

**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.)

**INITIAL COMMENTS
OF
DUKE ENERGY RETAIL SALES, LLC, AND
DUKE ENERGY COMMERCIAL ASSET MANAGEMENT, INC.**

On February 12, 2012, the Public Utilities Commission of Ohio (Commission) issued an entry commencing an investigation into Ohio's competitive retail electric service (CRES) market. Following the submission of comments and the holding of numerous workshops, staff of the Commission (Staff) filed a Market Development Work Plan (Plan), on January 16, 2014. Also on that date, the attorney examiner issued an entry calling for comments and reply comments to be filed by February 6 and February 20, 2014, respectively.

In accordance with the Commission's schedule, Duke Energy Retail Sales, LLC (DER), and Duke Energy Commercial Asset Management, Inc. (DECAM), respectfully submit their comments. Although not addressing every issue covered by the Plan in these initial comments, DER and DECAM reserve their right to file reply comments on topics that may be addressed by other commenters.

1. Standardizing the Retail Electric Service Market

In its Plan, Staff starts by highlighting the need for consistency and standardization across the state. Under the current system, operational details differ from the territory of one electric distribution utility (EDU) to another. This results in barriers to the competitive efforts of CRES

providers. Thus, Staff recommends standardization of “practices, processes, and market rules” of the Ohio EDUs.

DER has argued strenuously for increased standardization, through other dockets and, thus, strongly supports this recommendation by Staff. However, DER would also note that it is not only the EDUs’ “practices, processes, and market rules” that need to be consistent. Enforcement of the Commission’s rules is also a critical element for the health and growth of the competitive market. Where rules are not predictably and consistently enforced – or where they are not enforceable, on a practical basis – competition is discouraged. Thus, the Commission’s rules should be crystal clear and not subject to differing interpretations that could allow one market participant to benefit over another. And where the Commission, over time, learns of problems that are occurring and yet have no practical solution, it should take rectifying steps proactively, without waiting for a five-year rule review process.

In addition, DER and DECAM note that the Commission, in furthering the goal of standardization, must be sensitive to the resultant costs. Where a particular standardization measure is likely to be costly, with the costs to be passed on to CRES providers, that additional expense must be substantially and clearly worth incurring as compared to the benefit to be gained, or the additional cost to CRES providers will merely be an additional barrier to entry.

2. Ohio Retail Electric Service Market Definition and Measurements

The next topic that Staff discusses in the Plan relates to analysis of the CRES market, including a definition of the market and proposed methodologies for measuring its development. Staff suggests that the definition should include factors relating to the existence of multiple sellers, the participation by informed buyers, the lack of barriers to suppliers and customers, and the offering of a variety of products. Staff believes that the “definition should be used as the goal” for the CRES market in Ohio, to be “used in conjunction with a set of measurements or

defining criteria . . .”¹ In order to measure the “health” of the market, so defined, Staff would consider eight identified criteria, the first five of which many workshop participants agreed with:

1. Number of certified CRES providers in Ohio
2. Number of certified CRES providers in each utility’s territory
3. Number of “active” CRES providers in each territory
4. Number of shopping customers in each territory, broken out by customer class
5. Percentage of load shopping in each territory, broken out by customer class
6. Whether each utility is structurally separated
7. Whether 100 percent of the supply for utilities’ default service is procured through auction
8. Whether customers are “engaged and informed”

While DER and DECAM are, in general, in agreement with much of the definition and measurement criteria proposed by Staff, some concerns merit mention. First, although Staff mentions the need to “determine where [the] market is today” and what it should ultimately look like, it is unclear how the definition and measurement criteria might be used. DER and DECAM are troubled by Staff’s reference to “action taken by the Commission against an individual market participant,”² as it is unclear how the Commission, being a creature of statute, would have the jurisdiction or authority to take a market-driven action against an unregulated entity. DER and DECAM certainly agree that the outcome of any case before the Commission should be based on the “application of Ohio law to specific facts or conduct and should not be based solely on any individual metric performance data.”³ However, the threat of Commission action arising out of its “measurement” of the market’s health is problematic.

With regard to the specifics of the definition and the measurement criteria, DER and DECAM note that the certification of a CRES supplier by the Commission, or even the suppliers

¹ Plan, at pg. 10.

² Plan, at pg. 11.

³ *Id.*

registration with an EDU, is of very little significance to the market. What matters is, first, the number of sellers that are actively pursuing customers and, second, the number of offers available to consumers. The first of these factors is included in Staff's list, although the term "active" should be more clearly defined. The second is not addressed in the Plan and might more appropriately be measured directly.

DER and DECAM question the relevance of Staff's sixth and seventh proposed criteria, relating to structural separation and the procurement of default offer supply. The market that the Commission would be attempting to measure is the offering, at retail, of differing generation supply options, by market participants that are certified by the Commission but that set their own pricing levels. The EDUs are forbidden from making competitive offers, having their prices set through Commission proceedings and remaining constant for a predictable period of time. It is the EDU price against which the market participants compete, but the EDU itself is not a participant. Thus, the corporate structure of the EDU should be irrelevant. Similarly, the manner in which the EDU obtains the generation supply to serve its default customers is irrelevant to the health of the competitive efforts of market participants to gain market share. Corporate structure and competitive auctions for wholesale supply are certainly of consequence to the Commission with regard to other issues, but not this one. Furthermore, as these matters have been addressed in the standard service offer proceedings of all Ohio EDUs, their inclusion in measurement metrics would be of no benefit whatsoever.

Finally, DER and DECAM are reluctant to include in measurement criteria a factor that cannot be measured. While it is laudable for the Commission and all market participants to strive for customer engagement and understanding, even Staff recognizes that the goal is "not

readily quantifiable.”⁴ A factor that cannot be quantified should not be adopted as part of the measurement of success.

3. Confidentiality of Supplier Information

Staff, in this section, starts by expressing its belief that the Commission’s assessment of the “health and vitality of the market” requires consideration of data concerning market share. Staff points out that current rules require submission of such data to Staff but deem it to be confidential. Concerned about that confidentiality and the possibility that one marketer could have most of the market share in a territory, Staff asserts that “[t]he number of customers served and load in MWh for each CRES in each EDUs [*sic*] service territory should not be confidential because this type of information is not confidential in other industries.”⁵

Staff is mistaken in this regard. In most other industries, competitors do not release information concerning their market share. Indeed, that information is generally a closely guarded secret. And where competitive market participants do release market-share information, that release is voluntary in non-regulated markets. Staff, here, is proposing to mandate such disclosure. Such a requirement would be a substantial infringement on suppliers’ ability to compete and, thus, the requirement itself would create a barrier to the development of competition.

4. Corporate Separation

Staff’s analysis and recommendation regarding corporation separation is challenging to analyze, particularly with regard to two aspects of the discussion.

Since the beginning of deregulation in Ohio, the Commission has considered the need for structural separation. The electric transition plans of the Ohio utilities required utilities’

⁴ Plan, at pg. 10.

⁵ Plan, at pp. 11-12.

generation assets to be transferred to affiliates, following approved timetables.⁶ Although the FirstEnergy utilities completed that transfer soon after the new law was effective, other utilities did not. In their cases, the Commission waived the structural separation requirement and allowed functional separation to continue, under the terms of corporate separation plans. For example, in Duke Energy Ohio's rate stabilization plan, the Commission indicated that it would allow the company to retain its generating assets during the period when it was providing stabilized rates.⁷

It is important to note that the law at that time discussed the sale of generating assets, but did not specify any need to transfer generating assets to an entity that is unaffiliated with the utility. The current version of the law – now requiring Commission approval to transfer – is no different; there is no mention of a need to sell these assets to a non-affiliated entity. Yet Staff's comments appear to reference exactly that. In its initial recommendation paragraph, Staff distinguishes between full divestiture (which it describes as “maintaining their own shareholders and therefore, [sic] operating completely separate [sic] from affiliate structure . . .”) and structural separation.⁸ Indeed, Staff correctly identifies the deadlines for “structural separation” but then goes on to propose requirements for any utility that does not “fully divest” the non-regulated functions from the regulated ones. Thus, Staff appears to take the view that there are three possible levels of separation: (1) functional, where the various functions all occur within one corporate entity, as different business units, (2) structural, where the functions occur within

⁶ See, e.g., *In the Matter of the Application of The Cincinnati Gas & Electric Company for Approval of its Electric Transition Plan, Approval of Tariff Changes and New Tariffs, Authority to Modify Current Accounting Procedures, and Approval to Transfer its Generating Assets to an Exempt Wholesale Generator*, Case No. 99-1658-EL-ETP, *et al.*, Opinion and Order (Sept. 1, 2000), at pp. 46-47.

⁷ *In the Matter of the Application of The Cincinnati Gas & Electric Company to Modify its Nonresidential Generation Rates to Provide for Market-Based Standard Service Offer Pricing and to Establish an Alternative Competitive-Bid Service Rate Option Subsequent to the Market Development Period*, Case No. 03-93-EL-ATA, *et al.*, Opinion and Order (Sept. 29, 2004), at pg. 34.

⁸ Plan, at pg. 12.

different, but affiliated, corporate entities, and (3) fully divested, where the assets are sold to an unaffiliated entity. Although these different options certainly exist, nothing in Ohio law provides the Commission with the authority to order full divestiture. Once assets are transferred to a non-regulated entity, they are outside the Commission's jurisdiction for almost all purposes,⁹ whether the entity is affiliated or not.

Even more disturbing, Staff also focuses on a need for divestiture of the regulated distribution and transmission functions from both "generation and competitive suppliers."¹⁰ It is unclear what Staff means by the term "competitive suppliers" but, in its broadest sense, this could refer to both wholesale and retail suppliers, in both electric and gas industries. DER and DECAM do not dispute that competitive suppliers, if affiliated with a utility, must operate pursuant to a corporate separation plan, under the requirements of R.C. 4928.17. But nothing requires them to be fully divested from the utility.

The steps that Staff suggests begin with a proposed requirement that utilities – if not fully divested from generation and suppliers functions – file "policies and procedures" for ensuring compliance with the code of conduct requirements in O.A.C. 4901:1-37. This suggestion is unnecessary. O.A.C. 4901:1-37-4(D) already delineates those matters that are to be covered by the code of conduct. And O.A.C. 4901:1-37-5(B) provides a detailed list of requirements with regard to disclosing policies and procedures for ensuring compliance. For example, paragraph (B)(8) requires a description and timeline of all planned education and training, to ensure that utility and affiliate employees know and can implement the rule's policies and procedures. It also requires the training information to be posted on the utility's website. Paragraph (B)(9) requires employees with access to nonpublic utility information to sign a policy statement

⁹ The Commission retains certain limited authority over non-regulated businesses, including the regulation of competitive retail suppliers and pipeline safety.

¹⁰ Plan, at pp. 12-13.

assuring compliance. Paragraph (B)(10) requires description of internal compliance monitoring procedures and corrective actions. Paragraph (B)(11) requires designation of a compliance officer, for contact with Staff and updating of the plan. Paragraph (B)(12) requires a description of the utility's and affiliates' means of compliance. DER and DECAM are unaware of any additional policies and procedures that Staff could be seeking, other than those already filed with and approved by the Commission.

Furthermore, Staff suggests that changes to the policies and procedures should be filed no later than 60 days after the change. This is less onerous than the current rule, which requires Commission approval, based on a filing at least 60 days before the change.¹¹

Next Staff proposes that the Commission audit the policies and procedures at least every four years. Such audits are already within the Commission's power. For example, in 2009 the Commission initiated an audit of Duke Energy Ohio's corporate separation plan, and compliance with such plan. The Commission chose a third-party auditor in that case and ultimately issued its order, responding to the auditor's report.¹² Further administrative rules providing for such audits are unneeded.

Finally, Staff proposes a draconian punishment for any utility that fails to comply with corporate separation rules. Staff suggests that a noncompliant utility be required to "completely divest generation and supplier functions" In other words, Staff would have the Commission order a utility to sell affiliated entities to third parties. The Commission has no such power.

¹¹ O.A.C. 4901:1-37-06(B).

¹² *In the Matter of the Application of Duke Energy Ohio, Inc., for Approval of the Second Amended Corporate Separation Plan Under Section 4928.17, Revised Code, and Chapter 4901:1-37, Ohio Administrative Code*, Case No. 09-495-EL-UNC.

5. Purchase of Receivables

In the Plan, Staff reviews the debate over the need for a purchase of receivables (POR) program, concluding that it would be advantageous. Staff believes that a POR program would help CRES providers with bad debt collection, thereby eliminating a barrier market to market entry, increasing the number of active CRES suppliers, increasing the diversity of suppliers, and increasing the number of products available. In addition, Staff predicts a resultant reduction of customer confusion. Therefore, Staff recommends that the Commission mandate institution of a POR program by all EDUs that do not already have such a program in place.

DER agrees. DER has argued in previous filings for standardization of POR availability. The existence of a POR program clearly provides customers with a better shopping experience. They have the ability to receive one bill and pay one entity, for all electric services they require. When the contract with a CRES supplier terminates, the customer need not fear confusion and overlap. Furthermore, as CRES suppliers will not have to bear the credit risk of uncollectible bills, the prices for energy supply should fall.

DER supports Staff's recommendation that a POR program be required of all EDUs and suggests that such a program be modeled on the successful approach used by Duke Energy Ohio.

6. Electronic Data Interchange

Staff proposes the initiation of a policy working group to address electronic data interchange. Recognizing that, as the market develops and technology improves, new issues will continue to arise, DER supports this suggestion.

7. Seamless Moves / Contract Portability

In its Plan, Staff distinguishes between seamless moves (through which a CRES supplier remains with a customers through a move, with no interruption) and contract portability (through which a CRES supplier is able to submit an EDI enrollment for the customer at the new address).

Because, under Staff's definitions, only the seamless move option allows the CRES supply to continue without interruption, Staff favors that approach.

DER agrees that uninterrupted service under a CRES supplier contract is important, not only to CRES suppliers but also to customers. Continuation of an existing contract should be the default. However, DER also notes that a customer moving to a new address may have substantially different capacity needs or load shape. For example, a customer may begin, in a particular EDU territory, at a small apartment, later moving to a large, newly built home. This could result in quite different supply needs and costs. It should therefore be recognized that the CRES provider might need an opportunity to offer different terms to that customer, as a result of the move.

Staff also discusses the mechanics of seamless moves, citing but not explaining certain capacity issues. Staff states that the same problem was addressed in a Pennsylvania proceeding and that it was resolved by ordering the local utilities to submit plans to implement seamless moves. Thus, Staff suggests the same outcome here.

Without a more complete identification of the problem, neither DER nor DECAM can comment on the validity of the issue or the proposed resolution. A review of the Pennsylvania document cited by Staff verifies such an order but not the rationale.

8. Bill Format

Standardization of bill formats is the next subject discussed in the Plan. Recognizing the difficulties inherent in such an effort, Staff moved on to proposing a series of more limited areas of modification. Among other things, Staff's Plan proposes mandating the inclusion of CRES suppliers' logos on all utilities' bills and charging all "active" CRES providers a "one-time initial setup charge" to cover the cost of making that change to the bills. The charge would, according

to Staff, be calculated by splitting utilities' change costs evenly among the active CRES providers.

DER is in favor of as much standardization as possible, while recognizing that the benefits must be weighed against any resultant costs. A major area of concern is the move to including CRES suppliers' logos on the utilities' bills. Staff has recommended this mandate without concrete evidence of the cost of the change. And, worse, Staff would charge CRES providers evenly for the requirement, whether those providers have similar needs and benefits, or not. A CRES provider that may have fewer customers should not be compelled to subsidize the marketing efforts of its competitors. To make matters even more complex, after five years Staff would exempt from new CRES providers from any responsibility for the setup costs.

If the Commission decides to move into this area, CRES providers should be allowed to opt out of the change. A provider that is uninterested in having its logo displayed should not have to pay for the billing changes.

9. Customer Enrollment

Staff proposes to enable customer enrollment "from the wallet" by requiring EDUs to maintain websites from which customers can electronically obtain their account information. DER agrees that it should be possible for a customer to enroll from any location, without carrying an account number with them. Staff's suggestion seems like it would work, but DER believes that EDUs likely already have such sites in place.

10. Advanced Metering Infrastructure – Data Access and Time-Differentiated Rates

Staff's discusses access to usage data obtained by EDUs through advanced metering. Recognizing the inherent costs of making such access available, Staff nevertheless recommends, among other things, that EDUs with advanced metering data file tariff amendments to address

how that data could be available. With appropriate safeguards in place to ensure confidentiality of customers' personal information, DER and DECAM support changes to make such usage data available, noting that a primary use of this data could be more accurate allocation of load to suppliers with regard to customers that are not on interval meters.

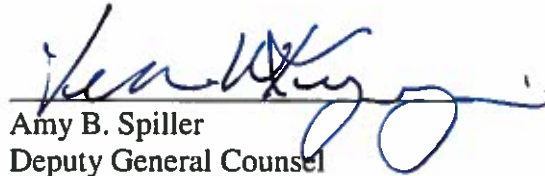
11. Multi-State Standardization Collaborative

Although Staff suggests that the Commission participate in discussions with regulators in other deregulated states, DER and DECAM would prefer to see the focus remain on the best options for Ohio.

DER and DECAM appreciate the opportunity to provide initial comments to the Commission.

Respectfully submitted,

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A handwritten signature in blue ink, appearing to read "Amy B. Spiller", is written over a horizontal line.

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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing was delivered via U.S. mail (postage prepaid), personal, or electronic mail delivery on this the 6th day of February, 2014, to the parties listed below.


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