompetition clauses that can be 12 months in length. By this suggestion, RESA is recommending that employees who move between an EDU and its affiliates be restricted in their duties so that there is less opportunity for improper use of the information learned/gained during the previous employment. Currently, the code of conduct rules preclude employees of an EDU affiliate from accessing information about the EDU's systems that is not contemporaneously and in the same form available to nonaffiliated CRES providers, and require EDUs to keep all CRES provider information confidential, unless the information becomes public otherwise.¹² RESA believes that the movement of employees within the EDU "family" should not give the EDU or any EDU

¹² Rules 4901:1-20-16(G)(4)(c) and (d), Ohio Administrative Code.

affiliate any competitive advantage. This restriction will enhance the corporate separation plans and codes of conduct, and will help to avoid improprieties.¹³

Corporate Separation Question (c): Since generation has been declared competitive in Ohio, should return on investment for EDUs be reduced in order to reflect lower risk?

It remains to be seen whether reductions in return on investment (“ROI”) should occur as part of future regular rate increase (“AIR”) proceedings. The declaration of competitive generation coupled with effective corporate separation and asset divestiture ongoing in Ohio should result in AIR proceedings where ROI is based solely on distribution and distribution-related infrastructure rather than on generation assets. Whether the ROI on those particular assets is increased, reduced, or stays the same will likely be decided on a case-by-case basis according to the specific issues deliberated in the AIR proceeding.

Corporate Separation Question (d): Should the capital structure of EDUs be more heavily weighted toward debt in light of the reduced risk associated with a wires-only company?

This too is an AIR rate case question. The EDU should be free to set the capital structure as it chooses. However, the Commission can determine a rate of return that uses an industry standard debt-to-equity ratio in setting the rate of return figure.

Corporate Separation Question (e): FERC Order 1000 requires and/or enables regional transmission organizations to consider non-transmission options and merchant transmission options in their planning processes. Would a statewide integrated resource plan or shadow plan provide the market with guidance on where and/or how to make investments in conjunction with the PJM planning process?

Corporate Separation Question (f): How could a competitive process be developed to provide all transmission developers, including incumbent

¹³ This suggestion has at its core the same rationale that exists for the restriction that precludes a former state official from representing a person on any matter in which the official personally participated. Section 102.03(A)(1), Ohio Revised Code. Similarly, former Commissioners and Commission Attorney Examiners are restricted from representing, or acting in a representative capacity, a public utility before any state agency for 2 years after leaving a Commission position. Section 102.03(A)(2), Ohio Revised Code.

transmission owners, with a fair chance to bid a transmission solution to a reliability problem identified by PJM?

Corporate Separation Question (g): Should competitive bidding for transmission construction be considered in order to ensure the lowest possible cost?

Corporate Separation Question (h): Does the current treatment of capacity injection rights adequately address units that retire and are later reactivated?

RESA takes no position on these four questions.

Conclusion

RESA believes that several components of Ohio's current market design must be improved in order to help Ohio's retail electric service market grow and develop in healthy and sustainable ways so that customers fully benefit from electric competition. RESA, both here and in its Initial and Reply Comments filed previously, has presented the necessary components of a truly competitive market in Ohio. RESA again urges the Commission to consider changes to the Ohio market that will create certainty for long-term investment, transparency for customers, economies of scale, and new products because they are the key components for any market. The Commission should ban non-bypassable riders that charge shopping customers for services that shopping customers do not need or are already receiving from their CRES providers. Similarly, the Commission should do away with switching fees and excessive charges for CRES providers or customers to receive data from the EDU. The Commission could provide for easy access to necessary metering data that resides solely in the hands of the EDU. The Commission should make it easier for customers to switch by exploring options other than a requirement for account numbers or information not readily known to the customer. Finally, the Commission should streamline the credit and billing collection services retail customers now must address when buying power by requiring Ohio EDUs¹⁴ to offer a purchase of receivables ("POR") program.

¹⁴ Duke Energy Ohio, Inc. already offers a POR program.

All of the reforms outlined above are necessary to ensure that the astute policy considerations that were supported when retail competition was enacted in this state are able to fully come to fruition so that customers can be empowered and benefit from electric choice.

RESA appreciates the opportunity to further explain its views and to respond to the additional questions posed by the Commission. RESA looks forward to working with the Commission as it embarks on these changes and the upcoming workshops.

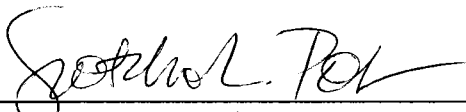
Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a true and accurate copy of the foregoing document was served by electronic mail this 8th day of July 2013 upon the persons listed below.


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Summary: Comments Initial Comments (Second Set) electronically filed by M HOWARD PETRICOFF on behalf of Retail Energy Supply Association