BEFORE THE
PUBLIC UTILITIES COMMISSION OF OHIO

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

COMMENTS OF FIRSTENERGY SOLUTIONS CORP. ON THE MARKET DEVELOPMENT WORK PLAN

I. INTRODUCTION

FirstEnergy Solutions Corp. ("FES") files these Comments on the Market Development Work Plan ("Plan") the Public Utilities Commission of Ohio Staff ("Staff") issued for comment in an Entry dated January 16, 2014. As a certified retail electric service provider ("CRES"), FES, participated in numerous workshops and subcommittees. FES appreciates the Public Utilities Commission of Ohio's ("Commission") dedication to examining the state of the competitive retail market, and thanks the Commission for the opportunity to file these comments on the Plan.

FES's Comments will focus on the recommendations that must be rejected because they contravene Ohio law, exceed the Commission's authority, lack any factual basis or supporting analysis, or are simply bad policy. These include the Plan's recommendation to make each CRES provider's market share, by number of customers served and load in megawatt hours ("MWh") in each electric distribution utility ("EDU") territory, publicly available, contrary to current law. As explained below, in an industry where a tremendous amount of information is published, a CRES provider's market share is extremely competitively sensitive and can be used by sophisticated competitors to gain an unfair competitive advantage. This recommendation is

exceedingly harmful to competition, will do nothing to benefit the Commission's market monitoring function, is based on faulty assumptions and lacks any supporting facts or analysis.

Also, the Plan recognizes that the Commission's current affiliate rules and Code of Conduct provide ample protections, and recommends the Commission periodically audit utilities for compliance. However, if the audit identifies any noncompliance, the Plan recommends a penalty of complete divestiture of generation and supplier functions from transmission and distribution functions, including separate shareholders. Such an excessive penalty is wholly out of proportion and would exceed the Commission's jurisdiction. The recommendation fails to account for this lack of proportionality, lacks the basic notice and opportunity to cure requirements of due process, wholly violates matters of federal jurisdiction, and is based on conjecture rather than facts.

In addition, the Plan recommends that the Commission order all EDUs that currently do not offer a purchase of receivables ("POR") program to take steps to implement a POR program, but does not specify whether participation by CRES providers is optional or mandatory. As explained below, participation in any POR program should be voluntary for CRES providers using consolidated EDU billing, and CRES providers that do not participate should bear no costs of funding a POR program.

Further, the Plan disregards six months of participants' extensive discussions about ways to allow a supplier to keep a willing shopping customer who moves within an EDU's service territory, through a "warm transfer" or "contract portability" program. Instead, the Plan looks outside the entire investigation, and recommends adopting an unvetted, untested proposal recently made to the Pennsylvania Public Utility Commission for an electronic data interchange ("EDI")-driven "seamless moves" program. As explained below, a seamless moves program

must be rejected because it conflicts with governmental aggregation, thereby violating Ohio law, and fails to empower the customer. Instead, the Commission should adopt the "warm transfer" program described below, which puts the power and choice in the hands of the customer and enhances the customer's relationship with the supplier.

The Plan also recommends that the Commission order an EDU to include on its bills the supplier's logo, but would require *all* CRES providers to include their logo on an EDU's bills, and to contribute to the EDU's IT costs associated with including supplier logos on bills. As explained below, requiring all CRES providers to include their logos on EDU bills would violate a non-consenting CRES provider's exclusive rights under federal trademark law to control when and where its mark appears, and requiring a non-participating CRES provider to contribute to the EDU's IT costs would violate the non-participating CRES provider's Constitutional right to free speech. Moreover, both recommendations exceed the Commission's authority.

Again, FES appreciates the Staff's dedication to the proper development of retail electric competition and finding ways to improve suppliers' ability to enter and stay in the market. Throughout this investigation, it is important to identify ways to improve the market without making customers dissatisfied with retail electric competition, giving some participants an unfair competitive advantage, or burdening some competitors with unnecessary costs. When evaluating potential retail market enhancements, it is also important to recognize that whether a retailer can enter and stay in a market is largely influenced by factors outside the Commission's control, such as wholesale power market developments. For instance Dominion Retail, a well-established supplier that has been an active participant throughout this investigation, recently announced its potential exit from the retail electric generation market due to wholesale market prices, among other things. *See Dominion Exits Retail Business, Turns to Solar*, Megawatt Daily (February 3,

2014) at 1. Competitive suppliers must contend with forces such as these on their own, without the Commission burdening suppliers with yet more additional and unexpected costs. While competitors contend with these wholesale market forces, it is important for the Commission to continue focusing its efforts on protecting customers and ensuring they have a good experience with retail electric competition. FES looks forward to continuing to work with the Commission and other stakeholders to identify ways to improve customers' shopping experiences.

II. COMMENTS

(a) CONFIDENTIALITY OF SUPPLIER INFORMATION[1]

Ohio law entrusts the Commission with monitoring the provision of retail electric service to discern competitive retail electric service that is no longer subject to effective competition. Section 4928.06(C), O.R.C. To that end, the Commission collects quarterly reports from CRES providers which contain competitively sensitive information including the number of customers a CRES provider serves and the amount of its sales in megawatt hours in each EDU service territory. Section 4901:1-25-02(A)(3), O.A.C. The Commission can use this and other data it collects from EDUs to calculate a CRES provider's market share in each EDU territory. Ohio law requires the Commission to take such measures as it considers necessary to protect the confidentiality of this information. Section 4928.06(F), O.R.C. The numbers of customers served and megawatt hours sold by a CRES provider are legally recognized as confidential and protected from public dissemination unless the CRES provider consents to making it public. Section 4901:1-25-02(A)(5)(b), O.A.C.

The Plan acknowledges these laws but disregards them as it recommends the Commission make each CRES provider's market share, by number of customers served and load

[1] The organization of these Comments generally follows the headings of the Work Plan. While these Comments do not address each and every issue raised in the Work Plan, FES reserves the right to reply to other participants' comments on the issues addressed in these Comments as well as any other issues.

in MWh in each EDU service territory, publicly available. Plan at 12. This proposal blatantly ignores the law and must be rejected. It is also bad policy which will harm competition; it is unsupported by any analysis identifying a legitimate need to make such competitively sensitive information public, and it fails to identify any pro-competitive benefits of publication.

The Plan's recommendation must be rejected as bad policy because it will substantially harm retail electric competition by disseminating competitively sensitive information among sophisticated competitors. Because market share is an indicator of success, customer count and MWh sold are among a CRES provider's most competitively sensitive data and all CRES providers protect it diligently. Indeed, given the transparency of the PJM Interconnection, LLC ("PJM") energy market and the publication of competitors' pricing on Apples to Apples, the market share, customer count and MWh sold are among the few items of confidential information CRES providers have left to protect. If the Plan's recommendation are adopted, sophisticated competitors, armed with competitors' market share (updated quarterly), as well as information on Apples to Apples and from PJM, can use such information to make tactical decisions about where and when to compete and against whom, about which competitors' product offerings are more effective, etc. This will deter some potential competitors from making offers or even entering an EDU's territory based on their analysis of such information. While this recommendation may immediately harm only certain competitors, over time it will harm *all* competitors, competition and customers. It is noteworthy that the Plan's recommendation contradicts the direction taken by the Pennsylvania Public Utility Commission — an agency of great interest to the Plan — which recently affirmed that "[t]he Commission is very sensitive to preserving the confidentiality of information that may jeopardize the competitiveness of EGSs in Pennsylvania." *Petition of PECO Energy Company for Approval of*

its Default Service Plan, Pa. P.U.C. Docket No. P-2012-2283641 (Opinion and Order entered January 24, 2014), slip op. at 34. In contrast with Pennsylvania, the recommendation would interfere with the natural working of competitive market forces, at the risk of setting retail competition back significantly. For this reason alone it must be rejected.

In addition, the Plan neither sets forth an analysis identifying an actual *need* for publication of customer count and MWh served, nor any pro-competitive benefits of making this data public. Indeed, no recommendation to make CRES providers' customer counts and MWh sold publicly available was seriously discussed among stakeholders despite ample opportunities throughout six (6) months of workshops and sub-committee meetings.[2] As a result, the recommendation is uninformed by stakeholders' perspectives and relies instead on bald assertions. For example, the Plan asserts that "this data...is often public knowledge in non-regulated markets," Plan at 11, and "this type of information is not confidential in other industries," Plan at 12, but does not identify any of these other industries, nor the types of data published in these industries that compares to a CRES provider's customer count and MWh sold. Also, the Plan never explains how these other unidentified industries compare in transparency to retail electric markets, where extensive data is already available as a result of PJM's highly transparent wholesale power market and sources such as market indices, as well as Apples to Apples.

The Plan also explains that publication is important because "it is imperative that the public trust the market and know that information is available and accurate." Plan at 11. However, the Plan never identifies any member of this "public" that has expressed a need for this information, and never explains how the Plan intends for the public to use this information. The

[2] Consistent with the lack of any serious discussion, the Summary of the Market Evaluation Subcommittee discussions that Staff circulated on October 8, 2013 did not mention any proposal to make CRES providers' market share publicly available.

Plan further explains that "[d]uring workshop and subcommittee discussions, utilities would cite the percentage of shopping customers in their territory to claim the market is vibrant," but asserts that "the statistic alone can be misleading," without the "proper context." Plan at 12. This argument overlooks the critical fact that the Commission already has access to customer count and MWh served, and already analyzes this data pursuant to its statutory responsibility to monitor competitive retail electric service and report to the General Assembly. Making this competitively sensitive data public will add nothing to the Commission's retail competition monitoring capabilities. Instead, the recommendation will do nothing more than share customer count and MWh sold among all CRES providers, which as explained above will substantially harm retail electric competition.

Further, in at least one instance the Plan's rationale for its recommendation is internally inconsistent. The Plan asserts that publication is necessary "[t]o *create* an effective and competitive retail electric service market," Plan at 11 (emphasis added), reflecting a flawed assumption of ineffective competition which itself is based on no analysis in the Plan's preceding pages. On the next page, however, the Plan concludes that publication of this data is "a crucial step in *determining* the health and viability of the retail electric market," Plan at 12 (emphasis added).

What is more, the recommendation is untimely because it recommends a change to a Commission rule, Section 4901:1-25-02, O.A.C., which the Commission declined to change following its recent rule review for that Chapter.[3] This rule review engaged in the type of analysis that is lacking in the Plan. For all of these reasons, the Plan's recommendation to rescind the confidential nature of market share by CRES providers' customer count and MWh

[3] See Commission Order in Case No. 12-2053-EL-ORD, January 29, 2014.

served will substantially harm the competitive landscape in Ohio, will satisfy no legitimate need for this information, and must be rejected.

(b) CORPORATE SEPARATION

The Plan recognizes that the Commission's existing corporate separation requirements and Code of Conduct provide ample protections, and recommends that the Commission periodically audit each utility's policy and procedures pertaining to compliance with the Commission's Code of Conduct. Plan at 12-13. However, the Plan further recommends that in response to any failure identified by the audit, the Commission should direct a complete divestiture of EDUs and their affiliated CRES providers:

> Should these audits demonstrate a failure to comply with Chapter 4901:1-37 O.A.C., Staff would recommend the Commission to consider requiring generation and CRES providers to completely divest generation and supplier functions from transmission and distribution entities, maintaining their own shareholders and therefore, operating completely separate from affiliate structure.

Plan at 14. The Commission must reject this recommendation for several reasons.

The recommendation exceeds the Commission's authority and implicates matters of federal jurisdiction. The Commission's authority over EDUs' corporate separation is limited to structural separation and not complete dismantling of an electric utility holding company. Federal law, beginning with the Public Utilities Holding Company Act of 1935 and continuing through the 2005 Public Utility Holding Company Act, 42 U.S.C. § 15801, *et seq.*, authorizes the establishment of electric utility holding companies and permits them to employ shared services.

In addition, the Plan recommends this excessive penalty without regard to the nature or degree of the utility's failure to comply with the Code of Conduct. While compliance with all aspects of the Code of Conduct is important, in all but the most serious and persistent cases the

penalty will be grossly out of proportion to a violation. Also, the Plan recommends this drastic penalty without providing even basic notice and an opportunity to cure. Thus, the recommendation contradicts fundamental notions of due process.

Further, the Plan fails to explain why such a draconian penalty is necessary. The Plan attempts to justify its recommendation without identifying a single violation of the Code of Conduct or affiliate rules. Rather, the Plan explains that "Staff notes that there is the *potential* for utilities to share competitive information across functions." Plan at 13 (emphasis added). Contrary to the Plan's suggestion, the Commission does not base its punitive actions on mere conjecture. See, e.g., *In the Matter of the Complaint of the Ohio Consumers' Counsel, Stand Energy Corporation, Incorporated, Northeast Ohio Public Energy Council, and Ohio Farm Bureau Federation v. Interstate Gas Supply, Inc.*, Case No. 10-2395-GA-CSS, slip op. at 17 ("The mere possibility that something could happen is not a violation of the Commission's rules.")

The recommendation must be rejected because it exceeds the Commission's jurisdiction, provides for an excessive penalty, lacks any semblance of due process, and lacks any basis in fact.

(c) PURCHASE OF RECEIVABLES

The Plan recommends that the Commission order all EDUs that currently do not offer a purchase of receivables ("POR") program to file an application within one year of the Commission Order in this proceeding to implement a POR program. Plan at 17. The Plan explains that in a POR program, an EDU purchases the receivables of a CRES provider using consolidated EDU billing, sometimes at a discount, and those receivables become the debt of the utility which undertakes collection responsibility. Plan at 15. It further mentions that a POR

program would facilitate entry into the Ohio retail market by CRES providers who, for one reason or another, suffer from an "inability to efficiently and effectively process [their] bad-debt collections" and posits that Duke Energy Ohio's POR program impacted the number of active CRES providers in its service territory in a way that "cannot be minimalized." Plan at 16.

One important fact omitted from the Plan's discussion of Duke Energy Ohio's POR program is that CRES participation in the program is *voluntary*. If the Commission accepts the recommendation, it is important that participation in the EDUs' POR programs be voluntary for any CRES provider that uses consolidated EDU billing, not mandatory. CRES providers that have invested the necessary time, effort and resources in managing collections, some of which are among the earliest entrants in Ohio's competitive retail electric market, should not bear responsibility to pay for a program they do not need and which facilitates their competitors' operations.

(d) SEAMLESS MOVES / CONTRACT PORTABILITY

Over six months, the Data and Billing Subcommittee spent countless hours discussing at great length various choices that would permit a shopping customer moving from one location to another within an EDU territory to retain the customer's current CRES contract, focusing on readily accessible, low cost, customer friendly processes that would work across the state. At the December 11, 2013, En Banc Hearing, Staff and participants presented two proposals to the Commission for consideration: (1) "contract portability," in which the EDU would provide the existing CRES provider with a service start date and account information for the new location, allowing the CRES provider to submit EDI enrollment at the new location; and (2) a "warm transfer" in which a shopping customer calling an EDU customer service representative to advise of a pending move within an EDU's service territory is, if they wish, given their new account

number and any other necessary information and telephonically transferred to their current supplier to discuss supply options for the new location.

FES believes a warm transfer provides an immediate, low cost solution to a shopping customer moving from one location to another. When a shopping customer calls their EDU to notify it of an upcoming move, the EDU offers to transfer the customer to the existing CRES provider, and the customer is empowered to make the best choice. Warm transfers put the power in the customer's hands and makes shopping a personal experience. At the En Banc Hearing, Chairman Snitchler recognized a warm transfer as the simplest and most customer friendly way to maintain the supplier-customer relationship:

> [W]e talked a little bit about warm transfer.... From my perspective, as I reviewed the discussion and tried to get up to speed on where the subcommittees and the workshops have gotten, this seems to put the power in the hands of the consumer, and from my chair that is also ultimately where I think that power belongs.... I mean, ultimately I want the consumer to be able to make the best choice that they think makes sense for them. And isn't the warm transfer the model that seems to offer the greatest chance for consumers to be the most empowered, or am I misunderstanding that...? It seems to me that's the way to go.

Transcript at page 173.

Notwithstanding the Chairman's remarks, and despite countless hours and significant effort and resources expended by Commission Staff and the participants, the Plan recommends neither contract portability nor a warm transfer. Instead, and inexplicably, the Plan states "[s]ubsequent to the conclusion of the Data and Billing Subcommittee discussions, Staff ascertained that the issues...that prevented seamless moves have been resolved, per a proposal before the Pennsylvania Public Utility Commission...." Without describing the Pennsylvania proposal, the Plan recommends that Ohio adopt a seamless move program modeled after the program currently being developed in Pennsylvania. It is important to note that the proposal

before the Pennsylvania Public Utility Commission has yet to be vetted with stakeholders, much less approved.

FES urges the Commission to reject the Plan's seamless moves recommendation, which was never vetted in Ohio and is clearly still under review in Pennsylvania. One significant problem with seamless moves in Ohio is that it fails to account for instances in which a CRES provider cannot continue serving a customer at the same price at the new location. This is best illustrated in the case of governmental aggregation in Ohio. In governmental aggregation, the supplier's specific price and product for that community is applicable only within that particular governmental aggregation community. Therefore, a governmental aggregation customer moving from one governmental aggregation community to another location within the same EDU territory, even another governmental aggregation community, cannot keep the same generation supply price and contract. In other words, the contracts of governmental aggregation customers moving out of their current governmental aggregation communities cannot move, seamlessly or otherwise. The customer's current governmental aggregation supply contract must be terminated and the customer must be dropped to default service.

The implementation of seamless moves, as the Plan recommends, would be even worse for governmental aggregation suppliers. Under the seamless moves proposal, the governmental aggregation supplier is unable to drop the moving customer in time to avoid having to serve the customer for at least one billing period at the new location, at an inapplicable governmental aggregation rate, pursuant to an inapplicable contract. This process would deter supplier participation in communities' governmental aggregation programs and limit savings these communities obtain for their residents.

In short, the seamless moves proposal directly conflicts with large scale governmental aggregation. As a result, the recommendation contradicts the Commission's statutory obligation under Section 4928.20(K), O.R.C., which provides that the Commission "shall adopt rules *to encourage and promote* large-scale governmental aggregation in this state." (Emphasis added). To "encourage and promote" governmental aggregation, the Commission's rules must encourage and promote communities' solicitations by, among other things, encouraging and promoting robust supplier participation and robust bidding to create the greatest savings for customers. Seamless moves would not only fail to "encourage and promote" large-scale governmental aggregation; they would in fact severely undermine governmental aggregation in Ohio. Unlike Ohio, Pennsylvania does not have governmental aggregation and any seamless move programs there need not account for the needs of governmental aggregation suppliers.

In contrast, warm transfers do in fact "encourage and promote" large-scale governmental aggregation. They reduce the risk of customer attrition by giving the governmental aggregation supplier the discretion and flexibility to offer a new arrangement to keep the customer. Moreover, warm transfers eliminate the risk of a governmental aggregation supplier having to serve a moving customer at a rate that is inapplicable to the new location. This will give suppliers more confidence when they consider participating in communities' governmental aggregation solicitations. Therefore, the Commission, consistent with its statutory obligation, should reject seamless moves and instead adopt warm transfers.

While the Plan recommends seamless moves, it completely disregards the "warm transfer" option to permit a moving shopping customer to retain a current CRES contract. In fact, "warm transfers," which were discussed at length during the Data and Billing Subcommittee meetings and the En Banc Hearing, are not even mentioned in the Plan except in a

short bullet on page 40 in Appendix A-Workshop Summaries. Instead, the Plan recommends a seamless moves model based on EDI that does nothing to empower the customer or enhance their experience with retail electric competition. By promoting the EDI based seamless moves, all customer service components that accompany handling the move in real time, are eliminated, thereby reducing the move to nothing more than an electronic transaction. Further, the current proposal from the Pennsylvania EDI working group automatically moves a customer's contract from one location to the next within the same utility's territory. The utility notifies the supplier that the contract has moved by sending electronic data to the supplier. It is only after the move that the utility notifies the supplier via EDI that the customer and the contract have moved. This impersonal, electronic transaction does not allow the supplier to have any discussion with its customer; the customer is not empowered in any way. This EDI seamless move option does nothing to enhance the customer experience; rather, it merely delays the supplier's contact with the customer to provide the best options for service at the new location. Further, the seamless move does not eliminate the customer being returned to default service after the customer moves to a new location. The seamless move proposal, unlike the warm transfer, has significant potential for high customer frustration and little customer service at the time of the notification of the move. As such, the Commission should reject the Plan's seamless moves recommendation and instead direct EDUs to implement a warm transfer program.

(e) BILL FORMAT

The Plan recommends that the Commission order an EDU to include on its bills the supplier's logo, in the area containing the bill's "supply" charges, and makes additional recommendations regarding the supplier logo's size and appearance. Plan at 21. The Plan explains that "some CRES providers voiced the need to have CRES logos displayed on the bills."

Plan at 20. The Plan acknowledges, however, that "[w]hile CRES providers want the ability to place their logos on the bills, some want to ensure that this is an *option* and not a requirement." Plan at 20 (emphasis added). Notwithstanding its recognition that some suppliers want logo placement to be voluntary, the Plan recommends that the Commission order that "*[a]ll* CRES providers shall be required to include their logo on the bills." Plan at 21 (emphasis added). Notably, the Plan does not — indeed, it cannot — find that an EDU bill without a supplier logo somehow fails to meet the Commission's requirement that customer bills identify the supplier of each service. See section 4928.10(C)(3), O.R.C.

In addition, the Plan recommends that the Commission authorize the EDU to charge all active CRES providers in its territory a one-time initial setup charge to cover IT changes. The setup charge would be split evenly among all active CRES providers in the EDU's service territory. For the first five years following the IT changes, new CRES providers entering an EDU's service territory will be charged the same one-time setup fee. Plan at 21-22.

The Commission should reject the recommendations to require all CRES providers to include their logos on EDU bills and contribute to EDU costs. As explained below, the placement of a CRES provider's logo on an EDU's bill should be an option, not a requirement, and the EDU's costs of implementation should be borne by only those CRES providers opting to include their logo on an EDU's bill, or by all distribution customers. The Commission must reject the Plan's recommendations because they would violate a non-consenting CRES providers' rights under federal trademark law, exceed the Commission's authority, and violate a non-participating CRES provider's right to free speech by requiring the non-participating CRES provider to pay for others.

i. Requiring All CRES Providers to Include Their Logos on EDU Bills Violates an Unwilling CRES Provider's Rights Under Federal Trademark Law

Requiring an unwilling CRES provider to include its logo on an EDU's bill would run afoul of a CRES provider's exclusive right, as a trademark registrant, to use its mark under the federal trademark act ("Lanham Act"), 15 U.S.C. § 1051, *et seq*. The Lanham Act states that a certificate of registration from the United States Patent and Trademark Office ("USPTO") provides the owner of a trademark with *prima facie* evidence of the owner's "ownership of the mark," and the owner's "exclusive right to use the registered mark in commerce or in connection with the goods or services specified in the certificate [of registration]." 15 U.S.C. § 1057(b). The registrant's "exclusive right to use" means the right to exclude others from using its mark. *James Burrough, Ltd. v. Sign of the Beefeater, Inc.*, 540 F.2d 266 (7th Cir. 1976).

Accordingly, the trademark owner has the right to control the use of its mark pursuant to the federal trademark statute. *See Park 'N Fly, Inc. v. Dollar Park and Fly, Inc.*, 469 U.S. 189 (1985). The rights federal law confers on a trademark owner include, among other things, the owner's right to decide *not* to use the mark. Absent an act of Congress, the Commission cannot lawfully direct a CRES provider to use its federally registered mark when it does not want to use it. If a CRES provider does not want its mark to appear on an EDU's bill, e.g., because the CRES provider believes the appearance of its name on an invoice is sufficient to inform the customer of the entity supplying the customer's generation service, the Commission cannot lawfully compel the CRES providers to consent to the EDU's use of its mark (and further *pay* for the EDU's unauthorized use of the mark).

ii. Requiring All CRES Providers to Include Their Logos on EDU Bills and to Contribute to an EDU's Resulting Costs Exceeds the Limits of the Commission's Authority

The Reports' recommendations that the Commission require all CRES providers to include their logos on an EDU's bills, and to contribute to an EDU's costs of including supplier logos on its bills, would exceed the limits of the Commission's authority. While the Commission has the authority to specify minimum service requirements to prohibit unfair, deceptive and unconscionable practices in the marketing and sale of competitive retail electric service, including requirements that customer bills identify the supplier of each service, section 4928.10(C)(3), O.R.C., this authority to set the minimum content of customers bills does not empower the Commission to prescribe how a CRES provider uses its federally registered logo. Deciding where and when its logo appears is part of how a registered CRES provider manages its competitive business. Likewise, a CRES provider manages its competitive business when it decides how to allocate its budget to promote its business.

Even in the case of fully regulated public utilities, it is well established that the Public Utility Commission's "powers do not include the right to manage utilities or dictate their policies." *Elyria Telephone Co. v. Public Utilities Commission of Ohio*, 158 Ohio St. 441, 448, 110 N.E.2d 59, 63 (1953). Because CRES providers are not regulated public utilities, and in keeping with the policy of Ohio to recognize the continuing emergence of competitive electricity markets through the implementation of flexible regulatory treatment, section 4928.02(G), O.R.C., the Commission must exercise even greater restraint in refraining from micromanaging CRES providers. Notwithstanding the Commission's limited authority over CRES providers, the proposed Policy Statement would engage in managing registered CRES providers by improperly regulating and interfering with the exercise of their exclusive rights under federal law to decide when and where their logos appear, and by improperly interfering with their discretion to

determine how to allocate funds for marketing. Therefore the Plan's recommendations must be rejected.

iii. Requiring Non-Participating CRES Providers to Contribute to an EDU's Costs of Including Supplier Logos on Its Bills Would Violate Non-Participating CRES Providers' Constitutional Right to Free Speech

The Commission cannot require a CRES provider that does not want its logo to appear on EDU bills — as is its right under federal law as the trademark registrant — to pay for the costs associated with the IT changes necessary to allow other CRES providers to include their logos. A requirement that participants in a competitive industry make compelled contributions in support of an industry message which not all participants agree is necessary or appropriate constitutes compelled speech in violation of a non-consenting market participants' right to free speech. See, e.g., *U.S. v. United Foods, Inc.*, 533 U.S. 405, 413 (2001) (Striking down a federal requirement that all mushroom producers contribute funds for generic advertising in support of the mushroom industry as an infringement of a market participant's First Amendment right to free commercial speech).

As explained above, requiring all CRES providers to include their logos in EDU bills and contribute to paying for the EDU's costs of including supplier logos is unlawful and bad policy. If the Commission decides to allow CRES providers to include their logos on EDU bills, the placement of a CRES provider's logo on an EDU's bill should be an option, not a requirement, and the EDU's costs of implementation should be borne by only participating CRES providers or by all distribution customers.

III. CONCLUSION

For the reasons described above, the Commission should reject the Plan's recommendations specified above. FES appreciates the opportunity to actively participate in this

process.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

The undersigned herby certifies that a true and correct copy of the foregoing *Comments of FirstEnergy Solutions Corp. on the Market Development Work Plan* has been served upon the following via electronic mail or, as noted, via regular mail this 6th day of February, 2014.

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Summary: Comments electronically filed by Ms. Christine M Weber on behalf of FirstEnergy Solutions Corp.