

**BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

**In the Matter of the Commission-  
Ordered Investigation of Marketing  
Practices in the Competitive Retail  
Electric Service Market.**

**Case No. 14-568-EL-COI**

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**MEMORANDUM CONTRA OF FIRSTENERGY SOLUTIONS CORP. TO THE  
APPLICATION FOR REHEARING OF THE OHIO CONSUMERS' COUNSEL**

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**I. INTRODUCTION**

Pursuant to Ohio Administrative Code 4901-1-35(B), FirstEnergy Solutions Corp. (“FES”) submits this Memorandum Contra to the Application for Rehearing filed by the Ohio Consumers’ Counsel (“OCC”). The OCC fails to present any evidence that requires reconsideration in the matters set forth in its Application for Rehearing.

As an initial matter, it is clear that several parties that filed Applications for Rehearing continue to inexplicably misread and misinterpret the purpose for this docket. For example, the Retail Energy Supply Association (“RESA”) grossly misstates the actual language from the Commission Entry that initiated this docket in order to bolster its “argument” for rehearing.<sup>1</sup> RESA’s inability to follow instructions continues to misrepresent the record in this docket and is an unfortunate continuation of its filings to date.<sup>2</sup> The improper misrepresentations are also present in the Application for Rehearing filed by IGS Energy, which joins RESA in misstating

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<sup>1</sup> RESA states that this docket began after one specific retail provider charged customers for PJM costs. The plain language of the Commission’s Order states that the Commission became aware of pass-through clauses through consumer inquiries and informal complaints. *See* Commission Entry, April 9, 2014.

<sup>2</sup> *See* FES Reply Comments at pp. 5-6, May, 27, 2014.

the Commission's purpose for this docket.<sup>3</sup> However, IGS did not stop there. IGS then went on to make the uninformed assertion that FES has stopped providing service to mass market customers.<sup>4</sup> FES appreciates the Commission's forward-looking stance on the matters presented in this docket, and hopes that desperate competitors will reverse course and focus only on the important matters at issue.

While the OCC did not include similar false statements in its Application for Rehearing, it did focus on matters outside the scope of this investigation and raised several grounds for rehearing that should be denied.

## **II. THE COMMISSION'S ORDER PROPERLY FOCUSES ON FUTURE CONTRACTS**

The OCC argues that the Commission should have made a ruling on existing contracts,<sup>5</sup> contradicts itself in saying that the Commission did make a ruling on existing contracts<sup>6</sup> and then claims that the Commission is not protecting consumers by allowing them to file a complaint.<sup>7</sup> The Commission was clear, confining its holding to application on a "going-forward basis."<sup>8</sup> While FES does not agree with several portions of the Order as outlined in its Application for Rehearing, this language is unambiguous and consistent with the inability of the Commission to retroactively apply this ruling to current contracts. In one instance the OCC claims the Commission erred in not applying its ruling to existing contracts, then in another instance states that the Commission did in fact make a finding on existing contracts. The Commission made no mention of a specific pass-through clause or contract in the Order. The OCC is asking the

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<sup>3</sup> IGS Application for Rehearing at p. 6.

<sup>4</sup> *Id.*

<sup>5</sup> OCC Application for Rehearing at pp. 2-3.

<sup>6</sup> *Id.* at p. 3, 5.

<sup>7</sup> *Id.*

<sup>8</sup> November 18, 2015 Finding and Order, at p. 11.

Commission to invalidate current contracts that involve various versions of pass-through clauses between a number of suppliers and customers. That in and of itself is unreasonable and the Commission should not grant rehearing on this issue.

### **III. THE COMMISSION MAINTAINED ITS STATUTORY DUTY TO PROTECT CUSTOMERS**

The OCC encourages the Commission to allow consumers to breach contracts in misunderstanding the purpose and circumstances in which regulatory-out clauses are used.<sup>9</sup> The OCC fails to recognize the balance that must be maintained in order to protect consumers while encouraging diversity of reasonably priced electric supplies. The Commission does not allow a retail supplier to terminate a contract at will. Instead, there are instances which are unforeseeable and impossible to hedge against. The Commission rightfully recognized this market reality and gave various options when such a circumstance arises after careful consideration of competing interests.<sup>10</sup> The use of regulatory-out clauses protects both suppliers *and* consumers.<sup>11</sup> The statutory authority of the Commission does not extend to allowing outright breaches of a contract. If a customer agrees to a contract with a regulatory-out clause, then the exercise of that clause is proper. The OCC ignores the fact that a contract is an agreement. A customer has the ability to choose a supplier or the ability remain on the standard service offer by not shopping or opting-out of governmental aggregation. The OCC proposal to allow customers to breach contracts in the event that it becomes uneconomic defies logic and should not be allowed.

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<sup>9</sup> OCC Application for Rehearing at p. 6.

<sup>10</sup> Finding and Order at p. 12.

<sup>11</sup> *Id.*

In its Application for Rehearing, the OCC also asks the Commission to create new prohibitions of contract renewals that are not relevant to this docket.<sup>12</sup> Just as the Commission has not entertained such off-base recommendations from OCC and other parties in this investigation thus far, it should continue to focus on the issues presented in its initial Entry and refuse to grant rehearing on an issue that was never actually “heard.”<sup>13</sup>

#### **IV. CONCLUSION**

For the reasons stated above, the Commission should not grant rehearing on the issues raised by the OCC.

Respectfully submitted,

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<sup>12</sup> OCC Application for Rehearing at p. 7.

<sup>13</sup> Finding and Order at p. 27.

## **CERTIFICATE OF SERVICE**

The Public Utilities Commission of Ohio's e-filing system will electronically serve notice of the filing of this document on counsel for all parties this 28<sup>th</sup> day of December, 2015. A courtesy copy will be sent via e-mail to the individuals below.

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