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PUCO

Public Utilities Commission of Ohio  
Docketing Division  
180 East Broad St.  
Columbus, OH 43215-3793

February 28, 2014

Re: *In the Matter of the Commission's Review of its Rules for  
Corporate Separation for Electric Utilities and Affiliates  
Contained in Chapter 4901:1-37, Ohio Administrative Code; Case.  
No. 13-0954-EL-ORD*

To Whom It May Concern,

Enclosed please find a copy of FirstEnergy Solutions Corp.'s Reply Comments, to be filed under Case No. 13-0954-EL-ORD. Due to an oversight, these Reply Comments were filed in Case No. 13-0955. After consultation with the presiding Attorney Examiner and an understanding that all parties to Case No. 13-0954-EL-ORD were properly served, no parties will be prejudiced.

Sincerely,

Scott J. Casto

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**BEFORE**

**THE PUBLIC UTILITIES COMMISSION OF OHIO**

<b>In the Matter of the Commission's</b>	)	
<b>Review of its Rules for Corporate</b>	)	
<b>Separation For Electric Utilities and</b>	)	<b>Case No. 13-954-EL-ORD</b>
<b>Affiliates Contained in Chapter</b>	)	
<b>4901:1-37, Ohio Administrative Code</b>	)	

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**REPLY COMMENTS OF FIRSTENERGY SOLUTIONS CORP.**

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Pursuant to the Commission's December 18, 2013 Order, FirstEnergy Solutions Corp. ("FES") submits the following reply comments regarding Ohio Administrative Code ("OAC") 4901:1-37. FES recommends the Commission reject two recommendations of Direct Energy Services, LLC and Direct Energy Business, LLC (collectively "Direct") to change the affiliate disclosure rules.<sup>1</sup> As explained below, both recommendations are unnecessary, would render the Commission's existing rules ineffective, and are based on flawed premises and logic.

Direct's first recommendation relates to Rule 4901:1-21-05(C)(8)(g), an existing marketing and consumer protection rule which provides that it is a misleading marketing practice for an affiliated CRES provider to use advertising or marketing offers that fail to conspicuously disclose the affiliated CRES provider's relationship with an existing Ohio EDU. Direct urges the Commission to restate this rule in Rule 4901:1-37-04.<sup>2</sup> According to Direct, placing the same rule in two different sections heightens its importance.<sup>3</sup> Direct never suggests the existing rule is somehow inadequate, nor could it. FES disagrees with Direct's recommendation. A CRES provider is responsible for

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<sup>1</sup> Direct Comments, pages 3-4

<sup>2</sup> Direct Comments, page 3

<sup>3</sup> Direct Comments, page 4

complying with each and every Commission rule, regardless of where it appears.

Selecting certain rules for repetition in different parts of the OAC is unnecessary and will create confusion as to meaning and application. *Duplicating the rule in different sections of the Commission's rules will necessarily result in different interpretations of the same language and unnecessary ambiguity in both rules.* Rule 4901:1-21-05(C)(8)(g) is under the correct section and does not warrant repetition under Chapter 4901:1-37.

Direct's second recommendation is to require affiliates to provide disclosure of the affiliate relationship "near" any logo which uses a name similar to the utility.<sup>4</sup> Direct never identifies a need, evidence or legitimate reason for any change to the existing requirement of Rule 4901:1-29-05(C)(8)(f), which again provides that it is a misleading marketing practice for an affiliated CRES provider to use advertising or marketing offers that fail to conspicuously disclose an affiliated CRES provider's relationship with an existing Ohio EDU. Direct's recommendation is less effective than the existing requirement of a "conspicuous" disclaimer.

What is particularly troubling about this recommendation, however, is Direct's erroneous support for the recommendation. Direct cites to the Commission's Order in Case No. 10-2395-GA-CSS ("Order"), a case not even decided under the Commission's affiliate rules. This Order involved a complaint alleging that Interstate Gas Supply, Inc. ("IGS"), a retail gas supplier, engaged in unfair, misleading, deceptive or unconscionable sales or marketing acts in violation of Rule 4901:1-29-05(C)(8)(f) by marketing its products under the name "Columbia Retail Energy" and using the starburst logo within the Columbia Gas of Ohio service territory, pursuant to a service mark licensing

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<sup>4</sup> Id.

agreement.<sup>5</sup> In other words, the complaint alleged that IGS was marketing its products under a name and with a logo similar to that of the regulated utility, although *there was in fact no affiliate relationship*. The Order found that this practice was not misleading, unfair, deceptive or unconscionable because IGS used disclosures crafted in collaboration with Commission Staff.<sup>6</sup> Direct posits that “[i]f such a disclosure is appropriate for a non-affiliated company licensing a utility-affiliated name or logo, then similar a [sic] requirement for a CRES provider who is actually an affiliate of the utility is even more important to prevent customer confusion.”<sup>7</sup> It is disingenuous for Direct to suggest that there is more danger of harm to customers created by an affiliated CRES provider’s use of a name making a truthful claim of utility affiliation, e.g., PPL EnergyPlus, than a non-affiliated CRES provider’s use of a name making an incorrect suggestion of utility affiliation, i.e., IGS dba Columbia Retail Energy. The former example conveys truthful information to customers.

Further, Direct has already argued, unsuccessfully, for a similar disclosure requirement in the correct docket, Case No. 12-1924, the Commission’s review of Chapter 4901:1-21.<sup>8</sup> However, the Commission did not adopt Direct’s suggestion.<sup>9</sup> Based on this prior Commission rejection, the more effective “conspicuousness” standard in the current affiliate rules, and most importantly, the inapplicable precedent and flawed logic underlying Direct’s recommendation, FES urges the Commission to reject it.

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<sup>5</sup> IGS is not alone among non-affiliates in licensing a name similar to that of an incumbent utility. See, e.g., NY Public Service Commission, Proceeding on Motion of the Commission to Determine Whether the Use of the Name “NYSEG Solutions” by Direct Energy Constitutes “Misleading or Deceptive Conduct,” Prohibited by the Commission’s Uniform Business Rules. Case No. 13-M-0224

<sup>6</sup> Commission Order, August 15, 2012, page 17.

<sup>7</sup> Direct Comments, page 4 (emphasis added).

<sup>8</sup> Direct Comments, January 17, 2013, page 5.

<sup>9</sup> Commission Order Case No. 12-1924-EL-ORD, December 18, 2013, pages 17-18.

FES appreciates the opportunity to submit these comments and asks that the Commission reject the changes outlined above.

Respectfully Submitted,

/s/ Scott J. Casto

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## CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served this 31<sup>st</sup> day of January, 2014, via e-mail upon the parties below.

/s/ Scott J. Casto

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