BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Commission's Review of its Rules for Competitive Retail Electric Service Contained in Chapters 4901:1-21 and 4901:1-24 of the Ohio Administrative Code.	**)** **)** **)** **)** **)**	**Case No. 12-1924-EL-ORD**

REPLY COMMENTS OF FIRSTENERGY SOLUTIONS CORP.

I. INTRODUCTION

These Reply Comments are submitted by FirstEnergy Solutions Corp. ("FES") pursuant to the Public Utilities Commission of Ohio ("Commission") November 7, 2012 entry in its review of the Competitive Retail Electric Service ("CRES") rules in Ohio Administrative Code ("OAC") Chapters 4901:1-21 and 4901:1-24. FES and a number of other interested parties filed initial comments on January 7, 2013. Below, FES addresses several suggestions raised by other interested parties.

II. REPLY COMMENTS

1. Response to Duke Energy Ohio, Inc. ("Duke")

Duke suggested a new rule requiring CRES providers to notify the local utility of upcoming marketing and solicitation plans for door-to-door, telemarketing, and direct mail marketing efforts. Duke's proposed rule should not be adopted. Duke's justification for the new rule is that an Electric Distribution Company ("EDC") needs notice to appropriately staff its call center to assist with additional calls related to new marketing activity. However, this argument assumes customer calls increase with each

CRES marketing activity and that a utility's call center is not equipped to handle these types of customer concerns. A utility's lack of sufficient staffing should not force a CRES provider to take on the added burden of notifying the utility of upcoming marketing plans. Duke's proposal seeks to address the speculative concern of increased staffing of an EDC's call center while increasing administrative burdens on suppliers. The proposal would also force CRES providers to disclose, in advance, competitively sensitive and confidential marketing activities. Additionally, an EDC should not accept or answer any questions related to a CRES provider's marketing materials. CRES providers are required to include a telephone number with advertisements and promotional materials so customers are not directed to the local utility.

2. Response to Direct Energy Services, LLC and Direct Energy Business, LLC ("Direct Energy")

Direct Energy made two suggestions with which FES disagrees. First, Direct Energy suggests amending 4901:1-21-05(C)(8)(g) to require that disclosure of an affiliate relationship with an existing Ohio utility be made at the first practical opportunity, such as on the same line as the logo appears or in the introductory paragraph. This position is flawed for numerous reasons. It is important to note that Direct Energy currently has no affiliate relationships in Ohio. However, Direct Energy is inclined to push for added language that does not affect its marketing materials. The existing rules, which already require an affiliate disclaimer, have served customers well, and FES is unaware of any complaints or issues due to the appropriate disclosures not being made earlier in the marketing materials. Direct Energy also fails to mention any customer complaints, confusion or issues that have arisen from the current rule. Contrary to Direct Energy's

assertions, the current rule is both consistent and clear. Inserting an entire affiliate disclaimer where a CRES provider's logo appears defeats the purpose and effectiveness of a logo. A logo is intended to be a recognizable graphic that includes minimal (if any) language, not an explanation of an entity's corporate structure. The current rule is more than sufficient as is and should not be revised.

Direct Energy also suggested amending 4901:1-21-17(B) to require a governmental aggregator to provide notice to all current customers of their right to opt out of the aggregation every two years. Direct Energy has provided no rationale for this change other than increased consistency with the retail natural gas service rules. This proposal should be rejected. Governmental aggregation customers receive an opt-out notice prior to enrollment and every three years along with the ability to rescind enrollment with the utility. Customers have the option to opt out without a switching fee every three years pursuant to Ohio Revised Code ("ORC") 4928.20 (D) and may drop from the program at any time. There are currently no issues or complaints with the current notification requirements. There is no benefit to this change and Direct's basis for this proposed change is unsubstantiated.

3. Response to Eagle Energy, LLC ("Eagle Energy")

FES takes issue with a number of Eagle Energy's comments, from the faulty premise that the current rules do not adequately provide for consumer protection to the thinly veiled jabs at competitors utilizing unique and lawful marketing strategies. Eagle Energy's specific recommendations regarding the Price to Compare ("PTC"), affiliate names, and automatic renewal provisions are flawed, unfounded and should be rejected.

With respect to 4901:1-21-03(D), Eagle Energy suggests that the CRES provider should clearly notify customers when the price is higher than the EDC's PTC; a recommendation that seemingly ties to Eagle Energy's observation that a CRES provider offered a seven year term with a price that is allegedly higher than the current PTC. First, this proposal demonstrates a lack of understanding as to how the PTC works in Ohio markets. Due to the number of components that are updated on a quarterly basis, the PTC in each Ohio EDC changes on at least a quarterly basis, sometimes more often. The regulatory process and uncertainty in Ohio result in a number of unscheduled changes to the PTC. While FES fully supports the existing framework of consumer protections and efforts to educate the customer about choice, any attempt to make a direct comparison to the PTC at the time of an offer would be outdated in a very short amount of time. It would be nearly impossible for a CRES provider (and confusing to the customer) to constantly inform the customer about the status of the PTC over the course of a multi-year product. Multi- year contracts are desirable to customers because customers appreciate the option to choose a more stable long-term product. Some customers are willing to pay a premium for this choice. Eagle Energy's assertion that it is "unconscionable" for CRES providers to charge a price greater than the then current PTC demonstrates Eagle Energy's myopic focus solely on immediate and short term savings while ignoring the benefits and stability of long-term products.

Eagle Energy makes a second argument under the same section, 4901:1-21-03(D), suggesting that the rule be amended so that all price components (such as "grants") are disclosed. FES objects to this unnecessary requirement because, among other things, a CRES provider's proprietary pricing strategy is confidential and competitively sensitive

information. Further, Eagle Energy appears to be making this argument to further their position as described on page 4 of its initial comments that grants are inherently inappropriate. FES disagrees with this assertion, as there are a number of factors which "influence any municipality's decision to utilize an alternative provider." If a community chooses an arrangement that results in additional revenue, then the decision to disclose that information should be up to the community. Customers who do not agree with the price or other terms and conditions have the right to opt out or drop out of the program. Competition encourages ingenuity and unique product offerings. Eagle Energy, on the other hand, wishes to inhibit the competitive market and not allow new and customer-friendly offers.

Eagle Energy also recommended that 4901:1-21-05(C)(8)(g) be amended to prohibit affiliates adopting a similar name as the EDC. Forcing a CRES provider to change a current name constitutes a taking of private property without just compensation under the Fifth Amendment of the United States Constitution, as applied to the states through the Fourteenth Amendment. CRES providers like FES have a significant property interest in preserving its ability to use the name and the associated goodwill it has developed in the competitive retail market with customers, vendors and the public. Eagle Energy's proposal also violates the rights of a CRES provider's free speech under the First Amendment of the United States Constitution, as applied to the states through the Fourteenth Amendment. Trade names have long been recognized as constitutionally, protected commercial speech because they serve to identify a business entity and convey important information about its type, price and quality of service. Any requirement that a CRES provider change its name is unnecessary and more importantly unlawful.

Regarding 4901:1-21-12(B)(14) (Former 4901:1-21-12(B)(13)) , Eagle asserts that "automatic renewal provisions without the customer's written authorization should be prohibited." In addition to the disclosure requirement Eagle Energy refers to here, 4901:1-21-11(F) expressly allows for automatic contract renewal provisions and details the notification process CRES providers must follow when a customer nears the end of the term. Ironically, Eagle Energy wrongly asserts that a customer does not know when an aggregation period ends, notwithstanding the notification requirement noted above. In FES' experience, most customers prefer the option to select a CRES provider and continue to enjoy savings beyond the initial term of the contract without any interruption in service or going through the re-enrollment processes. The auto-renewal practice should be allowed to continue, subject to any disclosure and notification requirements.

4. Response to Interstate Gas Supply, Inc. ("IGS")

IGS has proposed that 4901:1-21-06 be modified such that affirmative consent is required for governmental aggregations to charge cancellation fees. This proposed modification should be rejected because it is in stark opposition to "opt-out" governmental aggregation. Contrary to IGS' arguments, the Ohio Revised Code *does* allow for cancellation fees in a governmental aggregation program. The terms and conditions of a governmental aggregation program are negotiated by the community and ORC 4928.20 requires the disclosure of all "…rates, charges and other terms and conditions of enrollment." As with any other program, any cancellation fee would be properly disclosed in a governmental aggregation program. Requiring affirmative consent for a CRES provider to charge governmental aggregation customers a cancellation fee would convert an opt-out aggregation program into an opt-in program.

The choice of whether to include cancellation fees in the opt-out program has been, and should remain, with the contractual relationship between the supplier and community.

5. Response to The Northeast Ohio Public Energy Council ("NOPEC")

NOPEC proposes two changes to the governmental aggregation portion of the rules that should be entirely rejected. First, NOPEC seeks to add additional language to new subparagraph (F) of 4901:1-21-02 to "confirm" that a CRES provider serving as a governmental aggregator's agent is severally liable. In making this suggestion NOPEC assumes that several liability is currently the law. This is incorrect. This is an issue that a CRES provider and governmental aggregators negotiate amongst themselves. The Commission can not apportion fault if a violation occurs as courts of law and actual contracts are best suited to deal with this issue.

Second, NOPEC alleges that it is somehow problematic or an "unfair advantage" for a customer to sign up with an aggregation before registering with a utility for electric service. More importantly, and equally incorrect, NOPEC argues that this situation is unlawful. However, NOPEC offers no statutory or other legal authority or support for this unfounded claim. There are no restrictions on when a customer can make the choice to become a customer of a CRES provider, whether individually or through an aggregation program. NOPEC is incorrect in stating that a consumer would never have the opportunity to participate in their community's opt-out aggregation program.

CRES providers must work hard to figure out how to market a product to reach consumers. If it is an advantage to reach customers early, then CRES providers will be motivated to find a way to do so. Reasonable restrictions, like the Commission's existing

rules on preventing misleading advertising, allow CRES providers the freedom to innovate and serve the needs of consumers.

NOPEC's proposed revision is inconsistent with the current rules and has no basis in law. A careful review of the relevant legal authority actually supports the innovation that is the basis for NOPEC's complaint. ORC 4928.08(C) states that the Commission's certification standards "shall allow flexibility for voluntary aggregation, to encourage market creativity in responding to consumer needs and demands…" Aggregation is but one form of choice, and it is the Commission's responsibility to ensure that any rule which is designed to promote aggregation does not create an unintentional barrier to effective competition in other forms. Creating a new rule that requires a CRES provider to wait until a consumer's name appears on the eligibility or governmental aggregation files from the utility is unreasonable, unnecessary and will not provide any more protection than the existing rules.

6. Response to Ohio Partners for Affordable Energy ("OPAE")

OPAE cites to Maine's requirements for financial security in suggesting similar rules should be put in place in Ohio to "ensure that the utility and its customers do not suffer additional costs for electricity and gas if a supplier fails to meet its obligations." This suggestion is flawed for several reasons. First, a proper reading of Maine's electric supplier security requirements makes it clear that they are intended to secure against present costs, not "additional" costs. The rule allows the security to be applied to any security deposits or advanced payments held by the supplier, restitution for amounts in error or illegally obtained, or to pay Commission imposed penalties. These are all present costs and do not look at restitution for the future cost of supply. In Ohio, the

licensing process includes a review of financial capability where the Commission can take into consideration whether suppliers have the ability to cover the same things.

Maine is not comparable to Ohio's market because in Maine, the utilities are completely divested from generation and the utilities are not obligated to provide default service. Instead, Maine's Standard Offer Service is arranged for by the Maine Public Utilities Commission. This is retail in nature because the chosen suppliers directly supply the electricity to end users. Standard offer suppliers take on migration risk and price it into their bids. The utility is essentially a billing agent. Another distinction is that in Maine if a customer has a claim based on losing the "benefit of the bargain" in their individual retail supply agreement with a defaulting supplier, then it would be dealt with by a court of law, not at the Maine commission. Maine's PUC did not retain jurisdiction over contract disputes when the retail electricity market was restructured, which explains why Maine's rules do not seek to secure payments for lost benefits.

Perhaps the most important difference is that because Maine's utilities are completely divested, there is no risk that the Maine utilities or their affiliates will gain an unfair advantage over suppliers through security requirements. In Ohio, onerous security requirements will unfairly disadvantage suppliers over utilities that still own generating assets and face no such requirement.

7. Response to The Office of the Ohio Consumers' Counsel ("OCC")

The OCC suggests that 4901:1-21-05(B) should include a requirement to submit promotional and advertising material to the OCC upon request. FES does not agree with this proposed modification. While OCC contends that processing time and effort could

be avoided, the new requirement would actually add processing time and effort to a CRES provider.

Similarly, the OCC has requested a new rule in which reports regarding slamming activity are sent to both the PUCO Staff and OCC. In addition, this new rule would require a CRES provider to review all enrollments performed by the individual allegedly engaged in slamming, potentially terminate the employee and undertake legal action against that individual. Unfortunately, the Commission can not promulgate rules requiring CRES providers to terminate and/or take civil legal action against its employees. Fortunately, the current rules are more than sufficient in this regard and provide ample deterrents to prevent and penalize a CRES provider from slamming a customer.[1] In addition, the decision to terminate an employee for what may be a simple, unintentional mistake should be the decision of the CRES provider, not a provision of the OAC. The additions proposed by OCC to this section should be rejected.

OCC also discusses customer complaints related to contracts with automatic renewal clauses. OCC proposes that CRES providers undertake the burdensome, yet vague task of using "survey instruments or other statistically valid methods" to make sure contracts are understandable. OCC fails to explain how these "surveys" will lead to fewer complaints. This new rule should not be adopted.

8. Response to The Retail Energy Supply Association and Interstate Gas Supply, Inc. ("RESA" and "IGS")

RESA and IGS proposed to amend the definition of small commercial customer to mean customers with a demand of 25 kW or less. However, this change would also result in limiting the customers who may take advantage of savings offered through

[1] See OAC 4901:1-21-08 and 4901:1-21-15

governmental aggregation programs and also limits savings opportunities for certain demand-level customers. As a result, this change should be rejected. As such, FES would only support such a change as long as there was a corresponding change to the eligible customer section of the governmental aggregation rules that clarified that non-mercantile customers are eligible, not just customers with demands of 25 kW or less.

III. CONCLUSION

FES appreciates the opportunity to submit Initial Comments and Reply Comments to the proposed CRES rules. For the reasons stated above, FES respectfully requests consideration of these Reply Comments.

Respectfully Submitted,

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Summary: Reply Comments of FirstEnergy Solutions Corp. electronically filed by Mr. Nathaniel Trevor Alexander on behalf of FirstEnergy Solutions Corp.