

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Review of Ohio Edison)	
Company, The Cleveland Electric Illuminating)	
Company, and The Toledo Edison Company's)	Case No. 17-974-EL-UNC
Compliance with R.C. 4928.17 and Ohio Admin.)	
Code Chapter 4902:1-37.)	

**REPLY COMMENTS
OF
NORTHEAST OHIO PUBLIC ENERGY COUNCIL**

I. SUMMARY

In its Initial Comments, the Northeast Ohio Public Energy Council (“NOPEC”) explained that FirstEnergy Solutions (“FES”) has been violating, and continues to violate, the PUCO’s marketing rules. NOPEC urged the PUCO to order FES to immediately cease the marketing, solicitation and sales of competitive retail electric services (“CRES”) to Ohio consumers.¹ The Operating Companies² confirm these rule violations in their Initial Comments by admitting that FEC “no longer provides competitive energy services,”³ and that FES no longer is under the FEC “corporate umbrella.”⁴ Yet, incredibly, FES continues to market itself under the “FirstEnergy” brand – claiming to be an FEC subsidiary affiliated with the Operating Companies.⁵ By doing so, FES is intentionally misleading and deceiving its prospective and current customers in violation of R.C. 4928.10, O.A.C. 4901:1-21-02(A)(2)(c), O.A.C. 4901:1-21-03(A), and O.A.C.

¹ NOPEC Initial Comments at 7-8.

² Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company (the “Operating Companies”) are Ohio monopoly electric distribution utilities (“EDUs”) whose parent is FirstEnergy Corp (“FEC”). FEC also is the parent of FES, a competitive retail electric service (“CRES”) provider in Ohio. FES and the Operating Companies are affiliate entities.

³ Companies’ Initial Comments at 1-2

⁴ Companies’ Initial Comments at 2.

⁵ See NOPEC Initial Comments, Attachment A; see, also, <https://www.fes.com/content/fes/offers/list.html> and Attachment A hereto.

4901:1-21-05(C).

Accordingly, for the reasons stated in its Initial Comments, and those provided below, NOPEC urges the PUCO to:

1. order FES to immediately cease all marketing, solicitations, and sales activities under the “FirstEnergy” brand, and
2. reject any future certificate application or renewal certificate application that seeks to provide CRES under the “FirstEnergy” name.

II. REPLY COMMENTS

All persons filing initial comments in this proceeding—except the Operating Companies—support the SAGE audit report’s recommendation⁶ that FES be ordered to remove “FirstEnergy” from its name.⁷ SAGE made its recommendation finding that FES’s use of the “FirstEnergy” name violated the Operating Companies’ Code of Conduct in their corporate separation plan.⁸ In their initial comments, the Operating Companies make two claims:

1. The Audit Report’s recommendation is moot, because FES no longer is under FEC’s “corporate umbrella.”⁹ In other words, because FES is no longer affiliated with the Operating Companies, the Code of Conduct’s affiliate separate rules no longer apply.
2. Even though FES no longer is affiliated with the Operating Companies, the PUCO should not order FES to change its name, because such an order “likely” is unlawful.¹⁰

Nothing about these claims absolve FES from its current and continuing unlawful conduct.

⁶ See SAGE Management Consultants, LLC [“SAGE”] Final Report for Compliance Audit of the FirstEnergy Operating Companies with the Corporate Separation Rules of the Public Utilities Commission of Ohio (May 14, 2018) (“Audit Report”) at 46, 98-99.

⁷ See initial comments of the Office of the Ohio Consumers’ Counsel at 3-5, Interstate Gas Supply, Inc. at 16-17, Retail Energy Supply Association at 9.

⁸ See Audit Report at 98-99.

⁹ Companies’ Initial Comments at 2.

¹⁰ Companies’ Initial Comments at 12.

A. By Admitting that FES no Longer is under FEC’s “corporate umbrella,” the Operating Companies Admit that FES has been Violating, and Continues to Violate, the PUCO’s Marketing Rules.

NOPEC and the Operating Companies agree on one thing—that because of events in FES’s ongoing Chapter 11 bankruptcy proceeding,¹¹ FES is no longer considered a subsidiary of FEC or affiliated with the Operating Companies. Indeed, NOPEC’s Initial Comments explain that FEC’s control over FES ended on September 26, 2018, when the Bankruptcy Court approved a settlement freeing FEC of its obligations and responsibilities to FES.¹²

Nevertheless, after FEC admittedly terminated the corporate relationship with FES on September 26, 2018, FES continued to market, solicit, and make sales to customers using the “FirstEnergy” name. In fact, as of the date of this filing, FES is using the “FirstEnergy” name to market, solicit and enroll customers to multi-year contracts through January 2022. See Attachment A; see, also, <https://www.fes.com/content/fes/offers/list.html>. More egregiously, to facilitate its sales, FES is expressly misrepresenting itself as a subsidiary of FEC and an affiliate of the Operating Companies by the following “disclaimer:”

FirstEnergy Solutions Corp. and Allegheny Energy Supply Company, LLC are unregulated subsidiaries of FirstEnergy Corp. Neither FirstEnergy Solutions Corp. nor Allegheny Energy Supply Company, LLC are the same company as FirstEnergy Corp. The prices of FirstEnergy Solutions Corp. and Allegheny Energy Supply Company, LLC are not regulated by the state public utility commissions. You do not have to buy electricity from FirstEnergy Solutions Corp. or Allegheny Energy Supply Company LLC in order to receive the same quality regulated services from FirstEnergy Corp.’s regulated electric utilities - Ohio Edison Company, The Cleveland Electric Illuminating Company, The Toledo Edison Company, West Penn Power Company, Pennsylvania Power Company, Pennsylvania Electric Company, Metropolitan Edison Company, Jersey Central Power & Light

¹¹ See *In re FirstEnergy Solutions Corp.*, Bankr. N.D. Ohio No. 18-50757 (Jointly Administered) (hereinafter “*FES Bankruptcy Proceeding*.”).

¹² NOPEC Initial Comments at 5-10; *FES Bankruptcy Proceeding*, Dkt. No. 1465.

Company, Monongahela Power Company, The Potomac Edison Company, and American Transmission Systems, Incorporated.
[*Id.*]

FES's conduct violates R.C. 4928.10, O.A.C. 4901:1-21-02(A)(2)(c), O.A.C. 4901:1-21-03(A), and O.A.C. 4901:1-21-05(C) in two respects. First, FES's explicit representation that it is a subsidiary of FEC and an affiliate of the Operating Companies, when it admittedly is no longer under FEC's umbrella, is misleading and deceptive to Ohio's consumers. Second, as the Audit Report finds, FES uses the "FirstEnergy" name to connote to customers that FES is a part of the FirstEnergy family, and that if customers enroll with FES they will continue to receive the same "trusted utility service" that they have received for years. Even if FES's unlawful use of the disclaimer were cured, FES's continued use of the "FirstEnergy" name would continue to mislead and deceive customers to believe that they will receive services under the FEC umbrella of companies, when they admittedly will not. FES's conduct becomes unconscionable, considering that it is misleading and deceiving customers to believe they will receive service from FES through January 2022, when FES already had entered into the Asset Purchase Agreement to sell FES's Ohio retail customer service contracts to Exelon on July 9, 2018.¹³

For these reasons, and those contained in NOPEC's Initial Comments, the PUCO must find that FES is in violation of R.C. 4928.10, O.A.C. 4901:1-21-02(A)(2)(c), O.A.C. 4901:1-21-03(A), and O.A.C. 4901:1-21-05(C). NOPEC urges the PUCO to order FES to immediately remove "FirstEnergy" from its name, and enforce all other remedies or penalties as the PUCO deems fit.

¹³ See NOPEC Initial Comments at 6.

B. The PUCO has the Authority to Reject an Unaffiliated CRES Provider's Proposed Use of the FirstEnergy Name, and May do so in the Certification or Renewal Process.

Curiously, although the Operating Companies admit they no longer are affiliated with, or responsible for, FES, they support FES's continued use of the "FirstEnergy" name. They claim that preventing a non-affiliated CRES from using the "FirstEnergy" name would be unlawful under the U.S. Constitution and the PUCO's own precedent. The Operating Companies' arguments are without merit. The PUCO may refuse to sanction use of the "FirstEnergy" name as a part of the certification or renewal process.

1. The Operating Companies' Constitutional arguments must be rejected.

The Operating Companies cite broad Constitutional issues that allegedly would prevent the PUCO from ordering a CRES to change its name.¹⁴ As a threshold matter, the PUCO lacks jurisdiction to consider Constitutional issues. Thus, the PUCO must reject the Operating Companies' Constitutional claims.¹⁵

In any event, the Operating Companies provide no analysis to support their claims—and for good reason: the courts have rejected such challenges. *See e.g., AEP Texas Commercial & Indus. Retail Ltd. Partnership v. Pub. Util. Com'n of Texas*, 436 S.W.3d 890, 923-924 (Tex. App. 2014), which upheld the Public Utility Commission of Texas' order denying shared use of the AEP name and logo, finding that that the government may freely regulate commercial speech that is misleading. Citing *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 557, 563 (1980); *Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 623-624 (1995). *See, also, Illinois Power Co. v. Illinois Commerce Com'n*, 316 Ill.App.3d 254, 261 (Ill. App. 2000)

¹⁴ Companies' Initial Comments at 12.

¹⁵ *Kister v. AT&T Ohio*, Case No. 11-3467-TP-CSS, Entry (February 29, 2012) ("The Public Utilities Commission of Ohio may exercise no jurisdiction beyond that conferred by statute. There is no Ohio statute which confers jurisdiction upon the Commission to hear and resolve disputes involving a person's rights under the [U.S. Constitution].")

(“Since the ban on [utility/affiliate] joint advertising and marketing passes muster under the intermediate level of scrutiny for the regulation of commercial speech, we reject [the utilities’] claims that the ban is unconstitutional.”).

2. The PUCO’s precedent expressly forbids a non-affiliated CRES provider from using an electric distribution utility’s name when such use is unfair, misleading or deceptive.

The Operating Companies also claim that the PUCO “soundly rejected” a proposal that would forbid joint branding, citing *In the Matter of the Commission’s Review of its Rules for Competitive Retail Electric Service*, Case No. 12-1924-EL-ORD, Finding and Order (December 18, 2013) (“*In Re Review of CRES*”), at 18.¹⁶ The Operating Companies grossly misstate the PUCO’s finding. In that rulemaking proceeding the PUCO found:

***the Commission does not believe that an *unaffiliated* CRES supplier should *necessarily* be prohibited from using the incumbent utility’s name and/or logo, *absent other circumstances indicating that use of the name and/or logo is unfair, misleading, or deceptive*. [*Id.* (emphasis supplied)]

The circumstances surrounding FES’s bankruptcy proceeding serve as the gold standard to prevent any unaffiliated CRES from taking the “FirstEnergy” name. FES has been providing CRES for nearly twenty years under the “FirstEnergy” brand shared with its parent (FEC), the affiliated Operating Companies, affiliated generation companies,¹⁷ an affiliated services company,¹⁸ and numerous other affiliates. During this time, it provided service by using the legacy FirstEnergy generating facilities and sharing certain services with the Operating Companies and other affiliates as a part of the “FirstEnergy” family. However, since at least 2016, FEC has made it known to the public and in the trade press that it no longer would provide

¹⁶ Companies’ Initial Comments at 12.

¹⁷ FirstEnergy Generation, LLC and FirstEnergy Nuclear Generation, LLC.

¹⁸ FirstEnergy Service Company.

competitive energy services¹⁹ and, indeed, was selling or deactivating its legacy generating facilities.²⁰ As of September 26, 2018, FEC confirmed to the public and in the trade press that FES is no longer a part of this family. Because the provision of service under the “FirstEnergy” name connotes the provision of “trusted utility service” by the corporate family, a non-affiliated CRES provider’s use of the “FirstEnergy” name would be tremendously confusing to consumers and inherently misleading and deceptive. Thus, *In Re Review of CRES* compels the PUCO to prevent FES’s continued use of the “FirstEnergy” name.

3. The PUCO has the authority to disallow an initial or renewal certification application if the CRES provider’s proposed name is unfair, misleading or deceptive.

NOPEC assumes that, on reply, commenters will cite to the PUCO’s precedent in *Ohio Consumers’ Counsel v. Interstate Gas Supply d/b/a Columbia Retail Energy*, Case No. 10-2395-GA-CSS, Opinion and Order (August 15, 2012) (“*IGS*”) for the proposition that a non-affiliated company may share a public utility’s name and logo. However, *IGS* is not controlling because it was decided under the PUCO’s quasi-judiciary (notice and hearing) authority granted by R.C. 4905.26 and 4929.24.²¹ The PUCO’s holding simply provided that the complaining parties had failed to provide sufficient evidence to maintain their burden of proof that *IGS had violated* a provision of R.C. Title 49,²² *i.e.*, that *IGS*’s use of part of a utility’s name and logo was unfair, misleading or deceptive.

¹⁹ See NOPEC Initial Comments at 6; See, also, <https://www.rtoinsider.com/firstenergy-competitive-generation-34029/>; see also https://www.firstenergycorp.com/newsroom/news_articles/firstenergy-s-transformation-to-fully-regulated-utility-company-.html.

²⁰ See NOPEC Initial Comments at 6; See, also <https://www.fes.com/content/fes/home/restructuring.html>; see also <https://www.prnewswire.com/news-releases/firstenergy-solutions-files-deactivation-notice-for-oil--and-coal-fired-plants-in-ohio-and-pennsylvania-300704459.html>

²¹ The PUCO is vested with quasi-judicial and quasi-legislative authority. *Consumers’ Counsel v. Pub. Util. Comm.*, 70 Ohio St.3d 244, 638 N.E.2d 550 (1994).

²² *IGS* at 17, 18.

On the other hand, certification applications are processed under the PUCO's quasi-legislative authority.²³ A hearing is not required to process a certification or renewal application.²⁴ Moreover, unlike a quasi-judicial proceeding, the issue is not whether the evidence supports a past violation of a statute or rule, but whether the applicant has provided documentation to show that it is fit to provide service prospectively that is compliant with the PUCO's rules.²⁵ The PUCO has the discretion to deny the application if it deems that the application does not comply with its rules, including rules intended to prevent unfair, misleading and deceptive acts and practices.²⁶

These distinctions are important because FES's current certificate to provide CRES in Ohio is due to expire May 1, 2019.²⁷ In their initial comments, the Operating Companies have failed to address what reorganization plan FES will choose in the Bankruptcy Proceeding—whether it will proceed with the sale of retail customer contracts to Exelon and abandon its certificate, or retain all or some such contracts as a non-affiliate, or even an affiliate, of the Operating Companies. If the entity emerging from Chapter 11 seeks certification, through an initial or renewal application, the certificate applicant should be denied use of the “FirstEnergy” name because it would be unfair, misleading and deceptive, for the reasons stated in this Reply and NOPEC's Initial Comments.

²³ See, e.g., *Alabama Pub. Service Comm. v. AAA Motor Lines*, 131 So.2d 172 (1961), citing *Avery Freight Lines v. White*, 245 Ala. 618, 18 So. 2d 394 (1944) (“In the exercise of its supervisory or executive powers over public utilities, the Commission possesses quasi-legislative powers, such as the granting of franchises.”).

²⁴ R.C. 4928.08(B), O.A.C. 4901:1-24-10(A)(2)(c).

²⁵ R.C. 4928.08(B) and (C), O.A.C. 4901:1-24-10B)(2); *Accord: AEP Texas Commercial & Indus. Retail Ltd. Partnership v. Pub. Util. Com'n of Texas*, 436 S.W.3d 890, 923-924 (Tex. App. 2014),

²⁶ R.C. 4928.08(B) and (C), 4928.10; O.A.C. 4901:1-21-02(A)(2)(c), O.A.C. 4901:1-21-03(A), and O.A.C. 4901:1-21-05(C)

²⁷ See *In Re Certification of FirstEnergy Solutions*, PUCO Case No. 00-1742-EL-CSS, Motion (October 22, 2018), Entry (October 26, 2018).

C. Should FES Reorganize under Chapter 11 as an Affiliate of the Operating Companies, the PUCO Must Adopt the SAGE Audit Report's Finding that Use of the "FirstEnergy" Name Violates the Companies' Code of Conduct.

As stated above, the Operating Companies did not disclose in their initial comments what reorganization plan FES would submit to the Bankruptcy Court. Arguably, FES could seek to regain its status with FEC and the Operating Companies. In that event, the PUCO not only should deny FES's certification renewal application, as discussed above; but, also find that FES's use of the "FirstEnergy" name violates the Operating Companies' Code of Conduct contained in their corporate separation plan. As discussed in NOPEC's Initial Comments,²⁸ the SAGE Audit Report concluded that FES's use of the "FirstEnergy" name violated the Operating Companies' Code of Conduct provision contained in O.A.C. 4901:1-37-04(D)(7), which provides:

(7) The electric distribution utility, upon request from a customer, will provide a complete list of all competitive retail electric service providers operating on the system, but *may not endorse any competitive retail electric service providers, indicate that an electric services company is an affiliate* unless specifically and independently asked by a customer or other third party, or indicate that any competitive retail electric service provider will receive preference because of an affiliate relationship. [Emphasis supplied.]

The Audit Report concludes that, by virtue of using the name "FirstEnergy Solutions," it is impossible for the Operating Companies' representatives *not* to "indicate" that FES is an affiliate, because they share a common name. Audit Report at 98. Indeed, by virtue of their widespread branding program the Operating Companies effectively are "endorsing" FES over

²⁸ See NOPEC Initial Comments at 2-5.

other CRES suppliers. *Id.*²⁹

IV. CONCLUSION

Under no circumstances – whether FES exits the Ohio CRES market, or retains all or some of its retail book of business, or some other plan of corporate reorganization of FES occurs – should the entity emerging from Chapter 11 be permitted to market or provide service under the “FirstEnergy” name to Ohio consumers. NOPEC respectfully requests the PUCO to order FES to cease using the “FirstEnergy” name immediately.

Respectfully submitted,



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²⁹ Indeed, jurisdictions that have deregulated the provision of electric and/or natural gas have adopted codes of conduct that enforce similar provisions. See, for example: *Re Affiliated Activities, Promotional Practices and Codes of Conduct of Regulated Gas and Electric Companies*, 91 Md.P.S.C. 312, 2000 WL 1273724 (Md.P.S.C.), Order (July 1, 2000). (“If a customer requests information from the utility about competitive core services, to the extent the utility responds to the request, it shall provide a list of all similar providers of that core service on its system. It shall not highlight or promote its core service affiliate(s) in any way.”). Indeed, the Arizona Commerce Commission forbids utilities and their competitive energy affiliates to share the utility’s name and logo. See Decision No. 62416 (April 3, 2000) (Arizona Public Service) and Decision No. 62767 (August 2, 2000) (Tucson Electric Power).

CERTIFICATE OF SERVICE

In accordance with Rule 4901-1-05, Ohio Administrative Code, the PUCO's e-filing system will electronically serve notice of the filing of this document upon the following parties. In addition, I hereby certify that a service copy of the foregoing *Initial Comments* was sent by, or on behalf of, the undersigned counsel to the following parties of record this 7th day of January 2019.

Dane Stinson (Reg. No. 0019101)

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