

**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.)	

COMMENTS OF FIRSTENERGY SOLUTIONS CORP.

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I. INTRODUCTION

Ohio's retail electric service market is twelve years old, but Ohio customers have only begun to enjoy the benefits that competition brings. An increasing number of Ohio customers are shopping for their generation service, in order to access lower prices – including estimated savings that can be very conservatively estimated at over \$200 million annually¹ – and more diverse product offerings. More suppliers are joining the market, which has increased competition and promoted even lower prices and more responsive and innovative products. At the same time, generators are responding to appropriate market signals that facilitate economic investments in Ohio and that ensure service reliability. The Commission has properly recognized the benefits and successes of Ohio's competitive market, but more can and should be done.

Ohio's competitive market continues to be held back by certain electric distribution utilities' ("EDUs")² failures and delays in completing corporate separation. Ohio law and a fully functional competitive market require that the previously vertically integrated EDUs separate their non-competitive, regulated distribution service from their generation service. EDUs, which continue to serve as the front-line face for customers based on their role as the provider of distribution service, cannot also provide a competitive generation service. Under such a

¹ The actual savings enjoyed by Ohio customers exceeds \$200 million. The \$200 million estimate assumes only a 4% discount off of the current price-to-compare in each Ohio EDU service territory at 2012 shopping levels. However, most customers receive more than a 4% discount through the competitive market.

² The Commission's Entry uses the term "utility" in many of the questions on which it seeks comments. The term "utility" can have several different meanings, many of which are material to the issues raised in the Entry. FES has assumed in these Comments that, in using the term "utility," the Commission is referring to "electric distribution utilities," as are subject to Commission regulation and defined at R.C. § 4928.01(A)(6).

scenario, third-party competitive suppliers face a decidedly uneven playing field and are less likely to invest the time and resources necessary to overcome the EDUs' hurdles. Only one Ohio EDU has completed structural separation and only two EDUs have begun to acquire the generation service needed for standard service offer ("SSO") customers from the market through a competitive bid process ("CBP").³ And the data confirm that these variables – corporate separation and market-based SSOs – have a significant impact on competition and shopping. Where the EDUs remain vertically integrated and maintain control over the generation service for SSO customers, there is substantially less shopping and less competition. The Commission can and should ensure that all EDUs comply with the existing requirements for corporate separation, such that all EDUs must acquire their SSO service through the market and such that Ohio customers can freely identify and select an offer for electric generation service that most benefits them. Both retail and wholesale competition are equally beneficial to Ohio.

FirstEnergy Solutions Corp. ("FES") thanks the Commission for the opportunity to update the Commission and stakeholders regarding the status of the competitive electric service market and the opportunities for its further development. FES is the largest competitive supplier in Ohio and serves customers in all EDU service territories and in all customer classes. As such, FES has witnessed first-hand the successes and the failures of the development of Ohio's competitive electric service market. FES also has significant experience in other states,⁴ whose lessons learned can guide the Commission and Ohio here. Ohio is well positioned to serve as a

³ Ohio's EDUs are commonly referred to (and regulated) as four separate groups based on common ownership: (1) the FirstEnergy Ohio utilities (the "FEOUs"), which comprise The Toledo Edison Company, Ohio Edison Company and The Cleveland Electric Illuminating Company; (2) American Electric Power ("AEP"), which comprises The Ohio Power Company and Columbus Southern Power Company service territories; (3) Duke Energy Ohio ("DEO"); and (4) The Dayton Power & Light Company ("DP&L").

⁴ FES serves customers in six states: Ohio; Pennsylvania; Illinois; Michigan; Maryland; and New Jersey.

leader in the development of a competitive market for electric service. The recommendations that follow will assure that Ohio customers receive the benefits of a fully functional competitive market for many years to come.

II. OHIO HAS MADE PROGRESS IN ESTABLISHING A COMPETITIVE MARKET AND HAS ENJOYED SIGNIFICANT BENEFITS AS A RESULT.

A. The Benefits of Competition

Competition in the electric services market provides a wide range of benefits to the state, to the economy, and to customers. Most importantly, competition promotes lower prices for customers. When suppliers must compete against each other to attract and retain customers, suppliers are incentivized to reduce their costs in order to offer lower prices, while maintaining or even increasing production. To do so, suppliers invest in improvements to operating performance and efficiency in existing generating plants. Competition also reduces the risk imposed on customers. Suppliers, rather than customers, bear the risk of generation investments because suppliers are not guaranteed to recover their costs in the competitive market – as EDUs, for example, are guaranteed to do in the regulated environment. Because suppliers bear the risk, they are further incentivized to ensure a favorable cost-benefit of any investments. Competition accordingly provides appropriate market signals regarding the need for new generation. Under the pressures of a competitive market and in order to remain competitive, suppliers must ensure that new generation is needed and cost-effective. All of these benefits work to lower prices, increase savings to customers, and promote jobs and economic growth.

B. The Evidence of Ohio's Burgeoning Competitive Market & Its Benefits To Customers

Ohio's retail electric service market began with the passage of S.B. 3. Since then, Ohio has enjoyed significant benefits – specifically in those territories where the competitive market has been allowed to develop. Even more notable gains have been seen in the four years since the

passage of S.B. 221. In fact, a recent study found that Ohio's competitive retail market has improved a great deal over the past year.⁵ As of September 2012, the most recent data available, 45% of Ohio customers were shopping, meaning that these customers found benefits in the competitive market through lower prices and/or better tailored product offerings. The problem, however, is that not all customers are able to access a fully developed competitive market. As discussed further below, the differences by EDU service territory are striking.

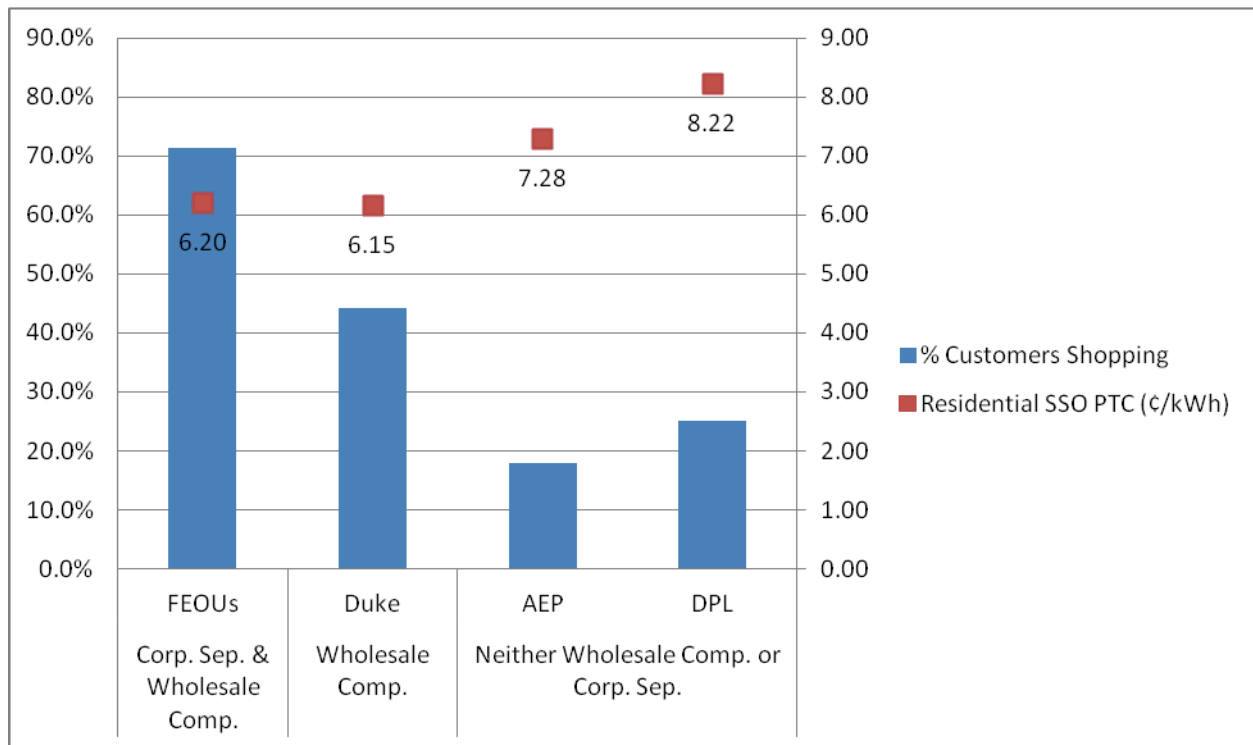
Those customers whose EDUs have instituted market-based SSOs have enjoyed the opportunity to decrease their electric costs. The use of CBPs to procure SSO service has led to significant decreases in SSO rates. DEO's recent CBPs resulted in a 17.5% rate decrease for DEO SSO customers in 2012.⁶ The FEOUs' recent CBPs reflected an additional 4% decrease for June 2012-May 2013, off the SSO prices that had already been reduced by previous CBPs.⁷ Shopping customers in these service territories also benefit because CRES providers must make their offers more attractive than the SSO price in order to secure customers. The customers in the service territories of those EDUs that have incorporated wholesale competition into the SSO: (1) shop more; and (2) enjoy a lower price to compare ("PTC") than customers in the other service territories.

⁵ See "Annual Baseline Assessment of Choice in Canada and the United States," Distributed Energy Financial Group LLC, Dec. 2012, p. 12.

⁶ PUCO Press Release, "Duke Energy auction leads to lower electric prices in 2012," Dec. 15, 2011.

⁷ PUCO Press Release, "FirstEnergy customers can expect lower electricity prices beginning this summer," Jan. 26, 2012.

Disparities in Competition by EDU⁸



More and more suppliers are interested in participating in Ohio's competitive market. Since the passage of S.B. 221, applications for certification as a CRES provider have drastically increased: 1 in 2009, 8 in 2010, 18 in 2011, and 27 in 2012.⁹ At the wholesale level, the CBPs held by the FEOUs and DEO also attracted numerous wholesale suppliers and have been oversubscribed.¹⁰ Once all Ohio service territories are fully open to competition and the

⁸ Data compiled from PUCO Planning & Market Analysis Division, "Summary of Switch Rates from EDUs to CRES Providers in terms of Customers for the Month Ending September 30, 2012."

⁹ Data compiled from PUCO Docketing System cases filed as Case No. XX-XXXX-EL-CRS.

¹⁰ In the 2011 auction for Duke Energy Ohio, suppliers bid for over 400 tranches in the first round when the Auction Managers were seeking only 100 tranches. *In the Matter of the Procurement of Standard Service Offer Generation for Customers of Duke Energy Ohio, Inc.*, Case No. 11-6000-EL-UNC, Updated Auction Manager's Report, filed Jan. 15, 2012 at p. 3. In the 2010 and 2011 auctions for the FirstEnergy Ohio utilities, suppliers bid over 210 tranches in the first rounds when the Auction Managers were seeking only 50 tranches in each round. *In the Matter of the Procurement of Standard Service Offer Generation for Customers of Ohio Edison Company, The Cleveland Electric Illuminating Company, and the Toledo Edison Company*, Case No. 10-1284-EL-UNC, Auction Manager's Report, filed Nov. 15, 2010 at p. 3 (211 tranches bid in round 1), and Auction Manager's Report, filed Feb. 17, 2011 at p. 3 (225

framework for the competitive market is implemented on a consistent basis, Ohio customers will benefit further because more suppliers will be attracted to the Ohio market. With more suppliers, competition will increase and there will be further downward pressure on prices.

The development of the market also can lead to further investments in Ohio. Since 2005, FES has invested over \$3 billion in its generating fleet in Ohio – all at no cost or risk to captive ratepayers. Indeed, significant generation investments have been and continue to be made in Ohio because of competition. Since S.B. 3 was passed, more than 10,200 MW of new generation has been developed in the state, and another 2,100 MW is scheduled to be added as of 2016. FES applauds the Commission’s commitment to ensure that it is doing all it can to facilitate competition and the benefits it brings to Ohio, customers, and the economy.

C. The Successes Of Governmental Aggregation Illustrate The Benefits Of Competition.

The option for governmental aggregation in Ohio has provided significant opportunities to residential customers. Because residential customers, each on their own, do not use large amounts of energy, CRES providers may focus instead on designing and marketing products for larger commercial and industrial customers. Ohio law allows residential customers to pool together through a governmental entity to attract larger savings from the competitive market. Over 200 communities in Ohio have authorized governmental aggregation through the ballot box. Customers in these communities most often enjoy savings provided by a specific percentage off of the SSO price-to-compare. The Commission’s information on governmental aggregation reflects that a significant portion of the 1.8 million residential customers who are

tranches bid in round 1). The publically available information from the 2009 auction also reflects over-subscription in the initial round. *See In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company for Authority to Establish a Standard Service Offer Pursuant to R.C. § 4928.143 in the Form of an Electric Security Plan*, Case No. 08-935-EL-SSO, Auction Manager’s Redacted Notification of SSO Auction Results, filed Jun. 5, 2009, at p. 3.

shopping are accessing the competitive market through an aggregation program.¹¹ The Northeast Ohio Public Energy Council (“NOPEC”), one of the largest public aggregation programs in the nation, has estimated that its residents have saved more than \$175 million since 2001 through aggregation – and its residents are projected to save more than \$300 million in total through the current term of the aggregation program. At the same time, in the competition to secure governmental aggregation customers, the communities themselves may benefit from product offers that incorporate grants or other savings for the communities themselves. At a time when the Ohio economy is struggling and government budgets have been reduced, governmental aggregation has provided a welcome benefit to residential and small commercial customers and their communities, all of whom may not have had the power standing alone to access or attract such competitive pricing.

III. FURTHER PROGRESS IS NEEDED TO FULFILL THE BENEFITS OF COMPETITION AND ENSURE ALL CUSTOMERS HAVE ACCESS TO THE MARKET.

A. MARKET DESIGN

1. Barriers in the Existing Retail Electric Service Market Design

- (a) *Does the existing retail electric service market design present barriers that prevent customers from obtaining, and suppliers from offering, benefits of a fully functional competitive retail electric service market? To the extent barriers exist, do they vary by customer class?*

Chapter 4928 of the Ohio Revised Code establishes an essentially two-pronged retail electric service market for customers.¹² Customers receive distribution service from the non-

¹¹ PUCO Div. of Market Monitoring and Assessment, “Aggregation Activity in Ohio,” as of Sept. 30, 2012.

¹² There are three components to the electric service received by customers: generation, transmission and distribution. Transmission service, for the most part, is subject to FERC regulation and to an automatic pass-through to customers – and, as such, is not relevant to the Commission’s inquiries here. See R.C. § 4928.05(A)(2).

competitive electric distribution utility in whose service territory the customer is located.¹³ On the other hand, customers can receive generation service from any available competitive supplier that the customer chooses.¹⁴ This separation of distribution and generation service into non-competitive and competitive services was a significant change as a result of S.B. 3. Prior to 2000, customers had no choice but to receive the service made available by their local electric utility. Thereafter, the competitive market was allowed to – and did – develop to provide a myriad of service offerings for customers. Ohio law was amended with the ultimate goal of getting EDUs out of the competitive generation business.¹⁵ EDUs were required to transfer their generation service to “a fully separated affiliate of the utility.”¹⁶

Corporate separation is critical to ensuring an even playing field for competitive suppliers. When an even playing field exists, more suppliers are attracted to the market, which in turn increases competition and promotes more of the benefits of competition. However, Ohio’s retail electric service market has not been able to develop into a fully functional competitive market because not all EDUs have completed corporate separation. In fact, as of today and over a decade after the passage of S.B. 3, only one of Ohio’s four EDUs has achieved the structural separation required by Ohio law. As discussed further below, one other EDU recently instituted a fully market-based SSO, despite its continued ownership of generating facilities. In the remaining service territories, however, the EDUs continue to have an inherent financial interest in securing customers for their legacy generation service and in keeping other competitive suppliers away from their customers. This dynamic significantly impedes the

¹³ See R.C. §§ 4928.03, 4928.05(A)(2).

¹⁴ See R.C. §§ 4928.03, 4928.05(A)(1).

¹⁵ R.C. § 4928.17.

¹⁶ R.C. § 4928.17(A)(1).

development of a fully functional competitive retail electric service market in those service territories. With their concomitant role as the monopoly provider of distribution service, the vertically integrated EDUs are well positioned to – and have been allowed to – impose barriers on shopping and competition. The Commission should carry out its authority and charge under Ohio law to require EDUs to separate their competitive generation service so that the competitive market can develop and bring further benefits to customers across all of Ohio.

The failure of all Ohio EDUs to separate their competitive generation service from their non-competitive distribution service has a number of significant ripple effects. Lack of corporate separation not only confuses customers and limits competition, but it also allows those EDUs to seek improper subsidies for their generation service. Indeed, the Commission has authorized a number of improper subsidies for EDU-based generation services when the law requires generation service to be competitive and standing on its own in the market. The subsidies can be seen in the approval of other generation-based revenues for EDUs, which are reflected in vaguely defined nonbypassable charges for “stability” or “certainty” or “financial integrity” in retail electric service or, more directly, in nonbypassable cost recovery for generating facilities or generation-related costs.¹⁷ If the EDU did not own generating facilities, it would have no opportunity to, or interest in, favoring its own generation in the provision of SSO service. The EDUs that continue to own generating facilities and receive such subsidies are provided with a

¹⁷ For example, the Commission authorized AEP to institute a nonbypassable charge for costs allegedly incurred as a result of the termination or modification of the AEP Pool Agreement, through which AEP distributes energy and capacity among its facilities spread across a number of states. *See In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Authority to Establish a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan*, Case No. 11-346-EL-SSO et al., Opinion and Order, Aug. 8, 2012 (the “AEP ESP Order”) at pp. 47-49. The Commission also initially authorized AEP to seek nonbypassable cost recovery for a solar energy facility; however, the Commission subsequently effectively rejected AEP’s proposal after it recognized that there was no need for the facility. *See AEP ESP Order*, pp. 19-25; *In the Matter of the Long-Term Forecast Report of Ohio Power Company and Related Matters*, Case No. 10-501-EL-FOR et al., Opinion and Order, Jan. 9, 2013.

competitive advantage above other suppliers. The EDUs can use the above-market, guaranteed revenue streams to artificially manipulate prices in Ohio and other markets, which distorts the market, serves as a disincentive for other suppliers to compete, and precludes customers from receiving the benefits of a fully competitive market.

The failure to carry out corporate separation results in the preferential use of the EDU's generation to serve SSO customers. If all EDUs had separated their generation services, the EDUs would be forced to acquire the necessary default SSO service from the market. A market-based SSO, as is seen in the FEOU and DEO territories, benefits SSO customers as well as shopping customers. When an EDU uses a CBP to acquire the service necessary for SSO, customers benefit from a price that is inherently more competitive and objective. Shopping customers also receive the benefit of a lower price-to-compare that competitive suppliers must meet to attract customers. As discussed above, as the SSO price decreases through the effects of wholesale competition, so too does the price available in the competitive retail market.

When EDUs continue to have a self-interest in generation service and limiting their competition for generation, there are inherent incentives to institute burdensome shopping rules or prices that discriminate against shopping. For example, EDUs impose switching fees, including fees charged directly to customers. EDUs impose varying and unnecessary minimum stay provisions to keep customers on SSO service. EDUs also have no incentive to institute shopping-friendly billing processes or to provide suppliers with access to service information.

Certain barriers do unduly impact one or more customer classes. For example, some utilities' per-bill fee represents a greater burden for residential customers because the fee represents a greater portion of the savings available in the competitive market. Further, minimum stays are more likely to be suffered by small commercial or industrial customers.

However, the significant impact of the barriers established by the lack of corporate separation and resulting inconsistencies are not limited to a certain customer class. All SSO and shopping customers are affected by certain EDUs' continuing failure to separate their competitive and non-competitive services. The Commission must carry out its charge "to resolve [such] abuses of market power by any electric utility that interfere with effective competition in the provision of retail electric service."¹⁸ Corporate separation is a fundamental requirement for a fully functional competitive market – it was true in 1999 when the law enacted the requirement and it is equally true today – and the state of Ohio's market cannot yet be judged without it.

2. The Potential Advantages To The Incumbent Default Service Provider

- (b) Does default service provide an unfair advantage to the incumbent provider and/or its generation affiliate(s)?*
- (h) What modifications are needed to the existing default service model to remove any inherent procurement (or other cost) advantages for the utility?*

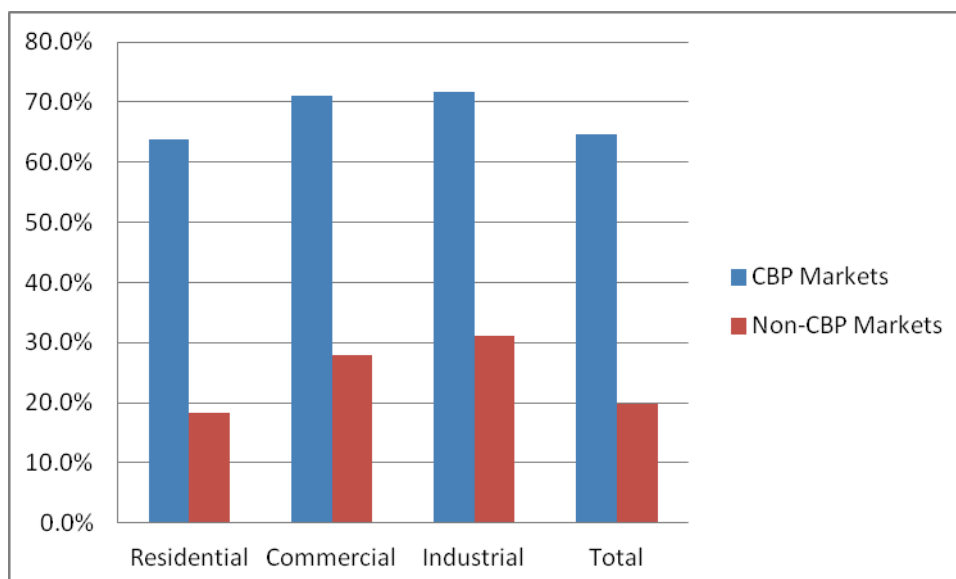
The default service model called for by Ohio law does not inherently provide an unfair advantage to the incumbent provider or its generation affiliate. The problems arise as a result of the Commission's implementation of the relevant laws. Generation service has not yet been properly treated as a competitive service. Incumbent EDUs that own generation service have been able to use their obligation to provide access to default service to secure unfair and anticompetitive advantages. As described above, these advantages include the preference for their own generation service to provide default service, the implementation of nonbypassable charges for generation-related costs, and the threat of "reliability" and "certainty" in the provision of retail service.

¹⁸ R.C. § 4928.06(E)(1).

The unfair advantages available to certain incumbent EDUs and their affiliates can be eliminated. All EDUs should be required to implement full, structural corporate separation as soon as possible. All EDUs, even before corporate separation, should be required to acquire the necessary default service through market-based CBPs. Under the CBP framework and with appropriate controls and protections against the abuse of market power, the EDU and its affiliates are precluded from enjoying any advantages over other generation suppliers. The recent FEOU and DEO auctions are illustrative. The winning bidders in the auctions reflect a broad group of suppliers. Tranches of SSO service were awarded to 12 different suppliers across the two sets of auctions. And the respective affiliated bidders won less than 20% of the available tranches. The Commission's most recent data on shopping in Ohio reflects that when an EDU institutes a fully market-based SSO, the retail market flourishes. The number of customers shopping in the FEOU and DEO service territories – the only two EDUs to implement a fully market-based SSO – is dramatically higher than in the service territories of the remaining EDUs.¹⁹

¹⁹ See PUCO, Division of Market Monitoring & Assessment, “Summary of Switch Rates from EDUs to CRES Providers in Terms of Customers For the Month Ending September 30, 2012.” The “CBP Markets” reflect the data associated with the FEOUs and DEO. The “Non-CBP Markets” reflect the data associated with AEP and DP&L.

Percentage of Customers Shopping²⁰



It should be noted that the CBP model is not immune to advantages available to an incumbent EDU or its affiliate. The Commission must ensure that the CBPs used to procure SSO service are implemented on a consistent basis and that protections are put in place. For example, if an EDU or its affiliate is receiving an improper generation-related subsidy, the EDU and its affiliate should not be allowed to also bid into an SSO CBP. Such subsidies distort the bidding process and serve as a barrier to full competition. Fewer suppliers are likely to be interested in participating in a CBP in which one supplier has an advantage over all others.

In sum, the Commission can eliminate the potential advantages of the current default service model for incumbent EDUs by: enforcing existing requirements for corporate separation and codes of conduct; promoting SSOs that are fully market-based; and instituting consistent CBPs that incorporate appropriate protections for the competitive market.

²⁰ Data compiled from PUCO Planning & Market Analysis Division, “Summary of Switch Rates from EDUs to CRES Providers in terms of Customers for the Month Ending September 30, 2012.”

3. Barriers in the Existing Default Service Model

- (c) *Should default service continue in its current form?*
- (d) *Does Ohio's current default service model impede competition, raise barriers, or otherwise prevent customers from choosing electricity products and services tailored to their individual needs?*

It is difficult to say whether default service should continue in its current form because each EDU's SSO differs. It is premature to evaluate the future of default service statewide when large areas of the state are served by EDUs that remain vertically integrated and that have not implemented market based pricing for SSO service. Certain forms of default service do benefit customers. Most notably, the EDUs that have instituted fully market-based SSOs have shown that the opportunities for retail competition also improve. Other EDUs' SSOs, which are provided in whole or in part by the incumbent EDU and are not based on the market, do impede competition, as discussed herein.

These inconsistencies within Ohio's default service model inherently limit competition. The inconsistencies render the market more confusing and more expensive for suppliers and customers. Moreover, at the most basic level, when the opportunities for competitive suppliers are limited by the EDUs' retention of generation service, the market is less attractive. Fewer suppliers will participate in the Ohio market and the benefits of competition, including diverse product offerings and the promotion of lower prices, will be suppressed.

- (f) *How can Ohio's electric default service model be improved to remove barriers to achieve a properly functioning and robust competitive retail electric service electricity market?*
- (g) *Are there additional market design changes that should be implemented to eliminate any status quo bias benefit for default service?*

Ohio's electric default service model would be vastly improved and would encourage more competition if it incorporated market-based SSOs and instituted consistent procedures

across all Ohio EDUs. The FEOU and DEO model – which incorporate a similar and transparent CBP format – have proven to be successful for both SSO and shopping customers. The CBPs also incorporate longer-term CBP products of varying lengths, which help to smooth out variations in market prices. If the FEOU/DEO model was standardized and applied across Ohio, it would promote supplier participation and time and cost efficiencies to the benefit of the EDUs, suppliers, the Commission, and customers.

Customers receiving service under a “reasonable arrangement” also should be allowed to shop. The retail market has shown that it can provide, and it has provided, favorable offers for customers in all classes. The customers that operate under a reasonable arrangement generally are larger and more sophisticated purchasers of electric service. Thus, these customers are well situated to take advantage of the market for additional savings and product offerings designed for their unique service requirements. All other customers also will benefit if reasonable arrangement customers are allowed to shop. The savings provided under reasonable arrangements (or the “delta revenue”) is recouped by EDUs from all of their customers. The fewer customers under a reasonable arrangement, the less the delta revenue charged to all other customers.

In addition, the load associated with reasonable arrangement customers should be placed up for bid so that competitive suppliers could serve these customers at a rate lower than the applicable tariff rate. Whether reasonable arrangements customers are allowed to shop or not, the load associated with those customers who do not to shop should be placed up for bid. (Of course, both proposals would provide more benefits than either proposal alone.) Using an RFP for the EDU’s reasonable arrangements load would reduce the delta revenue charged to all other EDU customers because the delta revenue would incorporate only the smaller difference between

the tariff rate and the winning supplier's rate.²¹ At the same time, the reasonable arrangement customers would continue to pay their favorable rate and continue to promote its economic development efforts.

Consistency would further the development of a robust competitive market. The Commission should take a more active role in coordinating the parameters of the market to ensure that CRES providers, EDUs and other stakeholders are on the same page and operating within a clear and transparent framework. To that end, the Commission should consider establishing formal working groups to explore and develop rules and resources for EDUs, CRES providers and customers – including websites, standardized billing, seamless move protocols, and dispute resolution procedures. Such working groups have benefited the competitive market in other states²² and can help Ohio realize the benefits of a fully functional retail electric service market.

4. Changes to the Existing Default Service Model

- (e) *Should Ohio continue a hybrid model that includes an ESP and MRO option?*

The hybrid model established under S.B. 221, on its face, provides valuable options to Ohio consumers and some flexibility for the Commission and EDUs. EDUs must provide an SSO that is market-based or better than the market.²³ The implementation of the model could be

²¹ For example, assume the tariff rate is 5 cents/kWh and the reasonable arrangement rate is 3 cents/kWh. Under these circumstances, the delta revenue recovered from all EDU customers would be the equivalent of 2 cents/kWh. If, however, a CRES provider offered to serve the reasonable arrangement customer for 4 cents/kWh, the delta revenue recovered from all EDU customers would be reduced to the equivalent of 1 cent/kWh.

²² For example, Pennsylvania's Office of Competitive Market Oversight facilitates monthly Committee Handling Activities for Retail Growth in Electricity ("CHARGE") conference calls. New Jersey's BPU Staff also has held various single-issue workshops in an effort to facilitate communication between suppliers and utilities.

²³ See R.C. §§ 4928.141, 4928.142, 4928.143.

improved, however, particularly as it relates to the MRO option. The statutory framework for an EDU's first application for an MRO unnecessarily requires a blend of market prices with legacy EDU prices for at least two years and as long as five years.²⁴ A properly structured CBP, such as was used by the FEOUs and DEO, can mitigate market price fluctuations. Further, the required blend precludes customers from receiving the full benefits of the historically low current market prices.

(i) *What changes can the Commission implement on its own under the existing default service model to improve the current state of retail electric service competition in Ohio?*

The Commission can take a number of steps under its existing authority to improve the current state of retail electric service competition in Ohio:

- **The Commission should facilitate and enforce corporate separation now**, pursuant to its authority under R.C. § 4928.17. As discussed throughout these Comments, structural corporate separation is critical to ensure an even playing field for competitive suppliers and to eliminate incentives for EDUs to institute barriers to competition.
- **The Commission should require all utilities to incorporate CBPs to set the SSO default service price**, pursuant to its authority under R.C. §§ 4928.17, 4928.141-4928.143, 4928.06, and 4928.02. Market-based SSOs have been shown to foster lower prices for SSO customers and to promote further retail competition.
- **The Commission should institute working groups involving Staff, CRES providers, and stakeholders to explore and develop policies regarding competitive issues**, pursuant to its authority under R.C. §§ 4928.02, 4928.06, 4928.10, and 4928.11. It is essential that Ohio's retail market establish a transparent framework of requirements for EDUs and CRES providers to encourage further development of the retail market and ensure a balanced set of rules. The working groups should consider such issues as standardized billing, notice requirements, dispute resolution procedures, and consumer resources.
- **The Commission should ensure consistency in the development and application of rules and requirements for the competitive retail electric services market**, pursuant to its authority under R.C. §§ 4928.02, 4928.06, and 4928.10. Consistency promotes competition by ensuring that the retail market is transparent and more attractive for competitive suppliers. Ohio's competitive market will attract more

²⁴ See R.C. § 4928.142(D).

competitive suppliers and, thus, more competition if it is treated as one market, without the current significant differences between EDU service territories.

- **The Commission should further develop educational resources regarding the competitive market for customers**, pursuant to its authority under R.C. §§ 4928.02, 4928.06, and 4928.10. The Commission's existing materials and website should be revised and updated to better reflect the information needed by customers, including more intuitive access portals and more clear comparisons of available generation service options.

5. Barriers Associated With Smart Meter Projects

- (k) *What potential barriers, if any, are being created by the implementation of a provider's smart meter plans? Should CRES suppliers be permitted to deploy smart meters to customers? Should the Commission consider standardizing installations to promote data availability and access?*

Smart meters should not be used so as to allow providers to implement barriers to shopping. For example, in conjunction with smart meters, some EDU dynamic pricing pilot programs currently prohibit participants from shopping. While this limitation may not have a significant impact as applied to pilot programs involving only a few participants, the Commission should ensure that, as these dynamic pricing plans are made available to larger numbers of customers, they do not limit participants from accessing the competitive market for electricity. With respect to standardizing smart grid data, the Commission should look to the work of the National Institute of Standards and Technology on smart grid interoperability to promote data availability and access, and to facilitate customers' ability to shop in the competitive market. While smart meters may have the potential to facilitate competition, FES submits that there are larger, more pressing barriers to effective competition in Ohio that should be remedied first – such as completing corporate separation and requiring market-based SSOs.

6. The Benefits of Standardized Billing

(l)²⁵ *Should the Commission consider standardized billing for electric utilities?*

Yes. Standardized billing is an important step towards facilitating a fully functional competitive market for retail electric service. Standardized billing would alleviate a number of procedural hurdles and technical limitations seen in varying degrees among Ohio EDUs, which cause confusion among customers and CRES providers and which unnecessarily require all participants in the competitive market to incur additional costs that reduce available customer savings. For example, not all Ohio EDUs allow for percent-off billing – a product offering that is very easy for consumers to understand and one of the primary vehicles for providing savings to residential customers. All EDUs should be required to enable percent-off billing. In addition, all EDUs should be required to establish billing systems that allow for budget-billing, another common billing option that is attractive to customers.

In addition to changes and updates in the billing systems, the bills themselves also should be standardized. Standardized bills should, for example, incorporate a clearly identified and prominently displayed price-to-compare. Like the Apples-to-Apples comparisons available on the Commission’s website, a clear price-to-compare that is provided directly to customers will enable customers to more readily evaluate any savings that may be available in the competitive market. A uniform bill layout also would reduce customer confusion and facilitate suppliers’ ability to participate in the Ohio market. A uniform layout should standardize what charges are generation-related (and included in the price-to-compare) and what charges are not. This

²⁵ In the Entry, the letters identifying the topics under “Market Design” repeat such that there are two topics identified as (i), (j), and (k). *See* Entry, pp. 3-4. For purposes of clarity, FES will refer to the second set of topics in sequence, using (l), (m), and (n).

standardized approach would prevent EDUs from distorting the price-to-compare and the savings from a CRES provider.

7. Alternative Energy Market Access

- (m) *Do third party providers of energy efficiency products, renewables, demand response or other alternative energy products have adequate market access? If not, how could this be enhanced?*

Competition in the alternative energy market necessarily brings benefits similar to those seen in the retail energy market. As long as EDUs offer alternative energy products, third-party providers have more limited access to that market and competition is limited. While FES has not completed an analysis of the scope of access to the alternative energy market, FES submits that the Commission should continue to focus on promoting full and effective competition in all facets of the retail electric services market.

B. CORPORATE SEPARATION

1. Utility Disclosure of Plant Retirements and Transmission Projects

- (a) *Whether an electric utility should be required to disclose to the Commission any information regarding the utility's analysis or the internal decision matrix involving plant retirements, capacity auction, and transmission projects, including correspondence and meetings among affiliates and their representatives?*

As it relates to plant retirements and capacity auctions, these issues should be moot based on Ohio law. An EDU should not be providing generation service and, as such, should not be faced with plant retirements or participation in capacity auctions. Ohio law requires that the electric generation service must be separate from the utility and subject to the competitive market. Once structural separation has occurred, the Federal Energy Regulatory Commission ("FERC") has exclusive and preemptive jurisdiction over the market rules and rates that apply to

the resulting stand-alone generation entity.²⁶ The types of issues raised in the Commission's Entry here are, accordingly, matters for the FERC and PJM stakeholder processes.

2. Continuation of Injection Rights

(c) *How long should a utility be permitted to retain their injection rights?*

Capacity Injection Rights ("CIRs"), as this term is used in the PJM Tariff,²⁷ are rights awarded to a generation developer to recognize the costs incurred by the developer to construct transmission network upgrades and facilities for a given generating unit. These rights are retained during the life of the generating facility and for a limited period after the retirement of a generating facility.²⁸ When a generating facility is retired, the owner must either declare its intent to continue to use its CIRs by developing a new generating facility at the same site within one (1) year or lose them entirely.²⁹ And, unless the owner eventually constructs such new generation, the CIRs eventually are forfeited.

It is worth noting that FERC reviewed and accepted the PJM tariff that provides for and describes the terms and conditions for award of CIRs.³⁰ Thus, these rights, which serve as a

²⁶ See, e.g., *New York v. FERC*, 535 U.S. 1, 23-24 (2002); see also *Miss. Power & Light v. Miss. ex rel Moore*, 487 U.S. 354, 374 (1988); *Conn. Dep't of Pub. Util. Control v. FERC*, 569 F.3d 477, 484 (D.C. Cir. 2009).

²⁷ See PJM Tariff § 230.

²⁸ See PJM Tariff § 230.3.

²⁹ See PJM Tariff § 230.3.3.

³⁰ See, e.g., *PJM Interconnection, L.L.C.*, 139 FERC ¶ 61,079 at PP 50-53 (2012) (approving PJM's proposed CIR revisions); see also *Standardization of Generator Interconnection Agreements and Procedures*, Order No. 2003, FERC Stats. & Regs. ¶ 31,146 at P 700 (2003) (finding that "PJM, which uses locational pricing, gives Firm Transmission Rights (FTRs) and Capacity Interconnection Rights (CIRs) to the Interconnection Customer in exchange for a 'but for;' cost payment. These are rights that are created by the Network Upgrades for which the Interconnection Customer pays, and they are well defined."), *order on reh'g*, Order No. 2003-A, FERC Stats. & Regs. ¶ 31,160 (2004), *order on reh'g*, Order No. 2003-B, FERC Stats. & Regs. ¶ 31,171, *order on reh'g*, Order No. 2003-C, FERC Stats. & Regs. ¶ 31,190 (2005), *aff'd sub nom. Nat'l Ass'n of Regulatory Util. Comm'rs v. FERC*, 475 F.3d 1277 (D.C. Cir. 2007) (codified at 18 C.F.R. pt. 35).

form of compensation under the PJM Tariff, are a FERC-approved filed-rate. This is relevant as the U.S. Supreme Court has repeatedly emphasized that the Federal Power Act leaves no room for a *state* determination regarding charges that are subject to FERC's exclusive jurisdiction and are actually allocated by FERC.³¹ As such, while the Commission does not have jurisdiction to regulate the terms and conditions under which CIRs are awarded, to the extent that the Commission is concerned about potential CIR issues, the Commission can raise and address its concerns in the PJM stakeholder process.

While the length of time that an entity can retain its FERC-approved and rightfully obtained injection rights is not a matter within the Commission's purview, FES submits that it is not aware of evidence that indicates the current tariffs are prohibiting new resources from being added to the system and, hence, no changes are warranted at this time.

3. Impact of Corporate Separation

(e) Is there a potential for consumers to be misled by a utility's corporate separation structure?

An EDU's corporate structure could lead to customer confusion under certain circumstances. For example, if an EDU has not completed structural separation and has not instituted a fully market-based SSO – such that the EDU is continuing to provide distribution and generation service (in whole or in part) to its customers – customers could be confused as to the role of CRES providers. If an EDU's separation from a competitive affiliate is not clearly disclosed, consumers may not be fully informed of the separation. The Commission – including,

³¹ See *Entergy La., Inc. v. La. Pub. Serv. Comm.*, 539 U.S. 39, 50 (2003); *Miss. Power & Light Co. v. Mississippi ex rel. Moore*, 487 U.S. 354, 374 (1988); *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953, 966-67 (1986); see also *AEP Texas North Co. v. Texas Indus. Energy Consumers*, 473 F.3d 581, 584-86 (5th Cir. 2006).

for example, the proposed working group(s) – can play a key role in ensuring that all Ohio EDUs carry out structural separation and in monitoring communications with customers to ensure full disclosure of the utility’s relationship to any competitive affiliates. Corporate separation and enforcement of codes of conduct will serve to clarify the scope of Ohio’s competitive retail electric service market and customers’ options within that market.

(f) *Are shared services within a ‘structural separation’ configuration causing market manipulation and undue preference?*

FES is unaware of any market manipulation or undue preference that has resulted from the use of shared services in a “structural separation” configuration. For shared services between an EDU and a generating affiliate, the Commission has established requirements for codes of conduct and accounting and other services. These requirements are designed to prevent separated entities from accessing information that would provide the affiliate with any competitive advantage. Assuming compliance with those requirements, it is difficult to see how shared services would lead to market manipulation or any undue preference.

Issues relating to any market manipulation or undue preference at the wholesale level, involving transmission entities, or between generation and transmission entities are within the FERC’s exclusive jurisdiction.³² However, here too, the FERC also has established requirements – for example, the Standards of Conduct for Transmission Providers³³ – that similarly prohibit the sharing of information between structurally separated generation and transmission entities and institute other protections to prevent market manipulation or undue preference. Thus, again, unless a party is violating explicit FERC regulations, it is difficult to imagine how any shared

³² See 16 U.S.C. § 824d; *New England Power Co. v. New Hampshire*, 455 U.S. 331, 340 (1982); *Entergy La., Inc. v. La. Pub. Serv. Comm.*, 539 U.S. 39 (2003); *AEP Texas North Co. v. Texas Indus. Energy Consumers*, 473 F.3d 581 (5th Cir. 2006).

³³ See FERC Order No. 717.

services could lead to market manipulation and undue preference. Moreover, FERC and PJM's Independent Market Monitor ("IMM") actively monitor market activity to ensure that there is no undue preference or market manipulation occurring as a result of any affiliate relationships pursuant to their authority to investigate and police any such improper conduct.³⁴

4. Requiring Complete Divestiture

- (g) *Should generation and competitive suppliers be required to completely divest from transmission and distribution entities, maintain their own shareholders and, therefore, operate completely separate from an affiliate structure?*

Under the current statutory construct, the Commission's authority as it relates to corporate separation is limited to EDUs. The Commission has no authority to require a non-regulated competitive supplier to divest a business service or maintain separate shareholders. Further, the Commission's authority over EDUs' corporate separation is limited to structural separation and not complete separation from an affiliate structure. Regardless, FES is unaware of any evidence that establishes that complete divestiture as described in the question benefits ratepayers. If any benefits did exist, they would need to be weighed against the transaction costs that would be imposed on ratepayers in such a process. At the same time, the shared services that are implemented amongst affiliates provide efficiencies. Shared services provide the ability to benefit from economies of scale, thus reducing overhead costs and lowering the administrative costs associated with the production and transmission of energy that is eventually provided to

³⁴ See, e.g., *American Transmission Systems, Inc.*, 132 FERC ¶ 61,056 at n. 7 (2010) (noting that in PJM's report on the RPM capacity auction results, the PJM IMM certified that the results were competitive, the market power tests were correctly applied and the auction process involved no undue preference for any participant).

retail consumers.³⁵ The enforcement of the Commission's code of conduct rules prevents any potential harm that could arise through structural separation and the use of shared services. But, where EDUs' costs are reduced (such as through shared services), so too are customers'. Customers should not face the risk of significant costs and lost opportunities for savings without clear evidence that complete divestiture would benefit customers.

Finally, it is important to note that many of the issues implicate matters of federal jurisdiction. Since the passage of the Public Utilities Holding Company Act of 1935 and including the 2005 Public Utility Holding Company Act,³⁶ the federal government has established the acceptable parameters for the corporate structure of electric utility holding companies and the requisite separation between affiliated electric distribution, generation and transmission entities. And pursuant to the federal parameters, Public Utility Holding Companies have the authority to use shared services among their respective generation, transmission and distribution affiliates.³⁷

5. PJM/FERC Requirements To Facilitate Competition

(h) Are there PJM tariffs or FERC rules that would mitigate market power and/or facilitate retail electric service competition?

Yes. FERC regulations and the PJM Tariff provide for the monitoring of market power and the mitigation of such market power with the goal of facilitating competition. For example,

³⁵ See *Cross-Subsidization Restrictions on Affiliate Transactions*, 124 FERC ¶ 61,047 at P 26 (FERC recognition "that efficiencies and economies of scale associated with providing these types of [shared] services and the goods to support those services between members within the single-state holding company system can benefit captive customers because the goods and services often can be provided less expensively, at cost, than if they were purchased from outside the system by individual system members").

³⁶ 49 Stat. 803, *codified* 15 U.S.C. §§79, *etc.* (1935), *repealed* 119 Stat. 972 (2005); 119 Stat. 972, *codified* 42 U.S.C. §15801, *etc.* (2005).

³⁷ See 18 C.F.R. § 366.23; *see also* FERC Order 731, *etc.*

FERC Order 697³⁸ sets forth the standards for the FERC’s continuing oversight and for the determination as to “whether a market-based rate seller or any of its affiliates has market power in generation or transmission and, if so, whether such market power has been mitigated.”³⁹ The FERC’s framework for oversight, including Order 697, was “designed to ensure that market-based rates charged by public utilities are just and reasonable.”⁴⁰ In addition, the FERC has ensured that it has the authority to “take steps to address seller market power or modify rates” and mitigate market power if necessary.⁴¹

PJM then provides an additional layer of regulation and protection for suppliers that participate in its RTO, “to help ensure that market power cannot be exercised in those organized markets and include additional protections (e.g., mitigation measures) where appropriate to ensure that prices in those markets are just and reasonable.”⁴² The PJM Tariff includes “Market Rules” to prevent market power abuses and allow for the mitigation of such market power. For example, PJM’s RPM incorporates a Minimum Offering Price Rule (“MOPR”),⁴³ which applies to sell offers of certain planned generation capacity resources and planned upgrades of existing generation resources. The MOPR allows PJM to identify offers that are lower than the determined set screen price and re-set those offers to meet the minimum screen price. Offers lower than the set screen price are only allowed after an extensive review process to confirm that the offer reflects a competitive, cost-based offer. PJM’s IMM also actively monitors for market

³⁸ *Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities*, Order No. 697, 119 FERC ¶ 61,295 (2007) (codified as 18 CFR pt. 35).

³⁹ *Id.* at p. 3.

⁴⁰ *Id.* at p. 2.

⁴¹ *Id.* at p. 5.

⁴² *Id.* at pp. 4-5.

⁴³ See PJM Tariff at Attachment DD, Section 5.14(h).

power issues and identifies any issues that should be mitigated.⁴⁴ Indeed, the IMM has broad authority to prevent market power abuses and is specifically charged to “objectively monitor the competitiveness of PJM Markets, investigate violations of FERC or PJM Market Rules, recommend changes to PJM Market Rules, prepare reports for the Authorized Government Agencies and take such other actions as are specified in this Plan.”⁴⁵ PJM also has the ability to ensure that there are no market power abuses occurring cross-jurisdictionally. Specifically, the PJM Operating Agreement provides PJM with the ability to release confidential information to the market monitoring units of the New York Independent System Operator in order to conduct joint investigations to prevent, among other things, any abuse of market power.⁴⁶

As shown above, there is an extensive FERC-created and FERC-approved regulatory framework for mitigating market power and numerous regulators, including the PJM IMM, actively monitor and enforce these regulations to ensure that energy markets operate efficiently and competitively to the benefit of retail consumers.

IV. CONCLUSION

Ohio customers have begun to enjoy the benefits associated with competition in electric service. FES welcomes the opportunity to provide an update on the status of Ohio’s competitive market and to make recommendations for improvements to this important system. Indeed, a fully functional market between truly competitive and separate generating entities operating on a level playing field will benefit customers, as well as the state and its economy.

⁴⁴ PJM Tariff at Attachment M, Section I.

⁴⁵ *Id.* at Attachment H, Section IV.A.

⁴⁶ PJM Operating Agreement at Section 18.17.5.

Respectfully submitted,

/s/ Mark A. Hayden

Mark A. Hayden (0081077)
FIRSTENERGY SERVICE COMPANY
76 South Main Street
Akron, OH 44308
(330) 761-7735
(330) 384-3875 (fax)
haydenm@firstenergycorp.com

James F. Lang (0059668)
Laura C. McBride (0080059)
N. Trevor Alexander (0080713)
Colleen M. O'Neil (0066576)
Lindsey E. Sacher (0087883)
CALFEE, HALTER & GRISWOLD LLP
1400 KeyBank Center
800 Superior Ave.
Cleveland, OH 44114
(216) 622-8200
(216) 241-0816 (fax)
jlang@calfee.com
lmcbride@calfee.com
talexander@calfee.com
coneil@calfee.com
lsacher@calfee.com

Attorneys for FirstEnergy Solutions Corp.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *Comments of FirstEnergy Solutions Corp.* was served this 1st day of March, 2013, via e-mail upon the parties below.

/s/ Laura C. McBride

One of the Attorneys for FirstEnergy Solutions Corp.

Samuel C. Randazzo
Frank P. Darr
Joseph E. Olikar
Matthew R. Pritchard
McNees Wallace & Nurick LLC
21 East State Street, 17th Floor
Columbus, Ohio 43215
sam@mwncmh.com
fdarr@mwncmh.com
joliker@mwncmh.com
mpritchard@mwncmh.com

Glenn S. Krassen
Bricker & Eckler LLP
1001 Lakeside Avenue East, Suite 1350
Cleveland, Ohio 44114
gkrassen@bricker.com

Matthew W. Warnock
J. Thomas Siwo
Bricker & Eckler LLP
100 South Third Street
Columbus, Ohio 43215
mwarnock@bricker.com
tsiwo@bricker.com

M. Howard Petricoff
Stephen M. Howard
Vorys, Sater, Seymour and Pease LLP
52 East Gay Street, P.O. Box 1008
Columbus, Ohio 43216-1008
mhpetricoff@vorys.com
smhoward@vorys.com

Steven T. Nourse
Matthew J. Satterwhite
Yazen Alami
American Electric Power Service Corporation
1 Riverside Plaza 29th Floor
Columbus, Ohio 43215
stnourse@aep.com
mjsatterwhite@aep.com
yalami@aep.com

Maureen R. Grady
Joseph P. Serio
Office of the Ohio Consumers' Counsel
10 West Broad Street, Suite 1800
Columbus, Ohio 43215-3485
grady@occ.state.oh.us
serio@occ.state.oh.us

Colleen L. Mooney
Ohio Partners for Affordable Energy
231 West Lima Street
Findlay, Ohio 45839-1793
cmooney2@columbus.rr.com

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