

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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

**REPLY COMMENTS OF OHIO PARTNERS FOR AFFORDABLE ENERGY, AARP,
THE OHIO POVERTY LAW CENTER, EDMONT NEIGHBORHOOD COALITION,
PRO SENIORS, INC., SOUTHEASTERN OHIO LEGAL SERVICES, LEGAL AID
SOCIETY OF COLUMBUS, LEGAL AID SOCIETY OF CLEVELAND, COMMUNITIES
UNITED FOR ACTION, AND THE CITIZENS COALITION**

I. INTRODUCTION

Ohio Partners for Affordable Energy; AARP; The Ohio Poverty Law Center; Edgemont Neighborhood Coalition; Pro Seniors, Inc.; Southeastern Ohio Legal Services; Legal Aid Society of Columbus; Legal Aid Society of Cleveland; Communities United for Action; and, The Citizens Coalition ("Consumers"), hereby submit the following reply comments in the above-referenced docket in response to the Commission's June 5, 2013 Entry.

II. OVERVIEW

Many commenters agree that it is unclear what the Commission means by its reference to seeking a "fully functional competitive retail electric market" in several of the questions. See Comments of The Dayton Power and Light Company ("DP&L") at 1; Comments of Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company (collectively "FirstEnergy") at 2-3. The Commission has proposed no metrics that would, in its view, determine what constitutes the market it has

failed to describe. FirstEnergy at 2-3. Moreover, as noted by FirstEnergy Solutions (“FES”), there are several conditions that must be met prior to any evaluation of whether or not a competitive market exists. FES thus views this proceeding as “premature”. FES at 2. In general, Consumers agree with the noted lack of any criteria or metrics to evaluate a “fully functional” retail electric market and conclude that the Commission should take no further action that would alter the current market structure that would rely on such a nebulous and undefined concept.

III. MARKET DESIGN QUESTIONS

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?

There is general agreement among the commenters, including the Consumers, that nothing should be done to undermine the relationship between customers and EDUs regarding the distribution function. The EDU is responsible for providing safe and reliable distribution service, energy efficiency, and other regulated services. Comments of Duke Energy – Ohio (“Duke”) at 1. Marketers likewise recognize the importance of the customer/EDU relationship. Comments of Constellation NewEnergy, Inc. and Exelon Generation Company, LLC (“Constellation & Exelon”) at 3. As noted by FirstEnergy, distribution is a regulated non-competitive service, so there is an inherent relationship between the customer and the EDU. FirstEnergy at 4.

Several marketers and the Office of the Ohio Consumers’ Counsel (“OCC”) observe that because of Ohio’s statutory framework which focuses on promoting

competition, EDUs should not preferentially promote the Standard Service Offer (“SSO”). See Duke at 2 and OCC at 4. EDUs should educate customers on the SSO, governmental aggregation options, and bilateral offers from marketers by referring customers to the Apples-to-Apples chart and other educational materials, and by not favoring their own SSOs. See Comments of the Retail Electric Supply Association (“RESA”) at 3; OCC at 3-4. Nonetheless, the provision of SSO service by EDUs remains a requirement of Ohio law and the relationship between the EDU and customers utilizing this option must continue. FE at 4; RESA at 3. Consumers agree that the EDU should present options to customers in a neutral manner and support the current statutory obligation of the EDU to provide SSO service.

Only the Consumers raised the issue of the need to effectively regulate marketers. Unconscionable practices need to be identified. Customer complaints need to be reviewed and acted upon. Contract terms must be transparent. For example, variable rate offers must be tied to a publicly available index so customers can effectively evaluate contracts offered by marketers. Absent strong regulations and effective enforcement, customers will become the prey of unscrupulous marketers. There is evidence of this already. The Commission needs to toughen its regulations and enforce them. See Consumers at 3-6.

a. 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?

A number of responses to this question, particularly those from marketers, evince a lack of understanding of the role of the Federal Energy Regulatory Commission (“FERC”) and PJM. The commenters argue there is no need for market oversight because these national and regional entities monitor market power issues. See RESA at 5, FES at 5; Comments of Duke Energy Retail and Duke Energy Commercial Asset Management to the Commission’s Supplemental Questions (“DER & DECAM”) at 2; Duke at 3; Constellation & Exelon at 5. FERC has regulatory authority over wholesale markets, not retail markets. PJM’s market monitor has responsibility for oversight of the wholesale markets in its region but no authority over retail markets.

Several commenters note that the Commission has a responsibility to monitor the market and report to the General Assembly on market issues, as OCC observes in its initial comments, but has no enforcement power over predatory pricing or collusion per se. R.C. 4928.06; OCC at 5-6. These responsibilities are within the purview of the Federal Trade Commission, the Justice Department, and the Ohio Attorney General. See RESA at 4. Consumers agree that the Commission does have the authority under R.C. 4928.06(E)(1) to correct the negative impacts on competition by EDUs because these remain regulated entities. However, R.C. 4928.06 does not provide the Commission the authority to prevent and prosecute predatory pricing or collusion. Instead, the law requires the Commission to take action to “ensure that service is provided at

compensatory, fair, and nondiscriminatory prices and terms and conditions.” The Commission has authority to ensure a fair outcome for consumers, not to regulate market behavior that leads to predatory pricing or collusion.

The Commission’s role is to certify marketers and enforce the regulations adopted to prevent abusive practices and protect consumers. A significant component of these protections is to require transparent pricing and complete disclosure of contract terms; these are important tools the Commission does possess that can help prevent predatory pricing and collusion. The activities of marketers and their subsidiaries, or newly minted corporations controlled by officers that have been investigated and sanctioned in other states, require special scrutiny. Effective enforcement is a critical factor in ensuring the integrity of the market.

Consumers also reiterate the point made in their initial comments that the SSO is the most effective market-based approach to protect against various forms of market abuse and failure. The SSO is transparent. The SSO allows customers to evaluate competing offers. The SSO sets a benchmark price that can serve as a reference point when reviewing the market for predatory pricing and collusion. A combination of the SSO and vigorous enforcement by authorized federal and state agencies, including the Commission, are the best means to prevent retail market abuse.

Interstate Gas Supply (“IGS”) uses this question as an excuse to decry the “unfairness” of the SSO and how it distorts the competitive market. IGS at 7-9. IGS spends an entire page lamenting the existence of the SSO and default

service, yet only offers one sentence on the need to prevent possibly predatory conduct by Competitive Retail Electric Suppliers (“CRES”). Curiously, no other marketers identify the SSO as the culprit in market failures. In general, marketers are currently increasing their market share. The fact that some marketers are unsuccessful for reasons such as mismanagement or failure to offer a product that consumers affirmatively choose is not an indication of a market failure, but rather a function of a normal competitive market. No marketer is entitled to succeed.

b. 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?

Comments from utilities, marketers, and consumers agree that the SSO is required by Ohio law. FE at 2-3, 6; DP&L at 1; RESA at 5; OCC at 3, 7; Consumers at 2, 8. There is nothing in Ohio’s statutory framework to lead to the conclusion that a fully functional retail market cannot or should not include a default service offered by the EDU. R.C. 4928.141. In fact, SB 221 intrinsically views the SSO as a competitive option that is consistent with a fully competitive retail market; the SSO and the goal of competition coexist in Ohio law. An SSO cannot be inconsistent with the goals articulated by the General Assembly because it is one of the options that has been authorized to attain a competitive market. See R.C. 4928.02 and R.C. 4904.

Consumers restate their answer to Question (a) regarding the appropriate oversight of the market to prevent predatory pricing, collusion, and other types of consumer abuses caused by market power.

c. 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?

The Northeast Ohio Public Energy Council (“NOPEC”) and FES argue that disclosure of payments and other incentives provided by suppliers to governmental aggregations should not be required. FES at 5-7; NOPEC at 5-6. However, Consumers and other marketers (particularly those that do not serve governmental aggregations) believe full disclosure is necessary in order to permit customers to effectively compare the offers from aggregations and those available through the SSO and bilateral contract offers. Consumers at 10-11; Constellation and Exelon at 6; IGS at 9-10. Transparency is critical to ensure the market supports customer choice. Given the fact that brokers are hired by governments to assist in the bidding process, Consumers believe that Ohio’s Public Records Act applies and the business agreements between governmental aggregations and brokers are available to customers.

d. Would a time-differentiated standard service (SSO) rate cause more shopping based upon customer preference for avoiding uncertainty?

Numerous parties oppose a time-differentiated SSO, for a variety of reasons. See RESA at 6; Constellation and Exelon at 6; FE at 7; FES at 8. DP&L notes

that one of the goals of SB 221 is to protect “the state’s at-risk populations when implementing mechanisms to further advance the goals of competitive retail electric service” and time-differentiated SSO rates would be “harmful” to these customers. DP&L at 3. Consumers agree.

A number of other commenters, particularly marketers, agree with the Consumers’ position that the SSO should be a plain vanilla offer that is simple for customers to evaluate and to use as a benchmark by which to evaluate other options. RESA at 7; Constellation and Exelon at 2; FES at 8. The Consumers believe that a transparent and properly disclosed SSO price to serve as a means to compare to marketer offers is what the General Assembly intended. See generally R.C. 4928.02; DP&L at 3.

Several marketers argue that time-varying rates including time-of-use (TOU) rates, critical peak pricing (CPP), peak time rebates (PTR), and real time pricing (RTP), as well as variations and combinations of these rate designs, should be exclusively within their purview. RESA at 6; FES at 7-8; Constellation and Exelon at 6. The issue does not need to be resolved in this proceeding. Consumers’ primary recommendation is that the SSO rate should not be designed as a time-varying rate.

OCC views the use of time-varying rates as an educational challenge. OCC at 9-10. The Consumers agree that education on these types of rates is necessary, but draw the line at using this type of rate design for the SSO. IGS views TOU rates as an opportunity for the Commission to break consumers of the reliance on default service, exacerbating the concerns of Consumers that this

may be an underlying purpose of the Commission's query. IGS goes so far as proposing that the SSO be based on hourly prices, the most extreme of the TOU options, and the one most likely to drive customers off the SSO. IGS at 11. The SSO is a requirement of Ohio law. Circumventing the intent of that law by making the SSO an unpalatable option for customers undermines the statutory purpose of the SSO.

The Comments of the Sierra Club and the Ohio Environmental Council ("Sierra and OEC") view time-differentiated pricing favorably, attributing a host of environmental benefits resulting from motivating customers to use energy wisely. Sierra and OEC at 2. However, the evidence to support these benefits is lacking in Ohio and whether such programs may be valuable as an option for consumers is a far cry from suggesting that the SSO should be structured as a time-varying rate. Nor is there any evidence that residential customers want such rate designs.¹ It is appropriate to offer such products in the market, but this should be where engaged customers may choose such rate designs.

e. Are competitive retail electric service providers better positioned to manage uncertainty in a retail market than EDUs that offer a flat SSO rate?

Several marketers contend that marketers are better positioned to manage risk. Constellation and Exelon at 3; IGS at 14; RESA at 8. They point to the fact that they exist in a competitive market and can adapt to market conditions quicker than EDUs. However, these marketers fail to appreciate that to the

¹A recent Duke report to its Smart Grid Collaborative noted that only 0.9% of the 100,000+ customers contacted enrolled in its most recent TOU rate offering.

extent the SSO is set through a market auction, the EDU is not managing risk; the marketers providing the generation are responsible for managing risk, which is reflected in their bids in the SSO auctions. Duke at 5; FES at 9. Given the Commission's goal of using auctions to set SSO prices, the question of EDUs managing risk in offering SSOs is nonsensical. FirstEnergy at 11-12.

f. 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?

Most parties opine that because of deregulation this issue is now in FERC's and PJM's hands, and Integrated Resource Planning ("IRP") is no longer appropriate. Constellation and Exelon at 7; DP&L at 3; Duke at 5; FirstEnergy at 12; FES at 9; IGS at 15; OCC at 15; RESA at 8. The PJM market determines the optimization of resources through the Base Residual Auction process. RESA at 8. Only the Consumers suggest that the Commission continue to consider IRPs through a process similar to the Delaware approach, looking to integrate the most cost effective options to achieve the efficiency, renewable, and demand response mandates of Ohio law with the obligation to provide a fixed price SSO. Consumers recommend the Commission adopt this approach. Consumers at 14.

g. 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?

None of the commenters believe this can be accomplished.

IV. Corporate Separation

Most of the commenters use these questions as a starting point to argue for complete corporate separation. Consumers agree that corporate separation effectively policed by the Commission is critical. Most commenters also agree that adjustment of the EDU's risk premium should occur through rate cases, as should questions of the debt/equity ratio of an EDU.

V. Conclusion

The vast majority of commenters believe the SSO must be retained for a variety of reasons, particularly because it is legally required. It should be a plain vanilla offer with alternative prices and rate designs left to other offers. Corporate separation that is detailed and effective oversight by the Commission are viewed as critical to a competitive market. Long term transmission and generation planning is now within the purview of FERC and PJM, but the Commission should still conduct IRPs to ensure the cost effective achievement of the goals of SB 221.

Only the Consumers point out the need for effective supervision of marketers to achieve the goals of a competitive market. Offers need to be transparent so the market works. It is clear that threats of predatory pricing and collusion can be minimized by the SSO, but only through effective oversight by entities charged with preventing market failures such as the Ohio Attorney General, the Federal Trade Commission, and the Department of Justice can the retail market be fair for customers, the most critical issue in a deregulated market. The Commission retains authority to reintroduce regulation as

necessary to “ensure that service is provided at compensatory, fair, and nondiscriminatory prices and terms and conditions.”

Respectfully submitted,

/s/William Sundermeyer

William Sundermeyer
Associate State Director, Advocacy
AARP Ohio
17 S. High Street, #800
Columbus, OH 43215
Tel: 614-222-1523
wsundermeyer@aarp.org
On behalf of AARP Ohio

/s/Michael R. Smalz

Michael R. Smalz
Joseph V. Maskovyak
Ohio Poverty Law Center
555 Buttles Avenue
Columbus, Ohio 43215-1137
PH: (614) 221-7201
FX: (614) 221-7625
msmalz@ohiopoveritylaw.org
jmaskovyak@ohiopoveritylaw.org
Attorneys for Ohio Poverty Law Center

/s/Ellis Jacobs

Ellis Jacobs
Advocates for Basic Legal Equality, Inc.
130 West Second Street, Suite 700 East
Dayton, Ohio 45402
PH: (937) 228-8104
FX: (937) 535-4600
ejacobs@ablelaw.org
Attorney for the Edgemont Neighborhood Coalition

/s/Noel Morgan

Noel Morgan
Legal Aid of Southwest Ohio, LLC
215 East Ninth Street, Suite 500
Cincinnati, Ohio 45202
PH: (513) 241-9400
FX: (513) 241-0047
nmorgan@lascinti.org
Attorney for Communities United for Action

/s/Michael A. Walters

Michael A. Walters
Pro Seniors, Inc.
7162 Reading Road, Suite 1150
Cincinnati, Ohio 45237
PH: (513) 458-5532
FX: (513) 621-5613
mwalters@proseniors.org
Attorney for Pro Seniors, Inc.

/s/Peggy Lee

Peggy Lee
Robert Johns
Southeastern Ohio Legal Services
964 East State Street
Athens, Ohio 45701
PH: (740) 594-3558
FX: (740) 594-3791
plee@oslsa.org
rjohns@oslsa.org
Attorneys for Southeastern Ohio Legal Services

/s/Julie Robie

Julie Robie
Anne Reese
The Legal Aid Society of Cleveland
1223 West Sixth Street
Cleveland, Ohio 44113
PH: (216) 687-1900
FX: (216) 861-0704
julie.robie@lasclev.org
anne.reese@lasclev.org
Attorneys for The Legal Aid Society of Cleveland

/s/Joseph P. Meissner
Joseph P. Meissner
Joseph Patrick Meissner and Associates
5400 Detroit Avenue
Cleveland, Ohio 44102
PH: (216) 912-8818
meissnerjoseph@yahoo.com
Attorney for the Citizens Coalition

/s/ Melissa Baker Linville
Melissa Baker Linville
Legal Aid Society of Columbus
1108 City Park Avenue
Columbus, Ohio 43206
PH: (614) 224-8374
FX: (614) 224-4514
mlinville@columbuslegalaid.org
Attorney for Legal Aid Society of Columbus

/s/Colleen L. Mooney
Colleen L. Mooney
Ohio Partners for Affordable Energy
231 West Lima Street
PO Box 1793
Findlay, OH 45839-1793
PH: (419) 425-8860
FX: (419) 425-8862
cmooney@ohiopartners.org
Attorney for Ohio Partners for Affordable Energy

CERTIFICATE OF SERVICE

I hereby certify that a copy of these Reply Comments was served on the persons stated below via electronic transmission this 22nd day of July 2013.

/s/ Colleen L. Mooney

burkj@firstenergycorp.com
stnourse@aep.com
Judi.sobecki@dplinc.com
Amy.Spiller@duke-energy.com
William.wright@puc.state.oh.us
Stephen.Bennett@Exeloncorp.com
mjsatterwhite@aep.com
gkrassen@bricker.com
mwarnock@bricker.com
tsiwo@bricker.com
marmstrong@bricker.com
sam@mwncmh.com
fdarr@mwncmh.com
joliker@mwncmh.com
mpritchard@mwncmh.com
jkooper@hess.com
dboehm@BKLawfirm.com
mkurtz@BKLawfirm.com
jklyercohn@BKLawfirm.com
mswhite@igsenergy.com
haydenm@firstenergycorp.com
ilang@calfee.com
NMcDaniel@elpc.org
mkl@bbrslaw.com
wsundermeyer@aarp.org
yalami@aep.com
cdunn@firstenergycorp.com
grady@occ.state.oh.us
serio@occ.state.oh.us
berger@occ.state.oh.us
smhoward@vorys.com
mpetricoff@vorys.com
cgoodman@energymarketers.com
srantala@energymarketers.com
toddm@wanenergylaw.com
callwein@wanenergylaw.com
cathy@theoec.org

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