

**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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**APPLICATION FOR REHEARING OF FIRSTENERGY SOLUTIONS CORP.**

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Pursuant to §4903.10, R.C. and Ohio Administrative Code 4901-1-35, FirstEnergy Solutions Corp. (“FES”) seeks rehearing of the Commission’s November 18, 2015 Finding and Order (“Order”) in the above-captioned matter on the following grounds:

- I. The Order is unreasonable and unlawful because it does not comply with §119.03, R.C.;
- II. The Order is unreasonable because it will needlessly cause prices to rise; and
- III. The Order is unreasonable because it does not take into account the differences between customer classes.

WHEREFORE, FES respectfully requests that the Commission grant the Application for Rehearing.

Respectfully submitted,

/s/ Scott J. Casto

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**MEMORANDUM IN SUPPORT OF APPLICATION FOR REHEARING OF  
FIRSTENERGY SOLUTIONS CORP.**

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**I. Introduction**

The Commission initiated an investigation to determine whether it is unfair, misleading, deceptive or unconscionable to market contracts as fixed-rate contracts or as variable contracts with a guaranteed percent off the standard service offer (“SSO”) rate when the contracts include pass-through clauses.<sup>1</sup> Although the Commission indicated it became aware of such pass-through clauses contained in competitive electric service (“CRES”) provider contracts in March 2014,<sup>2</sup> the Commission has been aware of such clauses since at least 2005.<sup>3</sup> However, this investigation did not begin until 2014. Notwithstanding the fact that the use of pass-through clauses are industry standard, the Commission found that in *all* CRES contracts, whether residential, commercial, or industrial, fixed should mean fixed.<sup>4</sup> In doing so, the Commission created new rules outside of the normal rulemaking procedures that impact virtually every retail contract in the state of Ohio.<sup>5</sup> In addition, CRES providers may not include a pass-through clause in a

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<sup>1</sup> November 18, 2015 Finding and Order, at pg. 2.

<sup>2</sup> *Id.* at pg. 1.

<sup>3</sup> See 00-2027-EL-GAG, Supplemental Out-out Aggregation notice, filed February 10, 2005.

<sup>4</sup> Order, at pg. 11.

<sup>5</sup> *Id.* at pg. 13.

contract labeled as “fixed-rate.”<sup>6</sup> However, the Commission will allow regulatory-out clauses in limited circumstances.<sup>7</sup>

**II. The Order is Unreasonable and Unlawful Because it Does Not Comply With §119.03, R.C.**

§119.03, R.C., contains several important steps an agency such as the Commission must comply with when administering rules. Most importantly, it requires that in the adoption or amendment of any rule, “Reasonable public notice shall be given in the register of Ohio at least thirty days prior to the date set for a hearing....”<sup>8</sup> The Finding and Order completely disregards this requirement in adopting new language to OAC 4901:1-21.<sup>9</sup> Although the Commission did initiate a rule change proceeding, it is impossible for the rule to actually change by January 1, 2016 as there are only 14 days as of the date of this filing until CRES providers must abide by the Finding and Order based on rules that are not properly proscribed. The Commission must comply with its statutory obligation to provide for notice and an opportunity to be heard, which includes a business impact analysis, recommendations from the common sense initiative office, among others, especially when altering a rule that effects every single CRES contract. Therefore, the Commission must grant rehearing or stay enforcement of the Order until it has met its statutory obligations.

**III. The Order is Unreasonable Because it Will Needlessly Cause Prices to Rise.**

As explained in FES’ initial comments, CRES providers face various unforeseeable contingencies that could affect pricing during contract performance. The current rules provide an avenue to mitigate these contingencies by requiring the disclosure of any contract contingencies

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<sup>6</sup> *Id.*

<sup>7</sup> *Id.* at pg. 12.

<sup>8</sup> §119.03(A)

<sup>9</sup> Order at pg. 13.

or conditions precedent when making an offer.<sup>10</sup> Contingencies exist in contracts because of uncertainty. If the outcome contemplated by a contingency was certain to occur, then that risk would be known and quantifiable. Unfortunately, the environment in which customers and CRES providers operate is full of uncertainty, which is increased by the change in long-standing Commission rules. The result could prevent new suppliers from entering Ohio and cause active suppliers to eliminate certain products. A more important outcome is the certainty that the price all customers will pay for CRES will increase. The Order assures that events in the past that may have had a negligible impact on customers will now have upward price implications going forward. Without the ability to pass through costs of unpredictable and unforeseeable events, the market will undoubtedly see an increase in variable priced contracts, where a customer will bear the risk of all contingencies and market volatility. Customers have enjoyed lower fixed rates with the understanding that there are risks of contingencies. The Order extinguishes this benefit. If the freedom to contract is further hampered by the Order, then competition will suffer. Instead of prohibiting the use of properly disclosed and explained terms, the Commission should develop ways to educate customers through its Office of Retail Competition.

**IV. The Order is Unreasonable Because it Does Not Take Into Account the Differences Between Customer Classes.**

If the Commission declines to permit rehearing on the Order as it relates to all customers, it should instead restrict its ruling to only residential and small commercial customers. CRES providers market to customers that vary in consumption and sophistication. The level of detail contained in the Commission's rules acknowledge this reality. For example, OAC 4901:1-21-05(A) states various requirements a CRES provider must comply with when making an offer.

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<sup>10</sup> See OAC 4901:1-21-05(A)(7).

The definitions are concise and contemplate the relative ease by which residential and small commercial customers are billed. However, for large customers, the various factors that are included in a bill do not permit an offer to be given a simple label such as fixed. A contract may fix energy but provide for transmission or capacity costs to be passed through. Electric service is one of the major costs of doing business for larger customers. As a result, the resources and level of sophistication of these customers should not be muted by overreaching rules. When presented with a similar issue, the Pennsylvania Public Utility Commission acknowledged the distinction between residential and industrial customers. The Pennsylvania Commission noted that any restriction on fixed-price contracts containing a pass-through clause did not apply to industrial customers.<sup>11</sup>

## **V. Conclusion**

For the reasons stated above, the Commission should grant rehearing on the issues contained herein.

Respectfully submitted,

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<sup>11</sup> Guidelines for Use of Fixed Price Labels for Products with a Pass-Through Clause, Pennsylvania Public Utility Commission, Docket No. M-2013-2362961, Final Order at p. 30 (Nov. 14, 2013).

## 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 18<sup>th</sup> day of December, 2015. A courtesy copy will be sent via e-mail to the individuals below.

/s/ Scott J. Casto

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