

**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   )

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**REPLY COMMENTS OF FIRSTENERGY SOLUTIONS CORP.  
ON ADDITIONAL QUESTIONS**

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**I. INTRODUCTION**

FirstEnergy Solutions Corp. (“FES”) files these Replies to the Comments of other interested parties on the Additional Questions posed by the Public Utilities Commission of Ohio (“Commission”) in its Entry dated June 5, 2013. In their initial Comments, several parties, including FES, emphasized the need for the remaining Ohio electric distribution utilities (“EDUs”) to complete structural corporate separation in accordance with Ohio law. See, e.g., OCC Comments at 13-14; Consumer Coalition<sup>1</sup> Comments at 16; RESA Comments at 9; IGS Comments at 17. Enforcing the existing law is something the Commission is capable of initiating immediately; will be effective in promoting retail electric competition by eliminating significant barriers to competitive retail electric service (“CRES”) provider participation and leveling the playing field; and is a realistic step that does not require changes in law or the structure of default service. Enforcing the existing law will remove the greatest barrier to effective retail competition throughout Ohio, i.e., the financial incentive for certain EDUs to inhibit retail electric competition for the benefit of their own generation investments.

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<sup>1</sup> Ohio Partners for Affordable Energy, AARP, Ohio Poverty Law Center, Edgemont Neighborhood Coalition, Pro Seniors, Inc., Southeastern Legal Services, Legal Aid Societies of Columbus and Cleveland, Communities United for Action and the Citizens Coalition.

Some of the parties, however, recommended other steps to “improve” Ohio’s competitive electric market, including eliminating default service or removing the EDU from the role of default service provider. These suggestions are impractical and require extensive changes in law, and are premature until all EDUs fully implement corporate separation and procure 100% of their default supply through competitive bid processes. Other suggestions, such as hourly default service pricing for all customer classes, are similarly unrealistic and premature. The Commission’s attention is better focused on enforcing the existing law rather than undertaking new initiatives which are complicated or will be ineffective until corporate separation is complete. As FES explained at length in its earlier Comments and Reply Comments in this proceeding, unless and until the Commission enforces the existing law which requires the remaining EDUs to complete structural corporate separation and procure 100% of their default supply through competitive bid processes, other recommendations are inappropriate and premature, and will be ineffective in a state without an essential level playing field.

## **II. REPLIES TO OTHER PARTIES’ COMMENTS**

### **(a) Recommended Changes to the Fundamental Structure of EDU Default Service Are Impractical and Premature**

Interstate Gas Supply, Inc. (“IGS”) incorrectly asserts that a major barrier to effective competition is default service supplied through competitive wholesale procurements. IGS Comments at 2. According to IGS, wholesale default service is subsidized and advantaged. IGS Comments at 5-6. Therefore, IGS continues to recommend significant changes to the structure of default service, including but not limited to eliminating default service and transferring all default service customers to retail suppliers, or auctioning off default service customers to CRES providers. IGS Comments at 3. The Commission should reject these recommendations, which

are impractical and premature, based on flawed premises, and unnecessary to materially improve retail electric competition throughout Ohio.

Eliminating EDU default service or auctioning customers off to retail suppliers is incapable of implementation in the near term because it would require extensive changes to Ohio law.<sup>2</sup> Indeed, eliminating default service presents many complicated legal, policy and technical issues. In contrast, the Commission already has the law and the means to immediately implement FES's recommendations to enforce the existing laws requiring statewide structural corporate separation, to eliminate subsidies for EDU-based generation, and to require EDUs to procure 100% of default supply through competitive bidding processes.

IGS's recommendations are also based on the flawed premise that wholesale default service is somehow “advantaged,” IGS Comments at 6, because it avoids substantial costs competitive retail suppliers must incur. As FES explained in detail in its previous Reply Comments in this docket, IGS's comparison of default service and competitive retail electric service is inaccurate and based on the incorrect premise that wholesale and retail products include the same risks and costs. FES explained that, contrary to IGS's contention, wholesale suppliers must incorporate significant costs in their pricing that retail suppliers do not. See FES Reply Comments at 8.

In addition, IGS's recommendations to eliminate default service ignore substantial evidence of robust shopping in the territories of EDUs which are procuring 100% of their default supply through wholesale competitive bid processes in accordance with Ohio law. Increased shopping rates, particularly in territories of EDUs with an auction based Standard Service Offer

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<sup>2</sup> Ohio Revised Code (“R.C”) § 4928.141 requires all EDUs to provide, on a comparable and nondiscriminatory basis, a Standard Service Offer to maintain essential electric service to customers.

("SSO"),<sup>3</sup> contradict IGS's characterization of competitively procured SSO supply as a barrier to retail electric competition. IGS further fails to account for differences in the levels of shopping in the territories of EDUs which procure 100% of their default supply through competitive wholesale bid processes and the territories of the EDUs which do not.<sup>4</sup> Accordingly, IGS's recommendations lack supporting facts and are unnecessary, and should be rejected.

FES submits that IGS's focus on abandoning or redesigning default service is unrealistic, as well as premature while the structural corporate separation of default service as envisioned by existing law has not been implemented throughout Ohio. Indeed, until a level playing field is achieved, a full and accurate evaluation of the health and vitality of Ohio's competitive retail electric market is impossible. The Commission's time, effort and resources are better spent on enforcing the existing law statewide, requiring all EDUs to procure 100% of their SSO supply through competitive bid processes, and requiring those EDUs which have not yet completed structural corporate separation to do so.

**(b) The Commission's Authority Regarding Market Power and CRES Providers Is Limited to Monitoring and Making Reports and Recommendations to the General Assembly**

The Ohio Consumers' Counsel ("OCC") incorrectly argues that the Commission has the ability to regulate market power under R.C. § 4928.06(B) as it pertains to CRES providers. OCC Comments at 7. However, Section 4928.06(B) relates only to the Commission's determination "that there is a decline or loss of effective competition with respect to a competitive retail electric service of an electric utility." (Emphasis added). Contrary to OCC's position, the Commission

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<sup>3</sup> See <http://www.puco.ohio.gov/puco/index.cfm/industry-information/statistical-reports/electric-customer-choice-switch-rates/>

<sup>4</sup> Currently, Duke Energy Ohio, The Cleveland Electric Illuminating Company, Toledo Edison and Ohio Edison are the only EDUs that have a competitive process for 100% of SSO supply.

has no power to “correct” pricing, terms or conditions of CRES providers. As FES further explained in its initial Comments on the Additional Questions, the law authorizes the Commission to monitor and evaluate indicators of market power, and make reports and recommendations to the General Assembly, but does not give the Commission the ability to “regulate” market power. FES Comments at 3-5.

**(c) Mandatory Public Disclosure of the Terms of Government Aggregation or Other Retail Electric Service Exceeds the Commission’s Legal Authority and is Bad Policy**

In its initial Comments on the Additional Questions, FES explained that while parties to a contract may elect to disclose the terms of their deal, mandatory public disclosure of information regarding retail electric service would exceed the Commission’s legal authority, would deprive communities and retail customers of valuable benefits of retail competition above and beyond savings on electricity, and would be harmful to retail electric competition. FES Comments at 5-7. Similarly, the Northeast Ohio Public Energy Council (“NOPEC”) explained in its Comments that no legitimate purpose would be served by requiring disclosure. NOPEC Comments at 5.

Nevertheless, Duke Energy Ohio (“Duke”), the Consumer Coalition, Duke Energy Retail and Duke Energy Commercial Asset Management (“DER”) and RESA recommend mandatory public disclosure of incentives and broker commissions. Duke Comments at 4; Consumer Coalition Comments at 10; DER Comments at 3; RESA Comments at 6. Only RESA even attempts to cite any legal authority applicable to the Commission, but the two provisions it cites, R.C. § 4928.10(A) and R.C. § 4928.20(K), do not support its contention. As FES explained in its initial Comments on these questions, R.C. § 4928.10(A) merely requires a CRES provider to disclose pricing and terms and conditions of service to a consumer before the consumer enters

into a contract. FES further explained that R.C. § 4928.20(K) only requires the Commission to adopt rules to encourage and promote large-scale government aggregation. Mandatory public disclosure of incentives and other information related to commodity contracts, however, would have the opposite effect, by diminishing CRES provider participation in government aggregation programs. See FES Comments at 6.

Duke and DER fail to discuss any statutes administered by the Commission. Rather, they contend only that such information qualifies as “public records” under Ohio’s Public Records Act. Duke Comments at 4; DER Comments at 3. The Ohio Public Records Act, however, does not confer any authority on the Commission to mandate public disclosure of incentives and other information related to commodity contracts. The duties of community officials to keep their constituents informed are beyond the scope of the Commission’s authority and this proceeding.

The Consumer Coalition contends that the Commission should require public disclosure of incentives and broker commissions in connection with government aggregation because public disclosure would enable end-use customers to compare their government aggregation offer with other offers available in the marketplace. Consumers Coalition at 10-11. To the contrary, there is no logical relationship between public disclosure of incentives or a broker’s commission and the end-use customer’s ability to compare the government aggregation price with other competitive offers.

As FES explained in its initial Comments on the Additional Questions, the freedom of CRES providers, brokers and customers to negotiate such terms as incentives, broker commissions and commodity pricing is a significant benefit of retail competition. Incentives and commissions and, in some instances, commodity pricing are competitively sensitive, and may even be subject to confidentiality agreements, and any regulatory requirement to publicly

disclose them runs counter to the State's policies to promote competition and large-scale government aggregation. R.C. §§ 4928.02, 4928.20(K).

**(d) Recommendations to Eliminate or Restrict Shared Services Should be Rejected**

The Federal Energy Regulatory Commission ("FERC") has long permitted sharing of support and service employees across affiliate subsidiaries of a holding company. As FES explained in its earlier Reply Comments in this proceeding, shared services among separate affiliates, when designed in accordance with the FERC Standards of Conduct and Affiliate Rules and Commission Code of Conduct, ensure that employees of EDUs and affiliated CRES providers function independently and provide no unfair advantage to the CRES provider. FES Reply Comments at 10-11.

Nevertheless, IGS recommends eliminating all shared services between unregulated affiliates and regulated utilities, to ensure an unregulated affiliate is not getting an unspecified "unfair advantage" in the marketplace. IGS Comments at 17. Also, RESA recommends the Commission impose an unspecified "restriction" on EDU employees who move to any EDU affiliate, and vice versa, for twelve months, "so that there is less opportunity for improper use of the information learned/gained during the previous employment." RESA Comments at 10-11. However, IGS and RESA never identify the "unfair advantage" or "opportunity" they seek to address, nor explain how existing Commission and FERC rules are lacking.

Both IGS's and RESA's Comments ignore the protections provided by the combination of complete structural corporate separation as required by Ohio law and compliance with the FERC Standards of Conduct and Affiliate Rules and Ohio Code of Conduct. IGS and RESA would have the Commission engage in matters of federal jurisdiction and prohibit activities that

the FERC permits. The FERC's Affiliate Rules contain provisions governing the restriction of market information among public utilities and power sales affiliates, and permissibly shared employees, field and maintenance employees and senior officers and boards of directors. 18 C.F.R. § 385.3(d) and (g). The FERC Affiliate Rules permit the sharing of support employees and field and maintenance employees among regulated and non-regulated affiliates. 18 C.F.R. § 35.39(2)(ii). The FERC also requires that all employees — shared, regulated and non-regulated — abide by the FERC's no-conduit provision, which prohibits an employee from using his or her position or any other employee to circumvent the affiliate restrictions. 18 C.F.R. § 35.39(g).

FES's obligations under the FERC Standards of Conduct and Affiliate Rules and the Ohio Standards of Conduct are more than adequate to protect the interests of Ohio consumers without forcing additional burdensome and costly restrictions on FES and similarly situated CRES providers. Compliance with an approved code of conduct upon complete structural corporate separation will ensure there is no unfair advantage between an EDU and an affiliate and also protect retail competition in Ohio. Compliance with the codes of conduct and completion of structural corporate separation in accordance with R.C. § 4928.17 adequately prevents preferential outcomes for unregulated affiliates. IGS's and RESA's recommendations lack any supporting facts, fail to address federal jurisdictional issues, and would deprive EDU ratepayers of savings.



### III. CONCLUSION

FES appreciates the opportunity to actively participate in this process. Ohio retail customers are beginning to realize the benefits of competition and will continue to see increased advantages with the suggestions outlined in FES's Comments and Reply Comments.

Respectfully Submitted,

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