

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Review of The Ohio Edison)
Company, The Cleveland Electric Illuminating) Case No. 17-974-EL-UNC
Company, and The Toledo Edison Company's)
Compliance with R.C. 4928.17 and the Ohio)
Adm. Code Chapter 4901:1-37.)

**COMMENTS
BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL**

I. INTRODUCTION

Corporate separation between electric monopolies and their unregulated affiliates provides protection for captive monopoly consumers against (among other things) subsidizing utility affiliates. And corporate separation protects the competitive electric markets that benefit Ohio consumers. In this regard, the Ohio General Assembly set forth this policy that protects consumers:

Ensure effective competition in the provision of retail electric service by avoiding anticompetitive subsidies flowing from a noncompetitive retail electric service to a competitive retail electric service or to a product or service other than retail electric service, and vice versa, including by prohibiting the recovery of any generation-related costs through distribution or transmission rates.¹

The Office of the Ohio Consumers' Counsel ("OCC") welcomes the opportunity to file comments on behalf of the 1.9 million residential utility customers of the FirstEnergy Utilities. OCC's comments are derived in part from, and are parallel with,

¹ R.C. 4928.02(H).

the Final Report of the Compliance Audit (“Compliance Audit Report”) submitted by SAGE Management Consultants, Inc. (“Auditor”) to the PUCO on May 14, 2018.²

OCC supports many of the findings and recommendations in the Compliance Audit Report. The PUCO should consider and adopt these findings and recommendations in a timely manner to protect the customers of the Utilities under R.C. 4928.17 and 4928.02 and the PUCO’s corporate separation rules in Ohio Adm. Code 4901:1-37, among other authority.

OCC focuses on those findings and recommendations in the Compliance Audit Report that are most important for consumer protection and for fostering for Ohioans a competitive and fair electric market. Our comments also center on those issues directly related to the prevention of market power abuse by the Utilities, the FirstEnergy Corporation, and its subsidiaries.

II. CONSUMER PROTECTION IN COMPETITIVE RETAIL GENERATION SERVICES AND PUBLIC REPRESENTATIONS AND DISCLOSURES

A. To protect customers the sale of the retail electric service business of FirstEnergy Solutions (“FES”) should be resolved as soon as possible.

In its General Findings (3), the Auditor finds “The FirstEnergy exit of the competitive generation business and the competitive retail electric services business in Ohio will reduce the risk to Ohio ratepayers from affiliate relationships and transactions with the Ohio Companies’ affiliates.”³ OCC agrees with this assessment. The current delay in the pending sale transaction in FES’ bankruptcy proceeding creates uncertainty.

² PUCO Case No. 17-0974-EL-UNC, Compliance Audit of the FirstEnergy Operating Companies with the Corporate Separation Rules of the Public Utilities Commission of Ohio, Final Report (May 14, 2018).

³ See Compliance Audit Report at 19.

Uncertainty can lead to customer confusion and possibly additional costs to the customers of the Utilities. Timely resolution of the sale of FES's retail generation business will eliminate or significantly reduce the potential harm to customers.

- B. The name “FirstEnergy” should be removed from the name of FirstEnergy Solutions to eliminate anti-competitive bias and customer confusion in the market. As a secondary alternative, FES should pay to the FirstEnergy Utilities a substantial royalty for the use of the FirstEnergy name, and the royalty revenues should be used as an offset on utility consumers’ electric bills.**

In its Findings (2) of Section V: Public Representations Disclosures, the Auditor finds “FirstEnergy Solutions’ successful competitive retail electric services in the Ohio Companies’ territories may be related to its use of the FirstEnergy name.”⁴ This is a reasonable finding by the Auditor. The PUCO should adopt the Auditor’s recommendation to remove “FirstEnergy” from the name of FirstEnergy Solutions, to eliminate affiliate bias.⁵

This “affiliate bias” favoring FES’s retail generation business is not justified. FES’s use of the FirstEnergy name can mislead customers who are making choices in the electric market, contrary to R.C. 4928.10. In this regard, R.C. 4928.10 prohibits, *inter alia*, unfair, deceptive sales and marketing practices. The PUCO rules, set forth in Ohio Adm. Code 4901:1-37-04(D)(8), require utilities to use reasonable efforts to protect consumers against unreasonable sales practices.⁶ Also, R.C. 4928.02(I) prohibits “unreasonable sales practices.” FES’s use of the FirstEnergy name is unfair to those

⁴ Id. at 97.

⁵ Id. at 98.

⁶ See also the Ohio Consumer Sales Practices Act, R.C. Chapter 1345, et al., that protects customers from unfair or deceptive acts or practices in connection with consumer transactions.

suppliers not affiliated with FirstEnergy, including that it is a “market deficiency” under R.C. 4928.02(I). OCC raised concerns about FirstEnergy’s marketing (through FES) in filings at the PUCO in the year 2000.⁷ Now, nearly 20 years after the legislature deregulated the electric market, it is long overdue that this “affiliate bias” should be eliminated. The recommendation by the Auditor to achieve this goal is reasonable and cost effective.

If FES sells its retail generation business in Ohio, then the new owner should be precluded from using the “FirstEnergy” name going forward. If FES keeps its retail generation business in Ohio, FES should use a different name that does not include “FirstEnergy” or any other name that implies a connection to the three FirstEnergy Ohio Utilities.

If the PUCO continues to allow FES (or its successor) to use the FirstEnergy name, then FES should be required to pay, on a continuing basis, a substantial royalty to the FirstEnergy Utilities for the use of the FirstEnergy name, reputation and goodwill that has economic value. Otherwise, customers are effectively subsidizing the operations of FES. FES’s royalty payment will be fairer for competition. And the royalty should be directly applied as an offset on utility customers’ bills, to defray what is in effect a subsidy to the affiliate. The royalty should be based on a percentage of FES’s (or its successors’) gross revenues.

⁷ See *Exelon et al. v. FirstEnergy Service Corp.*, Case No. 00-1862-EL-CSS, OCC Motion to Intervene and Memorandum in Support at 3 (Oct. 30, 2000); *In the Matter of the Application of FirstEnergy Services Corp. for Certification for Retail Generation Providers*, Case No. 00-1742-EL-CRS, OCC Motion to Intervene (Oct. 30, 2000).

C. The links between the FirstEnergy website and the FirstEnergy Solutions website should be removed to prevent customer confusion and an unfair competitive advantage.

In its Findings (3) of Section V: Public Representations Disclosures, the Auditor finds “The link to the FES website from the FirstEnergy website provides an unfair advantage”⁸ OCC agrees. The link between the FirstEnergy website (which also represents the three Ohio Utilities) to the FES website could be interpreted by customers as an endorsement of the FES competitive retail generation service by the Utilities which could lead to customer confusion and an unfair competitive advantage. There is no useful public interest purpose for keeping such a link between the two websites in terms of public representations and disclosures.

III. CONSUMER PROTECTION REGARDING THE COMPLIANCE PROGRAM ADDENDUM OF THE OHIO CORPORATE SEPARATION RULES

OCC supports the several findings and recommendations by the Auditor in this area. Specifically, OCC agrees with the General Findings (4), (5), (6), and (7) of the Compliance Audit Report. These Findings are:

- (4) FirstEnergy relies on Federal Energy Regulatory Commission rule compliance for the Ohio Companies’ corporation requirement compliance; there is no separate Ohio Corporate Separation Rule compliance program.⁹
- (5) The FERC rule compliance program does not cover all of the Ohio Corporate Separation Plan Code of Conduct articles.¹⁰
- (6) The assignment of FES CRES retail sales and service responsibility to the Service Company and the designation

⁸ Id.

⁹ Id. at 19.

¹⁰ Id. at 28.

of FES CRES sales and service leaders as Shared Services Employees is highly inappropriate.¹¹

- (7) The FERC classification designations for Shared Services Employee and Shared Senior Officer are overused.¹²

The PUCO should take immediate actions to address these Findings. The General Recommendations (1), (2), and (3) made in the Compliance Audit Report should serve as a good starting point in remedying the deficiencies of FirstEnergy's Corporate Separation Compliance programs. These Recommendations by the Auditor are:

- (1) Develop an Ohio Corporate Separation Rules Compliance Program addendum to the FERC and NERC CIP Compliance Programs.¹³
- (2) Transfer all Service Company personnel who support FES CRES sales and customer service in Ohio to FES.¹⁴
- (3) Once the plan for the exit of competitive commodity service is clear, reexamine the FERC classification for all positions.¹⁵

IV. TRANSMISSION AND DISTRIBUTION SYSTEM ACCESS

OCC has reviewed the findings and recommendations by the Auditor in this area. OCC supports Findings (3), (4), and (5) of Section II Transmission and Distribution System Access of the Compliance Audit Report. These Findings are:

- (3) The FERC compliance program relies on FERC Standards of Conduct training and FERC Affiliate Restrictions training for Ohio Corporate Separation Rules compliance beyond the physical and information technology employee

¹¹ Id. at 34.

¹² Id. at 35.

¹³ Id. at 36.

¹⁴ Id.

¹⁵ Id. at 37.

separations; however, there are many non-work opportunities for Competitive marketing Function, Transmission Function, and Regulated Employees to interact that are not explicitly covered by the compliance training programs.¹⁶

- (4) While there are strict physical and information system security measures, there are no security controls over FirstEnergy emails, land line phones, or cell phones.¹⁷
- (5) Physical security procedures for non-NERC/CIP facilities are not always followed.¹⁸

The deficiencies and problems identified by the Auditor in this area are related mostly to the internal operations of FirstEnergy and the Utilities. They do not necessarily or directly affect the participants in Ohio's retail generation market. However, they are security-related issues and the customers of FirstEnergy and the Utilities would likely be adversely impacted from service interruptions, security breaches, and any additional costs of correcting these adverse impacts. The PUCO should take timely actions, including the three Recommendations in Section II of the Compliance Audit Report. These three Recommendations are:

- (1) Amend the Affiliate Restriction training to emphasize non-work solutions.¹⁹
- (2) Develop and Implement an audit program for email and both land line and cell phone calls to ensure that restricted information is not being passed between different FERC classification employees.²⁰

¹⁶ See Compliance Audit Report at 60.

¹⁷ Id. at 62.

¹⁸ Id.

¹⁹ Id. at 63.

²⁰ Id.

- (3) Reemphasize following established security procedures in non-NERC/CIP facilities.²¹

V. CONSUMER PROTECTION REGARDING COMPARABLE ACCESS

Comparable access is a hallmark of a successful competitive market. Under the Ohio Administrative Code, the electric utility is required to provide comparable access to products and services related to tariff products and services. Specifically, “The electric utility shall not, through a tariff provision, a contract, or otherwise, give its affiliates or customers of affiliates preferential treatment or advantages over nonaffiliated competitors of retail electric service or their customers in matters relating to any product and/or service.”²²

The Auditor did not find that any relevant preferential treatment or advantages from the Utilities were given to FES or FES customers. However, the Auditor did identify two issues related to the availability and skill set of the customer service representatives (CSRs) working in the customer contact centers. They are detailed in Findings (5) and (6) of Section IV. Comparable Access. These two Findings are:

- (5) The use of a contractor to audition potential new CSR employees is common among utility companies; however, the majority of CSR contract candidates do not become FirstEnergy Employees.²³
- (6) The adequacy of the training program and the quality assurance of the work performed by one of the external contractors has not been verified by FirstEnergy Customer Service.²⁴

²¹ See Compliance Audit Report at 63.

²² See OAC 4901:1-37-04 (D) (10) (c).

²³ See Compliance Audit Report at 84.

²⁴ See Compliance Audit Report at 85.

The PUCO should take timely actions, including the two recommendations made in Section IV of the Compliance Audit Report.²⁵

VI. CONSUMER PROTECTION REGARDING THE COST ALLOCATION MANUAL

The use of a Cost Allocation Manual (“CAM”) is intended to safeguard consumers from cross-subsidization between the electric utility and its unregulated affiliates. That safeguard would comport with R.C. 4928.02(H). In general, the Auditor did not identify any prevalent and serious problems related to cross-subsidization between the Ohio Companies and their affiliates.

However, the Compliance Audit Report did identify two problems and contains two recommendations. OCC supports the two Findings of (4) and (12) in Section VI of the Compliance Audit Report. The PUCO should adopt and implement the two Recommendations as soon as possible. The two Findings are:

- (1) One of the CAM’s 18 allocation methods uses an arbitrary factor.²⁶
- (2) The CAM does not include all of the elements required by the Ohio Administrative Code.²⁷

The two Recommendations regarding the CAM are:

- (1) Reconfigure the “Multiple Factor – All” allocation method based on measurable factors.²⁸
- (2) Include all of the elements required by the Ohio Administrative Code (OAC) in the FirstEnergy CAM.²⁹

²⁵ Id.

²⁶ See Compliance Audit Report at 118.

²⁷ Id. at 120.

²⁸ Id. at 121.

²⁹ Id. at 121.

VII. CONCLUSION

Ohio's corporate separation rules are intended, for consumers, to foster a level playing field where all participants can compete freely and fairly, to prevent an unfair competitive advantage for certain participants, to prevent cross-subsidization between regulated and unregulated affiliates, and to prohibit the abuse of market power by the regulated utility or other market participants.³⁰ These issues are important to customers who rely on the competitive market to produce reasonably priced retail electric generation service. And the issues are important to customers who could be subjected to paying more if their utility is subsidizing an affiliate.

As discussed earlier, the Utilities and FirstEnergy have not clearly demonstrated that they are complying with the corporate separation requirements in Ohio. Changes or improvements on the part of the Utilities and FirstEnergy are needed for consumer protection. The Auditor has made many recommendations to resolve areas of non-compliance. The PUCO should adopt the Auditor's recommendations, as discussed above.

³⁰ Ohio Adm. Code 4901:1-37-02.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Comments was served via electronic transmission, to the persons listed below, on this 31st day of December 2018.

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