

**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**

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**MEMORANDUM CONTRA OF FIRSTENERGY SOLUTIONS CORP. TO THE  
APPLICATIONS FOR REHEARING OF THE OFFICE OF THE OHIO  
CONSUMERS' COUNSEL AND OHIO PARTNERS FOR AFFORDABLE  
ENERGY**

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**I. Introduction**

Pursuant to Ohio Administrative Code ("OAC") Rule 4901-1-35(B), FirstEnergy Solutions Corp. ("FES") submits this memorandum contra to the Applications for Rehearing ("AFR") filed by Ohio Partners for Affordable Energy, AARP, The Ohio Poverty Law Center, Edgemont Neighborhood Coalition, Pro Seniors, Inc., Southeastern Ohio Legal Services, Legal Aid Society of Columbus, Legal Aid Society of Cleveland, Communities United for Action and the Citizen Coalition (collectively "OPAE") and the Office of the Ohio Consumers' Counsel ("OCC"). As explained below, both parties fail to demonstrate that the Commission's March 26, 2014 Finding and Order ("Order") is unreasonable or unlawful and as a result, both AFRs should be denied.

**II. The Commission's ruling that certain CRES Provider information is confidential is correct**

The Order maintained confidential treatment of competitively-sensitive CRES provider information.<sup>1</sup> OCC and OPAE argue in their AFRs that competitively-sensitive CRES information is not confidential and the Commission should not protect the information as confidential.<sup>2</sup> OCC cites R.C. 149.43, 4901.12 and 4905.07 relating to confidential and public information in support of its argument that the Commission erred. However, absent from OCC's AFR is a discussion of the *exceptions* in those provisions that *defeat* OCC's arguments.

Both 4901.12 and 4905.07 make all information in the possession of the Commission public so long as it is consistent with the purposes of Title 49 of the Revised Code. If the Commission published the confidential CRES provider data recommended by OCC and OPAE, then the decision would be in direct contradiction with Title 49. For example, R.C. 4928.06(F) directs that the Commission shall take measures to protect the confidentiality of certain information that the Commission deems necessary to ensure the policy goals of R.C. 4928.02 are met.<sup>3</sup> One of those policy goals is to promote effective customer choice.<sup>4</sup> In an effort to ensure the policy goals of R.C. 4928.02, the Commission adopted Ohio Administrative Code ("OAC") Section 4901:1-25-02(A)(5)(b), which provides unquestioned confidential protection to the information OCC and OPAE claim is public. Maintaining the sensitive nature of information such as the number of customers a CRES provider serves helps preserve Ohio's competitive market, as previously explained in FES's Comments and Reply Comments.<sup>5</sup>

OCC fails to acknowledge the exceptions protecting competitively-sensitive information, instead relying on inapplicable portions of the OAC. OCC incorrectly argues that OAC 4901-1-24 and 4901-1-27(B)(7)(e) apply to the disclosure of competitively-sensitive information at

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<sup>1</sup> Order, pages 11-12.

<sup>2</sup> OCC Application for Rehearing, page 3. OPAE Application for Rehearing, pages 12-13.

<sup>3</sup> See R.C. 4928.06(A).

<sup>4</sup> See R.C. 4928.02(E).

<sup>5</sup> FES Comments, pages 4-8. FES Reply Comments, pages 4-5.

issue.<sup>6</sup> However, the provisions cited by OCC control discovery and hearings and are unrelated to the Commission's periodic review and protection of CRES providers' sensitive market share data at issue here. The relevant sections of the OAC that recognize the confidential nature of information provided to the Commission under OAC 4901:1-25-02(A)(5)(b) are unrelated to the regulations cited by OCC.<sup>7</sup> OCC argues that the Commission's Order creates a new burden on a party seeking confidential information.<sup>8</sup> However, this regulation remains unchanged and preserves the existing rules pertaining to protected confidential information.

OCC and OPAE further rely on arguments from the Staff Report, Comments and Reply Comments filed in this docket, which the Commission properly declined to adopt. For example, OPAE's assertion that "this information is not confidential in other industries" suffers from two equally incorrect assumptions.<sup>9</sup> First, OPAE does not give examples of a single industry that is comparable to Ohio's retail electric market. Second, OPAE fails to give a single example of how any such industry communicates such information to the public. OPAE and OCC also speculate that a customer may base a shopping decision on confidential information.<sup>10</sup> These assertions lack practical illustrations and overlook the Commission's stringent CRES provider registration requirements.<sup>11</sup> The Commission rightly holds the key to this information because only the Commission is tasked with using this competitively sensitive, confidential information to ensure competitive retail electric service.<sup>12</sup>

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<sup>6</sup> OCC Application for Rehearing, pages 4-5.

<sup>7</sup> See Order at page 11; OAC 4901:1-25-02(A)(5)(b).

<sup>8</sup> OCC Application for Rehearing, page 5.

<sup>9</sup> OPAE Application for Rehearing, page 12.

<sup>10</sup> OPAE Application for Rehearing, pages 12-13; OCC Application for Rehearing, page 5.

<sup>11</sup> OAC 4901:1-24

<sup>12</sup> See ORC 4928.06. Although OCC has a statutory right to protect the interests of consumers under ORC 4911, OCC's powers do not extend to the use of confidential information.

### III. Conclusion

Contrary to OCC's assertions that the Order "flies in the face" of the Ohio Revised Code,<sup>13</sup> the Order correctly recognizes the confidential nature of competitively-sensitive CRES provider information and upholds protections the law affords to the information. For the reasons stated herein, the Commission should deny the Applications for Rehearing filed by OCC and OP&A.

Respectfully submitted,

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<sup>13</sup> OCC Application for Rehearing, page 5.

## CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing has been served upon the following via electronic mail this 5<sup>th</sup> day of May 2014.

/s/ Scott J. Casto

Scott J. Casto

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Summary: Memorandum Contra electronically filed by Mr. Scott J Casto on behalf of FirstEnergy Solutions Corp.