BEFORE

**THE PUBLIC UTILITIES COMMISSION OF OHIO**

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| IN THE MATTER OF THE REVIEW OF THE OHIO EDISON COMPANY, THE CLEVELAND ELECTRIC ILLUMINATING COMPANY, AND THE TOLEDO EDISON COMPANY'S COMPLIANCE WITH R.C. 4928.17 AND THE OHIO ADM. CODE CHAPTER 4901:1-37 | )  )  )  )  ) | Case No. 17-0974-EL-UNC |

**COMMENTS OF IGS ENERGY**

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**COMMENTS OF IGS ENERGY**

1. **INTRODUCTION**

When the General Assembly restructured the Ohio retail electricity market, it recognized that it must establish a level playing field. To that end, Amended Substitute Senate Bill 3 (“SB 3”) required electric distribution utilities (“EDU”) to structurally separate their unregulated businesses from regulated businesses. Moreover, the law required each EDU to implement a formal corporate separation plan that ensures that the EDU will not use its regulated non-competitive services to provide an advantage, preference, or subsidy for the benefit of an affiliate or business unit that provides unregulated services.

The purpose of this proceeding is to audit and verify that the corporate separation plan of Ohio Edison Company, Toledo Edison Company, and Cleveland Electric Illuminating Company (collectively “FirstEnergy”) is working. In order to assist the Commission, after a request for proposal, the Commission selected an auditor, Sage Management Consultants, LLC (“Sage”), to draft a report evaluating whether FirstEnergy has complied with R.C. 4928.17 and Chapter 4901:1-37, ie, Ohio’s corporate separation laws and rules. On May 14, 2018, Sage issued its Audit Report assessing FirstEnergy’s compliance with Ohio’s the corporate separation laws and rules.

Interstate Gas Supply, Inc. (“IGS”) supports many of the recommendations contained in the Audit Report, which identify anticompetitive advantages that the FirstEnergy utilities have extended to their affiliate, FirstEnergy Solutions (“FES”). While the audit report correctly identified inappropriate behavior between FirstEnergy and its affiliate, the audit report contains a critical structural flaw—it failed to evaluate FirstEnergy’s provision of products and services other than retail electric services, ie unregulated non-electric services and whether additional action is needed to bring FirstEnergy’s practices into compliance with Ohio law and Commission precedent.

It is apparent that the Audit Report simply accepts without question that FirstEnergy provides these products under the umbrella of the monopoly utility without evaluating how this practice came to be or whether it is appropriate under Ohio law. It did not evaluate why FirstEnergy provides these products through the EDU—rather than an affiliate as required by the law.

The glaring hole in the Audit Report is particularly troubling, given that the Retail Energy Supply Association recently filed a corporate separation complaint against FirstEnergy alleging that it provides non-electric services in a manner that extends FirstEnergy’s unregulated business unit with an undue preference and competitive advantage—all while discriminating against other market participants. Based upon the undisputable facts, FirstEnergy provides unregulated non-electric products and services in violation of Ohio law, precedent, and in a fashion that discriminates against other suppliers of similar products. Therefore, IGS urges the Commission to direct FirstEnergy to modify its corporate separation plan to require all non-electric products to be provided through a fully separate affiliate, as required by Ohio law.

1. **BACKGROUND**
2. **Procedural and Factual Background**

Following the passage of SB 3 in 1999, FirstEnergy filed an electric transition plan (“ETP”) to separate and unbundle competitive and non-competitive services. As part of its ETP, FirstEnergy was required to implement a corporate separation plan, which complied with the requirements of R.C. 4928.17. That section—specifically, R.C. 4928.17(A)(1)—required full structural separation of all unregulated services and businesses from the EDU, although the law permitted a temporary exception from that requirement based upon a finding of good cause. Like many utilities, due to financial entanglements related to the financing of its competitive, unregulated assets, FirstEnergy sought and received, based upon a finding of good cause, an exception from the requirement to fully separate its unregulated businesses.[[1]](#footnote-1)

Although FirstEnergy subsequently amended its corporate separation plan from time to time, including the ultimate transfer of its generating assets to an affiliate, FirstEnergy never again received an exception based upon a finding of good cause from the requirement to provide non-electric services through a separate affiliate. FirstEnergy never sought additional approvals to offer non-electric services, rather it has continued to offer them under the umbrella of tariff language authorized as part of its ETP case.

On December 12, 2012, the Commission initiated an investigation into the development of the retail electric service market.[[2]](#footnote-2) In that entry, the Commission stated, “[a]s Ohio electric utilities are making the transition from functional to structural separation, the Commission finds it appropriate to evaluate the vitality of the competitive retail electric service markets supported by these legislative mandates now that the mandates have been in place sufficient time to assess the results.”[[3]](#footnote-3) In furtherance of its evaluation, the Commission solicited comments regarding several subjects and questions, including matters related to utilities’ corporate separation practices and their impact on the competitive market.[[4]](#footnote-4)

On January 16, 2014, following the submission of comments, Commission Staff issued a Market Development Work Plan finding, among other things, that “Staff fully believes it is imperative that utility and its affiliate activities should be vigilantly monitored to ensure compliance with section 4928.17, O.R.C. and Chapter 4901:1-37, O.A.C. Furthermore, alignment of cost causation with cost recovery is important in order to further Ohio's policy goals pursuant to Section 4928.02, O.R.C.”[[5]](#footnote-5) To that end, “Staff recommends that each utility's policy and procedures pertaining to compliance with the Code of Conduct rules between affiliates be audited at a minimum, every four years by the Staff of the Commission or by a third party auditor chosen by the Commission and under the direction of Staff.”[[6]](#footnote-6)

On March 26, 2014, the Commission issued its order in the *RMI Docket*, holding that “in light of the importance of vigilant monitoring of utility and affiliate activities, the Commission adopts Staff’s recommended audit schedule, unless the Commission subsequently orders otherwise, with the recovery of the cost of the audit as a normal operating expense.”[[7]](#footnote-7)

On April 12, 2017, the Commission opened this docket to initiate an audit of FirstEnergy’s compliance with R.C. 4928.17 and OAC 4901:1-37. On July 5, 2017, the Commission selected Sage Management Consultants, LLC to provide audit services to assist the Commission in its review.[[8]](#footnote-8)

On January 4, 2018, the Retail Energy Supply Association submitted a letter requesting that FirstEnergy’s Chief Ethics Officer “investigate probable violations of the FirstEnergy Ohio electric utilities’ (EDUs) Corporate Separation Plan.”[[9]](#footnote-9) The letter identified that FirstEnergy offers products and services other than retail electric service (non-electric services) in a manner that violates of its corporate separation plan, R.C. 4928.17, and filed tariffs. On February 8, 2018, FirstEnergy submitted a letter to RESA stating that:

1) the EDUs are permitted to offer certain products and services other than retail electric service under their corporate separation plan and existing tariff provisions, including the programs and services currently being offered by the EDUs in the Smartmart program; 2) that the probable violations alleged in RESA’s January 4, 2018 letter appear to be unfounded; and 3) that the EDUs’ offering of these programs and services are not in violation of RC 4928.17 or RC 4905.30.[[10]](#footnote-10)

On April 25, 2018, RESA filed a complaint against FirstEnergy at the Commission, alleging several violations of R.C. 4928.17 and other Ohio statutes prohibiting regulated entities from discriminating or providing undue preferences in the provision of services.[[11]](#footnote-11) Among other things, the complaint alleges that FirstEnergy utilizes non-competitive assets and resources, including the utility bill, to invoice and collect for non-electric products and services while denying non-affiliated third parties from using the same assets to provide the same or similar products:

16. The FirstEnergy EDUs utilize, or permit their affiliate(s) and/or third-party partner(s) to utilize, utility assets and resources for the marketing, advertising, promotion, financing and/or billing of Smartmart and HomeServe nonelectric products and services.

17. The FirstEnergy EDUs do not permit non-affiliated competitors to utilize the same utility assets and resources for the marketing, advertising, promotion, financing and/or billing of similar nonelectric services and products to the FirstEnergy EDUs’ customers.[[12]](#footnote-12)

On May 14, 2018, Sage Management Consultants, LLC issued an audit report assessing Ohio Edison Company’s, Cleveland Electric Illuminating Company’s, Toledo Edison Company’s (collectively, “FirstEnergy”) compliance with Ohio’s the corporate separation law.

On May 15, 2018, FirstEnergy filed an answer, admitting and denying certain aspects of RESA’s complaint.[[13]](#footnote-13) The complaint remains pending.

1. **Corporate Separation Requirements and the Audit Report’s Recommendations**

Ohio’s corporate separation requirements are set forth in R.C. 4928.17 and OAC Rule 4901:1-37. Specifically, the corporate separation plan must comply with the following:

* The plan provides, at minimum, provision of the competitive retail electric service *or the nonelectric product or service through a fully separated affiliate of the utility.* (emphasis added)
* The plan satisfies the public interest in preventing unfair competitive advantage and preventing the abuse of market power.
* The plan is sufficient to ensure that the utility will not extend any undue preference or advantage to any affiliate, division, or part of its own business engaged in the business of supplying the competitive retail electric service or nonelectric product or service, including, but not limited to, utility resources such as trucks, tools, office equipment, office space, supplies, customer and marketing information, advertising, billing and mailing systems, personnel, and training, without compensation based upon fully loaded embedded costs charged to the affiliate; and to ensure that any such affiliate, division, or part will not receive undue preference or advantage from any affiliate, division, or part of the business engaged in business of supplying the noncompetitive retail electric service. No such utility, affiliate, division, or part shall extend such undue preference.

Regarding the first requirements—structural separation—the law permitted a temporary exception, based upon a finding of good cause for an interim period provided in the order. The Commission has determined that the exception is not available to permit a utility to move backward in the restructuring process.[[14]](#footnote-14)

In evaluating FirstEnergy’s compliance with these requirements, the Audit Report largely focuses on FirstEnergy’s relationship with its affiliate, FES, recommending that FirstEnergy modify several practices which provide FES with an undue preference and competitive advantage. The Audit Report concludes that FES receives a competitive advantage from inappropriate changes made to the Retail Operations group. Specifically, in 2016, FES’ responsibilities and FirstEnergy’s management of non-electric products and services were transferred to the service company. “The Retail Sales and Marketing group formerly reported to the President of FES. The reporting relationship was transferred to the Service Company in 2016 when the responsibility for the FirstEnergy Products (FEP) back office was assigned to it.”[[15]](#footnote-15) “In 2016, responsibilities were added to this unit and it became a Service Company unit with both FES unregulated and FEP regulated functions.”[[16]](#footnote-16) Critical to this recommendation is the fact that the FEP Group is considered a component of EDU and thus has access to information and resources not available to other market participants.

The Audit Report also recommends that FES remove the words FirstEnergy from the name FirstEnergy Solutions. The Audit Report notes that Executives in the FEP Group, “tout the importance of using the FirstEnergy name with FirstEnergy Products, saying FirstEnergy is a ‘trusted supplier’ and the ‘FirstEnergy brand is prominent.’’[[17]](#footnote-17) Based upon this same reasoning, the Audit Report concludes that “[i]t is natural that some would infer that FirstEnergy Solutions is the same as their ‘trusted utility supplier’ and give greater consideration to FES in making their CRES supplier decisions.”[[18]](#footnote-18) Therefore, “Should FES continue to be a CRES provider in Ohio, it should have a different name that does not include “FirstEnergy” or any other name that implies a connection to the Ohio Companies.”[[19]](#footnote-19)

Interestingly, although the Audit Report identifies wrongdoing involving FES’ relationship with the division within FirstEnergy that provides non-electric services (FEP), the Audit Report does not mention or discuss either (1) the letter RESA sent to FirstEnergy alleging corporate separation violations, or (2) the complaint filed against FirstEnergy prior to the issuance of the Audit Report. It is not terribly surprising that the auditor does not appear to be aware of the complaint, given that the cost allocation manual does not contain all of the requirements detailed in the Commission’s rules, including the requirement to keep “[a] log of all complaints brought to the electric utility regarding this chapter.”[[20]](#footnote-20)

What does come as a surprise is that the Audit Report makes no conclusions one way or the other whether FirstEnergy’s provision of non-electric products is in conformity with Ohio’s corporate separation law. As discussed further below, the Audit Report accepts that FirstEnergy offers these products and treats them as a service to regulated customers.

In various places of the Audit Report identifies that FirstEnergy provides non-electric services through the FirstEnergy Products (FEP) group:

The only products and services other than retail electric service sold to the Ohio Companies’ customers by a FirstEnergy legal entity are provided by the Ohio Companies themselves as jobbing and contracting services or through the FirstEnergy Products (FEP) function. Jobbing and contracting services are provided by the Ohio Companies employees under a Public Utilities Commission of Ohio (PUCO) approved tariff. FEP is not a legal entity. It is a business unit operated by the FirstEnergy Service Company (Service Company) on behalf of the Ohio Companies and other FirstEnergy utility operating companies. There are no non-regulated competitive affiliates involved. The FEP function is described in Chapter V, Public Representation Disclosures. Service Company cost accounting and allocations, including for the FEP function, are governed by the FirstEnergy Cost Allocation Manual, which is covered in Chapter VI.[[21]](#footnote-21)

The “FEP back office operation has Ohio Companies’ regulated customer information . . . .”[[22]](#footnote-22) These services are often provided through a website known as Smart Mart:

The Marketing and Product Development group is responsible for the FirstEnergy Products (FEP) business unit and the FEP web-based Smart Mart. For clarity, it is also referred to as the FEP Business Unit in this report. Smart Mart sells products and services to the Ohio Companies’ and other FirstEnergy utility operating companies’ “regulated customers.”[[23]](#footnote-23)

The services provided by FEP on behalf of FirstEnergy are the same or similar services identified in the complaint filed by RESA.

The Audit Report assumes that FirstEnergy has authority to provide non-electric products and services under its tariff to “regulated customers”:

The ability to sell products to the Ohio Companies’ regulated customers is through a PUCO tariff which specifies types of products and services which can be sold, but does not specify individual products and prices. Example FEP Smart Mart products include smart thermostats and smart light bulbs (with cameras, speakers, or Wi-Fi boosters). Example services include appliance warrantees and electrician referrals.[[24]](#footnote-24)

Further, the Audit Report identifies that “Executives in this program tout the important of using the FirstEnergy name with FirstEnergy products, saying FirstEnergy is a ‘trusted supplier’ and the ‘FirstEnergy brand is prominent.’’[[25]](#footnote-25)

The Audit Report further identifies that FEP and Smart Mart provides services to FES upon request. Indeed, “this group will respond to an FES request for a product to bundle for a CRES sales offering.”[[26]](#footnote-26)

While the Audit Report does not go into detail how these products are invoiced or billed, that information is readily available on the Smart Mart website and acknowledged by FirstEnergy in the complaint filed by RESA.[[27]](#footnote-27) Specifically, FirstEnergy uses its consolidated utility bill to invoice customers for non-electric services.[[28]](#footnote-28) It may also provide this service for its affiliate, FES, as well when it responds to a request to bundle a “CRES sales offering.”[[29]](#footnote-29) FirstEnergy, however, refuses to permit other market participants, such as IGS or the members of the Retail Energy Supply Association to use the consolidated utility bill to invoice and collect non-electric services.

While the Audit Report identifies that FirstEnergy’s provision of non-electric products and services is “governed by the FirstEnergy Cost Allocation Manual”, the Audit Report does not specifically discuss how FirstEnergy allocates costs and revenues to the FEP group or whether such products are subsidized through non-competitive distribution rates. Moreover, the Audit Report does not evaluate how or if Homeserve is charged for services provided by FirstEnergy—such as billing—or the manner in which FirstEnergy and/or its parent company accounts for revenue or royalties received from Homeserve. In general, the Audit Report failed to evaluate whether FirstEnergy’s provision of non-electric services complies with R.C. 4928.17 and the Commission’s rules.

1. **COMMENTS**
2. **The Audit Report’s Failure to Evaluate FirstEnergy’s provision of non-electric services**

IGS is disappointed that the Audit Report failed to consider or evaluate whether FirstEnergy’s provision of non-electric services complies with Ohio law. The existence of a nearly two-decade old tariff does not provide a rubber stamp to evade R.C. 4928.17. Moreover, the complaint filed by RESA raised a host of questions that the Audit Report simply failed to address. Specifically, whether FirstEnergy has utilized non-competitive assets to provide an undue preference and competitive advantage to its internal business units that provides non-electric services. Such behavior clearly runs afoul of R.C. 4828.17(A)(2) and (3).

Moreover, as detailed in the complaint filed by RESA and demonstrated further in Attachment C, FirstEnergy is providing non-electric products and services in a discriminatory manner. Specifically, FirstEnergy utilizes non-competitive assets such as the consolidated utility bill to invoice and collect for non-electric services, while prohibiting CRES providers from using the same assets to provide the same or similar services. Again, this practice clearly violates R.C. 4928.17(A)(2) and (3).

Making matters worse, the Audit Report acknowledges that the FEP group has access to restricted utility customer information. This clearly provides a competitive advantage and preference in violation of the purpose and letter of the law.

Finally, the Audit Report fails to provide an evaluation of the manner in which FirstEnergy accounts for costs and revenues related to the provision of non-electric services, as well as costs and revenues related to its third party partner, Homeserve. While the Commission may prospectively mitigate this failure by requiring all non-electric services be provided by a separate affiliate, the Audit Report missed an important opportunity.

1. **The Audit Report’s Recommendation to Separate FES from the FEP Group is Insufficient to Comply with the Law**

The Audit Report senses that something is not right with the FirstEnergy structure, though it did not quite contemplate the extent of the wrongdoing. Specifically, the Audit Report identifies that inappropriate changes were made to the Retail Operations group when FEP and FES were brought under the same corporate structure. The problem stems from the sharing of employees and comingling regulated and unregulated businesses when the former has access to “regulated customer information”:

The FEP back office operation has Ohio Companies’ regulated customer information which the FES back office is prohibited from having. It is inappropriate for the FEP and FES back office operations to report to the same director. Further, the FES Retail Sales Vice President routinely participates in management meetings with other Service Company executives.

The placement of the FES CRES Retail Sales organization under the Service Company Marketing and Branding group makes the FES CRES Retail Sales Vice President part of the senior leadership team for a Service Company group that primarily serves the FirstEnergy regulated operating companies. Attendance by the FES CRES retail sales executive at meetings with other Service Company executives focused on regulated utility operations is problematic. It makes separation of regulated and competitive information highly challenging.[[30]](#footnote-30)

It is concerning that the FEP group may be a conduit to transfer sensitive regulated utility information to FES. But it is more concerning that the FEP group has access to that information in the first place—***the FEP group provides unregulated services***. It should have no access to any sensitive customer information. Such access would provide an undue preference and competitive advantage in violation of R.C. 4928.17(A)(2) and (3).

Rather than separating FES from the FEP group, the more appropriate course of action is to separate FEP from FirstEnergy and to cease offering non-electric services through the regulated utility as required by R.C. 4928.17(A)(1). That section requires FirstEnergy to provide non-electric products and services through a fully separate affiliate. Indeed, by transferring the provision of all non-electric services away from FirstEnergy to an affiliate no change to the current structure of the Retail Operations Group would be necessary.

1. **IGS Supports the Audit Report’s Recommendation to Remove a Link to FES from the FirstEnergy Website, But this Recommendation Should be Equally Applicable to Smart Mart**

The Audit Report identifies that it is inappropriate for the FirstEnergy website to include a link to the FES website.[[31]](#footnote-31) IGS agrees. But it is equally inappropriate that FirstEnergy advertises non-electric services and includes a link to the Smart Mart website.[[32]](#footnote-32) This is clearly an undue preference and competitive advantage to an internal business unit that provides unregulated services.

1. **IGS Supports the Audit Report’s Recommendation to Eliminate the FirstEnergy name from FES, But this Recommendation Should Apply to All Unregulated Businesses**

IGS supports the Audit Report’s recommendation that FES cease using the FirstEnergy name.[[33]](#footnote-33) Prohibitions against competitive entities leveraging the brand of the monopoly affiliate are commonplace other states such as Texas and Illinois.[[34]](#footnote-34) This recommendation, however, should be carried through to apply to all FirstEnergy entities that provide unregulated services.

1. **CONCLUSION**

For the reasons stated herein, IGS urges the Commission to take action to bring FirstEnergy’s practices into conformity with R.C. 4928.17.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a copy of the foregoing *Comments of IGS Energy* was served this 31st day of December 2018 via electronic mail upon the following:

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1. *In the Matter of the Application of FirstEnergy Corp. on behalf of Ohio Edison Company, the Cleveland Electric Illuminating Company, and the Toledo Edison Company for Approval of their Electric Transition Plans and for Authorization to Collect Transition Revenues*,Case No. 99-1212-ETP Order at 23-27 (Jul. 19, 2000). [↑](#footnote-ref-1)
2. *In the Matter of the Commission's Investigation of Ohio’s Retail Electric Service Market*, Case No. 12-3151-EL-COI, Entry (Dec. 12, 2012) (hereinafter referred to as the “*RMI Docket*”). [↑](#footnote-ref-2)
3. *Id.* at 1. [↑](#footnote-ref-3)
4. *Id.* at 3-5. [↑](#footnote-ref-4)
5. *RMI Docket*, Market Development Work Plan at 12 (Jan. 16, 2014) (hereinafter “Staff Report”). [↑](#footnote-ref-5)
6. *RMI Docket*, Staff Report at 13. [↑](#footnote-ref-6)
7. *RMI Docket*, Finding and Order at 16. [↑](#footnote-ref-7)
8. Entry at 1 (Jul. 5, 2017). [↑](#footnote-ref-8)
9. *Complaint of the Retail Energy Supply Association vs. Ohio Edison Company, Cleveland Electric Illuminating Company, and the Toledo Edison Company*, Case No. 18-0736-EL-CSS at Ex. A, p. 1 (Apr. 25, 2018) (Attachment A). [↑](#footnote-ref-9)
10. *Id.* at Ex. B. [↑](#footnote-ref-10)
11. *Id.*

    [↑](#footnote-ref-11)
12. *Id.* at para. 16 and 17. [↑](#footnote-ref-12)
13. Attachment B. [↑](#footnote-ref-13)
14. *In the Matter of the Application of Duke Energy Ohio, Inc. for Approval of its Fourth Amended Corporate Separation Plan Under R.C. 4928.17 and Ohio Adm. Code 4901:1-37*, Case Nos. 14-689-EL-UNC, *et al.*, Order on Remand at 2-4 (Jun. 14, 2017). [↑](#footnote-ref-14)
15. Audit Report at 13. [↑](#footnote-ref-15)
16. *Id.* [↑](#footnote-ref-16)
17. Audit Report at 98. [↑](#footnote-ref-17)
18. *Id.* [↑](#footnote-ref-18)
19. *Id.* at 98-99. [↑](#footnote-ref-19)
20. Audit Report at 120. [↑](#footnote-ref-20)
21. Audit Report at 65. [↑](#footnote-ref-21)
22. Audit Report at 34. [↑](#footnote-ref-22)
23. *Id.* at 94. [↑](#footnote-ref-23)
24. Audit Report at 94. [↑](#footnote-ref-24)
25. Audit Report at 98. [↑](#footnote-ref-25)
26. Audit Report at 94. [↑](#footnote-ref-26)
27. Attachment B at paras. 15 and 16. [↑](#footnote-ref-27)
28. Attachment C (containing the product offerings of several non-electric services offered by FirstEnergy and added to the monthly utility bill). [↑](#footnote-ref-28)
29. Audit Report at 94. [↑](#footnote-ref-29)
30. Audi Report at 34. [↑](#footnote-ref-30)
31. *Id.* at 98-99. [↑](#footnote-ref-31)
32. <https://www.firstenergycorp.com/content/customer/products/smartmart.html>. (accessible from the Ohio Edison home page). *See also* Attachment C. [↑](#footnote-ref-32)
33. Audit Report at 98-99. [↑](#footnote-ref-33)
34. *The Southern Company, AGL Resources Inc., and Northern Illinois Gas Company d/b/a Nicor Gas Company,* Case No. 15-0558 at 16 (Jun. 7, 2016) (authorizing a merger agreement and terminating Nicor Advanced Energy’s authority to use the word “Nicor” in the provision of competitive retail natural gas service); AEP Texas Commercial & Industrial Retail Limited Partnership v. Pub. Util. Commission of Texas, No. 03–13–00358–CV, Court of Appeals, Austin (Jul. 17, 2014) (affirming Commission prohibition against utilization of name “AEP” in conjunction with the provision of competitive retail electric service). [↑](#footnote-ref-34)