BEFORE THE
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

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

FirstEnergy Solutions Corp. ("FES") files these Replies to the Comments filed on February 6, 2014 regarding the Market Development Work Plan ("Plan") the Public Utilities Commission of Ohio Staff ("Staff") issued for comment in an Entry dated January 16, 2014. FES, a certified retail electric service ("CRES") provider, 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 Reply Comments.

I. INTRODUCTION

In its initial Comments, FES urged the Commission to identify ways to improve retail electric competition that recognize CRES providers' need to contend with wholesale power market developments without being burdened with additional and unnecessary costs. FES further emphasized the need for the Commission to focus its efforts on protecting customers and ensuring they have a good experience with retail electric competition. FES Comments at 3-4.

In furtherance of these objectives, FES's Comments recommended the Commission reject recommendations in the Plan that would impose additional burdens and costs on suppliers and harm competition, such as recommendations to make CRES providers' market share publicly available, to require complete divestiture of holding companies' generation affiliates in the event of even a single, *de minimis* audit failure, to undermine large-scale governmental

aggregation through a seamless moves construct rather than a "warm transfer" model that empowers the customer, and to require all CRES providers to participate in and pay for the inclusion of supplier logos on EDU's bills. FES's Comments also urged the Commission to reject Plan recommendations which would detract from customers' experiences with CRES providers, such as the seamless moves recommendation.

FES's Reply Comments will respond to recommendations in various participants' initial Comments which would similarly burden some CRES providers, give others an unfair competitive advantage, or make customers dissatisfied with retail electric competition. Specifically, the Commission should reject recommended alternatives to making CRES providers' market share publicly available, alternatives that would allow for the dissemination of market share data, but without providing CRES providers' names. As discussed below, these recommendations would not in fact protect the identities of some CRES providers, and would be even more harmful to competition than the Plan's recommendation.

The Commission should also reject the unsubstantiated comments of stakeholders who support the Plan's recommendation of complete corporate separation in the event of an audit failure, but would go even further and require complete corporate separation immediately. Like the Plan, these stakeholders' recommendations are based solely on conjecture, with no substantiation. Further, they ignore the federal law that authorizes the establishment of electric utility holding companies and authorizes shared services. These participants' recommendations exceed the Commission's authority and would require the Commission to encroach on matters of federal law.

In addition, the Commission should reject Dayton Power & Light Company's ("DP&L") recommendation that if the Commission adopts the Plan's recommendation to require all EDUs

to implement a purchase of receivables ("POR") program, participation in a POR program should be mandatory for all CRES providers. DP&L offers no rationale for its recommendation, and FES's initial Comments explained why participation in a POR program must be optional for CRES provides using EDU consolidated billing. Even in the POR program of Duke Energy Ohio, Inc. ("Duke"), which the Plan considers a model for other EDUs, CRES participation is voluntary, not mandatory.

Also, as FES explained in its initial Comments, the Plan's recommendation to adopt a yet-to-be-finalized Pennsylvania seamless moves construct, instead of a customer-friendly warm transfer model, would contradict Ohio law which requires the Commission to encourage and promote large-scale governmental aggregation. The Comments of the Retail Energy Supply Association ("RESA") attempt to support the Plan's recommendation. Like the Plan, however, RESA cannot explain any details of how the Pennsylvania model would work, or articulate how the Pennsylvania model addressed the obstacles identified in sub-committee discussions.

In addition, FES explained in its Comments that the Plans' recommendation that all CRES providers be required to include their logos on EDUs' bills would exceed the Commission's authority and violate non-consenting CRES providers' rights under federal trademark law. Moreover, requiring a CRES provider that does not participate in placing its logo on an EDU's bills to fund that capability for other suppliers would exceed the Commission's authority and violate the non-participating CRES provider's right to free speech. For the same reasons, the Commission should reject Direct Energy Services, LLC's and Direct Energy Business, LLC's (collectively "Direct") similar recommendation to require CRES providers to include their logos on EDU bills, absent a Commission waiver, as well as RESA's

recommendation regarding the allocation of EDU implementation costs among all active CRES providers using EDU-consolidated billing.

From the early stages of this proceeding, FES has also encouraged the Commission to focus the participants' efforts on identifying practical, near-term solutions to improve retail electric competition, rather than long-term changes in direction that necessitate statutory amendments. For this reason, the Commission should reject the impractical recommendations of participants that encourage the Commission to pursue significant changes to the structure of SSO service, by removing the EDU from the role of SSO provider, or by eliminating statutory provisions that give EDUs flexibility in crafting default supply procurements.

II. REPLIES TO OTHER PARTIES' COMMENTS

(a) Recommendations to Disclose Confidential Information Will Harm Competition

As FES explained at length in its initial Comments, Ohio law recognizes competitively sensitive information including the number of customers a CRES provider serves and the amount of its sales in megawatt hours ("MWh") in each EDU service territory to be confidential and protected from public dissemination unless the CRES provider consents to making it public. FES Comments at 4. FES urged the Commission to reject the Plan's recommendation to make this information publicly available because it would be exceedingly harmful to competition, will have no pro-competitive benefits, and is lacking in supporting facts and analysis.

While the Comments of Interstate Gas Supply, Inc. ("IGS") and RESA recognize that public disclosure of the confidential information will substantially harm Ohio's competitive landscape and will satisfy no legitimate need, IGS Comments at 16-17; RESA Comments at 5-6, both IGS and RESA offer an even more harmful alternative of publishing competitively sensitive market share data, or presenting it in a pie chart, but without CRES providers' names. IGS at 17.

RESA at 5-6. Also, Direct recommends the publication of market share pie charts without CRES providers' names. Direct Comments at 2.

The Commission must reject these alternatives, which would not maintain CRES provider anonymity and would be even more harmful to competition. As FES explained in its Comments, CRES providers are so sophisticated, and so much electric markets data is publicly available already, that competitors will always be able to identify the two or three CRES providers with the largest shares. As a result, IGS's, RESA's and Direct's proposed alternatives are designed to place two or three CRES providers with the largest shares at an unfair competitive disadvantage to CRES providers with smaller shares, who can remain relatively anonymous. Further, if this information were provided in two formats – with and without aggregation – as Direct suggests, such identification will effectively reveal the identities of certain suppliers as well. Consequently, IGS's, RESA's and Direct's proposed alternatives will undermine the competitive retail electric market.

As FES explained in its Comments, neither the Plan's recommendation, nor any supporting comments, can explain how divulging this information in any manner helps meet the Commission's goal of promoting robust retail electric generation competition. Consequently, IGS's, Direct's and RESA's proposed alternatives are not reasonable, will harm the competitive landscape in Ohio, will satisfy no legitimate need, and must be rejected.

(b) Recommendations to Order Complete Corporate Separation Exceed the Commission's Authority and Encroach On Matters of Federal Jurisdiction

In its Comments, FES explained that the Plan's recommendation that the Commission order complete corporate separation, in response to any audit failure, exceeds the Commission's legal authority and lacks fundamental due process. FES Comments at 8-9. IGS and the Sierra Club go even further than the Plan and recommend the Commission direct immediate,

unconditional, complete divestiture. IGS Comments at 11; Sierra Club Comments at 4. These parties' recommendations must be rejected because they are not supported by fact, and are contrary to federal law. IGS's and the Sierra Club's recommendations fail to recognize the ample protections provided by existing federal and state codes of conduct and affiliate rules.

IGS argues that without full corporate separation (wherein EDUs would no longer have competitive affiliates), the Commission should prohibit shared services and other similar cost sharing arrangements, which IGS contends are anti-competitive and create a "perverse incentive" to allocate costs to the regulated EDU. IGS asserts that Commission audits are unlikely to eliminate the alleged perverse incentive completely, because audits are influenced by self-reporting. IGS contends that eliminating shared services also will greatly reduce the likelihood that an affiliated company receives undue access to competitive information. IGS Comments at 11-12. IGS's bald assertions are based entirely on conjecture and devoid of any basis in actual facts. IGS provides no evidence of even a single instance of misallocated costs or undue access to competitive information as a result of shared services. IGS is well aware that this Commission has ruled that "[t]he mere possibility that something could happen is not a violation of the Commission's rules."[1]

The Sierra Club's Comments recommend immediate divestiture, hurl serious but unsupported and ridiculous accusations at FES, among others, and exhibit a stunning lack of professionalism and decorum. The Sierra Club bases its recommendations on the "potential" for

[1] *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 (Opinion and Order entered August 15, 2012), slip op. at 17. Indeed, this case calls IGS's strident opposition to affiliate relationships between competitive suppliers and affiliated utilities into question, given IGS's marketing of its natural gas products under the name "Columbia Retail Energy" and use of the starburst logo within the Columbia Gas of Ohio service territory, pursuant to a service mark licensing agreement. IGS has apparently been benefitting from communicating an affiliate relationship to customers when *there was in fact no affiliate relationship.* This fact is documented and not mere conjecture.

improper sharing of competitive information, and vague allegations that "general conflicts of interest exist between EDUs and their affiliates." Sierra Club Comments at 2, 5. The Sierra Club includes no factual support for its allegations and relies instead on conjecture and vitriol.

While the Sierra Club purports to offer "various instances" in support of its accusations, none of its claimed examples include any actual investigation establishing a single actual instance of unlawful or improper conduct. In fact, in a dissenting statement the Sierra Club quotes as its evidence, Commissioner Roberto cautions that, "I am not suggesting that the Companies or any other member of the Companies' family has taken an action that is unauthorized or outside of any existing authority in any manner." Sierra Club Comments at 3. Moreover, when alleging wrongdoing in connection with the PJM 2015/2016 base residual auction, the Sierra Club irresponsibly attributes motives, links unrelated events, and establishes causal connections where none exist. Its assertions are too lacking in detail to be verified or challenged. It is noteworthy that on September 5, 2013, when the Commission held its third monthly workshop of this Investigation to discuss corporate separation issues, and the Sierra Club had an opportunity to raise its accusations and engage in a productive discussion with stakeholders and Staff, the Sierra Club failed to participate.

The IGS and Sierra Club recommendations lack not only factual support but legal support as well. Under Ohio law, the Commission's authority is limited to structural separation and not complete divestiture from an affiliate structure. The Commission has no authority to require a non-regulated competitive supplier to divest a business service or maintain separate shareholders. Its jurisdiction over corporate separation is limited to jurisdictional EDUs. IGS's and the Sierra Club's recommendations exceed the Commission's authority. IGS, to its credit, never even tries to cite supporting law in its Comments. The Sierra Club cites no independent legal authority for

the Commission to order complete divestiture either, and erroneously relies upon the Plan, arguing that if the Commission has the power to order complete divestiture in response to an audit failure as the Plan recommends, the Commission should exercise that same power to direct immediate divestiture. Sierra Club Comments at 4.

Moreover, IGS's and the Sierra Club's recommendations would cause the Commission to encroach on FERC jurisdiction. Ohio law does not authorize the Commission to dismantle a multistate electric utility holding company. FES's initial Comments on the Plan explained that, 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.*, *federal law* authorizes the establishment of electric utility holding companies and permits them to employ shared services. Accordingly, the Commission must reject the suggestions raised by IGS and the Sierra Club.

(c) Recommendations to Reassign the SSO Obligation or Restructure SSO Service Are Impractical and Ill-timed

In its initial Comments on the Plan, FES emphasized the Commission's need to identify ways to improve the retail market while protecting consumers, and without burdening retail suppliers as they contend with developments in wholesale power markets outside the Commission's control. FES Comments at 3-4. Consistent with the need to protect customers while letting suppliers contend with wholesale market forces, FES urges the Commission to reject the recommendations of various participants for significant changes to the structure of SSO service, either by removing the EDU from the role of SSO provider, or eliminating an EDU's discretion in crafting its method of procuring default supply.

One participant, Direct, in its discussion of the Plan's proposed market evaluation metrics, urges the Commission to revise the seventh metric to allow for the potential for an "exited market" where default supply/SSO is provided by CRES providers. Direct Comments at

3. Another participant, Constellation NewEnergy, Inc. and Exelon Generation Company< LLC ("Constellation/Exelon"), encourage the Commission to "establish a standard, state-wide model for SSO supply procurement that will apply to all EDUs in Ohio as soon as is practicable." Constellation/Exelon Comments at 4-5. Finally, IGS's Comments are the least clear. IGS urges the Commission to "signal its intent to transition beyond the current default rate structure and take affirmative and immediate steps to do so."[2] While IGS asserts that, "[a]t a minimum,...[c]ustomers should have the option to choose a non-SSO product as soon as they sign up for distribution service with the EDU...," IGS indicates a preference that the Commission do something additional, in the near future if not in this proceeding, to "further the SSO towards a more competitive model" and "transition" the SSO product...." IGS Comments at 5-6.

These recommendations will substantially change the structure of SSO, requiring changes to Ohio statutes with no promise of near-term benefits to customers or competition. Ohio law requires an EDU to provide customers with SSO through an MRO or ESP; the law further provides an EDU with some discretion in crafting its ESP. Sections 4928.14-.143, O.R.C. FES respectfully submits that these recommendations seeking legislative changes shifting the SSO responsibility from EDUs to CRES providers are poorly timed and bad policy. EDUs can use the discretion the statute confers upon them in crafting an ESP to develop a plan responding to market developments and the needs of their respective service territories. Eliminating these tools of the EDU will compromise its ability to respond to market conditions, and will likely create customer dissatisfaction with Ohio's retail electricity generation market, to the detriment of all

[2] IGS appears to contend that significant changes to the current SSO structure are necessary to increase customer awareness and participation in the competitive electric markets. IGS Comments at 4-5. However, such an argument overlooks or undervalues Commission Staff's tireless efforts to educate the public, which included numerous meetings conducted across Ohio by the Commission's Office of Retail Competition.

CRES providers. Consequently, FES urges the Commission to focus on more practical near-term solutions to improving retail electric markets for customers and suppliers.

(d) Participation in EDU POR Programs Should Be Voluntary

In its Comments, FES recommended that participation in POR programs be *voluntary* for any CRES provider that uses consolidated EDU billing, as it is in Duke's POR program. FES explained that CRES providers that have invested the necessary time, effort and resources in managing collections should not bear responsibility to either pay for a program they do not need or a program which facilitates their competitors' operations. FES Comments at 10. Only Dayton Power & Light Company ("DP&L") recommends that if the Commission mandates implementation of a POR program for all EDUs, the Commission should further direct that "*[a]ll* CRES Providers must participate in the EDU POR program." DP&L Comments at 4 (emphasis added). DP&L offers no justification for mandatory CRES participation. For the reasons explained in FES's Comments, DP&L's recommendation is bad policy and should be rejected.

(e) Recommendations Requiring Seamless Moves Programs Contradict Ohio Law

FES explained in its Comments that a "warm transfer" is superior to seamless move and contract portability proposals because it is an immediately available, low cost solution for a shopping customer moving within an EDU's territory to retain the customer's current CRES contract; it makes shopping a personal experience for the customer; and, unlike the other proposed models, it encourages and promotes large-scale governmental aggregation as required by Ohio law. While seamless moves and contract portability are impersonal, in the words of Chairman Snitchler at the December 11, 2013 en banc hearing, warm transfer "put[s] the power in the hands of the consumer." Transcript at 173. Therefore, FES urged the Commission to reject the Plan's recommendation to adopt Pennsylvania's unidentified seamless moves proposal,

a proposal which the Pennsylvania Commission has yet to evaluate or even vet among stakeholders.

Given the lack of any detail in the Plan regarding Pennsylvania's incomplete seamless moves construct, participants that assume they support the Plan's recommendation could offer little advocacy in Comments. Indeed, these participants do not yet know what it is they are advocating. RESA's Comments echo the Plan's statement that the issues that prevented seamless moves discussed during subcommittee meetings have been resolved in Pennsylvania. RESA's attempt to explain Pennsylvania's solution is incoherent: "interested stakeholders in [Pennsylvania] believe that capacity will still be a part of the supplier's portfolio of existing accounts and, therefore, capacity concerns are already taken into consideration." RESA Comments at 9. Neither the Plan nor RESA offered any explanation about how the issues were addressed. There is no reasonable basis for the Commission to adopt the Plan's recommendation. FES urges the Commission to reject the seamless moves recommendation, which contradicts Ohio law, and instead adopt a warm transfer program for all Ohio EDUs.

(f) Recommendations Requiring the Use of and Payment For CRES Logos on EDU Bills Exceed the Commission's Authority and Violate Federal Law

FES's Comments urged rejection of the Plan's recommendation that all CRES providers be required to include their logos on EDUs' bills, as well as rejection of the Plan's recommendation that all CRES providers be required to contribute to an EDU's costs of including supplier logos on its bills. As FES explained, these requirements would exceed the Commission's authority and violate non-consenting CRES providers' rights under federal trademark law and the Constitution. FES Comments at 14-18.

Direct recognizes additional concerns with paying significant costs of including supplier logos on EDU bills while also supporting the inclusion of supplier logos on bills as a

"requirement" which the Commission should waive when the costs could act as a barrier to the market. Direct Comments at 5. In its Comments, FES explained that mandating that all CRES providers include their logos on EDU bills would violate an unwilling CRES provider's rights under federal trademark law and exceed the Commission's authority. FES Comments at 16-18. Based on this clear support, Direct's recommendations should be rejected.

RESA also expresses concern with the allocation of costs among too narrow or too broad a group of CRES providers. However, RESA asserts that "the one-time set-up fee should apply to all active CRES suppliers who are soliciting customers in the service territory *and* who are using EDU-consolidated billing." RESA Comments at 12. RESA's recommendation must be rejected because it would still require a CRES provider that does not include its logo on an EDU's bill to contribute to the EDU's costs of putting competing CRES providers' logos on its bills. As FES explained in its Comments, requiring a non-participating CRES provider to contribute to these costs would exceed the Commission's authority and violate the non-participating CRES provider's right to free speech. FES Comments at 16-18.

How a CRES provider — a competitive market participant – chooses to use its federally registered mark in commerce, or to spend its advertising budget, is beyond the Commission's jurisdiction. Simply put, the placement of a CRES provider's logo on an EDU's bill must be an option, not a requirement, and only those CRES providers that avail themselves of this option should be required to pay for it. Accordingly, the EDU's cost 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.

III. CONCLUSION

As explained above, FES urges the Commission to focus its efforts on protecting consumers and ensure they have a good experience with retail electric competition without burdening CRES providers with additional and unnecessary costs. FES appreciates the opportunity to submit these Reply Comments.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned herby certifies that a true and correct copy of the foregoing *Reply 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 20th day of February, 2014.

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