

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
BY THE
SIERRA CLUB**

I. Introduction

The Sierra Club respectfully submits their Reply Comments in response to the initial comments of several parties filed on February 6, 2014, in the Public Utilities Commission of Ohio's ("PUCO" or "Commission") investigation of Ohio's retail electric service market. The second sets of initial comments were in response to PUCO Staff's Investigation and Recommendations submitted on January 16, 2014.

II. The Commission has Statutory Authority Over Affiliates – Including the Authority to Order Full Divestiture – in Order to Promote Ohio's Policy Goals as Presented in Ohio Revised Code §4928.02

Sierra Club disagrees with the comments of certain other parties with regard to the scope of the Commission's authority. Specifically, Duke Energy Retail Sales, LLC, et al, ("DER") states there is nothing in the law to authorize the Commission to order full

divestiture.¹ DER further states that once a generating asset has been transferred to a non-regulated entity, affiliated or not, it is outside of the Commission's jurisdiction for almost all purposes.² The Sierra Club does not support this assertion and has previously demonstrated that the Commission does have broad authority over both the EDU and the affiliate with regard to corporate separation.

Ohio law authorizes the Commission to review the records of an affiliate to *ensure corporate separation* is maintained. Ohio Revised Code Section 4928.17 requires each utility to file a corporate separation plan. The law requires these plans to "satisf[y] the public interest in preventing unfair competitive advantage and preventing the abuse of market power."³ Ohio law gives the Commission jurisdiction to investigate the violation of Ohio law or a corporate separation plan.⁴ This investigative power also includes the authority to review the affiliate's records:

For this purpose, the commission may examine such books, accounts, or other records kept by an electric utility or its affiliate as may relate to the businesses for which corporate separation is required under section 4928.17 of the Revised Code, and may investigate such utility or affiliate operations as may relate to those businesses and investigate the interrelationship of those operations.⁵

¹ Duke Energy Retail Sales LLC, et al, Initial Comments at 7 (January 16, 2014).

² Id. at page 7. (The purposes they claim the Commission maintains jurisdiction appear in a footnote and are competitive retail suppliers and pipeline safety.)

³ R.C. 4928.17(A)(2).

⁴ R.C.4918.18(B).

⁵ (Emphasis added) R.C. 4928.18(B).

This authority of the Commission to review affiliate records is reiterated in the Ohio Administrative Code. The rules are applicable to the “activities of the electric utility and its transactions or other arrangements with its affiliates.”⁶ To ensure compliance, the Rules state that “the examination of the books and records of affiliates may be necessary.”⁷ The Commission staff, at their discretion, “may investigate such electric utility and/or affiliate operations and the interrelationship of those operations.”⁸ Staff is specifically allowed to review all information (required to be maintained) from both the utility and the affiliate related to “the businesses for which corporate separation is required.”⁹ This information would include meetings between affiliates and utilities regarding plant retirements, capacity auctions and transmission projects, as any or all of these have the potential to impact costs customers pay for electricity distribution and generation.

Ohio Revised Code 4928.18(B) provides the Commission with the authority to investigate the interrelationship of an EDU and its affiliate to determine if a violation of the EDU’s corporate separation plan as occurred. The statute states:

The commission has jurisdiction under section 4905.26 of the Revised Code, upon complaint of any person or upon complaint or initiative of the commission on or after the starting date of competitive retail electric service, to determine whether an electric utility or its affiliate has violated any provision of section 4928.17 of the Revised Code or an order issued or rule adopted under that section. For this purpose, the commission may examine such books, accounts, or other records kept by an electric utility

⁶ Ohio Adm. Code 4901:1-37-03(A)(1).

⁷ Ohio Adm. Code 4901:1-37-02(D).

⁸ Ohio Adm. Code 4901:1-37-07(B).

⁹ Ohio Adm. Code 4901:1-37-07(A).

or its affiliate as may relate to the businesses for which corporate separation is required under section 4928.17 of the Revised Code, and may investigate such utility or affiliate operations as may relate to those businesses and investigate the interrelationship of those operations. Any such examination or investigation by the commission shall be governed by Chapter 4903 of the Revised Code.¹⁰

The law clearly establishes that the Commission has authority to review and investigate both the regulated EDU and the unregulated affiliate. In addition, the law provides the Commission with the ability to carry out the State's Policies.

Ohio Revised Code 4928.18(C) states that in addition to any remedies otherwise provided by law, regarding a violation of R.C. 4928.17 (Corporate Separation Plan), the Commission may: (1) Issue and order directing the **utility or affiliate** to comply.¹¹ The Commission is statutorily authorized to rectify corporate separation issues in a manner which it sees fit. This may certainly include ordering full divestiture. Under R.C. 4928.18 affiliates are still under the jurisdiction of the Commission with regard to corporate separation issues and violations.

This statutory power of the Commission ensures the Commission has the ability to carry out the State's energy policy which includes prohibiting anticompetitive subsidies, of any kind, from flowing between the regulated entities and the affiliate,¹² and protecting consumers from market manipulations by market powers.¹³ The Commission is authorized to protect the market and that includes ordering full divestiture when it

¹⁰ (Emphasis added). R.C.4938.18(B).

¹¹ R.C. 4928.18(C)(1).

¹² R.C. 4928.02(H)

¹³ R.C. 4928.02(I).

becomes clear to the Commission that an EDU and affiliate are not abiding by their corporate separation plan and creating an unfair advantage for an affiliate.

III. The Sierra Club Agrees that, in the Absence of Full Divesture, Prohibiting Shared Services is an Appropriate Response to Violations of Corporate Separation Statutes or Rules.

Interstate Gas Supply (“IGS”) commented that it supports full divesture but requests that in the absence of full divesture the Commission prohibit shared services and other similar costs sharing arrangements between EDUs and affiliate CRES providers.¹⁴ The Sierra Club agrees with this request. In the absence of full divesture the elimination of shared services is necessary to protect the market and ensure a competitive marketplace. Shared services allow affiliates to enjoy an advantage that other unaffiliated CRES providers do not have.

In addition to ordering full divestiture and the elimination of shared services for a finding of corporate separation violations, the Commission could also choose to reduce the rate of return for overall distribution activity of the electric distribution utility. The reduction would be commensurate with the estimated economic harm, or large enough to convey a clear message that any unacceptable interpretation of Ohio law (i.e., one that distorts the market or potentially harms customers or customer interests) will be recognized and acted upon. This aligns with other remedies provided by §4928.18.

¹⁴ IGS comments page 11.

IV. Sierra Club Agrees with Many of the Recommendations from Other Parties Regarding Staff's Proposed Compliance Audits.

Many parties submitted comments regarding the Code of Conduct Audits proposed by the Staff.¹⁵ The Sierra Club agrees with the Staff's recommendation that these audits should occur at a minimum of every four years to ensure that EDUs and affiliated CRES providers are abiding by their corporate separation plan, along with the comments by other parties listed below.

a. Clear and Specific Rules

The Ohio Consumers' Counsel ("OCC") recommends the creation of clear rules regarding the execution and review of the audits.¹⁶ The Sierra Club agrees that clear and specific rules are necessary and suggest that the Commission open a new docket in response to these recommendations, in order to develop these rules with the input from interested parties. The rules should cover how the audits will be executed and the manner in which they are reviewed in a detailed and specific manner to eliminate confusion and varied interpretations in future audit proceedings.

b. Organizational Charts

The Sierra Club also agrees with OCC's recommendation for the creation of clear organizational charts which identify those employees that perform services for both the EDU and its affiliates.¹⁷ This type of organizational chart will allow the auditors to easily

¹⁵ Staff Report at 13 (January 16, 2014).

¹⁶ OCC comments page 17.

¹⁷ Id.

identify those employees that must be a necessary part of any investigation. The OCC also suggests that these employees be subject to interview and required to provide any documentation requested to the auditors, including correspondence. Further, the Sierra notes that this as much of this information should be made publicly available as possible. By minimizing confidentiality of correspondence and other aspects of an investigation the Commission will promote transparency and minimize inappropriate correspondence or dealings between EDUs and their affiliates.

c. Sierra Club Disagrees with FirstEnergy's Contention that Audits are Unnecessary Absent Evidence of Suspected Violations.

FirstEnergy does not believe further audits are necessary absent evidence of suspected violations.¹⁸ Additionally, FirstEnergy stated that if the audits are approved, then the costs should be fully recoverable by the utility, which it notes that the Staff did not clearly state.¹⁹ The Sierra Club strongly disagrees with FirstEnergy's comments regarding the lack of necessity of additional audits. The purpose of an audit, in part, is to deter violations. If the Commission were only to conduct audits after allegations of misconduct arise then there is no power of deterrence in the audit. The violations will have already been committed.

However, there is merit in the idea that, in addition to the audit schedule proposed by the Commission Staff, additional audits should be ordered by the Commission. FirstEnergy has already provided plenty of evidence that warrants an investigation into

¹⁸ FirstEnergy Comments at 14.

¹⁹ Id.

the interrelationship between FirstEnergy's EDUs and their affiliates.²⁰ Sierra Club generally agrees with FirstEnergy's comment that the costs of the audit should be recoverable by the utility; however, if violations are found as a result of the audit, then all audit costs should be completely borne by the Company's shareholders.

d. Sierra Club Disagrees with DER and AEP's Contention that Audit Rules are Redundant.

Duke declares that Staff's comments on Codes of Conduct and additional regulation do not make sense given that the regulatory scheme has been in place for a while and Staff's comments appear to add nothing new to the conversation.²¹ DER agrees that the Commission already performs audits regularly so there is no need for additional administrative rules which pertain to such audits.²² American Electric Power ("AEP") also opposes additional audit recommendations stating that the Commission's existing rules are adequate.²³ AEP states that the Commission's current rules already call for pre-approval of a corporate separation plan, processes for amendments, and tools for monitoring.²⁴ While these assertions may be true, Staff's recommendations propose a consistent and regular *utilization* of the rules for the benefit of Ohio's retail market and Ohio consumers.

²⁰ see Sierra Club's Initial Comments in this case at 13-15 (March 1, 2013).

²¹ Duke at 4.

²² DER page 8.

²³ Ohio Power Comments page 5.

²⁴ Id.

There is great value in establishing clear rules and procedures for these audits *as well as instituting* these audits on a regular basis. As previously discussed, regular audits will assist in the deterrence of any actual or perceived misconduct.²⁵ The Commission Staff's recommended audits are necessary and vital to the growth and protection of a competitive market in Ohio, and an important part of achieving *Effective Competition* as presented in the Staff Report.²⁶

e. One-Time Audit Insufficient.

AEP makes the additional claim that they have been ordered by the Commission to be subject to one audit following the implementation of its corporate separation plan.²⁷ For this reason, AEP declares Staff's recommendations to be duplicative.²⁸ Sierra Club notes that a one-time, single audit is not sufficient to safeguard a slow-developing market. Without the prospect of continual auditing there is no incentive to avoid misconduct, there is no safeguard to detect and stop misconduct, and the market will be perpetually at risk of distortion and lack of *Effective Competition*.

V. Market Standardization

Exelon Commented that regulatory stability and uniformity create the stability needed to encourage CRES providers to invest in the market.²⁹ Sierra Club

²⁵ For Example, see Sierra Club Initial Comments in this case at 13-15 (March 1, 2013).

²⁶ Staff Report at 9.

²⁷ Ohio Power Comments at 5.

²⁸ Id.

²⁹ Id.

generally agrees with this statement. Sierra Club also notes the need for standardization for related market items such as compliance reporting with Ohio Renewable Standards and alternative energy offerings by CRES providers. This reporting should be publicly provided and included in the Apples to Apples comparison charts.

VI. Conclusion

The Sierra Club appreciates the opportunity to submit reply comments regarding the Commission Staff's Report in this case. The Sierra Club respectfully requests that the Commission consider and adopt the above recommendations.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing *Reply Comments by the Sierra Club* has been filed with the Public Utilities Commission of Ohio and has been served upon the following parties via electronic mail or regular mail on February 20, 2014.

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